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*Feb. 2, 3, 4, 5
Dec. 14

FROBISHER LIMITED (*Plaintiff*) .....APPELLANT;

AND

CANADIAN PIPELINES & PETROLEUMS LIMITED, LAWRENCE C. MORRISROE, E. GEORGE MESCHI, A. OAK, A. AMREN, S. DAIGLE, JOCK MACKINNON AND D. J. SHERIDAN (*Defendants*) ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Real property—Mines and Minerals—Option to purchase mineral claims—Second option given to different company—Specific performance of first option sought—Whether option created equitable interest in land—Failure of optionee to comply with statutory requirement to hold licence—Pleadings—Amendments at trial—Regulations 8(1), 9(1), 124 of the Mineral Resources Act, R.S.S. 1953, c. 47.

On June 25, 1955, the plaintiff, through its agent H, took an option to purchase certain mining claims from four prospectors. The option provided that it should remain open to June 30, and set out the terms of purchase involving the transfer of the claims on or as close as possible to June 30 whereupon a certain sum would be paid; a further sum to be paid in stated instalments and the formation of a new company in which the vendors would receive 10 per cent. of the authorized stock. On June 29, the prospectors gave an option to purchase the same claims to the defendant P Co., which not only took with notice of the first option but actively induced the breach of it. The plaintiff sued P Co. and the four prospectors for specific performance and an injunction against any dealings with the claims by the defendants.

Towards the end of the trial, the defendants moved to amend by pleading regulations 8 and 9 of the Regulations made under the *Mineral Resources Act,* providing that no mining company shall be granted a licence unless it is registered under the Companies Act and that no person or company, not a holder of a licence, shall prospect for minerals, stake out or record any location or "acquire by transfer,

*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

assignment or otherwise howsoever, any mineral claim or any right or interest therein". The trial judge refused leave to amend and gave judgment for the plaintiff. The majority in the Court of Appeal ruled that the amendment should have been allowed and ordered a new trial restricted to the issue raised by the amendment. In all other respects the appeal was dismissed.

The plaintiff appealed to this Court and two of the prospectors cross-appealed. The plaintiff admitted before this Court that its agent H had no licence until July 27, 1955; that the plaintiff did not register under the *Companies Act* until March 9, 1956, and that it acquired its Miner's licence on March 12, 1956. Counsel all agreed that this admission should be regarded as evidence given before this Court under s. 67 of the *Supreme Court Act*.

Held (Locke and Martland JJ. dissenting): The appeal and the cross-appeals should be dismissed. The action must also be dismissed.

Per Curiam: The Court of Appeal exercised its discretion rightly in permitting the defendants to amend their defence so as to plead regulations 8(1) and 9(1).

Per Locke, Abbott, Martland and Judson JJ.: There was no necessity to decide as to the validity of regulation 124, providing compensation for the wrongful registration of a caveat, since it was clearly shown that no damage arose from the registration of the caveat and that the filing of it was completely justified under the circumstances.

Per Cartwright, Abbott and Judson JJ.: No valid distinction could be drawn between the position of the plaintiff during the period from June 25 to June 30 and what would have been its position if the first payment had been made. The option created an equitable interest in the claims and was rendered void because it was given and taken against the express prohibition contained in regulation 9(1). *London and South Western Railway v. Gomm*, 20 Ch. D. 562, followed.

The plaintiff's case was not assisted by the fact that the claims were to be transferred not the plaintiff but to a company to be incorporated. Its legal position was the same whether the transfer was made direct to the new company or to the plaintiff and from the latter to the new company.

The analogy which the plaintiff sought to draw with the cases dealing with the rule against perpetuities did not lead to the suggested result that the contract could still be enforced as a personal obligation. The case at bar was not concerned with that rule. Whether or not the contract, on the true construction of regulation 9, was forbidden, depended upon the rights which it conferred. By the contract, specific performance of which the plaintiff was seeking as construed by the trial judge, the plaintiff, during the currency of the option, acquired the exclusive right to enter upon, drill and explore the claims and the right to compel the conveyance of the claims upon completion of the option payments. The plaintiff, therefore, acquired a right or interest in the claims.

Per Abbott and Judson JJ.: The position of the optionee under the agreement was the same throughout all its stages; the plaintiff obtained an irrevocable offer for certain stipulated periods on payment of certain stipulated sums. The payments, if completed, constituted the purchase price and all that then would remain to be done was to form the new company, transfer the claims and allot to the prospectors 10 per cent. of the stock.

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An option to purchase land creates an equitable interest because it is specifically enforceable. There is a right to have the option held open and this is similar to the right that arises when a purchaser under a firm contract may call for a conveyance. In both cases there is an equitable interest but in the case of the option it is a contingent one, the contingency being the election to exercise the option. Judicial re-examination from time to time since the case of *London and South Western Railway v. Gomm, supra,* has resulted only in an affirmation of the rule that an option holder has an equitable interest.

An interest in these claims having been acquired, the agreement was void and of no effect because it was given and taken against the express prohibition contained in regulation 9.

Regulation 124, if valid, has no application when there is a *bona fide* dispute; registration of a caveat "wrongfully and without reasonable cause" means something in the nature of an officious intermeddling without any colour of right.

Per Locke J., *dissenting*: Assuming that on the authority of the *Gomm* case an option to purchase land vests in the optionee an equitable interest in the land in respect of which the option is granted when the land is to be transferred to the optionee, the case at bar was distinguishable in that the claims here were to be transferred not to the optionee but to a company to be incorporated. Consequently, the optionee in this case acquired no equitable interest in the claims. Its right was a personal right enforceable in a Court of equity by a decree of specific performance, and as such, was not affected by regulation 9.

Per Martland J., *dissenting*: The *Gomm* case was not to be considered as laying down, as a general proposition of law, that any option relating to land of necessity vests in the optionee, forthwith upon the granting of it, an interest in land. The word "option" was not a term of art; its meaning depended upon the context. Here, the option did not confer upon its exercise a right to the optionee to call for a conveyance of the title to the claims. Therefore, even on the reasoning of the *Gomm* case, the optionee did not acquire an equitable property interest in the claims.

An option for the purchase of land creates contractual rights and, accepting the reasoning in the *Gomm* case, its effect may be to create also a contingent limitation of land which may take effect in the future. If that limitation was rendered void by regulation 9, the contractual right remained. Consequently, the option in the case at bar was not rendered void by the regulation, and specific performance could be granted even though no interest in land was created.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], granting leave to amend the defence, ordering a new trial restricted to the issue raised by the amendment and otherwise affirming the judgment at trial. Appeal dismissed and action dismissed on admitted facts, Locke and Martland JJ. dissenting.

C. F. H. Carson, Q.C., A. Findlay, Q.C., and *J. R. Houston,* for the plaintiff, appellant.

[1] (1959), 10 D.L.R. (2d) 338, 23 W.W.R. 241.

J. J. Robinette, Q.C, and *W. M. Elliott,* for the defendants, respondents, Pipelines & Petroleums Ltd., Morrisroe and Meschi.

D. J. Murphy, for the defendants, respondents, Oak and Amren.

LOCKE J. (*dissenting*):—This is an action for specific performance and the plaintiff is the appellant.

The agreement sought to be enforced was signed at Uranium City, Saskatchewan, and reads as follows:

Date—25th day of June, 1955.

We, the undersigned, the sole owners of mineral claims—EO—1 to 16 incl.

Missing Link 1 to 9 incl.

IO—1 to 12 incl.

In all 37 claims contiguous, Located on or near Stewart Island, Lake, Athabasca, Province of Saskatchewan, Canada—do hereby grant to James A. Harquail, Mining Engineer—Suite 2810, 25 King St. West, Toronto, Ontario—in consideration of the sum of $1.00 (one dollar), receipt of which is hereby acknowledged, an option effective to 12 noon—June 30, 1955—to purchase said mineral claims from the undersigned under the terms of the following deal:

On receiving transfers to above claims in good order—on, or as close as possible to June 30, 1955—said transfers to be turned over to Uranium City Bank of Commerce branch at which time sum of $25,000.00 (twenty-five thousand dollars) will be issued to MacKinnon and partners. (Vendors).

New company to be formed in which vendors will receive 10% (ten per cent) of authorized stock.

$25,000. Firm cash.

Option Payments	
1st option—Nov. 1, 1955	$ 25,000.00
2nd option—March 1, 1956	50,000.00
3rd option—Nov. 1, 1956	50,000.00
4th option—July 1, 1957	50,000.00
	$200,000.00

The above agreement shall be binding on the executors, heirs, etc. of the people signing.

"A. Oak"

"Albin Amren"

"S. Daigle"

"Jock MacKinnon"

"A. D. Wilmot"

Witness to above four signatures.

Signed in the Settlement of Uranium City, Saskatchewan.

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On or prior to June 30, Harquail deposited the sum of $25,000 with the bank, to be paid to Oak, Amren, Daigle and MacKinnon (hereinafter referred to as the prospectors) upon their depositing transfers of the mineral claims as provided. They, however, did not comply with the option, having decided to repudiate any liability under it and having granted another option to the respondent company under the circumstances to be hereinafter mentioned.

Mineral claims in the Province of Saskatchewan are subject to the provisions of *The Mineral Resources Act* of that province, R.S.S. 1953, c. 47, and to the regulations made thereunder by the Lieutenant Governor in Council as authorized by s. 9. Under these regulations persons desiring to prospect and make entries on mineral claims must obtain a licence in the form prescribed. A licensee desiring to acquire a mineral claim situate in unsurveyed lands such as the area in question must stake the claim in the manner prescribed by the regulations, and within a stated period apply to have such location recorded as a mineral claim with the Mining Recorder of the district. Upon compliance with these requirements the Recorder may issue a certificate of record of the claim in Form B prescribed by the regulations, which simply certifies that the claim has been recorded in the name of the applicant and describes generally its location. A claim thus recorded may be transferred to another licensee. The entry is effective for one year and from year to year thereafter for a maximum period of ten years, provided that work to a prescribed value is done in each year. Upon the required work being done the licensee may obtain a certificate of improvements from the Recorder and, obtaining this, is entitled to a lease of the claim for 21 years, with a provision for renewals of such term at a rent prescribed.

The prospectors and Evelyn Oak, the wife of Alvar Oak, had staked the claims referred to in the option as EO-1-16 inclusive and recorded them with the Mining Recorder at Uranium City. Whether certificates of record in Form B had been issued in respect of these and the other claims is not clear from the evidence, but it is apparently undoubted that the parties who had staked the claims were entitled

to such certificates. It is also common ground that Oak had been authorized by his wife to sign the option upon the claims recorded in her name.

On June 28, 1955, the respondents Morrisroe and Meschi, both of whom were officers of the respondent company and were aware of the option granted by the prospectors to Harquail, entered into negotiations with the prospectors to obtain an option in favour of the respondent company. As a result, Oak and MacKinnon left Uranium City and proceeded with Morrisroe to Regina. MacKinnon had been given a power of attorney by the other prospectors to deal with the claims other than those of Mrs. Oak. On arrival at Regina on June 29 they were taken to the office of the solicitors for the respondent and there signed an option prepared by one of these solicitors upon the claims mentioned in the option to Harquail. Morrisroe appears to have concealed from his solicitor the fact that the prospectors had already given an option upon the properties to Harquail, Mr. Ehmann, the solicitor who dealt with the matter, contenting himself with asking Oak and MacKinnon if they and their associates owned the claims, a question which they answered in the affirmative. He thereupon prepared an option agreement dated June 29, 1955, between Oak and MacKinnon as optionors and the respondent company as optionee.

This document recited that the optionors were the owners and recorded holders of the mineral claims referred to (though in the case of the EO group of claims this was inaccurate) and that they had agreed to grant "the sole and exclusive option to purchase the said mining claims to the respondent company" in consideration of a cash payment of $25,000 and a further sum of $175,000 to be paid in stated instalments on November 1, 1955, March 1, 1956, November 1, 1956, and July 1, 1957. As a further consideration for the granting of the option it was provided that the optionee would "at such time as it may deem advisable" incorporate a public company for the development of the claims with a minimum authorised capital of four million shares. Of these shares the optionors were to receive 10 per cent. and of this percentage 10 per cent. were to be free shares and 90 held in escrow and released *pro rata* "as stock is released from escrow." It was provided

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that the optionors should forthwith execute transfers of the mining claims in blank and deposit such transfers with the Bank of Commerce in Uranium City, with any other title papers which they might have in their possession, including a copy of the option agreement, to be held by the bank in escrow to be delivered to the optionee or his nominee upon the prescribed payments being made and "in the event of this option not being exercised the said bank is to hold the said documents to the order of the optionors." During the currency of the option the optionee was given the right to enter upon the mining claims and to develop and work them in such manner as it might deem advisable. The optionee covenanted to do the required assessment work upon the claims and to record such work with the Mining Recorder until such time as the company had been formed, at which time such work should be performed by it. Upon default in payment of any of the amounts stipulated to be paid the option agreement was to terminate and any payments made thereunder be forfeited.

While, by the terms of the option agreement, transfers of the claims in blank were to be placed in escrow with the bank at Uranium City, for some reason which I am unable to understand, the solicitor, who said that in preparing the document he was acting on behalf of MacKinnon and Oak as well as the respondent company, obtained from Oak transfers of 18 claims which included the 12 claims being part of IO group 1 described in the option. It is not clear from the evidence in whose name these entries had been recorded or by whom the transfers were executed, and the transfers were not produced at the trial. According to Mr. Ehmann, he caused these transfers to be filed with the Mining Recorder, transferring these 18 claims to the respondent company on June 29. On the same date he prepared an agreement which was signed by Morrisroe on behalf of the respondent company, which recited that Alvar Oak "has entered into an agreement for sale to sell a certain group of claims known as the IO group" and that the respondent company undertook to transfer back to Oak Claims 14, 15, 16, 17 and 18. There had been in fact no agreement of sale entered into by Oak and it was not contemplated by the option that the claims should be

transferred to the respondent company then or apparently thereafter. Clearly, the parties intended that the claims would be transferred to the new company if the option payments were made, since otherwise the shares to be received by the prospectors would be worthless.

While the Mining Recorder at Regina was called and gave evidence of interviews which he had with Mr. Ehmann and Morrisroe on June 29 and 30, he made no mention of the recording of this transfer, the documents were not produced and there is no other evidence of the transfer of the claims than that given by the solicitor. The fact that such transfer was made was accepted by the learned trial judge and the matter dealt with in the manner hereinafter stated. On the morning of June 30 the respondent company filed a caveat with the Mining Recorder at Regina claiming to be interested in the mining claims under the option agreement referred to. On the same date Harquail filed a caveat based upon the option granted to him with the Mining Recorder at Uranium City. In view of the findings of fact made by the learned trial judge, the actual times at which these respective caveats were filed are not important. Transfers in blank of the entries made by Mrs. Oak and by Alvar Oak and MacKinnon were obtained by the respondent company and remained in their possession at the time of the trial. They were not deposited in escrow, as contemplated by the option, due apparently to the institution of this action.

Davis J. by whom the action was tried, found that the option agreement made between Harquail and the prospectors was a binding contract and directed that it should be specifically performed and carried into effect. It was directed that the respondent company cause the 12 mineral claims transferred to it to be recorded in the names of the prospectors jointly and, failing this being done, that the Mining Recorder do cancel the "title of the defendant Canadian Pipelines and Petroleums Limited to the said mineral claims" and record the same in the names of the prospectors and issue certificates of record in their names. The prospectors were directed to execute transfers of the said entries in blank and deposit the same in escrow in the Canadian Bank of Commerce at Uranium City in accordance with the terms of the agreement.

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A further term of the judgment continued an injunction made by Dorion J. on July 20, 1955, and continued by Graham J., the terms of which enjoined the respondents from disposing of or drilling or developing the said mineral claims.

A further term of the judgment read as follows:

> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the date of the first option payment of $25,000.00 under the said Agreement be fixed at four months after the said certificates of Record and Transfers in blank of all the said mineral claims are deposited in escrow at the said Bank, as aforesaid, that the date of the second option payment of $50,000.00 be fixed at four months thereafter, or so long as is necessary to assure to the Plaintiff the privilege of drilling on the ice during the months of January and February, that the date of the third option payment of $50,000.00 be fixed at eight months thereafter, and that the date of the fourth and final option payment of $50,000.00 be fixed at eight months thereafter.

As to this it is to be noted that the option to Harquail did not contain any provision entitling him to enter upon the claims or do any work on them and, in the absence of such a term in the agreement, the optionee had no such right, in my opinion. The claim advanced in the statement of claim is upon the option agreement of June 25, 1955, as it reads: it is not alleged that there was a contemporaneous oral agreement that the optionee might enter and work the claims during the currency of the option and that by a mutual mistake such a term was omitted from the writing, nor is there any claim made to rectify the agreement on this or any other ground. The respondent company had expressly stipulated for such a privilege in the option of June 29, 1955.

The main grounds of defence to the action were that the agreement had been signed on a Sunday and so was unenforceable under the provisions of the *Lord's Day Act*, R.S.C. 1952, c. 171, and that the agreement was uncertain and, accordingly, an action for specific performance did not lie. The learned trial judge found as a fact that the respondents Morrisroe, Meschi and the company, which had obtained an option agreement for the same claims from the prospectors following July 25, 1955, had done so with full knowledge of the fact that they had entered into the agreement above quoted.

Towards the end of the trial the defendant company, Morrisroe and Meschi had applied for leave to amend their defence so as to plead regulations 8(1) and 9(1) above quoted, but this motion was refused.

After the hearing of the evidence had been completed in the matter, counsel for the plaintiff asked leave to amend the statement of claim by claiming damages under regulation 124 of the *Quartz Mining Regulations,* which provides that any person registering a *caveat* wrongfully and without reasonable cause against a mineral claim shall make compensation to any person who has sustained damage thereby, but this application was refused.

The defendants Daigle and MacKinnon had counterclaimed in the action against the defendant company for an order declaring that the option agreement entered into by them with that company on June 29, 1955, became void and was terminated on November 1, 1955, and the judgment at the trial declared such agreement to have been terminated.

The plaintiff, the defendant company and the prospectors appealed to the Court of Appeal[1]. The judgment of that Court dismissed the appeal of the defendant company, Morrisroe and Meschi as to the merits, but allowed it to the extent that the said defendants were permitted to amend their statement of defence to plead regulations 8(1) and 9(1) upon terms upon compliance with which a new trial restricted to the issue raised by the said amendment was directed. The appeal taken by the same defendants against the judgment in favour of Daigle and MacKinnon declaring the agreement of June 29, 1955, to have been terminated was allowed. The appeals taken by the present appellant and by Oak and Amren were dismissed.

On this appeal the defence that the agreement dated June 25, 1955, had been made on a Sunday was abandoned and the finding that the respondent company and its officers Morrisroe and Meschi were aware that the prospectors had entered into the agreement of June 25, 1955, when they obtained the option of June 29, 1955, was not questioned.

[1] (1959) 10 D.L.R. (2d) 338, 23 W.W.R. 241.

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In so far as the present appeal seeks to set aside the judgment appealed from on the ground that the amendment to plead the Mining Regulations should not have been permitted, it should fail, in my opinion. I consider that no sound reason has been advanced which would justify our interfering with the exercise of the discretion vested in the Court of Appeal.

In order that the issues in the action might be properly dealt with in this Court and the cost of a new trial avoided, counsel for the appellant admitted before us that Harquail did not acquire a miner's licence until July 27, 1955, that the appellant company was not registered under the provisions of the *Companies Act* of Saskatchewan until May 9, 1956, and that it did not acquire a miner's licence until March 12, 1956. Counsel for all parties agreed that these admissions should be treated as evidence given before this Court under s. 67 of the *Supreme Court Act*.

The defence which raises what is in my opinion the only question of difficulty in the present appeal is based upon a contention that the agreement sought to be enforced gave to Harquail and his principal, the appellant, an equitable interest or estate in the mineral claims, that the acquisition of any such rights by an individual or a company not holding a miner's licence is prohibited by Regulation 9(1) and that the agreement is accordingly invalid.

This contention is based upon the decision of the Court of Appeal in *London and South Western Ry. Co. v. Gomm.*[1] It is necessary to consider with some care the facts of that case to determine just what was decided.

By an indenture dated August 10, 1865, made between the London and South Western Railway Company and one Powell, the company conveyed to the latter a parcel of land no longer required for its purposes. Powell, on his part, covenanted with the company that he, his heirs and assigns, owner and owners for the time being of the hereditaments intended to be thereby conveyed and all other persons who might be interested therein, would at any time thereafter whenever requested by the company, its successors or assigns, by a six calendar months' previous notice in

[1] (1882), 20 Ch. D. 562.

writing, reconvey the said lands to the company, its successors or assigns, for a consideration of 100 pounds. Powell sold the lands to Gomm in 1865 and the latter was in possession in 1880 when the company gave notice of its desire to repurchase the property. It was shown that Gomm had full notice of the provisions of the deed of 1865 when purchasing the property.

Kay J., who tried the action, rejected the argument of the defendant that the covenant created an estate or interest in land in the railway company and was, therefore, unenforceable as being contrary to the rules against perpetuities. He held that Gomm was bound by the covenant in the deed on the authority of *Tulk v. Moxhay*.[1]

The appeal to the Court of Appeal was heard by a Court consisting of Sir George Jessel, M.R., Sir James Hannen and Lindley L. J. The passage from the judgment of the Master of the Rolls which is relied upon for the proposition that an option to purchase land creates an equitable interest or estate in the optionee reads:

> If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present Appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.

In that case the option gave to the railway company the right to require a conveyance to itself and its assigns upon the terms stated, and this was held to give to it an equitable interest in the land. The present agreement, as it reads and as it was understood by the prospectors as

[1] (1848), 2 Ph. 774, 41 E.R. 1143.

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shown by their evidence, contemplated that the mineral claims should be conveyed not to Harquail or his principal but to a new company to be formed in which they would hold ten per cent. of the stock. Harquail, as is stated in his evidence, understood that the transfers of the mineral claims which were to be deposited in the bank would be in blank, the reason for this being, no doubt, that the new company was not then in existence and its name had not been determined. The name of the transferee would be inserted if the terms of the proposed option were complied with by the optionee and the completed transfers delivered to the new company. The judgment at the trial which directed the deposit of the transfers in blank so interpreted the agreement between the parties and that, in this respect, it properly construed the document is not questioned by anyone. The agreement did not provide and none of the parties to it contemplated that, upon making the payments specified in the option, Harquail or his principal would acquire any interest or estate in the claims. What they were to acquire was the majority share interest in the company which would be the owner of the claims. It was not, in my opinion, an option to purchase at all but an option upon the acceptance of which, by compliance with its terms, the optionee would become entitled to require delivery of the transfers to the new company. The fact that the agreement drawn by Harquail, a layman, reads "an option to purchase" does not relieve us of the duty of determining the true nature of the document.

In *Gomm's* case the covenant which was held not to bind the defendant required him to reconvey the land to the railway company on its demand, and this appears to have been the basis for the finding that it gave to the optionee an equitable estate or interest in it. The phrase reading "The right to call for a conveyance of the land is an equitable interest or equitable estate" in the judgment of Sir George Jessel must be construed in the light of the facts of the case, and thus as meaning a right to call for a conveyance of the legal title to the optionee. Sir James Hannen said in part (p. 586):

> it appears to me to be a startling proposition that the power to require a conveyance of land at a future time does not create any interest in that land.

and this, I consider, is to be construed in the like manner.

Here there is no such covenant.

It is altogether too easy a generality to say that an option vests in the optionee an equitable interest in the land in respect of which the option is granted. If it be assumed that *Gomm's* case was rightly decided, its application depends, of necessity, upon the nature of the right given to the optionee and that he may acquire upon its exercise.

I must confess my inability to understand how an option agreement which, when exercised, would not entitle the optionee to any estate, legal or equitable, in the mineral claims can be said to vest any equitable interest or estate in him prior to the exercise.

The argument based upon *Gomm's* case proceeds upon the assumption that the optionee, as of the time of the execution of the option, acquired, in the language of Regulation 9(1), "some right or interest" in the mineral claims. Since neither Harquail or the appellant had at that time a prospector's, developer's or miner's licence, the contention is that the transaction was prohibited by the regulation which, by virtue of the statute, has the force of law.

The interests of the prospectors in the claims upon which they had made entries which had been recorded are chattel interests, as declared by Regulation 38. Such a chattel interest is assignable at common law and Regulation 9(1), to the extent that it prohibits a transfer to a person not a licensee, is in derogation of common law rights. It is thus to be construed strictly (Maxwell, 10th ed., 292).

As I have pointed out, however, the option in question does not provide that the optionors will transfer the claims or any interest in them to the optionee, but rather, upon the exercise of the option, to a company to be formed. It is not to be assumed that that company would not obtain the required licence to enable it to accept a conveyance when the necessity arose. The regulation does not say that a person who has made and recorded an entry in a mineral claim may not lawfully agree with anyone to transfer such claim at some future date to a third person other than the optionee or to a company to be thereafter formed. We are asked to read into this regulation a prohibition which it does not

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contain, a course for which there is no warrant. In my opinion, the regulation as it reads does not affect the rights of the appellant under this agreement.

Unless regulation 9(1) is to be construed as rendering unenforceable a covenant to convey a mineral claim at some future time to a company to be thereafter incorporated, the decision in *Gomm's* case has no bearing on the matter to be decided. Whether that case should be followed in this country has not been considered by this Court. Apart from the fact that it was referred to with approval in *Davidson v. Norstrant*[1], in a dissenting judgment of Duff J. (as he then was), the case does not appear to have been mentioned in this Court. In that case, however, the option entitled the optionee to a conveyance to himself or his nominee of a half interest in the land, his rights in that respect being similar to those of the London and South Eastern Railway Company. The case was not referred to by the other members of the Court.

Apart from the difference in the nature of the rights given by the option, the facts in the present case differ from those in *Gomm's* case in another material particular. Here the ownership of the mineral claims has at all times remained in the prospectors. The 12 claims transferred by mistake to the respondent company have at all times been held by it as bare trustee for the prospectors. The respondent company was a necessary party to the action only for the purpose of obtaining a direction for a reconveyance of these claims to the prospectors, a declaration that the company had no interest in the claims, and to recover any damages caused by its interference with the appellant's contractual rights.

The facts of the present case are in this respect similar to those considered by the Court of Appeal in *South Eastern Railway v. Associated Portland Cement Manufacturers*[2].

In that case the railway company had obtained a conveyance of a strip of land from a landowner which reserved to himself, his heirs and assigns the right to make a tunnel at

[1] (1921), 61 S.C.R. 493 at 509, 57 D.L.R. 377 at 389.
[2] [1910] 1 Ch. 12.

his or their expense under the property conveyed. The defendants were the assignees of the landowner and, when they commenced the excavation of a tunnel, the railway company brought an action for an injunction, contending that as the time within which the tunnel might be constructed was unlimited the covenant offended against the rule against perpetuities. The railway company relied upon the judgment in *Gomm's* case and it was held by Swinfen Eady J. at the trial and by the unanimous judgment of the Court of Appeal that the case had no application. The defendants had succeeded to the rights of the landowner and, as expressed in the head note, it was held that as against the original covenantors, the railway company, the provision in the agreement as to the tunnel was a personal contract and was not obnoxious to the rule against perpetuities.

Swinfen Eady J., referring to *Gomm's* case, said in part (p. 25):

> Jessel M.R. . . . said that if it was a mere personal contract it would not be obnoxious to the rule against perpetuities, but, as Gomm had not himself entered into the covenant, it was essential for the plaintiff to prove that it ran with the land in order to succeed against the assignee.

The same difference in the facts was pointed out in the judgments of Cozens-Hardy M.R. and by Fletcher-Moulton L.J. Farwell L.J. referred to the judgment of the House of Lords in *Witham v. Vane,* the only report of which appears to be in Challis's Real Property, 3rd ed., p. 440, and said (p. 33):

> But the fact that there is some connection with or reference to land does not make a personal contract by A. less a personal contract binding on him, with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.

In my opinion, the right of the optionee in the present case, as above stated, is a personal right enforceable in a Court of equity by a decree of specific performance. The covenant related to land, as did the covenant in *Witham v. Vane* and the *Associated Portland Cement* case, and was enforceable as between the contracting parties.

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I would add that if *Gomm's* case applied in the present circumstances it would be necessary to consider the decision of the Court of Appeal in the case of *Manchester Ship Canal Co. v. Manchester Race Course Co.*[1], which is in direct conflict with it. The right of first refusal upon which the action was based in that case does not appear to differ from the right of an optionee who has the right to purchase, and the Court there held that such right was not an interest in land and rejected the argumet based upon *Gomm's* case. The latter case has, it is true, been followed in a number of cases by single judges in England who, apparently, considered themselves bound by it, but I think this does not add to its weight.

As to the defendant company, as found by the learned trial judge, the option agreement obtained by it was entered into with full knowledge of the option theretofore granted to Harquail, and the principle followed in *Lumley v. Wagner*[2], applies.

The fact that the appellants obtained an interim injunction restraining the respondents from entering upon and working the claims and that the formal judgment at the trial, as above pointed out, read in part:

> so long as is necessary to assure to the plaintiff the privilege of drilling on the ice during the months of January and February

cannot conceivably, in my opinion, affect our decision in this matter. The option required the prospectors to transfer the claims as they were at the date of the option to the company to be formed if the option was exercised and, clearly, during the currency of the option the optionee would be entitled in an action on the covenant to restrain the respondents from drilling on or removing material from the claims. However, equally clearly the optionee was not entitled to enter upon the claims and to conduct drilling operations since the agreement gave to it no such right and this term should be stricken from the judgment. It is, however, the duty of this Court to decide this matter upon its own view of the law, and the answer to the important question of law here to be decided cannot be

[1] [1901] 2 Ch. 37, 51.
[2] (1852), 1 De G.M. & G. 604, 42 E.R. 687.

determined by the opinion of the parties to the action as to the nature of those rights or the nature of the relief granted at the trial.

The defence that the agreement was uncertain and that an action for specific performance does not lie fails, in my opinion. I agree with the learned trial judge and with the majority of the learned judges of the Court of Appeal upon this aspect of the case.

The respondent company and Morrisroe and Meschi contend by way of cross-appeal that a new trial should have been granted in any event by reason of the refusal of the learned trial judge to permit the defendant Daigle to be cross-examined in respect of the issues as between the plaintiff and the company, on the ground that his interest as a defendant in the action was the same as that of the company. As to this, I agree with the view of the majority of the Court of Appeal that permission to cross-examine should not have been refused. I, however, also agree with them that, applying Rule 40 of the *Court of Appeal Rules*, a new trial should not be granted because no substantial wrong or miscarriage of justice was occasioned by the refusal to permit the cross-examination.

The application of the appellant for leave to amend its statement of claim to permit it to raise a claim for damages against the respondent company under regulation 124 above mentioned should, in my opinion, be refused. There is no evidence that the appellant suffered any damage by reason of the filing of the *caveat* and, without such proof, there can be no recovery under the regulation and the amendment would be of no advantage to the appellant. As to the claim advanced under that regulation by the respondents Oak and Amren, not only is there no proof of any damage to them by reason of the filing of the appellant's caveat, but filing it was neither wrongful nor without reasonable cause, within the meaning of the regulation: on the contrary, it was completely justified under the circumstances.

At the trial it was contended that regulation 124 was *ultra vires* the Executive Council of Saskatchewan, and Davis J. directed that the Attorney-General should be notified and permitted to be heard before the matter was decided. After argument in which counsel for the Attorney-General took part, the learned judge held the regulation to

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be *ultra vires*. The Attorney-General did not intervene formally in the litigation but was represented by counsel in the Court of Appeal and supported the regulation. The members of that Court did not consider it necessary to determine the matter. Before this Court the Attorney-General was again represented by counsel in support of the validity of the regulation, though he had not formally intervened in this Court. In the view of my conclusion that there can be in any event no recovery, either by the appellant or by the respondents Oak and Amren, it is unnecessary to decide the question as to the validity of the regulation. The matter does not come before us as a reference and, in my opinion, we should not express any opinion in the circumstances.

In the result, I would allow the appeal from that portion of the judgment of the Court of Appeal which directed on terms a new trial in respect of the issues raised as to non-compliance by Harquail and the appellant with regulations 8(1) and 9(1). I would direct that the judgment at the trial, however, be amended by striking out the words:

> or so long as it is necessary to assure to the plaintiff the privilege of drilling on the ice during the months of January and February

in that portion of the judgment above quoted. In all other respects, save as to costs, I would confirm the judgment of the Court of Appeal. The appellant should have its costs in this Court as well as in the Court of Appeal. The cross-appeal should be dismissed with costs.

CARTWRIGHT J.:—The relevant facts and the contentions of the parties are set out in the reasons of other members of the Court.

I am in agreement with what I understand to be the opinion of all the other members of this Court that the Court of Appeal[1] exercised its discretion rightly in permitting the respondents to amend their statements of defence so as to plead regulations 8(1) and 9(1) of the Regulations under *The Mineral Resources Act*, and the only point with which I find it necessary to deal is the defence based on regulation 9(1).

[1] (1959), 10 D.L.R. (2d) 338, 23 W.W.R. 241.

The contract which the appellant asks to have specifically enforced was made on June 25, 1955, between the respondents Oak, Amren, Daigle and MacKinnon, hereinafter referred to as "the prospectors", and Harquail who was acting as agent for the appellant. On June 29, 1955, the prospectors repudiated that contract by their conduct in entering into a contract with the respondent Canadian Pipelines and Petroleums Limited giving to that company the option to purchase the 37 mineral claims which formed the subject matter of the contract of June 25, 1955.

For the reasons given by my brother Judson I agree with his conclusions (i) that no valid distinction can be drawn between the position of the appellant during the period from June 25 to June 30, 1955, and what would have been its position if the first payment of $25,000 had been actually paid, and (ii) that the option granted by the contract of June 25, 1955, created an equitable interest in the claims and was rendered void because it was given and taken against the express prohibition contained in regulation 9(1).

The second of these conclusions is based on the decision of the Court of Appeal in *London and South Western Railway v. Gomm.*[1] It has been suggested that we ought not to follow that case, but in my opinion it was rightly decided. It is said that the decision of the Court of Appeal in *Manchester Ship Canal Company v. Manchester Racecourse Company*[2], conflicts with *Gomm.* In the *Manchester* case it was sought to enforce a conditional "right of pre-emption" contained in a contract which had been validated by Statute; no price was named in the contract but the trial judge, Farwell J., and the Court of Appeal held, against the argument of the defendant, that the price was ascertainable. Farwell J. used the expression "I think that clause 3 creates an interest in the land . . . But even if it does not create an interest in the land . . ." and went on to hold the plaintiff entitled to succeed on another ground based on the decision in *Willmott v. Barber.*[3] In the judgment of the Court of Appeal *Gomm's* case is not mentioned by name

[1] (1882), 20 Ch. D. 562. [2] [1901] 2 Ch. 37.
[3] (1880), 15 Ch. D. 96.

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although it had been cited in argument. The only reference to the question whether the right of pre-emption created an interest in land is found in the following passage at p. 50:

> Then it was objected that clause 3 could not be enforced against the Trafford Park Company, who are only alienees of the land. Farwell J., thought that clause 3 created an interest in land, and that this objection could be thus answered. We do not think that clause 3 does create an interest in land, nor do we think that there is anything in the decisions in *Tulk v. Moxhay* or in *London and County Banking Co. v. Lewis* which gets over the objection.

The Court then went on to uphold the decision of Farwell J. on the ground that the case fell within the principle of *Willmott v. Barber, supra* and of *Lumley v. Wagner*[1].

An expression of opinion by the learned Lords Justices who composed the Court in the *Manchester* case is, of course, entitled to great weight but if they had intended to negative the principle enunciated in *Gomm* it seems to me that they would have stated their reason for so doing. Be this as it may, in so far as the two cases are in conflict I prefer the decision in *Gomm* on the point with which we are concerned and think that we should follow it.

I wish to add some observations as to two other suggested objections to the conclusion that the option was rendered void by regulation 9(1).

First, it is said that the contract contemplates that, upon performance of all its terms by the appellant, the 37 claims are to be transferred not to the appellant but to a company to be incorporated. Accepting this as the correct construction of the contract, I am unable to find that the appellant's case is assisted. The appellant cannot be heard to say that there did not exist on June 29, 1955, a contract, specifically enforceable in equity, binding the prospectors to hold the option open, and, ultimately, if all the stipulated payments were made, to convey the claims, nor can it be heard to say that it had not the right to enforce that contract, for it seeks to support a judgment in its favour decreeing specific performance thereof. I have already indicated my agreement with the view that the specifically enforceable contractual right to require the holders of the claims to convey them constitutes an interest in the claims; that interest must on the critical date, June 29, 1955, have been held by someone and unless that someone was the holder

[1] (1852), 1 De G.M. & G. 604, 42 E.R. 687.

of a licence as required by regulation 9(1) the acquisition of that interest was forbidden. The appellant is not assisted by saying "True, I had no licence but I was acquiring the interest for someone else who likewise had no licence, and indeed no existence". In my view, the effect of the contract was that on the execution of the agreement of June 25, 1955, the appellant acquired an interest in the claims which interest by the terms of the contract it was obligated to cause to be transferred to a company to be incorporated at some future time. The legal position would be the same whether the actual transfer of the claims were made from the prospectors direct to the new company or from the prospectors to the appellant and from the latter to the new company.

Secondly, it is said that, by analogy with certain cases dealing with the rule against perpetuities, even if in so far as it creates an interest in the claims the contract of June 25, 1955, is rendered void by regulation 9(1) it may still be enforced as a personal obligation binding the prospectors.

The effect of the cases referred to is conveniently summarized as follows, in Halsbury's Laws of England, 2nd ed., vol. 25, at p. 109:

> A contract relating to a right of or equitable interest in property *in futuro* may be intended to create a limitation of land only, in which case, if the limitation is to take effect beyond the perpetuity period, the contract is wholly void and unenforceable; or the contract may, upon its true construction, be a personal contract only, in which case the rule does not apply to it; or it may, upon its true construction, be, as regards the original covenantor, both a personal contract and a contract attempting to create a remote limitation, in which case the limitation will be bad for perpetuity, but the personal contract will be enforceable, if the case otherwise admits, against the promisor by specific performance or by damages, or against his personal representatives in damages only. In all cases it is a question of construction whether the contract is intended to create a limitation of property only, or a personal obligation only, or both.

In my respectful view the supposed analogy does not lead to the suggested result. Contracts in so far as they are merely personal are outside the rule against perpetuities altogether. We are not concerned with that rule in the case at bar. The question before us is whether or not on the true

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construction of regulation 9(1) the contract of June 25, 1955, was forbidden by that Regulation, which has the force of a statute.

The regulation reads as follows:

> 9. (1) No person or mining partnership not a holder of a Prospector's, Developer's and Miner's licence shall prospect for minerals upon land subject to these regulations, or stake out or record any location, and no person, mining partnership or company not a holder of a Prospector's, Developer's and Miner's licence shall acquire by transfer, assignment or otherwise howsoever any mineral claim or any right or interest therein for which a lease or a patent has not been issued.

To determine whether the contract contravenes the regulation it is necessary to consider the nature of the rights which it conferred upon the appellant. The argument of counsel for the respondents that the contract was too vague and uncertain to be specifically enforceable was rejected by the learned trial judge and by the majority in the Court of Appeal and the appellant is seeking to uphold a judgment for the specific performance of the contract as construed by the learned trial judge. The manner in which he construed it appears from paras. 2, 3 and 5 of the formal judgment of April 10, 1956, which read as follows:

> 2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Defendant Canadian Pipelines and Petroleums Limited do cause the said mineral claims known as I.O. 1 to 12 inclusive, to be recorded in the names of the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon jointly, failing which that the Mining Recorder do cancel the title of the Defendant Canadian Pipelines and Petroleums Limited to the said mineral claims and do record the same in the names of the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon jointly, that the Mining Recorder do issue Certificates of Record of the said mineral claims to the said Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon jointly, that the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon do execute in blank a Transfer of the said mineral claims, that the said Defendants and the Defendant Canadian Pipelines and Petroleums Limited do thereupon deposit in escrow at the Canadian Bank of Commerce at Uranium City, in the Province of Saskatchewan, in accordance with the said Agreement, the Certificates of Record and Transfers in blank of the said mineral claims known as I.O. 1 to 12 inclusive, Missing Link 1 to 9 inclusive, and E.O. 1 to 16 inclusive, that in the event of the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon, or any of them, neglecting or refusing to execute or deliver to the said Bank any of the said Certificates of Record and Transfers in blank, that the Mining Recorder do execute and deliver over to the said Bank the necessary Certificates of Record and Transfers in blank of the said mineral claims, and that upon the receipt by the Bank of the said Certificates of Record and Transfers in blank of all the said mineral claims the Plaintiff do pay to the Defendants A. Oak, A. Amaren, S. Daigle and Jock MacKinnon, the sum of $25,000.00.

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the date of the first option payment of $25,000.00 under the said Agreement be fixed at four months after the said Certificates of Record and Transfers in blank of all the said mineral claims are deposited in escrow at the said Bank, as aforesaid, that the date of the second option payment of $50,000.00 be fixed at four months thereafter, or so long as is necessary to assure to the Plaintiff the privilege of drilling on the ice during the months of January and February, that the date of the third option payment of $50,000.00 be fixed at eight months thereafter, and that the date of the fourth and final option payment of $50,000.00 be fixed at eight months thereafter.

* * *

5. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Injunction with respect to the said mineral claims granted by The Honourable Mr. Justice Dorion on the 20th day of July, 1955, and continued by the Honourable Mr. Justice Graham on the 6th day of September, 1955, be continued, except as herein otherwise ordered, until further order.

The injunction granted by Doiron J. which is continued by the terms of para. 5 is not copied in the appeal case but its effect is stated as follows in the appellant's factum:

> On July 20th, 1955, Frobisher commenced this action for specific performance of its agreement with the prospectors and on the same date obtained an injunction restraining the Respondents from selling, transferring or otherwise disposing of or entering upon, drilling, exploring, developing, operating or otherwise dealing with the mining claims until the final disposition of the action.

It appears from this that the contract has been construed as conferring upon the appellant not only the right to call for a conveyance of the claims to a company to be incorporated when all the payments stipulated have been made, but also the right during the currency of the option, to the exclusion of all of the respondents, to enter upon drill and explore the mining claims. It is my opinion that on this construction of the contract the appellant, during the currency of the option, could have maintained an action of trespass not only against a stranger who entered on the claims but also against the respondents if they did so. I find myself quite unable to say that the appellant in these circumstances did not "acquire by transfer, assignment or otherwisehowsoever . . . any right or interest in the claims". It appears to me that it acquired, by contract, the exclusive right to enter upon drill and explore the claims during the currency of the option and the right to compel their conveyance upon completion of the option payments. On any reasonable view of the meaning of the words "right" and

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"interest" as used in the regulation I am of opinion that what the appellant acquired under the contract falls within one or other or both of those words. The very wide meaning ordinarily attributed to both of these words may conveniently be found in "The Dictionary of English Law" by Earl Jowitt at p. 1560, sub. verb. "Right" and p. 991, sub. verb. "Interest".

Authority is scarcely needed for the proposition that a contract which is expressly or implicitly prohibited by statute is illegal and that what is done in contravention of the provisions of an act of the legislature cannot be made the subject matter of an action, but reference may be made to the judgment of Lord Ellenborough in *Langton v. Hughes*[1].

I would dispose of the appeal as proposed by my brother Judson.

ABBOTT J.:—For the reasons given by my brothers Cartwright and Judson, with which I am in agreement, I would dispose of the appeal of Frobisher and the cross-appeal of Oak and Amren as proposed by my brother Judson.

MARTLAND J. (*dissenting*):—On June 18, 1955, the respondents Oak and MacKinnon made a discovery of uranium ore on Stewart Island in the Lake Athabaska district of Saskatchewan. The discovery was made on mining claims owned jointly by the respondents Oak, Amren, Daigle and MacKinnon (hereinafter referred to as "the prospectors").

By an agreement in writing, dated June 25, 1955, the prospectors granted to James A. Harquail, a mining engineer and geologist employed by the appellant (which company is hereinafter referred to as "Frobisher"), an option in the following terms:

Date—25th day of June, 1955.

AGREEMENT

We, the undersigned, the sole owners of mineral claims—EO—1 to 16 incl.

Missing Link 1 to 9 incl.

IO—1 to 12 incl.

In all 37 claims contiguous, Located on or near Stewart Island, Lake Athabasca, Province of Saskatchewan, Canada—do hereby grant to James A. Harquail, Mining Engineer—Suite 2810, 25 King St. West,

[1] (1813), 1 M. & S. 593, 105 E.R. 222.

Toronto, Ontario—in consideration of the sum of $1.00 (one dollar), receipt of which is hereby acknowledged, an option effective to 12 noon—June 30, 1955—to purchase said mineral claims from the undersigned under the terms of the following deal:

On receiving transfers to above claims in good order—on, or as close as possible to June 30th, 1955—said transfers to be turned over to Uranium City Bank of Commerce branch at which time sum of $25,000.00 (twenty-five thousand dollars) will be issued to MacKinnon and partners. (Vendors).

New company to be formed in which vendors will receive 10% (ten percent) of authorized stock.

$25,000. Firm cash.

Option Payments

1st option—Nov. 1, 1955	$ 25,000.00
2nd option—March 1, 1956	50,000.00
3rd option—November 1, 1956	50,000.00
4th option—July 1, 1957	50,000.00
	$200,000.00

The above agreement shall be binding on the executors, heirs, etc. of the people signing.

"A. Oak"

"Albin Amren"

"S. Daigle"

"Jock MacKinnon"

"A. D. Wilmot"

Witness to above four signatures.

June 25, 1955.

Signed in the Settlement of Uranium City, Saskatchewan.

S—Numbers

Claims IO—1 to 12 incl.—S-30628 to S-30639 inc.

Claims Missing Link—1-9 incl.—S-46551 to S-46559 inc.

Claims EQ—1 to 16 incl.—Being recorded June 27—No S numbers as yet.

The respondents Morrisroe and Meschi, although they had knowledge of the existence of the agreement made between the prospectors and Harquail, subsequently persuaded the prospectors to enter into a written agreement, dated June 29, 1955, under which the prospectors purported to grant to Canadian Pipelines and Petroleums Limited (hereinafter referred to as "Pipelines") an option on the same mining claims on terms similar to those contained in the agreement with Harquail.

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On June 30, 1955, both Pipelines and Harquail filed caveats against the mining claims. Harquail had deposited $25,000 with the Canadian Bank of Commerce at Uranium City on June 28, 1955.

Pipelines obtained from the prospectors the documents of title with respect to the mining claims, together with transfers executed in blank by the persons in whose names the claims were recorded. Certain of the claims were actually transferred into the name of Pipelines.

On July 20, 1955, Frobisher commenced action for specific performance of its agreement with the prospectors and on the same date obtained an injunction restraining the respondents from selling, transferring or otherwise disposing of, or entering upon, drilling, exploring, developing, operating or otherwise dealing with the mining claims until the final disposition of the action.

The various respondents, in their statements of defence, pleaded that the agreement between Frobisher and the prospectors was invalid because it had been made on Sunday, June 26, 1955. They also contended that no consideration had been paid by Harquail to the prospectors and that Harquail did not enter into the agreement as agent of Frobisher.

Pipelines, Morrisroe and Meschi also counterclaimed against Frobisher, claiming compensation, pursuant to Reg. 124 of the *Quartz Mining Regulations* of Saskatchewan, enacted pursuant to *The Mineral Resources Act,* on the ground that the caveat filed by Harquail had been registered wrongfully and without reasonable and probable cause. A similar counterclaim was also made against Frobisher by Oak and Amren. Pipelines, Morrisroe and Meschi did not submit this contention in the present appeal, but Oak and Amren did.

The respondents Daigle and MacKinnon did not make any counterclaim against Frobisher, but did counterclaim against Pipelines, seeking a declaration that the agreement between Pipelines and the prospectors had been terminated, or, alternatively, that it should be rescinded on the grounds of undue influence and misrepresentation.

The main issues at the trial, which was a lengthy one, were those raised by the statements of defence as to the validity of the agreement between Frobisher and the prospectors. The learned trial judge, on ample evidence, found that these defences failed, that the agreement was made on Saturday, June 25, 1955, that there was consideration for the agreement and that it had been made by Harquail as agent for Frobisher. These findings were subsequently upheld by the Court of Appeal of Saskatchewan[1] and these issues were not involved in the hearing before this Court.

Toward the end of the trial a motion was made on behalf of the respondents Pipelines, Morrisroe and Meschi to amend their statement of defence so as to plead regulations 8(1) and 9(1) of the *Quartz Mining Regulations*. This motion was refused by the learned trial judge. The Court of Appeal, Gordon J.A. dissenting, was of the opinion that the amendment should have been allowed and that there should be a new trial restricted to the issues raised by the amendment.

At the conclusion of the trial it was contended by Frobisher that it should be entitled to compensation, pursuant to regulation 124, on the ground that the caveat filed by Pipelines had been registered wrongfully and without reasonable cause. Argument was subsequently presented regarding the validity of the regulation in question at a hearing at which the Attorney-General of Saskatchewan was represented. The learned trial judge later held that regulation 124(4) was *ultra vires* and he refused Frobisher's application to amend its statement of claim to claim damages pursuant to that particular regulation.

With respect to this issue, in the Court of Appeal, Martin C.J.S. agreed with the learned trial judge that regulation 124(4) was *ultra vires*. Procter J.A., McNiven J.A. and Culliton J.A. were of the opinion that there was no valid claim under regulation 124(4), since no damage had been proved by Frobisher. Gordon J.A. was of the opinion that leave should not have been given to Frobisher to raise this issue by an amendment to its statement of claim.

[1] (1959), 10 D.L.R. (2d) 338, 23 W.W.R. 241.

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The counterclaim of Daigle and MacKinnon as against Pipelines, which had been allowed by the learned trial judge, was dismissed by the Court of Appeal and no appeal was taken to this Court from that part of the judgment of the Court of Appeal.

At the trial the learned trial judge ruled that counsel for Pipelines, Morrisroe and Meschi was not entitled to cross-examine MacKinnon and Daigle, except only in respect of the issues raised in the counterclaim of MacKinnon and Daigle as against Pipelines.

On appeal it was contended by Pipelines that, because of this refusal to permit cross-examination by the learned trial judge, a new trial should be ordered. Four of the five judges of the Court of Appeal held that the learned trial judge should have permitted the cross-examination of MacKinnon and Daigle by counsel for Pipelines, Morrisroe and Meschi. Martin C.J.S. was of the opinion that the ruling of the learned trial judge was correct. However, four of the five judges held that in the light of the other evidence no substantial wrong or miscarriage of justice had been occasioned by the ruling the learned trial judge and accordingly held that a new trial should not be granted on this ground. Procter J.A. would have granted a new trial.

On the present appeal the following questions were in issue:

1. Was the Court of Appeal right in allowing the amendment to the statement of defence, so as to plead non-compliance by Frobisher and Harquail with the provisions of Regs. 8(1) and 9(1) of the *Regulation* made under the *Mineral Resources Act*, and in directing a new trial in respect of the issues thus raised?
2. Was the Court of Appeal right in refusing to order a new trial because of the refusal of the learned trial judge to permit cross-examination of Daigle and MacKinnon by counsel for Pipelines, Morrisroe and Meschi?
3. Was there any claim for damages established by Frobisher against Pipelines, or by Oak and Amren against Frobisher, pursuant to Reg. 124(4), in respect of the caveats filed respectively by Pipelines and by Frobisher?

I agree with the view of the majority in the Court of Appeal that the learned trial judge ought to have granted the amendment to the statement of defence so as to plead the non-compliance by Harquail and Frobisher with the provisions of regulations 8(1) and 9(1).

Rule 209 of the *Queen's Bench Rules* provides that the Court

> may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and upon such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Lord Esher, in *Steward v. North Metropolitan Tramways Company*[1], stated the general rule as to amendments as follows:

> The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.

The issue raised by the proposed amendment was one which questioned the legal validity of the agreement of June 25, 1955. If decided in favour of Pipelines, the claim of Frobisher would fail. It was, therefore, an issue of vital importance which Pipelines should have been entitled to raise, unless by making the amendment Frobisher would have been put into a position that it must be injured. I do not think, despite the weighty arguments of Gordon J.A. to the contrary, that Frobisher would have been placed in such a position and consequently I am of the opinion that the amendment should have been allowed.

Regulations 8 and 9(1) of the *Quartz Mining Regulations* provide as follows:

MINING COMPANY

> 8. (1) No mining company shall be granted a licence under these regulations unless such company is licensed or registered under the provisions of the Companies Act of Saskatchewan and in the case of a mining syndicate unless such syndicate is registered under The Securities Act.
>
> (2) Notwithstanding anything contained in these regulations, except as provided in Part XIV hereof, a Prospector's, Developer's and Miner's licence issued to a company shall only convey the authority to hold mineral claims by transfer or assignment. A licence held by a company does not include the privilege of staking claims and shall not entitle any shareholder, officer or employee thereof to the rights and privileges of a licensee.

[1] (1886), 16 Q.B.D. 556.

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LICENCE REQUIRED

9. (1) No person or mining partnership not a holder of a Prospector's, Developer's and Miner's licence shall prospect for minerals upon lands subject to these regulations, or stake out or record any location, and no person, mining partnership or company not a holder of a Prospector's, Developer's and Miner's licence shall acquire by transfer, assignment or otherwise howsoever any mineral claim or any right or interest therein for which a lease or a patent has not been issued.

Counsel for Frobisher admitted on the argument before this Court that Harquail did not acquire a miner's licence until July 27, 1955, that Frobisher was not registered under the provisions of *The Companies Act* of Saskatchewan until March 9, 1956, and that it did not acquire a miner's licence until March 12, 1956. This admission was made for the purpose of avoiding a new trial on incontrovertible facts and counsel for all parties agreed that it should be regarded as evidence given before this Court under s. 67 of the *Supreme Court Act*.

Accordingly the issue which was argued was as to whether or not the agreement of June 25, 1955, was rendered void by reason of the provisions of these regulations.

The argument of Pipelines was that the agreement, being an option in respect of the mineral claims described in it, created an interest in Frobisher in the claims. It was contended that the acquisition of any interest in the claims by a company not holding a miner's licence being forbidden by regulation 9(1), the agreement was, therefore, illegal and was void.

For Frobisher it was contended that at the time the agreement was made with the prospectors on June 25, 1955, Frobisher did not acquire any interest in the claims, but only an option which gave time for it to decide whether, on the turning over of the transfers to the mineral claims by the prospectors, it would pay the cash sum of $25,000 and thus acquire an option in respect of the claims on the terms provided in the agreement. It was also urged that the agreement did not contemplate an ultimate transfer of the mineral claims to Frobisher, but to a new company for the incorporation of which the agreement provided.

The argument of Pipelines is based upon the judgment of the Court of Appeal in England in the case of *London and South Western Railway Company v. Gomm*[1], which is the decision chiefly relied upon by the majority of the Court of Appeal in directing that there be a new trial. Counsel for Pipelines also referred to other cases in which that judgment had been followed.

That case involved an indenture dated August 10, 1865, between the London and South Western Railway Company and George Powell, by which the railway company conveyed to Powell a parcel of land no longer required for the purposes of the railway. Powell, for himself, his heirs, executors, administrators and assigns, convenanted with the railway company, its successors and assigns, that he, his heirs and assigns, owner and owners for the time being of the lands intended to be conveyed, and all persons who should or might be interested, should, at any time thereafter, whenever the land might be required for the railway or works of the company, whenever requested by the company, its successors or assigns, by six months' previous written notice and on payment of 100 pounds, reconvey the land.

In 1879 Powell sold the lands to Gomm, who had full notice of the contents of the deed of 1865. Notice was given by the railway company to Gomm on March 12, 1880, claiming to repurchase. Gomm refused to reconvey and the railway company sued for specific performance of the covenant in the deed.

The case was first heard by Kay J., who held that the covenant did not create any estate or interest in land and, therefore, was not obnoxious to the rule against perpetuities. He held that Gomm was bound by the covenant in the deed on the principle of *Tulk v. Moxhay*[2].

On appeal it was held that the covenant gave to the railway company an executory interest in land, to arise on an event which might occur after the period allowed by the rules as to remoteness, and was invalid.

Jessel M.R., at p. 580, after referring to the covenant giving the right of repurchase, said:

> If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears

[1] (1882), 20 Ch. D. 562.
[2] (1848), 2 Ph. 774, 41 E.R. 1143.

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to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present Appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contact it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.

Sir James Hannen and Lindley L.J., the other members of the Court, agreed.

On principle it would appear to me that the decision of Kay J., who later, in *Mackenzie v. Childers*[1], described the proposition thus enunciated as "entirely novel", was right. An option to purchase land is nothing more than an offer to sell and differs only from other offers in that for a stipulated period it is irrevocable. No contract for the acquisition of land results unless the offer is accepted.

In this connection the decision of the House of Lords in *Helby v. Matthews*[2], is of some interest. In that case there was under consideration the effect of an option to purchase a chattel. The owner of a piano let it on hire, the hirer agreeing to pay rent by monthly instalments. The hirer could terminate the hiring by delivering up the piano to the owner, the hirer remaining liable for all arrears of hire. If the hirer paid all of a stipulated number of monthly instalments, he would then acquire title to the piano, but, until that time, it remained the sole property of the owner. The question in issue was as to whether the hirer was "a person having agreed to buy goods" within the meaning of the *Factors Act*, he having pledged it to a pawnbroker after paying only a few instalments of rent and the pawnbroker claiming title to the piano under that Act.

The Lord Chancellor, Lord Herschell, said at p. 477:

It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words "agreement to sell" be

[1] (1889), 43 Ch. D. 265 at 279. [2] [1895] A.C. 471.

used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case.

It is of interest to note that the grantee of a mineral claim under the *Quartz Mining Regulations* acquires a chattel interest. Regulation 38 provides:

38. The interest of a grantee of a mineral claim shall, prior to the issue of a lease, be deemed to be a chattel interest, equivalent to a lease of the minerals in or under the land for one year, and thence from year to year, subject to the performance and observance of all of the terms and conditions of these regulations.

In the *Gomm* case itself the option to the railway company was a term of the agreement by which Powell himself acquired title to the land from the railway company and it might be regarded as a limitation upon the grant of that title. The decision, however, appears to be based on an analogy between the option itself and the agreement to purchase which would result upon its acceptance. In that case the terms of the option were such that the optionee, by accepting it, immediately became entitled to a conveyance of title. It will be found that the options considered in other cases which have followed the *Gomm* case were similar to it in that respect. It seems to me that it is only on this basis that an option might, perhaps, be considered as analogous to an agreement for sale so as to create an interest in land.

In the case of *Manchester Ship Canal Company v. Manchester Racecourse Company*[1], the Court of Appeal had to consider a provision in an agreement between these two companies which read, in part, as follows:

3. If and whenever the lands and hereditaments belonging to the racecourse company, and now used as a racecourse, shall cease to be used as a racecourse, or should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes, then and in either of such cases the racecourse company shall give to the canal company the first refusal of the aforesaid land and hereditaments en bloc. . . .

This agreement was scheduled to an Act of Parliament, which declared it to be valid and binding upon the parties thereto.

[1] [1901] 2 Ch. 37

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The racecourse company had offered to sell the lands in question to the canal company for 350,000 pounds. At that time the racecourse company already had an offer to purchase from the Trafford Park Company, which wished to use the land for dock purposes, for 250,000 pounds. The canal company offered 200,000 pounds, which was not accepted, and the racecourse company later sold the land to the Trafford Park Company for 280,000 pounds. The latter company had knowledge of the provision in question and agreed to indemnify the racecourse company in respect of any claim under that clause.

Farwell J., at the trial[1], held that the racecourse company could not sell the racecourse without offering it to the canal company at the actual price offered by the Trafford Park Company. He held, on the authority of *London and South Western Railway Company v. Gomm,* that the right of first refusal gave the canal company an interest in the land which could be enforced by it against the Trafford Park Company.

The Court of Appeal held that the clause did not create any interest in the land in the railway company, but also held that the clause involved a negative covenant whereby the racecourse company agreed not to part with one racecourse to anyone else without giving the canal company first refusal and that consequently the clause could be enforced as against the Trafford Park Company by the canal company within the principle of *Lumley v. Wagner*[2].

London and South Western Railway Company v. Gomm was followed by Warrington J. in *Woodall v. Clifton*[3]. That was a case in which a lease of land for a term of ninety-nine years contained an option to the lessee, his heirs or assigns, to purchase the freehold at a price of 500 pounds per acre. An assignee of the lease sought to exercise the option as against the assigns of the lessor.

Warrington J. held that the option gave to the lessee an interest in land which might not vest within the period fixed by the rule against perpetuities. He held that the option was invalid on the ground of remoteness.

[1] [1900] 2 Ch. 352.
[2] (1852), 1 De G.M. & G. 604, 42 E.R. 687.
[3] [1905] 2 Ch. 257.

The Court of Appeal upheld his decision on other grounds, holding that the covenant did not come within 32 Hen. VIII, c. 34, so as to make the liability to perform it run with the reversion and that consequently the action could not be maintained against the lessor's assigns.

Warrington J. again followed *London and South Western Railway Company v. Gomm* in *Worthing Corporation v. Heather*[1]. As in the case of *Woodall v. Clifton,* this decision related to an option contained in a lease and the only material difference in the facts was that the option was given for charitable purposes. The option to purchase was held to be void for remoteness and the fact that it was for charitable purposes did not cure it because the interest of the charity did not become effective until the happening of the future event.

Although it was held that specific performance could not be granted, Warrington J. held that the plaintiff was entitled to damages for breach of contract by the defendant for failure to convey upon the exercise of the option. His reasoning on this point was stated at p. 540:

> It is not in my opinion the contract which is void because it infringes the rule against perpetuities, but it is the limitation which, by the operation of the doctrines of the Court of Equity, it is the effect of the contract to create, that is void. The contract remains a valid contract in every respect, but it is the limitation it creates in the contemplation of the Court of Equity, and it is that alone, which is void.

The *Gomm* case was considered again by Wynn-Parry J. in *Wright v. Dean*[2]. In explaining why the option under consideration by him in that case created an interest in land, he says at p. 693:

> The option confers upon its exercise a right to call for a conveyance of the freehold and, therefore, it creates an interest in land.

In *Griffith v. Pelton*[3], Jenkins L.J., at p. 533, defines what he refers to as an "option in gross" to purchase land in the following manner:

> An option in gross for the purchase of land is a conditional contract for such purchase by the grantee of the option from the grantor, which the grantee is entitled to convert into a concluded contract of purchase, and to have carried to completion by the grantor, upon giving the prescribed notice and otherwise complying with the conditions upon which the option is made exercisable in any particular case.

[1] [1906] 2 Ch. 532.
[2] [1948] Ch. 686.
[3] [1957] 3 W.L.R. 522.

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The *Gomm* case was cited with approval by Duff J. (as he then was) in his dissenting opinion in *Davidson v. Norstrant*[1].

Reference has been made to the foregoing authorities because they are of assistance in deciding the extent of the judgment of the Court of Appeal in the *Gomm* case. Is it to be considered as laying down, as a general proposition of law, that any option which relates to land of necessity vests in the optionee, forthwith upon the granting of it, an interest in land? I do not think that it does.

The word "option" is not a term of art. It does not, by itself, necessarily mean an option to purchase or to call for the whole of the interest of the person giving the option in the subject-matter. Its meaning depends upon the context. Its acceptance results in a contract, the nature of which must depend upon the terms of the offer which is made.

In each of the cases above cited in which the *Gomm* case has been followed the offer which was made for valuable consideration was to convey a title to land to the optionee forthwith upon payment of a stipulated sum of money.

The initial option given to Harquail did not, to paraphrase Wynn-Parry J. in *Wright v. Dean,* confer upon its exercise a right to Frobisher to call for a conveyance of the title to the mineral claims. For that reason, even assuming the correctness of the decision in the *Gomm* case, I do not think that Frobisher acquired, by virtue of the agreement, any property interest in the mineral claims. What it had was the right, upon payment of the $25,000 when the transfers of the mineral claims had been turned over to the Uranium City Bank of Commerce branch, to acquire an option under the terms of which, upon the payment of the option payments in accordance with the agreement, the mineral claims would, in due course, become the property of a new company to be formed, in which the prospectors would have 10 per cent. of the authorized capital stock. It was that company, not yet in existence, which the agreement contemplated as becoming the ultimate owner of the mineral claims. It was that company which could, in due course, acquire a property interest in the mineral claims, but it was not yet a legal entity and there was no certainty that it would ever exist. If the periodic payments

[1] (1921) 61 S.C.R. 493 at 509, 57 D.L.R. 377.

called for by the agreement were not made by Frobisher there would never be any occasion for it to be created. Frobisher acquired only a contractual right, by making the various stipulated payments, to see that the mineral claims were dealt with in this way. In view of this, I do not think that Frobisher could be regarded, even on the reasoning of the *Gomm,* case as having acquired an equitable property interest in the mineral claims.

There is a second ground upon which I think that the contention of Pipelines fails on this issue. To sum up that argument again, it is this: (1) Applying the rule in the *Gomm* case, Frobisher purported to acquire, by the option, an interest in the mineral claims. (2) Regulation 9(1) says that Frobisher, not having a miner's licence, shall not acquire such an interest. (3) Therefore, the contract is illegal and void.

An option for the purchase of land creates contractual rights and, if the reasoning in the *Gomm* case be accepted, its effect may be to create also a contingent limitation of land which may take effect in the future. This is what is referred to by Warrington J. in *Worthing Corporation v. Heather* in the passage from his judgment previously quoted. The point is well stated by Farwell L.J. in *South Eastern Railway v. Associated Portland Cement Manufacturers (1900), Limited*[1], where he says:

> But the fact that there is some connection with or reference to land does not make a personal contract by A. less a personal contract binding on him, with all the remedies arising thereout, unless the Court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only. As regards the original covenantor it may be both; he may have attempted both to limit the estate, which may be bad for perpetuity, and he may have entered into a personal covenant which is binding on him because the rule against perpetuities has no application to such a covenant.
>
> The real answer to the argument founded on the inconvenience of tying up land is that the action upon the covenant sounds in damages only unless the defendant has still got the land to which the covenant relates. If he has still that land, then in an action on the covenant the plaintiff may claim specific performance, and it is for the Court to see whether in such circumstances it is inequitable to grant specific performance, or whether the covenantor ought to pay damages in lieu of it. There is no defence to such an action in the present case.

[1] [1910] 1 Ch. 12 at 33.

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If the option did create an interest in the mineral claims in Frobisher, such limitation would be rendered void by regulation 9(1), as, in the *Worthing* case, the limitation was rendered void by virtue of the rule against perpetuities. However, the contractual right still remains.

In other words, Frobisher, by the effect of regulation 9(1), did not, when the option was made, have the capacity to acquire, at that time, an interest in the mining claims, but it could acquire contractual rights as against the prospectors to require that the mineral claims should be dealt with, in the future, in accordance with the terms of the agreement.

The *Quartz Mining Regulations* in question are a part of a code of rules laid down by the Government of Saskatchewan regarding the acquisition of quartz mining claims, the property of the Crown in the right of the Province of Saskatchewan. The Crown does not recognize any interest in a mining claim in anyone not possessing a miner's licence. In the case of a company, the authority to hold mining claims by transfer or assignment is acquired by the obtaining of a miner's licence as provided in regulation 8(2). It does not seem to me that these *regulations* make it illegal for a company which does not possess a miner's licence to obtain contractual rights as against persons who have acquired title to mineral claims regarding the disposition of those claims in the future. Their effect is that such a company is not recognized, in law, as having the capacity to acquire any property interest in mineral claims.

For the foregoing reasons I do not think that the agreement of June 25, 1955, was rendered void by regulations 8 and 9 of the *Quartz Mining Regulations*.

It was contended by Pipelines that specific performance of the contract could not be granted unless it did create an interest in land.

With respect to this point I agree with the proposition stated by Jenkins J. in *Hutton v. Watling*[1], that the jurisdiction to grant specific performance of a contract for the sale of land is founded, not on the equitable interest in land

[1] [1948] Ch. 26 at 36.

which the contract is regarded as conferring on the purchaser, but on the simple ground that damages will not afford an adequate remedy. Specific performance is merely an equitable mode of enforcing a personal obligation.

While specific performance is granted normally only against a party to the contract, if a stranger gets possession of the subject-matter he may be made a party to the action for specific performance of the contract on the equitable ground that his conscience is affected by the notice.

I turn now to the second point raised on this appeal; namely, as to whether a new trial should be ordered because of the refusal of the learned trial judge to permit cross-examination of Daigle and MacKinnon by counsel for Pipelines.

During the course of the cross-examination of Daigle the learned trial judge ruled that he could not be cross-examined in respect of the issues as between Frobisher and Pipelines because his interest as a defendant in Frobisher's action, as disclosed in the pleadings, was the same as that of Pipelines. This view was also adopted by Martin C.J.S. in the Court of Appeal.

I agree with the view of the majority of the Court of Appeal that permission to cross-examine should not have been refused. However, I also agree with the majority of the Court of Appeal that, applying Rule 40 of the *Court of Appeal Rules,* a new trial should not be granted because no substantial wrong or miscarriage of justice had been occasioned thereby.

The third question is in respect of the claims for damages sought to be made by Frobisher against Pipelines and by Oak and Amren against Frobisher by reason of the filing of the caveats by Pipelines and Frobisher.

These claims are based upon regulation 124 of the *Quartz Mining Regulations,* which provides as follows:

> 124. (1) Any person registering or continuing a caveat wrongfully and without reasonable cause shall make compensation to any person who has sustained damage thereby.
>
> (2) Such compensation with costs may be recovered by proceedings at law, if the caveator has withdrawn his caveat and no proceedings have been taken by the caveatee as herein provided.
>
> (3) If proceedings have been taken by the caveatee the compensation and costs shall be determined by the court and judge acting in the same proceedings.

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(4) Where compensation is determined by the court, the compensation to the claim owner and all other persons who have sustained damage by the wrongful registration or continuation of the caveat without reasonable cause shall be not less than $25.00 per claim affected thereby for every day such caveat has been so wrongfully registered or continued, to be apportioned by the court as it deems fit.

No claim can be made under this regulation unless the person claiming can establish that he has sustained damage thereby. I do not find any evidence of damage having been sustained by Frobisher by reason of the filing of the caveat by Pipelines. Any damages sustained by Frobisher resulted from the making of the agreement by the prospectors with Pipelines and the turning over of the documents relating to the mineral claims to Pipelines in breach of the prospectors' agreement with Frobisher. There was no increase in such damages because of the filing of the caveat by Pipelines and the position as between Frobisher and Pipelines was not altered by the filing of it.

No damages were sustained by Oak and Amren as a result of the filing of the Frobisher caveat.

In view of the above conclusions, it is not necessary to express any opinion as to the validity of regulation 124.

In the result, in my opinion, the appeal of Frobisher from that portion of the judgment of the Court of Appeal which directed, on terms, a new trial in respect of the issues raised as to non-compliance by Harquail and Frobisher with regulations 8(1) and 9(1) should be allowed. In all other respects, save as to costs, I think the judgment of the Court of Appeal should be affirmed. Frobisher should be entitled to its costs in this Court as well as in the Court of Appeal.

JUDSON J.:—On June 25, 1955, the appellant, Frobisher Limited, through its agent James A. Harquail, took an option to purchase certain mining claims from four prospectors. On June 29, 1955, the prospectors gave a similar option on the same claims to Canadian Pipelines and Petroleums Limited. This company not only took with notice of the first agreement but actively induced the breach of it. Frobisher, immediately after hearing of the second agreement, began this action against Canadian Pipelines, its two officers Morrisroe and Meschi, and the four prospectors, for specific performance of its agreement and an injunction

against any dealings with the claims by the defendants. The main defence was that the Frobisher agreement was made on Sunday and the greater part of the evidence was directed to this issue. The learned trial judge, on ample evidence, made a clear finding that this defence failed and that the Frobisher agreement was made on Saturday, June 25, 1955, and not on Sunday, June 26, 1955, as alleged by the defence. The Court of Appeal[1] agreed with this finding and this matter is no longer in issue.

Towards the end of what had proved to be a very long trial, the defence moved to amend by pleading regulations 8 and 9 of the Regulations made under *The Mineral Resources Act*. The learned trial judge refused leave to amend and gave judgment for the plaintiff. The Court of Appeal[1] was of the opinion, Gordon J.A. dissenting, that the amendment should have been allowed and that there should be a new trial restricted to the issue raised by the amendment. In all other respects the appeal was dismissed. Frobisher now appeals to this Court from the order of the Court of Appeal allowing the amendment and seeks the restoration of the judgment given at trial.

Briefly, the regulations provide that no mining company shall be granted a licence unless it is registered under the *Companies Act* of Saskatchewan and that no person or company, not a holder of a licence shall prospect for minerals, stake out or record any location or "acquire by transfer, assignment or otherwise howsoever, any mineral claim or any right or interest therein." The appellant now admits that its agent Harquail had no licence until July 27, 1955; that Frobisher did not register under the *Companies Act* of Saskatchewan until March 9, 1956, and that it acquired its Miner's licence on March 12, 1956. This admission is made for the purpose of avoiding a new trial on incontrovertible facts and all counsel agree that it should be regarded as evidence given before us under s. 67 of the *Supreme Court Act*. The question, therefore, is whether Frobisher or its agent acquired any "right or interest" in the claims on June 25, 1955, the date of the Frobisher agreement when neither company nor agent held

[1] (1959), 10 D.L.R. (2d) 338, 23 W.W.R. 241.

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any licence. If they did and if, in consequence, the Frobisher agreement is null and void, then, on the admissions made, the action must be dismissed.

The Frobisher agreement, signed by the four prospectors, is in the following terms:

Date—25th day of June, 1955.

AGREEMENT

We, the undersigned, the sole owners of mineral claims—EO-1 to 16 incl.

Missing Link 1 to 9 incl.

IO—1 to 12 incl.

In all 37 claims contiguous, located on or near Stewart Island, Lake Athabasca, Province of Saskatchewan, Canada—do hereby grant to James A. Harquail, Mining Engineer—Suite 2810, 25 King st. West, Toronto, Ontario—in consideration of the sum of $1.00 (one dollar), receipt of which is hereby acknowledged, an option effective to 12 noon—June 30, 1955—to purchase said mineral claims from the undersigned under the terms of the following deal:

On receiving transfers to above claims in good order—on, or as close as possible to June 30th, 1955—said transfers to be turned over to Uranium City Bank of Commerce branch at which time sum of $25,000.00 (twenty-five thousand dollars) will be issued to Mackinnon and partners. (Vendors)

New company to be formed in which vendors will receive 10% (ten percent) of authorized stock.

$25,000. Firm cash

Option Payments

1st option—Nov. 1, 1955	$ 25,000.00
2nd option—March 1, 1956	50,000.00
3rd option—November 1, 1956	50,000.00
4th option—July 1, 1957	50,000.00
	$200,000.00

The above agreement shall be binding on the executors, heirs, etc. of the people signing.

Frobisher submits that during the interval from June 25 to June 30, it acquired no interest in the claims and that the prospectors granted this period of time to Harquail to enable him to find out whether his principal would make the payment of $25,000 on June 30; that, on the other hand, the prospectors needed time to record claims E.O. 1-16 and to complete their deposit of their title papers with the bank to be delivered on payment of the $25,000; and further that the option did not begin until the $25,000

had been paid. During this five day period Frobisher says that it held no more than an option to decide whether it would take an option. It was conceded that an interest in land would arise when the payment of $25,000 was made.

I am quite unable to see any valid distinction between Frobisher's position during the five day period and what it would have been had the first $25,000 actually been paid. It was during this five day period that the prospectors repudiated their obligation to Frobisher by making the other agreement with Canadian Pipelines and refusing to deposit their title papers with the bank. Frobisher did everything that it could do in the circumstances to make the payment on June 30. What Frobisher had during the five day period was an irrevocable offer, obtained for the consideration of one dollar, which was actually paid. What it would have had on June 30 on payment of $25,000 was an irrevocable offer for the period ending November 1, 1955. The further payments provided for in the agreement would hold the offer irrevocable until the dates specified and on the making of the last payment Frobisher would be entitled to the title papers for the purpose of transfer to the new company. The position of Frobisher as the optionee under this agreement is the same throughout all its stages. It has the right to have the offer kept open on payment of the stated consideration. The payments, if completed, constitute the purchase price and all that then remains to be done is to form the new company, transfer the claims and allot to the prospectors 10 per cent. of the authorized stock.

Does an option to purchase land give rise to an equitable interest in land? The question has usually been considered in connection with conveyances and leases and the rule against perpetuities, and it has been held that the option is too remote if it can be exercised beyond the perpetuity period. The underlying theory is that the option to purchase land does create an equitable interest because it is specifically enforceable. There is a right to have the option held open and this is similar to the right that arises when a purchaser under a firm contract may call for a conveyance.

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In both cases there is an equitable interest but in the case of the option it is a contingent one, the contingency being the election to exercise the option.

In *London & South Western Railway Co. v. Gomm*[1], Kay J. held that such an interest did not arise, that an option to purchase was not within the rule against perpetuities and that a purchaser for value without notice of the option would not be bound by the covenant to re-convey. In the particular case before him, he held that the defendant Gomm had taken with notice and that he was bound in Equity by the covenant, on the principle of *Tulk v. Moxhay*[2]. The facts of the case may be stated in very simple terms for the purpose of these reasons. The Railway Company conveyed surplus lands to one Powell in fee simple and exacted a covenant that the grantee, his heirs or assigns would re-convey on payment of the consideration of £100, should the lands at any time be required for railway purposes. The Court of Appeal, reversing the judgment of Kay J., held that Gomm, the purchaser from Powell, was not bound by the covenant because it created an equitable interest in the land, which offended the rule against perpetuities. The two conflicting views of the problem are thus stated in the plainest terms in this decision. Is the matter one of contract or property? Since the decision in *Gomm,* I am unable to find in any judicial decision in England any deviation from the rule that the matter is one of a property interest and not merely of contract. Even though Kay J. in the subsequent case of *Mackenzie v. Childers*[3], expressed the opinion that the doctrine enunciated in *Gomm* was "entirely novel", judicial re-examination from time to time has resulted only in an affirmation of the rule that an option holder has an equitable interest—for example, by Warrington J. in *Woodall v. Clifton*[4], and in *Worthing v. Heather*[5], and by Jenkins L.J. in *Hutton v. Watling*[6], and in *Griffith v. Pelton*[7].

[1] (1882), 20 Ch. D. 562.
[2] (1848), 2 Ph. 774, 41 E.R. 1143.
[3] (1889), 43 Ch. D. 265 at 279.
[4] [1905] 2 Ch. 257.
[5] [1906] 2 Ch. 532.
[6] [1948] Ch. 26.
[7] (1957), 3 W.L.R. 522.

In this Court, Duff J. in *Davidson v. Norstrant*[1], in a dissenting opinion which alone referred to this matter, stated:

> It seems quite clear that the option if validly created would vest in the optionee an interest in land. The decision of the Court of Appeal in *London and Southwestern Railway Co. v. Gomm* (1882) 20 Ch. D. 562, seems to be conclusive. Each one of the three judges, Sir George Jessel, Sir James Hannen, and Lindley L.J. explicitly hold that the grant of an option has the effect of creating an interest in land and these opinions are not mere dicta; they are the foundation of a distinct ground upon which the judgment of the court was based.

Further, in *Auld v. Scales*[2], where there was option to purchase contained in a lease which, at the time of the litigation, had become one from year to year, it was held that the option did not offend the rule against perpetuities, because the lease and with it the option could be terminated at any time on proper notice. Although the decision in *Gomm* is not expressly mentioned, the judgment is based on the assumption that the option to purchase under consideration did create an interest in land.

The New Zealand Court of Appeal, in *Morland v. Hales*[3], also reached the same conclusion. An owner of land, for valuable consideration, gave an option to purchase for a period of ten days. Under the mistaken impression that the option had been abandoned by the optionee, the owner gave a similar option to a second person, and then the first optionee exercised his option by acceptance within the ten days. It was held, following the decision in *Gomm*, that the option created an interest in land and that the holder of the first option had therefore a superior equity to that of the holder of the second option.

In the present case, in view of my opinion that Frobisher's attempt to distinguish its position at the first stage of the option from the later stages fails, there is no conclusion possible other than the one that in the period June 25 to June 30 it did acquire an interest in these claims. This was also the opinion of the Court of Appeal and once they had reached this conclusion, which is really decisive of the whole case, they had no choice but to rule that the rejection of the amendment by the learned trial judge was an erroneous

[1] (1921), 61 S.C.R. 493, 57 D.L.R. 377.

[2] [1947] S.C.R. 543, 4 D.L.R. 721.

[3] (1911), 30 N.Z.L.R. 201.

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exercise of discretion. I am in respectful agreement with their order based, as it is, upon the theory that the option created an equitable interest in the claims. Gordon J.A. dissented and would have rejected the motion to amend on many grounds, all of them substantial; that it was made too late; that the point should have been raised in the statement of defence; that the litigant should be bound by his conduct of the case; and finally, that the amendment might leave the plaintiff open to a large claim for damages under regulation 124 for "wrongfully and without reasonable cause" registering a caveat against the claims. The force of most of these objections to the amendment largely disappears when one has in mind that the facts on which the application was based were not open to controversy. In the view I take of regulation 124 no claim for damages can arise in this case.

My conclusion therefore is that this option, creating as it did an equitable interest in these claims, was rendered void and of no effect because it was given and taken against the express prohibition contained in regulation 9. I reach this conclusion with regret and with knowledge that an honest bargain is being defeated on technical objections, taken late in the proceedings by defendants who, by concurrent findings of fact, have been found guilty of a conspiracy to induce a breach of contract. The appeal of Frobisher must be dismissed with costs and in view of the admission that the necessary licences were not held at the date of the taking of the option and that a new trial is unnecessary, the action must be dismissed. I would maintain the disposition of the Court of Appeal as to costs of the trial and the appeal to the Court of Appeal.

Two of the prospectors, Oak and Amren, counter-claimed against Frobisher for damages for breach of regulation 124 in connection with the registration of a caveat against the claims. Regulation 124 reads:

> 124. (1) Any person registering or continuing a caveat wrongfully and without reasonable cause shall make compensation to any person who has sustained damage thereby.
>
> (2) Such compensation with costs may be recovered by proceedings at law, if the caveator has withdrawn his caveat and no proceedings have been taken by the caveatee as herein provided.

(3) If proceedings have been taken by the caveatee the compensation and costs shall be determined by the court and judge acting in the same proceedings.

(4) Where compensation is determined by the court, the compensation to the claim owner and all other persons who have sustained damage by the wrongful registration or continuation of the caveat without reasonable cause shall be not less than $25.00 per claim affected thereby for every day such caveat has been so wrongfully registered or continued, to be apportioned by the court as it deems fit.

The learned trial judge, on proper notice to the Attorney-General held this regulation to be void as going beyond the authority contained in the statute. In the Court of Appeal only the Chief Justice dealt with this matter and he agreed with the trial judge. In this Court counsel for Oak and Amren opened the question again and argued in favour of the validity of the regulation and sought an assessment of damages. I agree with the majority in the Court of Appeal that it is unnecessary in this case to determine whether or not regulation 124 is *intra vires* because it was clearly shown that no damage arose from the registration of the caveat. The damage, if any, resulted from the litigation which followed almost inevitably when the prospectors gave two options for the same claims to competing interests. I am also of the opinion, although it is unnecessary to base my judgment on this ground, that registration of a caveat "wrongfully and without reasonable cause" means something in the nature of an officious intermeddling without any colour of right and that the regulation, if valid, has no application when there is a *bona fide* dispute.

The result is that the appeal of Frobisher and the cross-appeal of Oak and Amren are dismissed with costs. Judgment should be entered dismissing the action and the counterclaim both with costs to the plaintiff because of the shortcomings of the defendants in the conduct of their defence. The costs of the appeal to the Court of Appeal should stand as ordered by that Court. The cross-action of the two prospectors Daigle and MacKinnon against Pipelines was finally disposed of in the Court of Appeal.

Appeal and cross-appeals dismissed with costs, LOCKE *and* MARTLAND JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Davidson, Davidson & Blakeney, Regina.

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Solicitors for the defendants, Oak and Amren: Pitcher, Ehmann & Murphy, Regina.