

Three years ago, a man conveyed a tract of land to a friend for \$50,000 by a deed that provided: "By accepting this deed, [the friend] covenants for herself, her heirs and assigns, that the premises herein conveyed shall be used solely for residential purposes and, if the premises are used for nonresidential purposes, [the man], his heirs and assigns, shall have the right to repurchase the premises for the sum of one thousand dollars (\$1,000)." In order to pay the \$50,000 purchase price for land, the friend obtained a \$35,000 mortgage loan from the bank. The man had full knowledge of the mortgage transaction. The deed and mortgage were promptly and properly recorded in proper sequence. The mortgage, however, made no reference to the quoted language in the deed.

Two years ago, the friend converted her use of the land from residential to commercial without the knowledge or consent of the man or of the bank. The friend's commercial venture failed, and she defaulted on her mortgage payments to the bank. The land now has a fair market value of \$25,000.

The bank began appropriate foreclosure proceedings against the friend. The man properly intervened, tendered \$1,000, and sought judgment that the friend and the bank be ordered to convey the land to the man, free and clear of the mortgage.

The common-law Rule Against Perpetuities is unmodified by statute.

If the court rules against the man, what will be the reason?

- A. The bank had no actual knowledge of, and did not consent to, the violation of the covenant.
- B. The consideration of \$1,000 was inadequate.
- C. The provision quoted from the deed violates the Rule Against Perpetuities.
- D. The rights reserved by the man were subordinated, by necessary implication, to the rights of the bank as the lender of the purchase money.

Explanation:

The **Rule Against Perpetuities** (RAP) applies only to *contingent future interests*—ie, future interests that are held by **unknown/unborn** persons or subject to a **condition precedent**. Here, the deed conveyed the friend a present possessory interest in the tract, and the man received an **option to purchase** the premises contingent upon the friend's use of the premises for nonresidential purposes. Therefore, the man's future interest is subject to RAP.

Under the common law, RAP renders a contingent future interest **void *ab initio*** if it could **vest more than 21 years after** some relevant **life in being** at the creation of the interest. Therefore, an option to purchase is almost always void if it is **not set to terminate** within the perpetuities period. Here, the option to purchase will vest if the friend, her heirs, and assigns *ever* use the premises for nonresidential purposes. This means that the man's option to purchase violates RAP because it is possible that it could vest well after the perpetuities period.

(Choices A & D) Since a deed is recorded before a purchase-money mortgage, the mortgagee's (bank's) rights are subject to whatever rights the mortgagor (friend) holds in the land. Therefore, the bank's *mortgage* is subordinate to the man's purchase option in the deed—regardless of whether the bank had actual knowledge of or consented to its existence.

(Choice B) **Adequate consideration** exists so long as there is a bargained-for exchange of promises or performance. Since the man gave \$1,000 in exchange for the friend's promise to give the man a purchase option, his consideration was adequate.

Educational objective:

The Rule Against Perpetuities applies only to *contingent* future interests (eg, purchase options) and voids any such interest that may not vest for more than 21 years after some relevant life in being at the creation of the interest.

References

61 Am. Jur. 2d Perpetuities and Restraints on Alienation § 5 (2020) (Rule Against Perpetuities).

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Rule against perpetuities (RAP)

