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The Assignability of an Option Contract

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"The decisive argument, however, was and is that the absence of responsibility to some external authority is bad for the schools themselves. This fact, which Minor had early recognized, is patent to any one who has visited a large number of law schools. It is apparent even in schools which, because they have virtually a local monopoly of legal education, are under no pressure to reduce their standards. It takes here the form of a certain listlessness. The teachers are tempted to sink into that condition of uninspired placidity which is only too characteristic of many American college professors. That law teachers, as a class, move on a higher plane of efficiency than their colleagues in the colleges of liberal arts is undoubtedly attributable in part to their greater measure of accountability." 6

He quotes Professor Minor to the effect that it is better for the law schools,

"As well as the young gentlemen who graduate therein, that they should not enjoy this exclusive privilege; but that their fitness to practise law should be tested in the same way with students in private offices or in private law schools." 7

-L. C.

THE ASSIGNABILITY OF AN OPTION CONTRACT.—The authorities are in conflict as to the assignability of an unexercised land option contract.1 Of course, if the option is expressly assignable,2 or is clearly personal to the offeree,3 no question arises. The intention of the parties governs. Where the option is silent upon the point, most courts, hold it assignable and permit the assignee of the holder of the option, after acceptance, to have a bill for specific performance against the optionor.4 West Virginia, however, and a few other

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6 P. 267. 7 P. 280. It will be recalled that a bill was introduced at the recent session of the West Virginia Legislature for the purpose of extending the diploma privilege to schools of other states. Instead of attempting this, it would seem well worth consideration whether the privilege ought not utterly to be abolished.

1 The cases are collected and commented upon in Williston on Contracts, § 415; in 43 L. R. A. (N. S.) 115, note; and in 27 R. C L. 345, 346. 2 Simmons v. Zimmerman, 144 Cal. 256, 79 Pac. 451 (1904); Fulton v. Messenger, 61 W. Va. 477, 56 S. E. 830 (1907); Wheeling Creek Co., v. Elder, 170 Fed. 215 (1909).
4 See note 1, supra.
jurisdictions, have taken a contrary view. This seems wrong.

An offer to sell land is a promise. If the offer is under seal, the historical significance of the seal, where the common law rule is still in force, makes the promise binding. The giving of a consideration for the offer, although the latter is not under seal, has the same effect. This is because the offer in either case, is also a contract, preliminary and incidental to a further contract of purchase and sale, it is true, nevertheless a contract in itself. Since the promise contained in the offer is conditioned upon acceptance, no liability arises until that event. Meanwhile, however, the offeror is under a duty not to revoke his offer. And if the offer, instead of itself being given under seal or for a consideration, is accompanied by an express collateral promise, under seal or for a consideration, to keep the offer open during the specified period, the same is true, for the same reasons. But not only is the offeror, in all of these situations, under a duty not to revoke the offer; he is actually powerless to do so. By declaring the offer irrevocable, both law and equity specifically enforce this duty and render any attempted revocation ineffectual. Once the offer is made under any of the circumstances mentioned, the offeror cannot withdraw his offer so as to prevent the offeree from bringing a contract of purchase and sale into existence by acceptance. Thus, the offeree, during the period specified and prior to acceptance, has something more than the mere power or privilege of the ordinary offeree, subject as it is to the offeror's privilege of revocation, to create by acceptance the contemplated main contract of purchase and sale. He has a contract right to do so, and the additional assurance that any attempted...


6 See WILLISTON ON CONTRACTS, § 25.


8 Weaver v. Burr, 31 W. Va. 736, 8 S. E. 743 (1888); Swift v. Erwin, 104 Ark. 459, 148 S. W. 267, 269 (1912). See also WILLISTON ON CONTRACTS, § 61.

9 See WILLISTON ON CONTRACTS, §§ 61, 217.


11 Logically, perhaps, the optionor should have the power to break his subsidiary contractual obligation not to revoke, with resulting responsibility in damages, so as to be able actually to prevent the creation of the contemplated main contract by acceptance. See LANGDELL, SUMMARY, § 178; ASHLEY ON CONTRACTS, § 13. The result indicated in the text seems to have been reached mainly on the practical ground of commercial convenience.
breach of the officer's correlative duty not to revoke will not disturb his position.

Once the option is exercised and the contract of purchase and sale is created, the prospective purchaser acquires a new contract right against the owner to obtain title to the land, a right enforceable at law in an action for damages and in equity by a bill for specific performance. And as a concomitant of the availability of the latter remedy, he acquires an equitable interest in the land.

This right of the holder of an unexercised option to acquire further contractual rights in personam and in rem, even though it does not become an equitable interest in the land until the offer is accepted, is nevertheless as valuable a commercial asset as an interest in the land and should partake of an ordinary incident of property, like assignability. Thus, although it is not available to creditors of the optionee upon equitable execution, an unexercised option may be taken and sold by the optionee's assignee in bankruptcy, or by a receiver appointed to wind up his affairs, and at his death it goes to the personal representative for the benefit of those entitled to the personality. And certainly the same considerations of commercial expediency which brought about the historical development resulting in the assignability of contracts generally, and the irrevocability of options given under seal or for a consideration, demand that this preliminary contractual right be assignable unless the parties have expressly stipulated otherwise.

It remains to notice particularly the case of *Rease v. Kittle*, in which the Supreme Court of Appeals of West Virginia enunciated the doctrine under discussion, and which has been followed by a

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14 *Williston on Contracts*, § 415.

15 Because the option is not yet an equitable interest in the land, Sweezy v. Jones, 65 Ia. 272, 21 N. W. 603 (1884); *Provident Co. v. Mills*, 91 Fed. 435 (1899).


17 *Blank v. Independent Ice Co.*, 152 Ia. 241, 133 N. W. 344 (1911).

18 This is clearly the correct view, for the option being a right only to acquire further contract rights, is personalty. *McCormick v. Stephany*, 57 N. J. Eq. 297, 41 Atl. 840 (1886); *Newton v. Newton*, 11 R. I. 390, 25 Am. Rep. 476 (1876) seems to be opposed to this view, but it is submitted that what really actuated that decision was a feeling upon the part of the court that because of the curious facts of the case, it would be unwise for the administrator to exercise the option, in that the rights of creditors of the estate would thereby be seriously injured. There was also some evidence that the parties to the option had understood that it was to be personal to the optionee. The very few cases on this subject are collected and discussed in 43 L. R. A. (N. S.) 113, note.

19 See *Williston on Contracts*, ch. 14, and see note 12, supra.
Federal court sitting in this state. Kittle, for a consideration, gave Howell an option to buy coal land for a certain cash price at any time during five years. Kittle shortly afterward conveyed the land to Womelsdorf for cash. Howell later assigned the option to Rease. Rease then exercised the option and tendered the price to Kittle. A conveyance being refused, he brought a bill for specific performance against Kittle, Womelsdorf, Howell, and certain creditors of Kittle. A demurrer was interposed. The lower court granted the relief sought. Womelsdorf appealed. The Supreme Court of Appeals reversed the decree, sustained the demurrer and dismissed the bill.

The main ground relied upon was that an unexercised option, although irrevocable because given for a consideration, is nevertheless essentially an offer, and can therefore be accepted only by the person to whom it is made. This phase of the problem has already been discussed. An option is not merely an offer. It is also a contract, made distinctive by its specific enforceability. That is, its contractual features are more noteworthy than its characteristics as an offer. And "it seems reasonable where a contract right of value is concerned (and an option often is of value) and the performance of the offeree can be as effectively rendered by any one as by him, that the rule generally applicable to offers should yield."

However, the case might well have been disposed of with the same result on other grounds. While the option remained in Howell’s hands, unexercised, and before its assignment to Rease, Womelsdorf purchased the land for cash from Kittle, apparently without either actual or constructive notice of Howell’s option. Whatever may be Kittle’s liability in damages, it seems clear that Womelsdorf must have taken a title free from any claims based upon the outstanding option. In other words, because of the interposition of a bona fide purchaser for value without notice, the question of what rights Howell later assigned to Rease does not arise. Howell himself could not, after the conveyance to Womelsdorf without notice, have had specific performance for the land, and his assignee stood in no better position. That is all that the case means.

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20 See note 5, supra.
21 See WILLIAMS ON CONTRACTS, § 415. The court also relied upon Newton v. Newton, but see note 18, supra.
22 See the cases collected in 28 L. R. A. (N. S.) 522, note, and 43 L. R. A. (N. S.) 1150, note. See also WILLIAMS ON CONTRACTS, § 936, note 70; and Ames, "Purchaser for Value Without Notice," 1 HARV. L. REV. 1.