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Landlord and Tenant - Option to Purchase Premises - Action for Damages without Tendering Performance

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called consequential.[12] The water has physically invaded the property and a "taking" has occurred.[13] Shock waves flowing from a government air base similarly invade neighboring property. It would seem that where the invasion is so great that residential property can no longer be used for that purpose, the property has been "taken" just as effectively as if it were flooded. Where interference stops short of entire deprivation of the normal use of the property, it may be classified as consequential damage.[14] This is the proper line of distinction between damage and a "taking."

The dissent in the *Batten* case, which argued that a distinction between noise and shock waves traveling vertically and those traveling horizontally was unreal, has been called the better view by two state supreme courts.[15] One of them,[16] at least, felt this would be the position taken by the Supreme Court if it rules on the question.

DONALD H. LEONARD

LANDLORD AND TENANT—OPTION TO PURCHASE PREMISES—ACTION FOR DAMAGES WITHOUT TENDERING PERFORMANCE—The plaintiff agreed to lease certain lands for three years with an option to purchase at any time during the term. Eight months later the defendant-lessor repudiated the lease, including the option, and requested the plaintiff to vacate the premises. In an action for damages to recover the difference between the option price and the fair market value of the property, motion for judgment of involuntary nonsuit was granted because until the plaintiff had exercised the option, there could be no breach and therefore no recoverable damages. The Supreme Court of Oregon, with two justices dissenting,[1] *held* that a tender of the purchase price was not necessary because it would require the plaintiff to make his election before the term he had bargained for had lapsed. And despite the fact that the plaintiff might not have exercised his option, the defendant, whose repudiation of the option created this element of uncertainty, could not be relieved of liability on the ground that the damages were speculative. *Fullington v. M. Penn Phillips Co.*, 395 P.2d 124 (Ore. 1964).

12. United States v. Lynah, 188 U.S. 445 (1903); *accord,* Pumpelly v. G.B. & M. Canal Co., 80 U.S. (13 Wall.) 166 (1891).

13. United States v. Dickinson, 331 U.S. 745 (1947); United States v. Lynah, *supra* note 12.

14. See Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

15. Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 391 P.2d 540 (Wash. 1964).

16. Martin v. Port of Seattle, *supra* note 15.

1. Goodwin, J. dissents on the ground that damages are too speculative. Repudiation of the agreement did not terminate the option and the plaintiff still has the remainder of the term in which to exercise it. Even if the optionor no longer had the power to perform (which is not the case) the better rule would require the optionee to exercise the option before bringing an action for damages.

This holding appears to be unprecedented in this country. Recognized legal writers, however, in support of the proposition have stated that the holder of an option to purchase may bring an action for damages, without first having exercised the option, when the optionor has repudiated or made performance impossible.[2] The view expressed by these writers is supported by case law to this extent: the optionee may recover damages without tendering the purchase price when the optionor has rendered himself unable to perform by selling the property to a third person without notice of the option[3] or when, due to the optionor's breach, a substantial portion of the subject matter of the option has ceased to exist.[4] The theory of these cases is that the law will not require a vain or useless act.

It seems then that there are two rules: first, the optionee may recover damages without tendering performance of the option when the optionor has rendered himself unable to perform.[5] Second, as illustrated by the instant case, the optionee has an action for damages, without having tendered the purchase price, when the optionor has merely repudiated the option even though there is no evidence that performance has been frustrated or made impossible.

The majority opinion cites a number of condemnation cases which it says, by analogy, support the holding that an optionee who has not exercised his option to purchase can recover damages for the optionor's repudiation of the lease-option agreement. While some of these cases involve options to purchase realty,[6] most of them are concerned with options to renew or extend existing leasehold interests.[7] It appears that a majority of the courts that have

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2. 1A CORBIN, CONTRACTS § 272 at 579 (1963). "During the agreed term of his option, *he* [the optionee] *has a right that the option giver shall not repudiate* or make performance impossible or more difficult by conveying the land to a third person. *These rights are enforceable by all the usual judicial remedies, including judgment for damages,* injunction, and decree for specific performance." (Emphasis supplied). JAMES, OPTION CONTRACTS § 1104 at 504 (1916). "The optionor expressly or impliedly stipulates not to withdraw the offer of sale during the time limit, and, therefore, *if during the time limit he breaches the option agreement by repudiating the option,* or by placing himself in a position where it is impossible for him to perform, *it would seem the optionee has an action to recover damages arising from breach of the option, although he has not elected.*" (Emphasis supplied).

3. Pearson v. Horne, 139 Ga. 453, 77 S.E. 387 (1913).

4. In McFerran v. Heroux, 44 Wash. 2d 631, 269 P.2d 815 (1954), the defendant owned a grandstand situated upon land owned by the plaintiff. In consideration of a ten year lease of the premises to the defendant, the plaintiff received an option to purchase the grandstand at the end of the term for a relatively nominal price. As a part of the lease option agreement, the defendant convenanted that should the grandstand be destroyed by fire he would either rebuild the grandstand or surrender the lease to the plaintiff. The grandstand was destroyed by fire and the defendant elected to rebuild. When a new grandstand, which was not substantially the same as the one destroyed had been erected, the plaintiff, without tendering performance, brought an action for damages to recover the value of his option. The court held that the defendant's failure to rebuild the grandstand in substantially the same form deprived the plaintiff of his option to purchase and that the legal effect was no different than if the defendant had sold the property to a third person. As a result of the defendant's breach the subject matter of the option no longer existed. It would be useless to require the plaintiff to allege that, but for the breach, he would have been willing to exercise the option.

5. *Supra* notes 3 & 4.

6. Nicholson v. Weaver, 194 F.2d 804 (9th Cir. 1952); Dreier v. Kaw Valley Drainage Dist., 117 Kan. 402, 232 Pac. 600 (1925); Cullen & Vaughn Co. v. Bender Co., 122 Ohio St. 82, 170 N.E. 633 (1930).

7. United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. 425, 031 Square Feet of Land, 187 F.2d 798 (3d Cir. 1951); Brooklyn Eastern Dist. Terminal v.

considered the question have held that the holder of an option to purchase, which is unexercised at the time of taking, is not entitled to a portion of the condemnation award.[8] Conversely, the prevailing view among the courts that have ruled on the issue regarding options to renew a lease have allowed the option holder to recover damages for the value of his option.[9] Some cases have drawn the distinction that a renewal option creates an interest in land, while a purchase option is a mere contract right.[10] In view of these authorities it is questionable how much support, if any, they lend to the principal case. Even the cases[11] which have allowed damages to the holder of an option to purchase would seem to afford more support for the rule that tender of performance is excused only when the optionor has rendered himself unable to perform.[12]

There is considerable authority for the dissenting justices' view that repudiation of the lease does not necessarily terminate the option. It is generally held that the option is not terminated if the lease and option can be considered separate and independent agreements;[13] but, if they constitute one entire agreement, the unexercised option is automatically extinguished upon termination of the lease.[14] When the lease and option are inseparable the doctrine of relief against forfeitures may, under certain circumstances, prevent the option from being terminated with the lease.[15] On these bases the option holder may still have had the right to exercise the option even if the repudiation did terminate the lease.

The author concludes that the recovery of damages, in instances where the option has not been exercised, should be restricted to cases where it is no longer within the power of the optionor to perform. This gives the optionee only what he bargained for—the right to purchase the property at any time during the term. "He did

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City of New York, 139 F.2d 1007 (2d Cir. 1944); State *ex rel.* Morrison v. Carlson, 83 Ariz. 363, 321 P.2d 1025 (1958); Department of Pub. Works and Bldgs. v. Bohne, 415 Ill. 253, 113 N.E.2d 319 (1953); Hercy v. Board of Chosen Freeholders, 99 N.J. Eq. 525, 133 Atl. 872 (1926).

8. *E.g.*, City of Ashland v. Kittle, 347 S.W.2d 522 (Ky. 1961); State v. New Jersey Zinc Co., 40 N.J. 560, 193 A.2d 244 (1963); See Annot., 85 A.L.R.2d 588 (1962).

9. State *ex rel.* Morrison v. Carlson, *supra* note 7.

10. *E.g.*, City of Ashland v. Kittle, *supra* note 8; Cornell-Andrews Smelting Co. v. Boston & P. R.R., 209 Mass. 298, 95 N.E. 887 (1911). Many other cases are in accord with the interest in land theory. See *e.g.*, People v. Ocean Shore R.R., 90 Cal. App. 2d 464, 203 P.2d 579 (1949); Anderson v. Blixt, 72 N.W.2d 799 (N.D. 1955). In Gulf Interstate Gas Co. v. Garvin, 368 S.W.2d 309 (Ky. 1963) the court, after distinguishing the *Kittle* case and refusing to recognize the interest in land view, presented this test: If at the time of condemnation there are any rights outstanding, enforceable against the owner of the fee, and if these rights reduce the market value of the property, the holders of the rights are entitled to compensation for their loss or impairment. Thus it is immaterial whether such rights constitute an interest in land.

11. Cases cited note 6 *supra*.

12. See Goodman v. Yawkey, 101 F. Supp. 769 (D.C. Mass. 1952), *aff'd sub nom. on condition,* Brooks v. Yawkey, 200 F.2d 663 (1st Cir. 1953) where the court held that the rights of a holder of an option to purchase were terminated by the taking of the property in condemnation since it was impossible for the optionor to perform thereafter.

13. *E.g.*, Mathews Slate Co. v. New Empire Slate Co., 122 Fed. 972 (C.C.N.D.N.Y. 1903); Holmes v. Harris, 33 N.J. Super. 395, 110 A.2d 329 (1954); Warner-Quinlon Co. v. Smith, 134 Misc. 649, 236 N.Y. Supp. 241 (1929), *aff'd without opinion* 229 App. Div. 814, 242 N.Y Supp. 762 (1930), *aff'd without opinion* 255 N.Y. 582, 175 N.E. 322 (1930).

14. *E.g.*, Mooney v. Weaver, 262 Ala. 392, 79 So. 2d 3 (1955); Estfan v. Hawks, 166 Kan. 712, 204 P.2d 780 (1949); Simon v. Schabo, 117 N.W.2d 412 (N.D. 1962).

15. See Thompson v. Coe, 96 Conn. 644, 115 Atl. 219 (1921).

not buy the right to sue for damages"[16] and should be precluded from doing so without exercising his right. Until such time, he has lost nothing.

JOHN L. SHERMAN

16. Fullington v. M. Penn Phillips Co., 395 P.2d 124, 127 (Ore. 1964) (dissenting opinion).