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The Requirement of a Definite Time Period in Option Contracts

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ture. Justice Hay in *Arizona Board of Regents v. Harper*[43] best expresses the need for such a new approach.

> It must be recognized that the nonresident students bring to the campus a pollinating effect in the form of new ideas from other parts of the country and the world. They prevent sterility and provincialism in local thinking. The schools with the most cosmopolitan student bodies are among those most highly regarded in America today. A school which prohibits the enrollment of nonresidents is doomed to mediocrity.[44]

Martha Salvant

THE REQUIREMENT OF A DEFINITE TIME PERIOD IN OPTION CONTRACTS

Louisiana courts have, on several occasions, held that options to purchase which do not contain definite time periods for the life of the options are invalid.[1] The reason given, in the cases so holding, is that an option with no limit on its duration could hold the affected property out of commerce perpetually if the option were never exercised. The most recent example of this is the case of *Delcambre v. Dubois*,[2] in which the plaintiff sued for specific performance of an unrecorded counterletter granting him the right to repurchase his interest in certain lands sold to defendant co-owners. The court, on original hearing,[3] found that the counterletter was an option, invalid for lack of a definite time period:

> Our jurisprudence establishes a public policy in this state against holding property out of commerce. . . . The . . . option, which

43. 108 Ariz. 223, 495 P.2d 453 (1972).

44. *Id.* at 228, 495 P.2d at 458.

1. Williams v. McCormick, 139 La. 319, 71 So. 523 (1916); Parrott v. McCormick, 139 La. 318, 71 So. 523 (1916); Nervis v. McCormick, 139 La. 318, 71 So. 523 (1916); Dunham v. McCormick, 139 La. 317, 71 So. 523 (1916); Calhoun v. Christine Oil & Gas Co., 139 La. 316, 71 So. 522 (1916); Bristo v. Christine Oil & Gas Co., 139 La. 312, 71 So. 521 (1916); Delcambre v. Dubois, 263 So. 2d 96 (La. App. 3d Cir. 1972); Clark v. Dixon, 254 So. 2d 482 (La. App. 3d Cir. 1971).

2. 263 So. 2d 96 (La. App. 3d Cir. 1972).

3. On rehearing, the court, apparently conceding the conclusions of law drawn on original hearing, found the counterletter to be a reservation of the right of repurchase, which is not invalid for the lack of definite time period, but rather is reducible to the statutory maximum of 10 years provided in article 2568.

is a property right and is heritable, could be perpetual, and could take this property out of commerce.[4]

While it is unquestionable that public policy disallows encumberances which render property perpetually inalienable, the option in this case could have no such effect since it was unrecorded. As such, it is only effective as between the parties to the instrument, and can have no effect upon third parties relying upon the public records.[5] The court apparently felt that any option, whether recorded or not, which does not stipulate a definite time period for its duration is invalid. In reaching this result, the court relied on *Bristo v. Christine Oil & Gas Co.*[6] and *Clark v. Dixon.*[7]

In *Bristo*, plaintiff landowner granted to defendant a mineral lease under which the defendant could, at his option, exploit the land for oil, gas, and other minerals, or could pay a nominal delay penalty. No primary term for the lease was stipulated by the parties. In holding this lease and option invalid for lack of a definite time period, the court stated:

> To recognize that defendant has the right, without any obligation, to hold the plaintiff's land under a perpetual lease or option, would take the property out of commerce, and be violative of the doctrine of ownership, defined in the second title of the second book of the Civil Code.[8]

Although this case is cited as authority for the rule that options without definite time periods are invalid, neither its facts nor the basis of its decision justify application of the rule to options to purchase. The instrument involved in the *Bristo* case was a mineral lease, a bilateral contract in which both parties are bound. An option to purchase is a unilateral contract in which only the grantor of the option is bound,[9] the optionholder having the right to choose whether

4. 263 So. 2d at 100-01.

5. This fact is noted in Judge Domengeaux's dissenting opinion on original hearing, which concludes that "there was at no time anything in the public records which prevented the defendants (vendees) from disposing of the property and thereby placing it in the stream of commerce." *Id.* at 101. The only recognition given this fact by the majority is to characterize the counterletter as a "secret agreement."

6. 139 La. 312, 71 So. 521 (1916).

7. 254 So. 2d 482 (La. App. 3d Cir. 1971).

8. 139 La. at 315, 71 So. at 522.

9. The distinction between unilateral contracts and bilateral contracts is dealt with in Civil Code article 1765, which provides: "To all contracts there must be at least two parties; one who does, or engages to do or not to do, another to whom the engagement is made. If this latter party make no express agreement on his part, the contract is called *unilateral,* even in cases where the law attaches certain obligations to his

or not he will be bound. The lessee's "option" in the *Bristo* case was merely the right to choose between several alternate performances; [10] the lessee was unconditionally bound to render one of the alternatives.[11] In contrast, the holder of an option to purchase is under no obligation whatsoever to the grantor of the option.

Since the lessee had the option of rendering either a substantial performance (exploitation of the land) or an insufficient performance (payment of nominal delay rentals), the lessee in effect had the option of performing or not, at his will, while the lessor remained unconditionally bound. Agreements such as this, where the obligor's duty is conditioned solely upon his own will, come within the scope of articles 2034[12] and 2035[13] of the Civil Code, dealing with obligations contracted subject to purely potestative conditions. The reason for the decision in *Bristo* is that the court found that the defendant had contracted subject to a purely potestative condition, for the court is not so much concerned that the defendant's right is perpetual as it is that he has that right "without any obligation."[14]

In a bilateral contract, the cause of each party's undertaking is

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acceptance.

"It is called a *bilateral* or reciprocal contract, when the parties expressly enter into mutual engagements."

10. Civil Code article 2066 defines alternative obligations: "But where the things, which form the object of the contract, are separated by a disjunctive, then the obligation is *alternative.* A promise to deliver a certain thing, or to pay a specified sum of money, is an example of this kind of obligation."

11. LA. CIV. CODE art. 2067: "The debtor in an alternative obligation is discharged by the delivery of one of the two things that were comprised in the obligation."

12. LA. CIV. CODE art. 2034: "Every obligation is null, that has been contracted, on a protestative condition, on the part of him who binds himself."

13. LA. CIV. CODE art. 2035: "The last preceding article is limited to potestative conditions, which make the obligation depend solely on the exercise of the obligor's will; but if the condition be, that the obligor shall do or not do a certain act, although the doing or not doing of the act depends on the will of the obligor, yet the obligation depending on such condition, is not void."

14. 139 La. 312, 71 So. 522 (1916). The court cites *Murray v. Barnhart,* 117 La. 1023, 42 So. 489 (1906) and *Saunders v. Busch-Everette Co.,* 138 La. 1049, 71 So. 453 (1914), two cases turning on the question of the validity of mineral leases similar to that in the *Bristo* case, except that the earlier leases had primary terms. Dispositive of the issue in each case was a determination of whether the alternative obligations or "options" in each lease involved a potestative condition. In *Murray* the lease was declared null, while the one in *Saunders* was upheld. The court in *Bristo,* while recognizing that the lease was contracted subject to a potestative condition, and citing these two earlier cases, states that it does not base its holding on the potestative condition. The similarities between the cited cases and the *Bristo* case, the fact that the court recognizes that the lease contains a potestative condition, and the terms in which the court couches its holding tend to discredit this disclaimer.

presumed to be the obligation assumed by the other party.[15] When one party to such a contract binds himself subject solely to his will, he is not in fact *bound*,[16] and the other party has not received that for which he contracted. This situation may be treated in either of two ways: first, it may be said that the obligee has contracted in error, having bound himself in order to receive that which does not exist (the obligor's undertaking); second, it may be said that the obligee has contracted subject to a suspensive condition (that the obligor bind himself) which has failed. In either case the result is the same: the contract is invalid.[17]

In a unilateral contract such as an option to purchase, however, the obligor (grantor) neither expects nor is entitled to expect that the obligee (optionholder) will undertake any obligation in return. He has not, therefore, contracted in error, nor has he contracted subject to a suspensive condition that the obligee bind himself, for then the contract would no longer be an option contract (since these are unilateral), but would be another contract entirely. Additionally, the provisions of article 2036[18] make it clear that the obligation made to depend solely upon the will of the obligee is not null. Thus, to the extent that the holding in *Bristo* rests upon a finding that the defendant contracted subject to a purely potestative condition, and to the extent that the court was concerned with the "option" to select between alternative performances, the case is inapplicable to options to purchase.

In *Clark v. Dixon*,[19] plaintiff landowner sued to have an option granted by him to the defendant declared invalid on the grounds that

15. LA. CIV. CODE art. 1768: "Commutative contracts are those in which what is done, given or promised by one party, is considered as equivalent to, or a consideration for what is done, given, or promised by the other."

LA. CIV. CODE art. 1770: "A contract containing mutual convenants [covenants] shall be presumed to be commutative, unless the contrary be expressed."

16. All that article 2034 provides is that a party who has contracted subject to a potestative condition is not bound because he has not bound himself. The article deals only with the nullity (more properly the non-existence) of the *obligor's* obligations, not with the consequential nullity of the entire contract.

17. The relationship between these two views is illustrated by article 1824, which provides: "The reality of the cause is a kind of condition precedent to the contract, without which the consent would not have been given, because the motive being that which determines the will, if there be no such cause where one was supposed to exist, or if it be falsely represented, there can be no valid consent."

18. LA. CIV. CODE art. 2036: "An obligation may also be made, by the consent of the parties, to depend on the will of the obligee for its duration. Thus a lease may be made during the will of the lessor, and a sale may be made conditioned to be void, if the vendor chooses to redeem the property."

19. 254 So. 2d 482 (La. App. 3d Cir. 1971).

the option lacked a definite time period. In holding the option invalid on those grounds, the court noted:

> To hold otherwise would be to give all of the advantage to the one in whose favor the option was granted. He [the optionholder] could wait many years before determining whether to exercise the option. He could wait and see if the property involved would increase in value before exercising his option.[20]

The court in *Clark* cited the *Bristo* case, and some of the same reasoning responsible for the earlier case seems to have prompted the result in this case, as evidenced by the court's concern that the optionholder in this case has "all the advantage." The *Clark* case, however, unlike either *Delcambre* or *Bristo*, also based its holding on the language of article 2462, holding that the words "within a stipulated time" contained in that article constituted a statutory requirement that options stipulate definite time periods for their duration.[21]

Article 2462 of the Civil Code of 1870 contained only provisions relative to the promise of sale, without mention of option contracts.[22] The article was amended by Act 249 of 1910 which, in addition to effecting changes in the existing provisions, added a paragraph authorizing option contracts:

> One may purchase the right, or option, to accept or reject, within a stipulated time, an offer or promise to sell. After the purchase of such option, for value, such offer or promise can not be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract, or agreement, to sell, evidenced by such promise and acceptance, may be specifically enforced by either party.

The article was further amended by Act 27 of 1920, in which the only material change in the second paragraph was the substitution of the words "for any consideration therein stipulated" for the words "for value."

The most plausible explanation for the legislature's desire to

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20. *Id.* at 483, 484.

21. The court held: "We are of the opinion that the rule of law as set forth in LSA-CC Art. 2462, to the effect that there must be a definite time set forth in the option, is the correct one." *Id.* at 483.

22. It should be noted that the French "promise of sale" has the legal effect of an option contract. The promise of sale or contract to sell, as it is known in Louisiana law, does not exist in French law, the parties' consent as to the thing and the price giving rise to a present sale. This result was disapproved in Louisiana in the early case of *Peck v. Bemiss*, 10 La. Ann. 160 (1855), but this sentiment no doubt contributed to the confusion surrounding the nature and propriety of option contracts.

expressly authorize such contracts is that there was doubt as to the propriety of such agreements in Louisiana.[23] The legislature added to article 2462 an amendment authorizing the option contract, clearly indicating that it was to be considered as an irrevocable offer. In providing for the existence of options, the legislative intent was clearly permissive, rather than regulatory or prohibitory, as is evidenced by the fact that the amendment is cast in permissive terms: "One *may* purchase the right or option . . . ."[24] Also, the provisions of article 1764[25] indicate that some elements of a contract, those which are implicit from the nature of the agreement, but are not essential to the contract, may be modified or renounced by the parties without destroying the contract. Article 2462 indicates that an option is the sale of an offer to sell, and article 2456[26] states that the sale is perfect upon agreement as to the thing and the price. It would seem then, that time is not an essential element of the option contract, without which the contract cannot exist, but rather is an element which arises from the nature of the agreement, and which may be modified or renounced by the parties. While it is arguable that the words "within a stipulated time" constitute an absolute prerequisite to the validity of option contracts, such an interpretation conflicts with civilian theory and may well have the effect of defeating the legislative intent in amending article 2462 rather than implementing it.

The previously discussed cases ostensibly rest their holdings on the theory that since an option is a heritable, assignable contract, failure to state a definite time limit could theoretically take the affected property out of commerce forever. In this regard, it is instructive to examine the approaches which the civil law and common law

23. In *Belle Alliance Co. v. International Molasses Co.*, 8 Orl. App. 176 (La. App. 1911), it was said that prior to the 1910 amendment to article 2462, an option was a mere *nudum pactum*, as there was no mutuality of engagement. Both the statement and the reason given therefore are questionable.

24. LA. CIV. CODE art. 2462 (Emphasis added.) See the text of the amendment to article 2462 in the above discussion.

25. LA. CIV. CODE art. 1764: "2. Things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which can be modified or renounced, without changing the character of the contract or destroying its effect."

26. LA. CIV. CODE art. 2456: "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and the price thereof, although the object has not yet been delivered, nor the price paid."

have taken to this problem, for both have rules against perpetuities,[27] yet both recognize option contracts.[28]

In French civilian theory, in the absence of a time period stipulated by the parties, an option is open for a reasonable time only, the parties being held to have tacitly receded from the agreement after that time.[29] In this manner, the parties' intention is given reasonable effect without violating the rule against perpetuities, although it is not clear that the property would be out of commerce even if the option were to remain in effect forever.[30]

At common law, the same result obtains, as illustrated by the Restatement of Contracts:

> An offer for which such consideration has been given or received . . . cannot be terminated during the term fixed in the offer itself, or if no time is fixed, within a reasonable time. . . .[31]
>
> An offer cannot be terminated during the term therein stated, or, if no term is therein stated for a reasonable time, . . . if by collateral contract the offeror has undertaken not to revoke the offer.[32]

According to Professor Corbin, "a contact is not invalid for indefiniteness for the mere reason that it does not specify a time for the continuance of performance,"[33] because the rules of contractual interpretation require that covenants be construed to reach a reasonable result

27. 1 PLANIOL, CIVIL LAW TREATISE nos. 2344, 2355 (La. St. L. Inst. transl. 1959); although the rule is not so strong at common law, it does exist. *See* 3 A. CORBIN, CONTRACTS § 553 (1950).

28. 2 PLANIOL, CIVIL LAW TREATISE nos. 1398-1410 (La. St. L. Inst. transl. 1959); 1 A. CORBIN, CONTRACTS §§ 259-79 (1950); RESTATEMENT OF CONTRACTS §§ 46, 47 (1932).

29. 2 PLANIOL, CIVIL LAW TREATISE no. 1408 (La. St. L. Inst. transl. 1959).

30. Planiol indicates that the optionholder has merely a personal right against the grantor, rather than a real right in the land. *See* 2 PLANIOL, CIVIL LAW TREATISE nos. 1402, 1403 (La. St. L. Inst. transl. 1959). The common law view is that the optionholder has an "interest in the land" rather than a mere personal right. *See* 1A A. CORBIN, CONTRACTS § 272 (1950).

31. RESTATEMENT OF CONTRACTS § 46 (1932).

32. *Id.* § 47 (1932). In TENTATIVE DRAFTS 1-7 OF THE RESTATEMENT (SECOND) OF CONTRACTS (1973), sections 46 and 47 of the original work are omitted, being replaced by section 24A, which provides: "An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer." Section 230 (new) of the Tentative Drafts provides that: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." It would seem, then, that the reasonable time rule would obtain under the Tentative Drafts as well as under the existing provisions.

33. 3 A. CORBIN, CONTRACTS § 553 (1950).

rather than an absurd one; thus, the parties are held to have intended that the agreement remain open for a reasonable time, rather than for no time, or in perpetuity.[34]

The same result is available in Louisiana under the provisions of the Civil Code. Article 1951 provides that "[W]hen a clause is susceptible of two interpretations, it must be understood in that in which it may have some effect, rather than in a sense which would render it nugatory." This rule is a reflection of the same rule of Roman law which underlies the French and common law rules.[35] Under this rule, Louisiana courts may, as French and common law courts have done for years, impose a reasonable time limit on the life of an option in the absence of a stipulation by the parties.[36] Courts could give reasonable legal effect to the intention of the parties while insuring that the property would not forever be subject to the rights of the optionholder. Also, by applying this rule of interpretation to options, courts could interpret article 2462 in a manner more in harmony with traditional civilian thought without "reading out" the language relative to time limits.

The application of this rule of interpretation to option contracts would not require a wholesale upheaval of existing jurisprudence, but rather would bring the time period requirement in line with other jurisprudence relative to options, allowing the optionholder reasonable rights, but refusing to specifically enforce the option where the optionholder has acted unreasonably, to the detriment of the grantor.[37] The parties could sue for a determination of what is a reasonable

34. *Id.* at § 553 (1950): "Rules of interpretation are commonly laid down to the effect that words should be interpreted so as to reach a reasonable result rather than an unreasonable one, and so that the agreement may be valid rather than invalid, (ut res magis valeat quam pereat, to use what Chancellor Kent described as the 'mysterious wand of French and Roman law')." *See also* RESTATEMENT OF CONTRACTS § 236 (1932); TENTATIVE DRAFTS 1-7 OF THE RESTATEMENT (SECOND) OF CONTRACTS § 229 (1973).

35. *See* note 36 *supra.* Planiol recognizes that under provisions of the Code Napoleon similar to those in the Louisiana Civil Code judges may employ broad interpretative powers in construing contractual agreements, and need not strictly confine themselves to the document in order to determine its meaning. *See* 2 PLANIOL, CIVIL LAW TREATISE nos. 1181-1182A (La. St. L. Inst. transl. 1959). *See also* 1 AUBRY & RAU, OBLIGATIONS § 347 (La. St. L. Inst. transl. 1965).

36. Louisiana courts already apply such a rule in the case of offers which do not limit their duration. Article 1809 provides that the offeror cannot revoke his offer "without allowing such reasonable time as from the terms of his offer he has given, or from the circumstances of the case he may be supposed to have intended to give the party, to communicate his determination." The similarities between an offer and an option contract are obvious, and the same reasons which compel courts to give effect to the intention of the offeror should compel them to give reasonable legal effect to the intention of the parties to an option contract.

37. An option holder cannot wait many years before exercising his right, to the

time under the circumstances,[38] or the grantor could sue to have the option erased from the public records at the end of a reasonable time. Also, the grantor may urge as a defense to a suit on the option that the optionholder attempted to exercise his option after a reasonable time had elapsed.

The rule that options without definite time periods are invalid is a harsh one. The optionholder is left without even an action for damages, as he has no contract on which to sue. The optionholder's only relief is the return of the price of the option, and while this insures that the property will not be held out of commerce forever, the optionholder's rights must be sacrificed in order to reach this result.

A sounder rule is that options are open for a reasonable time, which time is to be determined by the facts and circumstances of each case. This result is clearly available under Louisiana law, and allows courts to give effect to both the intention of the parties to the agreement and to the public policy against holding property out of commerce. In light of these considerations, it is suggested that the present rule, resting, as it does, on a somewhat questionable theory, be disapproved. The rule that options without definite time periods are open for a reasonable time rests on firmer theoretical ground, effects a more equitable balancing of interests, and is more properly applicable to such cases.

H. Evans Scobee

ABORTION REGULATION: LOUISIANA'S ABORTIVE ATTEMPT

During the 1973 fiscal session, the Louisiana legislature enacted provisions[1] regarding abortion in apparent response to the United

detriment of the grantor. Joffrion v. Gumbel, 123 La. 391, 48 So. 1007 (1909). The grantor of an option has an action for lesion beyond moiety against the optionholder, the value of the property to be calculated at the time the option was exercised. Lakeside Dairies v. Gregerson, 217 La. 510, 46 So. 2d 752 (1950); Ronaldson & Puckett v. Bynum, 122 La. 687, 48 So. 152 (1908). Options are specifically enforceable according to justice and equity, not of right. Chalmette Petro. Corp. v. Chalmette Dist. Co., 143 F.2d 826 (5th Cir. 1944).

38. This situation seems to be within the purview of articles 1871-83 of the Code of Civil Procedure, which provide for declaratory judgments.

1. LA. R.S. 40:1299.31-.34 (Supp. 1973); LA. R.S. 13:1569 (1950), *as amended by* La. Acts 1956, No. 104 § 1, No. 108 § 1, No. 109 § 1, No. 110 § 1; 1968, No. 645 § 1; 1972, No. 139 § 1; 1973, No. 73 § 1; LA. R.S. 13:1570 (1950), *as amended by* La. Acts 1968, No. 644 § 1; 1973, No. 73 § 1; LA. R.S. 14:87 (1950), *as amended by* La. Acts 1964, No. 167; LA. R.S. 14:87.1 (Supp. 1973); LA. R.S. 14:87.2 (Supp. 1973); LA. R.S. 14:87.4 (Supp. 1973); LA. R.S. 40:254.1 (Supp. 1973); LA. R.S. 40:309.1 (Supp. 1973);