

St. Regis Paper Co. v. Brown: Georgia Enters the Mainstream of Property Law

In *St. Regis Paper Co. v. Brown*,¹ the Supreme Court of Georgia held that an option to purchase that was written into a lease did not violate the Rule Against Perpetuities even though the time during which the option could be exercised extended beyond the period allowed by the Rule.² Distinguishing an option appendant from an option in gross, the court concluded that the early vesting of an interest in realty along with the lessee's right of possession provided a sufficient basis to exempt the option from the limitations found within the Rule.³

The plaintiff lessors filed suit in the Superior Court of Stewart County, seeking a judgment declaring null and void the purchase options contained in two timber lease agreements entered into with the defendant lessee, St. Regis Paper Company.⁴ The lease agreements extended over a term of sixty years, plus a few months, and each granted the lessee an option to purchase the real estate at a fixed per acre price after a period specified in the lease.⁵ As a result, the option clauses held by St. Regis were exercisable for more than sixty years following the execution of the documents in which they were contained.⁶

The trial court granted plaintiffs' motion for summary judgment, denied a similar motion made by defendant, and cited the relevant Georgia statute on perpetuities as the basis of its decision.⁷ The Georgia Court of

1. 247 Ga. 361, 276 S.E.2d 24 (1981).

2. *Id.* at 364, 276 S.E.2d at 26.

3. *Id.* at 363, 276 S.E.2d at 26.

4. *Id.* at 361, 276 S.E.2d at 24.

5. The pertinent language of the purchase options stated as follows:

Lessor, in consideration of One Dollar (\$1.00) and other consideration, the receipt whereof is acknowledged, hereby grants unto St. Regis, the irrevocable right and option at any time after September 1st, 1970 [March 31, 1971 for Lease B] when St. Regis is not in default with respect to any payment required to be made under Section 3A (1) or 3B hereof to purchase the property at and for the purchase price of \$65.00 per acre.

St. Regis Paper Co. v. Brown, 1 Ga. App. 679, 679, 272 S.E.2d 544, 545 (1980).

6. Lease A had been executed on September 1, 1958, and Lease B had been executed on April 1, 1959. When suit was filed, therefore, St. Regis had approximately 49 years in which to exercise the option in Lease A and approximately 48 years in which to exercise the option in Lease B. *Id.*

7. The statute provides as follows: "Limitations of estates may extend through any

Appeals affirmed the lower court and concluded that the options to purchase were violative of the Rule since they were subject to exercise more than twenty-one years from their effective date.⁸ The Supreme Court of Georgia reversed the appellate court's decision, however, and held that the options to purchase were valid despite being exercisable beyond the allotted period found in the statute.⁹ Emphasizing the basic policies of the Rule together with the commercial realities involved, the majority determined that options appendant to a lease should not be subject to the Rule since they encourage the investment, development, and transfer of property.¹⁰

The Rule Against Perpetuities, traditionally stated, provides as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."¹¹ The Georgia statute is closely aligned with this terminology and the Georgia courts have apparently assumed that the statute is declaratory of the common law.¹² The necessity for a rule arose in the seventeenth century following the recognition of executory interests and the subsequent determination by English courts that these interests were indestructible.¹³ As a result of this determination, existing landowners could indefinitely control the ownership and disposition of property through the use of executory interests.¹⁴ An effort to limit these estates was finally undertaken in the *Duke of Norfolk's case*,¹⁵ in which the English Court of Chancery

number of lives in being at the time when the limitations commence, and 21 years, and the usual period of gestation added thereafter. A limitation beyond that period the law terms a perpetuity and forbids its creation." GA. CODE ANN. § 85-707(a) (1978).

8. 155 Ga. App. at 682, 272 S.E.2d at 547.

9. 247 Ga. at 364, 276 S.E.2d at 26.

10. *Id.* The Rule Against Perpetuities was created to serve the following several objectives: (a) to prevent the current owner from indefinitely prolonging control over the devolution and use of property, (b) to further the utilization of societal wealth by encouraging the investment and development of property, and (c) to keep property responsive to the exigencies of its current owners. See RESTATEMENT OF PROPERTY, Introductory Notes, at 2129 (1944).

11. J. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

12. See *Reeves v. Comfort*, 172 Ga. 331, 157 S.E. 629 (1931). In that case the court stated: "The rule against perpetuities made by our statute, which is a codification of the common law (Civil Code, § 3678) deals with estates in land and the vesting of estates. . . ." *Id.* at 334, 157 S.E. at 631.

13. Executory interests were recognized after the Statute of Uses took effect in 1536. L. SIMES, HANDBOOK ON THE LAW OF FUTURE INTERESTS 363 (1951). See also *Pells v. Brown*, 79 Eng. Rep. 504 (1620); *Manning's Case*, 77 Eng. Rep. 618 (1609).

14. L. SIMES, *supra* note 13, at 363.

15. 22 Eng. Rep. 931 (1682). The device considered by the court in this case was an executory interest contained in a trust. The court upheld the device, stating that the validity of an executory interest depended upon the time within which it could vest. Although the ultimate permissible duration of the postponement of vesting was not specifically ascer-

held that future interests had to vest, if at all, within the period of a life in being. By 1833, a gross period of twenty-one years after the termination of lives in being had been established as the maximum allowable period of postponement for vesting purposes.¹⁶

Although the Rule was originally established to regulate the law relating to decedents' estates, the English Court of Chancery extended the principle to commercial options in the landmark case of *London and Southwestern Railway Co. v. Gomm*.¹⁷ The law in England continued along this line of reasoning, and until recently,¹⁸ made no distinction between options in gross and options appendant, but found the rule applicable to each situation.¹⁹ Most American courts did make a distinction, however, and concluded that the Rule does not apply to options appendant held by a lessee.²⁰ Both Alabama and Florida, for example, have determined that an option to purchase that is written into a lease is excluded from the operation of the Rule Against Perpetuities as long as it is exercisable within the term of the lease.²¹

The reasoning expressed by the majority may be viewed as an extension of the treatment previously given by the court to commercial lease agreements. In *Williams v. J.M. High Co.*,²² for instance, a testator's will granted a corporation the perpetual right to lease certain land, this right being subject only to the continued existence of the corporation and its annual payment of the fair rental value of the property. The court upheld

tained, it was determined that if the limitation was so framed that the future interest would have to vest within the period of a life in being, then the future interest was valid. 22 Eng. Rep. at 938.

16. See *Cadell v. Palmer*, 6 Eng. Rep. 956 (1833).

17. 20 Ch. D. 562 (C.A. 1882). The court stated that an option to purchase land was specifically enforceable and that the optionholder had a contingent interest in the land. Since contingent interests in land were void unless they had to vest within the period of perpetuities, the court reasoned that an option to purchase must likewise be exercised prior to that period or be void as a perpetuity. 20 Ch. D. at 573.

18. The Perpetuities and Accumulations Act, ch.55 § 8, passed by Parliament in 1964, exempted options appendant from the Rule.

19. See *Worthing Corp. v. Heather*, 2 Ch. 532 (1906); *Woodall v. Clifton*, 2 Ch. 257 (1905).

20. See *Dozier v. Troy Drive-In-Theatres, Inc.*, 265 Ala. 93, 89 So. 2d 537 (1956); *Keogh v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925); *Hollander v. Central Metal & Supply Co.*, 109 Md. 1341, 71 A. 442 (1908). *Contra*, *First Huntington Nat'l Bank v. Gideon-Broh Realty Co.*, 139 W. Va. 130, 79 S.E.2d 675 (1953). This case was promptly reversed by West Virginia Code Ann. § 36-1-24 (1957).

21. See *Dozier v. Troy Drive-In-Theatres, Inc.*, 265 Ala. 93, 89 So. 2d 537 (1956); *Wing, Inc. v. Arnold*, 107 So. 2d 765 (Fla. 1958). See generally *Abbot, Leases and the Rule Against Perpetuities*, 27 YALE L.J. 878 (1918); *Berg, Long-Term Options and the Rule Against Perpetuities*, 37 CALIF. L. REV. 1 (1949); and *Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952).

22. 200 Ga. 230, 36 S.E.2d 667 (1946).

the validity of the clause, stating that neither a perpetual lease nor a perpetual option to renew a lease violated the Rule Against Perpetuities in Georgia.²³

A similar situation was presented in *Smith v. Aggregate Supply Co.*,²⁴ in which a written instrument provided the lessee with a right, unrestricted by time, to secure sand, gravel, and stone from specifically described realty. In finding the instrument valid, the court asserted that options to renew a lease required a separate treatment from that which had traditionally been accorded options to purchase.²⁵ The same conclusion has been shared by most American jurisdictions, usually on the theory that perpetual lease agreements aid rather than hinder alienability by providing an accepted commercial device used for the disposition of real estate.²⁶

In rendering its decision in *St. Regis*, the Georgia Supreme Court distinguished *Turner v. Peacock*²⁷ and *Brown v. Mathis*,²⁸ earlier Georgia cases relied on by plaintiffs, in which straight options to purchase had been held subject to the Rule. The court emphasized that in both *Turner* and *Brown*, the options to purchase had not been contained in a lease but instead were included in a deed eventually conveyed by a grantor to a grantee.²⁹ The option in each case, given to a party having no other interest in the property, prevented the owner in fee from developing the land

23. *Id.* at 236, 36 S.E.2d at 671. In so holding, the majority relied on the following Georgia cases: *Penick v. Atkinson*, 139 Ga. 649, 77 S.E. 1055 (1913) and *Atkinson v. Orr*, 83 Ga. 34, 9 S.E. 787 (1889).

24. 214 Ga. 20, 102 S.E.2d 539 (1958).

25. *Id.* at 24, 102 S.E.2d at 542. The court reasoned that with a straight option, the parties intend the reserved right to be only a privilege and not a vested interest. If the privilege is unrestricted by time, it is a violation of the Rule since title does not have to vest within a life in being plus 21 years. On the other hand, the right to exercise the privileges of a lease is usually vested immediately upon its execution by the parties. Consequently, the actual rights under the lease are vested and the perpetual right to renew should not be subject to the Rule. *Id.*

26. L. SIMES, *supra* note 13, at 380.

27. 153 Ga. 870, 113 S.E. 585 (1922).

28. 201 Ga. 740, 41 S.E.2d 137 (1947).

29. In *Turner*, the deed contained a clause that permitted the grantor to sell a perpetual right or option to purchase 50 acres of land from the tract in question. The court invalidated the option, stating that the clause in the deed which gave an unlimited period for the exercise of such an option violated the Rule Against Perpetuities. 153 Ga. at 877, 113 S.E. at 589. See *Barton v. Thaw*, 246 Pa. 348, 92 A. 312 (1914); *Starcher Bros. v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1907). In *Brown*, a clause in the deed reserved to the grantor a right to mine sand from the property, and to pay the grantee, his heirs, executors, or assigns, 1 cent per carload for all sand secured from the premises. The court held that the clause constituted a perpetual option and was therefore a direct violation of the Code. 201 Ga. at 746, 41 S.E.2d at 141.

and left him with an unsalable estate.³⁰ As the majority indicated, however, the lease in *St. Regis* created a present interest in the real estate that placed the lessee in a stronger position than that of a mere option holder in gross.³¹ The right of immediate possession, combined with the lessee's present interest in the land, provided a sufficient rationale to place the option appendant beyond the prohibitions contained in the Rule Against Perpetuities.³²

The court also reasoned that an option appendant fosters the practical alienability of land because it encourages the development of property by a lessee and protects him against the possible loss of valuable improvements at the expiration of the lease.³³ Stating that the Rule was originally intended to stimulate the utilization of real estate, the majority stressed the irrelevance of lives in being plus twenty-one years to commercial transactions analogous to that presented in *St. Regis*.³⁴ Although the Rule continues to serve a beneficial function by preventing the remote vesting of future interests, the pressures that created the Rule do not exist with regard to arm's-length contractual agreements.³⁵ The court concluded, therefore, that invalidation of an option contained in a lease would defeat the very policy of free alienation and full utilization of property that the Rule Against Perpetuities had been designed to promote.³⁶

Justice Smith expressed a strict interpretation of the Rule in his dissent, maintaining that no distinction between options in gross and options appendant had been made under Georgia law.³⁷ Noting that the legislature had failed to alter the existing statute, he stated that the court was, consequently, bound to treat the option in *St. Regis* as any other option to purchase real estate.³⁸ Further, the dissent charged that in establishing a rule for Georgia, the majority had simply disregarded previ-

30. An option in gross "operates as a practical clog on development and alienation alike." Abbot, *supra* note 21, at 886. The owner in fee is unable to make improvements to the land for fear that the improvements will be lost if the optionholder decides to exercise his option. *Id.*

31. 247 Ga. at 363, 276 S.E.2d at 26.

32. *Id.*

33. *Id.* at 362, 276 S.E.2d at 25.

34. *Id.*

35. Commercial transactions normally stimulate the development of real estate to the fullest extent since the purchaser of the present interest strives to get the greatest benefit possible from his investment. See generally Berg, *supra* note 21.

36. 247 Ga. at 364, 276 S.E.2d at 26.

37. *Id.* at 364-65, 276 S.E.2d at 27 (Smith, J., dissenting).

38. *Id.* at 366, 276 S.E.2d at 28. Justice Smith pointed out that although the General Assembly has had many opportunities to amend the statute, it has chosen to do so only once. In 1953 the Legislature exempted from the Rule pension, profit sharing, stock bonus, death benefit, and disability trusts created by an employer for the benefit of an employee. GA. CODE ANN. § 85-707(b) (1978).

ous case law³⁹ holding an option to purchase void if not in compliance with the Rule and the applicable statute. In *Smith*, for example, although the court upheld the validity of a perpetual lease, it also clearly stated that an option to purchase realty violated the Code if unrestricted as to the time of its execution.⁴⁰ Likewise, the court in *Turner* had indicated that it was unable to find any case upholding a clause that gave unlimited time for the exercise of an option as did the terms contained in the deed there in question.⁴¹ Any proper alteration of the Rule, concluded the dissent, should be made through an act of the legislature rather than through a decision handed down by the court.⁴²

Although the decision in *St. Regis* is likely to be criticized by some as a failure to enforce a plainly worded statute, the court's treatment should be viewed as a sensible approach to the problem of options appendant and a logical interpretation of the Rule Against Perpetuities. Whereas the statute expounds a well established and concise principle of law, the exception created by the majority is reflective of public policy and provides a more practical rule for the State of Georgia. A few American jurisdictions have felt that the covenant for renewal of a lease is an illogical exception to the Rule and have, consequently, refused to extend the exception to an option contained in a lease. By labeling the Rule in terms of a formula rather than in terms of its fundamental purpose, however, these courts have failed to place the Rule in a true perspective and have overlooked the original premise that prompted its establishment by the common law courts. In finding the option in a lease valid, the Georgia Supreme Court recognized the policy objectives behind the Rule and adhered to the better reasoning supported by the weight of authority in the United States.

The decision reached by the majority will no doubt rekindle the burning question that has long been asked by so many: Where exactly does the Rule begin and where does it end? The answer must lie in either legislative action by the General Assembly or in future decisions rendered by the courts as they consider the question on a case-by-case basis. In any event, the validation of long-term options contained in a lease provides a fair and rational principle for the law of perpetuities in Georgia.

D. SHANE SMITH

39. See, e.g., *Thomas v. Murrow*, 245 Ga. 38, 262 S.E.2d 802 (1980); *Smith v. Aggregat Supply Co.*, 214 Ga. 20, 102 S.E.2d 539 (1958); *Gearhart v. West Lumber Co.*, 212 Ga. 25, 9 S.E.2d 10 (1955); *Turner v. Peacock*, 153 Ga. 870, 113 S.E. 585 (1922).

40. 214 Ga. at 22, 102 S.E.2d at 541.

41. 153 Ga. at 874, 113 S.E. at 587.

42. 247 Ga. at 366, 276 S.E.2d at 28.