Denver Law Review

Volume 55 | Issue 1 Article 5

February 2021

Colorado Softens the Rule Against Perpetuities

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FACULTY COMMENT

COLORADO SOFTENS THE RULE AGAINST PERPETUITIES

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A 1949 recorded agreement provided that:

> 1. The City hereby gives . . . unto the Atchisons the . . . prior right at the option of the Atchisons to repurchase . . . the lands . . . at the same price and upon the same terms and conditions upon which the City is willing to sell . . . to any third person; and the City shall not sell . . . to any third person unless . . . the City . . . shall first offer . . . to sell . . . to the Atchisons at the same price and upon the same terms and conditions as in the case of such other sale . . . to any third person . . . .
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> . . . .
>
> 3. The rights of the Atchisons under this agreement shall be deemed not in tenancy in common but in joint tenancy in them and the survivor of them, their assigns, and the heirs, and assigns of such survivor.[1]

In 1956 the City leased to Martin for twenty-five years, with an option to purchase at $158 per acre. No offer was made to the Atchisons.

In 1966 Martin elected to exercise its option to purchase and, in 1967, the City sold to Martin. No offer was made to the Atchisons.

In 1969, in an action brought by the Atchisons for a declaratory judgment as to the validity of their preemptive right, the Supreme Court of Colorado held that, because of paragraph "3" the agreement was "void" because it violated the rule against perpetuities.[2]

The Atchisons then brought an action seeking either reformation of the 1949 agreement and specific performance thereof or rescission of the 1949 conveyances to the City and damages.

In 1973, the court said that in 1969 "we were silently assum-

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[1] Atchison v. Englewood, 568 P.2d 13, 16, 17 (Colo. 1977).

[2] Atchison v. Englewood, 170 Colo. 295, 463 P.2d 297 (1969). The court quoted Gray's statement of the rule: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." *Id.* at 300, 463 P.2d at 299.

ing that the Atchisons could go to the trial court for other relief," and held that the prior decision did not bar the Atchisons' second action.[3]

In 1977, the court affirmed the trial court's decision to reform the agreement by deleting the provision which had violated the rule.[4] In the course of its opinion the court said:

> In its "Conclusions of Law," . . . the trial court inferred from its findings of fact that the parties intended to extend the rights to the Atchisons' heirs and assigns and that they mistakenly believed that such a provision would be enforceable. We decline to follow the trial court's conclusion of law in this regard. The findings of fact and the record demonstrate that the parties intended to create personal preemptive rights exercisable only . . . during their joint lives and by the survivor of them during his or her life.[5]

If the decision is limited by this finding of fact, it is, of course, of no particular significance.

However, there is other language which would justify reformation upon the findings of the trial court:

> Even if we were to hold . . . that the parties' mistake was one of law, and not of fact, reformation would nevertheless be appropriate because this mistake concerns the private rights of the parties involved. A "mistake as to particular private rights may be treated as a mistake of fact. . . ."[6]

Could there be a contract in which a mistake as to enforceability would not concern the "private rights of the parties"?

In other words, whenever the parties are mistaken in their belief that a contract is enforceable, even though it does in fact violate the rule against perpetuities, it may be reformed so as to make it enforceable!

The rule has been undergoing continuous deterioration in recent years, and while there has never been a decision like this one, it is analogous to *In re Chun Quan Yee Hop*,[7] where a remote provision was validated by reforming a will to read "twenty-one years" instead of "thirty years." This was said to be an application of "the doctrine of equitable approximation (also known as

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[3] Atchison v. Englewood, 180 Colo. 407, 414, 506 P.2d 140, 143 (1973).

[4] Atchison v. Englewood, 568 P.2d 13 (Colo. 1977).

[5] *Id.* at 17.

[6] *Id.*

[7] 52 Haw. 40, 469 P.2d 183 (1970).

the *cy-pres* doctrine)." Analogous reformation would be required under a Connecticut statute which provides that "[i]f an interest in real or personal property would violate the rule against perpetuities . . . because such interest is contingent upon any person attaining or failing to attain an age in excess of twenty-one, the age contingency shall be reduced to twenty-one . . . ."[8]

Colorado has now taken a step in the same direction.

After the court had approved the reformation which validated the agreement, it directed that damages be paid to the Atchisons:

> [T]he contract was repudiated by the City when it sold the property to Martin on November 8, 1967. Because we have held that Martin took the property subject to the Atchisons' rights, Martin is liable to the Atchisons for the difference between the market value of the land on November 8, 1967, and the amount that Martin paid for the property together with interest as provided by law.[9]

Martin is liable, but the City is not![10] The court does not say why.

Martin's 1956 option to buy was at $158 per acre.[11] At the trial the Atchisons' expert witness testified that the fair market value of the land was $1000 per acre when the City sold the land to Martin in 1967.

It is apparent that the Atchisons suffered a substantial loss as a result of the breach of the agreement and that the court's measure of damages is a proper measure of that loss and of Martin's gain. However, the City gained nothing by its breach of the reformed contract. It sold for $158 per acre land that was said to be worth $1000 per acre.

If the recovery were based upon the usual rule for breach of contract, the City would be liable for the loss sustained by the Atchisons even though the City had not profited. But that is not what the court held.

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[8] CONN. GEN. STAT. ANN. §§ 45-96 (1958).

[9] 6 COLO. LAW. 1630, 1636 (1977).

[10] On September 6, 1977, petitions for rehearing were denied, and the opinion was "modified" to read, "[T]he *defendants* are liable to the Atchisons . . . ." 568 P.2d at 22 (emphasis added). A "modification" would not seem to negate the basis of the opinion, and therefore, following long established judicial precedent, this case comment is minimally modified only by the inclusion of this footnote.

[11] Opening Brief of Plaintiffs-Appellants at 9.

It seems, therefore, that the basis for Martin's sole liability is unjust enrichment.

The opinion states that:

> In June, 1956, Martin received from its attorneys a title opinion discussing the Atchisons' prior recorded interest. There was testimony that this discovery of the preemptive rights caused anxiety and "many sleepless nights."[12] Yet no action was taken by Martin or its attorneys to obtain from the Atchisons a waiver, consent, or release.[13]

It is apparent that at that time everyone knew of the existence of the words which purported to create a preemptive right and that no one knew of the existence of the rule against perpetuities.

If Martin's liability is based upon a theory of unjust enrichment, and if the decision is *limited* to the supreme court's finding of fact,[14] then the injustice consisted of buying land in violation of a preemptive right which was at that time void for remoteness,[15] but which was validated a decade later by a decree of reformation based upon testimony concerning circumstances of which Martin could hardly have been aware.[16]

If Martin's liability is based upon a theory of unjust enrichment, and if the decision is *broadly* based upon the trial court's finding of fact,[17] then the injustice consisted of buying land in violation of a preemptive right which at that time was void for remoteness, but which was validated a decade later by an unprecedented decision.

This is undoubtedly a landmark case, but in what direction from this landmark will the law develop? What will a title exam-

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[12] How could such testimony have been elicited?

[13] 568 P.2d at 21.

[14] *See* text accompanying note 5 *supra*.

[15] The court did not use the orthodox word "void" but said "partially defective," a concept new to the law of perpetuities.

[16] The opinion states:

> The lawyer who drafted the preemptive rights agreement testified that his responsibility had been merely to draft an agreement previously worked out by the parties and that he had followed in this instance his usual practice during that time period of inserting this standard provision in all real estate contracts. Further he testified that he doubted that this paragraph's meaning or effect had been discussed with anybody. The Atchisons testified that there had never been any discussion or agreement to the effect that the preemptive rights would run to their heirs.

568 P.2d at 17.

[17] *See* text accompanying note 6 *supra*.

iner do about a recorded deed which contains a provision that violates the rule against perpetuities? Will he assume that it is reformable, and if so, to what extent? Will lapse of time or the death of some of the parties affect his decision?[18]

Another possible development is based upon a recent opinion by the Supreme Court of Virginia.[19] It is there suggested that the recognition of the validity of "savings clauses" may encourage deliberate violations of the rule because it may happen that no one will ever raise the question of remoteness, and if anyone does, no great harm will be done. It would seem that the ready availability of reformation might encourage the same practice.

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[18] For example, are the provisions which were held to be void in Barry v. Newton, 130 Colo. 106, 273 P.2d 735 (1954) and Rocky Mountain Fuel Co. v. Heflin, 148 Colo. 415, 366 P.2d 577 (1961) still subject to reformation?

[19] Hagemann v. National Bank and Trust Co., 237 S.E.2d 388 (Va. 1977).