

**Quarto Mining Co., Appellant, V.
Litman, Appellee. Quarto Mining Co., Appellee, V. Litman,
Appellant**

Supreme Court of Ohio
42 Ohio St. 2d 73 (1975)

[The owner of the coal rights underlying the land wants to build a belt line to transport coal on the surface. The owner of the deed for the surface rights claims that a provision in deed that gives access rights to the coal mine should not be enforced. The provision gave the support right to the mine and specified that the mine owner could purchase land on the surface required for mining at a price of \$100 per acre. The option was without a time limitation. The question the court must answer is whether the option is void by the rule against perpetuities as a restraint upon alienation.]

JUDGES: STERN, J. O'NEILL, C. J., HERBERT, CORRIGAN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

OPINIONBY: STERN

The dispute in these cases is between the owner of recoverable coal and of mining rights to the coal, and the owners of the surface land overlying that coal. Plaintiff seeks to obtain title or use of a strip of defendants' lands in order to construct a belt line to transport its coal, under the provisions of two 1906 deeds; defendants claim that the rights to use of the surface estates granted by those deeds are void.

The relevant provisions of the 1906 deeds are that plaintiff may take surface ground required for mining purposes, including ground for the purpose of transporting the coal of other lands, and that the plaintiff may require the conveyance of the surface ground taken at specified prices. n1

n1 The deed in the Asher Litman tract granted ownership of a specified vein of coal, and contained the following provision:

"* * * Together with all the rights and privileges necessary and useful in the mining and removing of said coal, including the right of mining the same without leaving any support for the overlying strata, and without any liability for any injuries which may result to the surface from the breaking of said strata, the right of ventilation and drainage and of access to the mines for men and material; the shafts or openings for ventilation and drainage however, to be in the ravines and waste place upon said lands and not nearer than twenty rods of the principal buildings thereon. Any surface ground required for shafts or openings, or machinery, ways, roads, houses for employees, etc. may also

be taken by the grantee, his heirs or assigns, but shall be paid for before being occupied at the rate of one hundred dollars per acre, which payment shall thereupon entitle the grantee, his heirs or assigns, to a deed in fee for the same. Also the exclusive rights of way for the purpose of mining, ventilating, draining and transporting the coal of other lands through the mines and openings in, upon, and over the said lands of the grantor. * * *

The deed to the Juanita Litman tract contained the following provisions:

"* * * Together with all necessary or convenient rights of way on the surface and under it for the purpose of approaching, mining, removing and transporting said coal, and, also the coal under other lands and to at pleasure, place, maintain, remove and replace on the surface or under it all fixtures, structures, and machinery and appliances deemed necessary or convenient to the operation of the mines ...said grantees are also given the option to at pleasure buy and require a like conveyance of the surface exclusive of buildings at the price of two hundred dollars per acre payable in cash when conveyed. * * *

Although it was not directly argued, the options to purchase contained in both deeds apparently are restricted to purchases incident to the exercise of the mining rights.

The trial court and the Court of Appeals found that the proposed use of the surface land was necessary and useful for plaintiff's mining operations, and that finding is not disputed by defendants. The essential issue, as it was presented to the trial court, was whether an option, without time limitation, to purchase surface ground necessary for the exercise of mining rights granted incident to the sale of the underlying coal was specifically enforceable, or was void by reason of the rule against perpetuities as a restraint against alienation. Our resolution of that issue makes it unnecessary to consider other issues raised in the Court of Appeals.

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The fundamental purpose of the rule against perpetuities, as it developed in common law, was to prevent restraints on the alienation of property which might be perpetual or unreasonably long, while permitting restraints limited within the strict period of the rule, in recognition of a property owner's rights to the use and disposition of his property. The complexities of the common-law rule are familiar to every first-year law student, although full understanding of its application and logic is no doubt a rare achievement.

[the rule against perpetuities – The common law principle that no interest in property is valid unless it vests not later than twenty-one years, plus the period of gestation, after some life or lives in being which exist at the time of the creation of the interest.]

A bare option exercisable outside the period of the rule is generally held to be void as an unreasonable restraint upon alienation. ...

As the courts have recognized, an option to purchase land can be a severe restraint on the free alienability of property. The fundamental defect of a perpetual option is that the right to alienate the property is divided into two roughly equivalent interests, and these interests may be so antagonistic as to effectively prevent the transfer of a fee simple estate. Where a definite option price is stated, an effective ceiling price is imposed on the property, above which no one may, with safety, purchase the property; the holder of the option in such case holds the effective power to alienate. Development and improvement of the property may thereby be severely retarded, for the existence of the option threatens the developer with loss of the profit from his efforts if the option is exercised. The possibility of fluctuation in land values and in the buying power of the dollar must further render imponderable the safety of any purchase of property encumbered by an option.

Because of this potential for the indefinite suspension of the "practical" power of alienation, and because the exercise of the option is so likely to depend upon changes in market value and level of development of the property over time, the courts have generally held such an option to be a non-vested contingent equitable interest in property, subject to the rule against perpetuities. ...

However, the same objections do not apply to all forms of options, and the courts have excepted certain types of options not considered to fall within the rule. Thus, courts have generally held that an option to purchase land is valid as a part of a long-term lease of that land. ...

... The reason for excepting options contained in leases, aside from the complexities of the common-law rule, is that the practical benefits of enabling the actual user of the property to acquire full title justifies such an exception, especially in commercial leases. ... Realistically, in long-term commercial leases, the granting to the lessee of an option to purchase is more likely to act as an aid, rather than a hindrance, to alienability, since the long term occupant of the property is thereby able to convey both the lease and the fee estate, and thus is more likely to encourage development and improvement of the property.

A similar problem is posed by options for the purchase of a part of an overlying surface estate, granted as a part of a mineral estate. The courts have uniformly considered such options to be vested in possession as a part of the mineral estate where the option does not in fact act as a restraint upon alienation.

In *Buck v. Walker* (1911), 115 Minn. 239, ... the property owner sold the surface estate, but reserved mining rights and the ownership of any minerals. The deed provided that, if mining activities injured or destroyed the land or any buildings or improvements thereon, the owner of the mining rights should pay to the property owner "all reasonable and proper damages occasioned by such mining operations; or, at the option of the * * * [owners of the mining rights], they may demand a conveyance to themselves of such portion of said lands as they may designate in writing from time to time, and at a price

not exceeding thirty dollars per acre of the lands so designated * * *." The court held that this provision was not void for uncertainty or because it created a perpetuity, because the option was " * * * simply an incident to the exercise by the grantor of his right to explore and remove the minerals, an alternative provision, at the election of the grantor, in place of the agreement to pay the actual damages. It begins and ends with the exercise by the grantor of his right to explore for and remove the minerals." (115 Minn., at 246.) The court considered the option right to be an incident to the mineral estate alienable as a part of that estate, and therefore held the option to be valid under the Minnesota rule against perpetuities, which provided that no interest in land be inalienable beyond the limitation of two lives in being at the creation of the estate.

In *Threlkeld v. Inglett* (1919), 289 Ill. 90, ..., the Supreme Court of Illinois upheld an option in a deed which provided for the taking of such portion of the surface land as necessary for the purpose of the mining rights conveyed, to be paid for at \$ 150 per acre plus the full cash value of any permanent improvements. The court held that this option was only a means to attain the fruits and effects of the mining rights to the property, and as such was not subject to the rule against perpetuities. ...

The rationale of those cases is that the use of the surface estate is a necessary incident to the use and enjoyment of an underlying mineral estate, as the courts have long recognized, and that the taking of a part of the surface estate necessary for mining, by means of an option, is a reasonable incident to the mineral estate. Indeed, the requirement that necessary property taken for mining be conveyed and paid for may protect the property owner from uncompensated use of his property. Since mining rights include necessary uses of the surface such as the sinking of shafts, rights of way above and below the surface, use of the land for the housing of miners, and other uses, an option which requires payment for actual use of the surface does not render the surface estate to any greater degree inalienable, where the option is limited to the exercise of those mining rights. The option, in fact, prevents an uncompensated taking for use under an easement.

...

A single principle is expressed in all of the above cases: A bare option to purchase land which is unlimited as to time is void as an impermissible restraint upon alienation, but an option which is appurtenant to a mineral estate and is limited to the necessary and reasonable use of the overlying surface estate for the exercise of mining rights is a presently vested part of the mineral estate, and is not void as a restraint upon alienation.

This principle is consistent both with the legal relationship between a surface estate and an underlying mineral estate, and with the realities of mining practice. The mining of a deposit inevitably requires some use of the surface for the sinking of shafts, rights of way for removal of the minerals, and other such uses dependent upon the type of mining operation. Unless the language of the conveyance by which the minerals are acquired repels such construction, a severed mineral estate is considered to include those rights to use of the surface as are reasonably necessary for the proper working of the mine and the obtaining of the minerals... Similarly, the owner of the land has the right to subjacent support, and any conveyance or waiver of this right must clearly appear in the instrument

conveying the estate. ...The owner has the right to enjoy the land free from annoyance, except such as reasonably arises from the need to exercise the mining rights of the mineral estate. ...

...

In the instant cases, the taking is limited to necessary use of the surface estate for deep mining, and the use is for a mining right specifically included in the deed, namely, the right to use of the surface to transport coal from other lands. ...The options in these deeds provide only that the use of the surface necessary for the exercise of granted mining rights may be effected by payment and conveyance of necessary parts of the surface. ...

We therefore reverse the judgments of the Court of Appeals which held these options to be void.

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Questions

1. Why would a restraint upon alienation be inefficient?
2. An option divides property into separate interests. The court states that when an option imposes an effective ceiling on the value of the property, the holder of the option controls the sale of the property. Is this analysis correct?
3. Does this option serve to restrict the sale of the surface rights? Is the option incident to the commercial business of mining? Does the option create a good that might not otherwise have existed?
4. Can an option to purchase ever create economic inefficiencies? Could this happen in efficient markets?
5. Are there economic reasons for distinguishing between bare options and options tied to mineral rights as the court does?