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OPTIONS TO PURCHASE REAL PROPERTY IN NORTH CAROLINA

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Land options are often written in an informal manner, without the parties' having given much thought to the details of the prospective transfer. This may lead to grief for a party to the contract, for the law of options is technical and occasionally peculiar, and a party may find that his informality and lack of precision have resulted in his contract's being materially different from what he had believed it to be, unenforceable, or, indeed, nonexistent. The purpose of this article is to present in concise form the principles and rules applicable to options in North Carolina, together with some discussion of doubtful areas. The article is not intended to be an exhaustive study, but rather is designed to provide a convenient reference for the attorney who is dealing with a particular problem in this area.

I. DEFINITIONS AND NATURE

An option to buy real property is a right acquired by contract to accept or reject a present offer to sell.¹ An option creates a unilateral obligation upon the prospective vendor (maker) to sell on the conditions agreed, but creates no obligation on the optionee or holder (prospective buyer) to buy. It does give the latter the right to exercise the option at his election. If the holder does not exercise his election by an acceptance, he loses only the consideration paid for the option.² In effect, an option to buy land amounts to a conditional contract to sell,³ although it is important to bear in mind that

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¹ Clark v. East Lake Lumber Co., 158 N.C. 139, 145, 73 S.E. 793 (1912).

² Douglass v. Brooks, 242 N.C. 178, 87 S.E.2d 258 (1955).

³ Ward v. Albertson, 165 N.C. 218, 81 S.E. 168 (1914).

An option . . . is a contract by which the owner of property agrees with another that he shall have the right to purchase the same at a fixed price within a certain time. It is in legal effect an offer to sell, coupled with an agreement to hold the offer open for acceptance for the time specified, such agreement being supported by a valuable consideration, or, at common law, being under seal, so that it constitutes a binding and irrevocable contract to sell if the other party shall elect to purchase within the time specified.

Id. at 221-22, 81 S.E. at 169.

there are material differences between an option and a contract for sale of land. An option does not create an "interest" in the property, but is, in effect, an offer to convey;⁴ this is true even though the offer is binding. Thus, an optionee has no legal or equitable "interest" as such in the land. The decisions repeatedly point out that an option is a unilateral contract.⁵ While an option does not create an "interest" in the property, it does establish a right that the courts will enforce. When the optionee accepts in due form, a bilateral contract for sale is created,⁶ and thereupon both parties have interests in the property.⁷

II. DISTINGUISHED FROM CONTRACT FOR SALE

The optionee has no "interest" in the land itself, legal or equitable, whereas in a contract for sale, both the vendor and the vendee have "interests" in the land, and both are bound by certain obligations. An option is not a contract to sell, but it is transformed into one on acceptance by the optionee.⁸ The name that the parties give the written agreement does not determine whether it is an option or a contract for sale; rather, the nature of the obligations that are imposed is the determining factor. An agreement by which one party binds himself to purchase and the other to sell is a "contract for sale." The fact that the prospective buyer forfeits his deposit (or consideration) if he does not exercise his option does not make the transaction a contract for sale, for it is the usual thing for the consideration to be forfeited if the optionee does not accept. For

⁴ *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954); *Carolina Timber Co. v. Wells*, 171 N.C. 262, 88 S.E. 327 (1916). *But see* *Chapman v. Great W. Gypsum Co.*, 216 Cal. 420, 14 P.2d 758 (1932).

⁵ *Parks v. Jacobs*, 259 N.C. 129, 129 S.E.2d 884 (1963); *Douglass v. Brooks*, 242 N.C. 178, 87 S.E.2d 258 (1955); *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954); *Edwards Lumber & Land Co. v. Smith*, 191 N.C. 619, 132 S.E. 593 (1926); *Winders v. Kenan*, 161 N.C. 628, 77 S.E. 687 (1913); *Alston v. Connell*, 140 N.C. 485, 53 S.E. 292 (1906). For a discussion of an option as a bilateral contract, see 1A CORBIN, CONTRACTS § 260 (1963) [hereinafter cited as CORBIN].

⁶ *Wachovia Bank & Trust Co. v. United States*, 98 F.2d 609 (4th Cir. 1938); *Byrd v. Freeman*, 252 N.C. 724, 114 S.E.2d 715 (1960); *Samonds v. Cloninger*, 189 N.C. 610, 127 S.E. 706 (1925).

⁷ For a general discussion of options, see 3 AMERICAN LAW OF PROPERTY § 11.17 (Casner ed. 1952); 1A CORBIN §§ 259-74 (1963); WILLISTON, CONTRACTS §§ 61A-B (3d ed. 1957) [hereinafter cited as WILLISTON].

⁸ See cases cited note 6 *supra*.

example, if *X* pays ten dollars for a thirty-day option and does not buy, he normally forfeits the ten dollars.

In *Davis v. Martin*,⁹ *X* agreed to convey certain lands to *Y* at two dollars an acre, provided said sum be paid within three years. Twenty-five dollars was paid at the time "by way of earnest." The court rejected the argument that this was merely an option.¹⁰ In another case,¹¹ the agreement stated that *A* had bought described land "and doth thereby bind himself, heirs and assigns, at any time previous to 1 December, 1899, to sell the same to whom P. G. Alston may direct for \$3,502."¹² The paper was signed and sealed. The court ruled that this was an option. Though the results are contrary, the facts of the two cases are close. In *Davis*, the money paid is described as "earnest" and this may be the difference; also the language in *Davis* is more like that of a sale—but not much. The decision in *Davis* is questionable. However, a contract for sale may provide for forfeiture on default in an installment, with the buyer's being released, with no further liability. The fact that the buyer may be released by his own act does not of itself constitute an option.

In a third case,¹³ the agreement stated that *X*, for and in consideration of fifty dollars, agreed to sell and convey certain real property to *Y* for 16,000 dollars, provided that *X* could give title and that *Y* accepted said offer on or before July 5, 1923. This was held to be an option.¹⁴

⁹ 146 N.C. 281, 59 S.E. 700 (1907).

¹⁰ The paper has all the essential elements of a bond to make title. It is in no sense a mere option. It is not a continuing offer to sell, but a complete agreement to sell, accompanied by payment of a part of the purchase money. . . . The true character of the paper is manifest by its recital of the receipt of \$25 as 'earnest' money, evidently used in the sense of purchase money. This signifies, not a payment for the privilege of exercising a future option to buy or not, but a payment of part of the contract price for the sale of the land.

Id. at 282, 59 S.E. at 700.

¹¹ *Alston v. Connell*, 140 N.C. 485, 53 S.E. 292 (1906).

¹² *Id.* at 488, 53 S.E. at 293.

¹³ *Edwards Lumber & Land Co. v. Smith*, 191 N.C. 619, 132 S.E. 593 (1926).

¹⁴ *Ibid.*; *Douglass v. Brooks*, 242 N.C. 178, 87 S.E.2d 258 (1955); *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954); *Harry's Cadillac-Pontiac Co. v. Norburn*, 230 N.C. 23, 51 S.E.2d 916 (1949); *Kluttz v. Allison*, 214 N.C. 379, 199 S.E. 395 (1938); *Sitterding v. Grizzard*, 114 N.C. 108, 19 S.E. 92 (1894) (contract for sale). For a discussion of the differences between options and contracts for sale, see 55 A.M. JUR. *Vendor & Purchaser* § 28 (1946); 91 C.J.S. *Vendor & Purchaser* § 5 (1955); Annot., 87 A.L.R. 563 (1933); Annot., 3 A.L.R. 576 (1919).

III. FIRST REFUSAL

The right of "first refusal" in a lease, deed, or other agreement may be a binding promise, and it is something like, yet strictly speaking not, an option. It is not an offer, and it creates no power of acceptance. The typical situation is where *A* agrees that *B* shall have a right of first refusal at the same price and terms as those of an offer made by a third person that *A* is willing to accept. *A* is not obligated to sell to anyone, and *B* has no power to accept unless *A* is willing to accept an offer by a third party. If there is consideration for *A*'s promise, then a valid unilateral contract exists. For the agreed period, *B* has a right that *A* not sell to anyone else at any price without first offering the property to *B* at the same price, and this right is enforceable at law and in equity.¹⁵

First-refusal agreements sometimes are made with respect to the sale or leasing of land; for example a lease may provide that the lessee shall have the right of first refusal in renewing the lease. If lawsuits are to be avoided, it is important to spell out the terms of the right of first refusal, including the time during which it shall be in force.

The decision in *R. J. Reynolds Realty Co. v. Logan*¹⁶ indicates that the North Carolina court is not friendly to such arrangements. There, the tenant had the right to renew a lease "in preference to a third party at a figure satisfactory to the landlord,"¹⁷ and the court voided the provision for uncertainty. This result appears unnecessary, for it is clear that the parties intended that if the landlord rented to anyone at any price, the tenant should have first refusal at that price. This is an arrangement that both parties may desire to make, for adequate business reasons, and there is no good reason to block it, assuming there is consideration for the promise.

IV. REQUIREMENTS AND FORM

An option to purchase real property must be definite and certain in its terms. It must adequately describe the property and state the financial and other terms of the agreement.¹⁸ It is not necessary

¹⁵ See *Blair v. Kingsley*, 128 So. 2d 889 (Fla. Dist. Ct. App. 1961); 1A CORBIN § 261; 7 N.C.L. REV. 474 (1929); Annot., 6 A.L.R.2d 820 (1949).

¹⁶ 216 N.C. 26, 3 S.E.2d 280 (1939).

¹⁷ *Id.* at 27, 3 S.E.2d at 281.

¹⁸ *Kelly v. Kelly*, 246 N.C. 174, 97 S.E.2d 872 (1957); *Harvey v. Linker*, 226 N.C. 711, 40 S.E.2d 202 (1946). See *Smith v. Joyce*, 214 N.C. 602, 200 S.E. 431 (1939).

that it specify the obligations of each party as such, as long as these are clear from the context. Thus, the option need not expressly state that the maker promises to convey, since giving the optionee the right to purchase necessarily includes an obligation on the maker to convey.

An option for land must be in writing, and the general requirements of the writing are the same as for a contract for sale.¹⁹ Thus, a later amendment to the memorandum must be signed by the party to be charged.²⁰ In *Millikan v. Simmons*,²¹ during the life of a valid option the parties made a verbal agreement for an extension of time. A written memorandum, properly signed, was made of this extension agreement after the time of the original option had expired, and the court held that this complied with the Statute of Frauds. The party to be charged (thus, the defendant) must sign the memorandum, although the position of the signature on the instrument is not important as long as it is affixed for the purpose of signing.²² The mark of an illiterate person is sufficient.²³ It is not necessary that the plaintiff sign.²⁴ Of course, both parties should sign, for at the time of the making of the agreement it is not known which party will be suing.

An option may be cancelled by the parties by parol or abandoned

¹⁹ N.C. GEN. STAT. § 22-2 (1953). *Millikan v. Simmons*, 244 N.C. 195, 93 S.E.2d. 59 (1956); *Harvey v. Linker*, 226 N.C. 711, 40 S.E.2d 202 (1946); *Wright v. Allred*, 226 N.C. 113, 37 S.E.2d 107 (1946). Options are subject to the recording statutes.

²⁰ *Harvey v. Linker*, *supra* note 19, where a properly signed memorandum was later amended but the parties to be charged did not thereafter sign. *But see Harry's Cadillac-Pontiac Co. v. Norburn*, 230 N.C. 23, 51 S.E.2d 916 (1949), where after the buyer had signed the contract, the seller made material changes therein in buyer's presence, and seller then signed. The fact that the buyer did not re-sign was held not to affect the contract since he accepted the agreement as changed with knowledge that it was to be notarized and recorded; this was a ratification and adoption without affixing another signature.

²¹ 244 N.C. 195, 93 S.E.2d 59 (1956).

²² In the Matter of Will of Williams, 234 N.C. 228, 66 S.E.2d 902 (1951) (signed for another, approved); *McCall v. Textile Industrial Institute*, 189 N.C. 775, 128 S.E. 349 (1925) (agent may sign); *Flowe v. Hartwick*, 167 N.C. 448, 83 S.E. 841 (1914); *Burriss v. Starr*, 165 N.C. 657, 81 S.E. 929 (1914); *Proctor v. Finley*, 119 N.C. 536, 26 S.E. 128 (1896). With regard to signing on behalf of corporations, see *McCall v. Textile Industrial Institute*, *supra*; *Neaves v. North State Mining Co.*, 90 N.C. 412 (1884). On signing for municipal corporations, see *Wade v. City of New Bern*, 77 N.C. 460 (1877).

²³ *Devereux v. McMahan*, 108 N.C. 134, 12 S.E. 902 (1891).

²⁴ *Clegg v. Bishop*, 188 N.C. 564, 125 S.E. 122 (1924); *Lewis v. Murray*, 177 N.C. 17, 97 S.E. 750 (1919); *Hall v. Misenheimer*, 137 N.C. 183, 49 S.E. 104 (1904); *Mizell v. Burnett*, 49 N.C. 249 (1857).

by acts or matters in pais.²⁵ Acceptance of the offer by the optionee may be by parol, except when the option agreement provides otherwise.²⁶

Death or insanity of the owner of the land does not terminate the option if there is consideration, as the obligations of the option are not personal.²⁷ The courts sometimes speak of options as covenants running with the land.²⁸ If there is neither consideration nor a seal, the death or insanity of the owner of the land apparently terminates the "option," since without consideration or a seal there would be no option in the true sense of the term, but merely a revocable offer.²⁹ Hence, the situation would be analogous to an offer in any bilateral contract situation where, if the offeror dies

²⁵ *Scott v. Jordan*, 235 N.C. 244, 69 S.E.2d 557 (1952); *Bell v. Brown*, 227 N.C. 319, 42 S.E.2d 92 (1947). "[I]n the absence of mutual agreement, an abandonment, or waiver . . . is to be inferred only from such positive and unequivocal acts and conduct as are clearly inconsistent with the contract." *Id.* at 322, 42 S.E.2d at 94. *May v. Getty*, 140 N.C. 310, 53 S.E. 75 (1905); *Holden v. Purefoy*, 108 N.C. 163, 12 S.E. 848 (1891).

²⁶ *Kottler v. Martin*, 241 N.C. 369, 85 S.E.2d 314 (1955); *Trodden v. Williams*, 144 N.C. 192, 56 S.E. 865 (1907). Such oral acceptance binds the maker. However, under the Statute of Frauds, it does not bind the optionee. Hence, if the maker is suing the optionee, the acceptance must meet the written requirements, including signature, of the Statute of Frauds. 1A CORBIN, § 264. It is usually held that an acceptance must in fact be received by the maker in order to create a bilateral contract. *Edwards Lumber & Land Co. v. Smith*, 191 N.C. 619, 132 S.E. 593 (1926); *Hudson v. Cozart*, 179 N.C. 247, 102 S.E. 278 (1920) (tender to one tenant in common binds all); *Ward v. Albertson*, 165 N.C. 218, 81 S.E. 168 (1914); *Gaylord v. McCoy*, 161 N.C. 685, 77 S.E. 959 (1913); *Winders v. Kenan*, 161 N.C. 628, 77 S.E. 687 (1913); *Bateman v. Kramer Lumber Co.*, 154 N.C. 248, 70 S.E. 474 (1911) (acceptance and tender must be made to present owner if land has been sold); *Trodden v. Williams*, *supra*; 1A CORBIN § 264. Where acceptance is expected by mail, contrary to the general rule that mailing by the offeree binds the contract, it may be that in options the maker must receive the acceptance in order for a bilateral contract to be in force, and the contract thus dates from the date of receipt. See 1A CORBIN § 264 at 521.

²⁷ *First-Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E.2d 367 (1946); *Mizell v. Dennis Simmons Lumber Co.*, 174 N.C. 68, 93 S.E. 436 (1917); *Barbee v. Greenberg*, 144 N.C. 430, 57 S.E. 125 (1907). RESTATEMENT, CONTRACTS § 46 (1932); 1 CORBIN § 54; Annot., 148 A.L.R. 172 (1944).

²⁸ *First-Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E.2d 367 (1946); *Bank of Greenville v. Gornito*, 161 N.C. 341, 77 S.E. 222 (1913); *Barbee v. Greenberg*, 144 N.C. 430, 57 S.E. 125 (1907).

²⁹ *Waters v. Security Life & Annuity Co.*, 144 N.C. 663, 57 S.E. 437 (1907). See RESTATEMENT, CONTRACTS §§ 48-9 (1932); 1 WILLISTON § 62; 1 CORBIN § 54. Is it necessary that the optionee have notice of the death or insanity prior to his acceptance? The answer appears to be in the negative. RESTATEMENT, CONTRACTS § 48 (1932); 1 WILLISTON §§ 62-62A; 1 CORBIN § 54.

before the offeree accepts and nothing else is involved, the offer terminates.³⁰ An interesting situation would arise where the offeree accepts without knowledge of the offeror's prior death, and then the offeror's personal representative seeks to hold the offeree. It is thought that the same result would follow—no liability due to the offer's termination on the offeror's death.³¹

What is the effect on the option if improvements on the property are destroyed prior to acceptance? The general rule appears to be that the owner is not required to replace the improvements, and the optionee is not entitled to an abatement of the option price.³² This is because an optionee does not have an interest in the land, and acceptance does not relate back to the date of the offer.³³

A more troublesome problem arises where the property is destroyed after acceptance but before the deed is delivered by the vendor. After acceptance, a bilateral contract of sale exists between the vendor and the optionee, and it is clear that the rules for contract for sale apply. If the common-law rule that the buyer in a contract for sale must bear the loss³⁴ absent a contrary agreement is in force, the optionee-vendee is bound, and he bears the loss. This raises questions because in a formal contract for sale the parties normally use a detailed form or contract—often printed—which provides for various situations, whereas in an option the agreement is more likely to be a very short statement in which the parties do not work out details or anticipate contingencies. Hence, the lawyer

³⁰ RESTATEMENT, CONTRACTS § 48 (1932).

³¹ See 1 CORBIN § 54; RESTATEMENT, CONTRACTS § 48 (1932).

³² See 3 AMERICAN LAW OF PROPERTY § 11.17 (Casner ed. 1952); 1A CORBIN § 272 (insurance). If the owner collects insurance on the destroyed improvements, it seems that the optionee is not entitled to have this applied toward the purchase price. This is a harsh rule, although the optionee has the remedy of not exercising the option; but if he has paid valuable consideration for the option, he loses it. On recovery of consideration paid for option when improvements destroyed, see *Perlee v. Jeffcott*, 89 N.J.L. 34, 97 Atl. 789 (1916). Annot., 23 A.L.R. 1225 (1923) (optionee's right to have insurance applied on purchase price). See also *Poole v. Scott*, 228 N.C. 464, 46 S.E.2d 145 (1948).

³³ In a contract of sale, the vendee has an interest in the land, and he is liable for loss; by statute he may be relieved of this liability. The optionee apparently cannot hold the maker responsible for the loss either at common law or by statute, and he cannot abate the price. His remedy is to elect not to accept the option. See *Caldwell v. Frazier*, 65 Kan. 24, 68 Pac. 1076 (1902); 1 AMERICAN LAW OF PROPERTY § 3.84 (Casner ed. 1952); 3 *id.* § 11.17; Annot., 148 A.L.R. 172 (1944).

³⁴ See 7 WILLISTON § 928; 3 AMERICAN LAW OF PROPERTY § 11.30 (Casner ed. 1952).

should give the same care to drafting an option that he does a contract for sale.

North Carolina has changed the common-law rule for contracts for sale by General Statutes section 39-39, and the risk of loss is now generally on the vendor unless the vendee has either legal title or possession; the vendee in such case may recover any portion of the purchase price he has paid.⁸⁵ Consequently, it would appear that in North Carolina, where the buildings are destroyed after the acceptance but before the optionee has either legal title (under the contract for sale he has only equitable title) or possession, the maker or owner must bear the loss.

In tendering payment, may the optionee reduce the amount to be tendered by the amount of an existing mortgage or similar encumbrance? Unless it appears that the understanding is otherwise, it seems that in some cases such abatement may be made by the optionee.⁸⁶ Technically, if the option is for a clear title, the optionee would tender the full amount and demand a good deed, free of encumbrances; and it would be up to the maker to meet the obligation to give a clear title. As a practical matter, if the optionee is willing to attend to the encumbrance himself, there is no reason not to hold the maker upon tender of the abated sum (agreed price less value of encumbrances), at least when the encumbrance is a

⁸⁵ N.C. GEN. STAT. § 39-39 (Supp. 1963).

Risk of loss. Any contract hereafter made in this State for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

- (1) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid;
- (2) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid.

⁸⁶ See RESTATEMENT, CONTRACTS §§ 364-65 (1932); 3 AMERICAN LAW OF PROPERTY § 11.61 (Casner ed. 1952); 92 C.J.S. *Vendor & Purchaser* §§ 259(d), 263, 265 (1955); Annot., 81 A.L.R.2d 1020 (1962); Annot., 148 A.L.R. 292 (1944) (dower); Annot., 40 A.L.R. 1078 (1926) (outstanding title); Annot., 57 A.L.R. 1253, 1379, 1508 (1928); Annot., 46 A.L.R. 748 (1926). Payments made to obtain the option ordinarily do not count as part of the purchase price. See 92 C.J.S. *Vendor & Purchaser* § 270 (1955).

mortgage or some other item that the maker doubtless had in mind when he set the price.³⁷ But it may be argued that if some lesser type of encumbrance appears (*e.g.*, dower, determinable fee) and if the maker is not bound to deliver good title (*i.e.*, if he has agreed to deliver good title only if he can), then it would be unjust to force him to sell at the abated price; some courts do not grant specific performance at an abated price against the vendor where a dower interest is involved.³⁸

A statement of the price to be paid for the land is an essential ingredient of the option. Normally this is accomplished merely by stating the price and the terms, but it may be enough if the option provides a manner in which the price may be fixed with certainty.³⁹ An option to renew at the highest rental offered by

³⁷ *Farmers Tobacco Warehouse Co. v. Eastern Carolina Warehouse Corp.*, 185 N.C. 518, 117 S.E. 625 (1923). Where vendor sought specific performance, the court wrote:

And in reference to appellant's second position as to encumbrances, while the existence of an encumbrance inherent in the property as an easement, substantially impairing its value, or a moneyed lien for a substantial sum, unknown at the time of the contract or indeterminate in amount has been held to interfere with the conveyance of a marketable title (particularly where there is an express covenant against encumbrances), a mortgage or deed of trust to secure a definite sum of money, which is known to exist at the time of the contract, is not regarded as such an encumbrance in the strict sense of the term, nor will its existence always justify an avoidance of the agreement on the part of the vendee. Thus, where it is made to appear before a court . . . that the encumbrance complained of is less than the purchase price, or where, being a docketed judgment, the amount has been amply secured on appeal in the case, or where, being of small, proportional amount, full and adequate protection can be afforded, it is held that specific performance will be enforced, the decree making proper provision for the relief of the property. A position especially insistent where the vendee has gone into possession fully aware of the alleged encumbrance and has been exercising over the property full control as owner.

Id. at 526, 117 S.E. at 628. See also *Sutton v. Davis*, 143 N.C. 474, 55 S.E. 844 (1906).

³⁸ See 49 AM. JUR. *Specific Performance* §§ 112-13 (1943); Annot., 46 A.L.R. 748 (1927); Annot., 148 A.L.R. 292 (1944). In *Bethell v. McKinney*, 164 N.C. 71, 80 S.E. 162 (1913), *A* contracted to sell land to *B*, the contract containing an agreement against encumbrances. *B* knew that *A* was married. The court held that *B* was entitled to specific performance, with an abatement in price for dower. *Farthing v. Rochelle*, 131 N.C. 563, 45 S.E. 1 (1902) (no abatement for dower when vendee knew vendor married); *Fortune v. Watkins*, 94 N.C. 304 (1886) (where vendee did not know vendor was married, abatement for dower allowed).

³⁹ 1 AMERICAN LAW OF PROPERTY § 3.82 (Casner ed. 1952).

anyone would appear to meet the test.⁴⁰ In *McAdoo v. Callum*⁴¹ the lease provided that the tenant should have the refusal of the premises for another year, and the court held that he could have the premises on the same terms as the year before. But merely to state "at a price to be agreed on" is usually held to be invalid.⁴² It may be satisfactory to provide for the price to be fixed by arbitration if the terms of the arbitration arrangements are specified, but some courts will not grant specific performance in such cases. The position of North Carolina is in doubt because of a lack of recent decisions, with the older decisions being unfavorable toward enforcement of arbitration agreements; but it is hoped that the supreme court will look with favor on such an arrangement, for arbitration is a device of great social utility today.⁴³ Where the terms of the arbitration arrangement are reasonably certain, there is much to be said for granting specific performance.

The terms of payment need not be set out in great detail, but they should be clear. Where no terms are stated, it would seem that the contract should be interpreted to mean payment in cash, since this would be in accord with common practice.

⁴⁰ See *Bettens v. Hoover*, 12 Cal. App. 313, 107 Pac. 329 (1909). In *Crotts v. Thomas*, 226 N.C. 385, 38 S.E.2d 158 (1946), the option obligated the maker to sell at a price to be agreed upon but not to exceed a stated sum. The court held that the optionee may accept at that stated sum without further negotiation.

⁴¹ 86 N.C. 419 (1882).

⁴² *R. J. Reynolds Realty Co. v. Logan*, 216 N.C. 26, 3 S.E.2d 280 (1939). Here, the tenant had the right to renew "in preference to a third party at a figure satisfactory to the landlord." The provision was held void for uncertainty. See Annot., 30 A.L.R. 572 (1924); Annot., 68 A.L.R. 157 (1930); Annot., 166 A.L.R. 1237 (1947); Annot., 6 A.L.R.2d 448 (1949).

⁴³ See *Maas Bros. v. Weitzman*, 288 Mich. 625, 286 N.W. 104 (1939); *Kaufmann v. Liggett*, 209 Pa. 87, 58 Atl. 129 (1904); *Brownell v. Burlington Fed. Sav. & Loan Ass'n*, 115 Vt. 455, 63 A.2d 862 (1949). Some courts, especially in older decisions, have held that the arbitration agreements are valid but that specific performance will not lie; even so, some of these courts give equitable relief very close to specific performance. See *Norfleet v. Southall*, 7 N.C. 189 (1819) (where arbitration agreed upon by contract failed, court would not substitute its judgment); Annot., 167 A.L.R. 727 (1947). There is no reason today why equity should not enforce an arbitration agreement as to price in an option where the arbitration or appraisal clause is not the essence of the contract, or where the parties may easily be returned to the status quo. Thus, specific performance should be granted in lease-renewal situations. See Annot., 30 A.L.R. 572, 580 (1924); Annot., 167 A.L.R. 741-49 (1947). N.C. GEN. STAT. § 1-544 (1953) appears not to be relevant to these cases, since it refers only to existing disputes. *Skinner v. Gaither Corp.*, 234 N.C. 385, 67 S.E.2d 267 (1951); *Sturges, Arbitration Under the New North Carolina Arbitration Statute*, 6 N.C.L. REV. 363 (1928).

Must there be consideration for an option? If there is no consideration, the maker is free to withdraw the offer at any time prior to acceptance; but if the optionee properly accepts prior to a withdrawal of the offer and within the time provided, the maker is bound.⁴⁴ Notice of the withdrawal must be given to the optionee, and oral notice is sufficient.⁴⁵ An interesting situation would arise if the maker withdraws and the optionee accepts at the same time; perhaps the optionee would prevail since he accepted before withdrawal.⁴⁶ If there is consideration and the option is otherwise valid, the maker is bound for the time of the option and cannot withdraw the offer.⁴⁷

What consideration is required for specific performance? North Carolina follows the common law and accepts a seal in lieu of consideration.⁴⁸ The rationale for accepting the seal is not clear, but the decisions say either (1) the seal conclusively imports consideration, or (2) the solemnity of the act of sealing imports such reflection and care that a consideration is regarded as unnecessary.⁴⁹ At law, then, a seal is enough to make a valid contract. Would the seal be sufficient in equity, for example, in an action for specific performance? Equity generally looks beyond form and ordinarily will refuse to exert its powers in aid of a sealed instrument except when there is a valuable consideration.⁵⁰ Thus, in the absence of such consideration, specific performance may be denied. But options to purchase do not come within this rule. Equity will enforce op-

⁴⁴ *Kottler v. Martin*, 241 N.C. 369, 85 S.E.2d 314 (1955); *Atkinson v. Atkinson*, 225 N.C. 120, 33 S.E.2d 666 (1945); *Thomason v. Bescher*, 176 N.C. 622, 97 S.E. 654 (1918); *Winders v. Kenan*, 161 N.C. 628, 77 S.E. 687 (1913); *Bryant Timber Co. v. Wilson*, 151 N.C. 154, 65 S.E. 932 (1909). RESTATEMENT, CONTRACTS §§ 34-5 (1932).

⁴⁵ See cases cited note 44 *supra*; RESTATEMENT, CONTRACTS § 41 (1932); 1 CORBIN § 67; 1 WILLISTON §§ 56-57. What if optionee receives information from third parties that maker has sold property or that property has been destroyed? See RESTATEMENT, CONTRACTS § 42 (1932); 1 WILLISTON § 57; 1 CORBIN § 40.

⁴⁶ See RESTATEMENT, CONTRACTS § 41 (1932).

⁴⁷ *Crotts v. Thomas*, 226 N.C. 385, 38 S.E.2d 158 (1946); *Thomason v. Bescher*, 176 N.C. 622, 97 S.E. 654 (1918); *Gaylord v. McCoy*, 161 N.C. 685, 77 S.E. 959 (1913); *Bryant Timber Co. v. Wilson*, 151 N.C. 154, 65 S.E. 932 (1909).

⁴⁸ *Crotts v. Thomas*, *supra* note 47; *Samonds v. Cloninger*, 189 N.C. 610, 127 S.E. 706 (1925); *Thomason v. Bescher*, *supra* note 47; *Ward v. Albertson*, 165 N.C. 218, 81 S.E. 168 (1914).

⁴⁹ See *Thomason v. Bescher*, *supra* note 47; MORDECAI, LAW LECTURES 931-33 (1907).

⁵⁰ See note 49 *supra*. See also *Woodall v. Prevatt*, 45 N.C. 199 (1853).

tions under seal even though there is no valuable consideration.⁵¹ The reasoning is as follows: The seal is enough to keep the option open; on acceptance within the time provided, a bilateral contract is constituted, and in an action for specific performance, "the consideration is not restricted to the seal or the nominal amount usually present in these bargains, but extends to and includes the purchase price agreed upon."⁵²

A nominal amount of money is sufficient to support specific performance of an option.⁵³ In *Thomason v. Bescher*, the court stated:

We are not unmindful of the position that in equity causes the Court looks beyond the form and will usually refuse to exert its powers in aid of a sealed instrument, its collection and enforcement, except when there is a valuable consideration. . . . But these options, containing a continuing offer to sell and constituting a contract, binding on the parties because in the form of a covenant under seal, serve their purpose in keeping the offer open for the time specified and preventing a withdrawal by the vendor. On acceptance and offer to perform within the time, a bilateral contract is then constituted which, on breach, is enforceable by appropriate remedies, legal or equitable. And in case of action for specific performance, the consideration is not restricted to the seal or the nominal amount usually present in these bargains, but extends to and includes the purchase price agreed upon.⁵⁴

⁵¹ See cases cited note 48 *supra*. See also 1A CORBIN § 263; Annot., 2 A.L.R. 631 (1919); Annot., 21 A.L.R. 137 (1922).

⁵² *Thomason v. Bescher*, 176 N.C. 622, 627, 97 S.E. 654, 655-56 (1918). See cases cited note 48 *supra*.

⁵³ In reference to the \$5 paid by plaintiff as the consideration for his interest, it is the accepted position, in this State, that a "binding contract to convey land, where there has been no fraud, mistake, undue influence, or oppression, will be specifically enforced, and, as a rule, the mere inadequacy of price, without more, will not affect the application of the principle" . . . and where the contract has been perfected by acceptance within the time or proper tender of performance, on suit for specific performance, the real consideration is the contract price, which must be paid before the interest is finally acquired, in this instance the \$1,000, and, as to the option itself, which only provides for holding the privilege open for a short period of time and involving also the opportunity to effect a sale by the potential vendor, the \$5 paid may very properly be held as a sufficient consideration to bind the party . . . and there is high authority for the position that, in States where this matter has not been regulated by statute, the seal itself conclusively imports a consideration.

Ward v. Albertson, 165 N.C. 218, 222-23, 81 S.E. 168, 170 (1914).

⁵⁴ 176 N.C. 622, 626-27, 97 S.E. 654, 655-56 (1918).

A clause in a lease that gives the lessee an option to buy the property or to renew the lease is binding as far as consideration is concerned, since the lease itself is consideration.⁵⁵ Such a clause is thus irrevocable.

V. ESTOPPEL

Consideration makes an option, which is otherwise sufficient, irrevocable for the time provided. An option may also be irrevocable due to an estoppel. In fact, estoppel may in certain cases take the place of both consideration and a writing.

In *Alston v. Connell*,⁵⁶ *A* gave *B* an option, in writing and for consideration, to purchase land. *B* was ready to exercise the option, but at *A*'s request he delayed doing so until the period had expired. In a suit by *B*, the court held that *A* could not plead the Statute of Frauds and that *B* was entitled to specific performance. This is a sound decision.⁵⁷ In *Dixson v. C. E. Johnson Realty Co.*,⁵⁸ a written option for consideration gave the buyer of land the right to reconvey the land within one year and obtain a refund of his money. Within the year, the buyer demanded refund of his money under the option, and on oral request of the seller, the buyer orally agreed to delay for a year. During the new period the buyer repeated his demand. In the buyer's action, the seller pleaded the Statute of Frauds. The court held for the buyer, saying it would not permit the seller to repudiate his obligations and rely on the Statute of Frauds.

In *Johnson v. Noles*,⁵⁹ the maker orally and without further consideration extended the time for tender by the optionee so that

⁵⁵ *Kottler v. Martin*, 241 N.C. 369, 85 S.E.2d 314 (1955); *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954); *First Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E.2d 367 (1946); *Crotts v. Thomas*, 226 N.C. 385, 38 S.E.2d 158 (1946); *Bateman v. Kramer Lumber Co.*, 154 N.C. 248, 70 S.E. 474 (1911).

⁵⁶ 140 N.C. 485, 53 S.E. 292 (1906).

The extension having been given at Thomas Connell's request and for his convenience, when the extended agreement itself and all the circumstances clearly implied that he regarded it as a valid and binding contract and that he intended to live up to its terms, the law will not permit him now to repudiate its obligations, invoke for his protection the statute of frauds and defeat the plaintiff's recovery, who has forborne a timely performance by reason of Thomas Connell's request and in reasonable reliance on his assurance.

Id. at 491-92, 53 S.E. at 294.

⁵⁷ See 2 CORBIN § 310; RESTATEMENT, CONTRACTS § 224 (1932).

⁵⁸ 209 N.C. 354, 183 S.E. 382 (1936).

⁵⁹ 224 N.C. 542, 31 S.E.2d 637 (1944).

the former could give a good deed with covenants, which he could not do when the extension was granted. The court said that the extension was for the maker's benefit and at his request, and that he would not be heard to plead the Statute of Frauds.

These situations are somewhat similar to what is termed promissory estoppel, but in reality they are not the same. Section 90 of the *Restatement of Contracts* describes promissory estoppel (but without using the term) as: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Promissory estoppel normally takes the place of consideration, but some cases also invoke it as a means of enforcing contracts that otherwise are unenforceable because of the Statute of Frauds.⁶⁰ The estoppel raised in *Alston* arises where the plaintiff has failed to meet a necessary condition precedent to the defendant's duty under the contract and that failure was brought about by the defendant himself. In this situation, the plaintiff can have judgment based on the contract without meeting the condition. Of course, it must be shown that, but for the defendant's request or other conduct, the plaintiff would have fulfilled the condition. Thus, if the plaintiff-optionee fails to tender within the time specified in the option because of a request of the defendant-maker, and if the plaintiff-optionee was ready, willing, and able to tender within the time and forbore solely at the defendant's request, then the defendant cannot be heard to say that his promise was oral or that it was without consideration.

The remarkable thing about these holdings is that North Carolina is one of the few states that refuse to honor part performance as taking an oral contract for sale of land out of the Statute of Frauds.⁶¹ The buyer has been misled to his detriment by the owner's bad conduct in both situations, and there is less risk of perjury in the part-performance situation.

⁶⁰ For discussion of promissory estoppel, see 1A CORBIN § 194; 1 WILLISTON § 140; 19 AM. JUR. *Estoppel* § 53 (1939); Annot., 115 A.L.R. 152 (1938); Annot., 48 A.L.R.2d 1069 (1956). See *Stevens v. Turlington*, 186 N.C. 191, 119 S.E. 210 (1923) (where a purchaser of land relied on oral promise of mortgagee to release land, it was held to estop the mortgagee).

⁶¹ *Duckett v. Harrison*, 235 N.C. 145, 69 S.E.2d 176 (1952).

VI. LACHES

In *Ritter v. Chandler*,⁶² the optionee accepted the offer in due form, but waited more than ten years to demand specific performance, making no claim on the property in the meantime. The owner rented to others and finally sold to a third party. The court held that the optionee was barred by laches. Long delay, the court said, accompanied by acts inconsistent with a purpose of performing a contract will, if there is no waiver, bar the buyer's bringing specific performance. In an early case, where the owner had made improvements, the optionee was barred after six years.⁶³ The principle applied in these cases is a sound one. Lapse of time alone generally is not enough to invoke laches, but lapse taken with other circumstances may be sufficient. With only one or two possible exceptions, the North Carolina cases in this area have involved lapse of time and acts showing either abandonment or change in position.⁶⁴

VII. RULE AGAINST PERPETUITIES

As a rule, future interests in land reserved in the grantor are not subject to the Rule Against Perpetuities, for the reversion, the resulting trust, the power of termination, and the possibility of reverter are not covered by the rule. A grantor may also retain an interest of sorts by reserving an option in the land, and in theory this would seem to be similar to other types of retained interests, but it is settled that the option contract is subject to the Rule Against Perpetuities. It makes no difference whether the grantor keeps the option and parts with the land, or keeps the land and gives an option. If the option to purchase land is in gross, and thus is not appendant to a leasehold estate, and if it can be exercised be-

⁶² 214 N.C. 703, 200 S.E. 398 (1939).

⁶³ *Francis v. Love*, 56 N.C. 321 (1857). See *May v. Getty*, 140 N.C. 310, 53 S.E. 75 (1905) (acts by buyer and long delay); *Beattie v. Carolina Cent. R.R.*, 108 N.C. 425, 12 S.E. 913 (1891); *Holden v. Purefoy*, 108 N.C. 163, 12 S.E. 848 (1891); *Love v. Welch*, 97 N.C. 200, 2 S.E. 242 (1887) (thirty-year delay); *Faw v. Whittington*, 72 N.C. 321 (1875) (mere lapse of time alone not enough); *McGalliard v. Aikins*, 37 N.C. 186 (1842) (twenty years and acts by the plaintiff showing abandonment); *Strickland v. Fowler*, 21 N.C. 629 (1837) (nine years and change of position); *Tate v. Conner*, 17 N.C. 224 (1832) (thirty-four years—the decision appears to have been based primarily on the long delay).

⁶⁴ See cases cited note 63 *supra*. See generally 5A CORBIN §§ 1167, 1177; 6 POWELL, REAL PROPERTY § 930 (1958).

yond the period of the rule, it is void. Thus, in a Georgia decision, an option in a deed to the grantee, its successors, and assigns, giving a perpetual right and option to purchase certain other land with no time limit and binding the grantor, his heirs, and assigns, was held to violate the Rule Against Perpetuities.⁶⁵

In the North Carolina case of *Hardy Bros. v. Galloway*,⁶⁶ the deed provided that the grantors retained for themselves, their heirs, and assigns the right to repurchase the land "when sold." The court found several faults with this, including the fact that price was not agreed on. It also held that since the right to repurchase was of indefinite duration as to time, it was a void restriction on alienation.⁶⁷

Another North Carolina decision makes an exception to this rule. In *Pure Oil Co. v. Baars*,⁶⁸ at the time of delivery of the deed the grantor received a written option to repurchase at any time within a year, with automatic renewal from year to year, subject to cancellation on sixty days notice prior to the end of a current period. The court in effect enforced the option. One of the grounds was that "the option is an integral part of the transaction, and it would be inequitable to allow the defendants to claim the property under deed . . . and at the same time annul the essential terms of its acquisition. If the option is to go out, so must the deed which induced it."⁶⁹ The *Restatement of Property* adopts the North Carolina position, citing the *Pure Oil* decision as the sole basis. The *Restatement* reads:

An option to repurchase the whole or any part of the interest conveyed is necessarily only one ingredient in the entire transaction between the parties. If this ingredient is so essential a part of the entire agreement that the parties would not have made the agreement, if they had known of the option's invalidity, then the failure of the option is a sufficient basis for appropriate proceedings to rescind the entire transaction and to restore each of the partners to the situation in which he was before the transaction was made.⁷⁰

⁶⁵ *Turner v. Peacock*, 153 Ga. 870, 113 S.E. 585 (1922).

⁶⁶ 111 N.C. 519, 15 S.E. 890 (1892).

⁶⁷ This decision is put more on the ground that the option was a restraint on a fee rather than on perpetuity grounds, but it does indicate that the N.C. courts frown on permanent options.

⁶⁸ 224 N.C. 612, 31 S.E.2d 854 (1944).

⁶⁹ *Id.* at 615, 31 S.E.2d at 856.

⁷⁰ RESTATEMENT, PROPERTY § 394, comment f (Supp. 1948).

Where it is clear that the maker would want the entire transaction to be voided if the option is void, this holding is sound. And the facts in *Pure Oil* do make this reasonably clear. But this exception should be applied only in exceptional circumstances. A better way to handle the *Pure Oil* situation would be for the court to hold that the option should last only for the grantor's lifetime, if that is possible, and thus avoid the perpetuities rule. In this way the transaction would stand, and in many cases the needs and wishes of the parties would be fully served.

It has long been established that an option to renew the lease in a lease for years is not subject to the rule. Thus, if *X* leases Blackacre to *Y* for ninety-nine years, with a covenant for perpetual renewal, such provision is good, and specific performance lies. According to Simes the better explanation for this is that such a covenant aids rather than hinders alienability, since it is an accepted commercial device used in disposing of real estate.⁷¹ This rationale works well if the lease is for a long term—for example, ninety-nine years; but if the lease is for a short term, the reasoning loses its appeal, for the same rationale then works for any option: options in general are accepted commercial devices which assist in making land saleable. Gray's explanation that the covenant to renew is part of the lessee's present interest, and so is "vested," may well be a more suitable explanation.⁷² But, as Gray admits, the real explanation seems to be simply that this is an exception to the Rule Against Perpetuities because a long line of decisions have said it is.⁷³ Likewise, an option to purchase contained in a lease is held not to fall within the rule in the United States if the option is to be exercised within the term of the lease.⁷⁴

When an option is held void as violating the Rule Against Perpetuities, the question remains as to how the rest of the instrument is affected. It may be that the option alone will be excised, leaving the remainder of the instrument as it is; it may be that the

⁷¹ SIMES & SMITH, *FUTURE INTERESTS* § 1244 (1956).

⁷² GRAY, *RULE AGAINST PERPETUITIES* 231 (4th ed. 1942). Gray points out that the option must be in the control of those having vested interests under the lease. Thus, if a lease for years gives the lessee and his heirs a perpetual right of renewal, with a limitation over to *M* and his heirs if the lessee's children all die under age twenty-five, then the devise to *M* is bad.

⁷³ *Id.* at 233-34.

⁷⁴ See SIMES & SMITH, *op. cit. supra* note 71, at 162.

entire instrument will be voided, as was discussed in the *Pure Oil* decision.⁷⁵

Almost no North Carolina authority exists on the Rule Against Perpetuities as applied to options, but no reason appears why the state would not follow the general trend in this country, as stated by Simes and in the *Restatement of Property*.⁷⁶

VIII. EXERCISE OF OPTION

Except where the agreement provides otherwise, an oral acceptance of a valid option to purchase land binds the maker when the optionee sues the maker, since the person being charged has signed a memorandum. But an oral acceptance does not bind the optionee where the maker is suing him, since the person to be charged is the optionee and a written acceptance signed by him is necessary under the Statute of Frauds.⁷⁷ It is usually held that the acceptance must in fact be received by the maker for the bilateral contract to come into effect.⁷⁸ The acceptance must be unqualified; variation of the terms thereof constitutes merely a new offer.⁷⁹

A. Time of Essence

If no time limit for acceptance is stated, courts generally hold that the option must be exercised within a reasonable time.⁸⁰ If the option is in a lease and is silent as to time, it is presumed that

⁷⁵ *Pure Oil Co. v. Baars*, 224 N.C. 612, 31 S.E.2d 854 (1944); *Hardy Bros. v. Galloway*, 111 N.C. 519, 15 S.E. 890 (1892).

⁷⁶ For a discussion of application of the Rule Against Perpetuities to options, see SIMES & SMITH, *op. cit. supra* note 71, at § 1244; GRAY, *op. cit. supra* note 72, at §§ 230-30.3; RESTATEMENT, PROPERTY §§ 393-95 (1944); 6 AMERICAN LAW OF PROPERTY §§ 24.56-57 (Casner ed. 1952); POWELL, *op. cit. supra* note 64, at § 771; Annot., 162 A.L.R. 581 (1946); Annot., 122 A.L.R. 1145 (1939); Annot., 3 A.L.R. 498 (1919).

⁷⁷ See cases cited note 24 *supra*.

⁷⁸ See cases cited note 24 *supra*.

⁷⁹ *Clark v. East Lake Lumber Co.*, 158 N.C. 139, 73 S.E. 793 (1912). See also *Hudson v. Cozart*, 179 N.C. 247, 102 S.E. 278 (1920), where it was held that to obtain specific performance, the optionee must aver that he has complied with all the terms; tender alone is not enough if the contract sets out other requirements.

⁸⁰ *Lewis v. Allred*, 249 N.C. 486, 106 S.E.2d 689 (1959); *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954) (a delay of eleven years was too long); *Atkinson v. Atkinson*, 225 N.C. 120, 33 S.E.2d 666 (1945); *Ritter v. Chandler*, 214 N.C. 703, 200 S.E. 398 (1939); *Trogden v. Williams*, 144 N.C. 192, 56 S.E. 865 (1907). If it appears that the parties intended that the option remain open indefinitely, then the option may be held void as violating the Rule Against Perpetuities.

the option may be exercised at any time during the existence of the lease.⁸¹ If a duration for the option is specified then time is of the essence.⁸² This means that a thirty-day option must be exercised within thirty days. Normally, time is not of the essence in a contract for the sale of land. However, since an option, unlike a contract for sale, is unilateral, it is construed strictly in favor of the maker;⁸³ therefore the optionee must adhere strictly to all the terms, including the time limit. However, an extension of time for acceptance granted by the maker for his own convenience, even though orally given, may be binding on him.⁸⁴

In a lease containing an option to renew or to buy, where the lessee has made valuable improvements in expectation of exercising the power and then has forgotten (or failed due to mistake or accident) to give notice until a few days after the specified time, some courts have granted specific performance. But even here, if the delay is long or if the lessor has reasonably changed his position, the court may refuse relief to the lessee.⁸⁵

⁸¹ See *Atlantic Prod. Co. v. Dunn*, 142 N.C. 471, 55 S.E. 299 (1906); *First-Citizens Bank & Trust Co. v. Frazelle*, 226 N.C. 724, 40 S.E.2d 367 (1946). Annot., 37 A.L.R. 1245 (1925); Annot., 163 A.L.R. 711 (1946); Annot., 10 A.L.R.2d 878 (1949); 1 *AMERICAN LAW PROPERTY* § 3.83 (Casner ed. 1952).

⁸² *Wachovia Bank & Trust Co. v. United States*, 98 F.2d 609 (4th Cir. 1938); *Wachovia Bank & Trust Co. v. Medford*, 258 N.C. 146, 128 S.E.2d 141 (1962); *Douglass v. Brooks*, 242 N.C. 178, 87 S.E.2d 258 (1955); *Atkinson v. Atkinson*, 225 N.C. 120, 33 S.E.2d 666 (1945); *Gaylord v. McCoy*, 161 N.C. 685, 77 S.E. 959 (1913); *Winders v. Kenan*, 161 N.C. 628, 77 S.E. 687 (1913); *Bateman v. Kramer Lumber Co.*, 154 N.C. 248, 70 S.E. 474 (1911); *Davis v. Martin*, 146 N.C. 281, 59 S.E. 700 (1907); *Trogden v. Williams*, 144 N.C. 192, 56 S.E. 865 (1907); *Alston v. Connell*, 140 N.C. 485, 53 S.E. 292 (1906).

⁸³ *Winders v. Kenan*, 161 N.C. 628, 77 S.E. 687 (1913). "The acceptance must be according to the terms of the contract, and if these require the payment of the purchase money . . . precedent to the exercise of the right to buy, the money must be paid or tendered, and a mere notice of an intention to buy or that the party will take the property does not change the relations of the parties . . ." *Id.* at 633-34, 77 S.E. at 689.

⁸⁴ In *Millikan v. Simmons*, 244 N.C. 195, 93 S.E.2d 59 (1956), an agreement to extend the option period made orally during the original period, but reduced to writing and signed after time expired was held to be valid. In *Wagner v. Consolidated Realty Corp.*, 210 N.C. 1, 185 S.E. 421 (1936), a letter by the vendor to his agent extending the time, which letter was shown to the vendee by the agent, was held to be a waiver, giving the vendee a reasonable time thereafter in which to accept. If the seller makes himself inaccessible on the option date, it may be that optionee will gain an extension. See *Harry's Cadillac-Pontiac Co. v. Norburn*, 230 N.C. 23, 51 S.E.2d 916 (1949).

⁸⁵ See *Gloyd v. Midwest Ref. Co.*, 62 F.2d 483 (10th Cir. 1933); 5 *CORBIN* § 1177.

B. Tender

Whether tender is necessary in order to constitute acceptance depends on the agreement; keep in mind that the option is construed in favor of the maker. Where tender is construed to be a condition of acceptance, strict adherence is necessary. In one case,⁸⁶ the option stated that "\$2,000 of [the purchase price] . . . is to be paid 1 April, 1905,"⁸⁷ and the court held that tender of 2,000 dollars was necessary for acceptance. Another case⁸⁸ held tender to be necessary where the option provided that if the optionees shall, within the time specified, elect to purchase, then they shall pay one-half cash. In another decision,⁸⁹ tender was necessary when the option required that *A* pay to parties of first part in cash 5,000 dollars on a specified date. In another case⁹⁰ involving a sale of timber with two years to remove, the agreement provided: "[I]n the event [the purchasers] . . . do not get it off in that time they shall have one year's time thereafter in which to remove the same by paying to the party of the first part interest on the purchase money for said extension of time."⁹¹ The court held that tender of the interest was necessary in order to accept the extension.⁹²

If tender is not a condition of acceptance, it follows that it is not necessary for acceptance. In one case,⁹³ the option stated that "the said vendors will sell . . . the land in question at \$8.50 per acre, the acreage to be ascertained by a survey to be made by the Department of Agriculture."⁹⁴ The court held that since the survey, as well as other conditions, was to be performed after acceptance, no tender was required for acceptance. Where an option⁹⁵ read that the lessee "may at any time during the term

⁸⁶ *Winders v. Kenan*, 161 N.C. 628, 77 S.E. 687 (1913).

⁸⁷ *Id.* at 629, 77 S.E. at 688.

⁸⁸ *Trogden v. Williams*, 144 N.C. 192, 56 S.E. 865 (1907).

⁸⁹ *Hudson v. Cozart*, 179 N.C. 247, 102 S.E. 278 (1920).

⁹⁰ *Bateman v. Kramer Lumber Co.*, 154 N.C. 248, 70 S.E. 474 (1911).

⁹¹ *Id.* at 249-50, 70 S.E. at 474.

⁹² See *Wachovia Bank & Trust Co. v. Medford*, 258 N.C. 146, 128 S.E.2d 141 (1962), where the optionee had thirty days and the terms read "Cash in full at the end of 30 days . . ." The court held that a tender was required. *Edwards Lumber & Land Co. v. Smith*, 191 N.C. 619, 132 S.E. 593 (1926) (decision is questionable because there was no mention of tender).

⁹³ *Wachovia Bank & Trust Co. v. United States*, 98 F.2d 609 (4th Cir. 1938).

⁹⁴ *Id.* at 610.

⁹⁵ *Id.* at 610.

of this lease elect to purchase said property at the sum of \$6,700,"⁹⁶ the court held that tender of the purchase price was not necessary for acceptance and need only be made when the owner tenders the deed. In *Crotts v. Thomas*⁹⁷ an option in a lease gave the tenant the right to buy "30 acres more or less" during the lease at not more than 150 dollars an acre, and the court held that where the buyer is ready, willing, and able to pay the price and notifies the vendor of his election to exercise the option, the vendor is under a duty to tender a deed; the buyer need only tender the money when such tender is made.

The importance of specifying the means of acceptance in plain language is evident in North Carolina. If tender is expected, the safe practice would be to state in the option that acceptance shall be exercised by notice and tender of payment. If tender is to await the delivery of the deed, the option should so state. In most cases, where the option contains no clear provision for method of acceptance, the optionee takes a risk if he does not tender cash.

Even when tender is required, it may be excused in certain situations. The optionee is not required to do a vain thing; thus, tender is not necessary if the maker has given notice that he will not honor the option, or if the property has been sold to a third party.⁹⁸ The maker, for his own benefit, may waive tender (or other requirement, including the time), even by parol. In such case, notice of acceptance without tender is sufficient to bind the bargain. In *Johnson v. Noles*,⁹⁹ the court said that since the extension of

⁹⁶ *Id.* at 373, 85 S.E.2d at 318.

⁹⁷ 226 N.C. 385, 38 S.E.2d 158 (1946). See *Phelps v. Davenport*, 151 N.C. 22, 65 S.E. 459 (1909); *Hardy v. Ward*, 150 N.C. 385, 64 S.E. 171 (1909). In *Tyndall v. Tyndall*, 245 N.C. 94, 95 S.E.2d 276 (1956), the price depended upon the amount of medical bills, an amount within the knowledge of the vendor, who refused to give the information. The court ruled that tender was not necessary.

⁹⁸ *Smithfield Oil Co. v. Furlonge*, 257 N.C. 388, 126 S.E.2d 167 (1962) (maker disavowed the option agreement); *Millikan v. Simmons*, 244 N.C. 195, 93 S.E.2d 59 (1956); *Douglass v. Brooks*, 242 N.C. 178, 87 S.E.2d 258 (1955); *Penny v. Nowell*, 231 N.C. 154, 56 S.E.2d 428 (1949); *Johnson v. Noles*, 224 N.C. 542, 31 S.E.2d 637 (1944); *Samonds v. Cloninger*, 189 N.C. 610, 127 S.E. 706 (1925); *Ward v. Albertson*, 165 N.C. 218, 81 S.E. 168 (1914) (owner sells to third party); *Gaylord v. McCoy*, 161 N.C. 685, 77 S.E. 959 (1913).

⁹⁹ 224 N.C. 542, 31 S.E.2d 637 (1944). See *Dixson v. C. E. Johnson Realty Co.*, 209 N.C. 354, 183 S.E. 382 (1936); *Alston v. Connell*, 140 N.C. 485, 53 S.E. 292 (1906). Cf. *Millikan v. Simmons*, 244 N.C. 195, 93 S.E.2d 59 (1956).

time in which to tender was made at maker's request (by parol without further consideration) to enable him to give a good deed and since the optionee had relied on this extension, the maker would not be heard to plead the Statute of Frauds.

In *Parks v. Jacobs*,¹⁰⁰ the court held that the optionee's having the money at his attorney's office and requesting the vendor to come there to close the deal did not constitute tender. The vendor is not required to go to a place selected by the buyer; rather, it is up to the buyer to tender to the vendor. In the event the maker sells the land to a third party before acceptance, tender is to be made to the new owner.¹⁰¹ Payments made as consideration for the option ordinarily are not considered part of the purchase price.¹⁰²

IX. ENCUMBRANCES

What is the effect of the maker's inability to give good title because of encumbrances? If the option provides that the maker is obligated to give whatever title he has, or is obligated only if he has good title, then, of course, the optionee cannot hold him beyond such agreement. If the option is for a consideration and it provides that on acceptance the maker will give good title, a breach because of an encumbrance should give the optionee an action for damages. In some circumstances, it seems that the optionee may deduct from the amount of the tender the value of the encumbrance and bind the maker.¹⁰³

When the encumbrance is discovered after exercise of the option, the rules of contract for sale should apply. In a situation where the vendor seeks to enforce the contract, with the vendee's pleading lack of good title as a defense for refusal to perform, the contract will be enforced if the encumbrance can be removed before delivery of the deed is required by using a portion of the

¹⁰⁰ 259 N.C. 129, 129 S.E.2d 884 (1963).

¹⁰¹ In tendering, may the optionee subtract the amount of an existing mortgage? See 55 AM. JUR. *Vendor & Purchaser* § 41 (1946); 91 C.J.S. *Vendor and Purchaser* §§ 259(d), 263, 265 (1955). If a building burns before acceptance, may the optionee tender the full amount less the value of the building? See 55 AM. JUR. *Vendor & Purchaser* § 41 (1946); Annot., 23 A.L.R. 1225 (1923). Can tender be made to one of several tenants in common? See *Hudson v. Cozart*, 179 N.C. 247, 102 S.E. 278 (1920).

¹⁰² *Carolina Timber Co. v. Wells*, 171 N.C. 262, 88 S.E. 327 (1916); *Ward v. Albertson*, 165 N.C. 218, 81 S.E. 168 (1914); *Bateman v. Kramer Lumber Co.*, 154 N.C. 248, 70 S.E. 474 (1911).

¹⁰³ See 92 C.J.S. *Vendor & Purchaser* § 270 (1955).

purchase price; otherwise the vendee is not bound to accept an encumbered title.¹⁰⁴

X. OPTION AS AN ENCUMBRANCE

An option itself is an encumbrance on land,¹⁰⁵ but if the option is revocable, then the encumbrance can be removed by the maker's revocation.¹⁰⁶

XI. RIGHT TO ASSIGN

A revocable option, which is nothing more than an offer, gives the optionee no interest in the land which is assignable.¹⁰⁷ If the option is irrevocable, then the optionee has sufficient interest in the land to enable him to assign the option in the absence of an agreement to the contrary. Such right is not dependent on the use of the word "assigns." If the assignee gives notice to the maker and performs all conditions precedent, specific performance will be granted.¹⁰⁸

When a lease contains an option for the lessee to purchase the property during the term of the lease, an assignment of the lease, in the absence of a contrary intent of the parties, also conveys the option to the assignee, and such right is not dependent on the use of the word "assigns."¹⁰⁹ In *Smithfield Oil Co. v. Furlonge*,¹¹⁰

¹⁰⁴ See 55 AM. JUR. *Vendor & Purchaser* § 41 (1946); 92 C.J.S. *Vendor & Purchaser* §§ 259(d), 263, 265 (1955).

¹⁰⁵ 91 C.J.S. *Vendor & Purchaser* § 4 (1955).

¹⁰⁶ 4 AMERICAN LAW OF PROPERTY § 18.81 (Casner ed. 1952); 91 C.J.S. *Vendor & Purchaser* § 4 (1955).

¹⁰⁷ See 1 CORBIN §§ 56, 57, 418 (1958); 1 WILLISTON § 415; 6 AM. JUR. 2d *Assignments* § 20 & n.15 (1963).

¹⁰⁸ *Smithfield Oil Co. v. Furlonge*, 257 N.C. 388, 126 S.E.2d 167 (1962); *Pearson v. Millard*, 150 N.C. 303, 63 S.E. 1053 (1909). See *Chappell v. Winslow*, 144 F.2d 160 (4th Cir. 1944); *Gulf States Creosoting Co. v. Loving*, 120 F.2d 195 (4th Cir. 1941); *Harry's Cadillac-Pontiac Co. v. Norburn*, 230 N.C. 23, 51 S.E.2d 916 (1949); *North Carolina Bank & Trust Co. v. Williams*, 201 N.C. 464, 160 S.E. 484 (1931); *Durham Const. Co. v. Wright*, 189 N.C. 456, 127 S.E. 580 (1925); *Guy v. Bullard*, 178 N.C. 228, 100 S.E. 328 (1919); *Atlantic & North Carolina R.R. Co. v. Atlantic & N.C. Co.*, 147 N.C. 368, 61 S.E. 185 (1908) (a much cited decision). 3 WILLISTON §§ 415, 936; 1 CORBIN §§ 54, 57, 271; RESTATEMENT, CONTRACTS §§ 151-52, 155 (1932); *Van Hecke, Assignability of an Option Contract*, 28 W. VA. L. REV. 64 (1922); Annot., 38 A.L.R. 1162 (1925).

¹⁰⁹ *Smithfield Oil Co. v. Furlonge*, *supra* note 108; *Pearson v. Millard*, *supra* note 108.

¹¹⁰ 257 N.C. 388, 126 S.E.2d 167 (1962). It seems that a sublessee is not entitled, merely by virtue of the sublease, to enforce an option to purchase contained in the lease; however the lessee may specifically assign the option to the sublessee. Thus, it is important here to determine whether the party is an assignee or a sublessee. See Annot., 45 A.L.R.2d 1034, 1048 (1956).

the lease contained an option to purchase; it also provided that the lessors should not sell the property during the term of the lease to anyone other than the lessee. The court held that assignees of the lessees could enforce the option and that the use of the word "assigns" was not necessary for the assignment of either the lease or the option. The provision by which the lessors agreed not to sell to any persons other than the lessees was held to be merely an affirmation of the option itself.

Since an option for the sale of land must be in writing, it follows that an assignment must also be in writing. However, the Statute of Frauds is not available as a defense to the maker in a suit by the assignee.¹¹¹ If the option gives a privilege of credit, this privilege is ordinarily considered personal and therefore not assignable. Likewise other provisions of a personal nature are not assignable.¹¹²

No special form or words of art are required for assignment of an option, but the assignment must comply with the general requirements for assigning a contract concerning land.¹¹³ Thus, informal language may be sufficient. Whether the assignment must be written on the original instrument is an open question, with some authority in the affirmative.¹¹⁴ As between the parties and as to those with notice (as by recording), however, it would seem that a separate instrument should suffice.¹¹⁵ Where the assign-

¹¹¹ See *Wilkie v. Womble*, 90 N.C. 254 (1884); *Love v. Cobb*, 63 N.C. 324 (1869); *Simms v. Killian*, 34 N.C. 252 (1851). 2 CORBIN § 414; 3 WILLISTON § 430; Annot., 38 A.L.R. 1348 (1925).

¹¹² *Chappell v. Winslow*, 144 F.2d 160 (4th Cir. 1944) (vendor could not assign); *Gulf States Creosoting Co. v. Loving*, 120 F.2d 195 (4th Cir. 1941). In *Durham Constr. Co. v. Wright*, 189 N.C. 456, 127 S.E. 580 (1925), the court held that a contract to buy materials and superintend construction of a building calls for personal service and is not assignable. In *Guy v. Bullard*, 178 N.C. 228, 100 S.E. 328 (1919), a contract for the purchase of a sawmill on condition that the buyer saw a certain amount of lumber for the seller was held to be assignable. See *Pearson v. Millard*, 150 N.C. 303, 63 S.E. 1053 (1909); *Atlantic & N.C. R.R. v. Atlantic & N.C. Co.*, 147 N.C. 368, 61 S.E. 185 (1908). 3 WILLISTON §§ 412, 415; 1A CORBIN §§ 57, 271; Annot., 10 A.L.R. 653 (1921); Annot., 39 A.L.R. 1192 (1925); Annot., 45 A.L.R.2d 1034, 1050 (1956). *Harry's Cadillac-Pontiac Co. v. Norburn*, 230 N.C. 23, 51 S.E.2d (1949), holds that a contract for sale is assignable even though a part of the purchase price was to be paid by notes, and that the assignee can enforce the contract against the vendor. This decision is questionable, for it requires the vendor to extend credit to a stranger.

¹¹³ See *Morton v. Thornton*, 259 N.C. 697, 131 S.E.2d 378 (1963); *Winberry v. Koonce*, 83 N.C. 351 (1880); 3 WILLISTON §§ 424, 430.

¹¹⁴ *Cannaday v. Shepard*, 55 N.C. 224 (1855); *Estes v. Hairston*, 12 N.C. 354 (1827).

¹¹⁵ See 3 WILLISTON § 430; 6 AM. JUR. 2d *Assignment* § 86 (1963).

ment is a gift to the assignee and the option instrument is delivered to him, there is no apparent reason why the gift should not be enforced as between the assignee and the original maker (grantor-owner).¹¹⁶ In regard to notice to the maker and to third parties, the recording laws are applicable, and a maker is not liable to an assignee until he has actual or constructive notice of the assignment.¹¹⁷ Where the assignment is made in one state and the original option was made in another, questions of conflicts of laws may arise.¹¹⁸

XII. REMEDIES FOR BREACH

On valid acceptance by the optionee, the relationship between the parties is that of vendor and vendee in a contract for sale of land, normally a bilateral contract. For breach of the contract for sale, an aggrieved party generally may at his election sue for damages or seek specific performance.¹¹⁹ Rescission or restitution

¹¹⁶ See *Buchman v. Smith*, 140 N.J. Eq. 390, 54 A.2d 775 (1947); *In re Huggins' Estate*, 204 Pa. 167, 53 Atl. 746 (1902); *Davie v. Davie*, 47 Wash. 231, 91 Pac. 950 (1907); 3 WILLISTON §§ 438A-40; 4 CORBIN §§ 909-21; RESTATEMENT, CONTRACTS §§ 150-77 (1932).

¹¹⁷ On notice, see *Lipe v. Guilford Nat'l Bank*, 236 N.C. 328, 72 S.E.2d 759 (1952); *Page Trust Co. v. Carolina Constr. Co.*, 191 N.C. 664, 132 S.E. 804 (1926); *Virginia-Carolina Chem. Co. v. McNair & Pearsall*, 138 N.C. 326, 51 S.E. 949 (1905); *Anniston Nat'l Bank v. School Comm.*, 118 N.C. 383, 24 S.E. 792 (1896); *Ellis v. Amason*, 17 N.C. 273 (1832). See generally 3 WILLISTON, §§ 433-35, 437; Annot., 44 A.L.R.2d 8, 172 (1926); Annot., 89 A.L.R. 171 (1934); Annot., 104 A.L.R. 1301 (1936) (recording assignments of mortgages); Annot., 110 A.L.R. 774 (1937).

¹¹⁸ *Grace v. Hannah*, 51 N.C. 94 (1858); *Reddick v. Jones*, 28 N.C. 107 (1845); RESTATEMENT, CONFLICTS §§ 348-54 (1934); 3 WILLISTON § 446; Annot., 31 A.L.R. 876, 883 (1924); Annot., 110 A.L.R. 774, 778 (1937); Annot., 62 A.L.R.2d 486 (1958).

¹¹⁹ *Crawford v. Allen*, 189 N.C. 434, 127 S.E. 521 (1925) (damages); *Thomason v. Bescher*, 176 N.C. 622, 97 S.E. 654 (1918) (specific performance); *Jones v. Jones*, 148 N.C. 358, 62 S.E. 417 (1908) (specific performance as matter of right); *Shakespeare v. Caldwell Land & Lumber Co.*, 144 N.C. 516, 57 S.E. 213 (1907) (specific performance); *Whitted v. Fuquay*, 127 N.C. 68, 37 S.E. 141 (1900) (specific performance); *Shaw v. Vincent*, 64 N.C. 690 (1870) (specific performance where the plaintiff has substantially performed); *Gordon v. Brown*, 39 N.C. 399 (1846) (specific performance where there is a penalty provision). 3 AMERICAN LAW OF PROPERTY §§ 11.66-81 (Casner ed. 1952). RESTATEMENT, CONTRACTS §§ 327, 358-80 (1932); 5 CORBIN §§ 1097-98, 1143-45. Annot., 32 A.L.R. 584 (1924); Annot., 98 A.L.R. 887 (1935) (penalty provision as affecting specific performance); Annot., 34 A.L.R. 1336 (1925) (stipulated damages); Annot., 52 A.L.R. 1511 (1928) (measure of damages); Annot., 54 A.L.R. 1355 (1928) (lessee refuses to take possession); Annot., 57 A.L.R. 1253, 1508 (1928) (substantial performance); Annot., 65 A.L.R. 7 (1930) (specific performance as matter of right); Annot., 81 A.L.R. 900 (1932) (abatement in price where not fully performed); Annot., 97 A.L.R. 1493 (1935) (penalty provision).

lies for fraud, duress, mistake, undue influence, mental incompetence, or default by one party,¹²⁰ and, also, of course, by mutual consent.¹²¹ Damages and specific performance are remedies based on an affirmation of the contract, and they are therefore not inconsistent, whereas rescission, since it destroys the contract, is inconsistent with any remedy affirming it.¹²² If an election is made to sue for damages rather than specific performance, and third parties are affected, the actor may not be allowed to change his mind and later seek specific performance.¹²³

An option contract is specifically enforceable between the parties without recording,¹²⁴ as are other instruments. Options are subject to the recording statutes in general, and to General Statutes section 47-18 in particular.¹²⁵

¹²⁰ *Torrey v. McFadyen*, 165 N.C. 237, 81 S.E. 296 (1914); *Stern v. Benbow*, 151 N.C. 460, 66 S.E. 445 (1909); *Redding v. Vogt*, 140 N.C. 562, 53 S.E. 337 (1906).

¹²¹ *Redding v. Vogt*, 140 N.C. 562, 53 S.E. 337 (1906). See *Harwell v. Rohrabacher*, 243 N.C. 255, 90 S.E.2d 499 (1955); *Scott v. Jordan*, 235 N.C. 244, 69 S.E.2d 557 (1952). In *Bell v. Brown*, 227 N.C. 319, 42 S.E.2d 92 (1947), an optionee holding an option at a set price for the purchase of a house then under construction requested material changes in house which would increase the cost. The court held that the vendor was entitled to treat this as a rescission. On rescission, see generally 3 *AMERICAN LAW OF PROPERTY* § 11.70-71 (Casner ed. 1952); Annot., 59 A.L.R. 189 (1929); Annot., 102 A.L.R. 852 (1936); Annot., 106 A.L.R. 125 (1937); Annot., 134 A.L.R. 1064 (1941); Annot., 142 A.L.R. 582 (1943).

¹²² *Lowe v. Hall*, 227 N.C. 541, 42 S.E.2d 670 (1947).

¹²³ *Dennis v. Dixon*, 209 N.C. 199, 183 S.E. 360 (1936).

¹²⁴ *Chandler v. Cameron*, 229 N.C. 62, 47 S.E.2d 528 (1948) (dicta). See *Patterson v. Bryant*, 216 N.C. 550, 5 S.E.2d 849 (1939); *Hargrove v. Adcock*, 111 N.C. 166, 16 S.E. 16 (1892).

¹²⁵ *Eller v. Arnold*, 230 N.C. 418, 53 S.E.2d 266 (1949).