of Review to proceed in conformity with this judgment. The respondent to pay the appellant its costs of the special case and of this appeal.

Solicitors for the appellant, *J. F. Fitzgerald & Walsh.*

Solicitors for the respondent, *H. J. Henchman*, Crown Solicitor for Queensland.

J. L. W.

[HIGH COURT OF AUSTRALIA.]

CARTER . . . . . APPELLANT;
DEFENDANT,

AND

HYDE AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract—Option to purchase—Consideration paid for option—Death of person to whom option given—Exercise of option by personal representative—Specific performance—Unconditional acceptance—Laches.

The defendant, who was in occupation of a hotel under an agreement with the owner for a lease of it for five years, signed a document by which, in consideration of £1 paid to him by the owner, he placed under offer to the owner the lease, licence, furniture and goodwill of the hotel for a certain sum, and agreed that this offer should not be revoked by him for a period of three months. Before the three months had expired the owner died without having executed any lease of the hotel to the defendant and without having accepted the offer.

Held, that upon the acceptance in writing of the offer within the three months by the personal representatives of the owner there was a valid contract for sale, specific performance of which could be enforced by the personal representatives.

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In the letter by which the personal representatives purported to accept the offer, it was described as an option to sell the lease, licence, goodwill and furniture "as per inventory dated" the date of the letter.

Held, that the reference to the inventory did not make the acceptance conditional.

Held, also, that a delay of about eight months after the acceptance of the offer before the personal representatives brought their action was not in the circumstances of the case laches on their part.

Decision of the Supreme Court of New South Wales (*Owen* J.): *Hyde* v. *Carter*, (1922) 23 S.R. (N.S.W.), 125, affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court of New South Wales in its equitable jurisdiction by Susan Letitia Hyde and Violet May Delaney against William Carter in which, by their statement of claim, the plaintiffs alleged that on 1st February 1921 the defendant was in possession of the Lord Cardigan Hotel at Newcastle and was the licensee thereof and claimed to be entitled to a lease thereof for five years under an agreement of 13th May 1920 from George Hyde, who was then the owner of the hotel; that, by a memorandum dated 1st February 1921 and signed by the defendant, the defendant in consideration of £1 paid to him by George Hyde placed under offer to George Hyde the lease, licence, furniture and goodwill of the hotel for the sum of £1,500, and further agreed that such offer should not be revoked for a period of three calendar months, and it was thereby agreed that any money spent by the defendant in repairs to the buildings during that period should be refunded by George Hyde; that George Hyde died on 15th March 1921; that on 22nd April 1921 the plaintiffs, who were the executrices of the will of George Hyde, by notice in writing given to the defendant duly exercised the option; that the defendant, although frequently requested to complete the contract thereby created, refused to do so; and that the plaintiffs had always been and were ready and willing to perform the contract so far as it remained to be performed on their part. The plaintiffs claimed specific performance of the contract. The defendant, by counterclaim, claimed specific performance of the agreement for a lease of 13th May 1920.

The action was heard by *Owen* J., who made a decree declaring

that the contract constituted by the option of 1st February 1921 and the acceptance thereof of 22nd April 1921 ought to be, and ordering that it should be, performed, and dismissed the counter-claim: *Hyde* v. *Carter* (1).

From that decision the defendant now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Flannery K.C. (with him *Davidson*), for the appellant. Having regard to the circumstances and to the terms of the option, it was not one which could be exercised by the respondents: it lapsed on the death of George Hyde. An offer without consideration cannot be accepted after the death of either offeror or offeree. An offer with consideration with regard to land cannot be exercised by the offeree after the death of the offeror, except where the right to enforce it passes as an incident of something which passes by demise—for example, an option of purchase included in a lease. [Counsel referred to *Goldsbrough, Mort & Co.* v. *Quinn* (2); *Reynolds* v. *Atherton* (3); *London and South-Western Railway Co.* v. *Gomm* (4); *Woodall* v. *Clifton* (5).]

[KNOX C.J. referred to *Birmingham Canal Co.* v. *Cartwright* (6).

[ISAACS J. referred to *In re Adams and Kensington Vestry* (7); *Hyde* v. *Skinner* (8); *In re Cousins*; *Alexander* v. *Cross* (9); *Woods* v. *Hyde* (10); *Goffin* v. *Houlder* (11).

[HIGGINS J. referred to *Wheatley* v. *Lane* (12).]

What is said to be an acceptance of the offer was not an acceptance but was a new offer. If there had been a simple acceptance there would have been room for dispute as to what was included in the word "furniture," but the introduction of the words "as per inventory dated 22nd April 1921" had the effect of fixing the meaning of furniture. It is a conditional acceptance (see *Crossley* v. *Maycock* (13); *Jones* v. *Daniel* (14)). The respondents have allowed a longer period of time to expire before bringing their action than

(1) (1922) 23 S.R. (N.S.W.), 125.
(2) (1910) 10 C.L.R., 674.
(3) (1921) 125 L.T., 690.
(4) (1882) 20 Ch. D., 562.
(5) (1905) 2 Ch., 257.
(6) (1879) 11 Ch. D., 421.
(7) (1884) 27 Ch. D., 394, at p. 402.
(8) (1723) 2 P. Wms., 196.
(9) (1885) 30 Ch. D., 203.
(10) (1862) 31 L.J. Ch., 295.
(11) (1920) 90 L.J. Ch., 488.
(12) (1669) 1 Wms. Saund., 216a (n. 1).
(13) (1874) L.R. 18 Eq., 180.
(14) (1894) 2 Ch., 332.

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was reasonable, and that is evidence of laches which operates as an assent to the contract not being proceeded with (*Huxham* v. *Llewellyn* (1)).

Innes K.C. (with him *Bonney*), for the respondents. As to the question of laches, there has been no such unreasonable delay as to raise a presumption of waiver or as would put the appellant in such a position as would make it unjust to enforce the contract. [Counsel was stopped on this point.] The acceptance of the offer was unconditional. The words relating to the inventory are not contractual, but they merely identify what was sold (*Gibbins* v. *North-Eastern Metropolitan Asylum District Board of Management* (2); *Harris's Case* (3); *English and Foreign Credit Co.* v. *Arduin* (4)). [Counsel was stopped on this point.] The option was exercisable by the respondents. An option for value to purchase land may be described as a contract for sale of land upon a condition subsequent, as in *Goldsbrough, Mort & Co.* v. *Quinn* (5) and *Bradbury* v. *Grimble & Co.* (6). It may also be described as a sale for a particular sum of a right to call for a conveyance during a certain period for a price stated. Or it may be described as an irrevocable offer which creates an equitable interest in land. In any case it is a proprietary right which prima facie devolves on the personal representatives. The only difference between an option for value and a bare offer is that the latter may be withdrawn (see *Lawes* v. *Bennett* (7); *Nicol* v. *Chant* (8); *Weeding* v. *Weeding* (9)). There is nothing in this transaction to show that the exercise of the option was intended to be personal. The mere fact that it was an option is not sufficient to raise the presumption that it was so intended, for there are a number of cases in which an option has been permitted to be exercised after the death of one of the parties (*Williams on Vendor and Purchaser*, 3rd ed., vol. I., p. 358). [Counsel also referred to *Reynolds* v. *Atherton* (10); *Galton* v. *Emuss* (11).]

Flannery K.C., in reply.

Cur. adv. vult.

(1) (1873) 21 W.R., 570, 766.
(2) (1847) 11 Beav., 1.
(3) (1872) L.R. 7 Ch., 587, at p. 593.
(4) (1870-71) L.R. 5 H.L., 64.
(5) (1910) 10 C.L.R., 674.
(6) (1920) 2 Ch., 548, at p. 551.
(7) (1785) 1 Cox, 167.
(8) (1909) 7 C.L.R., 569.
(9) (1861) 1 J. & H., 424.
(10) (1922) 127 L.T., 189, at p. 191.
(11) (1844) 1 Coll., 243.

The following written judgments were delivered :—

KNOX C.J. On 1st February 1921 the appellant, in consideration of £1 paid to him by George Hyde, signed a document in the following words, namely :—" In consideration of £1 paid to me by Mr. George Hyde I hereby place under offer to him the lease licence furniture and goodwill of hotel premises known as the Lord Cardigan Hotel for the sum of £1,500. And I further agree that this offer shall not be revoked by me for a period of three calendar months from this date. Also any money spent by me in repairs to building during above period to be refunded.—Dated this first day of February 1921. —(Signed) W. Carter.—(Witness) B. M. Platt." At this time the appellant was in occupation of the hotel under an agreement with George Hyde, dated 13th May 1920, for a lease for five years. George Hyde died on 15th March 1921 without having executed any lease of the hotel to the appellant and without having accepted this offer. The respondents, who are executrices of his will, on 22nd April 1921 caused to be delivered to the appellant a letter signed by them which is in the words following, namely :—" 22nd April 1921.— Dear Sir,—In reference to the option dated 1st February 1921 given by you to the late George Hyde to sell to him the lease licence goodwill and furniture as per inventory dated the 22nd day of April 1921 of the Lord Cardigan Hotel, Darby Street, Newcastle, for the sum of £1,500, we the undersigned being the executrices appointed under the will of the late George Hyde do hereby accept such option to purchase and will pay to you the sum of £1,500 on transfer to our nominee of the whole of the above specified items. We will arrange to have the transfer put through immediately we obtain a tenant for the hotel.—Yours faithfully, S. L. Hyde, V. M. Delaney— Executrices under the will of the late George Hyde." On the same day the persons who delivered this letter took an inventory of the furniture, &c., in the hotel in the presence of the appellant, who objected that certain articles were not included in the option and ought not to be put in the inventory, and subsequently refused to sign the inventory because a cash register, which was in the bar, was included in it. The option expired on 1st May 1921, and on 2nd May the appellant's solicitor wrote to the respondents informing them that, the contract not having been completed within the time expressed in

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the option, the property was no longer for sale to them. To this the respondents' solicitor replied on the same day, claiming that the contract became complete by the acceptance of the option by the letter of 22nd April, and threatening proceedings unless the appellant should forthwith proceed to carry out the contract, insisting that the respondents were entitled to specific performance or damages for breach of contract. Negotiations with reference to the terms of the lease which George Hyde had agreed to grant to the appellant followed, extending over some months, and on 15th September 1921 the respondents' solicitor served on the appellant a notice calling upon him to complete the sale and threatening proceedings for specific performance, and on 7th February 1922 proceedings were commenced.

At the trial *Owen* J. made a decree for specific performance of the contract constituted by the offer of 1st February and the acceptance of 22nd April, the respondents consenting to the cash register being excluded from the sale; and it is against this decree that the present appeal is brought. The appellant attacked the decree on three grounds, namely, (1) that the offer was not open for acceptance by the respondents after the death of George Hyde; (2) that the alleged acceptance of 22nd April was not an unconditional acceptance, and (3) that the respondents were guilty of such laches as to debar them from obtaining specific performance. Other grounds of defence which had been raised by the appellant in the Supreme Court were not pressed in argument before this Court.

The question raised by the first ground turns on the meaning and effect of the document of 1st February set out above. It is what is generally described as an option, that is, an offer made for valuable consideration. In effect it amounts to an agreement by the appellant to sell the lease, &c., for £1,500 to Hyde if within three months the latter signifies his assent to purchase. The benefit of such an offer may be personal to the offeree or may be assignable by him in equity. Whether it is the one or the other must depend on the subject matter of the offer, on the terms in which it is expressed and on the circumstances. Prima facie the benefit is assignable unless the terms of the offer or the subject matter or other circumstances show that it was intended only to be open to acceptance by the

offeree personally (see *Buckland* v. *Papillon* (1); *Tolhurst* v. *Associated Portland Cement Manufacturers* (2)). If the option is personal to the offeree, if, for instance, the agreement offered calls for the exercise of his personal skill or discretion, it can, of course, be accepted only during his lifetime and lapses on his death. Or it may be that the option, though not personal to the offeree in the sense of calling for his personal services or qualifications, on its true construction expressly or by necessary implication requires acceptance by him personally. The benefit of such an option could not pass to the executors of the offeree because it must be accepted if at all by the offeree personally. But, if the option be not personal to the offeree and do not expressly or by necessary implication stipulate for acceptance by him personally or limit the time for acceptance to his lifetime, I think the result of the authorities is that the benefit of the option is an ordinary assignable chose in action which on the death of the offeree passes along with his other property to his personal representative. In the present case I can find nothing, either in the terms of the document or in the nature of the property or in the circumstances, tending to show an intention either that the offer was open for acceptance only by George Hyde personally or that the time for acceptance was limited to expire on his death. It follows, in my opinion, that the benefit of the option passed on the death of George Hyde to the respondents as his personal representatives. The decision in *Hyde* v. *Skinner* (3), referred to by my brother *Isaacs* during the argument, supports the conclusion at which I have arrived.

The second objection depends on the meaning to be given the document of 22nd April, which is relied on as the acceptance of the offer. The appellant contends that the reference to the inventory contained in that document imports a condition into the alleged acceptance and so converts it into a counter-offer. In my opinion this contention cannot be sustained. The reference to the inventory is contained in the opening sentence, which purports to state the effect of the option. The option referred to is clearly identified as that "dated 1st February 1921 given by you"—i.e., the appellant—

(1) (1866) L.R. 1 Eq., 477. (2) (1903) A.C., 414, at p. 423.
(3) (1723) 2 P. Wms., 196.

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"to the late George Hyde" to sell to him the lease, &c., of the Lord Cardigan Hotel. Having stated—or rather mis-stated—the terms of that option, the document proceeds: "we the undersigned being the executrices appointed under the will of the late George Hyde do hereby accept such option to purchase and will pay" &c. In my opinion it is clear that the acceptance is of the option to purchase given by the appellant on 1st February 1921 whatever it was, and that that acceptance was not qualified or made conditional by the mis-statement as to the inventory.

The other ground relied on was that the respondents had debarred themselves by their laches. It is sufficient to say that I can find no evidence of any laches on their part. They threatened proceedings in May and again in September, and instituted proceedings in February. The delay between May and September was occasioned by the negotiations as to the terms of the lease, but there is nothing to show that the respondents ever receded from the position which they had taken up that they were entitled to have the agreement for purchase performed. The delay between September and February in itself affords no ground for this defence.

In my opinion the appeal fails, and should be dismissed.

ISAACS J. Three questions of law arise in this case: (1) whether the right contracted for by George Hyde was exercisable by his executors after his death; (2) whether it was in form properly exercised; (3) whether the executors had by laches lost their right to specific performance.

(1) The first point involves two considerations: the nature of Hyde's contractual right, and its transmissibility.

In the case of *Goldsbrough, Mort & Co.* v. *Quinn* (1) there are certainly some differences of opinion as to the nature of the right in that case. No two opinions exactly coincide in expression. On the one hand, the late learned Chief Justice held, as a general rule, that there was in that class of cases "not an offer accompanied by a promise, but a contract for valuable consideration . . . to sell the property . . . upon condition that the other party shall within the stipulated time bind himself to perform the terms

(1) (1910) 10 C.L.R., 674.

of the *offer* embodied in the contract" (1). On the other hand, my own view was that there was an offer which, created by a contract for valuable consideration, was irrevocable, and that the contract gave the optionee an interest in the land, and, there being in the eye of the law an offer still existing when acceptance was communicated, the optionee upon such acceptance became purchaser. I am not sure, when the words of Sir *Samuel Griffith* come to be analysed, they do not eventuate in the same way, because, as will be observed, the learned Chief Justice speaks of "*the offer* embodied in the contract," and, so far as I can see, it is only by acceptance of that offer that the other party can "bind himself to perform the terms" of it. But, be that as it may with respect to the document under consideration in *Goldsbrough, Mort & Co.* v. *Quinn* or as to "options" in general, it is unquestionable law that the bargain of two parties must always be ascertained by reference to the words those particular individuals have themselves selected.

Now, when the document of 1st February 1921 in this case is looked at, it matters not a straw which view was right in *Goldsbrough, Mort & Co.* v. *Quinn* (2). The words of the appellant Carter were:— "In consideration of £1 paid to me by Mr. George Hyde I hereby *place under offer to him* the lease licence furniture and goodwill of hotel premises known as the Lord Cardigan Hotel for the sum of £1,500. And I further *agree that this offer shall not be revoked by me* for a period of three calendar months from this date. Also any money spent by me in repairs to building during above period to be refunded." The very words of this document place it within the category of an offer created by a contract and irrevocable, and not in the category of an instant sale of the property as it then stood, subject to a subsequently performed condition.

The nature of the right, then, being an irrevocable offer which Hyde himself could, had he lived, have accepted during the stipulated time, the question of transmissibility arises. Mr. *Flannery* urged that no offer of whatsoever nature was transmissible. A bare offer, retractable at any moment, creates no interest; until acceptance no obligation arises either legal or equitable. But when an

(1) (1910) 10 C.L.R., at p. 678. (2) (1910) 10 C.L.R., 674.

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irrevocable offer is created, a situation arises which is entirely different. The very word "irrevocable" imports a right in the other party to hold the offeror to his offer and to have the benefit which acceptance linked with the offer would confer. Whether the right is transmissible depends on the nature of the offer properly construed. If when properly construed it is found to be limited to purely personal relations, it terminates with the death of either. If it is found to confer a right with respect to property, it may or may not be transmissible. There is only one universal rule for such a case; and that is, the instrument creating the right must be construed for the purpose according to recognized principles of construction applicable to such instruments. *In re Cousins*; *Alexander* v. *Cross* (1), was the case of a will. An option was given by the will of the testator to his son to purchase an hotel. A question arose whether this option was a right personal to the son or could be exercised after his death by his executors. It was held to be personal. The subsequent value of a decision is in the reasoning which guides it. *Brett* M.R. began by saying that in the case of a contract you have to consider the views of both parties, in the case of a will the views of one only, and therefore, in the case before him, he had only to rely on the rules applying to the construction of wills. He recognizes that the will gives the son "an option" (2) which amounts to a power over a business, that is, property, but holds that it is "a personal advantage." On a full consideration of the circumstances he concludes (3) that "this was a mere personal option." *Cotton* L.J. recognizes the gift as "an option" (3), and, after saying "undoubtedly an option may be valuable, and in one sense it is property," adds: "although this is property, is it such a property as can be made valuable at any time after the son's death?" He holds it cannot, but he so holds on a construction of the will and its application to the circumstances. *Lindley* L.J. says (4): "The question is, whether it was only an option which the son personally was entitled to exercise, or whether it was exercisable by his executors, administrators, or assigns." He concludes upon reading the will that it is "an option personal to the son." One observation of the

(1) (1885) 30 Ch. D., 203.
(2) (1885) 30 Ch. D., at p. 212.
(3) (1885) 30 Ch. D., at p. 213.
(4) (1885) 30 Ch. D., at p. 215.

learned Lord Justice is important. He holds that, even if it were not exclusively personal to him but were in the nature of property which would pass to assignees in bankruptcy if he became bankrupt, that would not determine the question. The question before the Court was whether it passed to executors. I regard that case, both from the eminence of the Judges and from the fundamental way in which the question was examined, as a valuable and leading case.

My duty, as I understand it, is to ascertain by a proper process of construction of the agreement of 1st February 1921 the nature and intended duration of the offer, that is, whether it was purely personal or in the nature of property, and, if in the nature of property and transferable as property of a living man, whether it was also transmissible as part of the estate of a deceased man. Its nature was that of a continuing offer to sell the property mentioned for £1,500 at any time within three months that Hyde chose to communicate his acceptance, provided however that to that price should be added the amount (if any) that Carter might in the meantime spend in repairing the building. It is really a work of supererogation to proceed to reasons why the right so created was a right of property. I refer to my judgment in *Goldsbrough, Mort & Co.* v. *Quinn* (1) for this, and to *In re Cousins*; *Alexander* v. *Cross* (2). As to the duration of the right, it was to be for three calendar months, supposing Hyde so long lived. As to whether his death ended the offer we have to read the document in the light of the circumstances in which both parties found themselves. Hyde was the owner in fee of the hotel; he had nine months before contracted to give Carter a lease for five years, a matter still resting on contract; and in those circumstances he entered into the agreement of 1st February 1921 whereby he would, if he exercised the option, be restored to a clear fee simple, unqualified by any lease. There was nothing of a purely personal nature in the bargain, there was nothing to indicate it was to be limited to Hyde's life, it was to round off so to speak his existing ownership of the property; and consequently it was, on a proper construction of the document, a right in the nature of property to endure for the expressed period of three months, and passed as part of his estate to his executors.

(1) (1910) 10 C.L.R., 674. (2) (1885) 30 Ch. D., 203.

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(2) The second question is whether the option was properly exercised. It was objected that, because in the written notice of acceptance given on 22nd April 1921 the option of 1st February 1921, being otherwise fully and unmistakably described, was referred to as an option "as per inventory dated the 22nd day of April" (that is, the date of acceptance), the acceptance was void, since it added another term to the offer. The communication of that acceptance was by personally handing it to the appellant accompanied with verbal intimation of acceptance of his offer; and, after reading the document, the appellant said "I suppose it is all right," and an inventory was proceeded with. The appellant certainly raised objections, but only to the inclusion of certain items on the ground that their exclusion had been verbally agreed to between Hyde and himself. No other objection was raised. In those circumstances the appropriate question is that of *Romer* J. in *Jones* v. *Daniel* (1), namely, "Now, what would anybody when he received that letter fairly understand to be the meaning of it?" I add, of course, "in the circumstances of its receipt." His own attitude shows that he understood it, and I think reasonably understood it, as adding nothing to the conditions. Ordinary practice for evidentiary purposes involves an inventory, and the addition of the word is only an indication of what the respondents understood the offer to import. His attitude is, in effect, an admission of that. The appellant's attitude was unaltered even in his solicitor's letter of 22nd April. The learned primary Judge has found, as a fact, that the objection on the ground of agreed exclusion was not well founded. Reference to an inventory on 22nd April is therefore innocuous, unless substantially the sale was to be of the property as on 1st February and not as it stood on 22nd April. The reasoning of *Eve* J. in *Goffin* v. *Houlder* (2) is, however, in point, and is in my opinion correct. The objection has no substance in it and fails.

(3) The third objection is laches. This is founded on the fact that the action was not instituted until 7th February 1922, that is to say, ten months after acceptance. The interim was occupied by communications, partly of dispute as to whether a contract had been effectively made, partly of completing the bargain to give Carter a

(1) (1894) 2 Ch., at p. 335.

(2) (1920) 90 L.J. Ch., at p. 489.

lease for five years, and partly, from the middle of September, of demands by the respondents for completion of the contract constituted by the acceptance of 22nd April. Abandonment is not pleaded; simply laches. The doctrine of laches is definitely settled by the Privy Council in *Lindsay Petroleum Co.* v. *Hurd* (1) in the following terms:—"Now the doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." Their Lordships, after referring to the relevant circumstances, say: "The situation of the parties having, therefore, in no substantial way been altered, either by the delay or by anything done during the interval, there is in these circumstances nothing to give special importance to the defence founded on time." The same may be said of the position here. True, the lease was a wasting asset, and so was the licence, but that was all to the advantage of the appellant who received a fixed price. Nor do the facts, in my opinion, show that the respondents, after binding themselves definitely to accept, were gambling with the chances of the property falling below the value of the price they had bound themselves to pay. I think that *Owen* J. took an accurate view of the facts of this branch of the case, and the defence resting on laches also fails.

The result is that the appeal should be dismissed.

(1) (1874) L.R. 5 P.C., 221, at pp. 239-240.

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HIGGINS J. The first and principal question with which the learned Judge of first instance (*Owen* J.) dealt is a point which was not taken in the defence: if a person to whom the owner of property has, for valuable consideration, given an option to buy die within the time limited for the exercise of the option, can his executors exercise the option?

The appellant Carter on 1st February 1921 signed this document, which was accepted by Hyde:—"In consideration of £1 paid to me by Mr. George Hyde I hereby place under offer to him the lease licence furniture and goodwill of the hotel premises known as the Lord Cardigan Hotel for the sum of £1,500. And I further agree that this offer shall not be revoked by me for a period of three calendar months from this date. Also any money spent by me in repairs to building during above period to be refunded." Hyde died on 15th March 1921; his executors purported to accept the option on 22nd April (for the present I treat the acceptance as sufficient); the three months expired on 1st May; on 2nd May the appellant by his solicitor wrote to one of the executors that "the contract not having been *completed*" (*sic*) "within the time expressed" (in the option) "the property is no longer for sale to you." On the same date the executors by their solicitor wrote saying that they could not understand such a contention (the offer having been accepted), and threatened proceedings.

This case does not raise the difficulty which was dealt with in *Goldsbrough, Mort & Co.* v. *Quinn* (1)). There the vendor, having sold an option for a week, revoked the offer within the week; and he contended that though he was liable to an action at law for his breach of contract, the offer was revoked and there was no contract for sale—no simultaneous *consensus ad idem* when, within the week, the purchaser gave notice of acceptance. This contention led the learned Judges in that case to an analysis of "option" in its relation to the principles of the law of contract. But in this case we have merely to consider the meaning and effect of the document which I have set out; and whatever else the document involves, it seems to involve this—that Carter contracts, for valuable consideration, to sell the hotel to Hyde for £1,500 if Hyde within three months consent to purchase.

(1) (1910) 10 C.L.R., 674.

Now it is said that the executors of Hyde could not consent to purchase so as to bind Carter to assign the lease, licence, &c. The case of *Hyde* v. *Skinner* (1), to which my brother *Isaacs* referred us, seems on its face to be conclusive that they could. In that case, S. leased to H. for five years and covenanted to renew the lease, with the same rent and covenants, upon the request of H. made within the term. H. died within the term; but within the term his executors requested S. to give a renewed lease in accordance with the covenant. It was urged for S. that the executors of H. had no right to require the renewal, but only H. Lord *Macclesfield* however said, "the executors of every person are implied in himself . . . it is immaterial whether the testator or the executors required the renewal of the lease, it need not be personal"; and he made a decree for specific performance. No one denies that an option could be so framed as to limit its exercise to Hyde personally; but there is not in this case any indication of any such limitation.

There is also a case of *Husband* v. *Pollard*, cited in the report of *Randal* v. *Randal* (2). A father holding a lease assigned it to his son in trust for the father for life, remainder in trust for the son; and the father covenanted to renew the lease every seven years so long as he should live. The son died, and when the seven years had passed, the son's executors brought a bill to compel the father to renew the lease. A decree was made in favour of the executors. In a still earlier case, in the time of Queen Elizabeth, A granted to B a lease for twenty-one years, and covenanted with B to make to him and to his assigns a lease for a further term of twenty-one years. It was held that B, the lessee, having died during the first term, the executors of B (or, rather, the executor of the executor of B) had a good action on the covenant as to the second lease. There was a difficulty as to the word "and" being used instead of "or" in the expression "and to his assigns"; but, according to the quaint report a certain "apprentice" of the Middle Temple, with another "apprentice" convinced the Judges that the executor had a right to bring the action even if "assigns" were not mentioned at all. It was also established, in *Potter* v. *Chapman* (3), that an archbishop's

(1) (1723) 2 P. Wms., 196. (2) (1728) 2 P. Wms., 464, at p. 467.
(3) (1750) Amb., 98.

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option passed to his executors. I understand that it used to be the practice for every bishop, on his confirmation, to convey to the archbishop the next avoidance of one benefice named by the archbishop; and it was held that not only the archbishop, but his executors, could present whom they chose to the benefice.

There are several more recent cases which show that the executors or other assignees of the person to whom the option is given may exercise the option. In *Buckland* v. *Papillon* (1) *Romilly* M.R. had to deal with such an option in an agreement to let. The agreement did not mention "assigns" or executors. The person who held the option had become bankrupt; and it was held that the assignee in bankruptcy could sell the agreement, and that the vendee could exercise the option. This was under the *Bankruptcy Act* of 1849, which vested in the assignee in bankruptcy all the "personal estate and effects present and future" of the bankrupt. The option, the Master of the Rolls said, is part of the interest contained in the agreement; and it could be assigned by the assignee unless an intention to the contrary can be collected from the contents of the agreement itself. This case was accepted by Lord *Lindley* in *Tolhurst* v. *Associated Portland Cement Manufacturers* (2) as establishing that "an agreement for a lease, and even an option to require a lease or a renewal of a lease, is assignable in equity even although there is no mention of executors, administrators, or assigns." It is true that in most of the cases "assigns" or "executors or administrators" are mentioned as persons who may acquire the lease or renewal of lease, or the fee simple; but, as Lord *Lindley* says, the absence of these words makes no difference for the purpose now in question. This was also the view of Lord *Coke* and *Gawdy* J. in *Anon.* (3). In *In re Adams and Kensington Vestry* (4) one C.A. was selling to the Vestry certain land; and the Vestry raised the objection to the title of C.A. unless he got the concurrence of the next-of-kin. Under a lease for sixty years from 1819, Smith to Ralph Adams, Smith had covenanted with R.A. that if R.A. "his executors administrators or assigns" should give notice of desire to purchase the fee simple Smith would sell it for £1,200. C.A. was administrator of R.A., and in 1877

(1) (1866) L.R. 1 Eq., 477.
(2) (1903) A.C., at p. 423.
(3) (1588) 1 Leon., 316.
(4) (1883) 24 Ch. D., 199; (1884) 27 Ch. D., 394.

gave notice of desire to purchase; and the fee simple was conveyed to him, not as administrator of R.A., but in his personal capacity. The question was, so far as material, had C.A. the right to purchase for himself. It was held by the Court of Appeal that he had not, and that the objection was good. "The person who is to exercise it" (the option) "after" (R.A.'s) "death is his administrator, and no one else" (1). No one suggested that the administrator had no such right.

The case of *Woodall* v. *Clifton* (2) contains nothing to weaken the authority of these cases. The question there was could the *assignee of the lessor* be compelled to convey the fee simple for £500 per acre in pursuance of a proviso in a lease? The Court of Appeal held that the proviso did not come within the Act 32 Hen. VIII. c. 34 so as to make the burden of the covenant run with the reversion, so as to bind the assignee of the lessor. The decision does not affect the question as to the right of executors of the person holding an option to exercise the option.

As I have already stated, no one denies that an option may be so framed as to limit its exercise to the holder of the option in person. Where a testator gave T. an annuity during the life of the testator's wife "on condition he behave himself civilly to her," the executors of T. were held not to be entitled to the annuity on T.'s death as the privilege was clearly personal (*Neal* v. *Hanbury* (3)). An instance of such an option of a personal nature is found in *In re Cousins*; *Alexander* v. *Cross* (4), a case of a will. There an estate was given by will to trustees to pay out of the rents annuities to the widow and the sister, and to divide the rest of the rents among the four children; and after the decease of the widow and the sister, a son named was to have the option of purchasing a certain hotel for £10,000; but if he should decline to purchase at that price within six months after their decease the trustees were to sell the hotel, and put the purchase-money into residue. A codicil of the will showed, by a recital, that the testator, a hotelkeeper, had given to the son his business of hotelkeeper. The son died a few days after the father, leaving executors. When the widow and sister had died, the executors of the son (within

(1) (1884) 27 Ch. D., at p. 401.
(2) (1905) 2 Ch., 257.
(3) (1701) Prec. Ch., 173.
(4) (1885) 30 Ch. D., 203.

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the six months) purported to exercise the option; but it was held that the option was a right personal to the son, and could not be exercised by his executors. *Brett* M.R. pointed out the differences between the construction of wills and of contracts; and all the members of the Court of Appeal concurred in dismissing the action. The option given by the will was construed to be a peculiar privilege granted to the son, a power of control very important to hotelkeepers and limited to the son. The position may be regarded in either of two aspects—contract and property; and in either aspect the result is the same, that the executors may sue. In *Williams on Executors* (11th ed., p. 606) the learned author says that with respect to such personal actions as are founded upon any obligation, contract or other duty, the general rule established from earliest times is that the right of action on which the testator might have sued in his lifetime is transmitted to his executor or administrator; and (p. 663) the executor is also in many cases entitled to sue on a contract made with the testator without naming his executors, although the right of action does not accrue till after the death of the testator. An executor can redeem a pawn made by a testator (p. 665). Moreover, the interest of the testator in an option is a contingent or executory interest in the estate, and as such it is transmissible to the executors of the holder of the option if he die before the contingency occur. That it is an executory interest is made clear in *London and South-Western Railway Co.* v. *Gomm* (1). There the railway company, in conveying some superfluous land, had obtained an option from the purchaser to buy it back at any time. "The only case in which a contingent future interest is not transmissible" (to executors) would seem to be "where the being in existence" (that is, the person holding the interest being in existence) "when the contingency happens is an essential part of the description of the person who is to take" (per *Kay* J. in *In re Cresswell*; *Parkin* v. *Cresswell* (2)). In other words, the instrument conferring the option must show in itself that the option is personal only. From the nature of the case these purely personal options are found more frequently in options given by will than in options given by contract.

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

(2) (1883) 24 Ch. D., 102, at p. 107.

For these reasons, I think that the learned primary Judge was right in his conclusion that this option could be exercised by the executors.

But it was urged that the option was not exercised in fact—that the executors did not accept the offer except on the condition that the furniture should comprise all the articles comprised in an inventory signed by one Gorman after the alleged acceptance but on the same date, in the presence of both Carter and Hyde. The words of the alleged acceptance have been already set out. After some hesitation, I have come to the conclusion that it is a valid acceptance of the offer, a valid exercise of the option. The executors "accept such *option to purchase*"; and that option is fully identified by date, by parties, by subject matter. It is true that after the words "furniture" are the words "as *per inventory dated*" 22nd April, and that these words were not justified by the words of the option. But they do not occur in the acceptance of the option, as a qualification or condition thereto; they are a mere misdescription of an option which is otherwise clearly identifiable and identified. The best way, perhaps, to test this is by supposing the position to be reversed, by supposing Carter to be seeking to enforce the contract against Hyde's executors: could Hyde's executors deny successfully that they had "accepted" the "option"? In my opinion, they could not; the option, identified, was accepted, although in one respect it was misdescribed; as if one said "I offer you the horse Bucephalus for £100," and the other replied "I accept the horse Bucephalus 16 hands high for £100," and the horse was actually 15 hands high. The case of *Crossley* v. *Maycock* (1), before *Jessel* M.R., was very different. There was no simultaneous *consensus ad idem*—the purchaser's offer was for an open contract, and the vendor purported to accept it as on vendor's special conditions. The other alleged variations of the option in the acceptance were not argued, and, in my opinion, could not be sustained.

The only other point that was pressed before us was that of laches. I can find no laches. On the very day, 2nd May, that the appellant's solicitor intimated that the property was no longer for sale to the executors, the respondents' solicitors announced that they

(1) (1874) L.R. 18 Eq., 180.

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would take proceedings to compel the conveyance. Some months were spent in procuring the completion of the contract to grant the lease to Carter, the lease which was to be assigned under the option; and as soon as the lease was executed, in September 1921, notice of these proceedings was given by the respondents. This action was started on 7th February 1922. The defence merely says (par. 8)—"I submit that the plaintiffs are barred by their laches from obtaining the relief sought by them in this suit"; it states no facts constituting the laches.

In my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *T. D. O'Sullivan*, Newcastle, by *H. P. Abbott*.

Solicitors for the respondents, *Baker & Chippindall*, Newcastle, by *Clayton & Utz*.

B. L.