OPTIONS TO BUY AND LEASE LAND AND THE RULE AGAINST PERPETUITIES

Introduction

Does the rule against perpetuities apply to options to buy or lease land, and if so to what extent? If it does apply, is there any way of circumventing the rule? And what remedies, if any, are available to enforce an option that may in terms be exercised after the expiration of the perpetuity period? These are the types of questions that it is proposed to examine in this article.

The rule against perpetuities, as is well known, is one of the more recent of the many rules developed by the law to prevent property from being indefinitely tied up and removed from commerce. The rule may be simply stated by saying that a perpetuity is void *ab initio* but this is none too helpful unless an adequate definition of a perpetuity can be found. Such a definition, including all necessary aspects, is difficult to formulate, but perhaps the best is the following given by Lewis in his work on perpetuities:

> "In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest till after the expiration of, or will not necessarily vest within, the period prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation." [1]

It needs to be added that the period prescribed by the law is the period of an ascertained life or lives in being and twenty-one years, or if no lives are mentioned in the limitation, a period of twenty-one years only.[2]

The ordinary option to buy or lease land is an offer by its owner to sell or lease the land to another for a named consideration within a short period of time, usually a few months. Because of the short period during which such options are operative, the rule against perpetuities in no way affects them. An inexpertly drawn option may, however, fail to state a time limit for its operation, but apart from this there are several not uncommon uses of options that merit examination with relation to the rule. For instance, an option in terms perpetual or for an indefinite period sometimes appears in a conveyance of land

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1. Quoted with approval by Jessel, M. R., in **London and South Western Railway Company v. Gomm**, (1881-2) 20 Ch. 562, at pp. 581-2.

2. This is of course the modern rule against perpetuities finally settled by the House of Lords in **Cadell v. Palmer**, (1833) 1 Cl. & F. 372; 6 E. R. 956; the old rule against perpetuities is now usually referred to as the rule in **Whitby v. Mitchell**, (1890) 44 Ch. 85; in this article, therefore, the modern rule is simply called the rule against perpetuities.

where the grantor desires to restrain the purchaser from alienating the land or to retain the power of getting the land back at a future time if he chooses to do so. More commonly an option that may operate at a time beyond the perpetuity period appears in a lease. Options for renewal in long term leases and perpetual renewal clauses immediately come to mind in this connection. Less frequently, but by no means rarely, one of the clauses of a long term lease will give the lessee the option to purchase the freehold during the term of the lease or a renewal thereof. This last type of option may take the form of an offer to sell for a named consideration or a consideration based on market value where the lessor has no objection to selling for such a consideration. It will take the form of a right of pre-emption where the lessor does not wish to be bound to sell for a named consideration, or at all, but the lessee is desirous of having the first opportunity of buying if the lessor ever seeks to sell.

In examining the effect of the rule against perpetuities on an option, different matters will have to be taken into account according to the nature of the rights sought to be given under the option and the document in which it is found. Thus different questions have arisen in this connection in relation to options intended to create contractual obligations only and options intended to run with land only and those with both these ends in view. Further, options in leases give rise to special problems that merit separate consideration. For these reasons it has been found convenient to deal with the subject under the following headings:

(a) Options creating contractual obligations only;
(b) Options purporting to bind the land;
(c) Options purporting to create contractual obligations and also to bind the land;
(d) Options in leases.

Options Creating Contractual Obligations Only

It is settled law that the rule against perpetuities is concerned with property, not with contract.[3] A contract giving rights upon the occurrence of a contingent event that may arise after the expiration of the perpetuity period will be upheld even when the contract relates to property.[4] An optionee may, therefore, obtain specific performance of an option created by a contract so long as the optionor retains the land, notwithstanding that the option may in terms be capable of operating at a remote time .[5] And damages for breach of contract may in any case be awarded if the optionor is unwilling or unable to fulfill

3. **Walsh v. Secretary of State for India,** (1863) 10 H. L. C. 367; 11 E. R. 1068; **Witham v. Vane,** (1883) Challis on Real Property, 2nd Ed., App. V. p. 401.

4. **Witham v. Vane,** (1883) Challis on Real Property, 2nd Ed., App. V. p. 401; **London and South Western Railway Company v. Gomm,** (1881-2) Ch. 562 per Kay, J., at p. 575 and Jessel, M. R., at p. 580; **Worthing Corporation v. Heather,** [1906] 2 Ch. 532; **Hutton v. Watling,** [1948] Ch. 26.

5. **Hutton v. Watling,** [1948] Ch. 26.

his obligations under the option.[6] Further, it was held in one case that an optionee could obtain an injunction against a third party who interfered with his rights under a long term contract giving him a right of "first refusal."[7] It is submitted also that a person knowingly interfering with such an option might lay himself open to an action in tort for inducing a breach of contract notwithstanding the fact that rights under it might be exercised at a remote time.

It can be seen, then, that an optionee has many remedies available to him to enforce long term options created by contract. What is more, these contractual rights may, it is submitted, be assigned voluntarily in the same way as other contractual rights and involuntarily by death or bankruptcy. And they may be enforced not only against the optionor himself but also against his personal representatives and beneficiaries[8] and his trustees in bankruptcy.[9]

But notwithstanding the existence of these many remedies, the fact remains that once an optionor has disposed of land subject to an option that is a mere contract, the optionee loses his right to have the land conveyed to him and must content himself with an action for damages. It is usual, therefore, to insert a clause for the purpose of making the option bind the land, and it is to options intended to bind the land that we must now turn our attention.

Options Purporting to Bind the Land

An option to purchase or lease land for a named consideration may, if it is framed so as to enure to the benefit of, and to be binding upon the heirs, successors and assigns of the parties, amount to an interest in land, and that interest is subject to the rule against perpetuities. The leading case on this point is *London and South Western Railway Company v. Gomm*,[10] the facts of which, in so far as they are relevant here, are as follows. By deed dated August 10, 1865, the plaintiff company conveyed lands no longer needed by it to one, Powell, for a consideration of £100, and Powell covenanted with the company that he, his heirs or assigns would, at any time thereafter when the lands might be required by the company for its railway works and whenever so requested by the company and on receiving £100, reconvey the land to the company. In 1879 the defendant purchased the land from Powell with notice of the covenant. The following year the company gave the defendant notice to reconvey the land pursuant to the covenant, and upon his refusal to do so, brought an action for specific performance of the covenant. Kay, J., who heard the case, held that the option did not amount to an interest in land so the rule against perpetuities had no application, and he

6. **Worthing Corporation v. Heather,** [1906] 2 Ch. 532.
7. **Manchester Ship Canal Company v. Manchester Racecourse Company,** [1901] 2 Ch. 37, at p. 51.
8. **Worthing Corporation v. Heather,** [1906] 2 Ch. 532.
9. **Borland's Trustee v. Steel Brothers & Co., Limited,** [1901] 1 Ch. 279.
10. (1881-2) 20 Ch. 562.

decreed specific performance on a ground that will be discussed later. The Court of Appeal (Jessel, M.R., Sir James Hannen and Lindley, L. J.) reversed Kay J.'s ruling on this question. Jessel, M. R., had this to say:

> "If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present Appellant can be bound. He did not enter the contract, but is only a purchaser from *Powell* who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.
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> It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognized exceptions, such as charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period."[11]

So too, an option in a conveyance giving the heirs of the grantor an option of obtaining a lease of part of the land conveyed after the expiration of a ninety-nine year lease has been held void for remoteness.[12]

The cases respecting the right of pre-emption are not so straightforward. Thus Fry, J., in *Birmingham Canal Company v. Cartwright*[13] thought the rule was inapplicable because it was possible for all the parties interested in the land to dispose of it absolutely, but this reasoning was rejected in the *Gomm* case and Fry, J.'s judgment overruled.[14] In *Manchester Ship Canal Company v. Manchester Racecourse* Company,[15] Farwell, J., interpreted an inartistically framed right of "first refusal" purporting to be binding on the heirs and assigns of the parties that appeared in a contract validated by statute

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11. **Ibid.**, at pp. 580-1.
12. **Hope v. The Mayor, Aldermen and Citizens of the City of Gloucester, (1855) 7 De G., M. &. G. 647; 44 E. R. 252.**
13. **(1879) 11 Ch. 421, at pp. 432-3.**
14. **(1881-2) 20 Ch. 562, at pp. 572-3, 582 and 588.**
15. **[1900] 2 Ch. 352; [1901] 2 Ch. 37.**

as a right of pre-emption, which he believed fell within the reasoning of the *Gomm* case and therefore amounted to an interest in land,[16] but the Court of Appeal (Rigby, Vaughan Williams and Stirling, L.JJ.) did not think this right of first refusal was an interest in land.[17] Subsequently, it was held by Sutherland, J., in an Ontario case, *United Fuel Supply Co. v. Volcanic Oil and Gas Co.*,[18] that a perpetual right of pre-emption to a *profit a prendre* was an interest in land but was void because of its perpetual nature.

It is submitted that the decision in the *Volcanic* case correctly expresses the law; that the right of pre-emption is an interest in land and that interest is subject to the rule against perpetuities. Any other view would demand that one draw a distinction between an ordinary option and a right of pre-emption or question the correctness of the *Gomm* case and the many cases that have followed it. Though the events bringing the rights into operation are somewhat different, there appears to be no valid reason for considering options and rights of pre-emption as interests of a different nature. And it seems inconceivable that a long established case like the *Gomm* case, decided as it was by a strong court, should ever be overruled, especially since it meets a commercial need.[19] Had the court in the *Manchester Canal* case intended to cast doubt upon such an important decision, it would, it is suggested, have done so in unmistakeable terms. The remark in the *Manchester Canal* case must be regarded in the light of the peculiar facts of the case, which turned upon the construction of a contract that the court might well have held void for uncertainty had it not been declared by statute "to be valid and binding upon the parties thereto."

In an effort to validate the option in the *Gomm* case notwithstanding the perpetuity rule, Kay, J., had interpreted it as a covenant running with the land under the doctrine set forth in *Tulk v. Moxhay*,[20] and decreed specific performance of the option on that ground, but his judgment was set aside by the Court of Appeal on the ground that the doctrine applies to restrictive, not positive, covenants. The reasoning of the Court of Appeal does not appear to extend to the right of pre-emption, which is in substance a negative contract.[21] The right of pre-emption would, however, appear to fall outside the doctrine in *Tulk v. Moxhay* for another reason. In *Noble and Wolf*

16. [1900] 2 Ch. 352, at pp. 363, 366.

17. [1901] 2 Ch. 37, at p. 50.

18. (1911-2) 3 O. W. N. 93; see also **Rutherford v. Rispin**, [1926] 4 D. L. R. 822; 59 O. L. R. 506.

19. Some writers have questioned whether an option is an interest in land; the question has been discussed in (1895) 39 Sol. J. 618; (1896) 15 C. L. T. 218; (1898) 42 Sol. J. 628; (1915) 35 C. L. T. 798; (1916) 36 C. L. T. 446; (1918) 38 C. L. T. 242, 322; but none have questioned that if it is an interest in land, the rule against perpetuities applies to it. An option does not appear to be an interest in land in the United States but the courts have found other remedies to prevent third parties from acquiring rights to land subject to an option: 66 C. J. 406-7, 493-4.

20. (1848) 2 Ph. 774; 41 E. R. 1143.

21. See **Manchester Ship Canal Company v. Manchester Racecourse Company**, [1901] 2 Ch. 37, where a right of first refusal was held to be a negative contract.

v. Alley et al,[22] the Supreme Court of Canada held that the doctrine is concerned with user of land, not with alienation.

One other question that may possibly be raised is whether an option might not, in a proper case, be considered as a vendor-purchaser covenant, the benefit of which (though not the burden) runs with the land, for these covenants are not affected by the rule against perpetuities.[23] But in the rare case where such a contention could be made, it is suggested that it could be successfully resisted, if the reasoning in connection with related doctrines may be applied here, on the ground that an option does not "touch and concern the land."[24]

Options Purporting to Create Contractual Obligations and also to Bind the Land

We have seen that the rule against perpetuities applies to options purporting to bind the land but not to options that are enforceable merely as contracts. Now some options are contracts only, and not interests in land, and some options that are interests in land arise under transactions other than contracts, such as, for instance, wills. But most options by far are interests in land that are the creatures of contracts. It remains to be seen, then, whether options that are void as interests in land may not be enforced by means of contractual remedies. In dealing with this problem, the judges have found themselves faced with two separate difficulties. One was that they were accustomed to view the law of land and the law of contracts as logic-tight compartments, a counterpart of the view taken of the law of contract and the law of torts before *Donoghue v. Stevenson*.[25] The second difficulty is that in enforcing a contract that creates an option that is obnoxious to the perpetuity rule, the courts appear to be enforcing indirectly an interest that they have declared void.

Dicta in some earlier cases would lead to the belief that contractual remedies are unavailable to enforce options that amount to interests in land that are void for remoteness. Thus Kay, J., in the *Gomm* case, apparently affected by the first of the difficulties mentioned in the last paragraph, found it necessary to decide that the option in that case was not an interest in land before he would decree specific performance of it.[26] And Warrington, J., in *Woodall v. Clifton*,[27] makes remarks that might lead to a similar conclusion. The matter came up for decision in the case of *Worthing Corporation v. Heather*.[28] In that case an action was brought against the estate of

22. [1951] 1 D.L.R. 321.
23. **Per Brougham, L. C., in Keppell v. Bailey, (1834) 2 My. & K. 517, at p. 578; 39 E. R. 1042, at p. 1046.**
24. **Noble and Wolf v. Alley, [1951] 1 D. L. R. 321 as to restrictive covenants; Woodall v. Clifton, [1905] 2 Ch. 257 as to covenants in leases.**
25. [1932] A. C. 562.
26. **London and South Western Railway Company v. Gomm, (1881-2) 20 Ch. 562 at pp. 575 - 6.**
27. [1905] 2 Ch. 257, at p. 261.
28. [1906] 2 Ch. 532.

an optionor for specific performance of an option providing that at any time during the currency of a thirty year lease, the optionor, her heirs or assigns would, on receiving notice of the plaintiffs' desire to purchase the land subject to the lease, convey the land to them for £1325. The plaintiffs further prayed that if specific performance could not be granted, damages should be given. During the course of the argument, the plaintiffs admitted that since the option created an interest in land that was void for perpetuities, specific performance could not be granted, but they persisted in their demand for damages for breach of contract. The defendants argued that the option was not a mere personal contract but gave an interest in land that was void under the rule against perpetuities. The rule, they contended, was based on public policy and a contract opposed to public policy was illegal. If therefore the court enforced the interest indirectly by awarding damages it would, they averred, be giving effect to an illegal contract. Warrington, J., who heard the case, stated that the *Gomm* case and *Woodall v. Clifton* showed that specific performance could not be given, as was admitted by the plaintiffs, and confined his judgment largely to the action for breach of contract. That action, he believed, could not be defeated on the ground of illegality. It was only the equitable interest in land that was void. This prevented the enforcement of the option by the supplementary remedies evolved by equity to give effect to equitable interests, but there was nothing to compel the court to consider the option merely as creating an equitable interest. In enforcing the contract, a court of law was not doing indirectly what it would not do directly; the defendants were not compelled to convey the land though they might find it advantageous to do so. The judge therefore awarded damages for breach of contract.

The decision to award damages in *Worthing Corporation v. Heather* did not escape criticism,[29] but without going into the technicalities of the problem it may be said that it is one thing for the law to devise rules preventing the tying up of property in perpetuity but it is quite another for it to become a destroyer of bargains. Further, a contract such as that which existed in *Witham v. Vane*,[30] though not creating an interest in land, would certainly inhibit alienation but it was enforced by the House of Lords. Why should the law treat the matter differently on the technical ground that an interest in land is created?

Warrington, J's view, based on an admission of counsel, that specific performance of an option that offended the rule against perpetuities would not be given, even as between the original parties or their representatives, was not questioned for many years. Objection to this view might well have been taken in *Rider v. Ford*,[31] in 1923 but counsel conceded the point. That such a concession should have been

29. See (1907) 51 Sol. J. 648, 669; (1909) 29 C.L.T. 759; Cheshire's Modern Real Property, (1944) 5th Ed., p. 492.

30. (1883) Challis on Real Property, 2nd Ed., App. V, p. 401.

31. [1923] 1 Ch. 541.

made is surprising in the light of the decision in *South East Railway v. Associated Portland Cement Manufacturers Limited*,[32] decided in 1909. That case, it is true, was not concerned with options but the reasoning upon which it proceeded was clearly applicable. The right in question was one to make a tunnel through the plaintiff company's land at a time to be selected by the grantee. This right is capable of being considered as an easement and was so regarded by the trial judge, Swinfen-Eady, J., but his judgment as well as those of the Court of Appeal (Cozens Hardy, M. R., Fletcher Moulton and Farwell, L.JJ.) also proceeded on the basis that the right was a future interest. All the judges were agreed that the rule against perpetuities has nothing to do with an action based on a contract between the original parties, but applied only when the action was based on an interest in land. We may quote here from the judgment of Farwell, J. Having first stated that "It is settled beyond argument that an agreement merely personal not creating an interest in land is not within the rule against perpetuities," he later continued:

> "But the fact that there is some connection with or reference to land does not make a personal contract by A. less a personal contract binding on him, with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, *and a limitation of land only*. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.
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> The real answer to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still the land, then in an action on the covenant the plaintiff may claim specific performance . . . . ."[33]

The application to options of the principles enunciated in the *Portland Cement* case came up for consideration in 1947 in *Hutton v. Watling*.[34] In that case the original optionee brought action against the original optionor to enforce an option that was perpetual in terms. The optionor pleaded, *inter alia*, the rule against perpetuities, and on this occasion there was no admission by the plaintiff that the rule prevented him from obtaining specific performance. The agreement was rather poorly drawn up and it is difficult to say whether the option was intended to be a personal obligation only or to create an interest in land. But Jenkins, J., who heard the case, found it unnecessary to express any opinion on this point. He was bound, he said, by the *Portland Cement* case and held the option specifically enforceable whether or not it created an interest in land. Here, in part, is what he said:

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32. [1910] 1 Ch. 12.
33. Ibid., at pp. 33-4; (italics mine).
34. [1948] Ch. 26.

> "The *Associated Portland Cement Manufacturers* case therefore, appears to me to provide clear authority, which is, of course, binding on me, to the effect that an option to purchase land without limit as regards time is specifically enforceable as a matter of personal contract against the original grantor of the option, and that the rule against perpetuities has no relevance to such a case, as distinct from a case in which such an option is sought to be enforced against some successor in title of the original grantor, not by virtue of any contractual obligation on the part of the successor in title, but by virtue of the equitable interest in land conferred on the grantee by the option agreement."[35]

Then having referred to doubts regarding the principles upon which he was acting in certain well known textbooks,[36] he explained the basis upon which specific performance could be given in such a case in clear terms, as follows:

> "These doubts appear to me to be ill founded, as I understand the jurisdiction to grant specific performance of a contract for the sale of land to be founded not on the equitable interest in the land which the contract is regarded as conferring upon the purchaser, but on the simple ground that damages will not afford an adequate remedy; in other words, specific performance is merely an equitable mode of enforcing a personal obligation with which the rule against perpetuities has nothing to do."[37]

It has now been decided, therefore, that as between the original parties specific performance or damages may be given of an option in a contract that amounts to an interest in land that is obnoxious to the rule against perpetuities, unless it appears that the option was intended to confer an interest in land only. Such an intent, it is suggested, would have to be clearly shown to resist an action on this ground, for most options created by contract are certainly intended to bind the original parties personally. Nor should it be forgotten that third parties may to a considerable extent partake of the benefits of contractual remedies by virtue of assignments, powers of attorney and other devices, not to mention death or bankruptcy. And to a lesser extent too, the burden of an option may fall to be performed by a person other than the original party, as occurred in *Worthing Corporation v. Heather* where damages were awarded against the executor and devisees of the original party.

The advantages of options that are interests in land over options that are contracts are that the right to have them specifically enforced is not so perishable and they are more easily assignable. The advantage of the option as a contract is that it is not limited as to time. The advantage of the contract over the interest may not be unimportant where both parties, or at least the optionor, are corporations, for the

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35. **Ibid.**, at pp. 35 - 6.
36. Williams on Vendors and Purchasers, 4th Ed., p. 424, n. (1); Gray on Perpetuities, 4th Ed., pp. 366-7.
37. [1948] Ch. 26, at p. 36; it is interesting to note that the case was appealed but not on this point: [1948] Ch. 398, at p. 400; for criticisms of the case, see (1948) 12 Conveyancer (N. S.) 258.

optionor may continue in being and be capable of being sued long after the expiration of the perpetuity period. In such a case, it should be possible to have the benefit of an interest in land for as long as the perpetuity period will allow and the benefit of the contractual remedies in perpetuity. This can be done by an agreement giving in one clause an option to the land binding on the parties, their heirs and assigns for the period of a named life or lives in being and twenty-one years, and in another clause, not expressed to be binding on the heirs and assigns, giving a perpetual option to the land not sold under the previous clause. Such an agreement will go a long way towards circumventing the rule, and more can perhaps be done by contracts calling for options that are interests in land to be given from time to time.[38]

Options in Leases

As was said above, there are a number of matters peculiar to options in leases that merit separate consideration. One of these concerns the option for renewal, which is, of course, the option most commonly found in leases. Though, as we have seen, an independent option to obtain a lease is subject to the rule against perpetuities, the option for renewal in a lease has long been treated as an exception to the rule.[39] This is so even when the option is one for perpetual renewal,[40] though the courts will lean against construing such an option as perpetual.[41] And the renewal called for need not be in the same terms as the original lease for the exception to apply,[42] but it must actually be a renewal — the exception will not be extended to closely related cases,[43] though the fact that the language used is not that of a renewal will not prevent an option from falling within the exception if it is truly a renewal.[44] Some attempt has been made to find a reason in principle for the exception by saying that the renewal forms part of the original estate of the tenant but the true reason for the exception appears to be that it was developed long before the perpetuity rule.[45]

In addition to an option for renewal, it is not uncommon, as was mentioned before, for an option to purchase the freehold to be inserted in a lease. Where the lease is for a term of over twenty-one years, the possible conflict of the option with the rule against perpe

38. Such devices would not appear to constitute void restraints on alienation if they do not immediately create interests in land; as early as Coke it was said: "If the feofee be bound in bond, that the feofee or his heiress shall not alien, this is good for he may notwithstanding alien if he will forfeit his bond that he himself hath made." Co Litt. 206b; see, however, T. Cyprian Williams in (1907) 51 Sol. J. 648. 669.

39 **Furnival v. Crew**, (1744) 3 Atk. 83; 26 E.R. 851;**Woodall v. Clifton**, (1905) 2 Ch. 257.

40. **Bridges v. Hitchcock**, (1715) 5 Bro. P. C. 6; 2 E.R. 498.

41. **Baynham v. Guy's Hospital**, (1796) 3 Ves. 295; 30 E.R. 1019.

42. **Rider v. Ford**, [1923] 1 Ch. 541.

43. **Muller v. Trafford**, [1901] 1 Ch. 54.

44. **Rider v. Ford**, [1923] 1 Ch. 541.

45. See **Muller v. Trafford**, [1901] 1 Ch. 54, at p. 61; **Woodall v. Clifton**, [1905] 2 Ch. 251, at pp. 265, 279.

tuities is immediately apparent. Such a situation arose in *Woodall v. Clifton*.[46] There a lease for ninety-nine years contained a proviso that if the lessee, his heirs or assigns should at any time during the term be desirous of purchasing the fee simple of the land or any part thereof at the rate of £500 per acre, the lessor, his heirs or assigns would, on receipt of the purchase money, execute a conveyance of the land in favour of the lessee, his heirs and assigns. The plaintiff, an assignee of the original lessee, claimed the benefit of the option. There were two possible grounds on which he could do this. One was that the option amounted to an interest in land, but the trial judge, Warrington, J., (and apparently the Court of Appeal also—Romer, Vaughan Williams and Stirling, L.JJ.) had no difficulty in rejecting the plaintiff's claim on this ground; following the *Gomm* case he held that the option was obnoxious to the rule against perpetuities and so void. The second ground upon which the plaintiff sought to justify his claim is one that is peculiar to leases; this ground was that the option was a covenant running with the land by virtue of the statute 32 Henry VIII, Cap. 32, and to support this contention cases dealing with options for renewal were cited. To this Warrington, J., said that whether or not the option was a covenant running with the land, the rule against perpetuities applied to it. The Court of Appeal's reason for rejecting the contention was that the option was not a covenant running with the land under the statute,[47] and it treated the rule respecting covenants for renewal, as Warrington, J., had done in the court below, as an anomaly.

The application of the rule against perpetuities to options in leases, where the term alone does not exceed the perpetuity period but the term if continued may, poses somewhat subtle problems. In the first place, if nothing is said in a lease about renewal and a tenant stays on the land after the expiration of the term, a tenancy from year to year, from month to month or from week to week is created which may last forever unless terminated by the parties. This straightforward situation will not cause difficulty so far as perpetuities are concerned because it has been held that an option to purchase is collateral to the relationship of landlord and tenant and will not be incorporated as part of a tenancy from year to year created by the tenant's holding over after the expiration of the original term.[48] The option may, however, be so worded as to operate not only during the term but also during any continuation thereof. A situation of this kind arose in *Auld v. Scales*,[49] decided in 1947 by the Supreme Court of Canada. There the tenancy from year to year arose under an express provision in the lease but this in no way affects the principle upon which the case was decided. The relevant facts for our purposes are as follows. A lease, dated August 1, 1926, by which the lessor leased land to the lessee for a term of ten years "provided . . . that at

46. [1905] 2 Ch. 257; see also Tormey v. The King, [1930] Ex. C.R. 178.
47. In the United States an option to purchase in a lease has been held to run with the land: 35 C.J. 1039; in England and in this country Woodall v. Clifton has generally been approved; see, however, (1911) 31 C. L. T. 367.
48. Re Leeds and Batley Breweries, and Bradbury's Lease, Bradbury v. Grimble, [1920] 2 Ch. 548; Tormey v. The King, [1930] Ex. C.R. 178.
49. [1947] S. C. R. 543.

the expiration of the ten year term . . . this demise and everything herein shall at the option of the . . . lessee continue as a demise . . . from year to year . . . at the same . . . rent . . . and subject to the same terms and conditions." The lease also contained a clause giving the lessee an option to purchase the freehold "at all times during the continuance of the . . . term or the continuation thereof . . ." The Court held that after the expiration of the ten year term the lease was one from year to year which could be terminated at any time by the lessor, and that the rule against perpetuities has no application to such a case. The following passage from the judgment of Kellock, J., (giving the judgment of himself, Chief Justice Rinfret and Taschereau, J.) sets out the reasoning of the court respecting the question of perpetuities:

> "It is next contended that the terms of the lease with respect to the option offend the rule against perpetuities as the option, like all other terms of the lease, 'shall respectively enure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators and assigns, respectively.'
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> . . . . . .
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> "It is said on behalf of the respondent that a tenancy from year to year, unless terminated by notice, is capable of going on indefinitely, and that consequently, as the period of time which was set for the operation of the option here in question was entirely indefinite it is void."

The learned judge then noted Jessel, M. R.'s approval in the *Gomm* case of the definition of a perpetuity given at the beginning of this article, and after quoting that definition with the following words italicized: "and which is not destructible by the persons for the time being entitled to the property subject to the future limitation," he continued:

> "Applying the above to the case at bar, it is clear in my opinion, that the option to purchase does not offend against the rule. 'The person for the time being entitled to the property subject to the future limitation,' namely, the respondent as owner, may destroy the option by terminating the lease by due notice in accordance with the relevant law without 'the concurrence of the individual interested under that limitation,' namely, the appellant or those claiming under him."[50]

Rand and Estey, JJ., gave similar opinions on this point.

Thusfar in our examination of the effect of the perpetuity rule on an option to purchase contained in a lease where the tenancy continues after the expiration of the term, we have focussed our attention mainly on the situation where the tenancy continues by virtue of the tenant's holding over after the expiration of the term. We must now take a closer look at the situation where the tenancy continues by virtue of a covenant for renewal. The option or the renewal clause may, of course, be so worded that the option operates only during the

50. Ibid., at p. 549.

original term.[51] But what of the case where an option that is an interest in land or a renewal clause is so worded that the option is to continue during the renewal or renewals? Authority on the question seems lacking and it raises problems that are both numerous and complex. The following remarks are, therefore, intended rather to indicate some of these problems and a few of the avenues that must be explored in attempting to solve them than to suggest any definite conclusions. Different considerations may possibly apply to the case where the option is expressed to continue during the term and its renewal than to the case where the option is expressed to continue during the term only but the scope of the renewal clause is such that it includes the option. Far more may depend upon the nature of the renewal clause. That clause may come into operation at the option of the lessor or the lessee,[52] or either or both of them; or it may call for automatic renewal of the lease unless one or other of the parties gives a notice of termination. Each of these situations may give rise to different problems, but one of the crucial matters, it is suggested, is whether or not the renewal clause can operate without the concurrence of the lessor. If such concurrence is necessary, a strong argument can be made that the rule against perpetuities is not infringed because the lessor has it within his power to prevent the option from operating for longer than the perpetuity period. The situation is not exactly parallel to that in *Auld v. Scales*. In that case the facts were, and the Supreme Court of Canada based its decision on the ground that the lessor had the power to cancel the lease and thereby revoke the option at any time, whereas here the lessor has but one opportunity to cancel the option — at the expiration of the original term. But it should be noted that in *Auld v. Scales* there was a period during which the option would be operative without the consent of the lessor, namely, the period between the issuance of a notice of termination and the time when it took effect. If, on the other hand, the renewal clause may operate without the concurrence of the lessor and the original term when added to the renewed term or terms together exceed the perpetuity period, it can certainly be argued, in the words of the definition of a perpetuity above given, that this is from the beginning "a future limitation . . . which will not necessarily vest within the period . . ., and which is not destructible by the persons for the time being entitled to the property subject to the limitation, except with the concurrence of the individual interested under the limitation," and is therefore void. But against this, may it not be contended, especially where the option is expressed to run for the term only, that the renewal clause can only be enforced in so far as the option is

51. Some **dicta in Sherwood v. Tucker, [1924] 2 Ch. 440, at pp. 444, 447** seem to suggest that an option to purchase, being collateral to the relationship of landlord and tenant, the renewal would have to clearly indicate its inclusion to make it a clause of the new tenancy; the case dealt with an independent agreement to extend the lease, not a renewal clause.

52. **And in this connection it should be remembered that if the renewal clause does not state at whose option it is exercisable, it is at the option of the lessee: Lewis v. Stephenson, [1898] 67 L. J. (Q.B.) 296.**

concerned (such option being collateral to the relationship of landlord and tenant) as a contract, and that, therefore, the option is a valid interest in land during the term and the renewal clause a mere contractual right to give a new option that is an interest in land at the expiration of the original term?

The answers to questions such as those set forth in the preceding paragraph will, in a proper case, tax the ingenuity of counsel and judges. But the problem facing the solicitor may be not so much to find answers to these questions as to devise means of preventing them from arising. A practical solution to most cases that are likely to arise may be found by providing that the option is to continue during the term of the lease and its renewal unless that exceeds the period of a named life or lives in being and twenty-one years, in which case the option is to continue during the period of that life or lives in being and twenty-one years. Such a limitation cannot be void for exceeding the perpetuity period, yet the lessor will be certain that the option will not be exercisable after the termination of the tenancy. This device will not afford a complete solution if the option is contained in a lease for a very long term or one that is perpetually renewable, but the existence of an option in such a lease seems unlikely to arise in practice. If it ever did, other means to re-enforce the limitation could be found, such as, for instance, a clause creating a contractual obligation upon the lessor to give new options from time to time enuring to the benefit of and binding upon the parties, their heirs and assigns.

Summary

An option to purchase or lease land or a right of pre-emption to land may be simply a contract, in which case the rule against perpetuities has no application to it. On the other hand, an option to purchase or lease land may create an equitable interest in land which vests on the exercise of the option and upon payment of the purchase price therein set out. The right of pre-emption would appear capable of creating a similar interest, though the optionee can only call for a conveyance when the optionor is willing to sell at a given price to a third party. To an interest in land so created, the rule against perpetuities applies, and therefore if the option is capable of being exercised after the expiration of the perpetuity period, it is void *ab initio* as an interest in land. But its invalidity as an interest in land will not interfere with its enforceability by means of contractual remedies if it is, as is usually the case, a contract also. And by a judicious use in an agreement of clauses creating interests in land and clauses creating contractual obligations only, a solicitor can do much to avoid the rigours of the rule.

An option, it appears, will not be construed as a covenant running with the land either at law or in equity, so no evasion of the rule against perpetuities is possible by this means. There is one exception to this. An option in a lease for the renewal of the term runs with

the land and may be exercised, notwithstanding that its operation may be postponed to a remote period, by assignees of the lessee against assignees of the lessor, and this is so even if such option is one for perpetual renewal. This exception will not be extended and does not apply to options to purchase the freehold that are frequently found in leases. In practice, it is usually possible to prevent conflict with the rule by limiting the operation of such options to purchase for the lesser of two alternative periods, one being the term of the lease (and its renewal or renewals if applicable) and the other a period allowed by the rule. Simply because a tenancy may continue as one from year to year after the expiration of a lease will not cause an option to purchase contained in the lease to be void for perpetuities even if the option is intended to continue during such tenancy. More difficult problems will arise when, by virtue of a renewal clause in a lease containing an option to purchase, a new term or terms may be created which with the original term may continue for a period longer than is allowed by the rule. Without hazarding a guess as to what the solution to any of these problems may be, it is submitted that much may depend on whether or not the renewal may be exercised without the concurrence of the lessor.[53]

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53. Since this article was written **Re Albay Realty Limited and Dufferin-Lawrence Developments Limited** has been reported: [1956] 2 D.L.R. 604: [1956] O. W. N. 302. In that case, Gale, J., held in an oral judgment in the Ontario High Court that a right of first refusal, unlimited in time, was invalid as between assignees of the original parties. The decision is undoubtedly correct but the reasons for judgment are rather confusing. For instance, after holding that the right was a personal one, the learned judge continues by saying that in addition it offended the rule against perpetuities. He may, however, have meant that if he was mistaken in holding that the right was a personal one, then it was void as offending the rule. The case gives some support for views expressed in the article relating to vendor-purchaser covenants and the assignability of options that are contracts only.

This article attempts to state the law, not to criticize it; for weighty criticisms and suggestions for reform, see W. Barton Leach, "Perpetuities: Staying the Slaughter of the Innocents" in (1952) 68 L.Q.R. 35 at pp. 53-55 and 59.