H. C. OF A. 1928.

WEBB v. BLOCH.

GAVAN DUFFY J. I am of opinion that the appeal should be dismissed.

*Appeal allowed. Judgment for the defendants set aside and judgment entered for the plaintiff for £500 damages with costs of the action (including the additional costs reasonably incurred by the plaintiff by reason of the trial of the action in Melbourne instead of in Adelaide) and of the appeal.*

Solicitors for the appellant, *Genders, Wilson & Pellew.*

Solicitors for the respondents, *Cook & McCallum*; *Pavey, Wilson & Cohen.*

C. C. B.

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[HIGH COURT OF AUSTRALIA.]

ABBOTT . . . . . APPELLANT;
DEFENDANT,

AND

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED AND OTHERS } RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1928.

SYDNEY, *Nov.* 15; *Dec.* 3.

KNOX C.J., ISAACS, HIGGINS, GAVAN DUFFY AND STARKE JJ.

*Will—Option to purchase—Death of donee of option—Exercise of option by personal representative—Whether personal to donee himself—Testator's intention.*

The question whether an option given under a will is personal to the donee or otherwise must be answered by ascertaining the intention of the testator as expressed in the will.

Throughout a will and codicil all references to the donee of the option were in a distinctly personal way, no reference being made to successors or others.

H. C. OF A. 1928.

ABBOTT v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

*Held*, that the right to exercise the option terminated at the death of the donee of the option.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.): *Perpetual Trustee Co.* v. *Union Trustee Co.*, (1927) 28 S.R. (N.S.W.) 222, reversed.

APPEAL from the Supreme Court of New South Wales.

Jonathan Abbott died on 22nd March 1910 having made his will on 13th May 1908, the material portion of which is as follows:— "I direct that on the death of my wife or at any earlier period which may be deemed expedient by her and my son William Campbell Abbott my said son shall have the option of purchasing the whole of my estate of which my wife shall be life tenant for the sum of seven thousand pounds and that out of such sum the sum of one thousand pounds shall be paid to my daughter Eliza Jane Thomas the sum of two thousand pounds shall be paid to my daughter Mabel Sarah Abbott the sum of two thousand pounds shall be paid to my son Thomas Joseph Abbott and the sum of two thousand pounds shall be paid to my son William Campbell Abbott. Should my son William Campbell Abbott not avail himself of the above option within six months of the death of my wife then my son Thomas Joseph Abbott shall have the same option thereafter for a period of six months and should my son Thomas Joseph Abbott not avail himself of the said option then the whole of my estate shall be submitted to auction and the net proceeds thereof shall be divided among my said four children so that my daughter Eliza Jane Thomas shall receive one thousand pounds less than either of my other three children who shall each receive equal amounts." By a codicil made on 13th March 1910 the testator altered his will as follows:—"Whereas by my said will I directed that on the happening of a certain event therein mentioned my son William Campbell Abbott should have the option of purchasing my estate devised by my said will to my wife for her life at the price of seven thousand pounds and that in the event of my said son not exercising his option of purchase as therein provided my other son Thomas Joseph Abbott should have a similar option of purchase exercisable by him as therein provided Now I direct and my will is that the name of my son Thomas Joseph Abbott shall be substituted in my

said will for William Campbell Abbott and the name William Campbell Abbott shall be substituted for Thomas Joseph Abbott to the intent that my son Thomas Joseph Abbott shall first have the option of purchase and if he shall not have exercised his right within the time limited by my said will then that the said William Campbell Abbott shall have a similar option of purchase exercisable as in the said will is provided in the name of Thomas Joseph Abbott."

The testator left him surviving his widow (Sarah Abbott) and the four children named in the will, but the son Thomas Joseph Abbott died in 1925 during the widow's lifetime without having exercised the option. Probate of the will and codicil was granted to the widow and David Cowan. After the death of Cowan in 1923 the Union Trustee Co. of Australia Ltd. was appointed, by order of the Court, trustee of the will and codicil in the stead of Sarah Abbott, who was removed from the trusts thereof on the ground of mental incapacity. Letters of administration of the estate of Thomas Joseph Abbott were granted to the Perpetual Trustee Co. Ltd.

An originating summons was taken out by the Perpetual Trustee Co. Ltd., and amended to include Herbert Albert Abbott (mortgagee of Thomas Joseph Abbott's interest under the will) as plaintiff, for the determination of the question whether upon the true construction of the will of the said Jonathan Abbott deceased and in the events which have happened the plaintiff Perpetual Trustee Co. Ltd. as administrator of the estate of Thomas Joseph Abbott deceased is entitled to the benefit of the option in the said will and codicil contained and is entitled to exercise the said option in manner and time in the said will and codicil provided.

The defendants to the summons were the Union Trustee Co. of Australia Ltd., and Mabel Sarah Woodley (formerly Abbott), William Campbell Abbott and Eliza Jane Thomas as beneficiaries under the will and codicil.

The summons was heard by *Harvey* C.J. in Eq., who answered the question in the affirmative: *Perpetual Trustee Co.* v. *Union Trustee Co.* (1).

From that decision William Campbell Abbott now appealed to the High Court, the respondents being the original plaintiffs together with Mabel Sarah Woodley and Eliza Jane Thomas.

(1) (1927) 28 S.R. (N.S.W.) 222.

H. C. OF A. 1928. ABBOTT v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

*Bonney* K.C. (with him *Murray-Prior*), for the appellant. The option given by the testator was personal to the donee of the option and, so far as it referred to the son Thomas Joseph Abbott, terminated at his death. Then, in accordance with the terms of the will and codicil, the son William Campbell Abbott became entitled to exercise the option within six months of the death of the testator's widow. The intention of the testator must be given effect to, and this should be ascertained from the will and codicil (see *In re Cousins* ; *Alexander* v. *Cross* (1), which case was cited with approval by this Court in *Carter* v. *Hyde* (2) ). The testator here intended that his grazing business should be carried on by one son or the other. That the testator intended the option to be personal to his sons is supported by the fact that he deals with them on the basis of absolute equality. All references to the donee of the option are in a distinctly personal way, and there is a careful avoidance of reference to successors or others. The change of order in the will and codicil also supports the contention, the testator preferred one son to the other and the two sons to outsiders. Unless a power is ancillary to a trust the power can be exercised only by the person named. The decision in *Carter* v. *Hyde* is distinguishable as there the Court was dealing with an option by agreement, which is binding, whereas an option under a will is an expression of the wish of the testator. The transaction in *Jacobs* v. *Larkin* (3) was not an option : it was a gift to the testator's sons subject to a charge in favour of the daughters of the testator. [Counsel also referred to *Belshaw* v. *Rollins* (4) ; *Wright* v. *Morgan* (5) ; *Pearce* v. *Pearce* (6).]

*Molloy*, for the respondents the Union Trustee Co. of Australia Ltd. and Mabel Sarah Woodley, was not called upon.

*Weston*, for the respondents the Perpetual Trustee Co. Ltd., Herbert Albert Abbott and Eliza Jane Thomas. If the true view is that a particular person has been indicated, then the option cannot be exercised beyond his death. But if that person gets a greater benefit, then the option is exercisable. Here the son

(1) (1885) 30 Ch. D. 203.
(2) (1923) 33 C.L.R. 115.
(3) (1892) 13 N.S.W.L.R. (Eq.) 62.
(4) (1904) 1 I.R. 284.
(5) (1926) A.C. 788.
(6) (1924) Gaz.L.R. (N.Z.) 306.

Thomas Joseph Abbott would be £3,000 better off by exercising the option. The difference between the purchase price indicated in the will and the actual value, is property, and that property is assignable (*Wright* v. *Morgan* (1) ). The properties are situated a long way from each other, and there is no suggestion that the sons to whom the option was given could carry them on conjointly.

[HIGGINS J. Is there any reported case which decides whether or not that when there is a selection of articles under a will given to a donee the executors of that donee can select for him after his death ?

[*Bonney* K.C. Yes: *In re Madge*; *Pridie* v. *Bellamy* (2), decides in the negative.]

If the appellant's construction of the will be correct there would be a period during which the option could not be exercised.

*Cur. adv. vult.*

Dec. 3.

The following written judgments were delivered :—

KNOX C.J. AND ISAACS J. The question for decision in this case relates to an option to purchase certain lands given by the will and codicil of Jonathan Abbott. The appellant, William Campbell Abbott, is the son of the testator referred to by that name in the will and codicil. The respondent the Union Trustee Co. is the trustee of the will and codicil, and the respondent the Perpetual Trustee Co. is the administrator of Thomas Joseph Abbott the other son of the testator referred to by that name in the will and codicil.

The will so far as now relevant is in the words following :— "I direct that on the death of my wife or at any earlier period which may be deemed expedient by her and my son William Campbell Abbott my said son shall have the option of purchasing the whole of my estate of which my wife shall be life tenant for the sum of seven thousand pounds and that out of such sum the sum of one thousand pounds shall be paid to my daughter Eliza Jane Thomas the sum of two thousand pounds shall be paid to my daughter Mabel Sarah Abbott the sum of two thousand pounds shall be paid to my son Thomas Joseph Abbott and the sum of two thousand pounds shall

(1) (1926) A.C., at p. 796.

(2) (1928) W.N. 71.

H. C. OF A. 1928.

ABBOTT v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

Knox C.J. Isaacs J.

be paid to my son William Campbell Abbott. Should my son William Campbell Abbott not avail himself of the above option within six months of the death of my wife then my son Thomas Joseph Abbott shall have the same option thereafter for a period of six months and should my son Thomas Joseph Abbott not avail himself of the said option then the whole of my estate shall be submitted to auction and the net proceeds thereof shall be divided amongst my said four children so that my daughter Eliza Jane Thomas shall receive one thousand pounds less than either of my other three children who shall each receive equal amounts." The codicil, so far as relevant, is in the words following:—"Whereas by my said will I directed that on the happening of a certain event therein mentioned my son William Campbell Abbott should have the option of purchasing my estate devised by my said will to my wife for her life at the price of seven thousand pounds and that in the event of my said son not exercising his option of purchase as therein provided my other son Thomas Joseph Abbott should have a similar option of purchase exercisable by him as therein provided Now I direct and my will is that the name of my son Thomas Joseph Abbott shall be substituted in my said will for William Campbell Abbott and the name William Campbell Abbott shall be substituted for Thomas Joseph Abbott to the intent that my son Thomas Joseph Abbott shall first have the option of purchase and if he shall not have exercised his right within the time limited by my said will then that the said William Campbell Abbott shall have a similar option of purchase exercisable as in the said will is provided in the name of Thomas Joseph Abbott."

Thomas Joseph Abbott died in the lifetime of testator's widow, and the question is whether the option given to him was determined by his death or on the other hand is exercisable by his personal representatives. The learned Chief Judge in Equity decided that the option did not terminate with the death of Thomas in the widow's lifetime but survived to his personal representatives, and from this decision William Campbell Abbott, the other son of the testator, now appeals. The Chief Judge in Equity thought that the answer to the question submitted for his decision depended on whether the option was purely personal to Thomas or was assignable

by him and transmissible by him to his personal representatives. We think the real question is not whether the option, whatever it was, was assignable, but rather what the option was that was given to Thomas. Was it an option to be exercised during his lifetime only or was it an option exercisable also by his personal representatives after his death? The answer to this question must be found in the intention of the testator as expressed in the will and codicil. We can find nothing in the will to show that the testator intended that his son's personal representatives should have the right to exercise the option. On the contrary we think there is a good deal in the will which supports the view that the testator meant to limit the exercise of the option to his son during his lifetime. In the first place it is clear that the testator wished that one or other of his sons should have the property, for it was only in the event of both sons refusing to avail themselves of the opportunity to purchase that the property was to be sold by auction. Moreover, the expressions in the will "Should *my son* . . . not avail himself of the above option," and the use in the codicil of the words "in the event of *my said son* not exercising *his* option of purchase as therein provided my other son Thomas Joseph Abbott should have a similar option of purchase *exercisable by him* as therein provided" and "*my son* Thomas Joseph Abbott shall first have the option of purchase and *if he* shall not have exercised *his* right" &c., seem to us to point in the same direction. And this view is supported by the transposition effected by the codicil, which may be regarded as indicating a preference on the part of the testator for one of his sons personally over the other as owner of the property. In a case such as this where the decision must depend on the meaning given to the words of a particular will, cases decided on the words used in other wills are of little, if any, assistance, and no good purpose can, we think, be served by referring in detail to the cases cited in argument. In the absence of any indication in the will or codicil that the testator intended the option given to be exercisable by a son's personal representatives, and having regard to the expressions in the will and codicil to which we have referred, we think the proper conclusion is that the option given to Thomas Joseph Abbott was an option exercisable only in

H. C. OF A. 1928.

ABBOTT v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

Higgins J.

his lifetime and that his personal representatives are not entitled to exercise it.

In our opinion the appeal should be allowed.

HIGGINS J. In this case a testator—by his will as altered by codicil—gave to his son Thomas "the option of purchasing" for £7,000 the residuary estate of which the widow was life tenant; but the option had to be exercised within six months after the widow's death. Thomas died on 8th April 1925; and the Perpetual Trustee Co. is the administrator of his estate claiming a right to exercise the option; the widow is still alive; but no objection is taken to the making of a declaration of right before her death. By the decretal order it is declared that the administrator may exercise the option. With all respect, I am unable to see how such a declaration is justified. None but the donee of a power can exercise the power; but, of course, if the will conferred the power on Thomas and his executors, administrators or assigns, the administrator also would be a donee of the power. We are not concerned in this case with a power which is the result of contract or based on an obligation to exercise the power: we are dealing with a right to exercise an option which the donee is free to exercise or not, as he choses. The decision of the Court in *Carter* v. *Hyde* (1) was based on a contract for valuable consideration to sell to the lessor the lease, licence, &c., of a hotel; and the offer was accepted by the executors of the lessor within the three months limited by the contract.

But not only is there a failure to produce any clear authority in support of the claim of the administrator of Thomas; there is strong authority in the old books against it. The problem of election, where the person to elect dies before election, has often been before the Courts. If a man gives one of his horses to be chosen by A and B, and A dies before election, B cannot elect (*Rolle's Abridgment*, Election, p. 726 (C) 6; *Comyns' Digest*, Election (B)). As stated in *Coke on Littleton*, 145a, "when nothing passeth to the . . . grantee before election to have one thing or the other; there the election ought to be made in the life of the parties; and the heir or executor cannot make election"; and see *In re Madge*; *Pridie* v. *Bellamy* (2). The position is different when an estate or interest passes

(1) (1923) 33 C.L.R. 115.

(2) (1928) W.N. 71.

immediately to the grantee; and this is the key to the case of *Belshaw* v. *Rollins* (1), which was not a case of "option," but a case of a positive devise of a farm conditional on the payment of £8 per acre—a condition subsequent. In my opinion, the editors of *Jarman on Wills*, 6th ed., p. 79, were fully justified in their dictum—in the body of the text—"An option of purchase given by will to A.B. is prima facie personal to him, and does not pass to his executors on his death." The chief authority cited for the dictum is in *In re Cousins*; *Alexander* v. *Cross*, in the Court of Appeal (2), and the reasoning of *Brett* M.R., *Cotton* and *Lindley* L.JJ. supports this view.

But it seems to me also that if there were any doubt as to the right of option being personal to Thomas in the present case, the doubt must vanish when one considers the context. For not only may Thomas exercise the option after the widow's death, but he may exercise it "at any earlier period which may be *deemed expedient by her and my son.*" Both steps involve mental processes—both the deeming it expedient and the existence of the will to exercise the option; and as the process of deeming it expedient must be a mental process of the son, not of his administrator, so must the other process.

In the case of *Pearce* v. *Pearce* (3) a learned Judge of New Zealand discussed *In re Cousins* (4) and other cases; but the discussion was not essential to the decision, for the fourth codicil to the will actually recited the fact that he who had the option had just died, and, while making certain consequent alterations in the will, treated the option as being still exercisable by the executor. In the case of *Wright* v. *Morgan* (5) Lord *Dunedin* pointed out what is very material to the present case, that although an option is "property" in some sense, it is only a right to enter into a contract. Until the option be exercised, there is no right to any of the residue.

In my opinion the appeal has to be allowed.

GAVAN DUFFY AND STARKE JJ. On the true construction of this particular will the testator gave his sons, in succession, a personal

(1) (1904) 1 I.R. 284.
(2) (1885) 30 Ch. D. 203.
(3) (1924) Gaz.L.R. (N.Z.) 306.
(4) (1885) 30 Ch. D. 203.
(5) (1926) A.C. 788.

H. C. OF A. 1928.

ABBOTT v. UNION TRUSTEE CO. OF AUSTRALIA LTD.

right, exercisable by them only, of acquiring the whole of his estate, and did not give the sons' executors, administrators or assigns any right to acquire it. Thomas Joseph Abbott, who died in the lifetime of the testator's widow, did not exercise his option, and his brother William Campbell Abbott is therefore now entitled to exercise his option.

KNOX C.J.

KNOX C.J. The order of the Court is :—Appeal allowed. Decretal order of 14th February 1928 discharged. Declare that upon the true construction of the will of the testator, and in the events which have happened, the respondent the Perpetual Trustee Co. Ltd. as administrator of the estate of Thomas Joseph Abbott deceased is not entitled to exercise the option in the will and codicil contained. Costs of all parties as between solicitor and client of the summons and of this appeal to be paid out of the estate. Costs of the respondent the Union Trustee Co. of Australia Ltd. to be as of submitting defendants.

*Order made accordingly.*

Solicitor for the appellant, *A. N. Harding.*

Solicitor for the respondent the Union Trustee Co. of Australia Ltd., *J. M. Hooke,* Taree, by *Thomas Rose & Dawes.*

Solicitor for the respondent the Perpetual Trustee Co. Ltd., *W. W. Hawdon,* Gloucester, by *A. Halloran.*

J. B.