[HIGH COURT OF AUSTRALIA.]

SHARP . . . . . APPELLANT;
DEFENDANT,

AND

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

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 19, 20.

SYDNEY, *Dec.* 4.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Will—Option to purchase—Partnership—Option to surviving partners "should they both be living at the time of my decease or the survivor of them if one be deceased" to purchase testator's share in assets of partnership—Death of one of optionees after testator's death—Rights of survivor.

A, J and T carried on business in partnership until the death of A. The will of A provided: "As to the assets and investments both in realty and personalty which are held by me in conjunction with" J and T "I declare that" J and T "should they both be living at the time of my decease or the survivor of them if one be deceased and notwithstanding that" T "shall have joined in the application for probate to my will and shall have accepted the trusts thereof shall for a period of two years from the date of my decease have an option or right of purchasing or taking over my share and interest and the share and interest of my estate in the said assets and investments or any specific one or more of them at" values to be ascertained as prescribed, "And in the event of" J and T "or either of them deciding to exercise such right or option (and if desired by them or either of them) payment therefor shall be accepted by my trustees on terms" stipulated. T died after, but within the period of two years from, the death of A.

Held, by *Latham* C.J., *Starke* and *McTiernan* JJ. (*Rich* and *Williams* JJ. dissenting), that in the events which happened the option lapsed on the death of T because, on the proper construction of the will, it was conferred only on J and T jointly and as a personal right.

Decision of the Supreme Court of Victoria (*O'Bryan* J.) affirmed.

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APPEAL from the Supreme Court of Victoria.

Australias Sharp (hereinafter called " the testator ") carried on business, until the time of his death, in partnership with his brother John Brown Sharp, and John Edmond Taylor. The testator died on 21st September 1943 leaving a will, dated 4th June 1929, probate of which was granted by the Supreme Court of Victoria on 17th July 1944, to The Union Trustee Co. of Australia Ltd. and Leonard Roberts Stillman, the executors and trustees named in the will (hereinafter called " the trustees "). The will contained the following provisions :—" As to the assets and investments both in realty and personalty which are held by me in conjunction with my brother John Brown Sharp and John Edmond Taylor I declare that the said John Brown Sharp and John Edmond Taylor should they both be living at the time of my decease or the survivor of them if one be deceased and notwithstanding that the said John Edmond Taylor shall have joined in the application for probate to my will and shall have accepted the trusts thereof shall for a period of two years from the date of my decease have an option or right of purchasing or taking over my share and interest and the share and interest of my estate in the said assets and investments or any specific one or more of them at the values respectively which at my death are shewn in the books relating to such assets and investments as the value thereof respectively And in the event of the said John Brown Sharp and John Edmond Taylor or either of them deciding to exercise such right or option (and if desired by them or either of them) payment therefor shall be accepted by my trustees on terms extending over a period of five years from the date of my death and by instalments or otherwise as the said The Union Trustee Company of Australia Limited in its full discretion shall consider fair and reasonable I declare that up to the date of exercise of such option or right my estate's share of the income arising on such assets and investments shall be income of my estate but on the intimation of the exercise of such option or right my estate's right to such income shall cease and thenceforward the said John Brown Sharp and John Edmond Taylor or the one of them exercising such right shall be charged with interest on the balance of the purchase money from time to time remaining unpaid at the rate of four pounds per centum per annum."

Taylor died on 17th December 1943. Subsequently J. B. Sharp gave the trustees a notice, dated 5th May 1944, whereby he purported, for himself alone, to exercise the option in respect of certain of the property covered by the clause in the will. The trustees took out an originating summons in the Supreme Court of Victoria, joining

as defendants J. B. Sharp, the executors of Taylor and Winifred Austen Vial (personally and as representing herself and all other the persons beneficially interested in the residuary estate of the testator). So far as is here material the questions raised by the summons were :

(A) (1) Is the option given by the will of the testator to the defendant John Brown Sharp and John Edmond Taylor deceased to purchase or take over the share and interest of the testator and of his estate in the assets and investments held by him in conjunction with the said John Brown Sharp and John Edmond Taylor or any specific one or more of them at the values respectively shown in the books relating to such assets and investments at the death of the testator as the value thereof,

(*a*) exercisable in the events which have happened by the said John Brown Sharp and the executors of the said John Edmond Taylor deceased jointly ?

(*b*) exercisable in the events which have happened by the said John Brown Sharp and the executors of the said John Edmond Taylor deceased severally ?

(*c*) exercisable only by the said John Brown Sharp or only by the executors of the said John Edmond Taylor deceased ?

O'Bryan J. ordered that question (A) (1) " be and the same is hereby answered by declaring that the option given by the will of the above-mentioned Australias Sharp deceased to the defendant John Brown Sharp and the above-named John Edmond Taylor deceased to purchase or take over the share and interest of the said Australias Sharp deceased and of his estate in the assets and investments held by him with the said John Brown Sharp and John Edmond Taylor deceased or any specific one or more of them at the values respectively shown in the books relating to such assets and investments at the death of the said Australias Sharp deceased as the value thereof lapsed on the death of the said John Edmond Taylor deceased on the 17th day of December 1943 and was not thereafter and is not now capable of being exercised by any person."

From this decision J. B. Sharp appealed to the High Court.

The respondents to the appeal were the trustees and Winifred Austen Vial. Taylor's executors were not joined as respondents, but on the hearing of the appeal the High Court heard argument on their behalf.

Fullagar K.C. (with him *Gowans*), for the appellant. It is not contended that the option was not " personal " in the sense that neither J. B. Sharp nor Taylor could have assigned his rights to a stranger. Further, it is not contended that, if both J. B. Sharp

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and Taylor had lived to exercise the option, it would have been exercisable otherwise than by them jointly. What the appellant claims is that, the option having been granted to him and Taylor jointly, the right conferred passed to the appellant by survivorship on Taylor's death. The right conferred was a proprietary right, and the ordinary rule as to survivorship between joint tenants should be applied : See *Farquhar* v. *Hadden* (1) ; *Colquhoun* v. *Brooks* (2) ; *Buffar* v. *Bradford* (3) ; *Jarman* on *Wills*, 7th ed. (1930), vol. III., p. 1777. [He also referred to *In re Pethybridge* ; *Reid* v. *Pethybridge* (4).] Even if that result is not correct as a matter of general principle, there is sufficient evidence in the words of the will that that was the result intended by the testator. That this was the intention appears from the words " or the survivor of them if one be deceased " and the ensuing words " And in the event of " J. B. Sharp or Taylor " *or either of them* deciding to exercise " the option. Although, prima facie, the will speaks as at the date of the testator's death, this rule must give way to another intention expressed in the will, and in the present context the words " survivor of them if one be deceased " are apt to relate to the time of the exercise of the option rather than to the time of the testator's death.

Coppel (by leave), for Taylor's executors. The words " if one be deceased " necessarily relate to the time of the testator's death. There is nothing in the will to displace the presumption that that is the meaning of the words. Accordingly, at the testator's death J. B. Sharp and Taylor together acquired the right conferred by the option clause. The right was not a proprietary right, so that the rule of survivorship as between joint tenants would apply. It was personal as distinct from proprietary, but that is not inconsistent with transmissibility. It was not personal in the sense that it was meant by the will to go to J. B. Sharp alone in the events which have happened ; the intention expressed in the will is that both J. B. Sharp and Taylor should have the opportunity to benefit by the option if both survived the testator, and the proper conclusion from the words of the will and the circumstances of the case is that the option is now exercisable jointly by J. B. Sharp and the executors of Taylor.

Ham K.C. (with him *Spicer*), for Winifred Austen Vial. The question is entirely one of the intention to be found in the will (*Abbott* v. *Union Trustee Co. of Australia Ltd.* (5))—See also *In re*

(1) (1871) 7 Ch. App. 1, at p. 5.
(2) (1887) 19 Q.B.D. 400, 406 ; (C.A.) (1888) 21 Q.B.D. 52, at p. 65.
(3) (1741) 2 Atk. 220 [26 E.R. 537].
(4) (1929) A.L.R. 228.
(5) (1928) 41 C.L.R. 375.

Sykes; *Younghouse* v. *Sykes* (1). The natural meaning of the words of the present will is that J. B. Sharp and Taylor were to have the right to exercise the option jointly if both survived the testator, but that, if only one of them survived the testator, he should have the right alone. In the events which have happened, *O'Bryan* J. rightly held that the option had lapsed. The words of the will, "if one be deceased", are not linked with the words relating to the period of two years; they must mean deceased at the death of the testator. Otherwise, these words would be unnecessary; "the survivor of them" would be sufficient to convey the meaning for which the appellant contends.

Sholl, for the trustees, submitted to the decision of the Court.

Fullagar, in reply, referred to *Jacobs* v. *Larkin* (2); *In re Hay* (3); *In re Ley*; *Ley* v. *Ley* (4).

Cur. adv. vult.

Dec. 4.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from an order of the Supreme Court of Victoria (*O'Bryan* J.) made upon an originating summons which raises questions as to the interpretation of the provisions of the will of the late Australias Sharp, who died on 21st September 1943, leaving a will dated 4th June 1929.

The testator carried on business in partnership with his brother John Brown Sharp and John Edmond Taylor, referred to as his friend in his will. There is no evidence of any formal partnership agreement, but the books and records of the partnership show that the capital contributions of the partners to the partnership have always been unequal (the testator usually having contributed more than either of the other partners), and the amounts of the capital contributions have varied from time to time. All profits and all losses of the partnership have been shared and borne equally by the partners. Thus the share in the profits of each partner would be one-third, but the share of each partner in the assets would depend also upon the relative amount of his capital contribution.

The will contained a provision giving an option of purchase over the testator's share in the partnership assets. J. E. Taylor died on 17th December 1943, that is, after the death of the testator, and J. B. Sharp (the appellant) now claims that he alone is entitled to exercise the option. On 5th May 1944 he gave notice of the exercise

(1) (1941) 1 Ch. 1.
(2) (1892) 13 L.R. (N.S.W.) Eq. 62.
(3) (1912) S.A.L.R. 21.
(4) (1932) S.A.S.R. 372.

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of the option in respect of testator's interest in 94,846 shares held by the partnership in John Sharp & Sons Pty. Ltd. These shares were valued in the balance-sheet of the partnership as at 21st September 1943 at £94,967. In fact they are worth much more than the sum stated. J. B. Sharp also purported to exercise the option in respect of two named racehorses, which, it is agreed, are included within a number of fifty-one horses which are valued in the balance-sheet at six pounds per head. The two horses in question are in fact worth more than six pounds per head.

The executors of J. E. Taylor (upon whose behalf argument was allowed to be heard in the appeal) contend that the option is still exercisable, but only jointly by J. B. Sharp and themselves. The residuary legatees, on the other hand, contend that the option was given only to J. B. Sharp and J. E. Taylor jointly if, as actually happened, they both survived the testator, and that, as they did not exercise the option, the option has lapsed and cannot now be exercised by any person. *O'Bryan* J. agreed with the last-stated contention.

The provisions in the will which have to be interpreted are as follows :—

"As to the assets and investments both in realty and personalty which are held by me in conjunction with my brother John Brown Sharp and John Edmond Taylor I declare that the said John Brown Sharp and John Edmond Taylor should they both be living at the time of my decease or the survivor of them if one be deceased and notwithstanding that the said John Edmond Taylor shall have joined in the application for probate to my will and shall have accepted the trusts thereof shall for a period of two years from the date of my decease have an option or right of purchasing or taking over my share and interest and the share and interest of my estate in the said assets and investments or any specific one or more of them at the values respectively which at my death are shewn in the books relating to such assets and investments as the value thereof respectively And in the event of the said John Brown Sharp and John Edmond Taylor or either of them deciding to exercise such right or option (and if desired by them or either of them) payment therefor shall be accepted by my trustees on terms extending over a period of five years from the date of my death and by instalments or otherwise as the said The Union Trustee Company of Australia Limited in its full discretion shall consider fair and reasonable I declare that up to the date of exercise of such option or right my estate's share of the income arising on such assets and investments shall be income of my estate but on the intimation

of the exercise of such option or right my estate's right to such income shall cease and thenceforward the said John Brown Sharp and John Edmond Taylor or the one of them exercising such right shall be charged with interest on the balance of the purchase money from time to time remaining unpaid at the rate of four pounds per centum per annum subject as aforesaid."

The contention for the appellant is that the option given by the will was in the nature of property, that it was given to J. B. Sharp and J. E. Taylor jointly, that J. E. Taylor, one of the joint owners, died after they had become joint owners, and that the other joint owner, J. B. Sharp, simply takes the option as survivor of one of two joint owners. Alternatively, the appellant contends that the words of the will expressly give the option to the survivor of the two partners, and that J. B. Sharp is the survivor of the two partners, as J. E. Taylor has died and J. B. Sharp is still alive.

The argument for the executors of J. E. Taylor is that the option was given to both J. B. Sharp and J. E. Taylor, but that it did not constitute property held in joint ownership so as to accrue to the survivor. The option, it is argued, was an offer which could be accepted by either of the persons to whom it was given during their lives or by the executors of either or both of them after the optionees had died, provided that it was exercised within the two-year period prescribed by the will.

The argument for the residuary legatees is that the option was personal to J. B. Sharp and J. E. Taylor, and that, in the event which happened, namely, that both of them were living at the time of the decease of the testator, the option was given to them jointly and to no other person, that it can be exercised by them jointly, and not otherwise, and that, as it has not been so exercised, the option has lapsed.

The provisions in the will relating to the option of purchase should be construed independently of any prima facie presumption, either that an option to purchase is personal only to the person to whom it is given, or that it is prima facie a form of property which is assignable by him and transmissible to his executors (*Skelton* v. *Younghouse* (1)). Accordingly, before considering whether an option of purchase is assignable property, the nature of the option itself must be ascertained. This can be done only by reading the words of the will in their natural grammatical meaning. When the words of the will have been so construed then the question whether the option was assignable to a stranger, or was transmissible to personal representatives, can be examined. If, however, it is held that, upon

(1) (1942) A.C. 571.

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the true construction of the will, it was the intention of the testator that only a named person or persons should exercise the option, no question as to assignability or transmissibility can arise : See *Abbott* v. *Union Trustee Co. of Australia Ltd.* (1).

The relevant clause of the will begins by defining the person or persons who are to be entitled to exercise the option and proceeds to define the nature of the right which that person or those persons are to have. The right which is given is an immediate right. It is not postponed for the purpose of letting in any prior interest. It is a right which can be exercised at any time (and possibly from time to time in respect of different assets) during a period of two years from the date of the testator's decease.

It is clear that it was intended that if both J. B. Sharp and J. E. Taylor were living at the time of the testator's decease they should be entitled jointly to exercise the option. All parties are agreed up to this point. The controversy arises as to the meaning of the words " or the survivor of them if one be deceased." It is argued for the appellant that the words " survivor of them " are satisfied by J. B. Sharp, who is the survivor of himself and J. E. Taylor. Upon this view the words " if one be deceased " are surplusage. There can be no survivor of two persons unless one of them is deceased.

The contrary view attaches a meaning to the words " if one be deceased " by reading the words as referring to death in the lifetime of the testator. The clause deals with two events. If both the other partners are living at the time of the testator's decease the option is given to both of them. If, on the other hand, at that time one is deceased, so that only one is living, then the option is given to the survivor.

In my opinion the latter construction is that which is to be preferred. The words " or the survivor of them " plainly refer to the survivor of the two other partners. But they do not in themselves indicate the point of time at which survivorship is to be ascertained or determined. The words might refer to the person who was the survivor of the two partners either at the time of the death of the testator, or at some later time. It is urged for the appellant that if one partner becomes the survivor of the other at any time during two years after the death of the testator, the partner so surviving is entitled to exercise the option. But, as already stated, this construction gives no effect to the words " if one be deceased." These words are placed in connection and juxtaposition with the words referring to the death of the testator. They are not associated with the words referring to the period of two years. In cases where,

(1) (1928) 41 C.L.R. 375, at p. 381.

after a life or other interest, an interest is given to the survivor of two persons, the tendency, after some variation, has been to hold that survivorship should be determined at the time when the prior interest falls in, that is, at the period of distribution : See the cases cited in *Jarman*, 7th ed. (1930), vol. III., pp. 2055 et seq., especially at p. 2063, and in *Laws of England*, 2nd ed., vol. 34, pp. 279, 280. In my opinion different considerations apply to a case such as the present where no prior interest during the two years is given to any other person, and where the expiry of the period of two years is not a point of time at which an interest of a survivor may arise. In the case of a gift to a survivor after a life or other interest the persons who are survivors then take their interests in possession. But in the present case it is impossible to carry out the intention of the testator by postponing the ascertainment of the survivor until the expiry of the two-year period, because after that period has expired the option itself has determined. Accordingly, in my opinion, there is no analogy between the present case and other cases which construe words relating to survivorship in connection with interests arising after a prior estate. " Survivor " means the one of J. B. Sharp and J. E. Taylor who lives the longer. To that survivor the option is given, but only in a certain event, namely, " if one be deceased." Instead of regarding these words as superfluous, I construe them as meaning that the time at which survivorship is to be determined is the time of the death of the testator.

It was pointed out in argument that the phrase " if one be deceased " is more apt for the purpose of referring to an event which has happened in the past than for referring to an event which may happen in the future. In other words, " if one be deceased " is a phrase which should not be read as equivalent to " if one shall die." This argument supports what I regard as the natural construction of the clause in question, namely, that if both of the testator's partners are living at the time of his decease they are to have the option jointly ; but that if one only is living at the time of his decease, then that one only is to have the option. Upon this view in the events which have happened J. B. Sharp and J. E. Taylor could exercise the option jointly, but there is no provision in the will giving the option to J. B. Sharp alone as " survivor " in the event (which has happened) of J. E. Taylor dying after the testator, but before J. B. Sharp.

It is contended for the appellant, however, that, even if, in the events which have happened, the option was given only to the two partners who survived the testator, yet the option was in the nature of property, and when one of those partners died it survived to the

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other. This question has to be answered, not by applying any rule of law, but by ascertaining the intention of the testator. The question is: " Does the will show that the testator intended, in the events which have happened, that the option should be exercised only by both partners personally ? "

In the present case the option is given to the testator's brother J. B. Sharp and his friend J. E. Taylor. The provision that J. E. Taylor may exercise the option, although he may have joined in the application for probate to the will, suggests that it was contemplated that J. E. Taylor himself, and not some stranger-assignee, would be exercising the option. There is express reference to the event of the said J. B. Sharp and J. E. Taylor or either of them " deciding to exercise such right or option " and it is provided that " if desired by them or either of them " terms shall be given for payment of the purchase money. These words suggest personal decision and personal desire.

The option includes a right to select assets and investments. It applies not only to " the said assets and investments ", but also to " any specific one or more of them." A right in a donee to select objects of gift is an element which supports the construction of the gift as personal to the donee (*In re Madge* ; *Pridie* v. *Bellamy* (1)).

Criticism was directed against the opinion expressed by *O'Bryan* J. that the " object of granting the option was to enable the surviving or continuing partners, if they were so minded, to continue the partnership business together after the death or retirement of the other partner instead of completely winding up the business." It was pointed out that the will of the testator conferred no power upon his executors to carry on the partnership business, so that a dissolution would be necessary (*Partnership Act* 1928 (Vict.), s. 37), and that in any event the partnership could not be continued between the surviving partners unless they agreed to continue it. Therefore, it was said, the provision in the testator's will would not make it possible to carry on the partnership. But I agree with the learned judge that the effect of the clause would be to give the partner or partners who survive the testator an opportunity, if he or they should so desire, to carry on in partnership or alone with such assets as might be selected from the assets of the firm. I agree with the learned judge that this points rather to a personal right than to a right intended to be transmissible to personal representatives.

In my opinion the option given by the will could, in the events which have happened, be exercised only by J. B. Sharp and J. E. Taylor jointly. This conclusion makes it unnecessary to consider

(1) (1928) 44 T.L.R. 372.

other questions raised in argument as to the method by which the book value of the testator's share in particular assets should be determined and various associated questions.

In my opinion the appeal should be dismissed.

RICH J. The facts material to the present appeal are as follow: The testator, together with his brother J. B. Sharp and his friend J. E. Taylor, carried on in partnership a business which included the business of investors and pastoralists. There was no written partnership agreement, but the profits and losses were shared and borne equally, and the records of the partnership show that the capital was unequally contributed, the testator's total contributions being usually larger than those of either of the others. By his will made on 4th June 1929 he appointed as his executors and trustees a trustee company and his partner J. E. Taylor, and gave his residuary estate to his trustees upon trust for conversion " but as to the assets and investments held by me in conjunction with my brother John Brown Sharp and my friend the said John Edmond Taylor or either of them subject to the directions and dispositions hereinafter contained respecting the same." The option which has given rise to the present appeal is in the following terms. " As to the assets and investments both in realty and personalty which are held by me in conjunction with my brother John Brown Sharp and John Edmond Taylor I declare that the said John Brown Sharp and John Edmond Taylor should they both be living at the time of my decease or the survivor of them if one be deceased and notwithstanding that the said John Edmond Taylor shall have joined in the application for probate to my will and shall have accepted the trusts thereof shall for a period of two years from the date of my decease have an option or right of purchasing or taking over my share and interest and the share and interest of my estate in the said assets and investments or any specific one or more of them at the values respectively which at my death are shewn in the books relating to such assets and investments as the value thereof respectively And in the event of the said John Brown Sharp and John Edmond Taylor or either of them deciding to exercise such right or option (and if desired by them or either of them) payment therefor shall be accepted by my trustees on terms extending over a period of five years from the date of my death and by instalments or otherwise as the said The Union Trustee Company of Australia Limited in its full discretion shall consider fair and reasonable I declare that up to the date of exercise of such option or right my estate's share of the income arising on such assets and investments shall be income of my estate

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but on the intimation of the exercise of such option or right my estate's right to such income shall cease and thenceforward the said John Brown Sharp and John Edmond Taylor or the one of them exercising such right shall be charged with interest on the balance of the purchase money from time to time remaining unpaid at the rate of four pounds per centum per annum." The testator confirmed his will by codicil on 23rd October 1935, and died on 21st September 1943. J. E. Taylor died on 17th October 1943. On 5th May 1944 J. B. Sharp, the testator's brother, purported to exercise the option to purchase created by the will.

The question is whether, upon the proper construction of the will, the option was one exercisable, if both partners should survive, only by both of them acting jointly, and whether an option was available to a single partner only if he should be the only partner to survive the testator. It was held by this Court in *Abbott* v. *Union Trustee Co. of Australia Ltd.* (1) and subsequently by the House of Lords in *Skelton* v. *Younghouse* (2), in relation to the question of the availability of an option created by will to the personal representatives or assignees of an optionee who survived the testator but subsequently died or purported to assign the option, that this depends upon the intention of the testator gathered from the language of his will read with reference to the nature of the subject property and the relationship between himself and the optionee. I am of opinion that the availability of the option in the present case depends upon similar considerations, due effect being given to the natural legal consequences of the language used.

The testator was a member of a partnership of three, and the persons mentioned as optionees are the other two partners. The option is conferred upon J. B. Sharp and J. E. Taylor " should they both be living at the time of my decease or the survivor of them if one be deceased." The subject matter of the option is " my share and interest and the share and interest of my estate in the said assets and investments or any specific one or more of them at the values respectively which at my death are shewn in the books relating to such assets and investments as the value thereof respectively." The assets and investments in question are the partnership assets, and what the testator is purporting to do is to give an option to purchase not his interest in the partnership business but his interest, at book values as at death, in either the whole of the partnership assets or in any one or more of the assets at the choice of the optionees or optionee.

(1) (1928) 41 C.L.R. 375. (2) (1942) A.C. 571.

Business partners own between them the whole of the partnership assets, and each partner has a proprietary interest in each and every item. But his interest is not a fixed proportion of each item, nor is it an immediately ascertainable quantity of the item. It is an indefinite and fluctuating interest, which at any given moment is in proportion to his share in the ultimate surplus coming to him if at that moment the partnership were wound up and its accounts taken (*Ashworth* v. *Munn* (1); *Marshall* v. *Maclure* (2); *Manley* v. *Sartori* (3); *In re Fuller's Contract* (4); *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (5)). No doubt, as between himself and his partners, his interest in individual items is subject to their right to have all the assets of the partnership for the time being dealt with in accordance with the partnership agreement, but his interest in them is none the less real for that (*In re Holland*; *Brethel* v. *Holland* (6); *In re Fuller's Contract* (4)). The partnership now in question was one which would become, and did become, dissolved upon the death of any partner; and upon the testator's death the right to wind up the partnership business, including the right to carry it on so far as necessary for this purpose, and to realize the partnership assets, both real and personal, would then become, and did then become, exclusively vested in the surviving partners. The testator had no power to interfere by his will with the rights of the survivors. But the optionees would not be likely to exercise the option except to the extent to which they thought that they would benefit more by doing so than by winding up the partnership in the ordinary way, that is, except in relation to partnership assets which at the death of the testator stood in the books of the partnership at less than their real value. The exercise of the option with respect to an item would have the result that on a taking of partnership accounts they would get everything referable to the item, whilst the estate would get nothing in respect of it out of the partnership, but would have instead the price which the optionees had paid in respect of the testator's share in it.

The will envisages the possibility that only one partner might survive the testator. Since the death of any of the three would dissolve the partnership which existed when the will was made, the testator must here be contemplating the possibility of one of the other two dying and of himself and the survivor arranging to acquire the business and form a new partnership of two for the purpose of carrying it on. If this had happened, the general position would

(1) (1880) 15 Ch. D. 363, at pp. 369, 370.
(2) (1885) 10 App. Cas. 325, at p. 334.
(3) (1927) 1 Ch. 157, at pp. 163, 164.
(4) (1933) Ch. 652, at p. 656.
(5) *Ante*, at p. 285.
(6) (1907) 2 Ch. 88, at p. 91.

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be the same as if, the partnership being still of three, two had survived the testator. It is true that in the clause creating the options the phrase used is " as to the assets . . . which are held by me in conjunction with my brother John Brown Sharp and John Edmond Taylor ", but it is evident that the words " or either of them " must here be understood. This is clear from the fact that these words appear in the earlier reference to this provision, and from the language of the declaration which immediately follows.

What in fact happened was that at the testator's death the partnership which existed when the will was made was still being carried on ; but J. E. Taylor, one of the two surviving partners, died within a month of the testator without having joined with the other survivor in exercising the option. This did not, of course, dissolve the partnership. It was already dissolved. It meant that only one partner was now left to wind up the partnership affairs.

The question is whether J. E. Taylor's death prevented the exercise by J. B. Sharp of the option which had been conferred upon them both. In my opinion, it did not. The will creates two options in the alternative, one in favour of both Sharp and Taylor should both survive the testator, the other in favour of whichever of them should survive the testator if only one should do so. The options were clearly intended to confer benefits. The option given to both confers a joint benefit upon both, and, prima facie, on the death of one joint beneficiary, a joint benefit survives to the other. I see nothing in the language of the will, the subject matter of the option, or the relationship of the parties to the deceased to suggest that survivorship was not intended. The evident object of the testator was to confer personal benefits on his surviving partners with respect to his interest in the partnership assets. As regards the phrase " and in the event of the said John Brown Sharp and John Edmond Taylor or either of them deciding to exercise such right or option (and if desired by them or either of them) payment therefor shall be accepted by my trustees on terms ", I think that the expression " such right or option " indicates that the testator is here referring to the right or option expressed to be vested in both if both should survive him or in either if that one only should survive him. To sum up, I think that, upon the true construction of the will and in the events which happened, no original several option ever became vested in J. B. Sharp, but an original joint option became vested in J. B. Sharp and J. E. Taylor, and on the death of the latter the right to exercise it became vested in J. B. Sharp by survivorship, because it was a joint option.

For these reasons the appeal should be allowed and the matter remitted to the primary judge. Costs of all parties except the intervener as between solicitor and client out of the estate. The intervener to bear his own costs.

STARKE J. The substantial question on this appeal is whether an option to purchase given by the will of Australias Sharp was exercisable by the donees jointly and is incapable of exercise by one of them or by anyone else.

It depends upon the terms of the testator's will construed in the light of the relevant surrounding circumstances (*Skelton* v. *Younghouse* (1)).

The option is given by the testator to his brother J. B. Sharp and J. E. Taylor " should they both be living at the time of my decease or the survivor of them if one be deceased . . . for a period of two years from the date of my decease . . . of purchasing or taking over my share and interest and the share and interest of my estate in the . . . assets and investments " " both in realty and personalty " held by the testator in conjunction with J. B. Sharp and Taylor " or any specific one or more of them at the values respectively which at " his death were " shewn in the books relating to such assets and investments as the value thereof respectively."

The testator, who died in September 1943, his brother J. B. Sharp and J. E. Taylor had carried on business in partnership as Sharp & Taylor. There was no deed of partnership, but the partners appear to have been interested in the partnership each in an equal third share though their capital had been contributed unequally. The business comprised various activities, and the assets thereof, which are of considerable value, consist of freehold properties, government stock, shares, debentures, live stock, plant and equipment.

J. B. Sharp and Taylor survived the testator, but Taylor died in December 1943 without the option given by the will having been exercised.

In my opinion the option was exercisable by the donees jointly and by no-one else. The option is given to them jointly and enables them to choose and decide whether they take over the share and interest of the testator or some specific one or more of the assets of the partnership, a choice, as it seems to me, which it is unlikely that the testator would confide in anyone but the donees themselves. But it was said, on the authority of *London and South Western Railway Co.* v. *Gomm* (2), that the option gave the donees severally some

(1) (1942) A.C. 571.

(2) (1882) 20 Ch. D. 562.

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sort of interest in the assets and investments of the partnership which passed to the personal representative of the deceased donee. The argument appears to me without any foundation: the option did not give to the donees or either of them any right or interest executory or otherwise in any property: it conferred a personal right to be exercised or not to be exercised as the donees jointly decided.

Then it was suggested that the will itself conferred upon J. B. Sharp the right to exercise the option now that Taylor was dead. The words relied upon were "or the survivor of them if one be deceased." But deceased when? Clearly, I should think, in the context in which the words appear, at the time of the death of the testator.

A suggestion was heard that the option given by the will was uncertain and void. On the part of those interested in the residuary estate it was said to be practically impossible to give effect to the option; by the appellant that it involved quite a simple calculation for a court of equity and well within the capacity of accountants and trustees; by the trustees that it involved fractions of astronomical proportions. But it is unnecessary for me in the view I take of the nature of the option to enter upon these interesting problems, which are far removed from anything the testator had in mind or intended and arise because of the nature of the partners' interests and responsibilities in connection with the partnership assets and liabilities.

The appeal should be dismissed.

McTIERNAN J. In my opinion the appeal should be dismissed.

I agree with the conclusions and in substance with the reasons of the Chief Justice.

WILLIAMS J. Australias Sharp, hereinafter called the testator, died on 21st September 1943 having duly made his last will on 4th June 1929 and a codicil thereto on 23rd October 1935, by which, subject to certain alterations and modifications, he confirmed his will.

At the date of his will, codicil and death the testator was carrying on in partnership with his brother John Brown Sharp and John Edmond Taylor under the style of Sharp & Taylor the business of investors in real and personal property, pastoralists and other business. There was no partnership agreement in writing, but it appears from the books and records of the partnership that the capital contributions of the partners were always unequal (the

testator having usually contributed more than either of the other partners), that the amounts of the capital contributions varied from time to time, but that the profits and losses of the partnership were shared and borne equally by the partners.

John Edmond Taylor died on 17th December 1943 without having joined with John Brown Sharp in the exercise of the option hereinafter referred to.

On 5th May 1944 John Brown Sharp gave the trustees notice in writing of his intention to exercise the option with respect to the shares in the company known as Sharp Investments Pty. Ltd. (formerly John Sharp & Sons Pty. Ltd.) and the two racehorses known as Chatfield and Punctilia, and that he required terms for payment extending over the period of five years from the date of the testator's death. The shares referred to in the notice were valued in the partnership books as at the date of the testator's death at £94,967 19s. 5d. and the horses at six pounds each.

The question having arisen whether the option lapsed upon the death of John Edmond Taylor, the trustees filed an originating summons in the Supreme Court of Victoria asking for the determination of this and other questions relating to the construction of the provisions of the will conferring the option. Upon the originating summons coming on to be heard, *O'Bryan* J. made an order in which he declared that the option had lapsed on the death of John Edmond Taylor. It is against this order that the appellant John Brown Sharp has appealed to this Court. The personal representatives of John Edmond Taylor, who were made defendants to the originating summons, were not served with the notice of appeal, but upon the hearing they appeared by counsel and contended that the option had not lapsed but was only exercisable by John Brown Sharp and his clients jointly.

By his will the testator, after appointing John Edmond Taylor one of his executors and trustees and after making a specific devise, gave, devised and bequeathed his residuary real and personal estate to his trustees upon trust to collect realize and convert the same into money, but provided that " as to the assets and investments held by me in conjunction with my brother John Brown Sharp and my friend John Edmond Taylor or either of them " the trust was to be subject to the directions and provisions thereinafter contained respecting the same. This exception of the assets held by the testator in conjunction with his brother and Taylor or either of them from the trust for sale would lead to the expectation that the subsequent portion of the will would contain an option over assets which the testator held in conjunction with his brother and Taylor

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or either of them at the date of his death. But the subsequent option only refers to the assets held by the testator in conjunction with his brother and Taylor. It is in these terms :— " As to the assets and investments both in realty and personalty which are held by me in conjunction with my brother John Brown Sharp and John Edmond Taylor I declare that the said John Brown Sharp and John Edmond Taylor should they both be living at the time of my decease or the survivor of them if one be deceased and notwithstanding that the said John Edmond Taylor shall have joined in the application for probate to my will and shall have accepted the trusts thereof shall for a period of two years from the date of my decease have an option or right of purchasing or taking over my share and interest and the share and interest of my estate in the said assets and investments or any specific one or more of them at the values respectively which at my death are shewn in the books relating to such assets and investments as the value thereof respectively And in the event of the said John Brown Sharp and John Edmond Taylor or either of them deciding to exercise such right or option (and if desired by them or either of them) payment therefor shall be accepted by my trustees on terms extending over a period of five years from the date of my death and by instalments or otherwise as the said The Union Trustee Company of Australia Limited in its full discretion shall consider fair and reasonable I declare that up to the date of exercise of such option or right my estate's share of the income arising on such assets and investments shall be income of my estate but on the intimation of the exercise of such option or right my estate's right to such income shall cease and thenceforward the said John Brown Sharp and John Edmond Taylor or the one of them exercising such right shall be charged with interest on the balance of the purchase money from time to time remaining unpaid at the rate of four pounds per centum per annum."

A will must be construed with reference to the real and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will. In the present will there is no indication of a contrary intention in the provisions relating to the option. On the contrary they must refer to assets which exist at the testator's death because the price to be paid is determined by their book value at that date. The words in the option " as to the assets and investments both in realty and personalty which are held by me in conjunction with my brother John Brown Sharp and John Edmond Taylor " contemplate, therefore, that both J. B. Sharp and Taylor would still be alive at the death

of the testator; and the share of the testator in these assets over which the option is given is a share calculated on the basis that there are three persons interested in the assets at that date. The testator then proceeds to declare that with respect to these assets his brother and Taylor " should they both be living at the time of my decease or the survivor of them if one be deceased . . . shall for a period of two years from the date of my decease " be entitled to exercise the option. The donees of the option in the first instance are therefore the testator's brother and Taylor provided they are both alive at his death. But if one of them be deceased, that is, if one is dead, the right to exercise the option is given to the survivor. It has been said that the word " survivor " is one which ought to be avoided by any person who is not a consummate master of the art of conveyancing because no word has occasioned more difficulty (per Lord *Hatherley*, then Sir *W. P. Wood* V.C., in *In re Gregson's Trusts* (1))—See also per *Rigby* L.J. in *In re Pickworth*; *Snaith* v. *Parkinson* (2). The words " should they both be living at the time of my decease " refer to the donees surviving the testator, but the words " or the survivor of them " refer to one of the persons named surviving the other, so that " survive " is used in its natural grammatical sense of one person living longer than the other (*White* v. *Baker* (3); *Re Wood*; *Hardy* v. *Hull* (4); *Knight* v. *Knight* (5)). The words " if one be deceased " do not expressly refer to any particular moment of time. Read literally they would appear to refer to one of the partners dying in the lifetime of the testator. But if one of the partners had predeceased the testator the partnership would have been dissolved and there would have been no assets which could be said strictly speaking to be held by the testator in conjunction with his brother and Taylor at his death, although assets still held by the testator in conjunction with the other surviving partner and the personal representatives of the deceased partner might be said in a loose sense to answer the description. But the testator must then be taken to have intended that the gift of the separate option should be conditional upon the partnership still being in the course of being wound up at the date of his death.

The gift is not a devise or bequest of property but an option to purchase property, so that the date corresponding to that on which a devise or bequest of property would vest in possession is not the death of the testator but the date on which the option is exercised, and the provisions relating to the payment of the purchase money

(1) (1864) 33 L.J. Ch. 531, at p. 532.
(2) (1899) 1 Ch. 642, at p. 651.
(3) (1860) 2 De G. F. & J. 55, at p. 64 [45 E.R. 542, at p. 546].
(4) (1923) 130 L.T. 408.
(5) (1912) 14 C.L.R. 86.

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in the event of the exercise of the option, and of the destination of the income of the assets prior to its exercise, and those which relate to the actual exercise of the option by J. B. Sharp or Taylor or either of them contemplate that the option might be exercised at any time prior to the expiry of the period of two years by the optionees jointly or by either of them separately.

Alternatively the description of the assets excepted from the trust for sale shows that the testator contemplated that assets owned by him in conjunction with his two partners might subsequently be held by him in conjunction with either of them, which would have taken place if either of his partners had predeceased him and he and the surviving partner had bought out the interest of the deceased partner and continued to carry on the partnership business. Possibly, therefore, the words " or either of them " should be supplied in the option after the initial reference to the assets held by the testator in conjunction with his brother and Taylor. If this is done the words " if one be deceased " would naturally refer to the death of the brother or Taylor in the lifetime of the testator, and the only option conferred by the will would be, in the events that have happened, a joint option to the brother and Taylor. But I agree with my brother *Rich* that upon this construction of the will there is nothing to prevent the right to exercise the option surviving to the brother upon Taylor's death. If the option had been conferred by a contract the chose in action would clearly have survived (*Southcote* v. *Hoare* (1) ; *Fadden* v. *Deputy Federal Commissioner of Taxation* (2) ; *Halsbury*, 2nd ed., vol. 4, p. 470 ; vol. 7, p. 73), and I can see no distinction in principle where an option is conferred by a will. The authorities cited in *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Milne's Case*) (3), to which I will add *Carter* v. *Hyde* (4), show that an option of purchase creates an equitable interest in the property subject to the option. The extent of that interest depends upon the terms of the contract or of the gift. If upon the true construction of the instrument an intention appears that the option is only to be exercised by the optionee personally, then the option determines upon his death (*Skelton* v. *Younghouse* (5) ; *Tawse's Trustees* v. *Lord Advocate* (6) ; *Abbott* v. *Union Trustee Co. of Australia Ltd.* (7)).

The terms of the present option, and particularly the right to select the assets to be purchased, are such that they do, in my opinion,

(1) (1810) 3 Taunt. 87 [128 E.R. 36].
(2) (1943) 68 C.L.R. 76, at p. 83.
(3) *Ante*, at pp. 285, 296.
(4) (1923) 33 C.L.R. 115, at p. 125.
(5) (1942) A.C. 571.
(6) (1943) S.C. 124 (Ct. Sess.).
(7) (1928) 41 C.L.R. 375.

manifest an intention that the option was to be exercised only by the testator's brother and Taylor personally and by no one else and therefore not by their assignees or personal representatives (*In re Madge*; *Pridie* v. *Bellamy* (1), a decision of Lord *Russell of Killowen* (then *Russell* J.) which Viscount *Maugham* referred to in *Skelton* v. *Younghouse* (2) as "unquestionably correct"; *Tawse's Trustees* v. *Lord Advocate* (3)). But there is no indication of an intention that the proprietary interest created by the joint option should not be subject to its ordinary incident of survivorship, and therefore, on the death of one of the optionees, be capable of being exercised by the other personally. The indications of intention are, I think, entirely to the contrary.

For these reasons I do not feel compelled to choose between the two constructions of the will, because whichever is right I am of opinion that J. B. Sharp was entitled to exercise the option on 5th May 1944.

It remains to consider the rights and obligations which then arose between him and the executors of the will. The property subject to the option is partnership property. The price to be paid under the option is the value of the testator's share in the assets to be purchased as shown in the books of the partnership at the date of death. When the books are looked at the shares in Sharp Investments Pty. Ltd. appear at £94,967 17s. 5d. and the racehorses, which, it is agreed, were at Tallarook, at six pounds each. The total assets of the partnership are shown in the books at the value of £377,020 10s. 8d., while on the liabilities side there appear £132,216 13s. 3d. owing to creditors and £244,803 17s. 5d. to the credit of the capital accounts of the partners. Of the amount to the credit of the capital accounts, the testator is credited with £162,305 19s. 2d. or approximately two-thirds. The purchase price payable by J. B. Sharp is therefore approximately two-thirds of £94,979 17s. 5d.

It is the duty of J. B. Sharp as the surviving partner to wind up the partnership by selling the assets, discharging the liabilities, and distributing the balance between the estates of his two partners and himself in accordance with the rights of the partners. The proceeds of sale of the shares in Sharp Investments Pty. Ltd. and of the two racehorses will be available, like the proceeds of sale of the other partnership assets, to discharge these liabilities. But out of the proceeds of sale of the whole of the assets received by the estate of the testator, the executors will be obliged to pay J. B. Sharp a sum equivalent to approximately two-thirds of the proceeds

(1) (1928) 44 T.L.R. 372.
(2) (1942) A.C., at p. 577.
(3) (1943) S.C. 124.

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of sale received by him upon the sale of the shares and the racehorses (*In re Holland*; *Brethel* v. *Holland* (1); *In re Armstrong's Will Trusts*; *Graham* v. *Armstrong* (2)). As the amount payable for the testator's share in these assets has been ascertained without taking into account the liabilities of the partnership, it follows that, in determining the liability of the estate to J. B. Sharp, the only deductions that should be made from the two-thirds of these proceeds of sale should be two-thirds of any expenses, such as commission, specifically referable to the sale of the shares and the racehorses and two-thirds of the proportion of the general costs, charges and expenses of winding up the partnership attributable to the proportion which the proceeds of sale of these assets bears to the total proceeds of sale of the partnership assets.

For these reasons I would allow the appeal and I agree with the order proposed by my brother *Rich*.

Appeal dismissed. Appellant to pay costs of respondent trustees and of Winifred Austen Vial.

Solicitors for the appellant, *J. V. McEacharn & Son.*
Solicitors for the trustees, *Abbott, Beckett, Stillman & Gray.*
Solicitors for Winifred Austen Vial, *Blake & Riggall.*
Solicitors for Taylor's executors, *Francis Newell & Son.*

E. F. H.

(1) (1907) 2 Ch. 88.

(2) (1943) Ch. 400.