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the constitutionality of a court is the place of its inception, not the source of its power, at least so far as New York is concerned. Whether we agree with this postulate is of no avail. It is the adjective law of this state. Yet we find the same tribunal that set forth this standard of demarcation using a different test in determining the constitutionality of a legislative body. In *People ex rel. Deitz v. Hogan*[35] it was held that the Board of Aldermen of the City of New York was a constitutional body not because it was created in the Constitution, which it assuredly was not, but because it was vested with the legislative power to create Assembly districts out of Senatorial districts.[36] Thus the test of the constitutionality of a body was shifted from the source of its inception to the source of a particular power. I leave it to others to harmonize these two conflicting approaches to the answer to the same question.

This, at least, can be maintained. If the reasoning employed in the *Deitz* case was the rationale of the *Haggerty* case it is obvious that the Municipal Court of the City of New York would be held to be a constitutional court for, as the writer sees it, such is the philosophic background of the *American Insurance* case.

THE STATUTE OF FRAUDS IN NEW YORK AS AFFECTING CONTRACTS FOR THE PAYMENT OF COMMISSIONS

A number of recent New York decisions have created some doubts as to the effect of the Statute of Frauds on certain types of employer-employee contracts, particularly those relating to the payment of commissions. A review of the cases in the light of their historical background will not entirely resolve the doubts, but it may serve at least to outline an area in which inconsistencies appear.

The section of the New York Statute with which we are concerned[1] is as follows:

> "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
>
> "1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime . . ."

The Historical Background

This section stems directly from the corresponding portion of the original Statute of Frauds[2] except for the last sixteen words quoted, which bring life-

35. 214 N. Y. 216, 222, 108 N. E. 459, 463 (1915).
36. N. Y. CONST., Art. III, § 5.

1. N. Y. PERS. PROP. LAW § 31(1).

time contracts within the purview[3] of the statute. These words were added to the New York statute in 1933[4] as part of a series of enactments designed to prevent the assertion of oral claims against the estates of deceased persons when the person alleged to have made the oral agreement could no longer testify regarding it.[5] The "lifetime" mentioned has been construed as meaning that of the promisor[6] (that is, in employment cases, the employer) and it includes agreements to pay for services actually rendered by the employee where payment in whole or in part is postponed beyond the death of the employer.[7] The ordinary agreement for the payment of commissions therefore falls outside the scope of this clause. Circumstances calling for its application to such an agreement are not inconceivable, but no cases on the point appear as yet to have been reported.[8]

The main portion of the statute we are considering has a long judicial history, without knowledge of which no understanding of it can be complete. The English courts early decided that an agreement which might, in accordance with the expressed intention of the parties, be performed within a year, is not within the statute notwithstanding that there may be a *possibility* that performance will take longer than a year.[9] This interpretation was well recognized long before the Revolution, and was taken into American law by those states which adopted the statute, or one similar to it, as their own.[10] Nor is it fatal that performance within a year was not *expected* by either party; the statute

2. 29 Charles II, c. 3 (1677).

3. Despite the use of the word "void" in the statute itself, contracts covered by the statute are, by judicial interpretation, not void but merely unenforceable. It has been said that a right of action against either or both parties to the contract is denied while the requirements of the statute are not complied with. 1 WILLISTON, CONTRACTS (rev. ed. 1936) § 16. But even this is too strong a statement. The right of action is not denied. In general, the statute will not serve as a bar unless pleaded. Hamer v. Sidway, 124 N. Y. 538, 548, 27 N. E. 256, 258 (1891); Duffy v. O'Donovan, 46 N. Y. 223, 226 (1871). *But see* Booker v. Heffner, 95 App. Div. 84, 88 N. Y. Supp. 499 (2d Dep't 1904).

4. C. 616, N. Y. Laws 1933. The amendment became effective on April 29, 1933.

5. *In re* Keeler's Estate, 186 Misc. 20, 53 N. Y. S. (2d) 61 (Surr. Ct. 1945); *In re* Block's Estate, 258 App. Div. 342, 16 N. Y. S. (2d) 674 (1st Dep't 1940).

6. Bayreuther v. LaGuardia, 176 Misc. 547, 25 N. Y. S. (2d) 620 (Sup. Ct. 1941).

7. *In re* Ditson's Estate, 177 Misc. 648, 31 N. Y. S. (2d) 468 (Surr. Ct. 1941).

8. The lifetime clause does not apply to any agreements made before its effective date. Wahl v. Seyfried, 25 N. Y. S. (2d) 653 (Sup. Ct. 1940), *aff'd*, 260 App. Div. 993, 25 N. Y. S. (2d) 656 (4th Dep't 1940), *aff'd*, 285 N. Y. 820, 35 N. E. (2d) 496 (1941).

9. Peter v. Compton, Skinn. 353, 90 Eng. Rep. 157 (K. B. 1694), involved an exchange of one guinea *in praesenti* for the promise of a certain sum on the day of the promisor's wedding. The agreement was held not to be within the statute. It is well settled that mere *unlikelihood* of performance within a year does not make a verbal contract unenforceable.

10. ". . . where English statutes, such . . . as the statute of frauds, . . . have been adopted into our own legislation, the known and settled construction of those statutes . . . has been considered . . . as silently incorporated into the acts . . ." Pennock v. Dialogue, 2 Pet. 1, 14 (U. S. 1829).

applies only to an agreement ". . . which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within a year from the time of its making."[11] This statement, which is reinforced by the most authoritative expressions of thought on the subject,[12] is worthy of careful notice. It does *not* say that *any* possibility of performance within a year takes the contract out of the statute. The possibility must lie within the general scope of the agreement.[13] If performance within a year, though physically possible, would be totally outside that design which is to be inferred from the words and circumstances of the agreement, the contract is not free of the statute.

This line of thought is clearly illustrated by the leading English case of *Boydell v. Drummond*.[14] Defendant orally agreed to buy a series of eighteen prints which plaintiff was to publish at the rate of at least one and probably two per year. The contract was held unenforceable under the statute. Though it was within the bounds of physical possibility for all eighteen prints to be published within a year, the court held that the seller could not, within a fair interpretation of the contract, force the prints, and liability for payment, upon the buyer within a year. On the other hand, a contract may be capable of indefinite continuance and still be outside the statute. For this to be so, the possibility of performance within a year must exist and be consistent with the agreement. Performance within a year need not be probable in any mathematical sense. An oral contract to insure property for a five-year term to commence within a year of the making of the contract is enforceable, since the insurance may become payable at any time after the beginning of the term.[15]

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11. BROWNE, THE STATUTE OF FRAUDS (5th ed. 1895) § 273.

12. Warner v. Texas and Pacific Ry. Co., 164 U. S. 418 (1896).

13. *But see* RESTATEMENT, CONTRACTS (1932) § 198, Illust. 5 for an example of the extremity to which the "general scope" of the contract can be stretched. It has to do with a timber-cutting contract which may last five years and which neither party expects can be performed within several years, nor can it be performed in less time if the timber is cut in the way that both parties expect. The Restatement concludes, however, that it is performable within a year within the meaning of the statute because by installation of other methods and the employment of numerous men, the timber might all be cut in less than a year. None of the New York cases appear to go so far. The English courts clearly take a more moderate view. Boydell v. Drummond, 11 East 142, 103 Eng. Rep. 958 (K. B. 1809).

14. 11 East 142, 103 Eng. Rep. 958 (K. B. 1809). The case is mentioned in 5 WILLISTON, CONTRACTS (rev. ed. 1936) § 500, where there is an excellent discussion of the effect of the statute on contracts which, though not intended or expected to be performed within a year, are nevertheless conceivably capable of such performance.

15. "If it can be performed consistently with the language in which the parties have expressed themselves, in other words, if the obligation of the contract is not, by its very terms or necessary construction, to endure for a longer period than one year, it is a valid agreement, although it may be capable of an indefinite continuance." Trustees of the First Baptist Church v. Brooklyn Fire Insurance Co., 19 N. Y. 305, 307 (1859).

That the time of performance is uncertain, and that it may probably extend, and may have been expected by the parties to extend, beyond a year, is not enough to bring it within the statute.

On similar reasoning, employment contracts which by their terms are to end with the death of the employee are enforceable though oral.[16] And until the enactment in 1933 of the "lifetime" clause discussed above, the same applied to contracts measured in duration by the life of the employer.[17] Similar in intent to the "lifetime" contracts are the contracts for "permanent employment". Whether these are viewed as lifetime contracts[18] or as contracts for hiring for an indefinite period,[19] they are enforceable[20] though oral.

It may be thought, because all personal service employment contracts end if the employee dies, that they are therefore performable within a year and hence outside the statute. Such is far from the case. The form in which the parties expressed themselves, as well as the substance of a contract, must decide its validity.[21] Williston[22] uses four examples of employment contracts to illustrate the hair-breadth fineness of the distinctions which may be necessary:

"1. A promise to serve two years;

2. A promise to serve as long as the employee lives, not exceeding two years;

16. RESTATEMENT, CONTRACTS (1932) § 198, Illust. 2.

17. The New York Statute of Frauds does not include an agreement uncertain as to time and which may consistently with its terms be performed within a year although it is not probable or expected that it will be, such as a parol agreement for work and labor to be paid for at the death of the employer. Kent v. Kent, 62 N. Y. 560 (1875). Such agreements, however, were carefully scrutinized by the courts because ". . . the peril of perjury and error is latent in the spoken promise." Cardozo, J., in Burns v. McCormick, 233 N. Y. 230, 135 N. E. 273 (1922). The oral contract in the latter case was held unenforceable because it involved a transfer of real property.

18. 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 496.

19. "A contract for permanent employment, 'in the absence of express or implied stipulations as to its duration, or of a good consideration additional to the rendering of services contracted for is no more than an indefinite general hiring terminable at the will of either party.'" It is such a contract as may be completely performed within a year and is not within this section. Brown v. Babcock, 265 App. Div. 596, 599, 40 N. Y. S. (2d) 428, 431 (4th Dep't 1943). Arentz v. Morse Dry Dock & Repair Co., 249 N. Y. 439, 444, 164 N. E. 342, 344 (1928).

20. Rochester Folding Box Co. v. Browne, 55 App. Div. 444, 66 N. Y. Supp. 867 (4th Dep't 1900), *aff'd*, 179 N. Y. 542, 71 N. E. 1139 (1904).

21. This emphasis on form, in the case of an oral contract which *"by its terms* is not to be performed within one year from the making thereof," does not seem to obtain as strongly in the solution of those cases involving a companion provision of the Statute of Frauds rendering unenforceable the oral promise of a surety or guarantor. N. Y. PERS. PROP. LAW, § 31(2). In considering such a case, the Supreme Court has said: ". . . the real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties; and the question always is, what the parties mutually understood by the language, whether they understood it to be a collateral or a direct promise." Davis v. Patrick, 141 U. S. 479, 489 (1891). *But see* (1917) 2 CORN. L. Q. 209.

22. 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 499.

3. A promise to serve two years if the promisor lives so long;
4. A promise to serve two years, but if the promisor dies the contract shall be terminated.

"It is obvious that all these promises have substantially the same meaning and, if enforceable, the same legal effect; yet certainly the first promise, and presumably the fourth, are within the statute, while certainly the second and presumably the third are not."

The distinction is between a contract which must, *by its terms*, take more than a year to perform but which may be defeated by a supervening contingency and one whose stated object can be fully performed within that time. Even the Supreme Court has had difficulty in hewing accurately to so thin a line. In *Packet Company v. Sickles*[23] the plaintiff contracted to install a machine on a boat and he was to be paid for it out of the savings in fuel realized during the remaining twelve-year life of the patent on the machine, provided the boat should last that long. The court held that the destruction of the boat before the expiration of the patent would be a supervening contingency causing a defeasance, not a completion of the contract, and declared that the statute applied. ". . . the possibility of a defeasance does not make it the less a contract not to be performed within the year."[24] The statement as quoted is a sound principle, but its misapplication in the *Packet Company* case was recognized in the leading case of *Warner v. Texas & Pacific Railway*,[25] where Justice Gray pointed out that the *Packet Company* contract was by its terms to be limited alike by the life of the patent and by the life of the boat. Both contingencies were stated in the contract, and the contemplated performance was not to extend beyond the happening of either of them. "It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat, so long as she shall last, can be distinguished in principle from a contract to support a man, so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds."[26] Despite this rejection of its reasoning, the *Packet Company* opinion is helpful to an understanding of the recent cases, to be discussed later, which draw the distinction between defeasance and performance. Contrary to the Supreme Court's holding in that case, it would appear that even though the boat were to be destroyed, the contract would not have been breached, but completed.

This view is taken in New York[27] of a contract containing an option

23. 5 Wall. 580 (U. S. 1866).

24. *Id.* at 595. *Cf.* Large v. Wire Wheel Corp. of Amer., 223 App. Div. 134, 227 N. Y. Supp. 449 (4th Dep't 1928), *aff'd*, 250 N. Y. 531, 166 N. E. 312 (1928).

25. 164 U. S. 418 (1896).

26. *Id.* at 431.

27. But generally not elsewhere. Union Car Advertising Co. v. Boston Elevated Ry. Co., 26 F. (2d) 755 (C. C. A. 1st, 1928); Street v. Maddox, 24 F. (2d) 617 (App. D. C.,

to terminate. A contract for services for one year commencing in the future is not within the statute if either party has an option to end it within a year of its formation.[28] Nor is a contract for employment for an indefinite term,[29] nor a contract to refrain from a certain act, payment to continue as long as the forbearance,[30] nor a contract to guarantee notes which matured beyond one year but were subject to the right of prepayment at any time.[31] Contracts which as a matter of law, are terminable at will also escape the statute despite the absence of any stated provision for termination in the contracts themselves.[32]

One more point may be briefly alluded to. In New York, a parol contract for more than a year is not validated by part performance. Nothing less than full performance by both parties takes it out of the statute.[33] And of course the possibility of performance within a year by one of the parties is insufficient to make the contract good if a time exceeding a year is stipulated for performance by the other party.[34]

In this brief review of the historical background we have noted (1) that the statute applies to contracts which in terms or by necessary implication require that performance shall last for more than a year, (2) that the language of the contract may be the deciding factor, (3) that in distinguishing between performance and defeasance the New York courts construe as possible performance a contingency giving relief from further performance, if the contingency is mentioned in the contract.[35] With these points in mind, we may proceed to consider some of the more recent New York cases.

1928); Hanau v. Ehrlich [1912] A. C. 39; Meyer v. Roberts, 46 Ark. 80 (1885); Wagniere v. Dunnell, 29 R. I. 580, 73 Atl. 309 (1909).

28. Standard Bitulithic Co. v. Curran, 256 Fed. 68 (C. C. A. 2d, 1919); Blake v. Voigt, 134 N. Y. 69, 31 N. E. 256 (1892).

29. Posner v. Precision Shapes, Inc., 271 App. Div. 435, 65 N. Y. S. (2d) 733 (1st Dep't 1946); Rochester Folding Box Co. v. Browne, 55 App. Div. 444, 66 N. Y. Supp. 867 (4th Dep't 1900), *aff'd.* 179 N. Y. 542, 71 N. E. 1139 (1904).

30. Rague v. N. Y. Evening Journal Pub. Co., 164 App. Div. 126, 149 N. Y. Supp. 668 (2d Dep't 1914).

31. Reeve v. Cromwell, 227 App. Div. 32, 237 N. Y. Supp. 20 (1st Dep't 1929).

32. Contracts between attorney and client are, for reasons of public policy, terminable at any time with or without cause. Such contracts therefore are outside this section of the statute. *In re* Williams' Estate, 179 Misc. 805, 39 N. Y. S. (2d) 741 (Surr. Ct. 1942); Degen v. Steinbrink, 188 App. Div. 622, 177 N. Y. Supp. 226 (1st Dep't 1919)

33. Tyler v. Windels, 186 App. Div. 698, 700, 174 N. Y. Supp. 762, 763 (1st Dep't 1919), *aff'd,* 227 N. Y. 589, 125 N. E. 926 (1919); Wahl v. Barnum, 116 N. Y. 87, 98, 22 N. E. 280, 283 (1889). This view, though it appears to be the better reasoned, is not supported by the numerical weight of authority in this country. 2 WILLISTON, CONTRACTS (rev. ed. 1936) § 504.

34. Broadwell v. Getman, 2 Denio 87 (N. Y. 1846). In England the statute does not apply in such a case provided it appears from the whole tenor of the agreement that it is the intention of the parties that one party shall perform his obligation within the year. 3 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND (19th ed., Cheshire 1928) 144.

35. In Radio Corp. of America v. Cable Radio Tube Corp., 66 F. (2d) 778 (C. C. A.

Some Recent New York Cases

The plaintiff in *Cohen v. Bartgis Bros. Co.*[36] had been engaged by defendant as a salesman. He alleged an oral contract whereby he was to receive a commission on ". . . all orders placed by Resolute Paper Products Corp., at any time, whether or not plaintiff was in defendant's employ at the time of the placing of such orders."[37] The Appellate Division, reversing Special Term, refused to allow the Statute of Frauds to be stricken out as a defense. The Appellate Division pointed out that the obligation imposed upon the defendant was one which was to continue for an unlimited period of time, ". . . so long as the defendant and Resolute Paper Products Corp. exist."[38] The last-quoted words are those of the court, not of the contract. The contract as alleged puts no period upon its term of operation; it simply says "at any time."

The case seems entirely sound. By any reasonable interpretation there was a contract of permanent duration. It was not a contract to last for plaintiff's life, or during the continuance of defendant's business, or for the existence of Resolute. It simply had no stated ending and might continue after ending of plaintiff's employment or his death. It was to that extent comparable to the contract alleged in *Pitkin v. Long Island R. R.*,[39] in which the plaintiff claimed that the railroad had agreed, as a permanent arrangement, to stop its cars at a certain place. The contract was held to be unenforceable ". . . because, from the nature and terms of the agreement, it was not to be performed by the company within one year from the making thereof."[40] True, as in the *Cohen* case, the railroad might have gone out of business within the year, but the language of the contract provided for no such contingency. If and when it happened, it would be a supervening excuse for non-performance not arising from the contract at all.

There still remains the argument that Resolute might, within a year, have ceased to place orders with Bartgis Brothers. Certainly there was no obligation on Resolute to place any, nor on defendant to accept them if placed. No liability in favor of the plaintiff need necessarily have accrued after a year from the making of the contract. Cannot this, therefore, be considered as a contract capable of performance within a year? It is submitted that it cannot, and that the court made no error in deciding that the statute applied. The mere cessation of orders would not alter the contractual relationship between plaintiff and defendant. Plaintiff would still be in possession of his contractual right, though the right might never have a monetary value. A contract which

2d, 1933), plaintiff's option to terminate was mentioned in the contract which, nevertheless, was held to be within the statute. However, the option was exercisable only if the contract had already been breached by the defendant.

36. 264 App. Div. 260, 35 N. Y. S. (2d) 206 (1st Dep't 1942), *aff'd*, 289 N. Y. 846, 47 N. E. (2d) 443 (1943).

37. *Id.* at 260.

38. *Id.* at 261.

39. 2 Barb. Ch. 221 (N. Y. 1847).

40. *Id.* at 232.

has been fully performed on both sides is discharged; therefore a contract which is not discharged has not been performed.[41]

The *Cohen* case appears to be in conflict with an earlier decision of the Appellate Division, though of a different Department. In *Hirsch v. Mendelson*[42] the plaintiff, a former employee of the defendant, sued for commissions on merchandise sold by the defendant, after the termination of plaintiff's employment, to customers obtained by the plaintiff during his employment. He was an employee at will under an oral contract. It was held that the statute was not a bar to this action. The facts appear to be indistinguishable from those of the *Cohen* case. As the latter case has the authority of a Court of Appeals affirmance, even though without opinion,[43] the earlier one can no longer be relied on.

In the month following the Appellate Division's decision in the *Cohen* case, the same court decided *Scanlan v. Henie*.[44] This was an appeal from a verdict against Sonja Henie, who was alleged to have agreed orally to pay Scanlan, her agent, as commissions, 20% of her earnings from the making of motion pictures. The agreement was understood by the plaintiff to remain effective as long as defendant was engaged in making motion pictures. In a three to two decision the Appellate Division held that the contract did not come within the statute. The majority wrote no opinion, but there was a dissenting opinion by Justice Glennon in which Justice Martin concurred. The contract, as indicated in this opinion, was that if defendant made pictures at any time and plaintiff were working as her manager, he would be entitled to a commission on her earnings. The alleged right to commissions depended on the result of plaintiff's efforts in arranging business contacts between the defendant and motion picture producers.[45] His employment contract was of indefinite duration, and such a contract is not within the statute.[46] The facts presented by

41. The continuing vitality of the contract but for the statute is emphasized by the fact that it would, under the conditions supposed, be merely a contract calling for the payment of money by the defendant to the plaintiff upon the happening of a contingency, namely, the placing of orders by Resolute. Presumably, therefore, it would still be assignable by the plaintiff. Assignability is, however, not a necessary factor in arriving at the conclusion stated.

42. 243 App. Div. 705, 277 N. Y. Supp. 13 (2d Dep't 1935).

43. Affirmance without opinion, while an affirmance of the result, does not necessarily constitute adoption of the reasoning used. But in commenting on the affirmance of the *Cohen* case by the Court of Appeals, Swan, J., said in Droste v. Harry Atlas Sons, Inc., 145 F. (2d) 899 (C. C. A. 2d, 1944): "Although we cannot know that the Court of Appeals adopted his (Justice Untermyer's) reasoning we can conceive of no other reasoning which would lead to an affirmative answer to the question certified." However, the sentence loses some of its force in the light of the fact that Clark, J., dissented on the ground that he interpreted the Court of Appeals' affirmance otherwise. The *Droste* case is more fully discussed *infra*.

44. 264 App. Div. 913, 35 N. Y. S. (2d) 844 (1st Dep't 1942).

45. See discussion of this case in Houston v. American Surety Co. of N. Y., — Misc. —, 57 N. Y. S. (2d) 290 (Sup. Ct. 1945).

46. Rochester Folding Box Co. v. Browne, 55 App. Div. 444, 66 N. Y. Supp. 867 (4th Dep't 1900), *aff'd*, 179 N. Y. 542, 71 N. E. 1139 (1904).

Justice Glennon in his dissent indicate that commissions would accrue only from arrangements made by plaintiff while employed as defendant's manager.[47] They would not necessarily accrue beyond the term of employment, nor would defendant necessarily be even contingently liable for them beyond that term. Defendant might, within a year, complete all the work plaintiff had arranged for her, pay him off and end his employment. The contract between them would thereupon have been performed and the contractual relationship dissolved.

In the recent case of *Elsfelder v. Cournand*,[48] the plaintiff alleged an oral agreement with a Delaware corporation whose obligations under the agreement were assumed by the defendant. The agreement was for the payment of commissions and was terminable by either party on thirty days' notice, but in the event of such termination the corporation was to remain obligated, without limitation as to time, to continue to pay commissions on re-orders. It was not shown that the life of the corporation was limited by its charter or by the laws of Delaware. As the plaintiff had alleged a perpetual contract with a perpetual corporation and claimed that its liability under it was to be perpetual, the court can hardly be criticized for finding that the agreement, according to the intention of the parties as expressed by the contract, could not be fully performed within a year.

The *Cohen* case was referred to in *Deucht v. Storper*[49] in which plaintiff alleged that defendant had agreed to employ him as long as defendant ". . . continued to employ workers trained, developed and gathered by plaintiff." He further alleged that he had been discharged by defendant who had nevertheless continued to employ such workers. The court held that the statute did not apply because it could have been performed within a year had defendant discharged within that time all the employees trained by plaintiff. The decision appears entirely sound. In *Griffin v. Frank J. Guigan Inc.*,[50] defendant orally agreed to pay plaintiff 5% commission on the gross amount of any contracts defendant should thereafter obtain from the United States Government. The court granted defendant's motion for judgment on the pleadings, correctly following the *Cohen* case.

However, *Houston v. American Surety Co. of New York*[51] appears to be a misapplication of the *Cohen* doctrine. Plaintiff alleges an oral agreement whereby defendant was to pay plaintiff $5000 a year as salary ". . . for so long as the plaintiff shall live and continue in the service of the defendant" in con-

47. ". . . plaintiff was asked, 'So then if Miss Henie made a picture say in 1936 and another one in 1937, you would get commissions on both of those two, according to your understanding, is that right?' To this question he replied, 'That's right. But I would be her manager, I would be working.'" Scanlan v. Henie, 264 App. Div. 913, 35 N. Y. S. (2d) 844 (1st Dep't 1942).

48. 270 App. Div. 162, 59 N. Y. S. (2d) 34 (1st Dep't 1945).

49. — Misc. —, 44 N. Y. S. (2d) 350 (N. Y. City Ct. 1943).

50. N. Y. L. J. Jan. 20, 1944, p. 251, col. 5 (Sup. Ct. N. Y. Co.).

51. — Misc —, 57 N. Y. S. (2d) 290 (Sup. Ct. 1945).

sideration of plaintiff's delivery of a telegraphic code to defendant. The court declared that the defendant could not terminate the contract at will and that under the *Cohen* case defendant's continued liability brought the case within the statute. It is submitted that either of the alternatives in the contract as quoted above would take it out of the statute. The liability extends at most up to plaintiff's death, and the *Cohen* case does not apply.

Jones v. Demuth Glass Works, Inc.[52] concerned an oral agreement for an exclusive distribution agency. By express stipulation, it was to last as long as both parties continued in business. In distinguishing the *Cohen* case, the Justice at Special Term said:

"It is precisely because the contingency of retiring from business could only be a supervening event and was not provided by its terms that the agreement in Cohen v. Bartgis Bros. Co. . . . was not saved thereby."

A close question was presented in the very recent case of *Hooke v. Petroleum Heat and Power Co.*[53] The plaintiff's contract was for commissions on all sales made to customers obtained by him ". . . as long as defendant continued to make such sales." The employment contract was terminable by either party at any time. This fact, however, appears to have been without significance in the case, as plaintiff was suing only for commissions on sales made after he left defendant's employ. His right to these commissions therefore could not be said to depend upon the duration of his employment. The court held that under the *Cohen* and *Elsfelder* decisions the defendant's obligation would be of indefinite duration and that the statute was a good defense. It is submitted that the form of the contract differs sufficiently from those in the cases relied on to take the case out of the statute. Defendant's liability was to last not perpetually, but only as long as such sales continued. If and when they stopped, the contract would have been performed *according to its terms.* In the *Cohen* case, such terms were not present. We have already seen that two contracts identical in intent and save for the statute, in their legal consequences, need not be affected in the same way by the statute. Here even a difference of intent may be discerned, though actually it is the difference in language that controls. The parties in the *Hooke* case intended that the contractual relationship should not survive the cessation of orders. Whether or not orders had, at any particular point, ceased, is a question for the trier of the facts. Presumably if they had stopped for a reasonable time, the contract would have been performed. From that point on, the possibility of their resumption would not maintain the contractual relationship, and the fact of their resumption would not revive it.

The difficulties considered in this comment have perplexed the Federal courts as well as those of New York. *Droste v. Harry Atlas Sons, Inc.*[54] pre-

52. N. Y. L. J., Feb. 21, 1946, p. 720, col. 5 (Sup. Ct. Kings Co.). *Accord:* H. J. McGrath Co. v. Marchant, 117 Md. 472, 83 Atl. 912 (1912).

53. N. Y. L. J., May 2, 1946, p. 1720, col. 2 (Sup. Ct., N. Y. Co.).

54. 145 F. (2d) 899 C. C. A. 2d, 1944). A petition for rehearing was denied with equal reluctance. 147 F. (2d) 675 (C. C. A. 2d, 1945).

sents a case analogous to the *Cohen* case. It involved an agreement for the payment to the plaintiff of commissions on all orders defendant might obtain at any time from any agency of the United States Government. Plaintiff acted as defendant's agent in obtaining one contract, but the commissions were to be paid on subsequent business as well. The court held the contract to be unenforceable under the statute, but remarked that a different result would have been reached had it not been for the *Cohen* case which, under *Erie Railroad Co. v. Tompkins*,[55] the Second Circuit Court of Appeals was bound to follow. Judge Clark in a strong dissent, viewed the matter as a procedural one. He suggested that the New York Court of Appeals in affirming the *Cohen* decision may merely have desired to avoid striking out the defense of the statute before trial in order not to foreclose a defense which the proof might have shown to be pertinent. It is true that in some cases in which the facts of the contract have been in question[56] the courts have refused to grant summary judgment. But the problem is broader than one of procedure. Extreme niceties appear in cases based on undisputed facts, and are hardly to be avoided. The *Cohen* decision appears sound as a substantive matter, and the difficulties it raises must sooner or later be squarely faced.

Conclusion

The difficulties are practical ones. The cases deal with oral contracts whose exact terms are provable only by witnesses subject to the usual rigors of cross-examination. The most the courts can do is to lay down a rule as to what must be proved, leaving questions of fact to the triers of fact, as always. A definitive statement of the rule, though it would not and could not eliminate difficulties of proof, would at least lighten the difficulties of pleading which gave rise to many of the cases discussed here. Whatever the rule, the public could guide itself accordingly.

The distinction to which the cases point is apparently between the possible continuance beyond a year of a liability, and the continuance beyond a year of a possible liability. The first is exemplified by the *Scanlan* case, the second by the *Cohen* case. The possibility that the promisor's liability will continue beyond a year will not bring the contract within the statute if the contract's terms include an event which may within that time end the contractual relationship. That is the *Scanlan* case. On the other hand, if the contract's terms require that the relationship shall last beyond a year it is within the statute even though the continuing liability to which the promisor is subject thereafter is merely a contingent one. That is the *Cohen* case. That the promisor's liability must endure, though it be but contingent, is the deciding factor.

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55. 304 U. S. 64 (1938).

56. High v. Pritzker, 269 App. Div. 1015, 59 N. Y. S. (2d) 57 (1st Dep't 1945); *cf.* Jacobson v. Jacobson, 268 App. Div. 770, 49 N. Y. S. (2d) 166, (1st Dep't 1944), leave to appeal denied 268 App. Div. 848 (1st Dep't 1944). The case is discussed in the *Droste* opinion on rehearing, 147 F. (2d) 675, 676 (C. C. A. 2d, 1945).