

March 2021

Future Interests - The Rule against Perpetuities Applied to a Pre-Emption - Atchison v. City of Englewood

Denver Law Journal

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Future Interests - The Rule against Perpetuities Applied to a Pre-Emption - Atchison v. City of Englewood, 47 Denv. L.J. 78 (1970).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

FACULTY COMMENT

FUTURE INTERESTS — The Rule Against Perpetuities Applied to a Pre-Emption. — *Atchison v. City of Englewood*, 463 P.2d 297 (Colo. 1969).

THE opinion by Mr. Justice Groves is noteworthy because of the sophistication with which it applies the rule against perpetuities to a pre-emption.

The document which is determined to be governing provided that, "in connection with the purchase of said land . . . by the City and as part of the consideration of the sale thereof by the Atchisons . . .

The City hereby gives and grants unto the Atchisons the exclusive and 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 . . . said real estate . . . to any third person . . .¹

The rights of the Atchisons under this agreement shall be deemed not in tenancy in common but in joint tenancy in them and in the survivor of them, their assigns and the heirs and assigns of such survivor."²

It was held that the pre-emption thereby created was not personal to the Atchisons; that it was therefore of unlimited duration; that it was subject to the rule against perpetuities; that it was void for remoteness; and that therefore the summary judgment of the district court should be affirmed.

A large part of the opinion is devoted to the construction of the documents and to a consideration of the argument that the district court erred in granting summary judgment, but the part of the opinion which is of the most general interest deals with the question of whether the pre-emption is subject to the rule against perpetuities.

The opinion quotes Gray's statement of the rule, with its magnificently sweeping and misleading³ phrase "[n]o interest is good," which

¹ *Atchison v. City of Englewood*, 463 P.2d 297, 299-300 (Colo. 1969).

² *Id.* at 300.

³ The following "interests" have been held to be not subject to the rule: contractual interests which do not create interests in other property, *Caplan v. City of Pittsburgh*, 375 Pa. 268, 100 A.2d 380 (1953); rights of entry for condition broken, *Hinton v. Gilbert*, 221 Ala. 309, 128 So. 604 (1930); possibilities of reverter, *Brown v. Independent Baptist Church of Woburn*, 325 Mass. 645, 91 N.E.2d 922 (1950); options to renew a lease, *Ehrhart v. Spencer*, 175 Kan. 227, 263 P.2d 246 (1953); options by lessees to buy, *Hollander v. Central Metal and Supply Co. of Baltimore City*, 109 Md. 131, 71 A. 442 (1908). As to common law contingent remainders there is a quare. See KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS IN ILLINOIS § 662 (1920). See also *Barry v. Newton — Perpetuities — Contingent Remainders — "If at All,"* 32 DICTA 7 (1955), where attention is called to the inconclusiveness of erroneous language like that found in the opinion of the case now under consideration: "the rule against

by itself provides a superficial answer; but the opinion does not stop there. It recognizes that ordinary options are subject to the rule and that a pre-emption is an option, but goes on to observe that a pre-emption is significantly different from an ordinary option:

An option given to a person, his heirs and assigns, to purchase land for \$5,000 with no limiting term is void under the rule against perpetuities. The reason is that, with such an option outstanding the owner dare not place substantial improvements on the land, and the likelihood of anyone purchasing it is remote. The reason for application of the rule against perpetuities to a pre-emptive right to purchase at an offeror's price acceptable to the owner is not supported by the same reasoning as found in the option example, thus making the case for non-application much more arguable.⁴

The opinion then presents an exhaustive array of the authorities on both sides of the question: the lumpers (All options are options and are subject to the rule.) v. the hairsplitters (There are two kinds of options, ordinary and pre-emptive, and the pre-emptive options are not subject to the rule.)

The opinion follows the hairsplitters and surpasses them. They split options into two kinds and say that pre-emptive options are not within the rule. The opinion splits the remaining half hair into three parts and says that there are three kinds of pre-emptive options: (1) those which are created in such a way that the owner of the pre-emption could be identified by referring to the record title; (2) those which are "restricted to a limited term found to be reasonable, albeit longer than a life in being plus 21 years;"⁵ and (3) those in which the owner cannot be so identified, and which are not limited to a reasonable term.

The opinion holds that the third kind of pre-emptive option is subject to the rule even though the other two might not be, and finds that the pre-emption granted to the Atchisons is of the third kind, and therefore void:

We have held that before us is an inheritable pre-emptive right without limit as to time. It is in no manner connected with any land owned by Mr. and Mrs. Atchison. . . . [T]here will be no land title interest of record to give any clue as to the identity of future successors in interest to the pre-emptive right. We feel that at some point in the infinite time at which [the City] might in the future conclude to sell the land, ascertaining and locating the owners of the pre-emptive right would be an unreasonable task. As a result, there would be a sufficiently unreasonable restraint upon the transferability of the property as to justify imposition of the rule against perpetuities. It may be said that

perpetuities . . . has been applied in Colorado to certain contingent remainder interests." *Atchison v. City of Englewood*, 463 P.2d 297, 299 (Colo. 1969). See *Rocky Mountain Fuel Co. v. Heflin*, 148 Colo. 415, 366 P.2d 577 (1961); *Barry v. Newton*, 130 Colo. 106, 273 P.2d 735 (1954). As a matter of fact, neither case dealt with a remainder. In *Fuel Co.* it was an option, and in *Barry*, a springing executory interest.

⁴ *Atchison v. City of Englewood*, 463 P.2d 297, 301-02 (Colo. 1969).

⁵ *Id.* at 303.

we are stating a rule against alienation and giving it a label of the rule against perpetuities. Be that as it may, the result is the same.⁶

The acceptance of this invitation to criticize the theory of the opinion turns out to be unrewarding. Since the reason for excluding pre-emptions from the rule against perpetuities is that land subject to a pre-emption is more readily alienable than land subject to an ordinary option,⁷ it follows that the degree of alienability is a logical basis for holding that some pre-emptions are subject to the rule even though others may not be.

The same considerations take most of the shock out of the statement that "our conclusion might be different . . . if [the pre-emption] were . . . limited [to a] term found to be reasonable, albeit longer than a life in being plus 21 years."⁸ How could such a long term be found to be reasonable? This is again a matter of the degree of alienability sufficient to take a pre-emption out of the rule applicable to ordinary options. There is a difference between a pre-emption granted "to A and his heirs and assigns" and one "for a period of 25 years." The recognition of this difference as a basis for determining which pre-emptions are subject to the rule against perpetuities does not change the basis of the opinion from the rule against perpetuities to the rule against restraints on alienation.

The opinion is therefore based upon a very narrow proposition, namely, that when

an inheritable pre-emptive right without limit as to time. . . [I]s in no manner connected with any land . . . there will be no land title interest of record to give any clue as to the identity of future successors in interest. . . . [And] [a]s a result, there would be sufficiently unreasonable restraint upon the transferability of the property to justify the imposition of the rule against perpetuities.⁹

In the petition for rehearing, plaintiffs in error insisted that this proposition did not afford a sufficient ground for distinguishing the case of *Weber v. Texas Co.*¹⁰ which had held that a pre-emption was not subject to the rule. The Colorado court is of course under no duty to distinguish cases from other jurisdictions and cannot be criticized for relying upon what might be called the Colorado rule.

However there would appear to be some logical difficulty in applying this Colorado rule to a pre-emption concerning Colorado land.

⁶ *Id.*

⁷ Other remote interests which have been held valid because of greater alienability are: (1) those found in a revocable trust, *Cook v. Horn*, 214 Ga. 289, 104 S.E.2d 461 (1958); (2) those subject to a general *inter vivos* power of appointment, *Appeal of Mifflin*, 121 Pa. 205, 15 A. 525 (1888); and (3) those subject to the power of a tenant in fee tail, *Barber v. Pittsburgh, Fort Wayne and Chicago Ry. Co.*, 166 U.S. 83, 108 (1896).

⁸ *Atchison v. City of Englewood*, 463 P.2d 297, 303 (Colo. 1969).

⁹ *Id.*

¹⁰ 83 F.2d 807 (5th Cir. 1936), *cert. denied*, 299 U.S. 561 (1936).

An essential part of the rule is that "there will be no land title interest of record . . ."¹¹ The Colorado recording act provides that "[a]ll . . . agreements or other instruments in writing . . . encumbering or affecting the title to real property . . . may be recorded . . ."¹² This language would seem to be broad enough to make a pre-emption itself recordable in Colorado, and if within the recording act, then not within the Colorado rule.

In the introductory part of the opinion, unusual stress is laid upon the fact that the phrase "if at all" is an important part of the orthodox statement of the rule against perpetuities.¹³ However, on the facts of this case the inclusion or exclusion of the phrase would have made no difference, and the Justice's remarks must be attributed to his inability to repress his amusement at the spectacle of a professor admonishing the court.¹⁴

By T.G.M.

¹¹ *Atchison v. City of Englewood*, 463 P.2d 297, 303 (Colo. 1969).

¹² COLO. REV. STAT. ANN. § 118-6-9 (1963). As a matter of fact, this pre-emption was recorded. Brief of Plaintiffs in Error at 7, *Atchison v. City of Englewood*, 463 P.2d 297 (Colo. 1969).

¹³ For an indication of the ease with which this sometimes crucial phrase is inadvertently omitted, see Model Rule Against Perpetuities Act § 1, 9C UNIFORM LAWS ANN. 75-76 (1956). See also *The Model Rule Against Perpetuities Act — "If at all,"* 11 PRAC. LAW. No. 4, at 73 (1965), and this sentence by W. Barton Leach himself: "By classical theory a future interest is void unless there is 'absolute certainty' that it will vest within the period of perpetuities." Leach, *Perpetuities: What Legislatures, Courts, and Practitioners Can Do About the Follies of the Rule*, 13 U. KAN. L. REV. 351, 352 (1965).

¹⁴ *Atchison v. City of Englewood*, 463 P.2d 297, 299 (Colo. 1969).