

Cases of an option to purchase are not infrequently controlled by the peculiar doctrines of equity which have the effect of converting a transaction which on its face, is an absolute sale, into a mortgage. A detailed discussion of these cases falls outside the scope of the present article, and it will be sufficient to note that, *prima facie*, an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage, merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what, upon a fair construction, is the meaning of the instruments? (c)

II. NECESSITY FOR A CONSIDERATION TO SUPPORT AN OPTION.

3. Option prior to acceptance, not binding on either party, unless supported by a consideration.—A doctrine now firmly established in all countries where the common law is administered is that an option, even though it is by its express terms to remain open for a definite period, will not bind the party giving it, nor, *a fortiori*, the party to whom it is given, unless it is supported by a consideration moving from the latter (d). Either party, therefore, may withdraw

(c) *Alderson v. White* (1858) 2 DeG. & J. 97, 3 Jur. N.S. 1316, per Lord Cranworth. An agreement between a mortgagor and mortgagee by which the latter parts with his equity of redemption with a provision allowing re-purchase on specified terms has been treated as an absolute sale in *Gossip v. Wright* (1863) 9 Jur. N.S. 592, citing *Emsworth v. Griffiths*, 5 Bro. P.C. 184; *Sevier v. Greenway*, 19 Ves. 412. The best general indication of the intention of the parties in cases where there is a sale with power of re-purchase seems to be the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such repurchase; if there is no such power, there is no mortgage. *Dart's V. & P.* p. 926.

(d) In *Cooke v. Oxley* (1790) T.R. 653, the declaration stated a proposal by the defendant to sell to the plaintiff 266 hogsheads of sugar at a specific price, that the plaintiff desired time to agree to, or dissent from, the proposal till four in the afternoon, and that defendant agreed to give the time and promised to sell and deliver, if the plaintiff would agree to purchase and give notice thereof before four o'clock. The court arrested the judgment on the ground that there was no consideration for the defendant's agreement to wait till four o'clock, and that the alleged promise to wait was *nudum factum*. It was recently remarked that all that this decision affirms is "that a party who gives time to another to accept or reject a proposal is not bound to wait till the time expires." *Stevenson v. McLean* (1880) 5 C.P.D. 346, per Lush, J. Mr. Benjamin (Sales, 7th Am. Ed. 52) points out that *Cooke v. Oxley* turned solely on the insufficiency of the plaintiff's allegation, and that, viewed in the light of the subsequent decisions, it would have been sufficient for him to have alleged that, at the time he gave notice of acceptance, no notice of its withdrawal had been communicated to him.