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RECENT CASES

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LANDLORD AND TENANT—Renewal or Extension of Lease as Extending Time for Exercise of Option to Purchase Contained Therein.—The defendant leased to the plaintiff's assignor a certain piece of land for the term of three years. The lease provided for a tenancy of 23 years at a fixed monthly rental. It further provided that the lessee "shall have the option to renew said lease for a like term, at an increase of twenty-five percent (25%) in the rent, upon sixty (60) days notice, prior to the termination of this agreement." Then in a subsequent paragraph, an option to purchase the demised premise was given to the lessee "during the term of this agreement." The lease was renewed at the date of its expiration for another term of three years, at the higher rent. Thereafter the plaintiff gave written notice to the defendants that he wished to exercise his option to purchase the property. The defendants refused to convey, and the plaintiff filed suit for specific performance. *Held,* where a lease with a right of renewal contains an option to purchase, it will be considered as an indivisible contract and unless otherwise limited, the lessee's option may be exercised during the period of renewal or extension. *Moore v. Maes, et al.,* ___ S. C. ___, 52 S. E. (2d) 204 (1949).

This case raises a novel point in South Carolina, a point that has produced wide controversy in other jurisdictions. The majority rule is that a provision for the extension of a lease extends an option to purchase contained therein. *e.g., Schaeffer v. Bilger,* 186 Md. 1, 45 A. (2d) 775.[1] The question depends upon the intention of the parties to be gathered from the lease itself. However, many decisions turn upon the narrow question whether the lease is to be extended or whether the term is to be extended, or whether the words used indicate that a new lease is to be executed. See: *Schaeffer v. Bilger, supra.* The English cases follow the line that the contract is divisible. Where a lease, containing an option to purchase "during the three years hereby provided for", was endorsed in its back to the effect that "this

1. See also 163 A. L. R. 706 (1946); 32 Am. Jur., Sec. 308, p. 285.

lease be extended for three years", the court held that only the relation of landlord and tenant, that is the tenancy, was extended and not the option. The court further held that to extend the lease meant to extend the term not the actual lease. *e.g., Sherwood v. Tucker,* 2 Ch. 440 (1924). The Pennsylvania Supreme Court followed this line of reasoning in a case where the lessee was given "the privilege of renewing the lease . . . , under the same terms and conditions as herein covenanted," and "the right to purchase the property herein described at any time during the term of this lease." The court held that the privilege of renewal relates only to the continuance of the tenancy, not the option, and further that the renewal of the lease was a leasing again, not an extension of the original. *Pettit v. Tourison,* 283 Pa. 529, 129 A. 587 (1925). In a well reasoned case to the contrary, a lease, with an option to purchase on or before the expiration of the lease and the privilege of renewal for four additional terms, was held to have not expired after four renewals, and the lessee was alowed to exercise the option. *Johnson v. Bates,* 128 N. J. Eq. 183, 15 A. (2d) 643 (1940). Another lease containing an option and the right of renewal, "all other conditions to be the same", was held to have given the right to renew both the term and the option. *Volunteers of America v. Spring,* 27 Ohio App. 229, 161 N. E. 215 (1927). The Pennsylvania Court has, contrary to the technical definitions of *Pettit v. Tourison, supra,* held that the term "lease" is commonly used as including something more than the mere legal act by which a tenancy is created, and embraces what are described as the covenants of the lease. *Goldberg v. Grossman,* ___ Pa. ___, 160 A. 138 (1932). The same court holds that the word "renewal" as applied to leases has no legal or technical signification. *Rosenblum v. Lurie,* 128 Pa. Super. 480. "Renewal" and "extension" as used in leases with reference to options are synonymous. *Economy Stores v. Moran,* 178 Miss. 62, 172 So. 865.

South Carolina has followed what is apparently the better rule, supported by a majority of the courts. The courts that refuse to follow this rule rely upon technical definitions of the words "lease" and "renewal", where the meaning should be determined by the intentions of the parties. The courts must consider these words in the light of intentions of the parties, and this is often best determined by an examina-

tion of the consideration and other provisions in the lease. It would not seem unjust to permit a person who leases property and insists upon the right to purchase to be allowed to exercise that option at any time during the tenancy, in the absence of any express limitations to the contrary.

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CONTRACTS — Defenses—Impossibility—Fortuitous Destruction of Subject Matter.—Defendant contracted to sell plaintiff peas of a certain kind and grade to be harvested from a locality contemplated by both parties. Before the peas could be harvested and delivered, all peas of the specified kind and grade in the comtemplated locality were destroyed by torrential rains. In action by plaintiff for damages for breach of contract, defendant pleaded act of God as defense. *Held,* destruction of the subject matter of the contract by an act of God vitiated the contract. *Pearce-Young-Angel Co. v. Charles R. Allen Co.,* 213 S. C. 578, 50 S. E. (2d) 698 (1948).

The early case of *Paradine v. Jane,* 26 Aleyn (1647), is still cited as an expression of the general rule that impossibility arising subsequent to the formation of the contract does not excuse performance on the part of the promisor. *Stagg v. Spray Water Power & Land Co.,* 171 N. C. 583, 89 S. E. 54 (1916). But the rigor of this rule, with its inevitable hardships, has been somewhat relieved by certain well recognized exceptions. See: *Dermott, Executor v. Jones,* 2 Wall. 1 (U. S. 1864); *Middlesex Water Co. v. Knappmann Whiting Co.,* 64 N. J. L. 240, 45 A. 692 (1900). It is now well settled that the destruction of the subject matter without the fault of either party, where performance of the contract depends on the continued existence of such subject matter, will excuse performance, in the absence of a warranty that it shall continue to exist. *Taylor v. Caldwell,* 3 Best. & S. 826 (1863); *Paddock v. Mason,* 187 Va. 809, 48 S. E. (2d) 199 (1948). The theory on which some courts base their decisions, excusing nonperformance when the subject matter is destroyed, is that a condition was implied that the subject matter would continue to exist or that if the subject matter was destroyed, performance would be excused. *e.g., Leonard v. Autocar Sales*

and Service Co., 392 Ill. 182, 64 N. E. (2d) 477 (1945); *Senters v. Elkhorn and Jellico Coal Co.*, 284 Ky. 667, 145 S. W. (2d) 848 (1940). This condition is said to be implied in spite of the unqualified character of the promissory words. See *Dow v. State Bank*, 88 Minn. 355, 93 N. W. 121 (1903). Other courts have regarded the destruction of the subject matter contemplated by both parties as a mutual mistake relieving the parties from performance. *E.g.*, *Pengra v. Wheeler*, 24 Ore. 532, 34 Pac. 354 (1893). The rule of implied conditions has been extended to cases where the total supply of the subject matter, or all of the subject matter of a contemplated locality, has been destroyed. *Browne v. U. S.*, 30 Ct. Cl. 124 (1895). Further application of the rule of implied conditions excusing nonperformance due to the destruction of specific subject matter of the contract can be seen in *Dexter v. Norton*, 47 N. Y. 62 (1871), in which it was held that the seller of specific bales of cotton, which, before title had passed, were accidentally destroyed by fire without the seller's fault, was not liable to the purchaser for nonperformance of the contract to sell and deliver the cotton. And in *Matousek v. Galligan*, 104 Neb. 731, 178 N. W. 510 (1918), it was held that the nonperformance by the seller of a contract to deliver specific hay was excused, where the contract referred to specific subject matter which was destroyed by storms and unusual rains.

It appears that this question of novel impression in South Carolina has been decided in accord with the view followed by the vast majority of courts in other jurisdictions which have modified many of the hard and fast rules of the common law affecting contracts. Rigid rules affecting liability of contracting parties have been relaxed to more nearly approach equitable considerations. The obligations imposed are more commensurate with the intentions, surroundings and capabilities of the contracting parties.

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