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**Southeastern Pennsylvania Transportation Authority v.
Philadelphia Transportation Co.-The Rule Against Perpetuities-
Does the Rule Apply to an Option to Purchase Held by a
Municipality**

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NOTES

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY v. PHILADELPHIA TRANSPORTATION CO. THE RULE AGAINST PERPETUITIES—DOES THE RULE APPLY TO AN OPTION TO PURCHASE HELD BY A MUNICIPALITY

The Supreme Court of Pennsylvania in *Southeastern Pennsylvania Transportation Authority v. Philadelphia Transportation Co.*¹ has held that the Rule Against Perpetuities does not apply to an option held by the city of Philadelphia for the purchase of the transportation system owned and operated by PTC. The purpose of this paper is to examine this decision to determine whether the court had a sound basis for its holdings that: (1) interests held by municipalities are not subject to the Rule Against Perpetuities; (2) options to purchase property are not subject to the Rule Against Perpetuities and; (3) the Estates Act of 1947² applies to this conveyance.

PTC was formed in 1902 as the Philadelphia Rapid Transit Company (PRT) when the various private transportation companies serving the city of Philadelphia consolidated. In 1907 Philadelphia and PRT entered into an agreement which granted PRT a franchise to operate and gave the city an option to purchase the leaseholds and franchises of PRT on July 1, 1957 or any July 1 thereafter. Philadelphia did not have the power to condemn at the time of this agreement. The 1907 agreement and the option to purchase was amended in 1939 so that:

- (1) The city could purchase the entire transportation system;
- (2) The city could purchase PTC's assets free and clear of indebtedness;³
- (3) The city could exercise the option on any July 1 with six months' notice to PTC;
- (4) The formula for determining the purchase price was changed to:

1. 416 Pa. 377, 233 A.2d 15 (1967) [hereinafter cited as SEPTA v. PTC].

2. PA. STAT. ANN. tit. 20, §§ 301.1-21 (Supp. 1966).

3. There was a major controversy over this clause which will not be discussed in this paper. SEPTA v. PTC, 416 Pa. 377, 390-397, 410-417, 233 A.2d 15, 20-24, 31-35 (1967).

- a. the amount of PTC's outstanding bonds, mortgages and ground rents;
 - b. the par value of PTC's outstanding preferred stock;
 - c. \$10 per share of PTC's outstanding common stock;
 - d. the amount of PTC's then undistributed corporate surplus;
- (5) The city reserved the right of condemnation which it had gained between 1907 and 1939;
- (6) The city could assign its option to purchase.

Portions of the 1939 agreement were amended or extended by later agreements in 1950, 1957, 1962 and 1965, but these agreements did not alter the 1939 option to purchase. On June 8, 1965, the city assigned its option to the Southeastern Pennsylvania Transportation Authority (SEPTA) which attempted to exercise the option. PTC claimed that the option was void under the Rule Against Perpetuities.

The Common Pleas Court of Philadelphia County disposed of the question by holding that the Rule Against Perpetuities did not apply because it is not applicable to a municipality; because it does not apply to an option to purchase property; and because the Estates Act of 1947⁴ applied to the agreement.⁵ On appeal, the supreme court affirmed.⁶ Whether or not SEPTA could purchase PTC was not in issue, because both the city and SEPTA had the power to condemn. The question at issue was the price SEPTA would have to pay. If SEPTA used its power to condemn, it would be required to pay a reasonable price by current standards;⁷ if it could use the option to purchase, it could obtain PTC for the price derived by using the 1939 formula.

Though a majority of the supreme court stated that it was in complete agreement with the reasoning of the lower court,⁸ it rephrased that reasoning. Rather than saying that the Rule Against Perpetuities does not apply to a municipality, the supreme court stated that "[t]he historical purpose of the [R]ule [A]gainst [P]erpetuities was to destroy serious hindrances to the beneficial and prosperous use of property. . . . In this case, the danger of fettering the free use of property is outweighed by considerations of public concern and welfare."⁹ But the supreme court did not state what those considerations of public concern and welfare are. The court went on to hold that all options to purchase property are mere contract rights to which the Rule Against Perpetuities does not apply. The court cited *Philadelphia v. Philadelphia Trans-*

4. PA. STAT. ANN. tit. 20, §§ 301.1-21 (Supp. 1966).

5. See unreported [hereinafter referred to as lower court decision] decision of Common Pleas Court of Philadelphia County in Record, vol. 1, at 97a-245a, *SEPTA v. PTC*, 416 Pa. 377, 233 A.2d 15 (1967).

6. *SEPTA v. PTC*, 416 Pa. 377, 233 A.2d 15 (1967).

7. PA. STAT. ANN. tit. 26, §§ 1-201 (Supp. 1966).

8. 416 Pa. 377, 382, 233 A.2d 15, 18 (1967).

9. *Id.* at 385, 233 A.2d at 19.

portation Co.¹⁰ as holding that the option gave Philadelphia no interest in PTC's property until the option was exercised, and then held that exclusively contractual agreements are not subject to the Rule Against Perpetuities, citing *Caplan v. Pittsburgh*.¹¹ The supreme court did not alter the lower court's reasoning concerning the application of the Estates Act of 1947.¹²

In a dissenting opinion, Chief Justice Bell stated that all three reasons for not applying the Rule Against Perpetuities expressed by the lower court were incorrect.¹³ According to the Chief Justice,¹⁴ exempting municipalities from the Rule Against Perpetuities was against established policy and unsupported by authority. Furthermore, an option to purchase land fettered the alienation of that land and therefore any such options should be subject to the Rule Against Perpetuities.¹⁵ Finally, he felt that the Estates Act of 1947 was not applicable because no agreement after 1939 could alter the option to purchase.¹⁶

The issue as to the applicability of the Estates Act of 1947 is of little importance and can be dealt with briefly. The Act applies to all conveyances which took place after January 1, 1948.¹⁷ A conveyance is an agreement which creates an interest in property.¹⁸ From this the lower court and majority of the supreme court reasoned that the agreements between the city and PTC after the 1939 agreement brought the option to purchase under the Estates Act.¹⁹ This reasoning appears flawed in that none of these later agreements created any new interest in property, but rather extended the option as it was created in 1939, an extension which was unnecessary because the original option had no time limit.²⁰ In *Husted Estate*²¹ the court said that a pre-1948 trust which was completely revised after 1948 qualified as a post-1948 conveyance

10. 386 Pa. 231, 126 A.2d 132 (1956).

11. 375 Pa. 268, 100 A.2d 380 (1953).

12. PA. STAT. ANN. tit. 20, §§ 301.1-21 (Supp. 1966).

13. 416 Pa. at 397-407, 233 A.2d at 24-29.

14. 426 Pa. at 405, 233 A.2d at 28.

15. 426 Pa. at 403, 233 A.2d at 27-28.

16. 426 Pa. at 404, 233 A.2d at 28.

17. PA. STAT. ANN. tit. 20, § 301.21 (Supp. 1966); PA. STAT. ANN. tit. 20, § 301.4(b) (Supp. 1966). (b) Void interest-exceptions. Upon the expiration of the period allowed by the common law [R]ule [A]gainst [P]erpetuities as measured by actual rather than possible events any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void.

18. PA. STAT. ANN. tit. 20, § 301.1(2) (Supp. 1966).

§ 301.1 Definitions

(2) "Conveyance" means an act by which it is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation.

19. 426 Pa. at 385-386, 233 A.2d at 20.

20. See agreements between PTC and Philadelphia in Record, vol. 1, at 30a-71a; *SEPTA v. PTC*, 426 Pa. 377, 233 A.2d 15 (1967).

21. 403 Pa. 185, 169 A.2d 57 (1961).

when the revision affected both the corpus and distribution.²² This would not seem to be precedent for holding that a 1939 option to purchase property which has remained unchanged should qualify as a post-1948 conveyance. The fact that the price to be paid by SEPTA for PTC in 1964 was based on the 1939 formula²³ indicates that later agreements did not change the nature of the 1939 option and no new interest had been created which would place the option under the Estates Act of 1947. Thus the Estates Act should not be considered a bar to the application of the Rule Against Perpetuities.

The more important issues are whether the supreme court intended to affirm the lower court holding that a municipality is not subject to the Rule Against Perpetuities, and whether an option to purchase property is an agreement not subject to the Rule. Even though the supreme court did not choose to restate the lower court's reasoning on these two points, it said:

The lower court's opinion, we believe, sets forth a comprehensive well-reasoned analysis of the problems involved and proposes, in every instance, a solution which this court deems fair and proper. Accordingly, we recommend to the interested reader that he closely study that opinion, for we intend here only to highlight the matters of importance.²⁴

This statement indicates that the supreme court intended to support the lower court on these two points. This would put *SEPTA v. PTC* partially in conflict with *Barton v. Thaw*,²⁵ which both the supreme court and lower court relied upon in their decisions.²⁶

Barton involved an option which read: "[S]hould the parties of the second part at any future time whatsoever desire to purchase any of said land in fee simple, then said parties of the first

22. In the words of the court:

Each time the settlor executed an amendment or supplement after 1947 to his 1940 trust indenture, (a) the scheme of distribution as to the named beneficiaries was changed and (b) the amount or interest given to each beneficiary was substantially changed and (c) *the settlor completely restated the entire dispositive provisions*, so that each amendment or supplement constituted a new and complete disposition of the trust assets. Moreover, while the settlor did not state in each or any supplement that the dispositive provisions of the original trust deed were revoked, that was clearly his intent, and the necessary, actual and legal effect of each succeeding supplement was to revoke the dispositive provisions of the prior supplement and create at that time new dispositive interests or gifts.

We therefore hold that the amendments of 1951 and 1956 were clearly "conveyances of assets" within both the language and spirit of the Estates Act of 1947

403 Pa. at 192, 169 A.2d at 61.

23. *SEPTA v. PTC*, 426 Pa. 377, 387-395, 233 A.2d 15, 20-24 (1967).

24. 426 Pa. at 382, 233 A.2d at 18.

25. 246 Pa. 268, 92 A. 312 (1914).

26. *SEPTA v. PTC*, 426 Pa. 377, 385, 233 A.2d 15, 19 (1967). See unreported lower court decision in Record, vol. 1, at 97a, 168a, *SEPTA v. PTC*, 426 Pa. 377, 233 A.2d 15 (1967).

part . . . covenant and agree to sell . . . at a price not exceeding \$100 per acre."²⁷ There was no limit on the option as to time; all or any part of the land subject to the option could be purchased, and the price was predetermined. Though the option was recognized as a contract right, the supreme court felt that it was a very definite restriction on alienation and that the Rule Against Perpetuities should be applied.²⁸ PTC cited *Barton* to support its argument that the Rule Against Perpetuities should have been applied to the option. But the supreme court said that *Barton* did not apply for policy reasons without explaining what reasons they had in mind.²⁹ The lower court stated that "*Barton v. Thaw* is unquestionably good law."³⁰ Yet both the lower court and the majority of the supreme court found that the Rule Against Perpetuities does not apply to options to purchase property despite the fact that *Barton* is still controlling law in Pennsylvania.³¹ The lower court relied heavily on the dissenting opinion in *Philadelphia v. Philadelphia Transportation Co.*³² In that dissent, Chief Justice Bell had stated, "[p]rior to any exercise of the option by the City, the optionee has no interest, legal or equitable, in or to the property subject to the option. . . ."³³ It is, I believe, clear that the City's *unexercised option of purchase gives the city no interest in the Company's properties. . . .*³⁴ *Philadelphia v. Philadelphia Transportation Co.* did not deal with the validity of the agreement under the Rule Against Perpetuities, but whether PTC could pay its stockholders a dividend over the city's objection. A majority of that court held that the city's interest in PTC through the option was sufficient to prevent the payment of the dividend.³⁵ Clearly,

27. 246 Pa. at 364, 92 A. at 316.

28. The court stated:

By its terms the option may be accepted at any time "before the sun grows cold, and the stars are old, and the leaves of the judgment book unfold." The time is limited only by the confines of eternity. We cannot conceive of a more violent breach of the [R]ule [A]gainst [P]erpetuities. Such an impress on land ought not to be sustained, and it cannot be. It isolates property. It takes it out of commerce. It remove[s] it from the market. It halts improvements.

246 Pa. at 363-64, 92 A. at 316. See *Morgan v. Griffith Realty Co.*, 192 F.2d 599 (10th Cir. 1951); *Middleton v. Western Coal and Mining Co.*, 241 F. Supp. 418 (W.D. Ark. 1965); *Lilley's Estate*, 272 Pa. 143, 116 A. 392 (1922); *Mumma v. Hinkle*, 20 D. & C.2d 621 (1958).

29. 426 Pa. at 385, 233 A.2d at 19.

30. See unreported lower court decision in Record, vol. 1, 97a, 168a, SEPTA v. PTC, 426 Pa. 377, 233 A.2d 15 (1967).

31. *Id.*

32. 386 Pa. 231, 126 A.2d 132 (1956).

33. 386 Pa. at 245, 126 A.2d at 138.

34. 386 Pa. at 247, 126 A.2d at 139.

35. The court said:

[M]ost important of all on this question [whether or not Philadelphia can keep PTC from paying a dividend to its stockholders] is the provision of the agreement between the City and the Company which gives the City the right to purchase all the

the basis for not applying the Rule Against Perpetuities to the option in *SEPTA v. PTC* was that an option to purchase property is not an interest in property until exercised, which makes the unexercised option a contract right to which the Rule Against Perpetuities does not apply. However, there are two lines of authority on this question.

The majority rule is that an option to purchase land is merely a contract right until exercised; however, when it is exercised the option becomes a vested interest in the land. Thus, an unexercised option to purchase is considered an interest in land contingent upon its exercise and is controlled by the Rule Against Perpetuities.³⁶ In *Middleton v. Western Coal and Mining Co.*³⁷ it was held that a mining company's option to purchase land at any time within sixty years for an agreed upon price was void under the Rule Against Perpetuities.

An interest in the surface in fee in the nature of an option or an election which grants a contingent interest, the exercise of which depends upon the discretion of the grantee and its successors or assigns and without any limitation as to time, unduly encumbers the alienation of the estate.³⁸

In *Morgan v. Griffith Realty Co.*³⁹ the court decided that an option to purchase land if a building was not constructed on it was void because of the Rule Against Perpetuities.

[T]he option, if exercised, will give the grantee of the option a right to regain title to the land at a fixed price This is an interest in land with the contingency that the option be exercised and, since no time limit is placed upon the contingency, the [R]ule [A]gainst [P]erpetuities applies and makes the option void.⁴⁰

Both *Middleton* and *Morgan* emphasized the fact that the unexercised option is merely a contract right, but since the exercised option would create a vested interest, both courts felt that the Rule

Company's property. . . . Thus it will be seen that an illegal disposal of any part of the Company's property, which includes, of course, its cash assets, would correspondingly diminish the value of the property at the time when the option might be exercised. . . . The Company contends that the City, as optionee, has no legal or equitable interest in the company's *property as such*, but it certainly does have an interest *in its right under the agreement to exercise its option* according to the terms and at the price therein provided and without any intervening impairment, if illegal, of the value of the property which is the subject of the option.

366 Pa. at 238-239, 126 A.2d at 135.

36. *Winsor v. Mills*, 157 Mass. 362, 32 N.E. 352 (1892); *Lilley's Estate*, 272 Pa. 143, 116 A. 392 (1922); *Barton v. Thaw*, 246 Pa. 348, 92 A. 312 (1914); *Mumma v. Hinkle*, 20 D. & C.2d 621 (1958); *Starcher v. Duty*, 61 W. Va. 373, 56 S.E. 524 (1965).

37. 241 F. Supp. 407 (W.D. Ark. 1965).

38. 241 F. Supp. at 417-418.

39. 192 F.2d 597 (10th Cir. 1951).

40. 192 F.2d at 600.

Against Perpetuities should be applied to protect the alienability of the land.⁴¹

A minority of cases have agreed that an option to purchase land is a contract right, but have refused to consider this right a contingent interest in land.⁴² Perhaps the best statement of this view appears in *Todd v. Citizens Gas Co.*⁴³ where the court said:

But the rule [the Rule Against Perpetuities] may not be invoked even on appellant's theory that the rights of the city amounted to nothing more than an option to be exercised at any time within twenty-five years. The [R]ule [A]gainst [P]erpetuities concerns rights of property. By the great weight of authority, a mere option to purchase land does not vest the holder of an option with any interest, legal or equitable.⁴⁴

The Supreme Court of Pennsylvania supported the majority view in *Barton v. Thaw* and the minority view in *Caplan v. Pittsburgh*⁴⁵ and both views are presently part of Pennsylvania case law. *Caplan*, which did not deal with an option to purchase, held that a contract right, which if enforced would create a vested interest in land, was not controlled by the Rule Against Perpetuities.⁴⁶ A property owner had contracted away his right to sue for damages if the city decided to widen the street and condemn part of his property at any time in the future. This was definitely a contract right which would restrict the alienability of the land, but the court stated that the Rule Against Perpetuities did not apply.⁴⁷ *Caplan* has yet to be cited for its holding on this issue in any case other than *SEPTA v. PTC*. *SEPTA v. PTC* then is directly in line with *Caplan* and the minority rule in holding that the Rule Against Perpetuities does not apply to an option to purchase property and yet it appears that the court did not intend to reverse *Barton*.

41. *Supra* notes 38 and 40.

42. *Todd v. Citizens Gas Co.*, 46 F.2d 855 (7th Cir. 1931). See *Richardson v. Hardwick*, 106 U.S. 252 (1868); *Keog v. Peck*, 316 Ill. 318, 147 N.E. 266 (1925); *Thacher v. Weston*, 197 Mass. 143, 83 N.E. 360 (1908). See also *Caplan v. Pittsburgh*, 375 Pa. 268, 100 A.2d 380 (1953).

43. 46 F.2d 855 (7th Cir. 1931).

44. 46 F.2d at 866. Though the *Todd* court states that its view is supported by "the great weight of authority," this view is not supported by case law. See note 36 *supra*.

45. 375 Pa. 268, 100 A.2d 380 (1953).

46. The court said:

The contract—for that is what the covenant is—provides that when the city widened the street through *eminent domain proceedings* and took the designated portion of the land, the grantee promised not to sue for damages and therefore waived same. This constituted an effective *release*. Such a proceeding created no interest *in future*, but *presently released* all future damages. The grantee made this covenant not only for himself but for "his successors" as well.

375 Pa. at 274, 100 A.2d at 384 (emphasis added).

47. *Id.*

A possible reason for the apparent conflict may rest in distinguishing features of the cases. Both *Caplan* and *SEPTA* involve a municipality as a party while in *Barton* both parties were private individuals. This leads to the apparently unsettled question of whether or not the Rule Against Perpetuities can be applied to a municipality. No Pennsylvania case other than *SEPTA v. PTC* has dealt with this issue. The only case which holds directly on this question in a foreign jurisdiction is *Schonthal v. Village of Sylvania*⁴⁸ which stated flatly that, "[c]ertainly no [R]ule [A]gainst [P]erpetuities could ever be intended to apply to municipal corporations. On the contrary, they are designed and intended to be perpetual."⁴⁹ The *Schonthal* court, however, gives no further explanation for this statement.

This issue is also discussed briefly in a California case. *Haggerty v. Oakland*⁵⁰ did not hold on the question of whether or not the Rule Against Perpetuities applied to a municipality but simply applied the Rule against the city. Oakland held a lease on property owned by a private individual which was to run for ten years after the completion of construction of the building which was to be subject to the lease. The court held that since there was a possibility the lease would run longer than twenty-one years from the date of its creation, it was void.⁵¹ Obviously this court was not following a doctrine which exempted municipalities from the Rule Against Perpetuities. *SEPTA v. PTC* is supported by an article written by an eminent property law expert, W. Barton Leach, who criticized the *Haggerty* case:

The Rule Against Perpetuities is a device for protecting the public interest against private settlements which unduly tie up the basic resources of the community. But in this case the city is the public. It is at least arguable that the Rule should not apply at all to dispositions made by duly constituted public bodies. The judge-made Rule was never conceived as a limitation upon the sovereign, and the California constitution, incorporating the common-law Rule, should not be construed as a limitation on action by the state or any of its subdivisions.⁵²

48. 60 Ohio App. 407, 21 N.E.2d 1008 (1938).

49. *Id.* at 415, 21 N.E.2d at 1012.

50. 161 Cal. App. 2d 407, 326 P.2d 957 (1958).

51. The court said:

The courts are not permitted to relax the [R]ule [A]gainst [P]erpetuities. The people have spoken by adopting the constitutional provision, and the Legislature has reaffirmed that position as late as 1951. The [R]ule itself contains no exceptions, and the courts should not create them. . . . Once an exception is created to the application of the [R]ule . . . no one can foretell where it may lead, or how it may be abused.

Id. at 417, 326 P.2d at 966.

52. Leach, *Perpetuities: New Absurdity, Judicial and Statutory Correctives*, 73 HARV. L. REV. 1318, 1321 (1960).

Haggerty was also disapproved in *Wong v. Di Grazia*, 60 Cal. App. 2d

The only authority offered by Leach for this statement is his own eminence in the field of property law. His rationale is similar to the rationale of the *SEPTA v. PTC*. There the court said that since a municipality represents the people, the Rule Against Perpetuities, devised to protect the public from the fettering of alienation of property, would not be serving its purpose if used to destroy unlimited contingent interests held by a municipality.⁵³

Another aspect of the reasoning used in *SEPTA v. PTC* is illustrated where the lower court says "to extend it [the rationale of *Barton v. Thaw*] to the present case would permit PTC to repudiate its most solemn agreements, from which it has greatly benefited, and would do the public, as represented by the City, a great injustice. In Professor Leach's acid phrase, such a result would be an absurdity."⁵⁴ This indicates that the court feels the right of freedom of contract is more important than the policies underlying the Rule Against Perpetuities. This does not support the theory that municipalities are exempt from the Rule, since the importance of freedom of contract is as valid a policy where pri-

525, 386 P.2d 817 (1963). As in *Haggerty* there was a ten year lease to begin upon the completion of construction. Neither party in *Wong* represented a municipality and no direct mention of whether or not the Rule Against Perpetuities could be used against a municipality was made. *Wong* attacked *Haggerty* on the grounds that since the lease was only for ten years, eleven years were left for completion of construction and there was little danger of the Rule being violated. *Wong* held that the lease should not be voided by the Rule when there was only a remote possibility that the twenty-one year period would be violated.

The court said:

Although the courts, at times, have been relentless in their application of the [R]ule [A]gainst [P]erpetuities, they have seldom carried relentlessness to such extremes. Both the California cases and those of a majority of other states, hold that a document should be interpreted if feasible to avoid the conclusion that it violates the [R]ule [A]gainst [P]erpetuities.

60 Cal. App. 2d at 535, 386 P.2d at 827. The court stated that the Rule should not be applied strictly, but that it should be applied in such a way as to facilitate modern commercial transactions. In the words of the court:

Certainly our function is not to interpret the [R]ule so as to create commercial anomalies. A lease to commence upon completion of the leased building is a common business arrangement. . . . [T]he parties to such transactions do not suspect that the [R]ule will be extended to invalidate their agreements. . . . Surely the courts do not seek to invalidate bona fide transactions by the imported application of esoteric legalisms. Our task is not to block the business pathway but to clear it, defining it by guideposts that are reasonably to be expected. . . . We therefore do not propose to apply the [R]ule in the rigid or remorseless manner characterized by some past decisions; instead we shall seek to interpret it reasonably, in the light of its objectives and the economic conditions of modern society.

Id. at 531, 386 P.2d at 823.

53. See unreported lower court decision in Record, vol. 1, at 97a, 164a, *SEPTA v. PTC*, 426 Pa. 377, 233 A.2d 15 (1967).

54. See lower court decision in Record at 97a, 168a, *SEPTA v. PTC*, 426 Pa. 377, 233 A.2d 15 (1967).

vate parties are involved as where a governmental unit is concerned.

This view, however, does illustrate another distinction between *SEPTA v. PTC* and *Barton v. Thaw*. *Barton* was concerned with one piece of property and one contract and might be said to have been an agreement mainly concerned with property rights. *SEPTA v. PTC* involved a complicated series of contracts in which the main concern was the operation and control of the transportation system of the city of Philadelphia, in effect a primarily contractual agreement. This rationale, however, does not explain away *Caplan v. Pittsburgh* where there was only one contract and one piece of land involved.

Another argument for exempting municipalities from the Rule Against Perpetuities can be found in *Merritt-Chapman & Scott Corp. v. Public Utility Dist. No. 2*⁵⁵ and *Todd v. Citizens Gas Co.*⁵⁶ In *Merritt* a bond issue had been sold to establish a fund to finance the construction of a dam. The court found that the money in the fund was held in trust for the government for the completion of the dam. Plaintiff claimed that these trusts failed because they violated the Rule Against Perpetuities. The court stated: "This rule [the Rule Against Perpetuities] does not apply to these trusts, because they are classified within the category of trusts for a Governmental or Municipal Purpose."⁵⁷ The court relied upon Austin Scott's treatise⁵⁸ which states that a trust held for the government or municipality is a charitable trust⁵⁹ to which the Rule Against Perpetuities did not apply.⁶⁰

Todd is directly in line with *Merritt* holding that a trust established for a municipality is a charitable trust.⁶¹ In *Todd* the city had appointed a board of trustees to establish a utility corporation. The stockholders of the corporation were to receive a fixed return for their investments; if at the end of twenty-five years the stockholders had not received this return the city had an option to acquire the corporation's assets by paying the balance due to the stockholders. The court refused to apply the Rule Against Perpetuities to the city's option, holding that this was a charitable trust to which the Rule did not apply.⁶² Although no trust is involved, the facts in *SEPTA v. PTC* are similar to *Todd*. Phil-

55. 237 F. Supp. 985 (S.D.N.Y. 1965).

56. 46 F.2d 855 (7th Cir. 1931).

57. 237 F. Supp. at 994.

58. A. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS § 373 (1960).

59. IV A. SCOTT, THE LAW OF TRUSTS § 373 (2d ed. 1956); Government or Municipal Purpose

A trust for the erection or construction of public works is charitable. . . . It has been held that a trust for the purpose of supplying the community with these or other facilities, which are usually supplied at the expense of the taxpayers, is charitable. . . .

60. J. GRAY, THE RULE AGAINST PERPETUITIES § 589-628 (4th ed. 1942).

61. 46 F.2d at 866.

62. *Id.*

adelphia had a very substantial interest in PTC.⁶³ By the 1939 agreement between the city and PTC, the Mayor of Philadelphia, *ex officio*, and four members appointed by the City Council were to sit on PTC's Board of Directors as full voting members;⁶⁴ City Council reserved the power to approve or disapprove any addition or extension of property or equipment PTC wished to make,⁶⁵ the city had the power to limit PTC's indebtedness, stock issue, and dividend payment,⁶⁶ as well as the power to approve any transfer.⁶⁷ Though PTC was not controlled by a board of trustees and though PTC received no money for operation from a specific fund established by the city, PTC was substantially controlled by the city. The *SEPTA* court could have utilized the same rationale as was used in *Todd and Merritt*, but instead they merely stated the effect of such a rationale; a municipality is exempt from the application of the Rule Against Perpetuities.

A closer look indicates that exempting municipalities from the Rule might do more damage than good to the public interest. The rationale behind the Rule Against Perpetuities, is stated in *Barton v. Thaw*:

Such an impress on land [as an unlimited contingent interest] ought not to be sustained, and it cannot be. It isolates the property. It takes it out of commerce. It remove[s] it from the market. It halts improvements. It prevents the land from answering to the needs of growing communities. . . . The entire community is interested. The welfare of the public is at stake. It is contrary to the well settled public policy of the state that such an option or right to purchase land should be held to be good. It was for the express purpose of destroying such serious hindrances to material and against social property and progress that the [R]ule [A]gainst [P]erpetuities was brought forth.⁶⁸

Thus, an agreement that isolates property, keeps it out of commerce or hinders its development violates the policy of the Rule as stated in *Barton*; and yet the exemption of municipalities from the Rule does just that in *SEPTA*. Under the 1939 agreement, the city's power to control the disposition of PTC's property⁶⁹ is a limitation which isolates that property from the stream of commerce. The option to purchase is an impress upon the property,⁷⁰ which hinders any development of it.

63. *Supra* note 35.

64. See agreements between Philadelphia and PTC in Records at 16a, 21a. *SEPTA v. PTC*, 426 Pa. 377, 233 A.2d 15 (1967).

65. *Id.* at 19a.

66. *Id.*

67. *Id.*

68. 246 Pa. 348, 364, 92 A. 312, 316 (1914).

69. See agreements between Philadelphia and PTC in Record at 16a, 19a-21a. *SEPTA v. PTC*, 426 Pa. 377, 233 A.2d 15 (1967).

70. *Philadelphia v. Philadelphia Transportation Co.*, 386 Pa. 231, 126 A.2d 132 (1956).

But more dangerous to the public interest than either of these factors is that portion of the agreement which establishes the consideration to be paid if the option is exercised. Part of the formula for determining the consideration is based on a valuation of the common stock:⁷¹ to hold a company to such an agreement for a long time is almost to insure that eventually, the price to be paid will be irrelevant to the actual value of the property. When this point is reached it is possible that a company, operating under the threat of being forced at any time to sell its capital assets at less than book value, will strain to keep the value of these assets at a minimum. The net effect, especially in the case of a utility, is that the public is forced to rely on an organization which makes no capital improvements, and which consequently provides poor service. The legislature's opinion on this matter is represented by its insistence that local governments pay a reasonable market value when exercising the power of eminent domain.

CONCLUSION

The rationale of *SEPTA v. PTC* that the Estates Act of 1947 applies to the option to purchase in the 1939 agreement is faulty because there was no conveyance between the city and PTC following the effective date of the Estates Act.

Though the lower court stated that the Rule Against Perpetuities did not apply to an option to purchase property, other language indicates that the holding of *SEPTA* applied only to the particular option between the city and PTC. *SEPTA* was not intended to overrule *Barton v. Thaw*. *SEPTA* held the Rule Against Perpetuities should not be applied to this particular option because one of the parties to the agreement was a municipality which represented the public. Cases exempting municipalities from the Rule have been based on the rationale that the Rule was designed to protect the public from the fettering of alienation of property, and since a municipality represents the interests of the public, no harm will be done if municipalities are exempted from the Rule. The effect of such reasoning could, however, be quite damaging to the public interest by hindering the improvement of the property of any company involved in such an agreement with a municipality. A study of the reasoning in *SEPTA* indicates that the court's rationale does not support the court's holding. The strongest argument for the support of the *SEPTA* holding is that the court looked at this particular situation, balanced the contractual interests against the property interests in the agreement between PTC and the city, and determined that the right of freedom of contract outweighed the argument for application of the Rule Against Perpetuities in this case.

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71. See agreements between Philadelphia and PTC in Record at 16a, 26a. *SEPTA v. PTC*, 426 Pa. 377, 233 A.2d 156 (1967).