Kentucky Law Journal

Volume 24 | Issue 1 Article 11

1935

Equity--Equitable Conversion--Option Contract--Death of Vendor

George T. Skinner
University of Kentucky

stated by way of dictum that the parents' duty to support does not necessarily end when the child *becomes of age*, the question being determined by the facts.[10] This case may be construed to overrule an earlier Kentucky case[11] holding that a parent is not legally bound to support a child after it becomes of legal age, and that no such obligation can be imposed by statute. Yet, if we are to give cognizance to a very strong inference, even this early Kentucky case recognized the common law duty to support *at least* until the child became of legal age.

A New York statute[12] provides a penalty for the abandonment in destitute circumstances of a child under sixteen. Another New York statute[13] provides a heavier penalty in the case of such abandonment of a child under fourteen. These provisions indicate a slight trend in the law toward lifting the burden of support from the shoulders of the parent. This trend is evidenced by the omissions in the statutes of the states to provide penalties for nonsupport or abandonment of children over sixteen years of age. The gap between the age of sixteeen and legal age, however, is still filled by the common law, making it a misdemeanor to commit such abandonment. Where injury has or is being done the infant the law will act to punish,[14] or to prescribe a remedy.[15] Where no harm is done, and, perhaps, the infant is benefited by the cutting of parental bonds, the law will remain discreetly silent.[16]

HOWARD H. WHITEHEAD.

EQUITY—EQUITABLE CONVERSION—OPTION CONTRACT—DEATH OF VENDOR.

One Bisbee leased certain real estate to two lessees for a period of two years, and gave these lessees an option to purchase the real estate at any time within the two years upon the payment of a certain sum. Almost a year later Bisbee died intestate. A month after Bisbee's death the lessees exercised their option to purchase. The property was conveyed to the lessees by Bisbee's administrator, and the purchase money was ordered to be, and was, distributed as personal property. The heirs of Bisbee sought to have the order set aside. Held: for the plaintiffs, who as heirs of Bisbee were entitled to the

[10] Crain v. Mallone, 130 Ky. 125, 113 S. W. 67 (1908).
[11] Commonwealth v. Willis' Exr., 7 Ky. Law Rep. 677 (1886).
[12] Cahill's Cons. Laws of N. Y., Ch. 41, Section 480.
[13] Cahill's Cons. Laws of N. Y., Ch. 41, Section 481.
[14] State v. Herring, 200 Iowa 1105, 205 N. W. 861 (1925); Commonwealth v. Donovan, 187 Ky. 779, 220 S. W. 1081 (1920).
[15] Springstun v. Springstun, 131 Wash. 109, 229 Pac. 14 (1924); Sanderson v. Sanderson, 149 Misc. R. 88, 267 N. Y. Supp. 410 (1933).
[16] Holland v. Hartley, 171 N. C. 376, 88 S. E. 507 (1916); Memphis Steel Const. Co. v. Lister, 138 Tenn. 307, 197 S. W. 902 (1917); Cohen v. Del. L. and W. Ry. Co., 150 Misc. 450, 269 N. Y. Supp. 667 (1934).

purchase money, on the basis that the land which had devolved to them as real estate was converted into personalty at the time of the exercise of the option.[1] The court repudiated the doctrine of "relation back," as propounded in certain English cases.

This case represents a phase of the problem of equitable conversion which, briefly stated, is this: Where there is made a contract for the purchase of real estate, the land is converted into personalty and the purchase money is to be treated as realty.

The very doctrine of equitable conversion assumes a specifically enforceable contract.[2] When there is a specifically enforceable contract the party wishing to enforce the contract is deemed to own that which he will receive if the contract may be, and is, specifically enforced.

The doctrine of equitable conversion has been extended to option contracts. "Since the equitable conversion will result only from a contract for the sale of land it is obvious that the mere giving of an option will not work an equitable conversion. Since the rights of the vendor and vendee are contingent, it will follow that according to the doctrine of equitable conversion the nature of the property, which is dependent upon those rights, will remain uncertain until the option is exercised. If the option is never exercised, then an equitable conversion will never take place. But upon the exercise of the option the obligation of the vendor becomes fixed, and according to the doctrine of equitable conversion the land is then converted into personalty in the hands of the vendor, and into realty in the hands of the vendee."[3]

"The problem, however, is not so simple if the vendor dies pending the exercise of the option. Until the exercise of the option the vendor's heir is of course entitled, both legally and equitably, to the property as land. If, however the vendee exercises his option, he, because of the principles of specific performance in equity, becomes equitably entitled to the land and can compel a conveyance on payment of the purchase price. The vendor's heir also must convey the property on the exercise of the option, for the same reason that the purchaser with notice, or the donee of property held subject to an option must convey upon the exercise of the option."[4]

Of course the option contract need never be in fact specifically enforced. The option which is exercised and so becomes a binding contract effects the conversion.[5]

The leading case on the doctrine of equitable conversion in regard to option contracts is the English case of *Lawes* v. *Bennett*,[6]

[1] Estate of Bisbee, 177 Wis. 77, 187 N. W. 653 (1922).

[2] Simpson, *"Legislative Changes in the Law of Equitable Conversion by Contract,"* 1935, 44 Yale L. J. 559, 563.

[3] Stone, *Equitable Conversion by Contract* (1913), 13 Col. L. R. 369, 376. See also Walsh, Equity (1930), p. 418.

[4] Stone, *loc. cit., supra*, note 3.

[5] Simpson, *supra*, note 2, at 564.

[6] 1 Cox Eq. Cas. 167 (Chancery 1785).

which was followed by the court in *Weeding* v. *Weeding*.[7] The doctrine of these cases has been phrased by Romer, L. J., as follows: "Where an option has been given by a testator over part of his real estate, then, whether given before or after the date of the will, that real estate is to be treated for the purposes of devolution on death as devolving from the date of the exercise of the option as proceeds of sale and not as real estate."[8] The result is that the personal representative is entitled to the purchase money, there having occurred an equitable conversion of the land into personalty relating back to the making or giving of the option.

One writer has said that the above statement of the doctrine really could not be based upon the two cases mentioned. He adds, that even though the cases do stand for that proposition, the proposition is not sound.[9] Such opinion is merely the reflection of the holdings of subsequent cases, and the opinions of many legal writers. The doctrine of *Lawes* v. *Bennett*, has been severely criticised by legal writers;[10] one writer going so far as to characterize it as a "blot on the law relating to constructive conversion."[11]

Another line of cases, which is headed by the principal case of *Estate of Bisbee*, have used the doctrine of equitable conversion to reach a directly opposite result. Using the strict ideas that the conversion occurs at the exercise of the option, and repudiating the fiction of relation back, these cases hold that the heir and not the personal representative is entitled to the purchase money.[12]

The reasoning of the courts should be analyzed in order to determine the true interpretation to be made of the contract of option which is exercised after the death of the optionor-vendor.

The doctrine of equitable conversion has been based upon several grounds. "It is sometimes said that equity regards as done what is agreed to be done; sometimes that from the moment of the contract the vendor is trustee for the purchaser; sometimes that from the moment the purchaser is the owner in equity subject of course to a lien for the unpaid price."[13]

Williston scorns such reasoning. He says that he who accepts the above maxims as reasons for the theory of equitable conversion "denies himself the effort of further thought."

Keeping in mind our particular problem of option contracts, it is apparent that the maxim that "equity considers as done what ought to be done" is of no meaning. At the death of the testator, the prop-

[7] 1 J. and H. 424 (Chancery 1861).
[8] 48 *Law Q. R.* 459, note.
[9] 48 *Law Q. R.* 459.
[10] Simpson, *supra*, note 2, at 564.
[11] Sweet, *Options of Purchase Contained in Leases* (1911), 55 Sol. J. 360, 361.
[12] *Ingraham* v. *Chandler*, 179 Iowa 304, 161 N. W. 434 (1917); *Smith* v. *Loewenstein*, 50 Ohio St. 346, 34 N. E. 159 (1893); see also, *Adams* v. *Peabody Coal Co.*, 230 Ill. 469, 82 N. E. 645 (1907).
[13] 2 Williston, *Contracts* (1921), Sec. 927, p. 1767.

erty passed to the heir or devisee as realty. There could be no conversion as yet. Conversion is admittedly based upon a specifically enforceable contract. The option not having been exercised, as yet there was no contract of sale in fact which could be specifically enforced. The maxim is of as much value as an argument against, as for equitable conversion. Up until the exercise of the option there is nothing that "ought to be done." When the option is exercised something ought to be done, but just to state the maxim is begging the question. Only at the exercise of the option does a contract to sell arise, binding the heirs to convey.[14]

How can we determine what ought to be done? As between the heir and the personal representative, who should have the rights and who should have the obligations formerly held by the testator?

In rejecting the rule of *Lawes* v. *Bennett*, in so far as it gave a retroactive effect to the exercise of the option, the court in *Estate of Bisbee*, said: "The doctrine of equitable conversion rests on the presumed intention of the owner of the property, and on the maxim that equity regards as done what ought to be done." As illustrative of the possibility of the arbitrary application of the maxim, we see that the court in the instant case reached a contrary result to *Lawes* v. *Bennett*, on presumed intention. The court said that the lessor must in reason be presumed to have intended that the discharge of the duty to convey should take effect for all purposes only from the date when the duty became absolute upon the occurrence of an uncertain event.

In analyzing the maxim of equity, regarding as done what ought to be done, presumed intention of the parties, and the fiction of relation back, the danger of using such to base property rights is clearly seen in the determination of who receives the purchase money at the exercise of the option after the death of the optionor. The fallacy of the argument giving the purchase money to the personal representative lies in failing to distinguish between right and obligation. The testator had an obligation to convey the land if, and when, the optionee exercised the option. Before the exercise of the option the testator had no right to receive the purchase money. How can it be conceivable that a personal representative can have greater rights than the testator?[15] What the owner does have at the time of his death is "realty which is subject to being changed into personalty by the option holder."[16] The heir who takes the land has also the obligation to convey.

The payment of money by the vendee is not to be received out of right; nor, conversely, is it paid by the vendee under an obligation. The vendee is merely desirous of obtaining the land. In order to get the land to whom does he give the money? To the heir who

[14] Walsh, *Equity* (1930), p. 417. Hart, *The Inconsistencies of the Doctrine of Equitable Conversion* (1908), 24 Law Q. R. 403, 406.

[15] Clark, *Principles of Equity* (1919), 149; 24 L. Q. Rev. 407; Langdell, *A Brief Survey of Equitable Jurisdiction* (1908), page 271.

[16] Clark, *op. cit., supra*, note 15, at 147.

has the land, of course. Equity will not compel the heir to convey without receiving money, for he is in the same position as his ancestor. The heir must not be held absolutely while the ancestor was held only conditionally.[17]

Also it is admitted by the weight of authority that where an express option has been exercised after the death of the testator (the optionor), the purchase money will go to the executor as against the general devisee.[18] Is this result not inconsistent with the disposition of the rents and profits pending the option? The fiction of relation back here is used to give the purchase money to the personal representative, but is not used by the majority of authorities in regard to the rents and profits. There is obvious inconsistency in the application of the doctrine of relation back.[19]

Stone and Langdell condemn the fiction of relation back. It is true that fictions are of use in the law, but in the words of Stone "no case will be found in the books where courts have made use of a fiction for the purpose of divesting rights deemed to have been honestly acquired."[20]

Langdell says that the use of the fiction of relation back in this situation is not justifiable for here it is not even "promotive of justice."[21] "Nobody defends the doctrine; every member of the court admits, with rueful candor, that in the case before them it defeats the intention of the testator and deprives legatees of benefits which they ought to enjoy."[22]

If we shall accept that the doctrine of relation back is a meaningless fiction, and if we adopt the logic that there was no right which devolved to the personal representative upon the death of the optionor we may turn from the individual claims of the heir and personal representatives, and look at the situation with a broader view. It is a self-evident fact, according to the court in *Charles J. Smith Co.* v. *Anderson*,[23] that the doctrine of *Lawes* v. *Bennett*, involving relation back "would lead to serious inconvenience and embarrassment in the settlement of estates and to complications concerning title to land attended upon a long-deferred conversion." This case is in accord with the result reached in the present trend of cases as illustrated by the principle case of *Estate of Bisbee*. "If the option is not exercised until after the death of the optionor, there is in the United States, no conversion."[24] This statement is another way of saying that the land will devolve to the heir who will be secure in holding the land subject only to the same obligation, as did the optionor, to convey upon the exercise of the option.

---

[17] Langdell, *op cit., supra*, note 15, at 272.
[18] Clark, *op. cit., supra*, note 15, at 148.
[19] 24 L. Q. Rev. 408; Clark, *op. cit., supra*, note 15, at 149.
[20] Stone, *supra*, note 3, at 377.
[21] Langdell, *op cit., supra*, note 15, at 272.
[22] 48 L. Q. R. 459.
[23] 84 N. J. Eq. 681, 687, 95 Atl. 358, 361 (1915).
[24] Simpson, *supra*, note 2, at p. 564.

There are no recent cases in Kentucky upon the specific problem. In as much as this is a moot question, it is submitted that the solution reached herein should be adopted in Kentucky.

In summary, it is suggested that the solution of the rights and duties of the parties involved in the situations of optionor, optionee, heir, and personal representative of the optionor are to be determined not by a phrase of magical import as equitable conversion, equitable conversion with relation back, or devolution of decedent's property.[25] These phrases may be useful in the discussion of the problem, and are helpful as handles for carrying the theories involved, but they are confusing in application if considered "as a reason for a decision rather than a mere name for the result of a decision."[26]

It is submitted that the case which is presented for decision be tested by the principles of contract and equity; that the case be broken into its component parts; that an equitable, practical result providing for the speedy settlement of decedent-optionors' estates be reached. After that, there would be no objection to christening the brain child equitable conversion.

The principle case, *Estate of Bisbee*, gives an equitable result, which no matter if it is called equitable conversion without relation back, affords a just settlement of the claims of the litigants as proveable by sound equitable and contract principles, and as favorable to a policy of speedy settlement of decedents' estates.

A summary of the situations of the parties of an option to buy real estate follows. At the making of the option contract the vendor has legal title to the land pending the exercise of the option. He holds the land under the obligation to convey to the purchaser at the instance of the latter's exercise of the option. The vendor has no enforceable right. The purchaser has an equitable right to exercise his option,—to tender the purchase price, and receive the land in return. If the purchaser does exercise the option before the death of the vendor, he has the equitable right to receive the land, which may be specifically enforced in equity. The vendor receives the right to the purchase money. The heir of the vendor received by the devolution of decedent's real estate the land subject to the same obligation as imposed on it during the life of the vendor, and is required to convey to the purchaser. The vendor died possessing a right to the purchase money. Such right, being personal, devolves to the vendor's personal representative. The purchaser if forced to go into equity to get specific enforcement of the contract will join the heir and the per-

[25] See Stone, *op cit., supra*, note 3, at 379. Stone dislikes the equitable conversion theory. He explains the situation by devolution of decedents' property theory which in effect keeps strict separation of real and personal property. He allows the personal representative of the testator to receive the purchase money even though there is no enforceable right in the testator at death before the exercise of the option by the optionee.

[26] Clark, *op. cit., supra*, note 15, at 149n; see also, 27 Har. L. Rev. 79; 23 Har. L. Rev. 70; 12 Col. L. Rev. 155.

sonal representative of the vendor, the former to convey the land, the latter receiving the money. The rights of all parties may be settled in the one action.

In the event that the vendor had died before the exercise of the option by the purchaser, the land would have gone to the heir as above. But there would be a difference in the disposition of the purchase money. The vendor having died without acquiring a right to the purchase money, the personal representative would receive no right to it. The heir, rather, would receive the purchase money, upon carrying out the obligation of conveyance imposed on the land descending to him.[27]

GEORGE T. SKINNER.

DOMESTIC RELATIONS—FALSE CHARGE OF LEWD AND LASCIVIOUS CONDUCT AS CONSTITUTING CRUELTY A GROUND FOR DIVORCE.

During a recent bar examination in this state, a question was put to those taking the examination which had reference to cruelty as a ground for divorce in Kentucky. The question was apparently taken from a late Kentucky case,[1] where the facts appear as follows. A wife instituted an action for divorce on the grounds of cruel and inhuman treatment. By answer and counterclaim the defendant husband traversed the allegations of the wife's petition and also asked for a divorce, charging that the wife had been guilty of such acts of immorality and lewd and lascivious conduct as proved her to be unchaste—that within six months before their separation she had been guilty of adultery. Such charges were also proved to have been made by the husband outside the court room. The charges were not sustained. The question was whether the charges of conjugal misconduct made by the husband against his wife, would, if unfounded and not in good faith, warrant the granting of a divorce on the grounds of cruel and inhuman treatment. The trial court answered the interrogatory in the affirmative and granted an absolute divorce to the petitioner.

Bouvier's Law Dictionary defines cruelty as between husband and wife as, "those acts which affect the life, the health, or even the comfort of the party aggrieved, and give a reasonable apprehension of bodily hurt."

The weight of authority is that conduct, in order to constitute cruelty, and thus come within the statutes of the various states, must consist in the infliction or threatened infliction of bodily harm. This

---

[27] Upon the problem see 16 R. C. L., p. 806; 13 C. J., pp. 856–858; also, the annotations in 57 L. R. A. 643, L. R. A. 1916 F 358, 50 A. L. R. 1314.

[1] *Bush* v. *Bush*, 245 Ky. 172, 53 S. W. (2d) 352 (1932).