

1963

# Gilbert N. Anderson and Ella B. Anderson v. E. Val Anderson : Brief of Respondent

Utah Supreme Court

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CITY OF UTAH

OCT 29 1963

**IN THE SUPREME COURT OF  
THE STATE OF UTAH**

**FILED**

OCT 24 1963

GILBERT N. ANDERSON and his  
wife, ELLA B. ANDERSON,  
*Plaintiffs and Respondents.*

vs.

E. VAL ANDERSON,  
*Defendant, and Appellant*

**Supreme Court, Utah**  
**RESPONDENT'S  
BRIEF**

Case No. 9854

**RESPONDENT'S BRIEF**

Appeal from the Judgment of the First District Court  
of Cache County, Utah

Honorable Charles J. Cowley, Judge

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## TABLE OF CONTENTS

### *Page*

FACTS AND NATURE OF CASE .....	1
ISSUE TO BE DETERMINED: Did the lower Court in holding that this contract for purchase of land, because of the unrestricted option given to the defendant to pay more at any time, violate the rule against perpetuities? .....	4
ARGUMENT: .....	4
Point 1: Lower Court properly construed this contract .....	4
Point 2: Court did not err in holding contract violated rule against perpetuities .....	8
Point 3: This contract is not a lease .....	12
CONCLUSION .....	14

## AUTHORITIES CITED

	<i>Page</i>
66 ALR 2d 733 .....	12, 13
17 CJS 682 .....	6
17 C.J.S. 685-86 .....	7
17 CJS 689 .....	7
70 CJS 577 .....	8
Powell on Real Property, Vol. V, 611-12 .....	9
Restatement of Property Division IV, Sec. 393 .....	11

## CASES CITED

Betchard vs. Iverson, Wash. 1949, 212 P2d 783 .....	11
Beloit Bldg. Co. vs. Quinn et al. Kan. 1937, 66 P2d 549 .....	10
Estate of Annie Williams Lee, Wash. 1956 299 P2d 1066 .....	11
Fisher vs. Bank of Spanish Fork, Utah 1937, 74 P2d 659; 93 U 514 .....	9
Haggerty vs. Oakland 1958, 116 Cal. App. 2d 407, 326 P2d 957; 66 ALR 2d 718 .....	13
Heards Estate, Cal. 1944, 146 P2d 725 .....	11
Henderson vs. Bell, Kan. 1918, 173 Pac. 1124 .....	10
Johnstons Estate, Cal. 1956, 299 P2d 892 .....	11
Sahlenders Estate, Cal. 1948, 201 P2d 69 .....	11
Udy vs. Jenson, Utah 1924, 222 Pac. 597 63 Ut. 94 .....	7

# IN THE SUPREME COURT OF THE STATE OF UTAH

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GILBERT N. ANDERSON and his  
wife, ELLA B. ANDERSON,  
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} RESPONDENT'S  
BRIEF

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RESPONDENT'S BRIEF  
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FACTS AND NATURE OF CASE

Plaintiffs brought this action to have an escrow contract terminated and title quieted to 133 acres of irrigated farm land in Cache County, Utah, for failure by the defendant to make payments alleged to be under the terms of the said contract. (F-3,) (Court File page 3).

There was no question of forfeiture because there was no interest charge for the first year under the terms of the contract, and the \$1,000 paid in two payments during the first year was less than the amount of interest and less than rental value. The record does not contain a transcript of evidence, but only the preliminary discussion of the Court and counsel when the case was called for trial when the Court sought to find a compromise so that the defendant would agree to pay for

the property with interest. The discussion was carried on for a substantial part of the forenoon, during which time the plaintiffs made offers to reinstate the contract if an agreement could be reached that would pay for the land. (Record 4 to 25) No such agreement was reached, and we take issue with the statement of the appellant at page two of their brief that plaintiffs stipulated that, "The defendant had paid all that was required by the contract."

The purchase price under the contract for the property was \$26,500.00, which sum was agreed to be paid by the purchaser as follows:

"\$500, May 1, 1959; \$500, December 1, 1959; \$1000, October 1, 1960; \$1,000 each October 1 thereafter until the full purchase price with interest on all deferred payments at the rate of 4½% per annum from January 1, 1960, all payments to be applied first to the payment of accrued interest to date of payment and the balance on the principal. Option to buyer to pay any additional amount at any time." (F 5)

Plaintiffs contended that the above language should be considered to mean the payment of \$1,000 on the principal, plus interest. The defendant contended that the language was clear and only required the defendant to pay \$1,000 per year, even though this was not enough to pay the interest as clearly provided in the language above quoted. (R-3)

The case was commenced in August, 1962. (F 1-4) Before it came to trial, the October payment was due. At that time the defendant made a written tender of

payment which was set-up by a supplemental complaint and as additional grounds for terminating the contract as follows:

4. "That the defendant failed and refused to pay any part of either of the said payments, but in lieu thereof the defendant on October 1, 1962, pretended to tender the sum of \$1,000 in currency as of this date as full payment of the deferred payments provided for under the escrow contract above referred to be due October 1, 1962. In this connection the plaintiff alleged that the defendant has no right to make any such conditional tender, that the contract gave them no right to make any such conditional offer. The offer was refused. However, the plaintiffs offered to accept the \$1,000 and credit it on the contract and wait the determination of the court as to what amounts might be due. Defendant refused to leave the tender, and Plaintiffs allege on information and belief that tender has not been kept good or made good." (F-29)

To the above allegation the defendant in his supplemental answer, answered as follows:

3. "Defendant alleges that on the 1st day of October, 1962, the defendant tendered to the plaintiffs, the sum of One Thousand Dollars (\$1,000.00) cash as full payment of the deferred payment provided for under the Escrow Contract due October 1, 1962, and alleges that the said amount was the full amount due under said contract, that other than above provided the defendant denies the allegations of paragraph 4 of the plaintiff's amended and supplemental complaint." (F23)

The defendant refused to make any payment that would pay the interest or any part of the principal. This

put the defendant in the place where he, in effect, refused to buy or pay for the farm, but insisted he had a right to keep it by paying at the rate of \$1,000 per year.

At page 2 of appellant's brief, he states:

"The effect of the contract is basically that of the yearly payments provided fall short of paying the interest on the principal. If the minimum payments were made, the defendant would be entitled to possession and the profits from the land perpetually; but the contract would not be paid out unless the buyer exercises his option to pay sufficiently more on the principal so that the payments would more than cover the interest."

### ISSUE TO BE DETERMINED

Did the lower Court err in holding that this contract for purchase of land, because of the unrestricted option given to the defendant to pay more at any time, violate the rule against Perpetuities?

### ARGUMENT

The defendant elected to stand on the proposition that this language is clear and unambiguous, and can have only one possible meaning, viz. Buyer is required to pay \$1,000 per year on the contract and nothing more.

#### POINT 1. LOWER COURT PROPERLY CONSTRUED THIS CONTRACT.

Plaintiff's contend that there is ambiguity in the language and that the Court should not permit counsel to limit the language to the \$1,000 payment and "nothing more." But that the express language used shows that



the language of the contract expressly and by necessary and reasonable implication does require more than \$1,000 payment each year.

It is to be regretted that the contract does contain language that can be described as ambiguous.

No one wishes to write a contract which requires interpretation, and it would be nice if every contract contained just exactly in definite terms all that the parties intended and no more than was intended. As a practical matter, very few perfect contracts are written. The Courts are required to interpret the language used in contracts for the purpose of determining the intent of the parties.

In the first place, this was a contract intended to be a contract of sale by a person willing to sell to a person willing to purchase and pay the agreed purchase price for the property.

The difficulty arises out of the language used in attempting to detail the manner and amount of payments of the purchase price. The contract clearly calls for payment of interest on the deferred payments at the rate of  $4\frac{1}{2}\%$  per annum from January 1, 1960. It further provides that payment should be applied to payment of accrued interest and the BALANCE ON THE PRINCIPAL.

The first difficulty with the defendant's claimed construction is that \$1,000 a year will not pay the accrued interest. Interest on \$25,640, at the rate of  $4\frac{1}{2}\%$  per annum is \$1150.38. Each year since 1960, the defendant

has refused to pay \$150 (in round numbers) interest accrued on the contract price and nothing on the principal.

The interpretation of defendant does violence to the language agreeing to pay interest and also to the additional language "and the balance on the principal." The net result of defendant's contention is that he would never even pay the interest provided for and never pay the principal or any part thereof. Any such construction, we contend, could not possibly be in accordance with the intention of the parties and would be void for uncertainty.

If two constructions are possible under the language of the contract, the Court will adopt the one that is legal and workable if such can be done without doing violence to the principles of justice and equity.

The theory of the plaintiffs is that the language means that the buyer agrees to pay \$1,000 per year and the interest provided for in the contract each year. It is our contention that interest will be presumed to be intended to be paid unless there is an express provision that no interest is intended. To require the purchaser in this case to pay the interest at a modest rate of  $4\frac{1}{2}\%$  per annum, plus \$1,000 on the principal is not only fair, reasonable and just, but allows him the very liberal term of 25 years after January, 1960, to pay for the property. It was never contended that this was an unreasonable contract.

17 C. J. S. 682 states:

"The law provides certain rules of construction to aid in determination as to the obligation of parties

under contracts which are ambiguous.”

At pages 685-86 it continues:

“A contract is ambiguous when and only when it is reasonably or fairly susceptible of different constructions. . . even an apparent unambiguous contract may be rendered ambiguous and open to construction if its words, taken literally lead to absurdity or illegality when applied to the facts. In determining whether or not there is such an ambiguity as calls for interpretation, the whole instrument must be considered and not an isolated part.”

At page 689 it further states:

“The primary rule of construction is that the Court must, if possible, ascertain and give effect to the mutual intention of the parties as of the time the contract is made as it may be done without controvening legal principals and statutes or public policy.”

The case of *Udy vs. Jenson*, Utah 1924, 222 Pac. 597-98, 63 U. 94 applies these same rules and concluded a written contract propoirting to be a contract to purchase the capital stock of a company was a mere option and not a contract to purchase stock. From this case we quote the following:

“The provision in the contract that ‘this agreement shall not be binding upon the party of the first part for any of his property whatsoever, but the party of second part shall hold the certificates of stock until paid for by the party of the first part’ cannot be disregarded because it is a part of the contract and has a definite signification. By saying that the agreement shall not be binding upon the first party for any of his property whatsoever is equivalent to saying that

the agreement to purchase should not be binding upon him at all because it is only by resort to his property that such an agreement could be enforced against him. The form of expression is inept and awkward, but in the light of circumstances and conditions surrounding the parties, the meaning is clear. The actual intention of the parties must prevail over dry words, inept expressions and careless recitations in the contract, unless the intentions are contrary to the plain sense and the binding words of the agreement.”

It is submitted that the foregoing rules of construction should be considered for two purposes, (1) to give a general perspective to the litigation that the plaintiff is not attempting to take technical advantage of the young purchaser by way of any forfeiture, and (2) that the contract cannot be construed to establish an intention between the parties to create the relationship of lessor and lessee.

## POINT 2. COURT DID NOT ERR IN HOLDING CONTRACT VIOLATED THE RULE AGAINST PERPETUITIES.

Utah has no state statute of the uses, but the common law rule against perpetuities is recognized as a law of this state.

70 C. J. S. 577 states the common law rule as follows: “The rule against perpetuities at common law, is that no interest within its scope is good unless it vests, if at all, not later than 21 years after some life in being at the creation of the interest . . . ”

It appears now to be conceded that there is nothing in the contract that title would ever vest in the purchaser

since there is nothing in defendant's interpretation that would ever result in the payment for the property and the vesting of the legal title in the defendant.

The case of Fisher vs. Bank of Spanish Fork, Utah, 1937, 74 P. 2d, 659: 93 U. 514 was a suit to foreclose a crop mortgage on crops grown in 1935. The mortgage provided that it was a mortgage lien on all crops planted and grown in 1933, and until the debt secured by this mortgage is fully paid.

The Court held that this was not a valid mortgage lien on crops grown after 1933. After talking about the indefiniteness and uncertainties the Court says at page 662.

"This is illustrated in another way by the rule against perpetuities which affects property in esse. The policy of the law is that it be freed from restrictions against alienation after a life or lives in being and 21 years."

The only claim on defendant's theory that the language used in this case can be construed to fix a time for payment of principal of the purchase price is "option to pay an additional amount at any time."

There seems to be no conflict in the many authorities that an option of this kind is void as it is against the rule of perpetuities.

From Powell on Real Property, Volume V, Page 611-12, we quote:

"Options to purchase or to repurchase land unconnected with a lease commonly denominated options

and gross have generally been held bad under the common law rule against perpetuities when not restricted in durations so as to comply with the permissible period under rule. This result applies the rule against perpetuities as it should be applied to any future interest and specific property with social advantages in permitting the type of interest or not affirmatively proved to outweigh the social policy of the rule favoring alienability.”

In the case of *Henderson vs. Bell*, Kansas 1918, 173 Pac. 1124, Headnote One states:

“A contract giving an option to purchase real property without limiting the time in which the purchase may be made is void for the reason that it violates the rule against perpetuities.”

In discussing this matter the Court says at page 1125. “By the contract, if Bell should elect to sell the property he must first offer it to the Buchanans. The contract, if enforceable, gives the Buchanans the right to purchase the property at some future, indefinite and unknown time, and Bell can be compelled to convey the property to the Buchanans at such time and for the price named. Bell cannot sell the property to any person without first offering it to those holding under the contract. When sold under the contract, the property must be sold at \$65 an acre, although at that time it may be worth \$1,000 an acre. Bell does not have absolute, uncontrolled right to sell the property at any time that he may see fit. It follows that the Buchanans and those holding under them, either as assignees or heirs, would hold a right to obtain an interest in the property running for an indefinite period of time. That right would be held in violation of the rule against perpetuity.”

This rule was cited with favor in *Beloit Bldg Co. vs. Quinn et al*, Kansas 1937, 66 P. 2d 549,552. which states:

“If it was a mere option to purchase at some remote time in the future, it would run headlong into the rule against perpetuities and the option would have been void.” (citing cases)

The Restatement of the Property Division IV, Section 393 adopts the view that an option violates the rule against perpetuities unless the time for exercising the option is limited so as to conform to the rule against perpetuities.

There are many cases in California holding attempts to create an interest in property void as against the rule. See *Sahlenders Estate*, Cal. 1948, 201 P. 2d, 69; *Johnstons estate*, Cal. 1956, 299 P. 2d 892; *Heards Estate*, Cal. 1944 146 P. 2d, 725.

*Betchard vs. Iverson*, Wash. 1949 212 P. 2d. 783, was a case construing a Will and the Court said at page 786.

“The rule against perpetuities prohibits the creation of future interest which, by possibility may not become vested within the life or lives in being at the time of the testators death and 21 years thereafter. Any limitation of a future interest which violates this rule is void. The purpose of the rule is to prevent the fettering of marketability of the property over long period of time by indirect restraints upon alienation. It is not a rule of construction, but a positive mandate of law to be applied irrespective of the intention of the testator. The proper procedure to determine the true construction of the Will just as if there were no such thing as a rule against perpetuities and then to apply the rule rigorously in complete disregard of the wishes or intentions of the testator.”

The *Estate of Annie Williams Lee*, Wash., 299 P. 2d, 1066, Headnote 3 states:

“If by any conceivable combination of circumstance it is possible that the event on which the estate or interest is limited may not occur within the period prescribed in the rule against perpetuities the limitation is void.”

POINT 3. THIS CONTRACT IS NOT A LEASE.

Defendant's counsel cites authorities apparently holding that the rules against perpetuities do not apply to long time leases. The authorities that he cites apply generally to oil and mineral leases or similar leases. We submit that mineral leases ordinarily are not perpetual leases, but their common provision provides that when production is discontinued for a time, usually fixed, and the royalties are paid thereunder, then the lease expires. There is nothing in the language of this contract that even squints at the proposition that the buyer should have a perpetual lease or possession of the farm, or that this is an agreement to lease in perpetuity. The contract contains none of the usual provisions of a lease; such as a covenant not to commit waste, maintain the fence etc. No terms are expressed whatever that the defendant was to have possession of the property unless he paid for it as a purchaser.

There are numerous cases cited that the mere fact that a lease is for a longer period of 21 years does not violate the rule. This reference to the citation of authorities finds no criticism from the plaintiffs. However, the note cited in 66 A.L.R. 2d, 733, makes a distinction between leases for a longer period than a term of 21 years or life, and a lease which is to take effect in the future at some uncertain period of which only becomes effective after the happening of some uncertain event. From this note we cite the following at page 733-734:



“The cases disclose uncertainties and to some extent conclusions in regard to the manner in which the common law rule against perpetuities applies to leases for years or for other fixed or defined terms. Some of the difficulties are related to omissions to distinguish consistently in thought and terminology between future leases and future terms of leases.”

2. Leases in Futuro: “There can be doubt that leases fall within the rule requiring that estates to vest within the prescribed period, that is the period of the common law rule against perpetuities. (Citing) *Haggerty vs. Oakland*, 1958, 116 Cal. App. 2d, 407, 326 P. 2d, 957-66 A. L. R. 2d, 718.”

“So a provision for a future lease which will not, or may not vest in interest within the period of the perpetuity of the rule is condemned by the rule.”

The real trouble with defendants authorities, as far as this case is concerned, is that this contract is not a lease. It was never drawn as a lease and a lease was never considered. The word lease is not to be found in the contract. This is escrow contract for purchase of land, in which the defendant agreed to purchase and the plaintiffs agreed to sell the property therein described. The controversy arises from the statement in the contract “\$1,000 each October 1st thereafter until the full purchase price with interest on all deferred payments at the rate of 4½% per annum from January 1, 1960,” have been paid, should be construed to mean, “The Buyer is required to pay \$1,000 per year on the contract and nothing more.” This is the apparent interpretation that the Defendant insists upon. Since the \$1,000 would not pay the interest, no title to the property agreed to be sold and purchased

would ever pass. For that reason, the contract must fall as in violation of the rule against perpetuities. If the Defendant had been willing to accept Plaintiff's interpretation of contract, he would have been give 25 years in which to pay for this property with a low rate of interest of 4½%, which it is submitted is a very reasonable time in which to make his payments. If it had been intended to give a long time lease on this property, the document would not have been drawn as a partial payment purchase price contract with a deed deposited in Escrow as was done in this case. We therefore, suggest that the argument of a long time present lease does not violate the rule against perpetuities and has no application whatever in this case, is without merit:

By way of answer to the defendants brief, it is our contention that the quotes therein have nothing to do with the facts in this case. The defendant is attempting to claim a present interest to buy this property by reason of his option to pay more whenever he feels like paying more. The interpretation insisted upon by the defendant in this case does violate the rule against perpetuities in that defendant's title to that property would never vest because he would never pay for it.

The trial court was clearly correct in refusing to adopt the interpretation sought to be placed upon the contract and insisted upon by the defendant.

## CONCLUSION

The contract in question was a contract intended to be a contract of sale and not a lease. No court should look upon the facts of this case and read into this contract

or make a new contract for the parties that would permit the defendants to retain this property perpetually without paying the interest provided for in the contract or any part of the principal by merely paying \$1,000.00 per year. The Judgment should be affirmed with costs awarded to the plaintiff.

Respectfully submitted,

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