

December 1941

# Contracts--Sufficiency of Notice to Require Exercise of Option

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## Recommended Citation

W. H. S., *Contracts--Sufficiency of Notice to Require Exercise of Option*, 48 W. Va. L. Rev. (1941).

Available at: <https://researchrepository.wvu.edu/wvlr/vol48/iss1/12>

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is concerned, the unsuccessful attempt is as vicious as complete success. It would appear that it is only in an exceptional case that a penalty will be held to be disproportionate to the offense, and that courts tend to give effect to the legislative policy respecting the duration of punishment for crime, making little use of the constitutional limitation.

B. D. T.

CONTRACTS — SUFFICIENCY OF NOTICE TO REQUIRE EXERCISE OF OPTION. — *P* was a tenant under a lease giving it an option to purchase the leased premises within seven days after notice of an offer from a third party at a satisfactory price. On July 31st notice was given to *P* of an offer to purchase, but the name of the offeror was not contained therein. *P* received assurance on August 3rd from the offeror's attorney that the offer was *bona fide* and that the offeror was bound under the terms of the purchase contract. *P* accepted under the terms of the option on August 9th. *D*, however, refused to comply with the option on the basis that *P* had not accepted within the time set by the option, and conveyed the premises to *X*, the undisclosed offeror. Among the terms of the undisclosed offeror's contract to purchase was a provision that the offeror was to pay five hundred dollars from a fund held in escrow if "by reason of their inability to effect suitable and proper financial arrangements" they should fail to purchase the premises. *P* sought to have the deed to *X* set aside and to obtain specific performance of the option. Judgment for *P*. *Held*, one judge dissenting, that *P*'s acceptance on August 9th was in accordance with the terms of the option, the notice of July 31st being insufficient because (1) the contract to purchase was conditional, and (2) the notice failed to give *P* a basis of inquiry into the *bona fides* of the offer. *Peerless Dept. Stores v. George M. Snook Co.*<sup>1</sup>

The court was of the opinion that the offer which *X* made to *D* for the purchase of the property was not the type of offer contemplated by the option in that it contained a provision for stipulated damages.<sup>2</sup> The inference to be gathered from the reasoning of the court is that the provision made the contract one in the alternative. So to hold would be tantamount to placing contracts with stipulations for liquidated damages in the same category with alternative contracts. The two types are closely interwoven<sup>3</sup> but may be dis-

<sup>1</sup> 15 S. E. (2d) 169 (W. Va. 1941), Rose, J., dissenting.

<sup>2</sup> Majority opinion, Fox, J., concurring specially.

<sup>3</sup> Note (1929) 35 W. VA. L. Q. 367, 368.

tinguished. A contract which gives either the promisor or promisee an alternative between two or more performances is an alternative contract,<sup>4</sup> while liquidated damages may be defined as damages fixed by the parties who enter into an agreement to avoid all future questions of damages which may result from a violation thereof, and to agree upon a definite sum as that amount which will be paid to the party who alleges and establishes the violation.<sup>5</sup> In the first, a party may do one of two or more things and yet fulfill the contract; in the second, he must perform the act or acts agreed upon, or pay a sum certain as liquidated damages for the failure so to do. To ascertain whether the contract is one in the alternative or one with a provision for liquidated damages, the court will consider the contract as a whole in order to arrive at the intent of the parties.<sup>6</sup>

The terms of the original contract to purchase clearly fall within the second class. The contract includes a provision for the payment of five hundred dollars in the event of noncompliance, and fails to give the promisor any alternative of performance. The subject matter treated in this contract is of a type that readily lends itself to a provision for liquidated damages.<sup>7</sup> The method of ascertaining damages for failure to fulfill a contract to purchase land is nebulous<sup>8</sup> and as a result a provision for liquidated damages is reasonable. The deposit of money to be forfeited in the event of

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<sup>4</sup> RESTATEMENT, CONTRACTS (1932) § 325.

<sup>5</sup> Welch v. McDonald, 85 Va. 500, 8 S. E. 711 (1888); Stoney Creek Lumber Co. v. Fields & Co., 102 Va. 1, 45 S. E. 797 (1903).

<sup>6</sup> Note (1929) 35 W. VA. L. Q. 367, 368: "To distinguish these two types of contracts, the determining question must be, is the intention of the parties, as ascertained from a fair interpretation of the contract, to form an absolute agreement to do, or refrain from doing a particular act, followed by a stipulation in relation to the amount of damages in case of breach, or is there merely an engagement to do or refrain from doing an act, or pay a sum of money, so that performance of the latter stipulation amounts to a performance of the contract, rather than damages for breach of an absolute agreement. If the latter, it is a true alternative contract, and not one for liquidated damages."

<sup>7</sup> Charleston Lumber Co. v. Friedman, 64 W. V. 151, 61 S. E. 815 (1908); Wilkes v. Bierne, 68 W. Va. 82, 69 S. E. 366, 31 L. R. A. (N. S.) 937 (1910): "In some cases, where, from the nature of the subject or from peculiar circumstances, the damages are uncertain and not ascertainable by any known and safe rule, or where, from the nature of the case and the tenor of the agreement, it is apparent that the damages have been the subject of actual fair estimate and adjustment by the parties themselves, the sum named to be paid for the breach may be inferred to have been intended as liquidated damages."

<sup>8</sup> McCORMICK, DAMAGES (1935) § 46: "The value of land may be proved by opinion evidence of those familiar with its value, by evidence of its location, area, and productiveness, and, in most states, by evidence of the prices paid on sales of similar land in the neighborhood within a reasonable time before or after the time of valuation."

failure to meet the terms of the contract also tends to indicate that this was a contract with a provision for liquidated damages.<sup>9</sup>

The second reason for holding the July 31st notice of the offer insufficient was that the name of the offeror was not included therein. The option was silent on the question of averment of *bona fides* in the notice of the offer. Often such options in lease agreements provide for assurance of the *bona fides* of the offer,<sup>10</sup> and if such had been stipulated in the lease agreement, the notice of the offer actually given would have been insufficient. It is not contended that if the offer made to the lessor had not been *bona fide* that *P* would have been under any duty to act,<sup>11</sup> but it is suggested that if the lessor was to have the burden of establishing *bona fides* in the notice, such should have been included in the option.

*P* claimed that it should have some basis of inquiry into the *bona fides* of the offer. The real inquiry desired was into the *bona fides* of the lessor giving notice of the offer, since there could be no fraud against the lessee unless the lessor was a party to it.<sup>12</sup> To require *bona fides* in such a notice would presume that the lessor intends to defraud the lessee and would place a burden on the lessor to prove his innocence. Moreover, why should the notice show *bona fides*? If the notice of the original offer is in fact fraudulent, the lessee is fully protected even though he purchases the property under the option.<sup>13</sup>

Finally it should be pointed out that the majority agreed that sufficient notice was given on August 3rd. It is difficult to understand that if notice was not sufficient on July 31st because the lessor failed to show sufficient basis for inquiring into the *bona fides* of the offer, why assurance of the offeror's attorney on August 3rd should provide any better basis of inquiry.

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<sup>9</sup> 1 SEDGWICK, DAMAGES (9th ed. 1913) § 414: "Where the instrument refers to a sum deposited as security for performance, or paid in advance to be forfeited on default, the forfeiture, if reasonable in amount, will be enforced as liquidated damages."

<sup>10</sup> See the terms of the options in *Slaughter v. Mallet Land & Cattle Co.*, 141 Fed. 282 (C. C. A. 5th, 1905); *Burleigh v. Mactier*, 108 Atl. 84 (N. J. Ch. 1919).

<sup>11</sup> *Ogle v. Hubbel*, 1 Cal. App. 357, 82 Pac. 217 (1905); *Sargent v. Vought*, 194 App. Div. 807, 185 N. Y. Supp. 578 (1920).

<sup>12</sup> Since the offeror is bound by the acceptance of his offer, the only inquiry would be into the *bona fides* of the lessor. Bad faith could exist only on the part of the lessor, or the lessor acting in collusion with the offeror.

<sup>13</sup> WALSH, EQUITY (1930) § 106.