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of an indemnity agreement. The failure to consider this principle may result in an injustice to the insured. This point may be illustrated by contrasting the *O'Dowd* and *Union Paving* cases. The basis of the injured party's cause of action in the former case was that the Housing Authority was passively negligent and the insured was actively negligent. The theory of the cross-claim was that the insured was ultimately liable on its indemnity agreement because it had been solely negligent. Thus an implied in law obligation to indemnify was easily recognized as the real basis of the insured's liability. In the latter case, however, the Paving Company's complaint merely alleged the sweeping indemnity agreement as the basis of the insured's liability. The important difference in the two cases is that in the latter the court failed to recognize the possibility of a liability of the insured which (though in form the result of his indemnity agreement) was in substance a liability he would have incurred in the absence of such an agreement. If a reasonable construction is to be given a contractual liability exclusion clause, and the intention of the parties to a contract of liability insurance embodying such a clause is to be respected, the courts must be quick to recognize that the literal application of the clause is to be held in abeyance until the deeper consideration of the extent of the insured's liability in the absence of an express indemnity agreement is determined.[27]

THE COHEN CASE AND THE ONE YEAR PROVISION OF THE STATUTE OF FRAUDS

INTRODUCTION

The Statute of Frauds, as adopted in New York, provides in part that an agreement which "by its terms is not to be performed within one year from the making thereof. . . ."[1] is unenforceable unless in writing. The case law interpreting this section is complex and technical. A seemingly new and equally complex rule was introduced in *Cohen v. Bartgis Bros. Co.*[2] At times the precedence of this decision has been obscured by memoranda opinions which, without explanation, cite it as controlling; at other times the decision has been misapplied. The rule has finally reached the confused point where, in the recent case of *Duncan v. Clarke*,[3] both plaintiff and defendant cited the *Cohen* case as controlling on the question of the application of this one year provision.[4] In an attempt to determine the exact nature of this rule it is necessary to consider the *Cohen* decision within the framework of its antecedents, and in the light of those cases which have followed it, making the rule more explicit by application or distinction.

27. United States Fidelity & Guaranty Co. v. Virginia Engineering Co., 213 F.2d 109, 112 (4th Cir. 1954).

1. N.Y. Pers. Prop. Law § 31(1).

2. 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).

3. 308 N.Y. 282, 125 N.E.2d 569 (1955).

4. Id. at 283.

THE COHEN RULE

In the formation of the rule of *Cohen v. Bartgis Bros. Co.*, the Appellate Division relied on the leading case of *Blake v. Voigt*,[5] in which the Court of Appeals was concerned with the application of this section of the Statute of Frauds to an agreement which provided that for a period of one year defendants would pay a certain commission on all business procured by plaintiff. The contract further provided that either party had the right to terminate the contract within a year. In an action to recover the commissions owing under the contract, the defendants contended that the Statute of Frauds barred the plaintiff's claim. Specifically, the defendants argued that termination by exercise of the option would not be performance, but rather destruction of the contract. The court agreed that this proposition would apply where there was no provision in the contract authorizing either party to terminate. But the court considered the question of ". . . whether a contract, which . . . is not to be performed within a year is taken out of the statute by the fact that it was part of such contract that either party might rightfully terminate it within the year."[6] The court held that the Statute of Frauds was inapplicable because performance of the contract was possible within a year. The exercise of the express termination provision, an event which could happen within a year's time, would be rightful performance and not destruction of the contract, ". . . because the contract would be executed in a way that the parties agreed that it might be executed."[7]

The court, in deciding the *Cohen* case, was squarely presented with the application of the Statute of Frauds to an agreement which contained no express termination provision. In this case plaintiff-salesman brought an action on an oral agreement, by which the defendant-corporation had promised to pay the plaintiff commissions on all orders placed by the Resolute Paper Products Corporation, a customer procured by the plaintiff, " '. . . at any time, whether or not plaintiff was in defendant's employ at the time of the placing of such orders.' "[8] The defendant appealed from an order which had stricken from its answer, as insufficient in law, the affirmative defense of the Statute of Frauds. The Appellate Division unanimously reversed the order.[9]

5. 134 N.Y. 69, 31 N.E. 256 (1892).

6. Id. at 72, 31 N.E. at 256.

7. Id. at 72-73, 31 N.E. at 257.

8. 264 App. Div. at 260, 35 N.Y.S.2d at 207.

9. Frequently, courts presented with this question on interlocutory appeal are reluctant to make a final decision with the few facts presented by the pleadings: see Schulman v. Royal Industrial Bank, 281 App. Div. 674, 117 N.Y.S.2d 459 (1st Dep't 1952); Baker v. Genesee Brewing Co., 271 App. Div. 994, 68 N.Y.S.2d 457 (1st Dep't 1947); Jacobson v. Jacobson, 268 App. Div. 770, 49 N.Y.S.2d 166 (1st Dep't 1944); Gordon v. Katz, 82 N.Y.S.2d 809 (Sup. Ct. 1948). It has been argued that the Cohen case be included in this class: see dissenting opinions per Clark, J. in Droste v. Harry Atlas Sons, Inc., 145 F.2d 899, 900 (2d Cir. 1944), petition for rehearing denied, 147 F.2d 675, 677 (2d Cir. 1945); Newkirk v. C. C. Bradley & Son, Inc., 271 App. Div. 658, 661, 67 N.Y.S.2d 459, 462-63 (4th Dep't 1947). But it is apparent from the Cohen decision itself and from the subsequent weight it has been accorded that the opinion was rendered on the merits.

The court, citing authority to indicate the conflict of opinion existing in other jurisdictions,[10] admitted that the question had not been directly considered by the appellate courts of its own state. But the Court of Appeals in *Blake v. Voigt* provided an excellent guide for the result reached by the Appellate Division in the *Cohen* case. In the *Blake* case the Court of Appeals had held that an express termination provision removed the contract from the Statute of Frauds, and, in anticipation of the particular problem of the *Cohen* case, had said further that failure to express such a provision would call for the application of the statute. The court in the *Cohen* case adopted the reasoning of the *Blake* case and the guidance of its dictum. The plaintiff suggested that the possibility of the defendant or customer retiring from business within a year would render performance within a year possible. But the court rejected this contention, reasoning, as had the court in the *Blake* case, that the termination of the contract by the occurrence of this contingency would not be "performance" of the contract, inasmuch as such an event was not expressly mentioned. Therefore, what had been dictum in the *Blake* case became the holding of the *Cohen* decision.

Moreover, the *Cohen* opinion did not overlook the possibility that the Statute of Frauds would not be applicable if performance, however unlikely, might be accomplished within a year even without the aid of a termination provision. It distinguished the authorities which had so held,[11] saying ". . . the contract here is of a different character, for not only is it of indefinite duration but, by its terms, an obligation is imposed on the defendant which continues so long as the defendant and Resolute Paper Products Corp. exist. It is true that if Resolute Paper Products Corp. should place no orders with the defendant within the year, no commissions would be earned, but the defendant's contract would not thereby have been 'performed,' for it would then apply to any orders that might be accepted in succeeding years."[12] This Appellate Division ruling was affirmed without opinion by the Court of Appeals.[13]

Several years later, the Court of Appeals explicitly reemphasized the holding of the *Cohen* decision in *Martocci v. Greater New York Brewery, Inc.*[14] Again the court was presented with the question of whether a verbal contract to pay plaintiff commissions on any sales made to a certain customer introduced to defendant by plaintiff was within the statute. Following the *Cohen* case, the court decided that if the terms of the contract had included an event which might end the contractual relationship of the parties within a year, defendant's possible liability beyond that time would not bring the contract within the statute. But since the relationship will continue beyond a year, the contract was held to be within the statute, even though the continuing liability to which defendant was subject was merely a contingent one.

10. Edmund D. Hewins, Inc. v. Malboro Cotton Mills, 242 Mass. 282, 136 N.E. 159 (1922); Fish Clearing House, Inc. v. Melchor, Armstrong, Dessau Co., 174 Wash. 539, 25 P.2d 381 (1933).

11. Warren Chemical & Mfg. Co. v. Holbrook, 118 N.Y. 586, 23 N.E. 908 (1890); Kent v. Kent, 62 N.Y. 560 (1875); Trustees v. Brooklyn Fire Ins. Co., 19 N.Y. 305 (1859).

12. 264 App. Div. at 261, 35 N.Y.S.2d at 208.

13. Cohen v. Bartgis Bros. Co., 289 N.Y. 846, 47 N.E.2d 443 (1943).

14. 301 N.Y. 57, 92 N.E.2d 887 (1950).

THE REQUISITES FOR ITS APPLICATION

Before analysis of the specific elements of the *Cohen* case as they have been applied in later decisions, a prerequisite to the discussion of the Statute of Frauds proper must be considered. It is an elementary principle that in order for the Statute of Frauds to apply there must be a contract, in all other respects recognized as giving rise to a legal obligation. As obvious as this proposition may appear, it is the basis for distinguishing several decisions which have held that agreements bearing close resemblance to the contracts of the *Cohen* and *Martocci* cases are not subject to their proscriptions.[15]

This proposition was demonstrated in *Nat Nal Service Stations, Inc. v. Wolf*,[16] where the complaint alleged an oral agreement whereby the defendant was to grant plaintiff a discount on all gasoline which plaintiff purchased from an oil producer through the defendant. The Appellate Division held that the agreement created a contractual obligation which, because of its indefinite duration, was within the Statute of Frauds. The Court of Appeals, by a narrowly divided court, reversed this decision and stated that it was ". . . confronted with an alleged contract by the terms of which neither party was bound to do anything at any time, and consequently there is nothing in its terms to bring it within the Statute of Frauds."[17] The plaintiff of the *Cohen* case surrendered consideration by procuring a customer for defendant, and similarly, the plaintiff of the *Martocci* case by introducing a prospective customer to defendant. "In both those cases the performance by the respective plaintiffs under the alleged oral agreement constituted the consideration necessary to impose a binding obligation upon the defendant. . . ."[18] In the *Nat Nal* case the plaintiff did nothing to give rise to defendant's obligation.

Where plaintiff's performance has given rise to defendant's obligation, the specific elements of the principle of the *Cohen* case come into focus. The endurance of the defendant's liability must first be measured to ascertain that it exceeds the statutory period of one year. Then it must be found that the agreement expresses no termination provision by which the excessive period may be shortened.

THE ENDURANCE OF THE CONTRACTUAL OBLIGATION

Where the obligation imposed upon the defendant by the contract endures beyond a year, the contract must be in writing to be enforceable. In *Elsfelder v. Cournand*,[19] plaintiff brought an action on an oral agreement whereby defendant promised to pay plaintiff commissions for his work as a sales manager. The contract provided that it was terminable by either party on thirty days

15. Prussiano v. Sunrise Plastering Corp., 285 App. Div. 1182, 141 N.Y.S.2d 277 (2d Dep't 1955); Bakers Equipment Corp. v. Barbarino, 128 N.Y.S.2d 903 (N.Y. Munic. Ct. 1954).

16. 304 N.Y. 332, 107 N.E.2d 473 (1952), reversing 279 App. Div. 206, 103 N.Y.S.2d 816 (1st Dep't 1951).

17. Id. at 337, 107 N.E.2d at 475.

18. Id. at 339, 107 N.E.2d at 477.

19. 270 App. Div. 162, 59 N.Y.S.2d 34 (1st Dep't 1945).

notice, but that in event of such termination defendant would remain obligated, without limitation of time, to continue to pay plaintiff's commissions on any reorders subsequently received. The court held that this contract was within the Statute of Frauds, deciding that the obligation to pay commissions on reorders subsequently received from customers ". . . 'would continue in perpetuity.' "[20]

It is this limitless quality of the defendant's obligation which places the contract within the statute under the *Cohen* rule,[21] and the fact that under the contract, defendant's liability is dependent upon acceptance of future orders is not a saving factor. Although defendant's liability might be contingent upon acceptance of a future order, the contractual obligation would endure for an indefinite period irrespective of the action taken on any such order.

It is essential in considering this point to distinguish, as the decision in the *Cohen* case did, between perpetual obligation and an obligation which, although the time for performance may be indefinite, admits of accomplishment within a year.[22] If the performance of the contract is such that it may be accomplished within a year, then *Cohen v. Bartgis Bros. Co.* is inapplicable.[23] An obvious example of this distinction is the case of *Shewitt v. City Stores Co.*,[24] where plaintiff sought to recover commissions under an oral agreement. This contract provided that plaintiff was to receive a commission on a sale of stock to defendant if plaintiff could bring about that sale. The court held that the agreement was not within the statute, since the sale and the payment of commissions were acts which could be accomplished within the year. The court distinguished the precedent of the *Cohen* case because the agreement of that case ". . . was of indefinite duration and *by its terms did not admit of performance within one year.*"[25]

There are, however, several decisions in which the distinction is tenuous. In *Newkirk v. C. C. Bradley & Son, Inc.*[26] plaintiff sought to recover commissions

20. Id. at 164, 59 N.Y.S.2d at 36.

21. Droste v. Harry Atlas Sons, Inc., 145 F.2d 899 (2d Cir. 1944); Fine v. Pacemaker, 277 App. Div. 881, 98 N.Y.S.2d 230 (2d Dep't 1950); Archer v. Hamilton Wright Organization, Inc., —Misc—, 155 N.Y.S.2d 556 (Sup. Ct. 1956); Hooke v. Petroleum Heat & Power Co., 65 N.Y.S.2d 115 (Sup. Ct. 1946). But see the memorandum decision of Scanlan v. Henie, 264 App. Div. 913, 35 N.Y.S.2d 844 (1st Dep't 1942), in which the majority wrote no opinion but the dissent set forth plaintiff's testimony indicating defendant's limitless obligation. The rule has been properly extended to contracts under which defendant's obligation, although not of indefinite duration, is to continue for a definite period, expressly in excess of a year's time: Mosberg v. Judson Enterprises, Inc., 139 N.Y.S.2d 780 (Sup. Ct. 1955); Jaffe v. New York Towers, Inc., 108 N.Y.S.2d 193 (N.Y. City Ct. 1951). (Commissions on rents under leases for terms of 21 and 5 years respectively.)

22. See note 11 supra.

23. Nathanson v. Brown & Williamson Tobacco Corp., 189 Misc. 1024, 68 N.Y.S.2d 914 (Sup. Ct. 1947); Blakeley v. Agency of Canadian Car & Foundry Co., 73 N.Y.S.2d 573 (Sup. Ct. 1947).

24. 74 N.Y.S.2d 738 (Sup. Ct. 1947).

25. Id. at 739.

26. 271 App. Div. 658, 67 N.Y.S.2d 459 (4th Dep't 1947).

under an oral contract. The defendant had promised that if plaintiff obtained for it the exclusive right to manufacture a milling machine from a third party, the defendant would then give plaintiff the exclusive sales agency for all such machines thereafter produced, paying him a commission on all machines sold. The court decided that such an agreement was not within the statute although it came "perilously close"[27] to the contract of the *Cohen* case. Although the basis for this distinction is not specifically set forth in the opinion, the court must have considered that the granting of the sales agency was the primary performance of the contract, and that this was ". . . the performance of a single act which may or may not be executed within a year. . . ."[28]

If, therefore, the contractual obligation can be performed within a year's time, the Statute of Frauds will not apply. But where the contract sued on does possess this quality of perpetual obligation, then it must be in writing to be enforceable.

The Saving Factor of an Express Termination Provision

Even where the period for performance of the contract extends beyond a year, the contract may still be saved from the requirements of the Statute of Frauds if it contains an express termination provision. Failure to mention such a provision will generally render an oral contract unenforceable. Subsequent cases have repeatedly applied this specific element of the rule which the *Cohen* case derived from the *Blake* case. In *Sack v. Beasley*,[29] the plaintiff argued that a custom of the trade which provided for the payment of commissions for as long as a radio show remained on the air for a particular sponsor removed his oral contract with the defendant from the proscription of the Statute of Frauds. But the court decided that since the oral employment contract did not express an event which might cause performance to be completed within a year, plaintiff could not claim the saving factor of an implied termination provision. The failure to express a contingency or option by which performance of the verbal contract may be effected within a year is fundamental to the application of the *Cohen* rule.[30]

It would seem that since failure to express a termination provision calls for the application of the statute, the corollary of this proposition should operate to remove all contracts which express such provisions from the statute. Generally, an express termination provision is sufficient. In *Steiner v. Fenster*,[31] for example, the defendant was under an obligation to pay the plaintiff commissions for the duration of the Second World War. The court decided that ". . . the end of the war was a possible event which might have transpired before the end of the year. The contract could, therefore, have been performed

27. Id. at 661, 67 N.Y.S.2d at 462.

28. Cohen v. Bartgis Bros. Co., 264 App. Div. at 261, 35 N.Y.S.2d at 203.

29. 282 App. Div. 153, 122 N.Y.S.2d 174 (1st Dep't 1953).

30. Goddard v. Gladstone, 146 N.Y.S.2d 890 (Sup. Ct. 1955); Beaver Pulp & Paper Co. v. St. Raymond Sales, Ltd., 139 N.Y.S.2d 717 (Sup. Ct. 1955); National Broadcasting Co. v. Twentieth Century Sporting Club, Inc., 29 N.Y.S.2d 945 (Sup. Ct. 1941).

31. 51 N.Y.S.2d 814 (Sup. Ct. 1944).

within the year. . . ."[32] In *Jones v. Demuth Glass Works, Inc.*,[33] a memorandum opinion, the court set forth facts which called for the application of the *Cohen* rule, but said that the contract was "dissimilar" to the one considered in the *Cohen* case. The basis for this dissimilarity is not apparent in the report, but the complaint reveals that ". . . such agreement . . . [was] . . . to continue as long as both parties remained in business."[34]

In *O'Brien v. O'Neil*,[35] the plaintiff was to receive commissions for procuring customers for defendant's service of guarding war plants. These commissions were to be paid for as long as business relations lasted between defendant and the customers. In spite of this provision the court held that the contract was unenforceable, mistakenly concentrating on the fact that there was nothing mentioned in the contract that it was to last only for the duration of the war. The court overlooked the fact that the contract provided for payment of commissions for as long as business relations lasted between the defendant and the customers. Such an express termination provision renders performance of the contract possible within the deadline of the Statute of Frauds.[36]

Included within the general rule that expression of a termination provision removes a contract from the Statute of Frauds are those provisions which are in their nature options. In the *Blake* case a mutual option to terminate was held sufficient to render performance within a year a possibility. Subsequent cases have extended this holding to include unilateral options, whether in defendant's control,[37] or in plaintiff's control.[38] There is, however, some conflict of opinion as to the effect of the plaintiff having the option. In *Houston v. American Surety Co.*,[39] the defendant was obligated to pay the plaintiff's salary for as long as the plaintiff decided to remain in defendant's employ. The court held that the contract was not saved from the statute by such a provision, since the defendant's performance was to be continuous. It is submitted, however, that it is immaterial in whose control the power of exercising the option to terminate lies. When such a provision is placed in the contract, rightful termination within a year is possible and the Statute of Frauds should not apply.

It is where the contract expresses a contingency, rather than an option, that the general rule does not unqualifiedly apply. The courts have been more strict in allowing the expression of a contingency to remove an oral agreement from

32. Id. at 815.

33. 271 App. Div. 840, 66 N.Y.S.2d 12 (2d Dep't 1946).

34. Id., Transcript of Record, p. 9.

35. 271 App. Div. 647, 67 N.Y.S.2d 227 (1st Dep't 1947).

36. Zupan v. Blumberg, 1 A.D.2d 203, 148 N.Y.S.2d 893 (1st Dep't 1956) (commissions to be paid as long as account was active in the concern); Platt v. Whitelawn Dairies, Inc., —Misc.—, 150 N.Y.S.2d 391 (Sup. Ct. 1956) (contract to terminate in event defendant ceases serving such customer for any reason whatsoever); High v. Pritzker, 58 N.Y.S.2d 706 (Sup. Ct. 1945) (contract to pay commissions for as long as defendant continued to exist).

37. Standard Bitulithic Co. v. Curran, 256 Fed. 68 (2d Cir. 1919); Deucht v. Storper, 44 N.Y.S.2d 350 (N.Y. City Ct. 1943).

38. Price v. Reynolds Metals Co., 69 F. Supp. 82 (E.D.N.Y. 1946); Raymond Spector Co. v. Serutan Co., 60 N.Y.S.2d 212 (Sup. Ct. 1946).

39. 57 N.Y.S.2d 290 (Sup. Ct. 1945).

the Statute of Frauds. While a simple and relatively normal event is sufficient,[40] the courts have been reluctant to accord this privilege to a contract in which there is one definite performance bargained for and the contingency, rather than expressing an alternative method of performance, is an event which completely frustrates further performance. In *Radio Corp. of America v. Cable Radio Tube Corp.*,[41] for example, the plaintiff had the right to terminate a four year license agreement only in event of the defendant's default, insolvency or bankruptcy. The court, denying that such a provision placed the contract without the statute, said that "as well might the possibility of a breach so fundamental that the plaintiffs might rescind take an oral contract out of the statute, as an option to terminate that is exercisable only in the event of a breach or of insolvency."[42] Again in the case of *Schwerin Air Conditioning Corp. v. Servel, Inc.*,[43] where defendant had the right to terminate in the event of the plaintiff's bankruptcy or fraud, the court dismissed the complaint, saying that "the contingency provided in the contract here defeats the contract and does not merely advance the period of fulfillment."[44] Thus, where the contingency expressed in the contract is an event which defeats the anticipated performance, such as breach, fraud or bankruptcy, the oral contract will nevertheless be subject to the requirements of the Statute of Frauds.

With the elements of the *Cohen* case synthesized, the rule may be stated: a contract, whose performance is impossible within a year, and which contains no express provision for termination, may not be enforced unless in the written form demanded by the Statute of Frauds.

Conclusion

It has been suggested that the *Cohen* case unnaturally broadened the application of this one year provision.[45] But the decision did no more than make explicit that which had been implicit. The distinction between an express or implied termination provision may appear tenuous, but the statute itself makes this distinction when it states that a contract *"by its terms . . .* not to be performed within one year. . . ."[46] must be in writing in order to be enforceable. Not only was the decision in conformity with the plain meaning of the statute in this respect, but it was also in accord with the authorities which preceded it. This very distinction had been intimated by the courts when relieving oral contracts of the burden of the Statute of Frauds in such cases as *Blake v. Voigt*.[47] Further, the court's contention that performance was impossible within a year was also the necessary result of the climate of opinion on this question.

40. See note 37 supra.

41. 66 F.2d 778 (2d Cir. 1933).

42. Id. at 785.

43. 132 N.Y.S.2d 372 (Sup. Ct. 1953).

44. Id. at 373. See also One Television, Inc. v. One Fifth Avenue Operating Corp., 205 Misc. 1090, 139 N.Y.S.2d 430 (Sup. Ct. 1954).

45. Meehan, Contracts Not to Be Performed Within One Year—Is New York Extending The Statute?, 20 Brooklyn L. Rev. 66 (1954).

46. N.Y. Pers. Prop. Law, § 31 (1). (Emphasis added.)

47. See note 5 supra.

Only a distortion or disregard of already settled principles would have allowed the court to hold that this perpetual obligation was capable of performance within a year. The court which decided the *Cohen* case had no choice. Any other solution would have been inconsistent with the framework of opinion which had indicated the answer to the problem. While the Statute of Frauds itself may be subject to criticism as an obsolete element of modern jurisprudence,[48] a court which renders a decision consistent with precedent and which refuses to usurp the functions of the legislature, should not be the subject of criticism.[49]

48. Willis, The Statute of Frauds—A Legal Anachronism, 3 Ind. L.J. 427 (1928).

49. At present the New York State Legislature is considering a recommendation of the Law Revision Commission for the clarification of section 31: N.Y. S. Int. No. 238 (1957); N.Y. A. Int. No. 357 (1957). See N.Y. Leg. Doc. No. 65(A) (1957).