company. Strangely enough, the question of whether a defendant to an action by a company may raise the doctrine as a defence has remained unanswered even ninety years after the *Ashbury Railway*[1] case. In the recent English decision *Bell Houses Ltd.* v. *City Wall Properties Ltd.*,[2] Mocatta, J. came to the startling conclusion that the defence could be raised by such a defendant and that the plaintiff company, suing for a commission, could not recover on the contract.

On appeal,[3] the issue was not considered although Salmon, L. J., referring to the lower court decision, made the tart observation[4] that the doctrine of *ultra vires* was not formulated so that:

> . . . third parties, by looking at the memorandum should have the security of knowing that they might safely enter into a contract and promise to pay the company for services without any obligation to honour their contractual promise after they had received the services. The judge in effect came to the conclusion that the reasoning in *Ashbury Railway Carriage and Iron Company* v. *Riche* led to this strange result.

Despite this implication that the Court of Appeal might be prepared to render a decision with more effective social engineering in mind the trial judgment is a glaring caveat to draftsmen of company objects clauses. To date the doctrine of *ultra vires* has been a trap for unwary third parties. If it does in fact work against the company as well it will have the anomalous effect of penalizing the company's shareholders, the very persons for whose protection the doctrine was formulated.

—S. M. CHUMIR*

1 (1875), L.R. 7 H.L. 653.
2 [1965] 3 All E.R. 427.
3 [1966] 2 All E.R. 674 (A.B.C.).
4 *Id.*, at 690.
* S. M. Chumir, B.A., LL.B. (Alta.), B.Litt. (Oxon.), of the Alberta Bar.

COMMERCIAL LAW—RULE AGAINST PERPETUITES—APPLICABILITY TO LEASE—OPTION AGREEMENTS—

The Supreme Court of Canada in *Louis J. Harris* v. *The Minister of National Revenue*,[1] rendered a decision of much significance to the lawyer in general commercial practice. The case could be missed as to its significance, for it concerns matters of taxation and, while it may make a limited contribution to that field of law, it has a far greater impact in the field of commercial law because of its treatment of the application of the rule against perpetuities on a lease-option agreement.

The facts in the case are unique, revolving around an attempt by a taxpayer to claim capital cost allowance against property held by him under a lease-option agreement. In 1960 the owner of a service station property leased the same to an oil company for a period of 25 years at an annual rental of $3,900.00. A few months later the owner granted a concurrent lease to the appellant, Harris for a term of 200 years at an annual rental of $3,100.00, which contained an option exercisable by the appellant to purchase the property at a stated figure at the expiration of the 200 year period. The appellant deposited with the owner a sum of money as security for the performance of his covenants and authorized

1 [1966] S.C.R. 489.

the owner to collect rents from the oil company and remit to the appellant the balance that remained after the owner deducted the $3,100.00 coming to him.

The appellant, on filing his 1960 income tax return, disclosed as income rentals received from the property, but on the representation he had acquired the property at a capital cost of some $639,000.00 (200 years' rent at $3,100.00 plus option price minus value of land) claimed a capital cost allowance of some $30,000.00 to be deducted from other income for that year.

The judgment of the Supreme Court was given by Cartwright, J. who held, *inter alia*, in dismissing the appeal that the clause purporting to give the appellant an option to purchase the service station property at the end of the 200 year period offended the rule against perpetuities and was void. The effect is that the lease takes effect as if the option was never granted.

It is well known that the rule against perpetuities, which came into being in England in the 17th and 18th Centuries, was primarily designed to prevent land owners from controlling the disposition of land for unreasonable lengths of time. Excessively long family settlements were the threat which produced the rule and commercial pressure for the free alienation of land forced it into being.

The classic and accepted definition of the rule goes back to Gray, *Rule Against Perpetuities*:[2]

> No interest is good unless it must vest, if at all, no later than 21 years after some life in being at the creation of the interest.

The rigidity of the rule has enjoyed no relaxation up to the present time for at page 501 of the *Harris* case Cartwright, J. says:

> The rule against perpetuities is founded on grounds of public policy and by it a contract by the owner of property to convey the property on such terms that it will not vest until the happening of a contingent event beyond the period permitted by the rule is not allowed to be made.

In the writer's view, the law is accurately stated in the following passage in the judgment of Jessel, M. R. in *London and South Western Railway Co.* v. *Gomm*:[3]

> It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognized exceptions, such as charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period.
>
> It was suggested that the rule has no application to any case of contract, but in my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift or contract can make no difference. The question is, what is the nature of the interest intended to be created? I do not know that I can do better than read the two passages cited in argument from Mr. Lewis' well known book on perpetuities at page 164. He cites with approbation this passage from Mr. Sanders' Essay on Uses and Trusts: 'A perpetuity may be defined to be a future limitation, restraining the owner of the estate from alienating the fee simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity'. Then Mr. Lewis adds these words: 'In other

2 4th ed., 1942, s. 201.
3 20 Ch.D. 562, at 581.

words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation'.

The particular clause in question in the lease in the *Harris* case reads:

At the expiration of the term hereby demised, and provided the Lessee is not in default hereunder, said Lessee shall have the option of purchasing the demised premises from the Lessor at the price of Nineteen Thousand Five Hundred ($19,500.00) Dollars. The Lessee may exercise the said option by giving to the Lessor three (3) months' notice in writing that he intends to purchase the demised premises and upon the exercise of the said option the sale shall be completed within a thirty (30) day period after the option has been exercised.

Cartwright, J. effectively dismisses the appellant's claim as follows:[4]

In my view, the position taken by counsel for the respondent in ground (c) set out above is well taken. The clause in the lease giving the option to purchase has been quoted above. It creates an equitable interest in the land demised which would vest on the giving of the required notice and payment of the purchase money. This interest will not necessarily vest within the period prescribed by law for the creation of future estates and interests, indeed it cannot vest until long after the expiry of that period which in the case at bar, since no life is specified, is 21 years. The right to exercise the option does not arise until the expiration of 200 years from the date of the lease. The grant of the option therefore offends the rule and is void. The effect of this is that the lease takes effect as if the void limitation created by the option were omitted.

Thus, it must be borne in mind that the rule against perpetuities applies to various types of interests. In Morris and Leach, *The Rule Against Perpetuities,* it is stated that in England, as well as the United States, it has been held that an option to purchase land is too remote if it can be exercised beyond the perpetuity period.[5] The reasoning appears to be that as an option to purchase land is specifically enforceable, the holder of the option has an equitable interest in the land. In that this interest is contingent upon the holder's election to exercise the option, it is void unless it vests within the perpetuity period. It follows, therefore, that to the extent it creates an interest in land an option to purchase which may be exercised beyond the perpetuity period is void. There is no magic in land and there is no reason to suppose that application of the rule against perpetuities is limited to real property. It surely must apply to options to purchase unique chattels (e.g. shares in a private company) if specific performance would be given. It would seem if the option to purchase refers to property which is so unique as would permit specific performance of the option, then an equitable interest in the property would be created in the optionee and this interest would be void if the option could be exercised beyond the period allowed by the rule.

Thus, the decision in the *Harris* case should serve as a firm reminder that this persistent rule must always be considered when drafting commercial documents where the rights of parties may vest or be determined at some future point of time. Practitioners would be well advised to examine closely all of the provisions of the so-called lease-back agreements now commonly employed in real estate transactions. Equal care

4 *Ante*, n. 1, at 497.
5 2nd ed., 1962, p. 219.

should be taken in the examination and preparation of share purchase options, stock option interests and conversion privileges in bonds.

Alberta practitioners are particularly vulnerable, for in the petroleum and mining industries one frequently has to cope with agreements whereby the right or option is granted to select lands owned by the grantor described as "common interest areas" or "after acquired lands". Indeed, on any occasion when the rights of a party to an agreement are deferred to a future time and the interest of such party is not immediately vested, a warning note should sound in the ear of the examiner or draftsman.

In conclusion, the question might well be asked if the rule against perpetuities should be applied in modern times with all its vigour and rigidity. It has been suggested that the rule should not apply to options of any kind and that it is unwise to apply it to commercial transactions where lives in being or the period of 21 years clearly have no significance. The argument follows that it is unfair when the option, which may form a material part of a commercial contract, violates the rule against perpetuities that the entire option is void rather than the period in excess of the time limit prescribed by the rule. This results in one party losing an advantage thought to have been given him for valuable consideration when the other party may be equally to blame for the inclusion of the invalid option. As is said in *Morris and Leach*[6] the rule against perpetuities thus, "becomes a destroyer of bargains which in all conscience ought to be performed."

In view of the decision of the Supreme Court in the *Harris* case it would appear that if reform is to be had, it must come from the legislature and not the courts.

—R. A. MacKimmie*

[6] *Id.*, at 219.
* R. A. MacKimmie, Q.C. of the Alberta Bar.

COMMERCIAL LAW—SECTION 19 OF THE CONDITIONAL SALES ACT—THE EFFECT OF AMENDMENT ss. 5—VOLUNTARY REPOSSESSION—EXTINGUISHING INDEBTEDNESS

Two Parts: *

THE CONDITIONAL SALES ACT[1]

19. (1) subject to subsections (6) to (8) this section applies only to a sale or agreement for the sale of goods made *before or after the commencement of this section of any of the following kinds, namely,*

(a) an agreement for sale under which the right of property in the goods remains in the seller until the purchase price is paid in full or until some other condition is fulfilled, and ....

(5) When goods

(a) are surrendered by the buyer to the seller with the seller's consent, or

(b) are seized pursuant to the agreement....

the indebtedness of the buyer under the agreement or under the judgment, to the extent that it is based on the purchase price of the goods is extinguished, and

* Editorial note—each part was contributed independently but are presented together here as both deal with s. 19 of the Act.
[1] 1965 S.A., c. 15.