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DEVOLUTION OF RIGHTS UNDER AN UNEXERCISED OPTION TO PURCHASE LAND

When the parties to a specifically enforceable option to purchase land die, a problem arises as to the devolution of the contractual rights in existence at the time of death. Normally a person who dies intestate has his personal estate settled by his personal representative who satisfies claims of creditors and distributes the balance to the next of kin. Title to decedent's realty vests in the heirs immediately. This note is concerned with whether contractual rights and obligations created by an option to buy land should devolve as personalty, to the personal representative for the next of kin, or as realty, to the heirs directly. Special attention is given to the proper rationalization for explaining the devolution. Although an analysis of "who gets what" upon death of a party to the option frequently is moot, since the heirs and the next of kin are usually the same persons, a proper rationalization is not academic in those jurisdictions where realty is not subject to debts of the decedent which exceed the personal estate. Generally, real property is liable for debts of decedent only after the personalty has been exhausted, and real property is entitled to be exonerated from encumbrances out of the personalty. Also, the legal relationship between heir and administrator is somewhat different from that of next of kin and personal representative.¹

The thesis of the discussion here is that the nature of the right is determinative, and that whether the right is real (having characteristics of a real property interest) or personal will govern whether the heir takes directly, or whether the personal representative takes for the next of kin. Since the courts attempt to decide the nature of the rights created by the option contract by determining whether an equitable conversion occurs, it is necessary first to decide whether this doctrine can be logically applied to an option contract.

The theory of equitable conversion is best illustrated in the case of a bilateral contract. When two parties enter into a specifically

¹ 16 Am. Jur. 793 (1938). In the analogous situation where the decedent disposes of his property by will, the analysis presented here would be significant. As between two devisees, one receiving "all realty" and the other receiving "all personalty," whether or not the contract right is treated as a real right would be controlling.
enforceable bilateral contract to convey land, Equity, by a constructive conversion, gives present effect to the contractual rights created. Thus the vendor, possessing a contract to obtain the purchase money at the time specified in the contract, is conceived to have the purchase money, while the vendee, possessing a contract right to obtain the realty at the time specified in the contract, is conceived to have the realty. Sir George Jessel stated the classical rationalization in this way:

Being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in Equity; it makes the purchase money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity.2 (Italics supplied by writer.)

One of the purposes of the doctrine of equitable conversion is to determine, in the case of death of one of the contracting parties, whether interests created by the contract should devolve as realty or personalty. At Common Law, real property—which included all interests in land except terms for years—went to the heir, while personal property—which included everything else—went to the executor to pay debts and to distribute to the next of kin. Therefore, before a contractual right of any sort could pass to the heir, the constructive conversion, changing the ownership of the estate in equity, had to be applied, thereby giving real, or property interest, effect to the right. The question of whether any particular interest, for instance a contractual right to purchase land, went to the heir or to the personal representative was dependent upon whether the essentials required for the application of equitable conversion were present. If equitable conversion could be effected, the equitable real property interest possessed by the vendee devolved to his heir, and the equitable personal property interest possessed by the vendor devolved to his personal representative.

One thread runs through the cases in which the doctrine of equitable conversion has been applied: The contract must be specifically enforceable by both parties. The AMERICAN LAW OF PROPERTY phrases this requirement as follows:

Application of conversion theory assumes a specifically enforceable contract. . . . If one party is not entitled to specific performance, but the other party is, . . ., devolution on the side of the party who cannot enforce the contract is not affected,3 nor, according to the au-

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1 In re Thomas, 34 Ch. Div. 166 (1886).
thorities, is devolution on the side of the party who can compel specific performance.\textsuperscript{4-5}

Since an option\textsuperscript{6} is not specifically enforceable by both parties, the courts have experienced difficulty in attempting to apply equitable conversion to an option. Granted, B, the vendee, does possess a real contractual right, but it is only a right to obtain a bilateral contract for the conveyance of the land in question. Until exercise of the option by the vendee, the contract upon which equitable conversion could apply is not even in existence, but is inchoate and dependent upon the desire of the vendee as to whether or not he will create it. What effect, therefore, could the application of equitable conversion have if a party to the option contract should die before the option is exercised? Since the classical notion of conversion will apply only upon exercise of the option, and when the contract becomes bilateral, it is submitted that the doctrine of equitable conversion is inadequate to rationalize devolution unless the doctrine is distorted or changed.\textsuperscript{7}

However, courts generally regard equitable conversion as applying to option contracts for the purchase of land, and attempt to solve devolution problems by determining whether or not equitable conversion can take place.\textsuperscript{8} This attempted extension of the scope of the doctrine is probably due to a supposed analogy between the option contract and the bilateral contract to convey. History and repetition rather than logic are its roots.

The landmark case applying equitable conversion to an option contract is \textit{Lawes v. Bennett}.\textsuperscript{9} There the court held that exercise of the option and the formation of the bilateral contract to convey after the death of the optionor related back to the time of the option agree-


\textsuperscript{5}3 American Law oF Property 64 (1952). Also, see Simpson, Legislative Changes in the Law of Equitable Conversion by Contract, 44 Yale L.J. 599, 593 (1935).

\textsuperscript{6}For the legal status of an option supported by consideration, see Williston, Selections From the Law of Contracts 24 (Rev. ed. 1938), where he states: “An option for which consideration is given . . . is a contract, but is also an offer which, when accepted will create another contract or a sale.”

\textsuperscript{7}For another class of cases in which the application of the doctrine of equitable conversion reaches unsound results see 4 Williston, Contracts 2604 et seq. (1936). He criticizes determination by equitable conversion of who, between vendor and vendee, bears the risk of loss or damage to premises when it occurs between signing of contract to convey, and the time specified for conveyance.


\textsuperscript{9}Supra note 8.
ment, and that therefore a conversion was effected.\textsuperscript{10} This application of fictional relation back upon fictional equitable conversion would allow, on the vendor’s side, the personal representative to obtain the purchase money as a part of decedent’s personal estate, and, on the vendee’s side, the heir to take the land. The later English cases, and the majority of American jurisdictions have refused to follow the “relation back” theory, and have held that the exercise of the option after death of a party did \textit{not} relate back to the time of the option agreement so as to effect, under equitable conversion, the devolution of the rights of either party.\textsuperscript{11}

A recent American case, \textit{Eddington v. Turner},\textsuperscript{12} expressly repudiated \textit{Lawes v. Bennett}. There Turner had devised a plot of land to his sister for life, and subsequently had given a 60 day option to purchase the land to Eddington. Turner died while the option was still in force. Eddington sought specific performance and paid the purchase money into court. In deciding whether the purchase money should go to the personal representative or to the devisee (for life only, of course), the Delaware court refuted the relation back of the conversion and allowed the devisee to take a life interest in the purchase money, with remainder to the heirs. This result was achieved by denying any conversion before the death of Turner since the option contract was not obligatory on both parties. This reasoning is logical as to time of conversion. Does it follow, however, that the purchase money should go to the devisee, rather than to the personal representative? The devisee took the land subject to the right of the holder of the option,\textsuperscript{13} and there would be nothing inequitable in taking the property from her and not giving her the purchase money. Although there was no firm contractual right in existence at the

\textsuperscript{10} The vendor had leased to Douglas, which lease included an option to purchase. Vendor then devised all realty to Bennett, and bequeathed his personal estate to Bennett and Mary Lawes. The Vendor died, and the option was subsequently exercised. Basing its decision on presumed intent of the testator, the court decreed that the purchase money was to be distributed as personalty to Bennett and Lawes in equal shares, rather than solely to devisee.

\textsuperscript{11} \textit{Eddington v. Turner, Supra} note 8; \textit{Adams v. Peabody Coal Co.}, 230 Ill. 469, 82 N.E. 645 (1907); \textit{Kern v. Robertson}, 92 Mont. 283, 12 P. 2d 565 (1932); \textit{Rockland-Rockport Lime Co. v. Leary, supra} note 8; \textit{Durepo v. May}, 54 A. 2d 15 (R.I. 1947). \textit{See also} \textit{Tyler v. Tyler}, 50 Mont. 65, 144 P. 1090 (1944).

\textsuperscript{12} \textit{Supra} note 8.

\textsuperscript{13} \textit{See In re Marlay}, 2 Ch. (Eng.) 264 CA (1915), where the judge states his opinion as to what interest the heir (devisee) gets when he takes the optionor’s land with the option outstanding: “I think the true view is that the devisee has an estate in fee defeasible upon the exercise of the option—on no other view can the devisee’s right to rents and profits until the option has been exercised be supported.” Since the heir never had an unqualified estate in the land, he is not being deprived of something “his.”
vendor's death, there was a contingent contract right to the purchase money, which right is personal and therefore vested in the personal representative. The fact that the right had not yet ripened does not change the fact that it was in being, and was created by contract.

When the other party to the contract, the option holder, dies, just as when the vendor dies, equitable conversion is inadequate to rationalize devolution. The same requirement for equitable conversion—that the contract must be specifically enforceable by both parties—is lacking. Considering this determinative, the majority of courts adopts the view that any rights which the optionee may have pass to his personal representative, and not to his heir, since only contractual rights are involved. Yet, in considering the approach which the courts have taken—that of affirming or negating the existence of the requirements for an equitable conversion—the impression remains that the character of the contractual right in question has not necessarily been determined even if equitable conversion cannot be effected.

It is submitted that rights and obligations which the decedent has must be examined as to their nature, and the determination as to who gets them must be made accordingly. Clark, in discussing just what the optionee of an option contract has, says:

... it is in substance a right to get land at a desirable price; and such a right seems to savor just as much of Realty as if the option holder had accepted the option before his death.

It must be recognized that this concept is a deviation from the historical notion that property interests can be created only by conveyance, while contractual rights arise only by agreement. However, logically it is appealing and it has ample precedent elsewhere in the law.

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25 Sutherland v. Perkins, 75 Ill. 338 (1874); Gaslin v. Union School Board District, 94 Mich. 502, 54 N.W. 156 (1893); In re Adams, 27 Ch. Div. 394 CA (1884); also see 172 L.R. 438 at 449 (1948). However, cf. 19 Cornell L.Q. 640, citing Ross v. Parks, 93 Ala. 153, 5 So. 368 (1890) where it is suggested that holder of an option has something more than a contract right.
16 CLARK, EQUITY 146 (1919).
17 Equitable servitudes, restricting the use of land or the erection of buildings thereon, may be created by agreement not involving transfer of title to land. Meade v. Dennistone, 173 Md. 295, 196 A. 330, 114 A.L.R. 1227 (1938); Cotton v. Cresse, 80 N.J. Eq. 540, 55 A. 600 (1912). Also see annotation 21 Am. St. Rep. 499 (1891). Agreements of this nature are generally viewed as creating property rights. Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 117 N.E. 244 (1917). CLARK, EQUITY (1919) on page 119 states: "A specifically enforceable right that the land of another shall or shall not be used in a certain way is of course a property right and not merely a contract right. . . ."
Since the contractual right possessed by the option holder is a real right, it should pass to his heir. On the correlative matter of whether the heir could require payment from the personal estate of the deceased, the logical view would seem to be to require the personal representative to pay the purchase price. At the time of the optionee's death, a contractual obligation is in existence, even though it is contingent. Since this conditional obligation to pay is personal in nature, it should pass as a personal obligation to the personal representative for settlement out of the personal estate of the decedent. If this is done, the next of kin are certainly none the worse off than if the option had been exercised during the life of the option holder. Thus, by operation of law, the presumed intention of the decedent is carried out.

In summation, the proper rationalization of devolution of the option should be along the following lines:

A. Vendor's side: A. gives a specifically enforceable option to B., and A. dies while it is still in force. The property should pass to the heir in fee subject to divestment by operation of condition (exercise of option). Upon exercise of the option, the purchase money should go to the personal representative since at the time the optionor died a personal right to obtain money was in existence, even though it was contingent.

B. Vendee's side: If B. dies while the option is still in effect, the heir should have the right to enforce the contract and receive the land, since the right to exercise the option and obtain the land is a real right created by contract. The personal representative should be required to pay the purchase price since a contingent personal obligation to pay money, arising out of contract, existed at the time of the optionee's death.

These legal consequences as to devolution are achieved by an application of ordinary equitable and property principles, with the nature of the right being determinative.

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18 CLARK, EQUITY 99, Fn. 1: "Juridical rights are all deductions from juridical remedies; hence, as soon as it became settled that a purchaser could get the remedy of specific performance of a contract to convey land, the inference or deduction was that there was already a specifically enforceable right to the property, which was the basis for his suit." Therefore, since an option contract may be enforced by the party holding the option, WILLISTON, SELECTIONS FROM THE LAW OF CONTRACTS 71 (Rev. ed. 1938), that party has a right to the property which is a real right.

19 CLARK, EQUITY 147 (1919).