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Application of the Rule Against Perpetuities to Options to Purchase Real Estate

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STUDENT NOTES AND RECENT CASES

APPLICATION OF THE RULE AGAINST PERPETUITIES TO OPTIONS TO PURCHASE REAL ESTATE.—The Rule against Perpetuities is said to be a rule of property, and has not reference to the law of contracts.¹ Yet it has been decided that an option to purchase real estate which might be exercised beyond the period allowed by the Rule violates it.² The question then arises, What interests in real estate does an option to purchase it create?

An option is a contract between a party called an optionor and another called an optionee, whereby the optionor, for a consideration paid him, promises to hold open for a stated length of time an offer to sell to the optionee a named thing at a named price.³ Such a contract, strictly speaking, gives the optionee merely a right to have the offer kept open the stipulated length of time,⁴ and gives no interest whatever in the land itself.⁵ It is not a contract for the sale of land, but is a contract to keep open an offer. When the offer is accepted, a new contract comes into being, and this latter contract does transfer to the former optionee an interest in the real estate to which it relates.⁶ It is then no longer an op-

¹ See *London & Southwestern Ry. Co. v. Gomm*, 20 Ch. D. 562, 575. See also GRAY, RULE AGAINST PERPETUITIES, 3 ed. §§ 273a, 275, 329.

² *London etc., Ry. Co. v. Gomm*, *supra*; *Winsor v. Mills*, 157 Mass. 362, 32 N. E. 352; *Barton v. Thaw*, 246 Pa. 343, 92 Atl. 312; *Woodall v. Bruen*, 76 W. Va. 193, 85 S. E. 170; *Starcher Bros. v. Duty*, 61 W. Va. 373, 566 S. E. 524. *Contra*, *Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 Atl. 442. See *Blakeman v. Miller*, 136 Cal. 138, 68 Pac. 537; *Bauer v. Lumaghi Coal Co.*, 209 Ill. 316, 70 N. E. 634; *Hardy v. Galloway*, 111 N. C. 519, 5 S. E. 890. See also GRAY, RULE AGAINST PERPETUITIES, §§ 33Cb, 330c; KALES, ESTATES, FUTURE INTERESTS, § 664; JAMES, OPTION CONTRACTS, §§ 219, 220. In *Starcher Bros. v. Duty* the court said that, since the contract infringed the Rule against Perpetuities, it was void from the beginning. If this is true, could not the optionee recover back the consideration paid the optionor on the void contract?

³ *Hanley v. Watterson*, 39 W. Va. 214, 19 S. E. 536; *John v. Elkins*, 63 W. Va. 158, 59 S. E. 961; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 654. See JAMES, OPTION CONTRACTS, § 101.

⁴ *John v. Elkins*, *supra*; *Fulton v. Messenger*, 61 W. Va. 477, 56 S. E. 830; *Hartman v. Selling*, 192 Pac 408 (Cal. 1920); *Rease v. Kittle*, 56 W. Va. 269, 49 S. E. 150. See JAMES, OPTION CONTRACTS, § 502; 21 L. R. A. 127.

⁵ *Reese v. Kittle*, *supra*; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795; *John v. Elkins*, *supra*; *Standford v. Thompson*, 135 Fed. 991, 63 C. C. A. 425; *Stearns v. Goad*, 111 Va. 834, 69 S. E. 1101; *Sheeby v. Scott*, 128 Ia. 551, 104 N. W. 1139. See JAMES, OPTION CONTRACTS, § 102; 57 L. R. A. 651. It is stated by some courts that an option contract gives the optionee a contingent interest. See *Worthing Corporation v. Heather*, [1906] 2 Ch. 532, 536. And this view is apparently approved by some eminent writers on the subject. See GRAY, RULE AGAINST PERPETUITIES, § 330; KALES, ESTATES, FUTURE INTERESTS, § 665; 18 HARV. L. REV. 379. See also Prof. John R. Rood, "Options and the Rule Against Perpetuities," 23 C. & COM. 835.

⁶ *Donnally v. Parker*, 5 W. Va. 301; *Taylor v. Holmes*, 14 Fed. 498. See JAMES, OPTION CONTRACTS, § 301 n. 1. And see 39 Cyc. 1243, 1302. As equitable owner of the real estate, he is entitled to any increase in value that may accrue, and must bear the risk of loss or damage. See 39 Cyc. 1304, 1641. And he may insure his interest. See 19 Cyc. 534.

tion contract, but is a binding bilateral contract for the sale of real estate.⁷ It is specifically enforceable in equity,⁸ and immediately vests in the former optionee an equitable interest in the land which descends to his heirs at law if he dies intestate.⁹ But before the option is exercised, the optionee gets no interest in the real estate to which the option contract relates.¹⁰

If the Rule against Perpetuities is strictly a rule of property law, and not of contract law, then it seems that it should not apply to unexercised option contracts.¹¹ And, after the right of election has been exercised, the rule is no longer concerned with the transaction, for the reason that upon election *ipso facto* the equitable title vests in the optionee,¹² and the Rule does not affect vested estates.¹³ It seems, therefore, that if the Rule against Perpetuities is to be applied to option contracts, it must reach them on the ground that it affects contracts, or at least some kinds of contracts, as well as interests in property.

The English courts seem to be inconsistent in applying the Rule to option contracts. In the case of *Worthing Corporation v. Heath*,¹⁴ although the court held that the option contract could not be specifically enforced, because it violated the Rule against Perpetuities, nevertheless it allowed the optionee to recover damages for its breach, stating that the Rule does not apply to contract rights.

⁷ *Thomason v. Bescher*, 176 N. C. 622, 97 S. E. 654. See 2 A. L. R. 631.

⁸ *Barrett v. McAllister*, 33 W. Va. 738, 11 S. E. 220; *Slattery v. Gross*, 86 Ore. 554, 187 Pac. 300. See *Donnally v. Parker*, 5 W. Va. 301, 324. See also 6 L. R. A. (N. S.) 403; 36 Cyc. 552. And see JAMES, OPTION CONTRACTS, § 514.

⁹ *Chandler*, 179 Ia. 304, 161 N. W. 434. See JAMES, OPTION CONTRACTS, § 872.

¹⁰ *Sewell v. Underhill*, 127 N. Y. App. Div. 92, 111 N. Y. Supp. 85; *Ingraham* If the right of election is not exercised until after the optionee's death, if he dies intestate the land does not descend to the heirs, but the next-of-kin acquire his rights under the option contract. See L. R. A. 1917D, 719. And if the optionee elects to purchase after the optionor's death intestate, the land having descended to the optionor's heir, the heir, and not the personal representatives of the optionor, gets the purchase money. *Smith v. Lowenstein*, 50 Ohio St. 346, 34 N. E. 159. See L. R. A. 1916F, 358. Also, while there is a conflict of authority, it seems that the better view is that election to purchase under such a contract does not relate back to the date of the option contract. *Rockland-Rockport Lime Co. v. Leary*, 203 N. Y. 469, 97 N. E. 43; *Smith v. Lowenstein*, *infra*; *Adams v. Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645. See L. R. A. 1916F, 358; L. R. A. 1917D, 719. *Contra*, *Townley v. Bedwell*, 14 Ves. Jr. 591. It is submitted that those cases which hold that the optionee of an unexercised option contract for the purchase of real estate has an insurable interest in it are unsound. See L. R. A. 1918A, 393. See also JAMES, OPTION CONTRACTS, § 872.

¹¹ See Note 5, *supra*.

¹² This is the argument of Prof. John R. Rood, "Options and the Rule Against Perpetuities," C. & COM. 835.

¹³ *Smith v. Lowenstein*, *supra*. See *Donnally v. Parker*, 5 W. Va. 301, 324. See also JAMES, OPTION CONTRACTS, § 514.

¹⁴ *Armstrong v. Barber*, 289, 88 N. E. 246. In this respect it is submitted that *Winsor v. Mills*, *supra*, is inaccurate. See GRAY, RULE AGAINST PERPETUITIES, § 275a.

¹⁵ [1906] 2 Ch. 532. *Cf.* *Woodall v. Clinton*, [1905] 2 Ch. 257.

The court, in that case, seems to have failed to differentiate between the true option contract and the contract to purchase land which grew out of it. It was in that case that the court made the statement that an option to purchase real estate creates an equitable interest therein.¹⁵

The American courts, it is submitted, have adopted the proper view. In a recent case,¹⁶ the Massachusetts court refused to enforce specifically the performance of a contract giving the optionee an election to purchase real estate at any time within twenty-five years; and, further, the court denied the optionee the right to recover common-law damages for the breach of the contract, expressly repudiating the doctrine of *Worthing Corporation v. Heather* in this respect. The ground on which the court rests its holding in that case is that the option contract violates the spirit of the Rule against Perpetuities,¹⁷ and, being void in equity, is also void at law. The New Jersey court has also recently reached the conclusion that the Rule against Perpetuities applies to contract rights as well as to contingent interests in property.¹⁸ It is submitted that this is the proper view. No cogent reason is seen why, if a contract relating to land is not specifically enforceable in equity, a law court ought to allow damages for its breach. The contract should be considered either valid or void, not void in one court and valid in another. These contracts should be held void not because they create interests of any kind in the land to which they relate, but because they violate the spirit of the Rule.¹⁹

—W. F. K.

EQUITABLE RESTRICTIONS—RESTRICTIONS AS TO THE USE OF LAND—STATUTE OF FRAUDS.—The West Virginia Supreme Court in two recent decisions¹ has recognized the validity of certain agreements creating equitable restrictions upon the use of land. In both instances these agreements were contained in the deeds

¹⁵ [1906] 2 Ch. 532, 536. And see note 5, *supra*.

¹⁶ *Eastman Marble Co. v. Vermont Marble Co.*, 128 N. E. 177 (Mass. 1920).

¹⁷ For an excellent statement of the spirit of the Rule, see the article by Edwin H. Abbot, Jr., "Leases and the Rule Against Perpetuities," 27 *YALE L. J.* 885. Professor Kales says that the option contract for the purchase of real estate makes the optionee the *dominus* of the land, and is objectionable for that reason. See *KALES, ESTATES, FUTURE INTERESTS*, § 665.

¹⁸ *Canda v. Canda*, 113 Atl. 503 (N. J. Ch. 1920). But clearly it does not apply to all contract rights. See *McKenzie v. Childers*, 43 Ch. Div. 265, 279. See also *GRAY, RULE AGAINST PERPETUITIES*, §329.

¹⁹ See note 17, *supra*.

¹ *Cole v. Seamons*, 104 S. E. 747 (W. Va. 1921); *Withers v. Ward*, 86 W. Va. 558, 104 S. E. 96 (1920).