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Equity: When Time is Not of the Essence of an Option to Renew Lease

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the deduction allowed by the Internal Revenue Code for property previously taxed[16] and for charitable bequests[17] should, under the 1949 act and the opinion in the principal case, exempt from any share in the estate tax burden those to whom these classes of property pass. In view of the 1951 statute protecting the widow, these will be the chief continuing values of the decision in the instant case.

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EQUITY: WHEN TIME IS NOT OF THE ESSENCE OF AN OPTION TO RENEW LEASE

Dugan v. Haige, 54 So.2d 201 (Fla. 1951)

Appellants gave appellees a ten-year lease on commercial property, with a five-year renewal option exercisable upon written notice at any time prior to May 1, 1950. Notice was not given until May 19, 1950, and the lessors refused to extend the term. Lessees sought specific performance, which was granted below. On appeal, HELD, the chancellor did not abuse his discretion, because the lessors, who were not harmed by the delay, had actual notice of the lessees' intent to renew; the equities favored the lessees; and the only copy of the lease in lessees' possession provided for a term of fifteen years. Decree affirmed, Associate Justice Parks dissenting.

It is ordinarily held that time is of the essence of an option to purchase or renew a lease of realty,[1] and that provisions in the instrument concerning notice of acceptance constitute conditions precedent, with which absolute compliance is required.[2] The fact that the

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[16]INT. REV. CODE §812(c). Property previously taxed with certain limitations, is property which has been taxed within five years in the estate of a prior decedent.

[17]INT. REV. CODE §812(d).

[1]J. M. Wilcox & Co. v. Scott-Burr Stores Corp., 97 F. Supp. 792 (N.D. Tex. 1951); Cole v. Williams, 157 Fla. 851, 27 So.2d 352 (1946); Orlando Realty Bd. Corp. v. Hilpert, 93 Fla. 954, 113 So. 100 (1927); Good v. Evans, 296 Ky. 756, 178 S.W.2d 600 (1944).

[2]Raleigh Associates v. Jackson, 96 N.Y.S.2d 528 (Sup. Ct. 1950); Goldberg v. Himlyn, 121 Misc. 580, 201 N.Y. Supp. 837 (King's County Ct. 1923); Pope v. Goethe, 175 S.C. 394, 179 S.E. 319 (1934).

optionor is unharmed by receiving notice not in the manner or within the time specified is immaterial.[3] This rule usually does not involve an equitably objectionable forfeiture, because an option, unlike a contract for the sale or lease of realty, merely gives the optionee a power, definitively limited in time, to exercise a legal right, and it creates no equitable interest in land.[4] When substantial improvements are made, however, it has been held that the optionee has an equitable interest which will be protected against forfeiture, provided the delay in exercising the option is due to mere neglect and has not harmed the optionor.[5] In cases of slight delay caused by accident, fraud, surprise, or mistake, without hint of gross negligence on the part of the optionee, specific performance may be granted at the discretion of the chancellor if a refusal of relief would result in unconscionable hardship to the optionee.[6]

Florida recognizes the proposition that special equities may alter the usual rule.[7] In *Finn v. Bowden*[8] the Court stated that a delay caused by optionor's conduct would be held excusable; but, since defendant optionor did not cause the delay, the fact that he was aware of plaintiff's intent to exercise the option was held immaterial.

In the instant case, however, the Florida Court treats actual notice as material when other equities in favor of the optionee are present. The facts of the case, more fully presented in the dissent than in the majority opinion, indicate that the lessees were clearly and solely negligent in not having a correct copy of the lease, and that substantial improvements, the presence of which would ordinarily justify relief, were alleged in the bill but not proved at the trial. It seems difficult to justify the statement of the majority that the weight of the equities was on plaintiff's side.[9] Only one other American decision goes as far. In *Application of Topp*[10] a New York court granted

[3]Rounds v. Owensboro Ferry Co., 253 Ky. 301, 69 S.W.2d 350 (1934); Merchants Oil Co. v. Mecklenburg County, 212 N.C. 642, 194 S.E. 114 (1937).

[4]McCall v. Carlson, 63 Nev. 390, 172 P.2d 171 (1946); *see* Wolfe v. Dougherty, 103 Fla. 432, 436, 137 So. 717, 719 (1931); see 5 CORBIN, CONTRACTS §1177 (1951).

[5]Xanthakey v. Hayes, 107 Conn. 459, 140 Atl. 808 (1928); F.B. Fountain Co. v. Stein, 97 Conn. 619, 118 Atl. 47 (1922); 5 POMEROY, EQUITY JURISPRUDENCE §453c (5th ed. 1941).

[6]Galvin v. Simons, 128 Conn. 616, 25 A.2d 64 (1942); see note 5 *supra;* Note, 27 A.L.R. 981 (1923).

[7]L'Engle v. Overstreet, 64 Fla. 339, 60 So. 120 (1912).

[8]66 Fla. 41, 63 So. 139 (1913).

[9]*See* Galvin v. Simons, 128 Conn. 616, 620, 25 A.2d 64, 66 (1942).

[10]81 N.Y.S.2d 344 (Sup. Ct. 1948).