

the contract is caused by the fact that the grantor was guilty of some default which rendered the completion impossible (*d*)—unless, as it seems, such default is in respect to one of the merely formal incidents of a transfer of a valuable interest (*e*)—; or where there is a postponement of the execution of the conveyance by the request of the grantor himself (*f*).

The situation of the party to whom the price is to be paid is also recognized as an excuse for the failure to complete a purchase within the time appointed (*g*).

Where the grantor of the option has ascertained the intention

existence of a controversy between the parties will not relieve the grantee of an option from the obligation of saving his rights provisionally by application to a court, *Mills v. Haywood* (C.A. 1877) 6 Ch. D. 198 [dispute arose as to proper form of conveyance of property to lessee with option of purchase, and mortgagee refused to join in the deed]; *Chesteman v. Mann* 9 Hare 206 [specific performance denied where the only ground on which a lessee with option of renewal refused to pay the fine demanded was that it was excessive].

(*d*) *Stathan v. Liverpool Docks Trustees* (1830) 3 Y. & J. 565; [grantor omitted to reduce to certainty, before the expiration of the period limited, the amount which the grantee was to pay]. Where the stipulation as to renewal presupposes the fixing of a valuation rent, the instrument declaring that, if this be made, then the new lease is to be executed; that, if the lease be not executed, the improvements are to be paid for; and that, if they are not paid for the lease is deemed to be renewed, but no provision is made for the contingency of a refusal by the lessor, his heirs, or assigns, to fix the valuation rent—the instrument will be construed as entitling the lessee to a renewal of the term, in case of the lessor's refusal both to fix the rent and to pay for the improvements. *Nudell v. Williams* (1864) 15 C.P. (Ont.) 348.

(*e*) The right of pre-emption given by a testator to his brother, if the purchase-money is paid within a period named, is lost by the non-fulfilment of the condition, although the solicitors of the trustees of the will have failed, upon request, to furnish an abstract of title, *Brook v. Garrod* (1858) 2 De G. & J. 62, 3 K. & J. 62. A lessee whose right of purchase is expressly made contingent on the price being paid during the currency of the term is not excused for his failure to pay it within the time stipulated by the fact that the lessor was unable, owing to his own neglect, to have a conveyance prepared before the expiration of the term, and that he will thus be obliged to pay the whole of the purchase-money before he can ascertain whether it is in the power of the lessor to make a good conveyance. *Weston v. Collins* (1865) 5 N.R. 345.

(*f*) *Ross v. Worsop* (1740) 1 Bro. P.C. 281 [renewal of lease decreed where application was made within period stipulated, and lessor, being about to start on a journey, and wished to defer signing the new lease till he returned].

(*g*) *Joy v. Birch* (1836) 4 Cl. & F. 57 (p. 89). It seems default in payment of purchase-money within the term as stipulated may be excused, where the owner is dead at the time the option is declared, and there is no personal representative to receive the money. *Forbes v. Connolly* (1857) 5 Grant (U.C.) 657. In a Kentucky case it was held that the non-payment of the purchase price for twenty-one days after the end of the period limited was excusable, where the administrator of the owner of the land, after consulting counsel, had concluded that he could not receive the money, and some of the heirs were infants and others non-resident, *Page v. Hughes* (1842) 2 B. Mour. (Ky.) 429. Failure to tender the purchase-money will not work a forfeiture where the vendor is undeniably unable to perform his part by delivering a deed. *Barrett v. McAllister* (1890) 33 W.Va. 738.