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**OPTION TO PURCHASE AS AN INTEREST IN LAND**

In order to determine the effect and interest that attaches to the holder of an option for the purchase of land, two specific questions must be considered. First, what is the nature of an option to purchase land? Second, should it be termed an equitable interest in land?

An *option* for the purchase of land is usually a privilege or a right which the owner confers on another person to become at his own election the purchaser of the property on stated terms within a stated period of time. *Williston, on Contracts*, states that the word option, "is a term of business usage rather than that of strictly legal nomenclature, and has frequently been used to include indiscriminately both binding conditional contracts and mere unsealed offers without consideration."<sup>3</sup> Legal texts usually define an option to purchase as a contract by which an owner agrees with another person that he shall have the privilege of buying his property at a fixed price within a certain time.<sup>3</sup>

There are apparently two lines of authority as to whether or not an option for the purchase of land creates an equitable interest in land. One group of cases holds that before its exercise the owner of an option, based on consideration, has an equitable interest in land; the other line of cases holds that the owner of such an option before its exercise has no interest, equitable or otherwise, in the land.<sup>4</sup>

The weight of authority in this country is in accord with the latter rule and typical statement found in the cases is such as is laid down in an early Montana case, *Ide v. Leiser*.<sup>4</sup> That case in determining the right or position of an optionee held that:

"An agreement in writing to give a person the option to purchase lands within a given time at a named price is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time. He does not sell his land; he does not then agree to sell it; but he does sell something; that is, the right or privilege to buy at the election or option of the other party. The second party

<sup>3</sup> WILLISTON, *CONTRACTS* (1st. ed. 1936) sec. 1441, p. 2265.

<sup>4</sup>55 AM. JUR., *Vendor Purchaser*, sec. 27. 27 R.C.L., *Vendor Purchaser*, sec. 31.

<sup>5</sup>Chapman et al v. Great Western Gypsum Co. et al (1932) 216 Cal. 420, 14 P. (2) 758, 85 A.L.R. 917.

<sup>6</sup>(1890) 10 Mont. 5, 24 P. 695, 24 Am. St. Rep. 17.

gets in praesenti, not lands, nor an agreement that he shall have lands, but he does get something of value, that is the right to call for and receive land if he elects. The owner parts with his right to sell his lands except to the second party, for a limited period. The second party receives this right or rather, from his point of view, he receives the right to elect to buy."

In a later Montana case,<sup>5</sup> it was held that an option to purchase was merely an agreement whereby the optionee may, upon compliance with certain terms and conditions, become the owner of the property. It is not bilateral in the sense that the optionee may compel specific performance, although such right is conferred on the optionee by virtue of a valid agreement. "It is simply a right conferred by contract upon one party by another, to accept or reject a present offer within a limited or reasonable time."<sup>6</sup> It is "neither a lease nor a contract to lease. It is simply a contract whereby the owner of the property agrees with another person that he has the right to exercise certain privileges with reference to the property in question."<sup>7</sup> In the most recent Montana case<sup>8</sup> the courts again consistently hold with their earlier views and say by way of dictum that an option to purchase real estate constitutes no interest in said real estate.

In accord with Montana and what seems to be the weight of American authority, courts of other jurisdictions lay down the general rule that an option to purchase creates no interest in the land. One court framed the rule in a somewhat different manner by saying, "It is frequently said that until an option to purchase is executed by acceptance the option holder has no property right but merely a contract right,"<sup>9</sup> or, "that an option to purchase land does not before acceptance, vest in the holder of the option an interest in the land."<sup>10</sup>

<sup>5</sup>Bennett v. Petroleum Co. et al (1930) 87 Mont. 436, 288 P. 1018; Nielson v. Hendrickson (1922) 63 Mont. 518, 210 P. 905.

<sup>6</sup>Sunburst Oil & Gas Co. v. Neville (1927) 79 Mont. 550, 257 P. 1016.

<sup>7</sup>Thomas et al v. Standard Development Co. (1924) 70 Mont. 156, 224 P. 870; Libby Lumber Co. v. Pacific States Fire Insurance Co. (1927) 79 Mont. 166, 255 P. 340, 60 A.L.R. 1; Snyder v. Yarbrough (1911) 43 Mont. 203, 115 P. 411.

<sup>8</sup>Halko v. Anderson (1939) 108 Mont. 588, 93 P. (2d) 956, 959.

<sup>9</sup>Stembridge v. Stembridge (1888) 87 Ky. 91, 7 S.W. 611; Sweezy v. Jones (1884) 65 Iowa 272, 21 N.W. 603.

<sup>10</sup>Richardson v. Hardwick (1882) 106 U.S. 252, 27 L.Ed. 145, 1 S.Ct. 213; Gustin v. Union School Dist. (1893) 94 Mich. 502, 54 N.W. 156, 34 Am. St. Rep. 361; Phoenix Insurance Co. v. Kerr (1904) 129 Fed. 723, 64 C.C.A. 251, 66 L.R.A. 569.

The leading California case of *Ludy v. Zumwalt*<sup>11</sup> clearly laid down the proposition that "while the optionee of a land purchase agreement may be entitled to have such agreement specifically enforced, it is to that extent only that he can claim if he can do so at all, an equity in the property involved in the agreement." Another California case<sup>12</sup> said in effect, that an option to purchase land is not an interest in land itself but a mere right of election to accept or reject a present offer within the time fixed.

Notwithstanding these general rules and what is apparently the weight of authority, there are other authorities, cases and dicta to the effect that an option to purchase land does create an interest therein.<sup>13</sup> It was held in a North Dakota case<sup>14</sup> that, "Such right of the optionee constitute an interest in land enforceable in equity." This case cited as their authority a summarization of this subject, which was purely dictum, in the case of *Smith v. Bangham*.<sup>15</sup> This case held as follows:

"It has been said that an option to purchase land does not, before acceptance, vest in the holder of the option an interest in the land. On the other hand there are cases holding that the grant, on a valuable consideration, of an option to purchase constitutes the grantee the equitable owner of an interest in the property. At any rate the option vests in the grantee the right or privilege of acquiring an interest in the land and when accepted entitles him to call for specific performance."

One of the reasons laid down for the general rule that an option is merely a contract right and not an interest in land is that until acceptance there is no equitable conversion.<sup>16</sup> It is submitted that this is no reason at all to deny an optionee an interest in the land.

To use the phrase, 'equitable conversion,' in this manner is to confuse the subject. At best it is only a result and not a cause. *Clark, on Equity*,<sup>17</sup> suggests in reference to the reason-

<sup>11</sup>*Ludy v. Zumwalt* (1927) 85 Cal. 119, 259 P. 52.

<sup>12</sup>*East Bay Municipal Utility Dist. v. Kieffer et al* (1929) 99 Cal. 240, 278 P. 376.

<sup>13</sup>*House v. Jackson* (1893) 24 Oreg. 89, 32 P. 1027; *Kerr v. Day* (1850) 14 Penn. 112, 53 Amer. Dec. 526; *Wall v. Minneapolis St. P. & S. S. M. Ry. Co.* (1893) 86 Wis. 48, 56 N.W. 367.

<sup>14</sup>*Horgan et al v. Russell* (1913) 24 N.D. 490, 140 N.W. 99, 43 L.R.A. (N.S.) 1150.

<sup>15</sup>(1909) 156 Cal. 359, 104 P. 689, 28 L.R.A. (N.S.) 522.

<sup>16</sup>33 H. L. R. 456, citing obiter in *Stembridge v. Stembridge & Sweeney v. Jones*, note 9, *supra*.

<sup>17</sup>CLARK, PRINCIPLES OF EQUITY (1st. ed. 1919) §112, p. 149.

ing of the majority of the courts which say that an option to purchase creates no interest, "that much of the confusion has been caused by considering equitable conversion as a reason for a decision rather than a mere name for the result of a decision. It may be suggested that if it is not feasible to get rid of the term, we ought at least to distinguish between entire and partial equitable conversion; entire equitable conversion would exist where the contract is specifically enforceable by both parties; partial equitable conversion would exist when the contract is specifically enforceable only by one." Further confusion is found in the cases from a failure of the courts to realize that all classes of rights may be specifically enforced whether or not they are equitable interests or equitable estates.

It would therefore seem that the rule laid down by the courts in denying that an option to purchase land is an interest in land is not based on sound reasoning.

A suitable comparison would be to compare the optionee's interest with that of other common law rights in another's land exempting legal charges<sup>18</sup> and natural rights.<sup>19</sup> These common law rights generally include easements,<sup>20</sup> profits,<sup>21</sup> and covenants running with the land.<sup>22</sup> Although these common law rights are not created separately as a distinct subject of property, they are incidents of the right of ownership and are treated as a interest in land.

Another example where the courts have declared an interest or right in the land exists, although the interest is less than complete ownership or less than an estate, is in their treatment of equitable servitudes. It is elementary today that equitable servitudes are interests in land and are only defeated by a bona fide purchaser for value without notice.

It would seem that that an option to purchase should also be declared an equitable interest in the land for the reason that it is given the protection of such an interest and yet the courts have failed to so designate. This point is brought out more clearly by the following material.

It is well settled than an option to purchase land may be enforced against the heirs, devisees, and representatives of a

<sup>18</sup>TIFFANY, REAL PROPERTY (1st. ed. 1940) §354, p. 363.

<sup>19</sup>TIFFANY, REAL PROPERTY (1st. ed. 1940) §504, p. 498.

<sup>20</sup>TIFFANY, REAL PROPERTY (1st. ed. 1940) §520, p. 523.

<sup>21</sup>TIFFANY, REAL PROPERTY (1st. ed. 1940) §565, p. 574.

<sup>22</sup>TIFFANY, REAL PROPERTY (1st. ed. 1940) §49, 342, 344.

deceased optionor.<sup>23</sup> It was specifically held in a Wisconsin<sup>24</sup> case that the death of the giver of the option did not impair the rights of the holder to make his election and enforce performance against the heirs. It is generally held, also, that on the death of the optionee, the right to exercise the option descends to his heirs or personal representatives.<sup>25</sup> The only exception to this general rule seems to be those types of option that are personal to the original optionee.<sup>26</sup>

It is a general rule and the overwhelming weight of authority that one who purchases land with notice that his grantor has given an option to a third party to purchase such property takes subject to the option and the purchaser may be compelled to perform the contract by a subsequent valid exercise of the option.<sup>27</sup> "As between the rights of a person exercising an option to purchase and the rights of one purchasing the property with notice of the option, after the giving of the option and before it is exercised, the general rule accords priority to the right of the holder of the option."<sup>28</sup>

Montana has specifically held that one who purchases land from the owner after the recording of an option given by the owner to another person to purchase the same land takes with constructive notice of the option and cannot claim to be an innocent purchaser.<sup>29</sup> However, as against a subsequent bona fide purchaser for value a contract formed by the exercise of an option given to another will not be enforced.<sup>30</sup>

An analysis of these decisions indicates that an option to purchase is treated exactly as other equitable interests which are cut off by a bona fide purchaser for value and are not cut off by a purchaser with notice.

Furthermore, it has been held that a tenant who exercises an option to purchase, contained in the lease, may enforce specific performance of the contract against one who purchases

<sup>23</sup>Ross v. Parks (1890) 93 Ala. 153, 8 So. 368, 11 L.R.A. 148.

<sup>24</sup>Mueller v. Nortmann (1903) 116 Wis. 463, 93 N.W. 538, 96 Am. St. Rep. 997.

<sup>25</sup>For full discussion of this point see note 43 A.L.R. (N.S.) 115.

<sup>26</sup>Sutherland v. Parkins (1874) 75 Ill. 338.

<sup>27</sup>55 AM. JUR., *Specific Performance*, §36.

<sup>28</sup>Guerin v. Sunburst Oil & Gas Co. (1923) 68 Mont. 365, 218 P. 949, 50 A.L.R. 1315.

<sup>29</sup>*Id.*

<sup>30</sup>Barrett v. McAllister (1890) 33 W. Va. 738, 11 S.E. 220, 28 L.R.A. (N.S.) 523, note.

the property with notice of the lease and contract to sell, and may compel a conveyance of the property.<sup>51</sup>

Other cases have held that a deed to an intervening purchaser, with notice of an outstanding option, will be annulled and specific performance will be granted to the optionee against his grantor.<sup>52</sup> It has also been held that an optionee may obtain an injunction against an intervening purchaser, with notice of the option to purchase timber land, from cutting the timber.<sup>53</sup>

Other cases revealing the protection with which the courts surround the optionee, hold that where a land owner stipulated that he would give the optionee the first refusal of his land, he was not free to dispose of the land to an independent purchaser without informing the holder of the option and offering the land to him at the sale price.<sup>54</sup> Another case held that a declaration of a homestead by the wife of the owner of real property, with knowledge of an option to purchase given to another, was subject to the right of the holder of the option to demand a conveyance in accordance with his contract.<sup>55</sup>

A case in Iowa<sup>56</sup> held that a receiver, in a receivership proceeding, had the right to sell an option to purchase real estate which was owned by the debtor and that the purchaser had the right to enforce the option in his own behalf. This holding is important in view of the fact that the Iowa court is committed to the doctrine that a mere option to purchase real estate creates no interest in land.<sup>57</sup>

After considering these last few decisions showing the protection with which they surround the optionee, it becomes obvious that the optionee's right is more than a contract right as is stated by the majority of the courts. If it is merely a contract right these decisions are irreconcilable.

It has been suggested that, "the creation of equitable estates is a generally recognized consequence of the right of specific performance; it would seem that . . . a springing use, i.e., a contingent equitable interest in the land analogous to an

<sup>51</sup>Lazaru v. Heelman (1882) 11 Abb. N.C. (N.Y.) 93.

<sup>52</sup>Chesbrough v. Vazaid Invest. Co. (1913) 156 Ky. 149, 160 S.W. 725.

<sup>53</sup>Pardee v. C. Crane & Co. (1914) 74 W. Va. 359, 82 S.E. 340.

<sup>54</sup>Manchester Ship Canal Co. v. Manchester Race Course (1901) 2 Ch. (End.) 37.

<sup>55</sup>Smith v. Bangham, note 15 *supra*.

<sup>56</sup>A. H. Blank v. Independent Ice Co. et al (1911) 153 Iowa 241, 133 N.W. 344, 43 L.R.A. (N.S.) 715.

<sup>57</sup>Sweezy v. Jones, note 9, *supra*.

executory devise, arises on the giving of an option.''<sup>38</sup> On this theory several decisions holding that an option contract may be enforced against an intervening donee or purchaser with notice can be explained.<sup>39</sup> Also, the explanation of the courts allowing the optionee an injunction or decisions that allow the optionee to come ahead of a declaration of homestead before the exercise of the option are more readily understandable.<sup>40</sup>

In conclusion, since the holder of an option is given protection similar to that given other equitable interests in land, it would be better terminology to call his right an interest in land. This would prevent a court from using the statement that an "option is in not an interest in land," as a reason for a decision as they did in dictum in *Halko v. Anderson*.<sup>41</sup> This would also be in accord with the general principle that equitable conversion is a consequence of the right to specific performance in equity.

Willis B. Jones.

<sup>38</sup>*Effect of an Optional Contract to Buy Land*, 26 HARV. L. REV. 747 (1912-1913).

<sup>39</sup>*Horgan et al v. Russell*, note 14, *supra*.

<sup>40</sup>*Pardee v. C. Crane & Co.*, note 33, *supra*; *Manchester Ship Canal Co. v. Manchester Race Course*, note 34, *supra*.

<sup>41</sup>Note 8, *supra*.

## THE PURPOSE OF THE DECLARATION OF MARRIAGE IN MONTANA<sup>1</sup>

Since the passage of the premarital medical examination

<sup>1</sup>The form of the declaration as provided for in §5725 which is in general use is substantially as follows (it, of course is contended that this is an improper use) :

### DECLARATION OF MARRIAGE

H..... and W..... do hereby jointly make and execute a declaration of marriage and make the following statements and representations of facts pursuant to the provisioss of section 5724 RCM 1935.

That H..... is .....years of age, and resides at.....,  
That W..... is .....years of age, and resides at.....

We do hereby declare that we are married and do enter into the marriage relationship at this time and place and at the time of the execution of this declaration at..... on the..... day of....., 19..... at.....AM PM.

We hereby certify that this marriage has not been solemnized.

In witness whereof, we hereunto set our hands this.....day of....., 19.....

Signatures of two witnesses.  
Notarization.

Signatures of H and W.