

the doctrine in this state is a combined result of the judicial influence of Chief Justice Beasley coupled with the tendency of courts voluntarily to make and judicially to follow ill-considered statements of the law.

The subject is one which clearly exemplifies the difference between the law, as a body of rules developed by courts on the basis of reason, and the law, as a collection of attitudes indulged in by our courts arbitrarily. When the law conflicts in these respects, we must, for practical purposes, adhere to the latter, although we may theoretically adhere to the former. It is with this attitude that the law in New Jersey should be acknowledged to be that a principal is liable for the unauthorized fraud of his agent, committed within the scope of the agent's authority, in contract actions, but not in tort for deceit.

This rule is so firmly, even though unsoundly, established in this State that the possibility of correcting the error is not immediately apparent. In the Federal Courts, however, the law has prevailed that the principal in such cases is liable in tort as well as contract,<sup>40</sup> but a recent case decided by the Federal Court of Appeals, 7th district,<sup>41</sup> suggests a change in attitude favoring the view prevalent in New Jersey. This recent case is no more convincing than our New Jersey cases, and it is to be hoped that the Federal Courts will not allow themselves to fall into the error prevalent in this and other states.<sup>42</sup>

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STATUTE OF FRAUDS—PERFORMANCE WITHIN A YEAR—PERFORMANCE WITHIN A YEAR BY ONE PARTY.—At the Common Law, a contract in writing was classed with parol contracts and had no added validity.<sup>1</sup> A writing was not necessary to give the agreement force.

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40. CORPUS JURIS SECUNDUM, vol. 3, par. 257; 51 Fed. 160.

41. Janeczko v. Manheimer, 77 Fed. (2d) 205, decided April 29, 1935; CORPUS JURIS SECUNDUM, vol. 3, par. 257.

42. Fultham v. Schultze, 282 N.Y.S. 972 (Sup. Ct. 1935).

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1. I WILLISTON ON CONTRACTS, 1920 Ed., sec. 448: "It was suggested in several cases in the latter part of the eighteenth century that the requirement of consideration was for the sake of evidence only, and therefore written contracts needed no consideration. This notion, however, was promptly overthrown by the

This situation obviously opened the door to fraud and perjury and in order to protect a defendant against fraudulent claims of parole agreements, the statute of frauds and perjuries was enacted in England in 1677.<sup>2</sup>

This statute, which has had a substantial re-enactment in the United States, provides among other things that no action shall be brought upon any agreement that is not to be performed within one year unless such agreement shall be in writing and signed by the person to be charged.

The obvious objective of the statute is stated in the original recital: "The prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury."<sup>3</sup> There was imminent danger in trusting to the memory of witnesses oral contracts made long before their testimony is given.

It would seem that so simple a statute, enacted with such a definitely specified purpose, need not have given rise to much difficulty of construction; but unfortunately the situation is otherwise and it must be confessed that the language of the enactment under the view taken of it by the courts does not always prevent the evils sought to be remedied and uniformity of construction is by no means achieved.<sup>4</sup>

The words "upon any agreement that is not to be performed within a year" have, perhaps, more than any other section of the statute, given

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House of Lords . . . and it is everywhere law that the same rules of consideration apply to written as well as to oral contracts." Williston, *supra*.

2. 29 Chas. II, c. 3.

3. REVISED STATUTES OF N. J., 1877, p. 445; REVISED STATUTES OF N. J., 1937, 25:1-5: "No action shall be brought . . . upon any agreement that is not to be performed within one year from the making thereof, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

4. George P. Costigan, Jr., *Has There Been Judicial Legislation in the Interpretation and Application of the Contract Clauses of the Statute of Frauds?* 14 ILL. LAW REVIEW 1

In *James v. Smith*, 1 Chan. 384 (1891), Kekewich, J., said: "It is no part of my judicial duty to say whether on the whole the Statute of Frauds has been a beneficial or mischievous statute, as to which I am, of course, aware there have been many opinions. It is quite easy for the advocates on one side or the other to argue in any case from the separate points of view which they hold."

rise to the greatest refinement by the courts construing their meaning.

The first inquiry, and the most natural one, is what contracts are within this statute; and this can only be answered by an understanding of the far more numerous types which are without the operation of this section of the statute. The latter may be grouped into two main classes: (1) Where there is a possibility of performance; (2) Where there is an actual performance by one of the parties within a year. It is with the last class that we are particularly concerned in this note, but a full understanding of this class is dependent on a knowledge of the first class, and it is deemed wise briefly to discuss the first at this time.

1. *Where there is a possibility of performance.* If upon reasonable construction of the contract it appears that both parties understood that it was not to be performed within a year, the contract is within the statute.<sup>5</sup> In order that an agreement may fall within this section of the statute, however, the parties must contemplate that it shall not be performed within a year. The mere fact that it may not be, or is not, performed within a year, does not bring it within the statute. If by any possibility the promise is capable of performance within the statutory time, the statute has no effect; even though the parties may intend that it will extend over a year and though in fact it does so extend.<sup>6</sup>

Therefore, we have that class of cases where no term of years is alluded to, but the time of performance is either wholly indefinite or depends upon some future contingency or event which may or may not happen within a year. Here, although such event does not occur until after a year, the promise is clearly not within the statute. Thus, "the following contracts have been held enforceable: to pay upon the death of a third person, to pay upon the termination of a suit, to pay

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5. See FRAUDS, STATUTE OF, Dec. Deg. (Key-No.) § 46; CLARK ON CONTRACTS, 3rd ed., p. 95.

6. *Burgesser v. Wendel*, 73 N.J.L. 286, 62 Atl. 994 (Sup. Ct. 1906). Williston, *supra*, p. 966: "A promise which is not likely to be performed within a year, and which in fact is not performed within a year is not within the statute if at the time the contract is made there is a possibility in law and fact that full performance such as the parties intended may be completed before the expiration of a year."

on the day of the promisor's marriage, to marry upon restoration to health, to pay out of one's estate after death, to pay during the life of the promisee, to pay during coverture."<sup>7</sup> In all of these cases, the holding is based on the theory that since the contingency might happen within a year, the statute would not be violated.

Also, under this general heading fall agreements for the continuous performance of acts *until* the happening of a contingency which might possibly occur within a year.<sup>8</sup> Thus, promises to support a child "so long as I think proper,"<sup>9</sup> to pay the plaintiffs 300 pounds a year "so long as she should maintain and educate children properly,"<sup>10</sup> to support a minor until he reaches a stated age,<sup>11</sup> to work so long as services are satisfactory<sup>12</sup> have all been held without the operation of the statute. The case to support a minor until he reaches a stated age more than one year distant from the date of the agreement as being without the statute is severely criticised by the text-writers on the subject, notably Professor Williston<sup>13</sup> who argue that the courts fail to distinguish between performing a contract and being discharged from liability thereunder. While it is true that if the minor did die within a year, the promisor would not be thereafter liable but he would not have *performed* his side of the bargain; he will merely be excused from performing it. It is possible under any contract whatever that some supervening circumstance may excuse the promisor from liability within a year; and in any personal contract, the possibility of death is the same as in promise to support. New Jersey holds agreements to support to be without the operation of the statute,<sup>14</sup> but it is submitted

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7. Van Syckle, J., in *Eiseman v. Schneider*, 60 N.J.L. 291, 37 Atl. 623 (Sup. Ct. 1897).

8. Williston, *supra*, p. 969: "Nor is a promise obnoxious to the statute which is performable at or until the happening of any specified contingency which may or may not occur within a year."

9. *Souch v. Strawbridge*, 2 C.B. 808 (1846).

10. *Haines v. Thompson*, 19 N.Y.Supp. 184 (1892).

11. *McCloskey v. Daly*, 76 N.Y. 594 (1879).

12. *Sax v. Detroit, etc. R. Co.*, 125 Mich. 252.

13. Williston, *supra*, p. 972.

14. *Eiseman v. Schneider*, *supra*, where the defendant made an oral agreement that in consideration of certain domestic services to be performed by the plaintiff, he would support and maintain her during her life, held, that the con-

that the more rational view would hold such agreements within the statute on the ground that actual performance is not to occur until after a year. It is submitted that the majority of the courts holding agreements to support as capable of performance within the statutory period confuse certainty of performance with actual performance and that the words of the statute do not comprehend certainty of performance.

Likewise, the principle that promises performable during the whole life or at the death of the promisor or another are performable within a year has been extended by some courts to a case where a promise to refrain from competition for a period in terms more than a year from the making of the contract.<sup>15</sup> The theory behind such a holding is that since the agreement is a personal engagement it stipulates nothing beyond the promisor's life and imposes no duties upon his legal representatives.<sup>16</sup> But here, too, we submit that there is a distinction between performance and excuse for non-performance, and it is so recognized in the leading case on the subject, although the promise is still held without the statute.<sup>17</sup> Williston's argument against cases of this type is that "it would merely have become certain that the contract would be performed since the promisor being dead could no

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tract was not within the statute because it might have been fully performed and terminated by her death.

15. Williston, *supra*, p. 973.

16. *Doyle v. Dixon*, 97 Mass. 205, 93 Am. Dec. 80 (1867).

17. *Doyle v. Dixon*, *supra*: "If the agreement cannot be completely performed within a year, the fact that it may be terminated or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in *Hill v. Hooper*, 1 Gray 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement fully performed and its purpose fully carried out it is not. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is without the statute, for it is a personal engagement, not stipulating for anything beyond the promisor's life."

longer break a negative promise; but no one can refrain from competition for two years within a year.<sup>18</sup> The question, then, is mainly one of construction: whether by dying the promisor would at once go out of business for the time specified or whether his death would merely spell certainty of his performance. It is submitted that the logical construction should be that where the time is indefinite and supervening death may work completion within a year, the court should not infer an intention to violate the statute; but where more than one year is expressly stipulated there is no room for inference and the statute should come in and make the promises unenforceable.

We can conclude then that if there is a possibility of performance the statute is inoperative, and to be within the statute the agreement must be such as does not *admit* of performance, according to its language and intention within a year from the time it is made.<sup>19</sup>

2. *Where there is an actual performance by one of the parties within a year.* Here the case arises where one of the parties has performed his side of the agreement, and the question is what effect has a plaintiff's performance within a year on the promise of the defendant?

In 1832 the Kings Bench of England advanced a very important doctrine on this point in the case of *Donnellon v. Read*.<sup>20</sup> There a landlord who had already demised premises for a term of years at fifty pounds a year, agreed with his tenant to lay out fifty pounds in making certain improvements on the premises, the tenant agreeing to pay an increased rent of five pounds a year during the remainder of the term (15 years). It was *held* that the landlord having done the work, might recover arrears of the five pounds a year against the tenant, even though the agreement had not been signed by either party. Littledale, J., in delivering the opinion said, "As to the contract not being to be performed within the year, we think that as the contract was entirely executed on one side within the year, and as it was the intention of

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18. 2 WILLISTON ON CONTRACTS, 1936 Ed., p. 1450.

19. "For the statute to apply it must appear that the parties intended that it should not be performed within a year, and, if such intent does not appear and the contract is one that, which in consideration of subject matter, may be performed within that time, the statute does not apply, although performance extends beyond a year." *Smith v. Balch*, 89 N.J.Eq. 566, 105 Atl. 17 (E. & A. 1918).

20. 3 BARN. & AN. 899 (1832).

the parties founded on a reasonable expectation that it should be so, the Statute of Frauds does not apply to such a case."<sup>21</sup>

This doctrine, that if the plaintiff's part of the contract be performable within a year, and *a fortiori* if it be so performed, the defendant's promise is thereby made valid, even though itself is clearly not to be performed within a year or even many years, has been much criticised on both sides of the Atlantic.

The doctrine rests partly on the construction of the word "agreement" in the statute, that it means the obligation of both parties and therefore unless both of the obligations are not performable within a year it cannot be said that the agreement—the whole agreement—is within the statute. It rests, also, in part upon the ground that if the contract be actually performed by the plaintiff and the defendant has received the full benefit thereof, he ought to pay for it.

The question seems to have first arisen in New Jersey in the case of *Berry v. Doremus*.<sup>22</sup> There the defendant moved for non-suit in an action on a contract made between defendant and one Meade, whereby in consideration of the sale of a house, the defendant had promised Meade that he would pay plaintiff's intestate the sum of \$100 a year during her lifetime. The Court in ruling on the non-suit said, "The ground of demanding a non-suit was that the agreement was void under the Statute of Frauds as it was not reduced to a writing and was an agreement not to be performed within a year. But here the contract on the part of Meade was actually and entirely performed at the very time of making it. His deed was actually executed and delivered and the defendant went immediately into possession under it. . . . He now seeks to keep the land under the deed and repudiate the consideration money by force of the Statute of Frauds. But the Statute of Frauds applies to no such case. *It only applies to cases where neither side is to perform the contract within a year.* At least it does not apply to cases where one of the parties is to perform and does in fact perform immediately." The court in this case does not attempt to rationalize the doctrine nor does it go into the merits of the rule. The court merely

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21. A full statement and discussion of this case will be found in BROWNE, STATUTE OF FRAUDS, 5th ed., p. 279.

22. 30 N.J.L. 399 (Sup. Ct. 1864).

cites *Donnellon v. Read*, *supra*, and enunciates the holding there as the universal rule. The decision in *Berry v. Doremus* is purely *stare decisis* and has been controlling ever since.

It had its most recent acceptance in New Jersey in the case of *Boyce v. Miller*,<sup>23</sup> wherein an agreement whereby defendant was to pay plaintiff one cent on all gasoline he sold if plaintiff acquired for him the exclusive right to sell a particular gasoline was held to be without the statute even though the agreement was not in writing and was not to be performed by defendant within a year, because plaintiff had fully performed his side of the bargain within the statutory time. *Berry v. Doremus* is cited as the authority for the holding. Again, the Court refuses to consider the merits of the rule and again the holding is *stare decisis*.

There can be no doubt that the vast preponderance of American cases adopt and approve this rule,<sup>24</sup> the majority of them on the foundation that the statute was only intended to operate upon agreements executory in character. The consideration moving to and the obligation assumed by each party made the agreements executory and when these obligations could not be performed within a year the statute required them to be in writing; but, runs the argument of the majority courts, when the agreement contemplates one party immediately, fully, and completely complying with his entire agreement and he does so immediately comply and there remains nothing to be done by the other but the payment of money pursuant to the agreement, then the agreement has ceased to become executory in character and has become executed.

Some courts have slightly limited the doctrine by holding that the applicability of the statute depends on whether the suit is brought against the party whose undertaking could have been performed within a year.<sup>25</sup> If so brought, the statute does not apply.<sup>26</sup> The rule is other-

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23. 15 N.J.Misc. 280, 190 Atl. 845 (Sup. Ct. 1937).

24. See 27 CORPUS JURIS 350; Williston, *supra*, p. 990; FRAUDS, STATUTE OF, Dec. Dig., key No. 54, sec. 136; Cent. Dig., sec. 81, 300; LEAKE ON CONTRACTS, 4th ed., p. 170; 29 AM. & ENG. ENCYL. OF LAW, 2nd ed., p. 835; BROWNE, STATUTE OF FRAUDS, *supra*, sec. 206; SMITH ON STATUTE OF FRAUDS, sec. 352.

25. *Wilson v. Ray*, 13 Ind. 1; *Sheehy v. Adarene*, 41 Vt. 541, 98 Am. Dec. 623; *Pierce v. Paine*, 28 Vt. 34.

wise where the action is brought against the party whose agreement could not have been performed within the year.<sup>27</sup> But the majority of the courts draw no such distinction.

As was stated at the outset of the discussion, it is vain to attempt to disguise the fact that the rule adopted by the majority has been severely and ably criticised. In Massachusetts, Vermont, Michigan, New York, California, and Ohio the courts have refused to accede to the doctrine<sup>28</sup> and Causten Browne in his text on the statute, *supra*, approves the minority view. And in spite of the numerous decisions to the contrary, are not reason, principle and the very words of the statute itself on the minority side?

The first argument advanced by the early cases that the word "agreement" necessarily implies the promises of both of the parties is highly untenable. If "agreement" means the promises of both parties, how can anyone bring a suit on any agreement? He cannot sue on his own promise; and, if his promise is half of the agreement, he must then bring his action on only half of an agreement. It approaches a ridiculous point.

In making the enactment, the legislature must be understood to have used the word "agreement" in no unusual sense. The word must be interpreted according to common and approved usage of the language, in the absence of statutory qualification or explanation. But even so, it seems immaterial what interpretation is placed on the word. If it is intended to include the stipulations of both parties or as a promise or undertaking by one party only, the requirement of the statute is that it be in writing. Whether it is of unilateral or bi-lateral character the plain words of the statute call for written evidence of the promise. If the former is the correct interpretation, then the true construction of the provision is that the stipulations of both parties must be in writing, unless the promise of each is to be fulfilled within a year. In other words, the entire agreement, comprehending all that is to be

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26. *Sheehy v. Adarene, supra.*

27. *Wilson v. Ray, supra; Pierce v. Paine, supra.*

28. See *Frary v. Sterling*, 99 Mass. 461, and Justice Bigelow's excellent opinion in *Marcy v. Marcy*, 9 Allen (Mass.) 8; *Pierce v. Paine, supra*; *Whipple v. Parker*, 29 Mich. 369; *Broadwell v. Getman*, 2 Den. (N.Y.) 82; *Patten v. Hicks*, 43 Cal. 509; *Rheinheimer v. Carter*, 31 Ohio St. 579.

performed by either party, must be supported by written evidence. It is immaterial that performance by one party of his part of the contract is to be completed within the prescribed period. It is none the less, on that account, a part of the original agreement. Nor can it be said that an agreement, if the word is used as applicable to the subject matter of a contract consisting of mutual obligations, is performed within a year when it has been fulfilled by one side only. An agreement cannot be said to be performed when a great part of it remains unperformed. If we accept the other interpretation of the word "agreement," as signifying the promise or contract of one party only, it would seem to be equally clear that it would apply to and include every stipulation, the performance of which is to be postponed beyond the expiration of a year.<sup>29</sup> "In either view, therefore, of which the meaning of the word 'agreement' is susceptible, whether it is construed to mean the stipulations of both parties, and to include those which have been performed as well as those which are future and executory, or whether it is interpreted as comprehending the latter only, the statute embraces both classes, and applies with equal force to a contract, where the consideration has been executed fully by one of the parties, and where the whole promise is executory."<sup>30</sup>

The real difficulty with the construction of the majority courts is that it virtually engrafts a distinct provision on the statute which the legislatures seem studiously to have omitted. The express requirement of the enactment is that no action shall be brought on agreements which are not to be performed within a year, unless they are supported by written proof. To this, by the mere force of judicial construction, must be added a further provision, an exception to the requirement, by which all agreements are taken out of the operation of the statute if they have been in part fulfilled by a performance by one of the parties within a year. The Supreme Court of Massachusetts has stated that they are "at a loss to understand how such a construction can be reconciled with any sound rule of judicial exposition,"<sup>31</sup> and it does

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29. For a complete and thorough discussion of the word "agreement" as used in the statute see *Marcy v. Marcy*, *supra*. This opinion has been adopted by the writer of this note as the better one.

30. Bigelow, J., in *Marcy v. Marcy*, *supra*.

31. *Ibidem*.

seem that no such complication necessarily arises out of the terms of the statute. Likewise, the fact that the same statute expressly provides that part performance of a contract for the sale of goods above thirty dollars will take the agreement out of the statute lends great weight to the argument that it was not intended to have effect on other contracts where it was not mentioned.

The argument that the doctrine is an unwarranted exception to the statute is greatly fortified by a consideration of the purpose which the statute of frauds was designed to accomplish and the mischief it was intended to prevent. The object was, as previously pointed out, that contracts of an important character as well as those not to be executed within a prescribed period should be supported by more certain and satisfactory evidence than could be afforded by verbal testimony alone. The danger of fraud and perjury, and the risks of mistakes arising from the defective and imperfect recollection of witnesses, were the evils against which the statute was directed. It is difficult to see why all the reasons for the enactment and the policy to which it owes its origin does not apply with equal force to an agreement, only part of which is not to be performed within a year, as to a contract the whole of which is executory and is not intended to be performed by either party until the year is past.

Likewise, an examination of the early cases supporting the majority rule show that the courts never intended the doctrine to be extended beyond the situation where the only performance left for the defendant was the payment of money; and, while it is admitted that most of the cases following the rule of *Donellon v. Read* relate to the payment of money, it may well be doubted whether the doctrine would ever have been accepted in England if the question had not uniformly arisen in cases where the stipulation sought to be enforced related solely to the payment of the money consideration. It was a mere point of form in bringing the action, the plaintiff's right to recover on the common count being clear.<sup>32</sup> With this recovery on the common count being clear the holding of *Donnellon v. Read* seems purely procedural. It seems safe to assume, that the doctrine was never intended to support a contention that where plaintiff has fully performed his part of the

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32. For a discussion of this point see Browne, *supra*, p. 384.

agreement within a year, the defendant can be compelled to do an act or otherwise perform the contract in a manner other than the mere payment over of the contract price. And an examination of the cases fail to reveal a decision in England holding that an agreement to do some *act* after the expiration of a year, in consideration of money paid presently, was binding without a writing.

Here, then, we must draw a proper distinction. If the contract has been performed on one side, in such a matter that the performance benefits a third person, whether it occurs within a year or not, it undoubtedly lays the foundation for a recovery against the party benefited, but upon the money count or on principles of quasi-contract and not on the contract. And that is all, it seems, that *Donnellon v. Read* decided: The holding is nothing more than saying, if one party, after having received goods or money on a contract within the Statute of Frauds, repudiates the contract, he must answer for the goods or money. The case does not say the contract was binding or that it could be sued upon specially. And that is the interpretation placed on the rule by the courts of New York, where it was said that a recovery may always be had for performance, or a part-performance, on one side, of a contract, within this or any other section of the Statute of Frauds, if repudiated by the other party, and this part performance came to the use of the other party; but the payment or performance of the consideration of an agreement or contract within the statute never takes it out of the operation of the statute.<sup>33</sup>

Thus, it seems that the rule of the majority courts, which, incidentally, is the one adopted by the Restatement,<sup>34</sup> that performance by one of the parties takes both of the promises out of the statute is a dangerous extension of the exception to the statute as laid down in *Donnellon v. Read*. To say, as they do, that the whole agreement is out of the operation of the statute is virtually disregarding both in terms

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33. *Lockwood v. Barnes*, 3 Hill (N.Y.) 131.

34. American Law Institute: Restatement of the Law of Contracts, sec. 198: "Where any of the promises in a bilateral contract cannot be fully performed within a year from the formation of the contract, all promises within the contract are within the statute, unless and until one party to such a contract completely performs what he has promised, and when there has been such a complete performance, none of the promises on the contract are within the statute."

and all the beneficial objects of its adoption.<sup>35</sup> The evils of fraud and perjury are none the less because the consideration has been performed within a year. The danger of fraud is chiefly connected with proof of the contract sued upon; and if that is not to be performed within a year on either side, it seems that no fair interpretation of the statute can consistently sustain an action thereon.

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35. The Supreme Court of New York has called the rule of *Donnellon v. Broadwell* "a plain violation of the Statute." *Broadwell v. Getman*, *supra*.