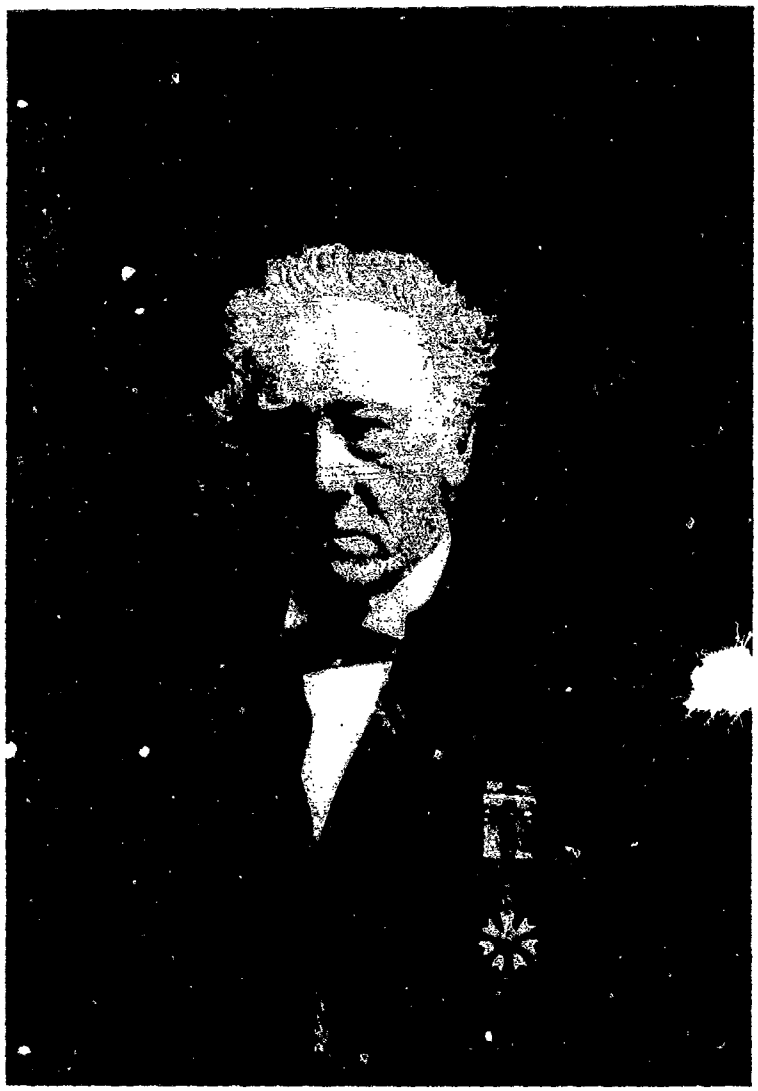

HON. JAMES ROBERT GOWAN, Q.C., C.M.G.,

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HON. JAMES ROBERT GOWAN, Q.C., C.M.G., LL.D., SENATOR.

As the original founder of this journal and its constant friend, as well as for other reasons more apparent to the public, it is appropriate that we should give to our readers the picture of the gentleman whose name is above-mentioned, and refer briefly to his career.

On the occasion of his retirement from the bench in October, 1883, we gave a brief memoir of his life and services up to that time, and we would refer our readers to the journal of that year, pages 301, 339 and 355. Further references to his career will be found in previous volumes of this journal as follows: 1885, p. 65; 1890, pp. 581, 596; 1893, p. 385.

Mr. Gowan was born Dec. 22, 1815, of an old Irish family which has contributed many distinguished men to the service of the Crown in days past. In 1834 he was admitted a student of the law to the Law Society of Upper Canada, and was on the 5th of August, 1839, called to the Bar, practising for a few years in Toronto with the late Hon. James E. Small, Solicitor-General. On Jan. 17, 1843, he was appointed, during the Baldwin-Lafontaine Government, Judge of the then Simcoe District with the unorganized Districts of Muskoka and Parry Sound, and the Islands on lakes Huron and Simcoe opposite thereto, an appointment which proved one of the very best made at the instance of that conscientious and eminent statesman the Hon. Robert Baldwin.

For some forty-two years Mr. Gowan occupied this judicial position to the great advantage of the public, enjoying the esteem and affection of all the members of the profession who practiced before him. No wiser, more worthy, or useful judge, to the extent of his sphere, ever sat on any bench. As appeals from his judgments were almost unknown, and his word law to the people in this district, and as he had the unbounded confidence of the bar it may naturally be supposed that his learning was equal to the other attributes which made the practice of the law in his courts a

pleasure, and which added dignity to and a sense of security in the administration of justice in the courts over which he so long presided. Space fails, however, to refer further to his judicial career, except to say that for many years before and after his retirement from the bench he occupied the position of Chairman of the Board of Judges, and that it was his own wish that prevented, on two occasions, judicial promotion, first to the Court of Common Pleas, and subsequently to the Court of Queen's Bench of this province, during the administration of the Right Hon. Sir John A. Macdonald.

Most of the best work done by Mr. Gowan during his long and useful life was not known to the public until many years elapsed, and much of it has as yet never been made known, though it has proved and will prove a lasting benefit to the country. For example, none but those connected with it knew that for many years this journal in the early years of its existence, was indebted to his learning and industry for articles which were of great service to the profession, to the magistracy and to the officers of the local courts of this province. Few likewise know the extent to which he was the author or framer of some of the most important enactments on our statute book, or that his ripe experience and wise counsel were often sought by others, some high in authority, in important matters of doubt and difficulty. It is however within public knowledge that he was largely engaged in the various revisions and consolidations of the statute law of this province; the statutes of Upper Canada to 23 Vict., the statutes of Canada up to 1859, and the Ontario consolidation of 1877; that he was associated at various times between 1852 and 1871 with judges of the Superior Courts in the framing of rules of procedure, and in the enquiry into various matters affecting the better administration of justice, etc., and that he sat on very important commissions, notably being one of three judges who, in 1873, were appointed by the Crown to investigate certain charges made in Parliament against Cabinet Ministers in connection with the Canadian Pacific Railway contract. We cannot, however, further refer to these matters in detail.

In 1885 the retired judge received Her Majesty's summons to the Senate of Canada, taking his seat in the Upper House on February 3rd of that year, and he then received congratulatory addresses and communications as well from the bar and other public bodies in his county as from various distinguished men

both in Great Britain and Canada, who valued the new senator as a warm personal friend, or who respected him for his many public services. In 1887 he was appointed chairman of the Committee upon Standing Orders and Private Bills, and the next year brought before the House the necessity of some amendment of the law of divorce, resulting in changes, and the adoption of a new procedure, which, under his wise supervision have proved most beneficial and now governs. Here we may interject the observation that it would be well for the country if those in power, to whatever party they may belong, were more able to free themselves from the trammels of party politics and give to the country in the Senate of Canada the services of men of independent views, not hampered or prejudiced by the bias of political partisanship. It is of such men that the Upper House should be largely composed, and the presence of Mr. Gowan in that body is a testimony to the propriety and benefit of such a course.

For thirteen sessions successively he was chairman of the Divorce tribunal in the Senate—thus, with previous service on the bench, making the unique record of fifty-five years of judicial work.

In 1870 Mr. Gowan was admitted to King's Inn and called to the bar of Ireland. In 1893, as a tribute to his public services, he received the distinction of being made a companion of "The Most Distinguished Order of St. Michael and St. George."

Though the greater part of his life was given to the law, and his later years to the service of the public in the Senate of Canada, there were other matters in which he took a hearty interest. In this connection we may quote from an article which appeared in the Toronto Globe on the occasion of his last birthday :—

"The senator's career promises to be as extended as it has been useful. The date on which Senator Gowan was appointed a judge, brings us back to the period when Ontario was in the formative state. From 1843 to 1883 is a notable stretch of time for the exercise of judicial functions, and the changes which Judge Gowan saw and helped to bring about were radical and far reaching. In the young communities of those days, it was imperative that the educated and public-spirited should spare time for the duties of citizenship outside of their special calling. Judge Gowan accordingly, besides his special services as judge, as a codifier of the laws, and as a member of judicial commissions, acted on

educational boards of various kinds, and indeed bore more than his share in the life of the growing municipalities. Full of years and honours is a trite phrase, but it applies so happily to Senator Gowan that none better could be coined to fit the case."

Yes! it is quite true the subject of this sketch as a pioneer judge within the sphere of his influence "set the pace" in all that made for moral and material progress. It is well for any country if its citizens work well and faithfully for their own day and generation; it is better still when their work is not limited to that, but looks forward to future needs—needs which perhaps are only recognized by those who, with a sort of prophetic instinct, well and truly lay foundations for men of a future day and generation to build upon. Such was the character of much of the effort put forth by the one of whom we speak, whose life has truly been a series of public services and patriotic efforts.

One of his last acts was in connection with the volunteer force of Canada with which he was connected in his student days. In remembrance of this, and with that loyal devotion to his Queen and country, which has always distinguished him, and seeing with others the necessity for a thorough training of our citizen soldiers for service in the field, he recently presented for competition amongst the regiments of his own province a beautiful silver challenge cup of great value, designed by himself, as a prize for superior efficiency in those matters which should distinguish the soldier of to-day.

Few men of greater individuality, keen far-sightedness and breadth of interest in all public matters have occupied prominent positions in this country; whilst those who have enjoyed his friendship in private and family life know from happy experience his kindly disposition, his warm and untiring friendship and his generosity of heart. The writer here ventures to quote from a letter recently received from Lord Dufferin and Ava, wherein he thus speaks of him:—"Thank you for what you tell me of my dear old friend Judge Gowan. I have the greatest respect and affection for him. A more conscientious, honourable and high minded man does not exist."

Though he has arrived at an advanced age his intellectual powers are as clear as ever. May he long be spared to be useful to his country, and to enjoy the good wishes of those who are privileged to know him.

We notice that a book is now in the press on Company Law in Canada by Mr. Masten of the Ontario Bar, which is to contain the various Dominion and Provincial statutes governing companies, with references to the corresponding provisions in the Imperial acts; Notes of the Canadian and some of the leading English and American decisions on the more important branches of company law, with a number of practical forms. We have received some of the advance sheets from the publishers, the Canada Law Book Company, and the appearance of them augurs well for the usefulness of the work.

We have much pleasure in acceding to the request of the Secretary of the American Bar Association to refer to the resolution adopted at their annual meeting on August 29, as to the late Lord Russell. It speaks of his brilliant career and the high office which he so worthily filled, and recalls "the noble address which he delivered to this Association in August, 1896," and expresses the sympathy of the members of the Association with the Bench and Bar of England in so great a loss to the profession. Another minute of the same Association adopted at the same meeting refers to the banquet given in London in the ancient Hall of the Middle Temple by the Bench and Bar of England to their brethren of the Bench and Bar of the United States, and places upon record the Association's hearty acknowledgment of this fraternal act and a cordial reciprocation of the sentiment which prompted it.

A LAW REFORMER.

The Police Magistrate of the City of Toronto has recently from his seat on the Bench delivered himself of some very remarkable utterances. It is not a pleasant duty to criticise adversely one who holds a judicial position, especially when he is an esteemed friend and a worthy and useful citizen; but, as he deals with the legal profession in a manner which we conceive to be wholly unfair, a duty seems to be cast upon us to take up the gauntlet.

It appears that a client of a solicitor made a charge against the latter of theft, on the ground that he had retained for costs a large portion of a sum of money which she said he had received on her account. It is surprising how such a matter could ever have come before a criminal tribunal, and this in itself would seem to be an abuse of the process of the Court; but however that may be, the

County Attorney, when the charge came before the Police Magistrate, explained to the Court that as the money had evidently been retained by the solicitor for legal charges, which were claimed to be due to him, there was no case to come before his Worship, and the charge was at once withdrawn. The Police Magistrate, thereupon—there being no case before him, and without any evidence except the ipse dixit of the complainant—proceeded in effect to accuse the solicitor of misappropriating money belonging to his client, and further, to make wholesale charges of wrong-doing against the profession as a class, winding up with some suggestions, as crude as they were comical, as to how legal business should be conducted. Were these observations made at an after-dinner speech they would have been received "with roars of laughter" (the Colonel is fond of a joke and tells a good story) and might be ignored; or, if they had been known only to a gaping crowd at a Police Court they would do little harm; but being uttered from the Bench by a person holding a judicial position, they cannot be passed over, more especially so as they have been circulated broadcast through the Press, so that many will be led to believe that the profession here is the degraded thing he charges it with being.

There is a personal feature of the case which may first be disposed of, and which, strangely enough, never seems to have occurred to the worthy Colonel, who, after all, apart from an occasional eccentricity, is an excellent Magistrate. He speaks of the "enormous charges" which lawyers make against their clients, but adds, by way of contrast, that in *his* Court "they try to get along without making any charges for costs if they can help it, and then the costs are very small." As a matter of fact, the costs of the Police Court are enormously greater in proportion than in any civil court; but let that pass. Now, the Police Magistrate, being of course a professional man, we are glad to see him well paid, but as he is so strongly of the opinion that there should be a reduction in lawyers' fees, it would be reasonable that he should begin by suggesting a large reduction in his own salary. For his services he is paid the sum of $4000 per annum, which, in proportion to the amount of time spent is vastly greater than the fees received by any Minister of the Crown, Chief Justice, or other official in the Dominion. It may also be noted that some time ago the City authorities were persuaded to give him an assistant, who does half the work that devolved upon him, and who receives $750 per annum. The gallant Colonel

does not pretend to know much law, but he knows something else of more value.

Having taken for granted, without any evidence that the statement of the complainant in the case before him was correct, he dilates upon the monstrous iniquity of people being deprived of their money by these rascally lawyers: "Now-a-days it is next to impossible to get anything out of a suit in Court after the lawyers have finished with it. Hundreds and thousands of cases have arisen within the past few years in which there has been little or nothing left for clients when the charges for lawyers' services have been paid. The fees collected are outrageous." It would be difficult to work into any three sentences a larger collection of reckless statements and false charges. What a wide knowledge comes from the sing-song of Police Court practice: "A dollar and costs or thirty days—Next case!" These acts of villainy, moreover, are in the thousands. "Oh, mother, I saw more than a thousand cats in our back yard last night." "Nonsense, my child." "Well, I saw a hundred." "Don't exaggerate." "Well, I am sure there were ten; at least, I know there was the black cat from next door." Upon cross-examination might not the thousands of cases suffer a similar reduction.

As to the subject matter of the charges made, let it be distinctly understood that, as stated, they are utterly unfounded, and made against a body of men who are as honest and honorable as any class in the community; that legal charges in this Province are not enormous, but, as compared with other countries, very moderate, and this the Police Magistrate, a lawyer himself, ought to know. At least he could easily inform himself on the subject, and should have done so before making these charges. Also, let it be understood that such charges are not the deliberate and thoughtful utterances of a judge competent to give an opinion, but of one who is not familiar with the matters which he so airily discusses, and his work, which is only to deal with ordinary Police Court cases does not help him to speak with any authority on the subject.

Were he discussing Imperial federation or military matters his remarks would doubtless be both instructive and interesting, but as to legal matters—why, the boast of the learned Police Magistrate is that he does not know or care anything about law—that he is a law unto himself.

We might add that, as the tariff of fees was prepared with great care by a Board of Supreme Court Judges, who are competent from their knowledge to deal with such matters, and who are his superior officers, it is not (to say the least) in good taste to criticise their action or judgment as he has done on this and on other occasions.

The learned Magistrate, after the obiter dicta above referred to proceeds to give his views as to how the legal business of the country should be conducted:—"Why cannot civil business be done as cheaply as criminal business. I would do away with the profession altogether. All the business now transacted by lawyers could be done just as well by the State." Surely this must have been said in joke. Comment is impossible, except to remind the speaker that no man is compelled to employ a lawyer. Any litigant has the right to appear in person, and if he does he is always treated by judges with the utmost courtesy. He then takes the judges to task: "In one Court two judges will take one side and one will take another." This is undoubtedly as sad as it is true, but it is likely to continue to the end of time, unless indeed this wonderful reformer can invent some process by which all men's minds can be run into the same mould. He is also correct in saying that "In the Court of Appeal the judgment will perhaps be adverse, and three judges will support the opinion of the minority number of the Court below, while two will agree with the first judgment. Then it goes to the Supreme Court," etc. All this may also be admitted, but how to prevent it is the problem. It is evident that the engrossing duties of the Police Magistrate have prevented his having heard that the best men at the Bar and the most enlightened patriots of the country have for half a century been and are giving their best thought towards ascertaining the best and cheapest system of legal procedure and administration of justice. Obviously, the thought in his mind is that the only way to get over the difficulties that vex his soul is to transfer all the litigation of the Province to the Toronto Police Court, where prompt justice will be administered at a "very small" cost and without the intervention of such unnecessary and objectionable characters as lawyers. Who is to do the rest of the work, now done by a thousand lawyers or so, he does not say. We fear, however, that under such circumstances the presiding Judge would not be able, as he does now, to leave his office after an hour or two's work and devote the rest of the day to his own private affairs.

THE LAW OF OPTIONS.

I. INTRODUCTORY.

II. NECESSITY FOR A CONSIDERATION TO SUPPORT AN OPTION.

III. COMPLETION, REVOCATION AND ABANDONMENT OF RIGHTS ARISING OUT OF OPTIONS.

IV. VALIDITY OF OPTIONS.

V. RESPECTIVE INTERESTS OF THE PARTIES IN THE SUBJECT MATTER AFTER THE OPTION IS GRANTED.

VI. DURATION OF THE PRIVILEGE CONFERRED BY THE OPTION.

24. When the right to exercise the option first accrues.
25. When the right expires.
26. Death of party making the offer, effect of.
27. Right of grantor of option to abridge the period for its exercise.

VII. WHAT PERSONS BESIDES THE IMMEDIATE GRANTEES ARE ENTITLED TO CLAIM THE BENEFIT OF OPTIONS.

28. Rights of a partner in an option.
29. Parties specially designated in instruments.
30. Heirs of grantees of options.
31. Administrators.
32. Assignees.

VIII. TO WHAT EXTENT THIRD PERSONS ARE BOUND BY THE EXISTENCE OF THE OPTION.

33. Parties acquiring the subject-matter of the option by testamentary provisions.
34. Subsequent purchases.
35. Creditors of the party giving the option.
36. Wife of party granting the option.

IX. NECESSITY FOR THE PERFORMANCE OF THE PRESCRIBED CONDITIONS BY THE GRANTEE OF THE OPTION.

37. Strict performance of conditions usually a pre-requisite to securing the benefits of an option.
38. Conditions considered without reference to the time fixed for performance.
39. Time usually of the essence of optional contracts.
40. Option lost if not accepted within period limited.
41. Acceptance must be within reasonable time where none is particularized.
42. Payment of purchase price or other sums stipulated at the specified time.
43. Delay in completing the contract after acceptance, consequence of.
44. When non-performance of conditions is excused.
45. Waiver of performance by grantor.

XI. ENFORCEMENT OF OPTIONS BY THE COURTS.

46. Mutuality.
47. Certainty of the terms.
48. Right of grantee of option to a good title.

I. INTRODUCTORY.

1. Scope of article.—What is commonly known among business men as an "option" may be defined as "a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a time certain" (*a*). It is obvious, however, that, from a juristic standpoint, the characteristic feature of this class of contracts is the acquisition by one party of a privilege of demanding from another party at a future time the surrender of a something valuable; and, as this element exists in other transactions besides those which involve an entire divestiture of ownership, no dissertation of the scope suggested by the title of the present article would be complete, if it did not refer to all the cases dealing with every class of contract which contemplates a subsequent transfer of any valuable interest in real or personal property, irrespective of the question whether such transfer was temporary or permanent, absolute or qualified. In the following pages, therefore, it is proposed to collect all the decisions which relate to rights of future acquisition, so far as those rights are contingent upon, and become perfected by, the expression by one or more of the parties concerned of his or their desire for a transfer of the subject matter of the given transaction or negotiation. Such rights of this description as are created by special statutory powers of purchase conferred upon public or quasi-public corporations, stand upon a peculiar footing, and will not be noticed, except in so far as the decisions on this head may be useful by way of

(*a*) *Ide* v. *Leiser* (1890) 10 Mont. 5, 24 Am. St. Rep. 17.

analogy (*b*). Nor is it intended to discuss the circumstances under which optional contracts may be invalid, as infringing the laws against gambling.

2. Options distinguished from complete contracts.—The question sometimes arises whether a transaction amounts to a sale in presenti, or whether the transfer contemplated is dependent upon some future expression of his wishes by the proposed vendee. This must be determined by the words employed by the owner of the property.

It may also be a matter for controversy whether a person dealing with property on which there was an option had the right to dispose of it for his own personal benefit, or was merely acting as the agent of the owner of the property with the advantages and disadvantages of that position. The rulings referred to in the subjoined note will show the view some American courts have taken of the points arising under this head.

(*b*) See, generally Darts' V. & P. pp. 242, et seq.

(*c*) An instrument, although worded as an agreement to sell, will be construed merely as an offer to sell, where a postscript is appended stating that "this offer" is to be "left over" till a date fixed. *Dickinson* v. *Dodds* (C.A. 1876) 2 Ch.D. 463. By a telegram asking if the addressee will sell the senders specified real estate, and adding the words: "Telegraph lowest price," a reply merely stating the lowest price, and an answer thereto, agreeing to buy the property at the price named, no contract of sale is constituted, since there is no offer to sell, but a mere statement of the lowest price. *Harvey* v. *Facey* (H.L.E.) [1893] A.C. 552. A paper in which the owner of land recites that another party is to have, for a specified period, the "refusal" of the land, is a mere offer, not an agreement to sell. *Potts* v. *Whitehead* (1869) 20 N.J. Eq. 55. A memorandum to the effect that A "agrees to sell a certain farm to B for a price payable on a certain date does not imply a mere offer to sell, but a completed contract. *Ives* v. *Hazard* (1855) 5 R.I. 25, 67 Am. Dec. 500. An absolute contract of sale, and not a mere option, is evidenced by an instrument reciting that the first party has "this day sold" the subject matter, although the purchase price is not to be paid, nor the deed made till a later date. *Monongah &c. Co.* v. *Fleming*, 42 W. Va. 538; or although the terms of sale are to be complied with in a certain time, or "deposit hereby made will be forfeited." *Haselton* v. *LeDuc*, 10 App. D.C. 379.

(*d*) Where the language of a memorandum given to a real estate agent leaves it doubtful whether the option was to buy as well as to sell, a court will not infer that the agent is entitled to become the purchaser. *Colbert* v. *Shepherd* (1892) 89 Va. 401. A contract giving a person "the exclusive sale of my land for sixty days for $6000, and also providing that he "must get his commission above that," does not confer upon that person an option to purchase the property, but simply makes him the exclusive agent of the landowner for the sale of the property. *Chesum* v. *Kreighbaum* (1892) 4 Wash. 680. The insertion of an agent's name in the instrument granting the option, merely for the purpose of facilitating the sale, and not with any idea of purchasing, does not estop him from claiming his commission as agent. *Russell* v. *Audral* (1891) 79 Wis. 108. Oral evidence to show that the plaintiff was an agent for the sale of land is not objectionable on the ground that it tends to vary a prior written contract by which he had an option to purchase the same land. Such evidence merely has the effect of establishing a distinct contract. *Riemer* v. *Rice* (1894) 88 Wis. 16.

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 he 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.

from the negotiations at any time prior to the time when the one to whom the offer is made accepts it (*e*), for it is only after such acceptance that an agreement mutually obligatory is deemed to exist. See sec. 8 post. The principle is that, "till both parties are agreed, either has a right to be off" (*f*). The mere fact that the subject-matter to which the undertaking relates is one of those which is within the provisions of the Statute of Frauds, and that the offer is duly reduced to writing will not affect the operation of this principle (*g*).

The same principles are applicable where, without any new consideration, the time for an option which was itself granted upon a consideration is extended. Such an undertaking is not obligatory, as the consideration for the first option will not do service for the second (*h*).

4. Discussion of this rule.—The rule established by the cases just referred to in the preceding section is different from that of the Civil Law, which treats as binding a promise to keep a proposal open for a definite time (*i*). It seems impossible to deny that this is one of the numerous instances in which that system is more consonant than our own to natural justice as well as to common sense. To the criticism of those jurists who take the ground that it is inconsistent with the plain principles of equity, that a person who has been induced to rely on such an engagement should have no remedy in case of disappointment (*j*), the only answer available is

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(*e*) *Routledge* v. *Grant* (1828) 4 Bing. 653. See also *Bristol &c. Co.* v. *Maggs* (1890) 44 Ch. 616; *Martin* v. *Mitchell* (1820) 2 J. & W. 413, 428; *Thornbury* v. *Bevil* (1842) 1 Y. & C.C.C. 554; *Head* v. *Diggon* (1828) 3 Man. & Ry. 97; *Butler* v. *Thomson* (1875) 92 U.S. 412; *Eliason* v. *Henshaw*, 4 Wheat. (U.S.) 228; *Carr* v. *Duval* (1840) 14 Pet. (U.S.) 77; *Boston &c. R. Co.* v. *Bartlett* (1849) 3 Cush. 224; *Houghwout* v. *Boisaubin* (1867) 18 N.J. Eq. 315; *Souffrain* v. *McDonald* (1860) 27 Ind. 269; *Eskridge* v. *Glover* (1834) 26 Am. Dec. 344, 5 Stew. & Port. (Ab.) 264; *Faulkner* v. *Hebard* (1854) 26 Vt. 452; *Weaver* v. *Burr* (1888) 31 W. Va. 736; *Dyer* v. *Duffy* (1894) 39 W. Va. 148, 24 L.R.A. 339; *Gordon* v. *Darnell* (1880) 5 Colo. 302; *Connor* v. *Renneker* (1886) 25 S.C. 514; *Larmon* v. *Jordan* (1870) 56 Ill. 204; *House* v. *Jackson* (1893) 24 Or. 89; *Crandall* v. *Willy* (1897) 166 Ill. 233; *Guston* v. *Union School Dist.* (1893) 34 Am. St. Rep. 361, 94 Mich. 502; *Warren* v. *Costello* (1891) 109 Mo. 33.

(*f*) *Routledge* v. *Grant* (1828) 4 Bing. 653.

(*g*) *Borst* v. *Simpson* (1889) 90 Ala. 373; *Burnet* v. *Bisco* (1809) 4 Johns (N.Y.) 235.

(*h*) *Ide* v. *Leisen* (1890) 24 Am. St. Rep. 17, 10 Mont. 5; *Coleman* v. *Applegarth* (1887) 6 Am. St. Rep. 417, 68 Md. 1.

(*i*) See Pollock Contr. p. 2.

(*j*) See *Boston &c. R. Co.* v. *Bartlett* (1849) 3 Cush. 224.

the very unsatisfactory one that, the rule being what it is, and presumably known to everyone who is considering an offer, his reliance upon the promise is of the qualified character which would naturally be induced by his realization of the fact that he has no remedy if the other party chooses to withdraw from the offer. But this circumstance is quite irrelevant as a factor in any discussion of the abstract merits or demerits of the rule itself. In the present instance, moreover, the presumption of the knowledge of the law is perhaps less than ordinarily justifiable, for a goodly proportion of the cases which come before the courts show that it is extremely difficult to instil into mankind the requisite appreciation of the fact that a promise is not legally binding, unless the promisor has given a tangible proof of his sincerity by accepting something of value from the promisee.

Nor are the above objections the only ones which may be made to the present rule. It may, we think, be fairly argued that the rule is not, as has been assumed, a necessary corollary of the common-law doctrine as to consideration. That doctrine would still have been preserved intact, if the courts, recognizing that, in the usual course of business affairs, persons receiving offers which are expressed to stand good for a definite period intend to, and actually do, expend a greater or less amount of time, trouble, and even money, in gathering information which will enable them to form a proper judgment upon the question whether the offers are worth accepting, had seen their way to treating the situation which exists when such an offer is made as one which essentially implies the giving of mutual promises by the parties, viz., an undertaking by the grantor of the option to surrender something valuable, if called upon within the period limited, and an undertaking by the grantee to make such investigation as may be reasonably necessary to ascertain, before that time expires, whether it is worth his while to demand the transfer contemplated by the option (*k*). The hypothesis of such mutual promises, which would of course suffice as a legal consideration, would not only not be a strained one under the circumstances, but would evidently have a much more solid basis of fact and practical experience to support it than many of the suppositions from which implied obligations are deduced in our jurisprudence. Upon general principles, of course, a failure of the consideration inferred from this prima facie presumption of real exertion and sacrifice of time and money by the grantee of the option would be open to rebuttal by appropriate testimony,

(*k*) The outrageously unfair results to which the present rule sometimes leads are strikingly exemplified in the refusal of an American court to recognize as mutual and binding a contract signed by the owners of land only, by which it is agreed that they will take a specified price for their mineral interest, and upon receipt of such price make title to the party of the second part, and that such party will make such tests as are satisfactory to himself, and do other things towards the perfection of the said sale as may be necessary on his part, and will not demand any rights outside of necessary tests, until the payment of the price. *Peacock* v. *Deweese* (1884) 73 Ga. 570 [injunction to restrain sale by owners to third party, refused].

and the analogies of the law of evidence indicate that, as a matter of procedure, such grantee should have the burden of proving that the presumption was justified by what was actually done by him in reliance on the promise of the grantor.

If due account had thus been taken of the normal acts and intentions of a person taking options, the resulting rule, while not trenching in any real sense upon the present doctrine of consideration, would have brought the common law into closer conformity with natural justice, and, if fenced about by the securities suggested, would have furnished an amply sufficient protection to the owner of the subject-matter of the offer. The rule now administered, ascribing, as it does, a controlling importance to the immediate transfer of a consideration often so small as to be quite nominal and merely formal, and wholly ignoring the course of action which is followed in a large majority of instances by grantees of options—at all events where the transaction is a part of a legitimate business transaction, and not purely speculative—deserves to be classed with that singular anomaly of the doctrine of accord and satisfaction which provoked the pungent remark of Sir George Jessel as to the extraordinary value which the common law attributes to a canary bird when it happens to be accepted in partial discharge of a debtor's liability.

5. Initial consideration not necessary, where subsequent acts are done in reliance upon the offer.—The hardships which the existing doctrine sometimes entails are to some extent mitigated by the operation of the doctrine that if the person to whom the promise is made should incur any loss, expense, or liability in consequence of the promise, and relying upon it, the promise thereupon becomes obligatory (*l*). An important limitation to this rule in the case of options upon land is that the party seeking to enforce the conveyance cannot receive any advantage from acts done on the land after the offer is made, unless they are such as are authorized by the offer (*m*). Nor can the rule be made to cover the acts of the party holding the option which are merely done for the purpose of ascertaining whether the property is worth acquiring (*n*).

(*l*) *Morse* v. *Bellows* (1835) 7 N.H. 549, 28 Am. Dec. 372; *Gordon* v. *Darnell* (1880) 5 Colo. 302 [entry followed by improvements]; *Perkins* v. *Hasdell* (1869) 50 Ill. 216 [taxes paid and improvements made]; *Wall* v. *Minneapolis &c. R. Co.* (1893) 86 Wis. 48 [entry within time limited, and improvements made]; *Byers* v. *Denver &c. R. Co.* (1889) 13 Colo. 552 [railway constructed].

(*m*) *Sutherland* v. *Parkins* (1874) 75 Ill. 338 [lessee in possession began to make fences].

(*n*) See *Peacock* v. *Deweese* cited in note to sec. ante. For another exception to the rule, see *Bostwick* v. *Hess*, referred to in sec. 22 (b) post.

6. Option on consideration binds grantor, but not grantee.—It is equally well settled, that one who, for a consideration which the law recognizes as sufficient to support a promise (*n*), agrees that another party shall have the privilege of deciding at some future time whether he will avail himself of an offer, is precluded from revoking the offer, until the specified period has expired (*o*), except in so far as he may have reserved the liberty of dealing with the subject-matter so as to defeat the inchoate rights conferred by the offer (*p*). For the purposes of this rule it is enough if the option granted was accessory to another contract in such a manner that the consideration of the latter may be regarded as supporting the option. The most common illustration of this situation is supplied by the cases which treat the rent reserved in a lease as the consideration which supports any option which may be granted to the lessee in respect to the purchase of the premises or a renewal of the lease (*q*). Other illustrations of the same situation are furnished by those cases in which a person contracts for the supply of an article for a definite time with an option of having the supply

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(*n*) Such as the note of the grantee of the option *Cherry* v. *Smith* (1842) 3 Humph. 19, 39 Am. Dec. 150; outlay of money and labour on the property, *Clarno* v. *Grayson*, 30 Or. 111, waiver of security required to be given by a purchaser at a judicial sale, *Bradford* v. *Foster* (1888) 87 Tenn. 4; a promise to transfer stock, *Faulkner* v. *Hebard* (1854) 26 Vt. 452.

(*o*) *Warren* v. *Costello* (1891) 109 Mo. 33; *Linn* v. *McLean* (1885) 80 Ala. 360; *Ross* v. *Parks* (1890) 93 Ala. 153, 30 Am. St. Rep. 47, 11 L.R.A. 148; *Hanna* v. *Ingram* (1890) 93 Ala. 482; *Guyler* v. *Warren* (1898) 175 Ill. 328; *Bradford* v. *Foster* (1888) 87 Tenn. 4, overruling *Gillespie* v. *Edmundson*, 11 Humph. (Tenn.) 553. "A man may as well bind himself to make a contract as bind himself by a contract," *De Rutte* v. *Muldron* (1860) 16 Cal. 505. "The owner parts with his right to sell his lands (except to the second party to the contract) for a limited period. The second party receives this right, or rather from his point of view, he receives the right to elect to buy," *Ide* v. *Leiser* (1890) 10 Mont. 5, 24 Am. St. Rep. 17.

(*p*) An option in a lease is not absolute for the period specified, where there is a proviso that, if the lessor should receive an offer, the lessee should be given notice, and then have the privilege of purchasing within a time limited. *Harding* v. *Gibbs* (1888) 8 Am. St. Rep. 345, 125 Ill. 85, where it was also held to be immaterial whether notice was given by the lessor or the person making the second offer.

(*q*) *Gustin* v. *Union &c. Dist.* (1893) 34 Am. St. Rep. 361, 94 Mich. 502; *Haveralty* v. *Warren* (1866) 18 N.J. Eq. 124, 90 Am. Dec. 613; *Re Jane Hunter* (1831) 1 Edw. Ch. (N.Y.) 1; *House* v. *Jackson* (1893) 24 Or. 89; *Schroeder* v. *Gemender* (1875) 10 Nev. 355; *Souffrain* v. *McDonald* (1866) 27 Ind. 269; *Hayes* v. *O'Brien* (1894) 149 Ill. 403; *Marske* v. *Willard* (1896) 68 Ill. App. 83, 169 Ill. 276; *De Rutte* v. *Muldron* (1860) 16 Cal. 505; *Hall* v. *Center* (1870) 40 Cal. 63. Improvements made upon property under a prior lease are sufficient consideration to support an option contained in a renewal lease for the purchase of the property, *House* v. *Jackson* (1893) 24 Or. 89.

continued for an additional period. The contract is then treated as an entire one, part of the consideration of which is the option to take the goods for the extended term (*r*).

Of course if an option, whether given by a lease or as part of any other kind of transaction, is evidenced by a covenant it comes within the principle that a contract under seal stands on the same footing as one supported by an actual consideration (*s*). It should be noted, however, that, as equity will always inquire into the consideration of a contract, regardless of its form, a seal will not supply the place of a real consideration in a suit for specific performance if it is proved that none actually passed (*t*).

The grantee of an option, on the other hand, is not in any way bound by merely expressing his willingness to consider an offer (*u*). It is obvious, indeed, that any other theory of the situation would be wholly inconsistent with the essential import of these transactions, which is simply that a certain amount is given for the privilege of considering whether it will be worth while to acquire some valuable interest within the period specified.

7. Acceptance of offer, whether supported by a consideration or not, creates a contract binding both parties.—The acceptance of the offer within the period specified by the party making it has the

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(*r*) *Christian &c. Co.* v. *Brenville &c. Co.* (1894) 106 Ala. 124.

(*s*) *Faulkner* v. *Hebard* (1854) 26 Vt. 452; *Willard* v. *Tayloe* (1869) 8 Wall. 557; *O'Brien* v. *Boland* (1896) 166 Mass. 481; *Mansfield* v. *Hodgdon* (1888) 147 Mass. 304. See also the English cases, hereafter cited, as to options of purchase granted in leases which, although not deciding this point in express terms, obviously assume the correctness of the doctrine in the text.

(*t*) *Crandall* v. *Willig* (1897) 166 Ill. 233.

(*u*) *Coleman* v. *Applegarth* (1887) 6 Am. St. Rep. 417, 68 Md. 1; *Harding* v. *Gibbs* (1888) 125 Ill. 85, 8 Am. St. Rep. 345. A lease allowing the lessee an option to purchase before a certain date, the rent to form part of the price, and providing that, if he should determine not to purchase and notify the lessor thereof, the payment of the rent should be postponed to a specified day, does not become a binding contract of sale for the reason that the lessee fails to give notice of his intention not to purchase. *McCalmont* v. *Mulhall* (1858) 4 All. (N.B.) 200. Where one has the beneficial use of the property of another, and agrees to pay instalments which are described as rent or hire instalments, and which he is entitled to treat as payments for hire only, an obligation to purchase will not be predicated for the reason that it is also stipulated that by continuing to make the payments for a certain time he shall acquire the property. This stipulation still leaves him the power, at any moment, and at his own will, by returning the property to the owner, to put an end to any obligation to pay any further instalments. *Helby* v *Mathews* (H.L.E.) 1895 A.C. 47. The special question in this case was whether the hirer was a person who had "agreed to buy goods" within the meaning of the Factors Act of 1889, sec. 9, so as to prevent the bailor from recovering the chattel from a pawnbroker to whom it had been pledged after a few payments had been made.

effect of substituting a bilateral contract for the option, and from that moment both parties are bound, irrespective of the question whether the option was supported by a consideration or not (*v*). The exercise of an option is not merely the initiation of a new contract which, like a proposition, requires acceptance to complete it (*w*).

A similar rule holds in the case of an extension of an option without consideration, which, though not at first a binding contract, becomes such if it is accepted before retractation (*x*).

III. COMPLETION, REVOCATION AND ABANDONMENT OF RIGHTS ARISING OUT OF OPTIONS.

8. Acceptance generally.—A general discussion of the principle upon which it is determined whether the acceptance of an offer is complete in such a sense that a binding contract is constituted, would be out of place in this article. As a whole, these principles are the same in the case of offers which, like options, are essentially of a continuing character, as in the case of offers which are supposed to be accepted or rejected at once or within the briefest period that the course of business admits. It will be useful, however, to advert

(*v*) *Lord Lilford* v. *Powys Keck* (1862) 30 Beav. 295; *Byrne* v. *Van Tienhoen* (1880) 5 C.B.D. 344; *Willard* v. *Tayloe* (1869) 8 Wall. 557; *Wilks* v. *Georgia Pac. R. Co* (1885) 79 Ala. 180; *Linn* v. *McLean* (1885) 80 Ala. 360; *Guyer* v. *Warren* (1898) 175 Ill. 328; *Dambmann* v. *Rittler* (1889) 14 Am. St. Rep. 364, 70 Md. 380; *Wilcox* v. *Cline* (1888) 70 Mich. 517; *Houghwout* v. *Boisaubin* (1867) 18 N.J. Eq. 315; *Fessler's Appeal* (1874) 75 Pa. 483; *Clarke* v. *Gordon* (1891) 35 W. Va. 735; *Donnally* v. *Parker* (1872) 5 W. Va. 301; *Watson* v. *Coast* (1891) 35 W. Va. 463. Under a stipulation that the intending lessee was to "have a purchasing clause of the estate, at any time within nine years, by giving three months' notice," for a specified sum, the relation of vendor and purchaser is substituted for that of lessor and lessee after the period of notice has expired. *Pegg* v. *Wisden* (1852) 16 Beav. 239. A lessor is bound at once without a new lease, where the lessee is to have the privilege of an extension of the term for a further period specified "by notice" to the lessor. *McClelland* v. *Rush* (1892) 150 Pa. 57; *Hansauer* v. *Dahlman* (1893) 72 Hun. 607. The right of a continuing partner who, by the articles, has an option to purchase a retiring partner's share, is absolute as soon as he exercises it. *Warder* v. *Stillwell* (1856) 3 Jur. N S. 9 [ineffectual attempt made by retiring partner to revoke offer and have the partnership dissolved].

(*w*) *Shollenberger* v. *Brinton* (1866) 52 Pa. 98. It has been declared by a distinguished American court that the acceptance is regarded as a sufficient legal consideration for the engagement on the part of the person making the offer, *Boston &c. R. Co.* v. *Bartlett* (1849) 3 Cush. 224; *Bray* v. *Harper* (1849) 3 Cush. 158. But probably a more precise way of explaining the rationale of the change in the relation of the parties is that the acceptance implies consent, and this consent implies a promise to do the acts which will eventuate in the ultimate transfer of interests which is contemplated.

(*x*) *Ide* v. *Leiser* (1890) 24 Am. St. Rep. 17, 10 Mont. 5.

briefly to a few of the cases which seem to be more especially pertinent to the the present discussion.

In some of these cases a preliminary question has presented itself, viz., whether the evidence adduced shows the conclusion of a bilateral contract, or merely indicates that the person to whom the offer is made is willing to be bound by the terms proposed in the event of his ultimately electing to accept the offer. The answer to the question depends of course entirely upon the words employed in the communication, written or verbal, which have passed between the parties (*y*).

The consent of all the persons to whom an option is given is necessary to the exercise of that option by one of them (*z*).

9. Acceptance must be of precise terms offered.—There is no such acceptance as the law requires in order to create a mutually binding contract where it is conditional (*a*), or varies in its terms from

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(*y*) A vendor's exercise of an option to take a lease of the premises sold by him at any time within twelve years after the conveyance is sufficiently established, where the vendor has written to the vendee a letter, which is expressly stated to be "a temporary thing until the completion of your purchase, and the signing of the agreement between us already prepared relative to the future holding of the farm by me," and has subsequently had the use of the property and paid rent. *Powell* v. *Lovegrove* (1856) 8 DeG. M. & G. 357. On the other hand, where the owner of premises offers to sell them for a specified sum, to be paid six months after date, "otherwise the offer to be null, and the other party declares that he hereby accepts the offer," there is merely a unilateral contract, such acceptance being tantamount to an acceptance of the condition that the offer should be void, if the money should not be paid at the day appointed. *Nevitt* v. *McMurray* (1886) 14 Ont. App. 126. So no acceptance can be inferred from a letter which simply amounts to an offer by the party having the option to meet the owner of the land, and a notice that he will then be ready to make tender of the price and execute the proper agreements. *Potts* v. *Whitehead* (1869) 20 N.J. Eq. 55. So there is no valid contract where, no consideration being received by the defendants for giving the option, the defendant offered by letter to receive from the plaintiff company, and transport from one city named to another, railroad iron not to exceed a certain number of tons, during certain specified months, at a specified rate per ton and the defendant answers, merely assenting to the proposal, but does not agree on his part to deliver any iron for transport. The letter amounts to nothing more than the acceptance of an option by the plaintiff company for the transportation of such quantity of iron by the defendants as it chose. *Chicago &c. R. Co.* v. *Dane* (1870) 43 N.Y. 240.

(*z*) *Pratt* v. *Prouty* (1898) 104 Iowa 419.

(*a*) *Hyde* v. *Wrench* (1840) 3 Beav. 334. Compare *Lucas* v. *James* (1849) Hare 410; *Weaver* v. *Burr* (1888) 31 W. Va. 736 [offer to pay on the terms specified, so soon as the owner should convey it by proper deed.]

those of the offer (*b*), or contemplates the possibility of those terms being altered before the contract is formally executed (*c*).

10. Sufficiency of the acceptance.—(See also sec. 40, post.) Where the grantor of the option has formulated certain conditions as to the time and manner of giving notice of an election to accept, these conditions must be strictly complied with. (See IX post). If there are no express provisions of this sort, or no dispute as to the timeliness of the communication which is relied upon as showing that notice was given, the only question to be settled is whether the words used are such that an acceptance may fairly be inferred from them (*a*).

The filing of a bill before the end of the period limited, alleging readiness to pay and asking for specific performance is of course a sufficient notice of acceptance of the offer (*b*). So also is a tender of the purchase money (*c*), which, even when made after a sale to a third party, entitles the grantee of the option to specific performance (*d*).

Where there is no provision for notice, holding over by the tenant is notice of his election to renew (*e*).

As the Statute of Frauds only requires a writing signed by the party to be charged, it follows that, even where the subject-matter of an option is land, an acceptance sufficient in point of law may

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(*b*) *Meynell* v. *Surtees* (1854) 3 Sm. & G. 101; *Hyde* v. *Wrench* (1840) 3 Beav. 334 [counter-offer on different terms].

(*c*) There is no absolute contract where the acceptance of the offer is "subject to the terms of a contract being arranged" between the party offering and the solicitor of the party accepting. *Honeyman* v. *Marryat* (1857) 6 H.L.C. 112.

(*a*) Sufficient notice of intention to renew a lease is given, where the secretary of the company to which the premises were leased, upon receiving a notification from the successor to the rights of the original lessor that the lease expired on the following day, writes back to the effect that "the directors are of course prepared to renew the lease." *Nicholson* v. *Smith* (1882) 22 Ch. D. 640. A letter sent by the person having the option in which he states that he elects to take the estate at a price fixed by the trustees of a will in accordance with its provisions, and goes on to ask that, if he has to sign any agreement, it may be forwarded to him is probably a sufficient exercise of the option. *Austin* v. *Tawney* (1867) L.R. 1 Ch. 143.

(*b*) *Maughlin* v. *Perry* (1871) 35 Md. 352.

(*c*) *Souffrain* v. *McDonald* (1866) 27 Ind. 249.

(*d*) *Hayes* v. *O'Brien* (1894) 149 Ill. 403.

(*e*) *Kelso* v. *Kelly*, 1 Daly (N.Y.) 419; *Schroeder* v. *Franklin* (1875) 10 Nev. 355.

be given by parol (*f*), or may be established by any other form of circumstantial evidence, outside the written instruments produced (*g*), as, for example, by the tender of the purchase price (*h*).

11. To whom notice of acceptance should be given.—Ordinarily, of course, the party to whom notice of an acceptance of an offer should be made is either the grantor himself or whatever person has succeeded to his rights of property in the subject-matter of the offer. If such successor is not sui juris at the time when the grantee of the option desires to exercise it, a court of equity will lend its aid and save the inchoate rights arising out of the offer by such relief as may be most appropriate under the circumstances (*a*). It would seem, moreover, that such a court will not feel itself precluded from enforcing an option simply because the notice was not, as required by the strict terms of the instrument conferring it, given to a person having an interest in the subject-matter as well as to the owner himself (*b*).

12. Acceptance by letter.—It is now well settled that, if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance properly addressed is posted in due time, a complete contract is made at the time when the letter of acceptance is posted (*c*), provided it is directed to the proper address (*d*), though

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(*f*) *Reuss* v. *Rickley*, L.R. 1 Exch. 342; *Houghmont* v. *Boisaubin* (1867) 18 N.J. Eq. 315; *Smith's Appeal* (1871) 69 Pa. 474; *Wall* v. *Minneapolis &c. R. Co.* (1893) 86 Wis. 48; *Ide* v. *Leiser* (1890) 24 Am. St. Rep. 17, 10 Mont. 5; *McLelland* v. *Rush* (1892) 150 Pa. 57.

(*g*) *Ives* v. *Hazard* (1855) 5 R.I. 25, 67 Am. Dec. 500.

(*h*) *Houghwout* v. *Boisaubin* (1867) 18 N.J. Eq. 315.

(*a*) *Woods* v. *Hyde* (1861) 31 L.J. Ch. 295 [notice to infant and guardian held sufficient, where trustees of will giving option of purchase disclaimed.]

(*b*) An Australian court has held that, where a tenant with the option of renewal has continued in possession for a year and paid rent, after giving notice to the attorney of the mortgagee of the land, equity will enforce his right to a renewal, although the covenant in the original lease was that the mortgagor and mortgagee would, if requested, grant a renewal. *Blackwell* v. *Smyly* (1866) 3 W.W. & A'B. (Vict. Eq.) 1.

(*c*) See the cases cited in the next three notes, and *Potter* v. *Sanders* (1846) 6 Hare 1 [question of priority of rights as between two purchasers]; *Linn* v. *McLean* (1885) 80 Ala. 360.

(*d*) *Potts* v. *Whitehead* (1869) 20 N.J. Eq. 55 [not enough to send it to a place to which the addressee only occasionally resorts].

there may be delay in the delivery (*c*), or though the letter never reaches the addressee (*d*). But this rule is subject to an exception where the offer is made by telegram. A prompt reply to such an offer is expected, and an acceptance by letter is not in time where it is known that it cannot be delivered till after the period during which the offer is to remain open has expired (*e*).

13. Revocation of Acceptance.—A retractation of an acceptance of an option communicated by letter is valid, provided it actually reaches the giver of the option before he receives the letter, but, in order to be effective, it must be as direct and explicit as the election itself (*f*).

14. Rejection of offer.—A definitive rejection of an offer will, of course, have the effect of determining the negotiations, but an inquiry whether the seller will modify the terms of a sale with respect to the time given for the payment of the price is not a rejection of the proposition which stands open at the time (*g*).

15. Revocation of options.—Where an option belongs to the class of revocable offers (see II. ante), the revocation to be effectual, must be actually communicated to the other party before he has accepted the offer (*h*). A notice of revocation which is not received until after a letter of acceptance was posted will not deprive the other party of the rights acquired by the despatch of of the letter, (see sec. 12 ante). "An uncommunicated revocation is for all practical purposes, and in point of law, no revocation at all" (*i*). No formal or express notice of retractation is necessary.

(*c*) *Dunlop* v. *Higgins* (1848) 1 H.L.C. 400; *Harris Case*, L.R. 7 Ch. 587.

(*d*) *Household Accident Co.* v. *Grant* (C.A. 1879) 4 Exch. D. 216, Bramwell, L.J., dissenting.

(*e*) *Quenorduaine* v. *Cole* (1883) 32 W.R. 185.

(*f*) *Linn* v. *McLean* (1885) 80 Ala. 360 [no effective retraction implied from a conversation between the parties, held on the same day as the letter of acceptance of an option on land was posted and before it was received, where the letter was not referred to, and the subject of the interview was merely a pending adverse suit which affected the land].

(*g*) *Stevenson* v. *McLean* (1880) 5 C.P.D. 346.

(*h*) *Stevenson* v. *McLean* (1880) 5 C.P.D. 346.

(*i*) *Byrne* v. *Van Tienhoven* (1880) 5 Q.B.D. 344, citing *Tayloe* v. *Merchants' F. Ins. Co.* 9 How. (U.S.) 390; 54 Benjamin on Sales, p. 72 (7th Am. Ed.). According to Lindley, J., in the English case just cited, Pothier and some other writers have expressed the opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason assigned is that there is not in fact any such consent by both parties as is essential to constitute a contract between them.

Hence, where the person receiving the offer is notified, before the close of the period during which it is to remain open, that the person who made it has sold the property to a third party, he cannot afterwards make a binding contract by accepting the offer (*j*). And, in general, an effectual revocation may be implied from the owner's dealing with the subject-matter of the option in a manner inconsistent with a willingness to leave it open (*k*).

16. Relinquishment of rights under option.—The party having the option may assent to its withdrawal, and the offer is then at an end (*a*). When he has clearly abandoned his rights, the other party is not obliged to notify him that he considers the negotiations at an end, in order to obtain the right to sell the property (*b*).

IV. VALIDITY OF OPTIONS.

17. Requirements of the Statute of Frauds.—As the Statute of Frauds requires, in the case of contracts relating to land, that they shall be evidenced by a writing signed by the party to be charged, it follows that an option for the purchase of any interest in real estate is not enforceable unless the offer is put into writing. For a similar reason an oral agreement to extend the time for the acceptance of such an option is invalid (*c*).

18. Option obtained by fraud.—On principles of universal application, it is manifest that an option procured by false pretenses for purposes other than those stated is not enforceable (*d*).

19. Validity as dependent on the power to grant the option.—An administrator is a mere trustee whose primary duty is to sell the intestate's estate within a reasonable time, and, although he may in some cases execute an underlease, that is an exceptional mode of

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(*j*) *Dickinson* v. *Dodds* (C.A. 1876) 2 Ch. D. 463.

(*k*) *Larmon* v. *Jordan* (1870) 56 Ill. 204.

(*a*) *O'Brien* v. *Boland* (1896) 16 Mass. 481. A purchaser with notice of the option who relies on the fact that it was abandoned by the agent of the party holding it must show that such agent had authority to make such abandonment. *Clark* v. *Gordon* (1891) 35 W. Va. 735.

(*b*) *Harton* v. *McKee* (1896) 73 Fed. 556.

(*c*) *Allee* v. *Bartholomew* (1887) 69 Wis. 43; *Co' .an* v. *Applegarth* (1887) 6 Am. St. Rep. 417, 68 Md. 1.

(*d*) *Collier* v. *Shepherd* (1892) 89 Va. 401 [refusing to sustain an action for damages].

dealing with the assets, and such a power cannot be construed, under any circumstances, as entitling him to insert an option of purchase in the lease (*a*).

In a lease under a power, a covenant to renew that lease at the expiration of the term is a good covenant, even though the first lease was for the full period authorized by the power, but when the time for carrying that covenant into effect arrives with the expiration of the first term it will not be enforced unless the rent and covenants stipulated for are the best rent and the proper covenants, when tested with reference to the conditions prevailing at that time (*b*).

An agent authorized to sell real estate at a specified price has no authority to give an option on it (*c*).

Under the English Lands Clauses Consolidation Act allowing railway companies to sell superfluous lands not required for their business, a sale reserving an option of re-purchase is ultra vires, as the Act requires an absolute sale (*d*).

20. Validity with reference to the rule against perpetuities.—Prima facie any grant of a privilege of acquiring an interest in land which is couched in such terms that to uphold it would have the effect of fettering the estate for an indefinite period is void under the rule against perpetuities.

On this ground the courts have refused to enforce a covenant to grant a lease to any one of the heirs of the lessee who should claim and make request within one year after the demised premises should become vacant (*a*), a covenant to re-convey to the trustees of a settlement in tail at any time during its continuance, although a tenant in tail may if he wishes bar the entail (*b*); an agreement by a railway company, in a conveyance of superflous land not required for its line, to the effect that the grantee should, upon receiving six months' notice reconvey the land to it (*c*).

(*a*) *Oceanic &c. Co.* v. *Lutherbury* (C.A. 1880) 16 Ch.D. 236.

(*b*) *Gaslight, &c., Co.* v. *Towse*, 35 Ch. D. 519.

(*c*) *Field* v. *Small*, 17 Col. 386.

(*d*) *London, &c. R. Co.* v. *Gomm* (C.A. 1882) 20 Ch. D. 562.

(*a*) *Hope* v. *Mayor of Gloucester* (1855) 7 DeG. M. & G. 647.

(*b*) *Trevelyan* v. *Trevelyan* (1886) 53 L.T. 853, following *London &c. R. Co.* v. *Gomm*, 20 Ch. D. 562.

(*c*) *London &c. R. Co.* v. *Gomm* (1882) 20 Ch. D. 562, overruling *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. D. 421.

But there is one noteworthy exception to this rule which is not easy to sustain upon principle. In the case of covenants for renewal in leases, while the courts lean against construing them to be for a perpetual renewal, unless it is perfectly clear that the covenant does mean it (*d*), the right to such a renewal will be enforced if it is granted in unequivocal terms (*e*).

21. How far options may be enforced apart from the rest of the contracts to which they are accessory.—That no effect can be given to an option apart from the other stipulations of a contract of which it forms a part is a necessary conclusion in any case, where the entire contract itself is invalid for any reason (*a*). So also it is plain that, if the right to exercise the option is declared in categorical terms to be dependant upon the existence of a certain relation between the parties at the particular time when the right is claimed, the option is necessarily lost whenever that relation is determined (*b*).

The general rule, however, is that, in the absence of some words indicating that the performance of the other stipulations was intended to be a condition precedent to the ultimate right to exercise the option, neither the essential invalidity of those stipu-

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(*d*) *Baynham* v. *Guys Hospital* (1796) 3 Ves. 295; *Furnival* v. *Crew* (1744) 3 Atk. 83; *Moore* v. *Grant* (1801) 6 Ves. 236; *Pernette* v. *Clinch* (1855) 8 New Br. R. 217.

(*e*) *Earl of Shelburne* v. *Biddulph* (1748) 6 Bro. P.C. 356, 363; *Furnival* v. *Crew* (1744) 3 Atk. 83; *Brown* v. *Hitchcock* (1715) 5 Bro. P.C. 6. A detailed examination of cases dealing with this class of contracts would be foreign to the scope of the present article. Those who wish for further information on the subject are referred to Woodfall on Landlord and Tenant, chap. ix., and to the opinion of the court in *Bedell* v. *Rector*, 8 New Br. R. 217, which contains a resumé of an opinion by Mr. Hargrave, the eminent conveyancer.

(*a*) *Hallett* v. *Martin* (1882) 52 L.J. Ch. 804 [lease departed from power in a will is a matter not remediable under Act of 12 & 13 Vict.—option in it held void].

(*b*) Where the contract is that the lessee shall "have the option and privilege of purchasing the land at any time during the continuance of the term" the option is lost, where the term is forfeited for non-payment of rent before the end of the term. The lessee cannot obtain specific performance on the theory that the option continued during the period over which the lease was to extend, whether the term came to an end or not. *Coventry* v. *McLean* (1894) 21 Ont. App. 176, affirming 22 Ont. Rep. 7.

lations, nor the justifiable forfeiture of the rights bestowed by them, will entail the loss of the privileges obtained by the option (*c*).

V. RESPECTIVE INTERESTS OF THE PARTIES IN THE SUBJECT MATTER AFTER THE OPTION IS GRANTED.

22. Prior to the acceptance of the offer.—(*a*) *No interest created where no consideration passes.*—From the principle already stated (sec. 3, ante), that an unaccepted option not supported by a consideration creates no obligation on the side of the grantor, it follows that, where the right to exercise the privilege is expressly made contingent upon the payment of a certain sum within a specified period, no interest or estate vests in the grantee until that payment has been made (*d*).

(*c*) Where an agreement for the granting of a lease after the intending tenant has erected a house on a specified plot of ground contains a stipulation that he should insure the property in a certain office in the joint names of himself and the lessor, and should have an option of purchasing within a stated period, the contract for the lease is independent of the option to purchase, and the lessee may compel a transfer of the property, even though the right under the contract for the lease may have been forfeited by the fact that the insurance was not effected in the manner agreed, and there is an express stipulation that, if the intending lessee should not fully perform the agreement on his part, the agreement for executing the lease should be void. *Green* v. *Low* (1856) 22 Beav. 625, 4 W.R. 669, 2 Jur. N.S 848 [injunction granted to restrain ejectment]. Where an option to purchase is given to a party who, after erecting buildings on the property, is to be granted a lease for ninety-nine years and is reserved by a provision in the contract which is entirely independent of another stipulation which authorizes the owner to terminate the agreement if the works are not proceeded with forthwith, the fact that the right given by this latter stipulation has been exercised for good cause will not deprive the other party of a right to purchase which he has acquired by a declaration of his intention to purchase, made prior to the time when he was notified of the determination of the leasing parts of the agreement. *Raffety* v. *Schofield* (1897) 1 Ch. 937 [refusing an injunction to restrain the party having the option from trespassing on the premises]. Where a lessee covenants to sink an oil well to a certain depth on the leased premises within a stated number of months, and is given the option of purchasing at any time during the term any five acres of the land they might select, and also the option of purchasing the residue of the land at the end of the term, the completion of the well is not a condition precedent to the exercise of the right of purchasing the five acres; for under such a contract the option may be declared the very day after the execution of the lease. The lessee, therefore, is entitled to specific performance of the contract, so far as this portion of it is concerned, although, owing to an accident to the machinery and from no fault of his own, he does not complete the well before the end of the term. *Hunt* v. *Spencer* (1867) 13 Grant (U.C.) 225. Where a lessor has the option of renewing on certain terms, or entering upon paying for improvements, the mere fact that the provision as to renewal may be illegal will not invalidate the obligations arising from the alternative stipulation. *Bedell* v. *Rector* (1855) 8 N.B.R. 217.

(*d*) *Richardson* v. *Hardwick* (1882) 106 U.S. 252; *Stembridge* v. *Stembridge* (1888) 87 Ky. 91. Where a partner's option to purchase a co-partner's share is lost by the expiration of the period allowed for its exercise, any land which may belong to the partnership retains its original character, as real estate, and descends to the heir. *Cookson* v. *Cookson*, 8 Sim. 529.

(*b*) ——— *or until the terms are definitely arranged.*—Where the negotiations have merely reached a stage at which an option is given to purchase within a specified period on certain terms and conditions, to be reduced to writing at the time of the purchase, the party receiving the option obtains no interest, legal or equitable, in the land (*a*).

(*c*) *Option on consideration creates interest recognized by equity.*—That the grant of an option upon consideration creates an equitable interest in the subject-matter is well settled.

"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" (*b*).

(*d*) ——— *but not in law.*—As an option, supported by a consideration, or under seal, constitutes a contract which binds the grantor, he may be sued for its breach (*c*).

But the interest created under such circumstances being essentially equitable in its nature, does not furnish a sufficient basis for any rights which pre-suppose the possession of a legal estate in the subject-matter.

Thus the interest in property acquired by an option does not pass under the statutable short form of mortgage used in Ontario, containing no recitals, but merely a covenant that the mortgagor is seised in fee simple (*d*)

(*a*) *Bostwick* v. *Hess* (1875) 80 Ill. 138.

(*b*) Jessel, M.R., in *London, &c., R. Co.* v. *Gomm* (C.A. 1882) 20 Ch. D. 562. To the same effect see *Kerr* v. *Day* (1850) 53 Am. Dec. 526, 14 Pa. 112. That the option of a tenant to take a lease for one of various specified perods, is an "interest in lands" within the meaning of sec. 112 of the English Bankruptcy Act, was held in *Buckland* v. *Papellon* (1866) L.R. 2 Ch. 67. An interest of one-sixth in an option is a sufficient and legal consideration for a note, wherever law and equity are fused. *Hanna* v. *Ingram* (1890) 93 Ala. 482.

(*c*) *Cherry* v. *Smith* (1842) 3 Humph. 19, 39 Am. Dec. 130; *Collier* v. *Shepherd* (1892) 89 Va. 401. Where a person owning several parcels of property covenants, on a lease of one of them, that, if he, his heirs or assigns, should, during the term, have any advantageous offer for an adjoining parcel, he, his heirs or assigns, should not dispose of the same without previously making an offer of it to the lessee, it is not a breach of the covenant to sell the entire property, including both the demised land and the adjoining parcel, for an entire consideration in one entire contract, without offering the parcel to the covenantee. *Collison* v. *Lettson* (1815) 6 Taunt. 224 [no opinion reported].

(*d*) *Nevitt* v. *McMurray* (1886) 14 Ont. App. 126, per Hagarty C.J.D. (p. 131).

So one who has been granted an option to purchase and subsequently entered the premises under a lease has no interest in the land except as lessee (*c*).

So it has been held that an unaccepted option is not such an interest as can be sold on execution (*d*).

(*e*) *Rights of the parties as regards the benefits of insurance on the property covered by the option.*—It has been held by an American court that an option of purchase given by a lease creates an interest in the premises of such a description that, so far as regards the right to the benefit of insurance moneys received for damages accruing before the exercise of the option, the lessee, after he has exercised the option, is regarded as the owner ab initio (*a*). For English judges, on the other hand, the controlling considerations under these circumstances have been that a contract of insurance is a mere personal contract for the payment of money, not a contract which runs with the land, and that it is only after a mutually obligatory contract of sale has come into existence that a vendor becomes a trustee for the purchaser as to the benefits accruing from the land. The conclusion arrived at, therefore, has been that, where the insurance on a building contracted to be sold is not mentioned in the agreement of sale, and the building is burnt down before the time fixed for the completion of the contract, the vendee is not entitled to have the policy moneys applied in payment of the purchase money (*b*). Accordingly, to entitle the holder of an option to have the proceeds of an insurance on the subject-matter applied to the payment of the purchase-price, there must be some special stipulation in the contract from which it may be inferred that this was the intention of the parties (*c*).

(*c*) *Mers* v. *Franklin Ins. Co.* (1878) 68 Mo. 127 [insurance policy avoided because lessee had not stated that he had a mere leasehold interest].

(*d*) *Provident Life, &c., Co.* v. *Mills* (1899) 91 Fed. 435.

(*a*) *Peoples &c. Co.* v. *Spencer* (1893) 36 Am. St. Rep. 22.

(*b*) *Rayner* v. *Preston* (C.A. 1881) 18 Ch. D. p. 11.

(*c*) No contract to hold the proceeds of an insurance policy of £14,000 for the benefit of a tenant having an option to purchase can be implied where, although the lessor agreed to insure, there was no stipulation with regard to the insurance moneys except in one contingency, viz., where there should be a fire causing damage of less than £4,000, in which case the term was to continue, and the lessor was to lay out the moneys received under the insurance in restoring the premises, while if the damage should exceed £4,000, the term was to cease, *Edwards* v. *West* (1878) 7 Ch. D. 858. Fry, J. distinguished the earlier case of

23. After the option is exercised.—The general principle upon which courts of equity adjust the rights of the parties is that the one to whom the option is granted becomes, after exercising it, the equitable owner of the interest to which it relates (*a*). One of the consequences of this doctrine is that, after an option on land has been exercised, the purchase-money becomes part of the personal estate of the vendor (*b*), a theory which, in cases where the owner of the property has deceased before the exercise of the option, has been pushed to the extent of holding that, under some circumstances, the equitable conversion shall be regarded as taking place at the time when the death took place. In other words, where there is a contract giving an option of purchase of real estate, and the option is not exercised till after the death of the person who created the option, the proceeds of the sale go as part of his personal estate and not as part of his real estate (*c*). This doctrine

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Reynard v. *Arnold*, L R. 10 Ch. 386. There a lessee who had an option to purchase covenanted to insure in the sum of £800 and it was agreed that the money recovered under that insurance should be applied in reinstating the premises. The lessee insured in one office, and the lessor, without the lessees' knowledge, in another office. In both policies were the usual average clauses, so that, the property being destroyed by fire, only half the amount of the lessees' insurance was recovered by him. It was held that the lessor could be compelled to apply the proceeds of his policy also to the reinstatement of the premises.

(*a*) *Rafferty* v. *Scholfield* (1897) 1 Ch. 937; *Frick's Appeal* (1882) 101 Pa. 485 [holder of option held entitled to surplus of proceeds of judicial sale.]

(*b*) *Lord Lilford* v. *Powy's Keck* (1862) 30 Beav. 295 [purchase ordered at the instance of the heir to be completed out of the decedent's personal estate]; *Forbes* v. *Connolly* (1857) 5 Grant (U.C.) 657.

(*c*) The case by which this doctrine was established was *Lawes* v. *Bennett*, 1 Cox 167, the authority of which has been recognized, though with many doubts as to its soundness, in the later decisions cited below. In *Townley* v. *Bedwell* (1808) 14 Ves. 591, it was held that prior to the exercise of such an option the rents of the demised premises belonged to the heir. In *Collingwood* v. *Row* (1857) 3 Jur. N.S. 785, it was held that the effect of the exercise of an option of purchase by a lessee after the lessor's death was to convert the realty into personalty; but Kindersley V.C. adverted to the inconveniences which may result from the doctrine, since after the enjoyment of the property for many years by the devisor, the realty may, on the expression of the option, be converted into personalty, and not only converted, but the whole may be taken away and given to another. Where the substance of a will is simply that the real estate is to pass to certain persons and the personal property to other persons, and the real estate is subject to an option of purchase by the lessee, his heirs, or assigns, the produce of the land, until the option is exercised, goes to the devisees, and after that time becomes personalty. *Weeding* v. *Weeding* (1861) 1 J. & H. 424. Where the partnership articles give surviving members of the firm the option to purchase the interest of a deceased or retiring member in the real property of the firm, the money received is a part of the personal estate of the decedent. *Ripley* v. *Waterworth* (1802) 7 Ves. 425. This rule prevails, although most of it may have been paid in respect of the interest of the deceased in the real estate of the firm. *Townshend* v. *Devaynes*, cited in Lindley on Partnership p. 344. See also 11 Sim. 498, n. The rule is otherwise where a railway company with compulsory powers of purchase agrees

has been held applicable to cases of intestacy, and even though the option to purchase is exercisible only after the death of the grantor (*d*). But otherwise the courts have shown a decided disposition to confine it very strictly to its original limits. Thus where the option is not exercised until after the death of the party receiving the option, no retrospective effect is attributed to it and the contract only becomes binding when the option is exercised (*e*). Nor can the doctrine be construed, as between the vendor and the purchaser who claims under the option, in such a sense as to throw the conversion back to the date of the contract giving the option (*f*). The operation of the doctrine is still further circumscribed by a rule of testamentary construction which may be stated thus: Wherever, in a will made after a contract giving an option of purchase, the testator, knowing of the existence of the contract, devises the specific property which is the subject of the contract, without referring in any way to the contract he has entered into, there is considered to be sufficient indication of his intention to pass all the interst, whatever it may be, that he had in it (*g*).

VI. DURATION OF THE PRIVILEGE CONFERRED BY THE OPTION.

24. When the right to exercise the option first accrues.—Usually an option is open for acceptance from the moment it is offered;

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to pay for such lands within the limits of deviation as it should take. Here if a plot is taken after the death of the other party to the agreement, the purchase-money belongs to the persons entitled to the real estate. In *re Walker's Estate* (1852) 17 Jur. 706, distinguishing other cases on the ground that the contract was not an agreement to take but an agreement fixing the price of such lands as they might take by virtue of the statutory rights.

(*d*) *Isaacs* v. *Reginall* (1894) 3 Ch. D. 506.

(*e*) *Re Adams &c.* (C.A. 1884) 27 Ch. D. 394.

(*f*) *Isaacs* v. *Reginall* (1894) 3 Ch. D. 506; *Edwards* v. *West* (1878) 7 Ch. D. 858, per Fry J. In the latter case the contention was that the option of purchase in a lease made the lessee the owner in equity of the premises demised in such a sense that the lessor was his trustee in respect to the fruits of the property—in this case moneys recovered on an insurance policy for a loss by fire. It was held, however, that there be no equitable conversion except where there is a right specifically enforceable, and, in the case of an option, this situation supervenes only when the option is exercised.

(*g*) *Emuss* v. *Smith* (1861) 1 J. & H. 424; *Drant* v. *Vause* (1842) 1 Y. & C. 580. Where a testator has, by his will, specifically devised certain freeholds and subsequently, on the same day executes both a codicil in which, although he does not refer in terms to those freeholds, he expressly confirms his will, and also a lease of the freeholds with an option of purchase, it will be presumed that it was his intention that, if the option is exercised after his death, the purchase-money should pass to the specific devisee. It is immaterial whether the codicil was executed before or after the lease, as under such circumstances it must have been present to his mind when he confirmed the will. *Pyle* v. *Pyle* (1895) 1 Ch. 724.

but, not infrequently, where it constitutes one of the terms of a contract which contemplates the existence of prolonged relations between the parties, the time when it is exercisible is expressly deferred to some future date. A common instance of such a postponment is a provision giving a lessee the right of purchase at the end of the term. Sometimes it becomes doubtful as a matter of construction, whether this limitation is intended to be absolute or is qualified by other words in the contract which may or may not imply an alternative right to an earlier exercise of the option (*a*).

Other illustrations of a similar postponement are furnished by those clauses in partnership articles which give the continuing partners the refusal of the share of a retiring partner (*b*).

Other cases of deferred options turn on testamentary provisions allowing designated persons the right of pre-emption as to portions of the estate (*c*). The time limited will in no case begin to run against the privileged party until the terms of the offer, if not fixed by the will, have been settled in the manner prescribed, and he has been duly informed thereof (*d*).

25. When the right expires.—(See also secs. 39, et seq., post.) In the majority of cases the date at which the option expires is

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(*a*) It has been held that, under a contract by which a lessee is to have "the choice of purchasing the property at a sum not exceeding £4000 at the end of the term, or sooner, if the vendor should wish to dispose of it," the condition in the last clause did not relate solely to the words "or sooner," but extended to the option, so that the lessee might, if he wished, purchase before the end of the term. *Collingwood* v. *Row* (1857) 3 Jur. N.S. 785.

(*b*) Where articles provide that a partnership shall last five years' unless previously dissolved by consent, and that, if any partner desires to withdraw after the close of one year from the date of the instrument, he shall give the others the refusal of his share and not sell except to an approved person, the inference is that a partner wishing to retire cannot exercise his option until at least one year has elapsed, and that the exercise of his right is contingent upon all the contracting parties being alive when the fulfilment of the contract is claimed. Hence if one of the partners dies within a year, and the firm is thus dissolved, any advantage which the others might have obtained from the contract is lost, and their only remedy is a suit for an ordinary accounting. *Frank* v. *Beswick* (1878) 44 U.C. Q.B. 1.

(*c*) Where a testatrix gives a legal estate to her husband for life with remainder to trustees in fee for specified purposes, with a proviso that her eldest son should have the right of purchasing the premises by giving notice of his intention to the trustees at any time within twelve months after the decease of her husband, and then dies before her husband, what is meant is that the son is to have the option from the time the estate comes into the hands of the trustees, and the fact that she pre-deceased her husband will be treated as immaterial. *Evans* v. *Stratford* (1864) 10 Jur. N.S. 861 [right of pre-emption held still to subsist.]

(*d*) *Austin* v. *Tawney* (1867) L. R. Ch. 143; *Lord Lilford* v. *Keck* (1862) 30 Beav. 295.

fixed by the express terms of the offer, and the inference will then be that the right to exercise it is a continuing one of the benefit of which nothing but the lapse of the prescribed period can deprive the party to whom it is given (*a*).

Where no time is specified, an offer is deemed to remain open for a reasonable time (*b*), and under such circumstances, unless the offer is accepted and acted upon within a reasonable time it must be treated as abandoned (*c*).

In cases of continuing relations like those created by leases and partnerships it is commonly provided, as already mentioned, that the option shall be exercised at the conclusion of the period during which the relation is to continue. Such a provision, it would seem, is construed liberally in favour of the party having the option (*d*). If a prolongation of the relations has occurred by the mutual consent of the parties, the presumption will perhaps usually be indulged that the option is intended to be still kept alive (*e*). And it is explicitly laid down that, if granted in general words, the option of a tenant to take a lease is retained as long as he continues to be tenant with the sanction of his landlord, and does not expire at the end of the term originally contracted for (*f*).

(*a*) Where one company assumes the control of the business and property of another, the consideration being that the first company shall provide for a mortgage debt of the former, and pay interest on its shares, and, as a part of the transaction, the transferee company obtains the option of becoming absolute owners of the property, provided they shall on or before any 25th of December, give the transferee company notice of their desire to avail themselves of the option, the transferee company does not forfeit its rights under the option because it gives the prescribed notice in a particular year and is unable to carry out the purchase owing to its want of funds. *Ward* v. *Wolverhampton &c. Co.* 41 L. J. Ch. 308; S. R. 13 Eq. 243.

(*b*) *Stone* v. *Harmon* (1884) 31 Minn. 512

(*c*) *Williams* v. *Williams* (1853) 17 Beav. 213; [specific performance denied after a delay of five years in completing a contract for the sale of land.] If the contract has been reduced to writing, it is for the Court to determine, as a matter of law, what is a reasonable time. *Stone* v. *Harmon* (1884) 31 Minn. 512.

(*d*) Where a person enters into an agreement for a lease by which the lessor stipulates, when requested, to renew the term at its expiration, and no time is mentioned within which the option is to be exercised, the renewal may be demanded after the end of the term, unless the landlord calls upon him to carry out the contract, and the lessee makes default. *Moss* v. *Barton* (1873) L.R. 1 Eq. 474, 35 Beav. 195.

(*e*) It has been implied, though not expressly decided in one case, that, where a partnership is continued after the term originally agreed on is finished, an option given to the survivor by the articles to purchase the property remains in force. *Essex* v. *Essex* (1855) 20 Beav. 442.

(*f*) *Buckland* v. *Papillon* (1866) L.R. 2 Ch. 67, aff. g.; 1 Eq. 477.

In other cases the question when the right expires resolves itself into the question from what time the period limited for the exercise of the right begins to run. See preceding section, ad finem.

26. Death of party making the offer, effect of.—It was strongly doubted by Lord Romilly whether a contract which gives a right of pre-emption "at all times hereafter" could be enforced after the death of the owner. (Compare sec. 19, ante.) But he was convinced that it could not bear this meaning where it was contemporaneous with another which distinctly provided that the right to purchase should only be exercised "in case the owner should wish to sell." The second agreement, he considered, did not enlarge or extend the meaning of the first, as it was absurd to suppose that any person should be desirous of selling property at an indefinitely distant period for the same price (*a*). In the case of an ordinary offer the rule is clear. "It is admitted law that if a man who makes an offer dies, the offer cannot be accepted after he is dead" (*b*).

27. Right of grantor of option to abridge the period for its exercise.—The terms of a contract of which an option forms a part may be such that the existence of a right on the part of the giver to demand that the privilege shall be exercised before a specified date or be forever lost is necessarily implied. Thus, under a contract giving a yearly tenant the right, if he wishes for a lease, to have it granted "for seven, fourteen, or twenty-one years, at the same rent," it is at any time competent for the lessor or his vendee to call upon the tenant to exercise his option, and, if it is not exercised, to determine the tenancy (*c*). The same rule holds when a lessee has an option of purchase (*d*)

VII. WHAT PERSONS BESIDES THE IMMEDIATE GRANTEES ARE ENTITLED TO CLAIM THE BENEFIT OF OPTIONS.

28. Rights of a partner in an option.—Where two persons enter into an agreement to purchase land on speculation, the arrangement being that one of them is to pay the expenses of the other

(*a*) *Stocker* v. *Dean* (1852) 16 Beav. 161.

(*b*) *Dickinson* v. *Dodds* (C.A. 1876) 2 Ch. D. 463, per Mellish, L.J., p. 475.

(*c*) *Heisy* v. *Giblett* (1854) 18 Beav. 174.

(*d*) *Schroeder* v. *Gemeinder* (1875) 10Nev. 355.

while he is engaged in negotiating with the owner, the former is entitled to share in the profits derived from any option which the latter may procure upon the property, whether those profits accrue as a result of the exercise of the option during the period originally covered by it, or were realized during a period over which was subsequently extended by the vendor (*a*).

29. Parties specially designated in instruments.—Where a will directs that a certain person, or whoever shall, after the testator's decease, be entitled to an estate in settlement, may have the refusal of a piece of property, one who is a tenant for life of a part of the property, not under the settlement, but under a recovery, does not answer the description so as to be entitled to exercise this right of pre-emption (*b*).

30. Heirs of grantees of options.—The cases in which the instrument granting the option confers the right to exercise it upon the heirs of the grantee present no difficulty. Thus where a lease for years contains a stipulation permitting the lessee, his heirs, and assigns, to purchase at any time during the term, the right to purchase goes to the heir-at-law, and not to the personal representative, after the death of the lessee (*c*).

Whether an option, supported by a consideration, but not granted in terms to heirs, would come under a like rule is a question which has apparently not been discussed by the English or Canadian Courts. It might perhaps be argued that although such an option creates an immediate equitable interest, which should in regular course descend to the heir, the principle of the cases cited below, as to options granted by wills, has been laid down in sufficiently general terms to warrant the conclusion that the heir would, at all events, not be permitted to require the payment of the purchase-price out of the personal estate.

By some American Courts the broad ground has been taken that an option which amounts to nothing more than a simple privilege to purchase an estate at any time within a specified period, and does not extend by its express terms to heirs or representatives, creates a purely personal right

(*a*) *Tupper* v. *Armand* (1889) 16 Can. S.C. 718.

(*b*) *Lord Radnor* v. *Shafto* (1805) 11 Ves. 448.

(*c*) *Henrihan* v. *Gallagher* (1862) 9 Grant (U.C.) 488, aff'd E. & A. 338, overruling *Sampson* v. *McArthur*, 8 Grant 72, in so far as that was a decision that an option of purchase in a lease was personalty.

which is determined by the death of the party to whom the privilege is granted, and is neither a chose in action, nor a transmissible right of property (*b*). Unless this doctrine is merely a succinct form of stating the results of the English cases between the heirs and personal representatives, (*c*) it is difficult to understand upon what ground this purely personal quality is predicated. It can scarcely be intended to rest upon the presumption that, in the absence of words to the contrary, the grantor of an option must be taken to have wished to restrict the right of purchasing to the grantee designated. Such a presumption would be essentially futile in face of the fact that every vendor must be taken to appreciate the possibility of his property passing to some third party at any moment after the transfer to the vendee, whether it be by the death of the latter, or a re-sale.

As respects testamentary options, it has been laid down that, if a testator goes no further than to provide that an estate shall be offered to a particular person at a price to be fixed by his trustees, and that person does not act in his lifetime, signifying what he will do, the interest he has lasts no longer than his life, and will not descend to his real representative to be paid for by his personal estate (*d*). One of the reasons assigned for this doctrine is thus stated in a well-known treatise:

"The heir or devisee has no right to insist on the completion of a purchase, except where the contract is such as might have been enforced against his ancestor or testator; for otherwise he would be able to take the purchase money from the personal estate, in order to purchase for himself that which his ancestor was not bound to purchase, and perhaps never would have purchased" (*e*).

31. Administrators.— In the Rhode Island case, cited under the preceding section, the administrator was held, equally with the heir, and for the same reason, to be incapable of exercising the option, but in Michigan it has been laid down that the equitable

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(*b*) *Newton* v. *Newton* (1876) 23 Am. Rep. 476; 11 R.I. 390 [bill to enforce sale]; *Sutherland* v. *Parkins* (1874) 75 Ill. 338 [bill to enforce sale]; *Gustin* v. *Union &c., District* (1893) 34 Am. St. Rep. 361, 94 Mich. 502.

(*c*) In the Rhode Island case cited the court laid some stress upon this aspect of the matter, but it does not appear to be the controlling consideration.

(*d*) *Lord Radnor* v. *Shafto* (1805) 11 Ves. 448, 454. Lord Eldon accordingly decided that there was no one who was capable of exercising the right of pre-emption, but suggested that, possibly, if there were a recital in his will that he offered such price as the trustees would dispose at, in other words, a reasonable price, and that he would accept the property on those terms, the estate might possibly pass by the devise.

(*e*) Fry Spec. Perf., sec. 218; see also *Brown* v. *Monck*, 10 Ves. 597.

interest acquired by an option of a lessee to purchase passes to his administrator, by whom and by his assignees the option may be enforced (*a*).

The effect of a stipulation in which administrators are expressly mentioned as among the parties in whose favour the option is created was recently considered by the English Court of Appeal in a case involving the effect of a clause in a lease, by which the lessor covenanted with the lessee, his executors, administrators, or assigns, that if the lessee, his executors, administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land, and should give notice in writing to the lessor, his heirs or assigns, then the lessor, his heirs or assigns would accept £1200 for the purchase of the fee simple, and on the receipt thereof would convey the fee simple to the lessee, his heirs or assigns, as he or they should direct. After the death of the lessee, intestate, his heir, who was also the administrator of his personal estate, called on and received from the lessor's devisee a conveyance of the premises. The heir afterwards contracted to sell a portion of this property, and a question arose as to the parties by whom the deed should be signed in order to convey a good title. The Lords Justices emphasizing the fact that they were merely construing the words of the particular covenant, held: (1) that the lessee having died intestate, the proper person to exercise the option was his administrator, and not the heir-at-law; (2) that the right of option, as one of the provisions contained in the lease, passed with the leasehold estate to the administrator upon his taking out administration to the intestate, and that he alone was capable of exercising the option; (3) that the word "assigns" in the covenant meant assigns of the leasehold interest. An argument advanced to sustain the view that a deed signed by the heir alone was sufficient was that the introduction of the word "heirs" in the clause relating to the conveyance (see supra) involved the consequence that he was entitled to buy and keep the fee himself. This contention was rejected, and the position taken that, if the administrator was also the heir-at-law, it was in his former capacity only that he had a right to exercise the option, under such a covenant. As the benefit to be derived from such exercise was for the benefit of the next of kin, a good title to the property could not be made unless the next of kin joined in the sale (*b*).

32. Assignees.—(*a*) *At law.*—Under common law principles, the question whether a covenant in a lease granting an option of purchase is assignable depends upon whether it runs with the term.

(*a*) *Gust'n v. Union, &c., Distr.* (1893) 94 Mich. 502; 34 Am. St. Rep. 361.

(*b*) *Re Adams, &c.*, (C.A. 1884) 27 Ch. D. 394.

To this category belongs a covenant which gives the lessee the privilege of purchasing the demised premises themselves (*a*); and its benefit passes to the assignees of the tenant, unless there is a clear and unmistakable reservation of the privilege in the assignment (*b*). On the other hand, a covenant to the effect that the assigns, as well as the lessee, shall have the option of purchasing a parcel of land adjoining the demised premises, if an offer is made for it by a third party, does not run with the land, for the reason that it is to do a thing collateral to the demised premises (*c*).

The grantee of a reversion of lands leased for a term of lives, with a covenant for perpetual renewal, cannot take advantage of a condition in the lease that, if the lessee should be desirous of alienating his interest, the lessor should be given the preference, upon paying the same as another bona fide purchaser, and that, in case of alienation by the lessee, without his giving the lessor the preference, the lease should cease and determine. Such a condition is merely collateral (*d*).

The effect of the rule in *Dumpor's Case* (*e*) is that neither a lessor of lands with a covenant for perpetual renewal, nor a party to whom he assigns the reversion, is entitled, after purchasing a portion of the tenant's interest, to enforce the covenant as to the residue of the property. Hence a party who afterwards contracts to purchase that residue cannot object to the title on the ground that the right of renewal still encumbers the land (*f*).

(*b*) *In equity.*—It seems clear, both upon principle and authority, that an option supported by a consideration may be enforced by assignees, especially after the conditions precedent have been duly performed (*g*).

Thus an assignment may be made of a tenant's option to purchase (*h*). So an option to take a lease for another term is assignable, unless it is expressly declared in the agreement that he shall not be at liberty to assign (*i*).

(*a*) *Albert Brick, &c., Co.* v. *Nelson* (1888) 27 New Br. R. 276 [immaterial that assignees were not named in covenant].

(*b*) *Laffan* v. *Naglee* (1858) 9 Cal. 662, 70 Am. Dec. 678.

(*c*) *Collins* v. *Lettsom* (1815) 6 Taunt. 224, citing *Mayor of Congleton* v. *Patterson*, (1808) 10 East. 130.

(*d*) *Sparrow* v. *Cooper* (1833) Hay & J. 204.

(*e*) 4 Coke 119, (b).

(*f*) *Sparrow* v. *Cooper* (1833) Hay & J. 404.

(*g*) *Perkins* v. *Hasdell* (1869) 50 Ill. 216.

(*h*) *Napier* v. *Darlington* (1871) 70 Pa. 64; citing *Kerr* v. *Day* (1850) 53 Am. Dec. 520, 14 Pa. 112; *House* v. *Jackson* (1893) 24 Or. 89; Contra, *Menger* v. *Ward*, 87 Tex. 622.

(*i*) *Buckland* v. *Papillon* (1866) L. R. 2 Ch. 67 [here the option was declared to pass to the assignee in bankruptcy].

So also one who has the privilege of selling all the produce of a certain kind which his land may yield during a specified term of years may assign his right to the purchaser of the land (*j*).

The grantee of an option does not, by assigning it, estop himself from exercising a right which he has expressly reserved to withdraw from the contract (*k*).

VIII. TO WHAT EXTENT THIRD PERSONS ARE BOUND BY THE EXISTENCE OF THE OPTION.

33. Parties acquiring the subject-matter of the option by testamentary provisions.—A covenant by a lessor to renew or pay for the improvements runs with the land and binds his devisee (*a*).

34. Subsequent purchasers.—(*a*) *At law.*—At law a purchaser of land affected by an option is bound by it, wherever it falls under the category of covenants running with the land. Thus an option of re-purchase binds the land in the hands of any person to whom it may pass (*b*) So covenants for the perpetual renewal of leases, being regarded as real agreements, affect the legal interest of all who take the estate with notice of them (*c*).

(*b*) *In equity.*—The granting of an option, not supported by a consideration, does not, for reasons which will be obvious, by referring to sec. 21 ante, create a right which will prevail against the interest of a subsequent purchaser. In a court of equity the same principle will of course prevail, where the consideration was merely nominal, and did not really pass (*d*). In such cases, the mere fact that a third person knows that the offer purports to be open till a date fixed will not prevent him from making a better offer (*e*).

(*j*) *LaRue* v. *Groesinger* (1890) 18 Am. St. Rep. 179; 84 Cal. 281 [decided with special reference to Cal. Civ. Code, secs. 1044, 1458, 1459, which virtually embody the rules of courts of equity as to assignments].

(*k*) *Clark* v. *Harmon*, 9 D.C. 1.

(*a*) *Irvin* v. *Simonds* (1864) 11 New Br. R. 190.

(*b*) *London &c. R. Co.* v. *Gomm* (C.A. 1882) 20 Ch. D. 562.

(*c*) *Earl of Shelburne* v. *Biddulph* 6 Bas. P.C. 356, 363 But a covenant for perpetual renewal, entered into by a person holding a limited interest in lands does not bind the estate beyond that interest. Hence, if his assignee acquires the inheritance, it is not bound by the covenant. *Brereton* v. *Twohey* (1858) 8 Jur. Com. L. 190.

(*d*) *Graybill* v. *Brugh* (1893) 89 Va. 895, 37 Am. St. Rep. 894.

(*e*) *Dickinson* v. *Dodds* (C.A. 1876) 2 Ch. D. 463, per Mellish L.J., p. 474.

On the other hand it is equally well settled that an option granted on a real consideration creates a substantial interest in the subject-matter, to which the rights of a subsequent purchaser who has notice of its existence are postponed in equity (*e*).

The possession of a tenant is constructive notice to one dealing with the landlord of the actual interest such tenant may have in the land, such as the rights acquired under an option to purchase within a given period (*f*), or to renew the term (*g*).

35. Creditors of the party giving the option.—As against creditors of the owner, having constructive notice of the option, the equitable interest of the holder of the option relates back to the date of the contract; and, wherever a contract giving an election to purchase has been registered, such creditors are put upon inquiry whether election has been exercised (*h*).

36. Wife of party granting the option.—A married woman is in no way bound by an option granted by her husband on her lands, where she was not a party to the transaction, and protested against it from the first moment that it came to her knowledge (*i*).

IX. NECESSITY FOR THE PERFORMANCE OF THE PRESCRIBED CONDITIONS BY THE GRANTEE OF THE OPTION.

37. Strict performance of conditions usually a pre-requisite to securing the benefits of an option.—The terms upon which options are granted are commonly such as to bring them within the general principle thus laid down by Lord Westbury:

"If it be clear that any particular act is a condition precedent, it is immaterial whether it be or be not reasonable to require that it be first done on the one side before any obligation arises on the other. The things required must be done in the order and sequence which are stipulated." (*j*).

It follows, therefore, that the holder of an option will, in the great majority of instances, be unable to enforce the inchoate

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(*e*) *Hersey* v. *Giblett* (1854) 18 Beav. 174 [tenant from year had an option to receive a lease upon demand]; *Ross* v. *Parks* (1890) 93 Ala. 153, 30 Am. St. Rep. 47, 11 L.R.A. 148; *Barrett* v. *McAllister* (1890) 33 W. Va. 738; *Clark* v. *Gordon* (1891) 35 W. Va. 735; *Jackson* v. *Groat* (1827) 7 Cow. (N.Y.) 285.

(*f*) *Daniels* v. *Dawson* (1809) 16 Ves. 253; *Kerr* v. *Day* (1850) 14 Pa. 112, 53 Am. Dec. 526.

(*g*) *Blackwell* v. *Smyly* (1866) 3 W.W. & A'B. (Vict. Eq.) 1.

(*h*) *Donnally* v. *Parker* (1872) 5 W. Va. 301.

(*i*) *Graybill* v. *Brugh* (1893) 37 Am. St. Rep. 874, 89 Va. 895.

(*j*) *Weston* v. *Collins* (1865) 5 N.R. [illegible] L.J. Ch. 353.

rights conferred by it, either in a legal or an equitable suit, unless he strictly fulfills all the conditions to which the undertaking of the grantor was expressly made subject by the provisions of the contract.

In practice it has happened that, for reasons which are sufficiently obvious in view of the usual subject-matter of these contracts and the nature of their provisions, this principle has ordinarily been applied in suits for specific performance, (see XI, post) which is refused, unless it is apparent that the condition which was not fulfilled was not intended to be of the essence of the contract (*b*), or unless, owing to no default on the part of the grantee of the option, it was impossible to fulfill those conditions (*c*).

Where "the covenantor cannot enforce a sale, but it is entirely in the option of the covenantee whether he will purchase or not, and where he is at liberty to exercise his option only upon the performance of certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for the sale and purchase of land, and a party entitled to purchase or not at his option must shew that he has performed all the terms, upon the performance of which alone he is entitled to exercise that option" (*d*).

38. Conditions considered without reference to the time fixed for performance.—Subjoined are some decisions in which the general principle stated alone has been applied without any special reference to the requirement that the act specified shall be done within a certain period.

(*a*) *Payment of purchase price.* (See also sec. 42, infra.)

If the proviso is that the grantee of an annuity will accept a specified sum for it within a specified period after the grantor, his heirs, etc., shall give notice of his desire to re-purchase it, the annuity is not extinguished unless a regular notice is given and payment actually made according to the notice (*e*).

(*b*) *Payment of rent by tenant with option to purchase or renew.*

As a general rule a tenant's stipulation to pay rent must be literally performed in order to entitle him to the specific performance of any

(*b*) *Joy* v. *Birch* (1836) 4 Cl. & F. 57 (p. 89); *Berwind* v. *Williams* (1895) 172 Pa. 1.

(*c*) *Ball* v. *Canada Co.* (1876) 24 Grant (U.C.) 281. See X, post.

(*d*) *Forbes* v. *Connolly* (1857) 5 Grant (U.C.) 657, per Spragge V.C.

(*e*) *Joy* v. *Birch* (1836) 4 Ch. V.F. 57, p. 89.

contract for the future disposition of the property in his interest (*b*). But an exception to this rule would seem to be admitted wherever the real consideration of the lease and the option was not the rent, but the improvements which the tenant was to make on the property (*c*).

(*c*) *Performance by tenant of covenants to repair and insure.*—Where the lessee covenants to keep the premises in repair, and is entitled to a renewal of the lease on giving six months' notice before the end of the term, he cannot enforce his right to the renewal, if the repairs were not completed either when the notice was given or when it expired (*d*). So also—although it was admitted to be a case of great hardship—where the lease contains the usual covenants to repair and insure, and also a covenant by the lessor that he would, provided the rent should have been paid and the covenants duly performed, procure from the lord of the manor, upon a request from the lessee in writing, a license to demise the premises for a further term, and so from time to time, provided such request should be given as aforesaid, and also that he would, on obtaining such license, grant a new lease with the same covenants, including the covenant for renewal, a court of equity will not relieve the lessee against a forfeiture of the privilege of renewal through the breach of the covenants to insure and repair, although the premises were only left uninsured a very short time, and the repairs were delayed in consequence of the landlord's objection to renew, and the lessee, who was the assignee of the original tenant, had expended large sums of money in erecting buildings on the property (*e*).

(*d*) *Furnishing of joint covenants by tenants with option to renew.* Where there are two tenants to a lease who have entered into joint and several covenants, and his agreement is to grant the renewed lease to the two, subject to the same covenants, he is entitled to have the joint and several covenants of the two on the renewed lease. Hence if one of them becomes bankrupt having shortly before assigned his interest to the other,

(*b*) *Davis* v. *Thomas* (1831) 1 Russ. & M. 506; *Weston* v. *Collins* (1805) 5 N. R. 345 (covenant that there should be a conveyance, if the tenant should pay the arrears of rent); In *Forbes* v. *Connolly* (1857) 5 Grant (U.C.) 637, specific performance was refused where a lessee had an option to purchase if he paid a stated sum and "performed and paid all the rents and covenants on his part to be performed" as set forth in the lease, and the rent had not been paid at the times stipulated. In another case relief was refused where the proviso was that "no default nor breach of covenant" should at any time have been made, and it was conceded that covenants as to payment of rent and taxes and cutting of timber had been broken. *Bull* v. *Canada Co.* (1876) 24 Grant (U.C.) 281.

(*c*) *Rawstone* v. *Bentley* (1793) 4 Bro. P.C. 415 (ejectment set aside where the rent reserved was nominal, and the land was vacant when the lessee entered, and had been already benefitted by the expenditure of £1000.)

(*d*) *Bastin* v. *Bidwell* (1881) 18 Ch. D. 238.

(*e*) *Job* v. *Banister* (1836) 2 Key & J. 374.

the latter cannot compel the landlord to renew the lease as to himself alone (*f*).

(*e*) *Application for renewal of lease upon the occurrence of a specified event.*—The general rule is that a tenant for lives forfeits the right of renewal if he does not comply exactly with provisions of the lease as to applying for the insertion of a new life after the death of a cestui que vie (*g*). Similarly where the lessor and lessee, in contemplation of the tenancy's continuing for a long term, provide for several renewals at the end of periods reckoned, not by lives, but by years, the right of renewal will be treated as being forfeited forever by the lessee's neglect to make application after the expiration of the first of these periods, where, upon a reasonable construction of the instrument, the lessor must have intended to limit the privilege to this extent (*h*).

But it is otherwise where a lease for a long term provides that the tenant may procure another lease for the same term by applying at the expiration of specified shorter periods during the currency of the term. The option of renewal is then regarded as a privilege which recurs as often as the end of one of these periods comes round (*i*).

39. Time usually of the essence of optional contracts.—(See also sec. 38 (*f*), supra.)—"In ordinary contracts of purchase, both parties are at once bound, and unless there be some special circumstances, the time for payment of the purchase money or for the conveyance of the estate, is not deemed of the essence of the contract" (*a*). In the case of such contracts, therefore, the circumstance that the day fixed for the payment of the money and completion of the purchase has passed, does not ordinarily entitle either party to refuse to carry out the agreement (*b*). A different rule usually

(*f*) *Finch* v. *Underwood* (C.A. 1876) 2 Ch. D. 310, [right of renewal of lease was here expressly made to depend upon the lessee's having "duly observed and performed all the covenants of the lease."]

(*g*) *Bayley* v. *Leominster* (1792) 3 Bro. Ch. Cas. 529, 1 Ves. 476, [two lives had dropped before election to renew was declared]; *Bernham* v. *Guy's Hospital* (1769) 3 Ves. 295; *Eaton* v. *Lyon* (1798) 3 Ves 690; *Pennette* v. *Clinch* (1894) 26 N.S.R. 410.

(*h*) *Rubery* v. *Jervoise* (1786) 1 T.R. 229; *Nicholson* v. *Smith* (1882) 22 Ch D. 640.

(*i*) *Bogg* v. *Midland R. Co.* L.R. 4 Eq. 310, 313, distinguishing *Eaton* v. *Lyon*, supra.

(*a*) *Weston* v. *Collins* (1863) 5 N.R. 345, 34 L.J. Ch. 333, per Ld. Westbury. As to the general principle upon which it is determined whether time is of the essence of the contract, see Dart's V. & P., 6th ed., pp. 482, et seq. As to the effect of the lapse of time generally, upon the right to obtain specific performance, see Fry's Spec. Perf. ch. XXV.

(*b*) *Randagh* v. *Melton* (1864) 2 Dr. & Sm. 278.

prevails in cases of the type under review. In these the controlling principle is that, wherever it is stipulated in effect that, provided the intending purchaser shall do a specified act, then the owner will convey the land, the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as stipulated (*c*). Clearly that relation can never come into existence at all if any act upon which such existence is expressly made dependent has been left unperformed at the expiration of the period for which the offer holds good. Mutatis mutandis; a similar principle is applicable where the negotiation contemplates a transfer of interests, not amounting to a complete sale.

40. Option lost, if not accepted within period limited.—Accordingly in most cases of options, as such offers are ordinarily worded, the rights of the party to whom the offer is made are gone forever, unless he duly communicates the fact of his acceptance to the party making the offer before the period which the latter allowed for consideration has expired (*a*).

An acceptance is ordinarily deemed to be given in time if communicated at any time during the period specified in the contract for the duration of the option (*b*), even though the stipulation is for so many days' notice, and the period covered by the option may be so nearly ended when the notice is given that it will have completely expired before those days have elapsed (*c*). And if the

(*c*) *Rawlagh* v. *Melton* (1864) 2 Dr. & Sm. 278. In *Page* v. *Hughes* (1842) 2 B. Mons (Ky.) 439, it was said that time was generally essential for the reason that the contract was not mutual. But the consideration seems irrelevant. The question is merely one of the intention of the person making the offer.

(*a*) *Coleman* v. *Applegarth* (1887) 6 Am. St. Rep. 417, 68 Md. 21; *Maughlin* v. *Perry*, 35 Md. 352; *Weaver* v. *Burr* (1888) 31 W. Va. 736; *Dyer* v. *Duffy* (1894) 36 W. Va. 148; *Mason* v. *Payne* (1871) 47 Mo. 517; *Barrett* v. *McAllister* (1890) 33 W. Va. 738; *Schields* v. *Horbach* (1890) 30 Neb. 536; *Longworth* v. *Mitchell* (1875) 26 Ohio St. 334; *Attee* v. *Bartholomew* (1887) 69 Wis. 433; *Magoffin* v. *Holt* (1863) 1 Duv. (Ky.) 95; and the cases cited in the following notes.

(*b*) *Shipman* v. *Grant*, 12 C. P. (Ont.) 395 [not necessary to give notice before the period begins]; *Brown* v. *Slee* (1880) 103 U.S. 828 [notice need not be given on the actual day a re-purchase is made under an option].

(*c*) *Guyer* v. *Warren* (1898) 175 Ill. 328. It has been held, however, that a notice of so many days required to be given by a lessee having an option of purchase at any time within five years is too late, when it is only given two days before the term expires, *Mason* v. *Payne* (1871) 47 Mo. 517. A similar obligation may sometimes be created by the express terms of the option. Thus when the notice of the lessee's desire to purchase is to be one of six months expiring on one of the quarterly days appointed in the lease for the payment of rent, a notice given at such a time that before it has been running six months, the end of the term is reached, is out of time, and a sale will not be enforced. *Riddell* v. *Dumford* (1893) W. N. 30.

grantee of the option has until a stated day to accept the proposition, the period does not expire till the close of that day (*d*).

The inchoate rights given by an option lapse without notice or declaration of forfeiture from the party making the offer (*e*)

The lapse of the option involves also the forfeiture of any rights of third parties which may be contingent upon its acceptance (*f*).

41. Acceptance must be within reasonable time where none is particularized.—The general rule is that, where no time is expressly limited for the exercise of the option by the terms of the proposal, the other party must signify his acceptance of the offer within a reasonable time, or he will be treated as having declined it (*g*).

42. Payment of purchase price or other sums stipulated at the specified time.—Another consequence of the essentiality of time in most cases of optional contracts is that, in order to perfect his inchoate rights, the grantee of an option will ordinarily be obliged not merely to declare his acceptance of it within the period for which it holds good, but also, before that period expires, either actually pay (*a*), or make a proper tender of the

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(*d*) *Houghwout* v. *Boisanbin* (1867) 18 N.J Eq. 315.

(*e*) *Cookson* v. *Cookson*, 8 Sim. 529; *Pyke* v. *Northwood* (1838) Beav. 152; *City of London* v. *Metford* (1807) 14 Ves. 41; *Allen* v. *Hilton* (1738) Fonbl. Eq. 432; *Wentworth* v. *Hull &c. R. W. Co.* (1891) 64 L.T. 190; *Barker* v. *Critzer* (1886) 35 Kan. 459 [option cannot be revived where grantor acquires the subject matter after its lapse.]

(*f*) *Cummings v. Lake & Co.* (1893) 86 Wis. 382 [no claim for services where option is forfeited].

(*g*) *Fitzpatrick* v. *Woodruff* (1884) 96 N.Y. 561; *Hanly* v. *Watterson* (1894) 39 W. Va. 214; *Larmon* v. *Jordan* (1870) 56 Ill. 204 [offer of property of fluctuating value, like stocks, not presumed to hold good for twenty-seven days; *Chicago, &c., R. Co.* v. *Dane* (1870) 43 N.Y. 240 [proposal to carry merchandise within certain specified months]; *Carr* v. *Duval* (1840) 14 Pet. (U.S.) 70 [twenty days not a reasonable time for a reply, where answer by return post is asked for]; *Catlin* v. *Green* (1886) 5 N.Y. S.R. (Brooklyn City Ct.) 866 [nine years too long for a stockholder to delay exercising option to exchange stock for bonds]. Where one party in consideration of another promising to use his best efforts to sell the former's land for a certain price, binds himself to convey the property to the latter, his assigns, or appointee, whenever called upon to do so, the owner to remain in possession in the meantime, the holder of the option cannot, after so long a period as four years, when the property has greatly increased in value, compel a conveyance, unless he at least tenders the purchase money, or shows that his appointee has the means to pay it. *Kellow* v. *Jory* (1891) 141 Pa. 144.

(*a*) *Pegg* v. *Wisden* (1852) 16 Beav. 239; *Weston* v. *Collins* (1865) 5 N.R. 345; *Lord Ranelagh* v. *Melton* (1864) 2 Dr. & Sm. 278; *Brook* v. *Garrod* (1858) 2 De G. & J. 62; 3 K. & J. 62; *Burril* v. *Sabine* (1684) 1 Vern. 268. See also to same effect *Nevitt* v. *McMurray* (1886) 14 Ont. App. 126; *Richardson* v. *Hardwick* (1882) 106 U.S. 252; *Kerr* v. *Purdy* (1872) 51 N.Y. 629, rev'g 50 Barb. 629; *Maughlin* v. *Perry* (1871) 35 Md. 352; *Hermann* v. *Conlon* (1897) 143 Mo. 369; *Clarno* v.

sum of money named as the price of the interest or estate to which the option relates (*b*); or—supposing the discharge of such a liability to have been expressly made a condition precedent to the right to demand a conveyance,—cancel some collateral debt, such as a mortgage on the property sold (*c*), or an outstanding note of the vendee himself for goods supplied by the vendor on some prior occasion (*d*).

In some early cases the doctrine seems to be laid down quite strongly that, where the right to renewal of a lease is made dependent upon the payment of fines at specified times, the court will not, in the absence of some special circumstance, assist the lessee where he has neglected to perform this condition (*e*); but in later rulings a distinction is taken between a mere omission to pay the fine, and wilful neglect or refusal to renew the lease. In the former case equity will relieve against the breach of the condition, in the latter specific performance will be denied (*f*). The failure to pay the fine during the currency of the term is of course not fatal to the right of renewal, where the provisions relating to the renewal are couched in terms which indicate that it was the intention of the parties that the fine was not to be paid until after the expiration of the old term (*g*).

Grayson, 3 Or. 111; *Bostwick* v. *Hess* (1875) 80 Ill. 138; *Stembridge* v. *Stembridge* (1888) 87 Ky. 91; *Weaver* v. *Burr* (1888) 31 W. Va. 736; *Clark* v. *Gordon* (1891) 35 W. Va. 735. "Where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming the privilege must show that the money was paid accordingly." *Davis* v. *Thomas* (1831) 1 Russ. & Myl. 506.

(*b*) *Dawson* v. *Dawson* (1837) 8 Sim. 346; *Carter* v. *Phillips* (1887) 144 Mass. 100; *Longfellow* v. *Moore* (1887) 102 Ill. 289. Even a tender of the money will not be sufficient, if the agreement distinctly contemplates a completion of the purchase before the end of the period. Thus, where one party pays a sum for an option to buy within so many days a piece of property for a specified price in cash, upon payment of which the owner is to make deed, the rights under the option are not saved by merely notifying the owner of an acceptance of the offer, and an offer to deposit such amount as might be required of him, pending examination of title. *Killough* v. *Lee* (1893) 2 Tex. Civ. App. 260.

(*c*) *Stembridge* v. *Stembridge* (1888) 87 Ky. 91.

(*d*) *Schields* v. *Horbach* (1890) 30 Neb. 536.

(*e*) See House of Lords decisions cited in the judgment in *Lawstone* v. *Bentley* (1793) 4 Bro. P.C. 415.

(*f*) *Lennon* v. *Napper* (1807) 2 Sch. & L. 682; *Chesterman* v. *Mann* (1851) 9 Hare (1851) 9 Hare 206 [evidence showed that up to the time when the renewal was open under the terms of the lease, the lessee had temporized on merely colourable grounds about coming to a definite arrangement, and had no *bona fide* intention of renewing].

(*g*) *Nicholson* v. *Smith* (1882) 22 Ch. D. 640. The time with reference to which the question of an under-lessee's laches in failing to pay the fine which is due from him upon his obtaining a renewal of the lease is reckoned not from the latest time at which the mesne landlord might have procured a lease, but from the time when the under-lessee is called upon to contribute to the payment of the fine. *Chestermann* v. *Mann* (1851) 9 Hare 206.

Payment within the period covered by the option is, of course, not obligatory where it is not required to be so made (*h*) Sometimes this non-essentiality of time may be inferred from the terms of the contract (*i*); or it may be deduced from the acts of the grantor of the option (*j*).

An extension of the time given for payment by a contract so worded as to make time essential does not destroy the essentiality of the condition altogether, but payment on the further day named is obligatory (*k*).

Money paid or account of an ordinary purchase is recoverable, if the contract is not completed owing to no fault of the vendee's, but a different rule governs, where the contract provides for a forfeiture of the sum paid for an option, in case the purchase is not completed within the time limited (*l*).

43. Delay in completing the contract after acceptance, consequence of.—Any laches after a demand for a lease is made by a tenant from year to year will be taken strongly against the tenant; but a subsequent acceptance of rent will cure such a defect (*a*).

(*h*) *Watson* v. *Coast* (1891) 35 W. Va. 463.

(*i*) Where it was provided that the tenant should "have the option of any time during the term to purchase the premises for £3500, and, upon payment thereof to the lessor, the said term should cease, and the tenant should thereupon be entitled to an assignment, it was held that the contract of sale became complete when the tenant notified the lessor of his intention to purchase, and the payment of the purchase-money was not a condition precedent to the existence of a mutually obligatory agreement, *Mills* v. *Haywood* (C.A. 1877) 6 Ch. D. 198. Where a lessee has the right of purchasing at any time within a specified period by giving three months' notice, and notice is duly given, time will not be considered to be of the essence of the contract, so far as regards its completion of the contract by payment of the price. *Pegg* v. *Wisden* (1852) 16 Beav. 239. The general rule has been said to be, that time is not of the essence where the contract shows no intrinsic purpose which would be defeated by delay in payment of the price, and there is no condition that the contract shall be avoided by the failure to make payment at the time appointed. *Wilson* v. *Herbert* (1893) 76 Md. 489, where the court decreed a renewal of a lease, in spite of the failure of the lessee to pay the purchase price before the end of the term, where the stipulation was merely that the property would be conveyed for the price specified, provided the lessee paid the arrears of rent, and also any rent that might be due up to the end of the term.

(*j*) Time is not of the essence although a lease only gives the tenant the right to purchase at any time within a year from its date, where the tenant has held over with the landlord's consent after the expiration of the year and is still in possession when he elects to purchase. *O'Arms* v. *Keyer* (1856) 20 Pa. 289.

(*k*) *Barclay* v. *Messenger* (1874) 43 L.J. Ch. 449; 22 W.R. 522.

(*l*) *McConkey* v. *Peach Bottom &c., Co.* (1895) 68 Fed. 830.

(*a*) *Hersey* v. *Giblett* (1854) 18 Beav. 174. A tenant with an option to purchase who after giving notice of his intention to exercise his option, delays for five years to enforce the contract, cannot claim specific performance, especially where the subject-matter of the contract is of a somewhat speculative and fluctuating value, (in this case a tavern), *Mills* v. *Haywood* (C.A. 1877) 6 Ch. D 198.

As a general rule, a purchaser in possession does not lose by delay his right to specific performance; but the benefit of this principle cannot be claimed, where there is nothing to show that the lessor and his mortgagee recognized or were bound to recognize the possession of the tenant, after notice of intention to purchase, as being the possession of a purchaser under the contract for sale (*b*).

After the contract has become binding by the declaration of an intention to exercise the option, time cannot be made of the essence of the contract by a notice from the vendor to complete the purchase, unless the period fixed by the notice is a reasonable one; and the question of reasonableness must be determined at the date when the notice is given (*c*).

44. When non-performance of conditions is excused.—The terms on which a court of equity will relieve against the legal consequences of a non-performance of conditions were thus explained as regards one common kind of optional contracts, more than a century ago:

"Where the lessee has lost his legal right, he must prove some fraud on the part of the lessor, by which he was debarred the exercise of his right; or some accident or misfortune on his own part, which he could not prevent, by means whereof he was disabled from applying for a renewal at the stated times, according to the terms of his lease." (*d*)

But several other excepted cases are recognized in later decisions besides those here mentioned. The non-completion of the contract at the time stipulated will be excused, where the vendor repudiates the contract (*e*); or where there is a bonâ fide dispute as to the terms on which the option may be exercised, unless the omission to settle those terms can be attributed to the fault or default of the holder of the option (*f*); or where the grantee's failure to complete

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(*b*) *Mills* v. *Haywood* (C.A. 1877) 6 Ch. D. 196.

(*c*) *Crawford* v. *Toogood* (1879) 13 Ch. D. 153; *Pegg* v. *Wisden* (1850) 10 Beav. 239.

(*d*) Lord Thurlow in *Bateman* v. *Murray* (1779), as quoted in *Rawstone* v. *Bentley* (1793) 4 Bro. P. C. 415.

(*e*) *Mansfield* v. *Hodgdon* (1888) 147 Mass. 304 refusal to include in the conveyance portion of the land covered by the option.

(*f*) *Hunter* v. *Hopetown* (1865) 13 L.T. (H.L.) 130, per Lord Kingsdown. There the actual point on which the decision turned was that a landlord, while a suit is pending in which he denies the relation of landlord and tenant, cannot justify his refusal to grant a new lease on the ground that the tenant should have treated the refused lease as granted, and that, if he desired a further renewal after the end of the period on which the lease so refused would have expired, he should have given notice of his desire for renewal twelve months before such expiration, as specified in the original instrument. In some cases, however, the

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

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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 he 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.

of the grantee to exercise it, and, in view of such exercise, has consented to prolong the relations upon the continuance of which the right of exercising it depends, the grantee's non-compliance with a provision that so many days' notice shall be given of his intention will not be fatal to his rights (*h*).

45. Waiver of performance by grantor.—The conditions upon which the grantee of an option is to be entitled to its benefits may of course be waived altogether by the grantor. Such a waiver will be inferred from any statements of the grantor of the option which indicate that he regards the obligations of the grantee, as still existing—as where a lessor, after his lessee has failed to complete a purchase within the time limited, writes a letter to the lessee, threatening to take proceedings for the enforcement of the contract, if there should be any further delay (*a*). So also a covenantor who by his own conduct causes a failure to comply with the condition that the price should be paid before a certain date waives the condition to that extent (*b*). But in no case will a waiver be implied, where the grantor of the option was not aware of the breach of the condition which entitled him to forfeit the privilege (*c*).

XI. ENFORCEMENT OF OPTIONS BY THE COURTS.

46. Options, though merely unilateral contracts, specifically enforceable.—The fact that an option is a merely unilateral contract has naturally suggested, in suits for specific performance, the objection that they are wanting in mutuality; but it is now well settled that courts of equity will not refuse relief upon this ground.

Some authorities treat these cases as exceptions to the general rule that a contract is not specifically enforceable unless it is mutual,—that is such that it may be enforced by either party against the other (*a*). In other words, the broad ground is taken that the mere fact of a contract being unilateral is no impediment

(*h*) *Wilson* v. *Herbert* (1893) 76 Md. 489.

(*a*) *Pegg* v. *Wisden* (1850) 16 Beav. 239.

(*b*) *Mansfield* v. *Hodgdon* (1888) 147 Mass. 304. Compare sec. 43 ante.

(*c*) *Thompson* v. *Guyon* (1831) 5 Sim. 65 [landlord allowed tenant to remain in possession, not knowing that he was liable to ejectment for breach of covenants in the lease].

(*d*) Fry Spec. Perf., sec. 470; *Lawrenson* v. *Butler*, 1 Sch. & Lef. 13; *Chesteman* v. *Mann* (1851) 9 Hare 206 [covenant by lessor to renew].

to its specific enforcement in any case where it is supported by a consideration (*a*).

Another view is that options, though unilateral, are not wanting in mutuality, if they are supported by a consideration (*b*).

The correctness of this latter theory as regards options after acceptance is, of course, not open to controversy, for the contract is thenceforward bilateral and therefore binding on both parties (*c*); and it may be that the general language used in the cases just referred to is accounted for by the fact that the possibility of their being a distinction between options before and after acceptance was not present to the mind of the court. A due regard for precision of terminology seems to require a recognition of this distinction; but obviously it can have no practical effect upon the rights of litigants. Inasmuch as the due assent of the grantee of the option and his performance of the prescribed conditions are essential pre-requisites to the maintenance of his suit, it follows that, in every instance in which the elements of an option specifically enforcabie are present, the dealings between the parties must have reached a stage at which the ingredient of mutuality is unquestionably present (*d*).

(*a*) *Watts* v. *Kellar* (C.C.A. 1893) 56 Fed. Rep. 1.

(*b*) *Waterman* v. *Waterman* (1886) 27 Fed. Rep. 827; *Johnston* v. *Trippe* (1887) 33 Fed. Rep. 330; *Herman* v. *Babcock* (1885) 103 Ind. 461; *Schroeder* v. *Gemender* (1875) 10 Nev. 355; *Ross* v. *Parks* (1890) 93 Ala. 153, 30 Am. St. Rep. 47, 11 S.R.A. 148; *Goodpaster* v. *Courtney* (1860) 11 Iowa 161; *Calanchuri* v. *Bramstelle* (1890) 84 Cal. 249. The fact that the agreement, which includes the option to purchase, contains other stipulations—as that that the party receiving the option will build on the land and pay the taxes—will not prevent the enforcement of the option on the ground of want of mutuality. It will not be presumed that the privilege of purchase was not the very inducement of the acts which the person having the option was to perform. *Stansbury* v. *Fringer* (1840) 11 Gill & J. (Md.) 149 [demurrer overruled].

(*c*) *Frick's Appeal* (1882) 101 Pa. 485; *O'Brien* v. *Boland* (1896) 166 Mass. 481; *Carson* v. *Mulvany* (1865) 49 Pa. 88; *Smith's Appeal*, 69 Pa. 474; *Richards* v. *Green*, 8 C.E. Green (N.J.) 536; *Woodruff* v. *Woodruff* (1888) 44 N.J. Eq. 349 [mutuality held to be created by filing of bill for specific performance]; *House* v. *Jackson* (1893) 24 Or. 89; *Johnston* v. *Wadsworth* (1893) 24 Or. 494; *Gordon* v. *Darnell* (1880) 5 Colo. 300. An agreement giving a coke company an option to furnish a stated number of car-loads of coke at a specified price per ton if it can induce manufacturers to build more ovens to furnish the requisite amount, and, in case of its being successful, binding the other party to accept that quantity of coke ceases to be merely unilateral when the coke company is successful in inducing the coke manufacturers to build the necessary ovens. *Sheffield, &c., Co.* v. *Hull, &c., Co.* (1893) 101 Ala. 446.

(*d*) Compare the remark of Fry, L.J., in his work on Spec. Perf., that a "more satisfactory reason [for allowing these contracts to be enforced] is that, by instituting proceedings the plaintiff has waived the original want of mutuality, and rendered the remedy mutual." See also *Yerkes* v. *Richards* (1893) 153 Pa. 646, 34 Am. St. Rep. 721, where it was held that want of mutuality cannot be predicated from the fact that the person seeking to enforce the option executed under seal the contract which gave it, as agent and without disclosing that his principal was his wife, and that as he does not show authority to bind her, a feme covert, by deed, she is not bound. The court remarked that, even if an option be

47. Certainty of the terms.—Whether the option is granted in terms sufficiently certain to make it a subject for specific performance depends of course upon whether the contract is reasonably susceptible of a construction which will impart the required definiteness to the provision under discussion. . In the subjoined note are collected several rulings, most of them relating to cases in which the uncertain ingredient was the price, the question in this case being whether the methods indicated for fixing it supply a standard sufficiently precise to form the foundation of a decree (*a*).

In any event specific performance will not be decreed until the price has been ascertained in the manner specified by the agreement (*b*).

"not mutual in the sense of equality of benefit, that is not the mutuality which stands in the way of enforcement; to bring it under this rule there must be want of mutuality in the remedy."

(*a*) A contract by which a yearly tenant has the right, if he wishes for a lease, to have it granted "for seven, fourteen, or twenty-one years at the same rent," is sufficiently certain to be specifically performed. It will be construed as creating a tenancy from year to year, "with an option given to the lessee to ask for a lease from the beginning, for twenty-one years, determinable, at his option, at the end of seven or fourteen years." *Hersey* v. *Giblett* (1854) 18 Beav. 174; Where a testator gives a right of pre-emption to a specified party at such price and upon such terms as the trustees of his will may think proper to fix, the Court will, upon the refusal of the trustees to act, have the price fixed before a Master, and then enforce the right. *Lord Radnor* v. *Shafts* (1805) 11 Ves. 448. Specific performance will not be refused, where a lessee is to have the privilege of purchasing upon such terms and "at the same price per acre as any other person or purchaser might have offered therefor." *Hayes* v. *O'Brien* (1894) 149 Ill. 403; nor where the price to be paid by a lessee is to be fixed by arbitrators or a "committee of three disinterested persons." *Herman* v. *Babcock* (1885) 103 Ind. 461. On the other hand, a Court declined to enforce a contract by which a person covenanted on the marriage of his daughter that her husband should have a certain estate for £1500 less than any other person would give for it. *Bromley* v. *Jeffries* (1700) 2 Vern. 415. So an option on land which fails to state the price and the terms, or the time for performance is too indefinite to be enforced. *Lombard Inv. Co.* v. *Carter*, 7 Wash. 4 [the Court here refused to supply the defects of the option by referring to a general policy of the grantor of the option (a railway company) in relation to its lands.] So specific performance has been refused of a covenant in a lease to the following effect: The party of the first part hereby agrees, in case the parties of the second part shall then be tenants of the premises, to first offer the said property so demised for sale by them for the sum of $25,000. The Court refused to say that it meant either that there was an absolute agreement to offer the premises to the lessees at $25,000, with the sole proviso that the lessees should then be tenants, or that it was to be read as if it ran: "In case the lessor first offers the property for sale for $25,000, then he will first offer it to the lessees at that price." *Buckmaster* v. *Thompson* (1867) 36 N.Y. 558. So a covenant in a lease that, "if the premises are for sale, the lessee shall have the refusal of them," but not fixing the price nor providing any way in which it can be fixed will not be specifically enforced. The Court declined to rule that the contract should be taken to mean that the lessee was to have the refusal "on the same terms as anyone else." *Fogg* v. *Price* (1888) 145 Mass. 513.

(*b*) *Woodruff* v. *Woodruff* (1888) 44 N.J. Eq. 349.

If the nature of the transaction is such that it rests with the grantee of the option to reduce the contract to certainty by the terms in which his election is expressed, the language used must be definite and precise to warrant a court of equity in enforcing it (*c*).

48. Right of grantee of option to a good title.— A person with an option to purchase land has, like any other intending purchaser, a right to have a good title shewn to the property (*a*), unless this right has been waived by his own conduct or declarations; and the burden of proving such waiver lies on the grantor of the option (*b*). Similarly in the case of an agreement to lease, the vendor is bound to show that there is a subsisting valid agreement to lease. This he cannot do where he has given the owner of the premises a right to cancel the lease by failure to perform certain conditions, and, at the time when the purchaser repudiates the contract, there has been merely a conditional and contingent waiver of the right of the owner of the premises to avoid the term (*c*). Even where the contract giving the option provides that the money paid for it is to be forfeited if the purchase is not completed, the holder of the option may, if he discovers, before the end of the period which it covers, that the owner of the property has not a good title to it, rescind the contract and recover the money so paid (*d*).

49. Right to exercise option lost by estoppel.—A mortgagor who without the knowledge either of the heir of the mortgagor or of a purchaser from such heir, has reserved a right of pre-emption in case of a sale of the property, is precluded from claiming, as against such purchaser, the benefit of this right, where he allows the sale to be completed without mentioning that he had the

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(*c*) *Christian &c. Co.* v. *Bienville &c. Co.* (1894) 106 Ala. 124, where the Court held that a contract for a water supply, with an option to the person supplied to have the service continued at a specified rate, was not void as to such option because of its indefiniteness as to such duration, but declined to enforce the agreement on the ground that the consumer had not expressed his election in sufficiently definite terms by a notice that he wished "to continue the service from month to month."

(*a*) *Welshman* v. *Spinks* (1861) 5 L.T. 385; *Brewer* v. *Broadwood* (1882) 22 Ch. D. 105; *Re Hunter* (1831) 1 Edw. Ch. (N.Y.) 1.

(*b*) *Welshman* v. *Spinks* (1861) 5 L.T. 385.

(*c*) *Brewer* v. *Broadwood* (1882) 22 Ch. D. 105.

(*d*) *Burks* v. *Davies* (1890) 20 Am. St. Rep. 213, 85 Cal. 110.

right (*a*). So also a party holding an option for the purchase of timber which is not limited as to time may estop himself from asserting it against a third person by acquiescence in the acts of the latter in removing the timber, and assisting the men engaged in the work (*b*).

50. Where the adequacy of the price is left to the discretion of the trustees, their action in accepting a certain amount will not ordinarily be interfered with, unless proof of fraud is given (*c*).

51. Equities adjusted under special circumstances between lessee and under-lessee, with option of renewal.—Where a tenant for lives under a lease not containing a covenant for perpetual renewal purchases the fee simple in order to save his estate, after the refusal of the holder of the reversion to renew the lease, such purchase does not give an under-lessee with a toties quoties covenant an absolute right to demand a perpetual renewal, by the insertion of new lives, but merely entitles him to call for a conveyance of the particular property comprised in his under-lease, upon the terms of satisfying his share of the expenses of acquiring it, having regard to the value of his covenants, which will have to be deducted from the valuation of the fee simple of the property comprised in his lease (*d*).

52. Enforcement of provisions giving continuing partners the option of purchasing share of retiring partner.—Since, generally speaking, a clause in partnership articles giving continuing partners a right of pre-emption as regards the share of a retiring partner is not the subject of conveyance in courts of law, it is not open to courts of equity to say, when the rights under such a clause are in question, that the parties will be left to their legal remedy. The jurisdiction of the latter courts to enforce the performance of such a clause is not merely discretionary as in the case of an ordinary contract between vendor and purchaser. In a proper case the violation of the right of pre-emption will be restrained by injunction, and its performance enforced, as a matter of course (*e*).

(*a*) *Orby* v. *Trigg* (1722) 9 Mod. 2.

(*b*) *Hanly* v. *Watterson* (1894) 39 W. Va. 214.

(*c*) *Edmunds* v. *Millett* (1855) 20 Beav. 52, refusing to restrain a sale.

(*d*) *Postlethwaite* v. *Lewthwaite* (1862) 2 Johns. & H. 237.

(*e*) *Humfray* v. *Fothergill* (1866) 1 Eq. 567.

But the discretionary powers of a chancellor will be freely used in shaping the relief granted, wherever the special circumstances render the ordinary remedies an inadequate protection to the interests of any of the parties concerned (*b*).

It will not be inferred that the partner desirous of selling may choose to which of his partners he will offer his share, and exclude some from the offer, unless, on the proper construction of the clause such a choice is clearly given. Hence if the pre-emption clause provides that the offer of the share of the outgoing partner shall be made first to all the other partners collectively, and, if that offer be declined, to the other partners desirous of collectively purchasing, an offer to all the continuing partners collectively, one of whom has determined, to the knowledge of the partner making the offer, not to purchase, enures to the benefit of the remaining partners, and they are entitled to specific performance (*c*).

In some cases special provisions are inserted in the articles with a view to ensuring that the retiring partner's offer of his share shall be duly brought to the knowledge of the other partners. Under such circumstances, it is sufficient if their is a substantial compliance with those provisions, particularly if the procedure followed is one which has been customarily followed in the same concern on previous occasions when a partner has retired (*d*)

Where notice has been given by one partner to another to exercise the option of the pre-emption reserved to each member of the firm under the articles, and the partner receiving the notice becomes a lunatic before he actually exercised the option, the notice is binding on the lunatic's committee, and the right of pre-emption is gone after the share is sold to a stranger (*e*).

(*b*) In a case before Lord Romilly, the articles provided that the partners who were to carry on business as surgeons for such a term as they should mutually agree, provided that in the event of the death or incapacity of either partner, the surviving or continuing partner might purchase his share in the business, and that, if he should decline, it might be sold to any other person who might be willing to purchase it. Upon the death of the partner who last entered the firm, the surviving member declined either to purchase or admit a stranger into the business. The course taken, as being most consistent with the true spirit of the articles, was to ascertain the value of the deceased partner in the concern at the time of his decease, and to charge the surviving partner with that amount. *Featherstonhaugh* v. *Turner* (1858) 25 Beav. 382.

(*c*) *Homfray* v. *Fothergill* (1866) L. R. 1 Eq. 567.

(*d*) *Glassington* v. *Thwaites* (1883) Coop. temp. Brough, 115 [provision as to notice to be given in writing, held to be satisfied by entry of offer in a book open to all the other persons concerned].

(*e*) *Rowland* v. *Evans* (1862) 8 Jur. N.S. 88, 30 Beav. 302.

XII. OPTIONS TO DO ONE OR OTHER OF TWO ALTERNATIVE THINGS.

53. Generally.—The principles determinative of the rights arising from options which expressly confer alternative privileges between which the grantee is allowed to choose are of course essentially the same as those already discussed. But, as the application of these principles is necessarily coloured in some degree by the presence of the distinctive element of this class of agreements, it will be convenient to note the decisions relating to them in a separate subtitle.

54. Construction of leases giving landlords the option to renew or pay for improvements.—(See also sec. 20, ante). The paying for the lessee's improvements, if the lessor takes them is the governing and main principle of these leases, and the renewal of the lease is but an optional and secondary consideration, which the lessor may or may not act upon (*a*).

Where the lessor covenants to renew, "if the same shall be lawfully demanded," or, "upon neglect or refusal so to do, after such demand," to pay for all improvements on the premises at a fair valuation, the option rests with the lessor and not the lessee either to renew or pay for the improvements (*b*).

Where the lessor has the option of continuing the lease or paying for the improvements, it is not the duty of the lessee to prepare and tender to the lessor the necessary instrument for continuing the lease; nor does the lessor sufficiently perform his covenant for renewal by being simply ready and willing to continue the lease. He must make his option and declare the same to the lessee before he can require the latter to prepare the new lease (*c*).

A covenant on a lease providing for the valuation of any buildings erected on the premises by the lessees, and upon such valuation that the lessor should have the option of paying the appraised value to the lessee, or to extend the lease for a further term of like duration, is deemed to have for its object merely the compensation of the tenant for improvements in one of two ways at the option of the landlord. The agreement will not be construed so as to prevent the tenant from waiving what is for his own benefit. It is only in case the tenant claims to be paid for improvements that the question of renewal arises, and the option of the landlord attaches. The mere fact that the tenant holds over at the expiration of the lease will not justify the inference that he intended to continue the occupation, upon the same conditions, nor warrant a court of equity in compelling him to

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(*a*) *Eedell* v. *Rector, &c.*, (1855) 8 N.B.R. 21.

(*b*) *Hutchinson* v. *Boulton* (1852) 3 Grant (U.C.) 391.

(*c*) *Auley* v. *Peters* (1847) 5 N.B.R. 543.

accept a lease for another term. Any other construction would operate to make the lease perpetual at the will of the lessors (*d*).

The intention of the lessor to renew for the same term and the same rent is inferred where he allows the lessee to remain in possession for a year after the expiration of the term, without having the property valued according to a stipulation in the lease (*e*).

55. Options as to return and surrender of stock.—Where stock is to be paid for or returned at the option of the purchaser before a certain date, he is liable if he allows the option period to expire without returning the stock (*a*).

Where the purchaser of corporate stock is given the option to surrender it at the end of two years for the full amount paid by him, his election not to exercise that option is conclusively inferred where he surrenders the stock to the corporation for cancellation and receives other stock in lieu thereof, and he cannot enforce the original agreement (*b*).

(*d*) *Sears* v. *Mayor, &c.* (1889) 18 S.C.R. 702 (diss. Ritchie, C.J., and Taschereau, J.,) aff'g 28 New Br. R. 1.

(*e*) *Irvin* v. *Simonds* (1864) 11 New Br. R. 190.

(*a*) *Stevens* v. *Hertzler*, 109 Ala. 423.

(*b*) *Holsky* v. *Enslen* (1893) 103 Ala. 87.

C. B. LABATT.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

PRACTICE—COUNTER-CLAIM SET UP BY REPLY—JUD. ACT 1873 (36 & 37 VICT., C. 66) S. 24, SUB-SS. 3, 7—ORDERS 199, 243, 250—(ONT. RULES 251, 252, 253, 274).

Renton v. *Neville* (1900) 2 Q.B. 181, was an appeal from Phillimore J. in Chambers, refusing to strike out a paragraph in the plaintiffs' reply setting up a counter-claim in reply to a counter-claim pleaded by the defendants. The defendants' counter-claim was for damages for breach by the plaintiffs of a contract, and the reply, besides denying that the alleged contract was binding on the plaintiffs, in the alternative alleged that if it was binding the defendants had committed breaches of it which caused loss to the plaintiffs which they claimed to set off against the defendants' counter-claim. The appeal was dismissed by the Court of Appeal (Collins and Romer, L.JJ.) who were of the

opinion that the case was governed by *Toke* v. *Andrews*, 8 Q.B.D. 428, and that as the plaintiffs relied on their counter-claim merely as a defence or shield to the defendants' counter-claim and not as a substantive cause of action, it might properly be set up by reply, and that it was not a case in which the matter relied on by the plaintiffs as a counter-claim could properly be set up by them by amendment of their statement of claim.

PAYMENT INTO COURT FOR LEAVE TO DEFEND—BANKRUPTCY OF DEFENDANT BEFORE TRIAL—SECURED CREDITOR—RULE 115—(ONT. RULE 603).

In re Ford (1900) 2 Q.B. 211, although a bankruptcy case, nevertheless deserves attention, inasmuch as it deals with the question of the effect of a payment into Court as a condition for leave to defend an action in which a summary motion for judgment is made under Rule 115, (Ont. Rule 603). In this case after the payment into Court had been made by the defendant and before the action had been tried, the defendant became bankrupt, and the trustee in bankruptcy applied to have the money so paid into Court, paid out to him; Wright, J., however held that he was not entitled to the money, which was to be regarded as paid in as a security for the plaintiff's debt in case he should succeed at the trial in establishing his claim, and that the plaintiff was to be regarded, to the extent of the money so paid in, as a secured creditor.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Practice.] DEUBER WATCH CASE CO. *v.* TAGGART. [Dec. 2c, 1899.

Evidence—Leave to adduce, after judgment in appeal—Rule 498.

After the judgment of the Court of Appeal affirming the judgment of the trial judge dismissing the action, had been pronounced, drawn up, and entered, and while an appeal was pending therefrom to the Supreme Court of Canada, the plaintiffs moved for leave to adduce further evidence for the purpose of showing that an exhibit which was used as part of the evidence in the case was not a true copy of the original document. It was not suggested that there was any error in the judgment of the Court of Appeal which could be corrected by the introduction of the proposed evidence, or that, if the proposed evidence had been given while the appeal was pending, the judgment would have been different. It might tend to displace one of the grounds on which the trial judge relied, or might pre-

vent the defendants from relying upon that ground if the case went further, but that was all that could be said.

Held, that the application should be refused.

Rule 498, which empowers the Court to receive further evidence, is clearly confined to cases where such evidence is sought to be introduced for the purpose of the appeal.

C. Millar, for plaintiffs. *J. A. Mills*, for defendants.

HIGH COURT OF JUSTICE.

Divisional Court.] LARKIN *v.* LARKIN. [May 17.

Mechanics' Lien—Trial—Procedure—Mortgagee—Materials on land—Lien.

The procedure for the trial of an action under the Lien and Wage-earners' Act, R.S.O., c. 153, is the ordinary procedure of the High Court, which is not affected by sections 35 and 36 of the Act; and therefore a mortgagee against whom relief is sought must be made a party to the action within the time limited by sub-s. 1 of s. 24. Materials were placed on the land by the owner thereof and paid for by the mortgagee to be used in the construction of buildings being erected thereon, but not actually incorporated therein. The materials were taken by the owner to a planing mill to be planed for placing in the buildings, and having been left there for some time, and storage charges incurred, the owner sold them to the mill owner.

Per MEREDITH, C.J.—No lien attached on such materials, the incorporation thereof in the building being an essential element.

Per ROSE and MACMAHON, JJ.—Such lien would attach, notwithstanding the absence of such incorporation, but there having been a conversion, no relief could be granted, for there is nothing in the Act which enables the Court to assess damages which could be made applicable to lienholders.

John G. Farmer, for mortgagee. *Kirwin Martin*, for plaintiff.

Divisional Court.] ENGLISH *v.* LAMB. [May 26.

Slander—Privileged occasion—Malice—What constitutes—Misdirection—New trial.

In an action for slander, where the occasion was privileged, the learned Judge, in defining malice, which it was essential for the plaintiff to prove, told the jury that it consisted of a reckless statement, or a statement not true, made without consideration of what the probable consequences might be to another person; and of a statement not made in good-faith—not truly, but wantonly and recklessly, and without proper consideration.

Held, misdirection, for it should have been left to the jury to say whether the defendant acted through a wrong feeling in his mind against the plaintiff—some injustifiable intention to do him wilful injury; and a new trial was directed.

George Ross, for plaintiff. *Wallace Nesbitt*, Q.C., for defendant.

Street, J.] RE CURRY. [June 14.

Evidence—Corroborative evidence—Interested party—R.S.O., c. 73, s. 10.

In an action by or against the representatives of a deceased person, the corroborative evidence required by R.S.O., c. 73, s. 10, may be found in the other facts adduced in the case, raising a natural and reasonable inference in support of the evidence whereof corroboration is required.

Semble, also, corroborative evidence within the meaning of that section may be given by an interested party so long as he is not the party obtaining the decision.

Fleming and *J. H. Moss* for A. A. Curry and executor of Cora Curry. *W. Nesbitt*, Q.C., and *Ellis* for administrator of Emma Glen. *S. H. Blake*, Q.C., and *Sutherland* for executor of J. R Curry.

Boyd, C.] TOWN OF WHITBY *v.* GRAND TRUNK RAILWAY. [June 21.

Railways—Bond of provisional directors—Consideration of bonus—Conditions—Liability to perform after amalgamation with other company.

The P. W. & P. P. R. W. Co. by the bond of its provisional directors in consideration of a bonus in aid of the Company agreed "to erect and maintain during the operation of the railway in the said town (Whitby) workshops. The Company after certain changes of name amalgamated with other companies and formed a larger one called the M.R.W. Co., which latter company ceased to so maintain the workshops. The M.R.W. Co. subsequently amalgamated with and become part of the G.T. R.W. Co. (the defendants).

Held, 1. The bond of provisional directors of the P.W. and P.P.R.W. Co. was a corporate one binding on its successors and by consequence on the defendants who had acquired the road.

2. The road though it formed part of a larger railway connection represented by the defendants was still in operation, and as the contract was to maintain the workshops during the operation of the railway, it remained a binding engagement; and a reference to ascertain the damages, if any, for the breach of the covenant, was directed.

Aylesworth, Q.C., for plaintiffs. *Walter Cassels*, Q.C., for defendants.

Meredith, C.J., Rose, J., MacMahon, J.] [June 27.

EBY *v.* MCTAVISH.

Bill of sale and chattel mortgage—Hire receipt—Transfer of rights under—Conditional sale of chattels—R.S.O., c. 148—Ib. c. 149.

The purchaser of a piano under a hire receipt, by which on his completing certain payments on account, the property was to pass to him, but in the meanwhile to remain in the vendors, before he had paid the required sum, agreed with his wife that she should purchase his interest and pay the balance due the vendors. There was no bill of sale registered nor such change of possession as required by R.S.O., c. 148.

Held, that the transaction was invalid as against execution creditors, under s. 37 of that Act; and that the transaction was not within s. 41, subs. 4, which was intended to except only conditional sales of chattels, within R.S.O., c. 149. The last named Act was not applicable here where there had been, as between husband and wife, no delivery of possession without the ownership of the property being acquired, within s. 1 nor any writing evidencing the transaction.

Held, however, that the wife was entitled to be subrogated to the rights of the vendors of the piano to the extent of the payments made by her.

Maybee, Q.C., for plaintiff. *Idington*, Q.C., for defendant.

Street, J.] CARSCALLEN *v.* WALLBRIDGE. [July 10.

Election by wife between benefits under separation deed and will of husband.

A husband in a separation deed covenanted to pay his wife an annuity of $200.00 as follows: $100.00 on 1st June and December in every year and charged it on certain land; the wife accepting it in full satisfaction for support, maintenance and alimony during coverture and of all dower in his lands then or thereafter possessed.

The husband by his will, subsequently executed, directed his executors to pay his wife $400.00 annually, $200.00 on 1st June and December in each year during her life and added "which provision in favour of my said wife is made in lieu of dower."

Held, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both.

M. Wright, for plaintiff. *Northrup*, Q.C., for defendants.

Province of Nova Scotia.

COUNTY COURT.

Johnston, Co. J., in Chambers.] [July 12.

MCMANUS *v.* TRACY.

Collection Act, 1894—Order to assign—Tool of trade.

This was an appeal from the order of a Commissioner which directed the defendant to assign in addition to all his other real and personal property one Gemunder violin. Defendant contended that s. 10 of "The Collection Act, 1894," having provided for the assignment of all the debtor's real and personal property in trust for the payment of the amount due, without further providing for the specifying of the particular things assigned, the Commissioner had exceeded his rights in ordering the defendant to assign said violin, and the order was therefore bad, and he further contended that said violin was a tool of trade (he having at the time of making of said order no other way of earning his living, but by playing

on said violin for money), and being as such exempt from execution under s. 1, sub-s. (e) of c. 34 of Acts of 1885, the same was not assignable under the Collection Act.

JOHNSTON, Co. J.—The only question here is as to whether the order for the defendant to assign is correct. The Act says the debtor may be ordered to assign all his real and personal property, and exception is taken to the order in addition specifying a violin while real and personal property would be sufficient and would embrace a violin. I do not think the specifying a violin vitiates the order.

I do not think the violin is exempt from execution; it is not a tool of his trade or calling, but an instrument upon which he practised gratuitously and for his own pleasure, though occasionally he may have received pay for his services. I dismiss the appeal with costs.

Province of New Brunswick.

SUPREME COURT.

En Banc.] EX PARTE KEERSON. [June 15.

Disclosure examination—Order in nature of mandamus.

An order in the nature of a mandamus under section 15 of the County Court Act will not lie to compel a County Court judge to discharge a defendant on examination under 59 Vict., c. 28, s. 32. Rule discharged.

G. Belyea, in support of rule. *Allen*, Q.C., and *Barnhill*, contra.

Province of Manitoba.

QUEEN'S BENCH.

Richards, J.] MILLER *v.* WESTBOURNE. [August 30.

Practice—Particulars in action of tort—What must be shown to get order for particulars.

The statement of claim alleged negligence by defendants in the construction of a ditch along the highway in front of plaintiff's land and neglect to keep such ditch in repair, and that in consequence a larger quantity of water was brought on to plaintiff's land and crops than would otherwise have naturally flowed thereon. Defendants applied for an order for particulars of such negligence and of the damages resulting therefrom, upon an affidavit of their solicitor proving service of a demand for such particulars and refusal to furnish same, and stating that defendants could not prove their statement of defence without them.

Held, that this affidavit did not show sufficient grounds to entitle defendants to the order asked for, that special grounds must be shown, and that at least such facts must be shown as would satisfy a judge that

defendants would be embarrassed in their defence without such particulars and that justice requires their delivery.

Brown v. *G. W. Ry. Co.*, 26 L.T.N.S., 398 followed, although perhaps it goes further than would now be required in every case.

Metcalfe, for plaintiff. *Hough*, Q.C., for defendants.

Province of British Columbia.

SUPREME COURT.

Martin, J.] IN RE SOY KING, AN INFANT. [July 26.

Infant—Right of person standing in loco parentis to custody of, as against stranger—How lost—Habeas corpus—Practice.

A girl aged fourteen was taken by a Refuge Home from the custody of a person standing in loco parentis who was proved to be leading a bigamous life.

Held, on habeas corpus proceedings, that such person had lost his right to the custody of the infant.

An application in vacation for a rule nisi for a writ of habeas corpus should be made in Chambers.

Fell, shewed cause. *Helmcken*, Q.C., contra.

Full Court.] GRUTCHFIELD *v.* HARBOTTLE.

Mining law—Failure to record transfer of mineral claim—Right of locator subsequent to such transfer—Mineral Act, ss. 9, 49 and 50.

The decision of MARTIN, J., reported ante p. 358, was appealed by the defendant to the full court and was reversed, the following judgment of the court being delivered by McCOLL, C.J.—There is apparently a conflict between ss. 49 and 50 of the Act. The former provides that an assignment though not recorded within the time limited shall be valid as between the parties and the latter that it shall be "enforceable" between them only after having been recorded. In my opinion the failure to record did not result in the claim becoming waste lands of the Crown open to location. An assignment is ordinarily enforceable against an unwilling party only by some legal process, and I think that s. 50 can and ought to be cotrued as meaning merely that a court should not afford relief before record of the assignment, thus giving effect to both sections.

WALKEM and IRVING JJ. concurred. Appeal allowed with costs.

S. S. Taylor, Q.C., for appellant. *L. P. Duff*, for respondent.

North-West Territories.

SUPREME COURT.

Rouleau, J.] QUEEN *v.* SETON. [Aug. 7.

Master and servant—Information must state offence with accuracy and precision—Information must not charge two offences—Magistrate must allow defendant reasonable time to appear to answer complaint.

The information was under Consolidated Ordinances, c. 50, s. 2, and charged: (1). That Elinor Mary Seton, formerly of the Village of Pincher Creek, but now temporarily of the City of Calgary, in said Territories, cook, was on the 21st day of December, A. D., 1899, a person engaged as a servant to the firm of Mitchell & Dobbie, and while so engaged and on same date refused to perform her duties, contrary to the provision of c. 50 of the Consolidated Ordinances of the North-West Territories.

(2). That the said Elinor Mary Seton on the said 21st day of December, being a servant of the firm of Mitchell & Dobbie did on the said date absent herself without leave from the proper service and employment, contrary to the provisions of c. 50 of the Consolidated Ordinances of the North-West Territories.

The Magistrate convicted the defendant that she on Dec. 21, 1899, while being a servant of Mitchell & Dobbie and employed by them as cook at the village of Pincher Creek in the North-West Territories, absented herself without leave from her proper service and employment contrary to the above provisions.

James Muir, Q.C., for defendant. *C. A. Stuart* and *C. F. Harris*, for the magistrate and the informant.

ROULEAU, J.—*Held*, 1 that the mere fact that a servant absents herself without leave is not per se an offence known to the law. The naked words of the Ordinance in the information would not therefore give authority to the magistrate to commit the servant unless it should appear on the face of the information that the servant absented herself without leave and without lawful excuse.

2. That not only the information is bad because it does not charge any offence and thereby does not give jurisdiction to the Magistrate, but the conviction is bad also because it does not state any offence: *Youle* v. *Mappin*, 30 L.J.M.C., 234; *Rider* v. *Wood*, 29 L.J.M.C. 1.; *Turner* v. *Ollerton*, 15 L.J.M.C. 140.

3. That where the information charges two offences and the conviction is for one offence only, such conviction is bad in law. See, however, *Regina* v. *Hasen*, 20 Ont. App. 633.