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FUTURE INTERESTS-RULE AGAINST PERPETUITIES--VALIDITY OF AN OPTION INCIDENT TO A LEASE EXERCISABLE AFTER THE EXPIRATION OF THE LEASE

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FUTURE INTERESTS—RULE AGAINST PERPETUITIES—VALIDITY OF AN OPTION INCIDENT TO A LEASE EXERCISABLE AFTER THE EXPIRATION OF THE LEASE—On November 13, 1941, plaintiff entered into a lease with defendant granting defendant the exclusive right to mine and remove coal from plaintiff's mine for twenty years. Incident to the lease defendant was granted the option, "at any time subsequent to November 1st, 1945, to purchase the remaining tonnage of recoverable coal" at a specified price. A deed thereto was placed in escrow. In January, 1946, defendant elected to exercise the option, tendered the price, and received the deed from escrow. Plaintiff refused to recognize the validity of the option and commenced an action in equity to cancel the deed on the ground that the option, being exercisable "at any time," extended beyond the period of the lease and was void under the rule against perpetuities. *Held*, the option is valid. The parties intended this option to be exercised only during the term of the lease; therefore it did not violate the rule against perpetuities. *Poland Coal Co. v. Hillman Coal and Coke Co.*, (Pa. 1947) 55 A. (2d) 414.

The rule both in England and in the United States is that an option to purchase real property is within the scope of the rule against perpetuities.[1] The option is void if it is unlimited as to time of exercise or if it may be exercised beyond the period of the rule.[2] In the United States, however, an exception to this rule is recognized where an option to purchase land is included in a lease of that land.[3] In such a case the option is upheld without regard to the term

[1]England: London & S.W. R. Co. v. Gomm, 20 Ch. Div. 562 (1882); Woodall v. Clifton, [1905] 2 Ch. 257; Rider v. Ford, [1923] 1 Ch. 541.

United States: Starcher Bros. v. Duty, 61 W. Va. 373, 56 S.E. 527 (1907); Barton v. Thaw, 246 Pa. 348, 92 A. 312 (1914); Winsor v. Mills, 157 Mass. 362, 32 N.E. 252 (1892); Skeen v. Clinchfield Coal Corp., 137 Va. 397, 119 S.E. 89 (1923); Lewis Oyster Co. v. West, 93 Conn. 518, 107 A. 138 (1919); Maddox v. Keeler, 296 Ky. 440, 117 S.W. (2d) 568 (1944).

[2] 4 PROPERTY RESTATEMENT, § 374 (1944).

[3] Todd v. Citizens' Gas Co., (C.C.A. 7th, 1931) 46 F. (2d) 855; Keogh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925) (option in a 99-year lease held valid);

of the lease. This distinction is not made in England.[4] The principal case clearly adopts the usual view taken in this country.[5] By way of dictum, however, it seems to indicate that an option incident to a lease, if exercisable beyond the period of the lease and beyond the period of the rule against perpetuities, is void ab initio.[6] Apparently there is no case authority directly on this point,[7] but the American Law Institute seems to support the view of the principal case in this respect.[8] The soundness of the view holding the option void ab

Hollander v. Central Metal & Supply Co., 109 Md. 131, 71 A. 442 (1908) (option in a 99-year lease held valid). There is American authority upholding an option to purchase in a lease without discussion of the rule: Prout v. Roby, 15 Wall. (82 U.S.) 471 (1872) (option held valid in a lease for perpetuity); Hagar v. Buck, 44 Vt. 285 (1872) (specific performance decreed of an option in a 99-year lease).

See generally, 2 SIMES, FUTURE INTERESTS, § 512 (1936); 4 PROPERTY RESTATEMENT, § 395 (1944); Abbot, "Leases and the Rule Against Perpetuities," 27 YALE L. J. 878 (1918); Leach, "Perpetuities in a Nutshell," 51 HARV. L. REV. 638 at 660 et seq. (1938); Langeluttig, "Options to Purchase and the Rule Against Perpetuities," 17 VA. L. REV. 461 (1931); Rood, "Options and the Rule Against Perpetuities," 23 CASE AND COMMENT 835 (1917). See 3 A.L.R. 498 (1919); 37 A.L.R. 1245 (1925); 162 A.L.R. 581 (1946); 163 A.L.R. 711 (1946).

[4] Woodall v. Clifton, [1905] 2 Ch. 257; Worthing Corp. v. Heather, [1906] 2 Ch. 532 (the option in a thirty-year lease was held void, but damages were given for breach of the covenant to convey). But cf. McMahon v. Swan, [1924] Vict. L.R. 397 (Australia) (holding an option to purchase, unlimited in time, in a five-year lease valid, since it was provided that the optionor could at any time terminate the option by an instrument in writing). One American author supports the English view: GRAY, RULE AGAINST PERPETUITIES, 4th ed., § 230.3 (1942).

American courts have refused damages in situations similar to that in the Worthing case: Eastman Marble Co. v. Vermont Marble Co., 236 Mass. 138, 128 N.E. 177 (1920).

[5] Principal case at 416.

[6] This is plaintiff's argument. The court does not refute this argument but apparently adopts the view that if the option in the lease under consideration is limited to the term of the lease it is valid, for a twenty-year option is valid whether contained in a lease or not. Principal case at 416.

[7] While no cases could be found treating an express provision for the exercise of an option incident to a lease beyond the end of the term, the weight of authority is that an option to purchase during the term cannot be exercised after its expiration by a tenant holding over. Friederang v. Ruth Aldo Co., 199 App. Div. 127, 191 N.Y.S. 401 (1921); Kruegel v. Berry, 75 Tex. 230, 9 S.W. 863 (1888); In re Leeds & B. Breweries, [1920] 2 Ch. 548; Napper v. Rice, 127 W. Va. 157, 32 S.E. (2d) 41 (1944); Atlantic Product Co. v. Dunn, 142 N. C. 376, 55 S.E. 299 (1906). There have been exceptions to this rule: D'Arras v. Keyser, 26 Pa. 249 (1856) (one-year lease; an exercise of the option by the tenant holding over after the expiration of the term held valid since time was not of the essence of the option); Irish American Loan Assn. v. Stanfield, 182 Misc. 363, 50 N.Y.S. (2d) 494 (1943) (exercise of an option by a tenant holding over held valid since the Federal Rent Regulations provided that the provisions of the original lease should remain in force).

[8] 4 PROPERTY RESTATEMENT, § 395, comment b (1944). "In order to have the rule stated in this Section apply it is essential that the option be, *under no circumstances, exercisable after the end of the lessee's term. . . . Any limitation which purports to create an option to last for longer than the maximum period described in*

initio merely because it extends beyond the period of the lease seems questionable. Certainly the same reasons of public policy which are applied to uphold the option incident to the lease [9] could be here applied to hold the option agreement severable. This would result in the option being held valid for the term of the lease, while that which extended beyond the expiration of the lease and the period of the rule against perpetuities would be invalid. It should be considered that such a result could be accomplished by the use of two separate agreements, one for the lease with or without an option to buy, and the other executed after the expiration of the lease giving an option to buy, which would be valid if it did not exceed the maximum period allowed by the rule. The contracting parties should not be unnecessarily penalized because of the form in which they have cast their agreement. Since it is in furtherance of a sound public policy, such option agreements should be found to be severable where it can reasonably be decided that the parties would have intended part of their agreement to be effective if they had known that the agreement as a whole might be held void.

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sec. 374 and after the end of the lessee's estate, invalidates the option ab initio." (Italics supplied).

It could be argued that where the option can be exercised after the end of the term of a lease, the period of the rule should be counted from the end of the term. The option in a lease situation is an exception to the rule against perpetuities. An option given by *X* on January 1, 1947, to *Y* to buy land at a set price between January 1, 1968 and January 1, 1970, is void, for there is a period in gross longer than the permissible period in which the property is tied up. But if the option to purchase between January 1, 1968 and January 1, 1970, follows a 21-year lease between *X* and *Y*, the property is not tied up for a period in gross beyond the period of the rule, and the rationale used to uphold the validity of an option incident to a lease could be used to uphold the option granted here, that is, it encourages the lessee to make the most beneficial use of the leased premises since by a purchase of the premises he can keep from losing the value of the improvements which he has placed thereon.

[9] 4 PROPERTY RESTATEMENT, § 395, comment a (1944); 2 SIMES, FUTURE INTERESTS, § 512 (1936); Leach, "Perpetuities in a Nutshell," 51 HARV. L. REV. 638 at 661 (1938).