

Michigan Law Review

Volume 53 | Issue 1

1954

Future Interests - Rule Against Perpetuities - Applicability of the Rule to an Option to Purchase Incident to a Lease

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Recommended Citation

Donald M. Wilkinson, Jr. S.Ed., *Future Interests - Rule Against Perpetuities - Applicability of the Rule to an Option to Purchase Incident to a Lease*, 53 MICH. L. REV. 147 (1954).

Available at: <https://repository.law.umich.edu/mlr/vol53/iss1/18>

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FUTURE INTERESTS—RULE AGAINST PERPETUITIES—APPLICABILITY OF THE RULE TO AN OPTION TO PURCHASE INCIDENT TO A LEASE—Plaintiffs' testator "leased" certain land to the defendants' assignor for a period of twenty-eight years, the latter contracting to pay \$1,200 annually and to pay all taxes and assessments against the land during that period. The instrument also contained a clause whereby plaintiffs' testator contracted to convey in fee to defendants' assignor at the expiration of the twenty-eight year period, upon the latter's making a payment of one dollar. During the twenty-eight year period considerable improvements were made on the land. At the expiration of the period plaintiffs sought a declaration of rights and obligations of the parties under the written instrument. The trial court determined the instrument to be a lease with an option, the latter violating the rule against perpetuities, and declared that defendants had no further right or interest in the property. On appeal to the Supreme Court of Appeals of West Virginia, *held*, affirmed, two judges dissenting. On its face the instrument purported to be a lease, and evidence showing it to be actually a contract for the sale of land was inadmissible.¹ The option, since it would not necessarily operate to vest the fee in the optionee

¹ The dissent in the principal case concluded that all the provisions of the instrument considered, it was in effect a contract to sell land.

within the period of the rule, was void. *First Huntington National Bank v. Gideon-Broh Realty Co.*, (W.Va. 1953) 79 S.E. (2d) 675.

The problem of the applicability of the rule against perpetuities to options has heretofore resulted in rather clear-cut distinctions. Mere options to purchase land, not incident to a lease arrangement, which may not be exercised within the period of the rule have quite uniformly been declared invalid.² An option to purchase incident to a lease has given rise to two opposing views. The English courts have held that such an option is within the purview of the rule against perpetuities, and if it must not necessarily be exercised within that period, it is void for remoteness.³ What American authority exists has not followed this approach. In at least two early cases, options to purchase in long-term leases were upheld without consideration of the effect of the rule against perpetuities.⁴ Where the rule has since been considered, the cases have been unanimous in finding that the rule does not render invalid an option to purchase incident to a lease.⁵ The principal case represents the first departure from this authority. The basis of the American view is that such options in effect aid the marketability of the land by making the lessee's interest a more desirable one to purchase, thus promoting rather than violating the underlying policy of the rule against perpetuities.⁶ In this respect such options substantially resemble renewal provisions in a lease, which have everywhere been recognized as valid even though the lessee need not necessarily renew within the period of the rule.⁷ The Restaters of Property also feel that the option to purchase incident to a lease is deserving of special treatment, and have therefore placed it,

² *London & S.W.R. Co. v. Gomm*, 20 Ch. 562 (1882). Cases are collected in 162 A.L.R. 581 (1946).

³ *Woodall v. Clifton*, [1905] 2 Ch. 257; *Rider v. Ford*, [1923] 1 Ch. 541; *Worthing Corp. v. Heather*, [1906] 2 Ch. 532. The last case is illustrative of the unique English view that although the rule against perpetuities renders the option unenforceable, it does not preclude a recovery in damages for refusal to perform.

⁴ *Prout v. Roby*, 15 Wall. (82 U.S.) 471 (1872); *Hagar v. Buck*, 44 Vt. 285 (1872).

⁵ *Hollander v. Central Metal & Supply Co.*, 109 Md. 131, 71 A. 442 (1908); *Keogh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925); *McKown v. Heery*, 200 Ga. 819, 38 S.E. (2d) 425 (1946) (dictum). Although the court in *Todd v. Citizens' Gas Co. of Indianapolis*, (7th Cir. 1931) 46 F. (2d) 855, cert. den. 283 U.S. 852, 51 S.Ct. 561 (1931), was not concerned with this exact problem, it said at 866: "But the rule may not be invoked even on appellants' theory that the rights of the city amounted to nothing more than an option to be exercised at any time within twenty-five years. . . . The rule to be applied to what appellants claim is an option in a franchise contract would be the same as is applied in the case of an option to purchase contained in a lease, and such options are not within the rule against perpetuities."

⁶ 2 SIMES, *FUTURE INTERESTS* §512 (1936). See also *Abbot*, "Leases and the Rule Against Perpetuities," 27 *YALE L.J.* 878 (1918); 35 *YALE L.J.* 213 (1925).

⁷ See cases collected in 3 A.L.R. 498 (1919); 162 A.L.R. 1147 (1946). *Ehrhart v. Spencer*, 175 Kan. 277, 263 P. (2d) 246 (1953). In *Woodall v. Clifton*, note 3 *supra*, the English court, in refusing to extend the treatment accorded to renewal provisions in leases to options to purchase, recognized the former as constituting an illogical exception to the rule against perpetuities.

along with the option to renew, outside the purview of the rule.⁸ Further doubt is cast upon the soundness of the decision in the principal case by a consideration of the provisions of the written instrument, the most significant being that the defendants' assignor was to become entitled to a conveyance at the end of the twenty-eight year period upon the payment of a mere one dollar. This would seem to point to a determination that the agreement constituted a contract to sell land, rather than a lease with an option to purchase.⁹ The vendee's vested equitable interest under a land contract does not violate the rule against perpetuities.¹⁰

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⁸ 4 PROPERTY RESTATEMENT §395 (1944).

⁹ See note 1 *supra*. Although the opinion does not indicate why the instrument was drawn in this manner, it is possible that tax considerations may have been paramount.

¹⁰ 2 SIMES, FUTURE INTERESTS §504 (1936); 70 C.J.S., Perpetuities §10 (1951).