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Scott Reed

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NOTES

FUTURE INTERESTS — RULE AGAINST PERPETUITIES APPLIED TO OPTIONS IN FAVOR OF GRANTOR TO PURCHASE BACK THE LAND CONVEYED —MADDOX V. KEELER

The recent case of *Maddox* v. *Keeler*[1] has introduced a new attitude on the part of the Kentucky Court of Appeals towards a phase of the law of future interests. In this case, one R. H. Hopkins and wife conveyed by deed a fee simple title to William Wheeler subject to this condition: "But this conveyance is on the condition that should the party of the Second part desire to sell or convey away said tract of land the said R. H. Hopkins is to have the option of becoming its purchaser on the condition that he give therefor the sum of one thousand dollars." Hopkins died intestate and his heir at law sought to enforce the option against the devisee of Wheeler, who wished to sell the land, having made improvements on it to the extent of $13,000. The Court held the option void because it violated the statute against perpetuities. In reaching this result, the court felt it was necessary to overrule the earlier case of *Coley* v. *Hord*.[2]

In the *Coley* Case, there was an option in favor of the grantor and his heirs to purchase the land conveyed at any time either the grantee or his heirs desired to sell it, with allowance to the grantee for the costs of any improvements made by him which increased the value of the land. The Court held that this option was enforceable since it was not within the statute against perpetuities.

The essential difference in the two cases is that in the *Maddox* Case the option was in favor of a named person with no mention of heirs and assigns, while in the *Coley* Case the option was in favor of the grantor and his heirs, thus demonstrating that in the former case there is a strong indication that the option is personal, while in the latter the option is inheritable by the express language of the deed.

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[1] 296 Ky. 440, 177 S. W. (2d) 568 (1944).
[2] 250 Ky. 250, 62 S. W. (2d) 792 (1933).

The decision in *Coley* v. *Hord* is in conflict with the English view. *London & Southwestern R. Co.* v. *Gomm*[3] is the controlling English case on the question. Here, a railroad company conveyed land with a provision in the deed that the grantee, his heirs and assigns, would reconvey to the company, its successors or assigns, on six months' written notice and the payment of £1,000. The railroad company sought to enforce this provision against one claiming under the grantee but the court declined to give relief, deciding that such a provision was an ultra vires act on the part of the company and that the provision violated the rule against perpetuities. The weight of American authority supports this view.[4]

The opinion in the *Maddox* Case ably disposes of *Coley* v. *Hord* by showing that the cases cited as precedents were not in point and that it was against the weight of authority.[5] The *Maddox* opinion is susceptible of criticism, however, in its treatment of the nature of the interest in land which the option created in favor of the grantor. The arguments of the Court, reduced to a syllogistic form, may be briefly stated as follows: first, interests in land susceptible of inheritance, since they go on from generation to generation, may cause remoteness in vesting; second, assuming this option to be an interest in land susceptible of inheritance, there is a possibility of remoteness in vesting; third, since there is a possibility of remoteness in vesting, the option violates the rule against perpetuities and it is unnecessary to determine whether or not it is an interest in land susceptible of inheritance. This is faulty logic on its face. The way the propositions are set up, the possibility of remoteness depends on the provision being construed as an interest in land susceptible of inheritance; hence, the last part of conclusion, that it is unnecessary to decide whether or not the option is the required type of interest in land, contradicts the second premise. It may well be said that the Court means that any interest, personal or real, which might create a possibility of remoteness may be held void as a violation of the

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[3] 20 Ch. D. 562, 51 L. J. Ch. N. S. 530, 46 L. T. (N. S.) 449 (1882).

[4] Winsor v. Mills, 157 Mass. 362, 32 N. E. 352 (1892); Barton v. Thaw, 246 Pa. 348, 92 Atl. 312 (1914); Skeen v. Clichfield Coal Corp., 137 W. Va. 397, 119 S. E. 89 (1922).

[5] 296 Ky. 440, 442, 117 S. W. (2d) 563, 569 (1944).

rule against perpetuities, but this is certainly not made clear by the option.

As has been pointed out, the option in the *Maddox* Case was to a named person with no mention of heirs and assigns. The present writer contends that the right was personal. The Court, however, refused to discuss the point. It is clear, nevertheless, that in order to bring the option under the rule forbidding remoteness in vesting, the Court had to construe the right as inheritable. That is exactly what they refused to do. It is much easier to hold that the option in the *Coley* Case violated the rule against perpetuities because there the right created was clearly inheritable by the express terms of the deed which gave the right to enforce the option to the grantor *and his heirs*. Therefore, it is submitted that the Court erred in holding the option in the *Maddox* Case violated the rule forbidding remoteness in vesting because the interest created was personal by the plain wording of the deed. Since the interest was personal, it could only be exercised during the life of the grantor and hence could not violate the rule against perpetuities as pronounced by the Kentucky statute.[6]

It is submitted that these difficulties would be resolved by holding that the option created an unreasonable restraint on alienation. Although often confused and lumped together into one rule, there are actually two major rules concerning future estates. Mr. Gray, after noting the confusion and considering the historical background, calls them "the Rule forbidding restraints on alienation" and "the Rule against Perpetuities."[7] The first was designed to prevent the taking from the owner of the power to alienate property and the latter's purpose was to prevent interests from being created in the too distant future. The leading English case on the rule forbidding restraint on alienations is *Re Rosher*.[8] In this case, a testator devised land subject to a proviso that if the devisee or any person claiming under him should desire to sell the property or any part of it in the lifetime of the testator's wife, she should have the option to

[6] KRS 381.220: "The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuation of a life or lives in being at the creation of the estate, and twenty one years and ten months thereafter."

[7] Note (1894) 7 HARV. L. REV. 406, 409.

[8] 26 Ch. D. 801 (1829).

purchase it at a certain price. The real value of the land was five times the price. The Court held the proviso void as an unreasonable restraint on alienation. By so doing it could avoid the difficulties that the restraint was only in existence during a life which was in being and that the estate had presently vested in the devisee on the death of the testator. There is respectable American authority supporting this view and construing such options as unreasonable restraints on alienation.[9]

That this view should be taken in Kentucky is further supported by the fact that by statute any future estate is alienable,[10] thus there is little reason to tie up estates so as to cause remoteness in vesting. Kentucky has subscribed to the doctrine of unreasonable restraint, independent of the statute,[11] on which the *Maddox* Case was decided, in situations where there was no remoteness in vesting but a restraint on alienation existed.[12] The statute was so constructed that the two rules were lumped together and stated in terms of remoteness in vesting. Therefore, the Court had to apply the unreasonable restraint doctrine independent of the statute.

Gray clearly advocates the view that the option in the *Maddox* Case should be construed as an illegal restraint on alienation.[13] Kales also appears to sustain this position,[14] but Simes apparently supports the view taken in the *Maddox* Case.[15]

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[9] For an excellent discussion of the background of this rule and its application, see Woodall v. Bruen, 76 W. Va. 193, 85 S. E. 170 (1915).

[10] KRS 381.040: "Any estate may be made to commence in the future by deed, in like manner as by will, and any estate which would be good as an executory devise or bequest shall be good if created by deed."

[11] For the statute see *supra* n. 6

[12] See Court v. Court's Guardian, 230 Ky. 241, 18 S. W. (2d) 957 (1929).

[13] GRAY, THE RULE AGAINST PERPETUITIES (4th ed., 1942) sec. 330.1, at page 365: "They seem, therefore, to have found it necessary, in order to prevent the enforcement of options extending over too long a period, to declare such options void at law. Whether this line of reasoning is correct, may be doubted; although the conclusion that such options are wholly void, at law as well as in equity, may well be supported on the ground that they would constitute illegal restraints on alienation if damages were allowed for their breach."

[14] KALES, FUTURE INTERESTS (2nd ed., 1920) sec. 665, at pp. 764, 765.

[15] SIMES, THE LAW OF FUTURE INTERESTS (1936) sec. 512, at page 379. The author points out situations where the restraint would not be appreciable and concludes that the only course open is to follow the English courts in holding that the options to purchase are within

When *Maddox* v. *Keeler* was presented for decision, the Court had two alternatives if it wanted to void the option. It could declare it void because it violated the rule against perpetuities or it could hold it void as an unreasonable restraint on alienation. The first alternative is the one which it chose. The fundamental difficulties which prevent this rule from operating in this case have been pointed out. Therefore, we must determine if it was void as an unreasonable restraint on alienation. Kentucky has held that an attempt to restrain the alienation of a fee simple estate devised by will during the entire life of the devisee is void, as it is unreasonable.[16] In the instant case we have an attempt to restrain a fee simple estate for the life of another. This would appear to be also unreasonable.

Therefore, it would appear that from the standpoint of policy as well as precedent, Kentucky should continue to hold such options void, not on the ground that they violate the statute against perpetuities, but for the reason that they constitute an unreasonable restraint on alienation.

SCOTT REED

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the rule against perpetuities. It should be pointed out, however, that he does not consider the technical difficulties in applying the rule against perpetuities to these situations.

[16] Thurmond v. Thurmond, 190 Ky. 582, 228 S. W. 29 (1921); Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264 (1909).