Florida Law Review

Volume 13 | Issue 2 Article 4

June 1960

Options and the Rule Against Perpetuities

Frederic G. Levin

George T. Dunlap III

innocence, however, certainly appeals more to the conception of justice than conviction of one who lies with a youthful temptress. The Florida statute and its interpretations form a fair compromise covering the void left in the common law of rape.

JOSEPH F. MCDERMOTT

OPTIONS AND THE RULE AGAINST PERPETUITIES

THE MARRIAGE

The use of options has become widespread in the business world. Much land speculation is undertaken with options to purchase in a stranger – herein referred to as "in gross"; shopping centers give to their lessees options to renew – herein referred to as "appendant to renew"; business property lessees insist upon options to purchase – herein referred to as "appendant to purchase." The stock option is a favorite form of corporate executive compensation. Businessmen employ the various option devices for the purpose of reaping profits from property that otherwise might remain unproductive, unprofitable, and in many cases unalienable. Public policy demands that businessmen be allowed to use long-term options.

The favored child of the law of future interests was conceived in 1681 in *The Duke of Norfolk's Case*.[1] Gestation lingered until 1833, however, when in *Cadell v. Palmer*[2] there was born what is known today as the Rule Against Perpetuities.[3] On the Rule's forty-ninth birthday it was coupled with the option in the landmark case of *London & South Western Ry. v. Gomm*.[4] It is submitted that the

---

[1] 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681).

[2] 10 Bing. 140, 131 Eng. Rep. 859 (H.L. 1833).

[3] Florida recognizes the common law Rule Against Perpetuities. In Story v. First Nat'l Bank & Trust Co., 115 Fla. 436, 156 So. 101 (1934), the Court said: "[T]he vesting of an estate . . . can be postponed no longer than a life or lives in being and twenty-one years plus the period of gestation." The generally accepted statement of the Rule, as stated by Gray, is as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." GRAY, THE RULE AGAINST PERPETUITIES §201 (4th ed. 1942).

[4] 20 Ch. D. 562 (1882).

Rule Against Perpetuities should not have trespassed into the mercurial world of commerce, where options are commonplace. The Rule should have been permitted to tread only in its original environment – the world of estates and trusts.

It is the design of this note to present the possibility of a divorce of the Rule Against Perpetuities from all options in certain jurisdictions, to reconcile the differing American decisions, and to indicate the possible effect of a substitution of appraisal price for fixed price in the option contract.

THE DIVORCE

The jurisdictions that have divorced options from the Rule Against Perpetuities have done so on one of the following grounds: (1) an option creates no interest in land;[5] (2) an option creates a vested interest in land;[6] (3) an option is personal;[7] (4) an option is an exception to the Rule Against Perpetuities.[8]

The Rule Against Perpetuities is a rule of property law, not of contract law. Options, therefore, can be affected only to the extent that they create an interest in property. In option contracts in which the Rule Against Perpetuities is not in issue, the courts generally have held that an unexercised option creates no interest in the property. A striking example of this occured in *Gautier v. Lapof.* The Florida Supreme Court stated:[9]

> "It seems clear to us that until an optionee exercises a right to purchase in accordance with the terms of his option he has no estate, either legal or equitable, in the lands involved . . . .
>
> "Nor do we know of any rule or reason which would cause a different result . . . ."

In cases not dealing with the Rule Against Perpetuities, only two jurisdictions have held that an unexercised option gives the optionee

---

[5]Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925).

[6]Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421 (1879).

[7]Dodd v. Rotterman, 330 Ill. 362, 161 N.E. 756 (1928); Weitzmann v. Weitzmann, 87 Ind. App. 236, 161 N.E. 385 (1928).

[8]Dozier v. Troy Drive-in-Theaters, Inc., 265 Ala. 93, 89 So.2d 537 (1956); Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 Atl. 442 (1908).

[9]91 So.2d 324, 326 (Fla. 1956).

any interest in the property.[10] American courts, with few exceptions, however, have held that the Rule Against Perpetuities applies to options by disregarding the issue of interest in land.[11] It is submitted that the jurisdictions that have not passed upon the question have a sound basis for granting this so-called divorce of the Rule Against Perpetuities from options by squarely facing the issue and holding that no interest in land is created by an option.

Jurisdictions that insist upon finding an interest in land can hold the interest to be vested,[12] thus circumventing the Rule Against Perpetuities. Although the only decision to employ such reasoning was later overruled,[13] the possibility of such a rationale should still be considered.

Notwithstanding the fact that the concept of a contingent interest is established, the Rule Against Perpetuities can be avoided by labeling the option personal. If a personal element is required of either party to an option, that party will be the life in being[14] and the Rule Against Perpetuities cannot be violated.[15]

The fourth and most direct method of divorcing options from the Rule Against Perpetuities is by simply holding that the option is an exception to the rule.[16] In America only West Virginia has decided that an option appendant to purchase was invalidated by the Rule Against Perpetuities.[17] A recent West Virginia statute,[18] however, has declared the option appendant to purchase an exception to the Rule. It is submitted that every American jurisdiction will find it commercially expedient to declare the option appendant to purchase at a fixed price[19] an exception to the Rule Against Perpetuities, either judicially or legislatively. In addition to options appendant to pur-

---

[10]Kerr v. Day, 14 Pa. 112 (1850); Wall v. Minneapolis, St. P. & S.S.M. Ry., 86 Wis. 48, 56 N.W. 367 (1893).

[11]See GRAY, THE RULE AGAINST PERPETUITIES §330 (4th ed. 1942).

[12]Birmingham Canal Co. v. Cartwright, 11 Ch. D. 421 (1879).

[13]London and South Western Ry. v. Gomm, 20 Ch. D. 562 (1882).

[14]Frissell v. Nichols, 94 Fla. 403, 114 So. 431 (1927). This case was not concerned with the Rule Against Perpetuities; however, it gives Florida's position on what kind of contract is personal.

[15]Cases cited note 7 *supra*.

[16]Cases cited note 8 *supra*.

[17]First Huntington Nat'l Bank v. Gideon-Broh Realty Co., 139 W. Va. 130, 79 S.E.2d 675 (1953).

[18]W. VA. CODE ch. 36, art. 1, §24 (Michie Supp. 1960).

[19]See text accompanying note 30 *infra* for the effect of the inclusion of appraisal or market price in the option appendant contract.

chase, "it is well settled that perpetual options to renew leases have always been held valid."[20]

Reconciling the American Decisions

The purposes behind the Rule Against Perpetuities have been stated to be (1) to prohibit remoteness of vesting,[21] (2) to prohibit restraint on alienation,[22] and (3) to prohibit restraint on improvements.[23] Undoubtedly there are special instances in which any one of the three purposes would be applicable, but it is submitted that only one is pertinent when referring to options — the prohibition against restraint on improvements.

It is impossible to reconcile the American views on options by using the definition of the Rule as one against restraint on alienation. Gulliver asserts:[24]

> "The rule against *suspension of the power of alienation* proceeds on the theory that the rule against perpetuities is only violated by an interest that may remain legally *unassignable* after the expiration of the period of the rule. Under this theory, an interest, even if it may remain contingent beyond the period, will not violate the rule if it is certain to be assignable before the period expires. An interest capable of being released is assignable for this purpose."

In the option contract there is no legal impediment to conversion of the various interests into absolute ownership, and for that reason the theory of restraint of alienation will not invalidate the option. There are still many practical obstacles to conversion, however. Gulliver states further: "The rule against remoteness of vesting favored by Gray . . . is the generally accepted theory in the United States today."[25] The purposes behind the rule against remoteness are to cur-

---

[20]See Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 662 (1938).

[21]Gray, The Rule Against Perpetuities §205 (4th ed. 1942).

[22]Berg, *Long-term Options and the Rule Against Perpetuities*, 37 Calif. L. Rev. 1, 2 (1949).

[23]Wing v. Arnold, 107 So.2d 765 (3d D.C.A. Fla. 1958).

[24]Gulliver, Future Interests 79 (1959). Professor Gulliver also points out that the theory of the rule against suspension of the power of alienation has been generally discarded today.

[25]Gulliver, Future Interests 80 (1959).

tail dead hand domination and to facilitate marketability. There is no more dead hand control or restraint on marketability of property subject to an option than there would be of property encumbered by an easement. In the latter instance the heirs of the owner must join with the holder of the easement in order to alienate the unencumbered property. In the option situation it would be possible to alienate the unencumbered property without joining with others, because the purchaser need deal only with the optionee. What if the optionee does not want to sell? The optionor's heirs can convey his land subject to the option, just as the owner of a servient estate can transfer his property subject to an easement.

A Florida district court of appeal has raised the only view whereby the American decisions on options in gross and appendant can rationally be reconciled: it has held that the Rule Against Perpetuities is a rule against restraint on improvements.[26] Various option situations will now be examined to see whether the party in possession will be restrained from making improvements.

An option in gross for a fixed price would certainly discourage the optionor-possessor from improving his land, because if he did so the optionor would not be repaid for the value of the improvements should the optionee exercise the option. Therefore, it should be held void. An option appendant to purchase at a *fixed price* or an option to renew would increase the chances of improvements, because improvements made by the optionee-possessor would inure to him at no amplification in price upon exercise of the option. Therefore, it should be held valid. Looking in retrospect at the American decisions, it is noted that the American view is in accord with these conclusions. This is a strong indication that restraint on improvements is the theory that the American courts have unconsciously been following. Professor Leach recognizes this theory, pointing out:[27]

> "An option in gross is an effective preventative of the improvement of the land over which it exists unless (as is rarely, if ever, the case) the purchase price under the option fluctuates in accordance with the improved value of the land. As long as the option lasts the owner in possession cannot afford to make improvements which can be snatched away from him without compensation by the exercise of the option."

---

[26]Wing v. Arnold, 107 So.2d 765 (3d D.C.A. Fla. 1958).

[27]Leach, *supra* note 20, at 661.

EFFECT OF THE APPRAISAL PRICE

A logical extension of the improvement theory is to draw a distinction between fixed price options and appraisal or market price options, because they have opposite effects upon restraint on improvements. The substitution of appraisal or market price for fixed price in the option contract should lead to a different conclusion as to the validity of the option. In two recent cases, however, the courts failed to recognize this distinction.

The Supreme Court of Errors of Connecticut in *Neustadt v. Pearce*[28] held that an option in gross to purchase at market price was invalid, saying simply, "This distinction is superficial and is not a valid one." However, Professor Leach, in discussing the improvement theory, has implied in a fact situation similar to the one presented to the Connecticut court that an opposite result is preferable, because improvements by the optionor would enhance the value of the property and would be reflected in an augmented purchase price.[29]

A Florida district court of appeal held valid an option appendant to purchase in a 99-year lease at a price to be determined by appraisal, stating in part:[30]

> "The reasoning given to the majority view is that improvement of the land is stimulated rather than retarded by the presence of an option to purchase in the lessee, and substantial improvements may be made by the lessee with impunity. Without the benefit of such an option it would not be good business for a lessee to make improvements which would have substantial value at the end of the lease term . . . ."

This quotation illustrates the reason why courts in the United States should hold an option appendant to purchase at a fixed price valid. Such an option does not violate the policy behind the Rule Against Perpetuities. The Florida court failed to note the peculiarity in the particular case, however, in that the purchase price was not fixed but was to be determined by appraisal at the time the option was to be exercised. It is submitted that the addition of the appraisal price could make the option appendant subject to the same limitation that

---

[28]145 Conn. 403, 143 A.2d 437, 438 (1958).

[29]Leach, *supra* note 20.

[30]Wing v. Arnold, 107 So.2d 765, 769 (3d D.C.A. Fla. 1958).

has resulted in invalidating options in gross to purchase at a fixed price. As previously pointed out, in the latter case the optionor-possessor will be restrained from making improvements, since any addition to the value of the land will not enhance the selling price. Similarly, in an option appendant to purchase at appraisal price, the optionee-lessee-possessor will not improve the leasehold until he exercises the option; any improvements made will increase the price that he will have to pay when he chooses to buy. It would indeed be a harsh rule that would invalidate an option in gross and condone precisely the same limitation in an option appendant with price to be determined by appraisal.

CONCLUSION

American jurisdictions today will uniformly protect the option appendant to purchase and the option appendant to renew from the Rule Against Perpetuities. It is doubtful that the courts will use the "appraisal or market price" distinction to hold the options appendant invalid when these factual situations arise. In the absence of legislation, future litigation will be concentrated in the option in gross area. Possibly the "appraisal or market price" distinction may be the basis upon which the courts will formulate decisions holding the option in gross valid. However, until the courts accept this distinction, the attorney, to be sure of avoiding the effect of the Rule Against Perpetuities, must draw the long-term option contract so that it is either manifestly a personal contract or necessarily exercised within the period deemed proper under the Rule Against Perpetuities.

The truism "wedlock is padlock" is seemingly quite apropos to the marriage of the Rule Against Perpetuities and options. It has been the purpose of this note to present some of the possible combinations for unlocking this union.

GEORGE T. DUNLAP III

FREDRIC G. LEVIN