

Equitable Restrictions--Restrictions as the Use of Land--Statutes of Fraud

M. T. V.

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).

by which the property was conveyed, and imposed certain restrictions upon the vendee as to the use of the land conveyed. In neither instance does it appear that the deed was signed by the vendee, but neither case attempts any explanation as to why these agreements are not within our Statute of Frauds.² Today the validity of such agreements is almost universally recognized; and in most jurisdictions independent of the mode or incidents of execution. However, practically none of these cases attempt to explain why such agreements are not within the Statute of Frauds. The courts of several states have taken the view that such agreements create interests in land within the contemplation of the Statute,³ while an equally limited number expressly take the opposite view.⁴ There are two decisions denying that such an agreement is one not to be performed within one year from the making thereof. One decision is based upon the theory that there is a possibility that the agreement may be performed within one year⁵; the other upon the theory that the provision does not apply to a negative contract.⁶ The text writers upon the Statute of Frauds adopt the view that such agreements are not within the Statute, but are not accompanied by explanations.⁷ It may be said to be a fairly well settled rule that such agreements are not within the provisions of the Statute of Frauds, but it is regrettable that the cases do not attempt any explanations as to why the Statute of Frauds does not apply.

—M. T. V.

RAILROADS—DUTY TO TAKE PRECAUTION TO AVOID INJURY TO DOMESTIC ANIMALS NEAR TRACK.—A train crew discovered a cow about 125 feet ahead and 8 or 10 feet from track and between it and a slope from which she was eating grass. No effort was made to check the engine until the cow suddenly wheeled around and got upon the track 60 feet ahead. *Held*, whether employes were negligent is a question for jury determination from all the circumstances. *Testerman v. Hines, Director General*, 107 S. E. 201, (W. Va. 1921.)

² W. VA. CODE, c. 98 § 1.

³ *Eprague v. Kimball*, 213 Mass. 380, 100 N. E. 622 (1913); *Clanton v. Scruggs*, 95 Ala. 279, 10 So. 757 (1892); *Rice v. Roberts*, 24 Wis. 461 (1869); *Wolfe v. Frost* 4 Sandf. Ch. 72 (N. Y. 1847).

⁴ *Hall v. Solomon*, 61 Conn. 476, 23 Atl. 876 (1892); *Pitman v. Hodge*, 67 N. H. 101, 36 Atl. 605 (1892); *Leinau v. Smart*, 11 Humph. 308 (Tenn. 1850); *Bostwick v. Leach*, 3 Day 476 (Conn. 1809).

⁵ *Hall v. Solomon*, *supra*.

⁶ *Leinau v. Smart*, *supra*.

⁷ See BROWNE, STATUTE OF FRAUDS, 4 ed., § 269; SMITH, LAW OF FRAUDS, § 3460.