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Rule against Perpetuities as Applied to Options

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THE RULE AGAINST PERPETUITIES AS APPLIED TO OPTIONS.—Does the rule against perpetuities render unlimited options void? This is a question which the English courts answered affirmatively some thirty-five years ago; new aspects of the question have been frequently presented to those courts since that time, and conclusions not easy to reconcile have been reached. It is believed that the present status of the law in England is that an option is like any other interest in land, void if it may arise at too remote a time, otherwise not. This conclusion is based on the decision in *Borland's Trustees* v. *Steel Bros. & Co.* [1901] 1 Ch. D. 279, sustaining an option of a corporation to buy or call in its stock at any time; and *Southeastern Ry. Co.* v. *Associated Portland Cement Mfgrs.* [1910] 1 Ch. D. 12, sustaining a reservation of the right to tunnel under a railway at any time, reserved in the grant of the right of way. The American courts are just getting into the muddle, and it remains for the future to tell what will come of it, and, if the doctrine is accepted, how our courts can reconcile it with our kindred decisions since the first settlement. The most extreme view yet advanced is in a recent West Virginia case. Defendants sold two parcels of land, reserving to themselves and their heirs the right at any time to purchase the minerals under one piece at $1 an acre, and to purchase the minerals under the other at the same price at any time within 99 years. Plaintiffs, claiming title under these deeds, sued to have the options declared void and the cloud removed from the title. A decree for defendants was reversed on appeal, and decree according to the prayer ordered. *Woodall* v. *Bruen* (W. Va. 1915), 85 S. E. 170.

This decision is an extension of the doctrine of *Starcher* v. *Duty*, 61 W. Va. 373, 56 S. E. 527, 9 L. R. A. N. S. 913, 123 Am. St. Rep. 990, in which the court held a *grant* of a similar option void. The whole doctrine is based on the decision of the English Court of Appeal in *London S. W.*

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Ry. Co. v. *Gomm,* 20 Ch. D. 562, holding a reservation of a right to purchase at any time void, followed by *Woodall* v. *Clifton* [1905] 2 Ch. D. 257, holding a grant to a tenant in a lease for 99 years of the right to buy at any time within the term of the lease void. These decisions have been followed in the case of *Barton* v. *Thaw,* 246 Pa. 348, 92 Atl. 312, holding a grant of the option to purchase the surface at any time, as incident to a grant of minerals in the same deed, void. The above decisions have been repudiated in two courts: *Blakeman* v. *Miller,* 136 Cal. 138, 68 Pac. 687, sustaining an option to purchase in a lease for 20 years under a statute that makes the perpetuity period lives and infancy only; and *Hollander* v. *Central Metals Co.,* 109 Md. 131, 71 Atl. 442, in which specific performance of a covenant in a lease to convey the reversion to the lessee or his assigns if the lessee or his assigns should demand it and tender the price during the term of the lease was decreed against the assignee of the reversion at the suit of the assignee of the term. *Winsor* v. *Mills,* 157 Mass. 362, 32 N. E. 352, has been cited to the contrary, but clearly is not, as that decision was merely that an option to purchase whenever the owner or his heirs should offer the property for sale be decreed void. Such an option is clearly future; and an option to *arise* at an indefinite future time would surely be no better than an absolute estate to arise under similar circumstances.

We have now reviewed all the American cases on the question which we have discovered, and the principal English ones. The court in the case of *Woodall* v. *Bruen,* above, declared that it is "committed" to the doctrine generally, indeed universally, accepted in America, that possibility of reverter after a base fee (so long as, until, &c.) and a possibility of forfeiture by breach of a condition subsequent are not covered by the rule against perpetuities; from which it would follow that a grant to another and his heirs until the grantor, his heirs or assigns should tender $1 per acre to the grantee, his heirs or assigns, or a grant upon the express condition that the grant should be void and the grantor or his heirs might enter and re-possess themselves of their former estate if the grantee or his assigns should fail to reconvey upon tender of $1 per acre at any time by the grantor or his heirs, would reserve a valid possibility of reverter or condition subsequent, and upon happening of the event the grantor or his heirs might recover the property at any remote period. But the court holds that an option to repurchase at any time violates the rule against perpetuities. That is certainly a distinction such as would pose the understanding of any man but a lawyer. There is no substance there; whatever of distinction exists is mere form. But the rule against perpetuities is a rule of public policy. If a disposition is permitted in one form it should be permitted in another.

In this connection the language of the "father of equity jurisprudence", who may with equal propriety be called the father of the rule against perpetuities, is so peculiarly appropriate that a quotation of it from the case which first formulated the rule is necessary. Lord Chancellor NOTTINGHAM said: "Another thing there is, which I take to be unanswerable, and gather it

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from what fell from my Lord Chief Justice Pemberton; and when I can answer that case, I shall be able to answer myself very much for that which I am doing. Suppose the proviso had been thus penned, 'and if Thomas die without issue male,-living Henry, so that the earldom of Arundel descend upon Henry, then the term of two hundred years limited to him and his issue shall utterly cease and termine, but then a new term of two hundred years shall arise and be limited to the same trustees for the benefit of Charles in tail,' this he thinks might have been well enough, and attained the end and intention of the family, because then this would not be a remainder in tail upon a tail, but a new term created. Pray let us so resolve cases here that they may stand with the reason of mankind, when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides? I would fain know the difference why I may not raise a new springing trust upon the same term as well as a new springing term upon the same trust; that is such a chicanery of law as will be laughed at all over the Christian world." Further on in the same case the Lord Chancellor said: "All men are agreed (and my Lord Chief Justice told us particularly how) that there is a way in which it might be done, only they do not like this way; and I desire no better argument in the world to maintain my opinion than that." *Duke of Norfolk's Case,* 3 Chan. Cas. 1.

If the decision in *Woodall* v. *Bruen* be sound it must follow that all mortgages not expressly limited to be foreclosed within the perpetuity term, all provisions in articles of incorporation permitting the corporation to levy assessments on stock or retire stock on terms, all options not expressly limited to the perpetuity term (which in most states would not permit even one day, the term being lives and infancy), and all wills, devises, and bequests, are utterly and absolutely void. To discern why this would render all wills void it is only necessary to remember that all persons to whom anything is given by will have an option to accept or reject the gift, which option may be exercised by the donee himself or by his heir after him. Before we pull the heavens down, let us sit and think a little.

J. R. R.

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