Volume 56
Issue 2 *Issues 2 & 3*

Article 8

June 1954

Future Interests--Contract of Purchase or Lease with Option

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both seem to have the same goal, that being to place all the matter relevant to the case before the triers of facts unless the evidence is clearly excluded by some rule or principle of law.

Thus, it would seem that the principal case is correct. It is certainly a step in the right direction and it certainly is another example of how the courts often attempt to limit the scope of exclusionary rules of evidence such as the *Weeks* doctrine. One case which seems to be quite similar, at least on the facts, to the principal case is *State v. Slamon,* 73 Vt. 212, 50 Atl. 1097 (1901). There it was said that a letter improperly taken from the defendant was inadmissible to impeach the writer, a witness for the defendant. This statement appears to be *contra* to the rule of the principal case. This case, however, has been overruled *sub silentio*: Vermont now repudiates the *Weeks* doctrine, *State v. Suitor,* 78 Vt. 391, 63 Atl. 182 (1906).

It is difficult to say just what the West Virginia court will do in the light of the decision in the principal case. In *State v. Wills,* 91 W. Va. 659, 114 S.E. 261 (1922), the doctrine of the *Weeks* case was adopted. The court, recognizing that there was a decided split among the states, said, "If we err, we would rather err on the side of liberty, and therefore we adopt as the better rule that laid down by the Supreme Court of the United States." *Id.* at 677, 114 S.E. at 266. The *Weeks* doctrine seems to be wrong since it is founded upon (1) a misapplication of a substantive rule of law and (2) an overextension of the protection of the Fifth Amendment. If the basic rule is wrong then certainly the rule in the principal case which deviates therefrom must be correct. This decision would seem to illustrate the fact that even the Supreme Court is not sure that the *Weeks* rule is on firm ground. When this is pointed out to the West Virginia court perhaps it will overrule the *Wills* case, *supra,* and adopt the orthodox rule.

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FUTURE INTERESTS—CONTRACT OF PURCHASE OR LEASE WITH OPTION.—*A* and *B* entered into a written agreement which by its own terms was denominated a "deed". Elsewhere in the instrument appeared the words "leased premises", "rent", "rental", "term", "grant", and "demise". Under this agreement *A* was to have possession and use of commercial realty, in return for which he was to

pay *B* $1200 per year for 28 years, and at the end of such term he could get a conveyance of the property by the payment of $1.00 to *B*. *P*, trustees, derive their title from *B*; *D*, from *A*. *P* seeks a declaration of rights and obligations of the parties to the instrument. *Held*, that the instrument was a lease with an option to purchase at the end of the term, and since the term was twenty-eight years, the option was void *ab initio* as being in violation of the rule against perpetuities. *First Huntington National Bank v. Gideon-Broh Realty Co.*, 79 S.E.2d 675 (W. Va. 1953) (3-2 decision).

In the case of *Spelman v. City of Parkersburg*, 35 W. Va. 605, 14 S.E. 279 (1891), there was involved an instrument similar to the one in the instant case in all of its salient provisions; in fact, it even contained the so-called option to purchase for one dollar at the end of the period. The court said this was clearly a contract of purchase. In *Crowell v. Brim*, 191 Ga. 288, 12 S.E.2d 585 (1940), cited in the dissenting opinion in the principal case, the instrument there construed contained the terms "lease" and "yearly rental", yet the court held it to be a contract of purchase, citing four other Georgia cases as authority. In one of these cases so cited, *Gibson v. Alford*, 161 Ga. 672, 132 S.E. 442 (1926), the instrument contained the provision that if there was a default in payment of any of the sums due under the agreement, the party so obligated to pay would be evicted as a tenant holding over. Still the court held it to be a contract of purchase and not a lease with an option to purchase. It is readily seen that such terms are not determinative of the construction to be placed upon the instrument.

From the conflict of authority, it must be noted that documents such as that in the principal case present a rather complex problem of construction. *Shirley v. Van Every*, 159 Va. 762, 167 S.E. 345 (1933), lays down the proposition that courts prefer to construe doubtful documents as bilateral contracts rather than unilateral contracts. The reason for this is the policy of the court favoring mutuality of obligation. *Turner v. Hall*, 128 Va. 247, 104 S.E. 861 (1920). It necessarily follows then that the courts would prefer to construe the instrument in the instant case as a contract of purchase rather than a lease with an option to purchase, since the latter is a unilateral contract.

In view of all the foregoing considerations, it is submitted that the better reasoning is found in the decisions which hold that an instrument such as this one is a contract of purchase and not a lease with an option to buy. If this instrument is a contract of purchase, *D*'s predecessors had a vested equitable title to the proper-

ty as soon as the contract was executed. Where there is a present vesting of a legal or equitable estate in land by an agreement, the rule against perpetuities does not bar a subsequent acquisition of the remaining estate, whether legal or equitable. *McKibben v. Pioneer Trust & Savings Bank,* 365 Ill. 369, 6 N.E.2d 619 (1937).

The West Virginia court held that the instrument was a lease with an option to purchase, and therefore, *D*'s predecessors in title had no vested estate until he exercised the option. Since the period at the end of which the option was to be exercised exceeded twenty-one years, it was void *ab initio* as being a violation of the rule against perpetuities. Granting, for the sake of rebuttal, that it is a lease with an option to purchase, the American authorities (*infra*) seem to be well in accord that the rule against perpetuities should not apply.

The court in the instant case failed to make an important distinction, that of options in gross and options appendant to a lease. The former arises when a stranger to the land has the right to exercise the option. The latter arises when the person having the right to exercise the option is already the lessee of the property. In *London & S.W.R. Co. v. Gomm,* 20 Ch.D. 562 (1880), cited by the West Virginia court to support the majority opinion, the option is in gross. The opinion in that case made no mention of options in gross and options appendant to a lease.

It seems to be the established rule in England that options in gross and options appendant both violate the rule against perpetuities. A curious paradox in English law was an instance where equity refused to enforce the promise as being too remote under the rule against perpetuities but the covenantee was allowed money damages at law for the breach of the covenant. *Worthing Corp. v. Heather,* 2 Ch.D. 532 (1906). This was an option appendant to a lease. In *Eastman Marble Co. v. Vermont Marble Co.,* 236 Mass. 138, 128 N.E. 177 (1920), a case concerning an option in gross, specific enforcement was denied by equity on the ground of the rule against perpetuities, and money damages were denied at law for the same reason.

There are not many cases in the United States on this particular point. According to Lanzebutting, *Options to Purchase and the Rule against Perpetuities,* 17 VA. L. REV. 461 (1931), it is the general rule in the United States that options appendant to a lease are not repugnant to the rule against perpetuities, while options in gross do violate the rule. *Banks v. Hastie,* 45 Md. 207 (1876), *Hollander v. Central Meat Co.,* 109 Md. 131, 71 Atl. 442

(1931); *Koegh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925). As far as research shows, the principal case is the first American case to hold a lease with an option to purchase in violation of the rule against perpetuities.

However, it is generally accepted here and in England that leases with a perpetual option to renew the lease do not violate the rule against perpetuities. *Thaw v. Gaffney*, 75 W. Va. 229, 83 S.E. 983 (1929). There seem to be two bases for this: (1) such leases existed before the rule against perpetuities came into being; (2) such leases do not violate the policy of the rule, though they may violate the letter of the rule. Abbot, *Leases and the Rule Against Perpetuities*, 27 YALE L.J. 878 (1918). The purpose of the rule against perpetuities has been variously stated, but may be summarized by saying it is to prevent one owner from unduly and unreasonably diminishing the value of ownership to his successors. It has as its companion rule, the rule against restraints on alienation, both having the same policy. Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).

If a lease with a perpetual option to renew is not repugnant to the policy of the rule against perpetuities, a lease with an option to purchase should also not be repugnant to the rule. In the case of a perpetual option, there is the equivalent of two fees running simultaneously in the same property, and this could go on forever. On the other hand, in the case of a lease with an option to purchase, one of the two estates is going to be terminated at a definite time. This fact should make the latter property more freely alienable than is the former property. Couple this with the fact that the rule against perpetuities is a rule of policy, and there results a good basis for widening the exceptions to the rule to include leases with an option to purchase.

There are other reasons to hold a lease with an option to purchase to be good as an exception to the rule against perpetuities. Since the lessee has the chance to buy the land, this will give him an incentive to improve it. Improvement of land is another public policy recognized by the courts. It is a system of land tenure advantageous to both lessee and lessor. It is the way a person with limited means may buy and pay for land with the profits he makes from the land. Comment, 35 YALE L.J. 261 (1925).

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