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STATUTE OF FRAUDS—AGREEMENT NOT TO BE PERFORMED WITHIN THE SPACE OF ONE YEAR

DURING the past fifty years there has existed in Texas a conflict in decisions as to whether or not an oral personal service contract not to be performed within the space of one year is within the Statute of Frauds.¹ Courts holding such an agreement to be without the Statute have done so on the theory that death of the promisor inside of a year would amount to performance within a year.² The contrary result reached by other Texas courts³ was predicated on the proposition that death within a year was not performance of the contract, but merely an excuse for nonperformance. Excuse for nonperformance not being the "performance" required by the Statute of Frauds, such contracts were held to be subject to the Statute. This view represents the weight of authority in this country.⁴

¹ TEX. REV. CIV. STAT. ANN. (Vernon, 1925) Art. 3995. "No action shall be brought in any court in any of the following cases, unless the promise or agreement upon which such actions shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized: . . . 5. Upon any agreement which is not to be performed within the space of one year from the making thereof."

² *Weatherford, M. W. & N. W. Ry. Co. v. Wood*, 88 Tex. 191, 30 S. W. 859 (1895); *Taylor v. Deseve*, 81 Tex. 246, 16 S. W. 1008 (1891); *Great A. & P. Tea Co. v. Warren*, 44 S. W. (2d) 510 (Tex. Civ. App. 1931) *writ of error refused*; *Ford Motor Co. v. Maddox Motor Co.*, 3 S. W. (2d) 911 (Tex. Civ. App. 1928) *writ of error granted, affirmed* 23 S. W. (2d) 333; *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 448 (1905); *Erwin v. Hayden*, 43 S. W. 610 (Tex. Civ. App. 1897); and *Warner v. Texas & Pac. Ry. Co.*, 164 U. S. 418 (1896).

³ *Paschall v. Anderson*, 127 Tex. 251, 91 S. W. (2d) 1050 (1936); *Chevalier v. Lane's Inc.*, 208 S. W. (2d) 113 (Tex. Civ. App. 1948) *affirmed in* 213 S. W. (2d) 530; *Wewerka v. Laniron*, 174 S. W. (2d) 630 (Tex. Civ. App. 1943) *writ of error refused*; *Jackman v. Anheuser-Busch, Inc.*, 162 S. W. (2d) 744 (Tex. Civ. App. 1942) *writ of error refused*; *Gulf Ref. Co. v. Boren*, 50 S. W. (2d) 883 (Tex. Civ. App. 1932); *Rease v. Clarksville Cotton Oil Co.*, 248 S. W. 434 (Tex. Civ. App. 1923) *writ of error dismissed*; *Stovall v. Garder*, 103 S. W. 405 (Tex. Civ. App. 1907); *San Antonio Light Pub. Co. v. Moore*, 46 Tex. Civ. App. 259, 101 S. W. 867 (1907) *writ of error refused*; *Texas Brewing Co. v. Walters*, 43 S. W. 548 (Tex. Civ. App. 1897); *Moody v. Jones*, 37 S. W. 379 (Tex. Civ. App. 1896); and *Milan v. Rio Grande & E. P. Ry. Co.*, 37 S. W. 165 (Tex. Civ. App. 1896).

⁴ 49 AM. JUR. *Statute of Frauds* § 32 (1936) wherein it is stated: "As a general rule,

The conflict in our courts appears to have arisen from the early case of *Weatherford, M. W. & N. W. Ry. Co. v. Wood*⁵ in which the Supreme Court of Texas held that an oral contract requiring the railroad company to furnish the Wood family a pass for ten years was not within the Statute of Frauds because the death of the family within a year would be complete performance. In so holding, the Court declared that where there exists a contingency such as death, "upon the happening of which within a year, the contract or agreement will be performed, the contract is not within the statute . . ."⁶ The Court was stating a recognized rule,⁷ but one which did not govern the facts before it because the death of the Wood family within a year would result not in performance of the contract, but only in legal excuse for nonperformance. The Court by way of illustration pointed out that the same rule would apply to take an oral contract to furnish the family a pass for life out of the Statute. In this example the Court was correct because the term of performance would be for life, and death within a year would not be merely an excuse for nonperformance, but would be complete performance by the very terms of the contract. This attempt by the Court to clarify the matter did nothing more than to emphasize its failure to differentiate between performance and excuse for nonperformance. During the half-century following the *Wood* case it has been cited as controlling by a line of Texas decisions which have made the same misapplication of the rule

if an agreement cannot be completely performed within a year, the fact that further performance may be excused or rendered impossible by the happening of a contingency, such as the death of the promisor or another person within a year, is not sufficient to take it out of the statute, for an excuse for further performance is not the equivalent to full performance"; 37 C. J. S. *Frauds, Statute of*, § 48 (1943); RESTATEMENT, CONTRACTS § 198, Illustration 3 (1932); 2 WILLISTON ON CONTRACTS § 496 (Rev. Ed. 1936).

⁵ 88 Tex. 191, 30 S. W. 859 (1895).

⁶ *Id.* at 195, 30 S. W. 859, 860 (1895).

⁷ 49 AM. JUR. *Statute of Frauds* § 30 (1936); RESTATEMENT, CONTRACTS § 198, Illustration 2 (1932); 2 WILLISTON ON CONTRACTS § 495 (Rev. Ed. 1936); 20 TEX. JUR., *Frauds, Statute of* § 43 (1932).

stated above.⁸ However, during the same period, a greater number of cases were being decided to the contrary.⁹

Recognizing that a real controversy did exist and determined to end it, the Supreme Court of Texas granted a writ of error in the recent case of *Chevalier v. Lane's, Inc.*¹⁰ The plaintiff was suing for a six months' bonus under an oral contract to render personal services for the defendant for a period longer than one year. In return he was to receive a monthly salary and a bonus at the end of each six-month period. The Court in rejecting the contention that death within a year would be performance and thus remove the contract from the Statute of Frauds expressly overruled that line of authority represented by the *Wood* case, and approved those decisions recognizing the differentiation between performance and excuse for performance. This decisive action by the Supreme Court has not only resolved the conflict among the courts of Texas, but, in addition, it has placed Texas in harmony with the majority of the jurisdictions and authority in this country in holding that an oral contract which provides for a period of performance longer than a year is within the Statute of Frauds even though death within a year may excuse further performance.¹¹

⁸ *Great A. & P. Tea Co. v. Warren*, 44 S. W. (2d) 510 (Tex. Civ. App. 1931) writ of error refused; *Ford Motor Co. v. Maddox Motor Co.*, 3 S. W. (2d) 911 (Tex. Civ. App. 1928) writ of error granted, affirmed 23 S. W. (2d) 333; *Shropshire v. Adams*, 40 Tex. Civ. App. 339, 89 S. W. 448 (1905); *Erwin v. Hayden*, 43 S. W. 610 (Tex. Civ. App. 1897); and *Warner v. Texas & Pac. Ry. Co.*, 164 U. S. 418 (1896).

⁹ *Paschall v. Anderson*, 127 Tex. 251, 91 S. W. (2d) 1050 (1936); *Chevalier v. Lane's Inc.*, 208 S. W. (2d) 113 (Tex. Civ. App. 1948) affirmed in 213 S. W. (2d) 530; *Wewerka v. Lantron*, 174 S. W. (2d) 630 (Tex. Civ. App. 1943) writ of error refused; *Jackman v. Anheuser-Busch, Inc.*, 162 S. W. (2d) 744 (Tex. Civ. App. 1942) writ of error refused; *Gulf Ref. Co. v. Boren*, 50 S. W. (2d) 883 (Tex. Civ. App. 1932); *Rease v. Clarksville Cotton Oil Co.*, 248 S. W. 434 (Tex. Civ. App. 1923) writ of error dismissed; *Stovall v. Garder*, 103 S. W. 405 (Tex. Civ. App. 1907); *San Antonio Light Pub. Co. v. Moore*, 46 Tex. Civ. App. 259, 101 S. W. 867 (1907) writ of error refused; *Texas Brewing Co. v. Walters*, 43 S. W. 548 (Tex. Civ. App. 1897); *Moody v. Jones*, 37 S. W. 379 (Tex. Civ. App. 1896); and *Milan v. Rio Grande & E. P. Ry. Co.*, 37 S. W. 165 (Tex. Civ. App. 1896).

¹⁰ — Tex. —, 213 S. W. (2d) 530 (1948).

¹¹ 49 AM. JUR., *Statute of Frauds* § 32 (1936); 27 C. J. 176 note 74 (1922); 47 C. J. S., *Frauds, Statute of* § 43 (1943); RESTATEMENT, CONTRACTS § 198 (1932); and 2 WILLISTON ON CONTRACTS § 496 (Rev. Ed. 1936).

Once a contract has been found to be within the Statute, the question arises as to whether or not the performance by the plaintiff has removed it from the operation of the Statute of Frauds. As to personal service contracts not performable within the space of one year, the Supreme Court of Texas took occasion to settle the law on this point in *Chevalier v. Lane's, Inc.*, also.

Assuming the performance of the plaintiff to have been full performance and relying largely on land contract cases,¹² the court concluded that a contract of employment not performable within a year is withdrawn from the Statute by full performance on one side when: (1) the performance is of such a nature as to render it a hardship on the plaintiff if he is left to recover on a quasi-contractual basis; and (2) the performance is unequivocally referable to the alleged contract so as to be ". . . at least a corroborative fact that the contract was actually made."¹³

As to the first element, it is usually present when the plaintiff seeks recovery under the contract. It is well settled, however, that hardship alone is not grounds for relief.¹⁴

The second requirement is of English origin.¹⁵ It was early established to give relief where justice required it, and to do so without opening the door to fraudulent claims based upon non-existent contracts.

Although this requisite that the performance be evidence of the existence of the alleged contract has been criticized,¹⁶ it is now

¹² *Francis v. Thomas*, 129 Tex. 579, 106 S. W. (2d) 257 (1937); *Clegg v. Brannan*, 111 Tex. 367, 234 S. W. 1076 (1921); *Hooks v. Bridgewater*, 111 Tex. 122, 229 S. W. 1114 (1921); *Lechenger v. Merchants' Nat. Bank*, 96 S. W. 638 (Tex. Civ. App. 1906) writ of error refused; *Burns v. McCormick*, 233 N. Y. 230, 135 N. E. 273 (1922); *Woolley v. Stewart*, 222 N. Y. 347, 118 N. E. 847 (1918).

¹³ ___ Tex. ___, ___; 213 S. W. (2d) 530, 533 (1948).

¹⁴ *Wooldridge v. Hancock*, 70 Tex. 18 (1888); *Lechenger v. Bank*, 96 S. W. 638 (Tex. Civ. App. 1906) writ of error refused; *Bradley v. Owsley*, 19 S. W. 340 (Tex. Civ. App. 1892); *Gay, Hardship as Taking a Parol Contract for the Sale of Land Out of the Statute of Frauds*, 2 TEX. L. REV. 347 (1924).

¹⁵ *Lama v. Bayly*, 2 Vernon 627 (1708); See *Lechenger v. Merchants' Nat. Bank*, 96 S. W. 638 (Tex. Civ. App. 1906) writ of error refused; 49 AM. JUR., *Statute of Frauds* § 420 (1936).

¹⁶ 49 AM. JUR., *Statute of Frauds* § 422 (1936); WALSH ON EQUITY, 401 (1930 Ed.);

accepted by several jurisdictions¹⁷ which, like Texas, have been reluctant to grant exceptions to the Statute of Frauds. As early as 1858, the Supreme Court of Texas stated:

“Whether possession be an unequivocal act, amounting to part performance, must depend upon the transaction itself. *If it be distinctly referable to the contract alleged in the pleadings*, I think no case has denied that it is a part performance.”¹⁸ (Italics supplied.)

That the performance be evidence of the alleged contract is essential to the maintenance of an action for specific performance based on an oral contract for the sale of land.¹⁹ This requirement is ordinarily satisfied where there has been payment of the consideration, possession by the vendee, and the making of valuable and permanent improvements upon the land with the consent of the vendor.²⁰

Because this requirement grew out of the equitable doctrine of “part performance”,²¹ which is restricted exclusively to land contracts,²² most jurisdictions have not followed Texas in extending it beyond the section of the Statute of Frauds applicable to land contracts. The first Texas case to inject this element into contracts of employment not to be performed within one year was the case of *Anderson v. Paschall*²³ in which the Court considered as con-

note, 117 A. L. R. 939 (1938); note, 101 A. L. R. 944 (1936) note, 75 A. L. R. 652 (1931).

¹⁷ *West v. McKay*, 225 Ala. 397, 143 So. 573 (1932); *Baker v. Bauchard*, 122 Cal. App. 708, 10 P. (2d) 468 (1932); *Harmonie Club v. Smirnow*, 106 Conn. 243, 137 A. 769 (1927); *Nelson v. Nelson*, 334 Ill. 43, 165 N. E. 159 (1929); *Dimick v. Snyder*, 34 S. W. (2d) 1004 (Mo. App. 1931); *Neverman v. Neverman*, 254 N. Y. 496, 173 N. E. 838 (1931); *Brennen v. Derby*, 124 Or. 574, 265 P. 425 (1928); and *Cannon v. Cannon*, 158 Va. 12, 163 S. E. 405 (1932).

¹⁸ *Neatherly v. Ripley*, 21 Tex. 434 (1858).

¹⁹ *Francis v. Thomas*, 129 Tex. 579, 106 S. W. (2d) 257 (1937); *Clegg v. Brannan*, 111 Tex. 367, 234 S. W. 1076 (1921); *Hooks v. Bridgewater*, 111 Tex. 122, 229 S. W. 1114 (1921); 20 TEX. JUR., *Frauds, Statute of* § 115 (1932).

²⁰ *Hooks v. Bridgewater*, 111 Tex. 122, 229 S. W. 1114 (1921); 20 TEX. JUR., *Frauds, Statute of* § 116 (1932).

²¹ 49 AM. JUR., *Statute of Frauds* § 422 (1936); *Gay, Hardship as Taking a Parol Contract for the Sale of Land Out of the Statute of Frauds*, 2 TEX. L. REV. 347 (1924).

²² RESTATEMENT, CONTRACTS § 197 (1932); 2 WILLISTON ON CONTRACTS § 533 (Rev. Ed. 1936).

²³ 60 S. W. (2d) 1087 (Tex. Civ. App. 1933) affirmed in 127 Tex. 251, 91 S. W. (2d) 1050.

trolling the following statement from *Clegg v. Brannan*:²⁴ "Acts of performance must be sufficient to identify the contract in themselves, and with no other view than to fulfill the particular contract."²⁵ The Court was of the opinion that the plaintiffs' performance for which they received a reasonable monthly salary did not give evidence of an alleged oral contract by which they were to receive a bonus. In *Brigg & Co. v. Lokey*,²⁶ decided the same year, it was held that work done by the plaintiff for which he was paid by the hour was an act which admitted of explanation without reference to the alleged oral contract of employment for a term of two years, for the breach of which the plaintiff was seeking recovery. The Court relied upon *Anderson v. Paschall* and similar cases.²⁷ *Southern Old Line Life Ins. Co. v. Mims*,²⁸ decided since the above cases, allowed the employee recovery under the oral contract though his performance was not referable thereto in that he received a regular monthly salary during the time in which he claimed to have done extra work contracted for by his employer. The Supreme Court points out in the *Chevalier* case that its action on the writ in the *Mims* case was by way of an alternative ground of decision only, and thus was not necessarily an approval of the case on that point.

The decision in the *Chevalier* case expressly reaffirms *Anderson v. Paschall*, and by citing *Clegg v. Brannan* and similar cases,²⁹ it declares in substance that the law as represented by these authorities shall control in the future. Such was held despite the fact that Justice Simpson, concurring in result only, pointed out that the weight of authority and better view was otherwise.

²⁴ 111 Tex. 367, 234 S. W. 1076 (1921). This case was cited as authority by the court in *Chevalier v. Lane's Inc.*, ___ Tex. ___, 213 S. W. (2d) 530 (1948).

²⁵ 111 Tex. 367, 374; 234 S. W. 1076, 1078 (1921).

²⁶ 62 S. W. (2d) 665 (Tex. Civ. App. 1934) *writ of error dismissed*.

²⁷ *Clegg v. Brannan*, 111 Tex. 367, 234 S. W. 1076 (1921); *Lechenger v. Bank*, 96 S. W. 638 (Tex. Civ. App. 1906) *writ of error refused*.

²⁸ 101 S. W. (2d) 396 (Tex. Civ. App. 1936) *writ of error dismissed*.

²⁹ *Francis v. Thomas*, 129 Tex. 579, 106 S. W. (2d) 257 (1937); *Hooks v. Bridgewater*, 111 Tex. 122, 229 S. W. 1114 (1921); *Lechenger v. Bank*, 96 S. W. 638 (Tex. Civ. App. 1906) *writ of error refused*.