[HIGH COURT OF AUSTRALIA.]

O'NEILL . . . . . APPELLANT;
PLAINTIFF,

AND

O'CONNELL AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON REMOVAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, 1945. *Oct.* 18, 20, 24.

Latham C.J.

MELBOURNE, 1946. *Feb.* 22, 25; SYDNEY, *April* 11.

Starke, Dixon, and Williams JJ.

National Security—Economic organization—Regulations—Prohibition of transactions relating to land without consent of Treasurer—"Purchase"—"Otherwise acquire"—Option to purchase land at specified sum conferred by will—Exercise of option—Application of regulations—National Security (Economic Organization) Regulations (*S.R.* 1942 *No.* 76—1944 *No.* 99), *Part III., regs.* 6 (1), 10 (1).

Constitutional Law (*Cth.*)—*Defence—National security—Economic organization—Regulations—Validity—Cessation of hostilities—Cause removed—Grounds on which High Court may decide cause—The Constitution* (63 & 64 *Vict. c.* 12), *s.* 51 (*vi.*)—*National Security Act* 1939-1943 (*No.* 15 *of* 1939—*No.* 38 *of* 1943), *s.* 5—*Judiciary Act* 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *ss.* 38A, 40A.

Upon its true interpretation reg. 6 (1) of the *National Security* (*Economic Organization*) *Regulations* does not cover the creation or transmission of interests by will or their enjoyment and it therefore does not make unlawful the exercise of an option conferred by will to purchase land of the testator and in any case reg. 10 (1) would validate the transaction.

So *held* by *Starke, Dixon* and *Williams* JJ.

Decision of *Latham* C.J., on this point, reversed.

The nature of an option conferred by a testamentary instrument and the legal effect of its exercise discussed.

When on the view taken in the Supreme Court of other questions a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of the States arises for decision, the whole cause is transmitted under s. 40A

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of the *Judiciary Act* 1903-1940 to the High Court, which may decide it on any ground whether of State or of Federal law if the rights of the parties are thereby determined.

Held, by *Latham* C.J. (in proceedings commenced on 1st September 1945), that Part III. of the *National Security* (*Economic Organization*) *Regulations* was valid and effectual as an exercise of the power conferred by s. 5 of the *National Security Act* 1939-1943 notwithstanding the cessation of hostilities in the war with Germany, Italy and Japan.

CAUSE removed into High Court under the *Judiciary Act* 1903-1940.

Daniel Francis O'Neill instituted proceedings in the Supreme Court of Victoria by originating summons against Florence Christopher O'Connell and Jerome Joseph O'Connell, executors of the will of Jerome O'Connell deceased, for the determination of questions arising under the will. The cause was removed into the High Court under s. 40A of the *Judiciary Act* 1903-1940. The facts are stated in the judgments hereunder.

Ashkanasy K.C. and *Rapke*, for the plaintiff.

Dean K.C. and *Frederico*, for the defendants.

Coppel K.C. and *P. D. Phillips*, for the Commonwealth (intervening).

Cur. adv. vult.

1945, Oct. 24. LATHAM C.J. delivered the following written judgment :—

Cause removed to the High Court under the *Judiciary Act* 1903-1940 by reason of a question arising as to the limits *inter se* of the constitutional powers of the Commonwealth and the States.

By his will the late Jerome O'Connell, who died on 26th October 1944, gave devised and bequeathed all his property to his trustees upon trust to sell, call in and convert into money and to stand possessed of the proceeds upon the trusts declared in the will. A codicil contained the following provisions :—" (1) I direct that my executors shall offer my business known as the Busy Store to the said Daniel O'Neill for purchase by him at a valuation to be agreed upon by accountants appointed one by my executors and one by him and in default of agreement by an umpire the purchase to be made within twelve months of my death. My executors may allow time for payment of the price ; (2) I give to the said Daniel O'Neill an option to purchase the freehold of the premises of the said business at £6,500 for which my executors may allow terms the option to be exercised within twelve months of my death."

On 24th August 1945 the plaintiff Daniel Francis O'Neill signed and on 25th August posted to the executors of the will the following letter :—" Take notice that I hereby exercise my option of the freehold of the premises of the ' Busy Store ' at Shepparton for the price of six thousand five hundred pounds which option was conferred on me by the terms of the will and codicil of the above-named deceased." Thus O'Neill exercised the option given by the second provision (as to the land) but not that given by the first provision (as to the business).

The *National Security* (*Economic Organization*) *Regulations*, Statutory Rules 1942 No. 76 as amended, provide in reg. 6 (1) :—

" 6. (1) Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer—

(*a*) purchase any land ;

(*b*) take an option for the purchase of any land ;

(*c*) take any lease of land ;

(*d*) take a transfer or assignment of any lease of land ; or

(*e*) otherwise acquire any land."

An application was made for the consent of the Treasurer to the purchase of the land by O'Neill. A valuation of the land as at 10th February 1942 was forwarded in pursuance of reg. 6 (7) (*a*). The Treasurer refused his consent upon the ground that the price of £6,500 exceeded a fair and reasonable value as at 10th February 1942. The plaintiff contends that the Regulations do not apply to the exercise of such an option as this and alternatively that the Regulations are invalid for various reasons. One argument upon which the plaintiff relies to support the last-mentioned contention is that even if the Regulations were valid up to the date of the surrender of Japan (2nd September 1945) they thereafter by reason of the cessation of hostilities with and surrender of both Germany and Japan became no longer supportable under the defence power. Accordingly on 16th October 1945 the plaintiff gave another notice to the executors exercising the option in respect of the land upon which the Busy Store is situated.

The matter before the Court is an originating summons in which the questions as amended are as follows :—

" (1) Is the notice dated 24th August 1945 or the notice dated 16th October 1945 delivered to the executors an effective exercise of the option to purchase the freehold of the business known as the Busy Store Shepparton under the terms of the codicil of the deceased dated 15th October 1944 ?

(2) Is the option to purchase the said freehold mentioned in the said codicil conditional on the purchase by Daniel O'Neill of the business known as the Busy Store ?

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(3) Does the notice dated 24th August 1945 or the notice dated 16th October 1945 delivered to the executors confer upon the plaintiff an enforceable right to receive a transfer of the freehold of the testator's business premises upon the terms contained in the codicil of the deceased ? "

Question No. (2) should be answered " No." No argument to the contrary was addressed to the Court.

The plaintiff has exercised his option in accordance with the terms of the will. He has communicated to the executors within the time specified in the will his intention to exercise the right given to him by the will in respect of the land. It is argued that the provision of the will amounts to a conditional gift of the land, the condition having been fulfilled by the intimation to the executors of the exercise of the option. No contract, it is said, was made between the parties by the exercise of the option, but a condition attached to a gift was thereby satisfied, the result being that the gift became absolute, so that the executors are bound, by reason of the terms of the will, and not by reason of any contract, to transfer the land to the optionee, as in the case of any devise. It is further argued for the plaintiff alternatively that if the exercise of the option made a contract between the optionee and executors, such a contract is not a purchase of land, but only an agreement to purchase land, and that it is not an acquisition of the land, but only an agreement for the acquisition of land. It is contended that upon these grounds the Regulations do not apply to the transaction. The plaintiff also relies upon reg. 10, which is in the following terms :—

" 10. (1) Where any transaction is entered into in contravention of this Part or of Part VI of these Regulations, or where any condition to which the transaction is subject is not complied with, the transaction shall not thereby be invalidated, and the rights, powers and remedies of any person thereunder shall be the same as if these Regulations had not been made.

(2) Nothing in this regulation shall affect the liability of any person to any penalty in respect of any contravention of these Regulations."

This regulation, it is argued, preserves all civil rights arising from a transaction, even though the transaction may constitute a breach of the Regulations. It is argued, therefore, that as between the parties, the optionee and the executors, the option has been effectively exercised, even if the optionee is (or both the optionee and the executors are) liable to penalties under the Regulations.

On the other hand it is contended for the executors that the option provision in the will was not a conditional gift of the land ; that if the exercise of the option brought about a contract of purchase,

there was a purchase, or at least an acquisition, of land within the meaning of the Regulations; that such a transaction is prohibited by the Regulations, and is therefore illegal and ineffective; and that reg. 10 applies only to past and completed transactions, or alternatively (if no contract was made) has no application to an unaccepted offer. It is also argued for the defendants that the "exercise of the option" was not the acceptance of an offer which the executors must be regarded as having made, but, on the other hand, was the making of an offer to the executors which they have not in fact accepted, so that no contract (or transaction) has resulted.

A distinction should be drawn between an option to purchase given *inter vivos* for value and an option given by will. Options of the first class are binding contracts. Varying opinions have been expressed upon the question whether such an option agreement vests an equitable interest in the property in the optionee before it is exercised: See *Goldsbrough, Mort & Co. Ltd.* v. *Quinn* (1), where *Griffith* C.J. said that the option did give an interest in property (2). *O'Connor* J. was not definite on this point. *Isaacs* J. took another view (3)—See comment made by *Isaacs* J. in *Carter* v. *Hyde* (4). See also *Commissioner of Taxes (Q.)* v. *Camphin* (5); *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (6). In *Halsbury's Laws of England*, 2nd ed., vol. 6, at p. 109, and vol. 20, at p. 65, the references to the creation of an equitable interest in property over which an option may be exercised refer to the exercise of the option, and not to the mere existence of the option agreement.

There are statements that options given for value are themselves property in a sense which is not very precisely defined: *In re Cousins*; *Alexander* v. *Cross* (7), where an option which was held to be personal to the optionee, exercisable by him only, and not assignable, was nevertheless, because it was of value, said to be property "in one sense." See, further, *Carter* v. *Hyde* (8); *Re Busby*; *Busby* v. *Busby* (9).

But an option given by a will is very different in legal character from an option arising under a contract. Such an option is plainly not a contract. It is unilateral. It is not an offer made by the testator during his lifetime capable of acceptance after his death so as to become a contract under which the testator can be held to have become liable.

(1) (1910) 10 C.L.R. 674.
(2) (1910) 10 C.L.R., at p. 678.
(3) (1910) 10 C.L.R., at p. 692.
(4) (1923) 33 C.L.R. 115, at pp. 122-123.
(5) (1937) 57 C.L.R. 127.
(6) (1944) 69 C.L.R. 270, at p. 285.
(7) (1885) 30 Ch. D. 203.
(8) (1923) 33 C.L.R. 115.
(9) (1930) 30 S.R. (N.S.W.) 399; 47 W.N. 155.

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An option to purchase given by will is distinct from a gift to a devisee or legatee conditional upon the payment of money (*In re Sykes* (1)), though it may obviously be difficult in particular cases to apply the distinction. It was said, or at least suggested, by Lord *Dunedin* in *Wright* v. *Morgan* (2), that an option given by will created a vested interest (apparently in the property to which the option applied) which was assignable unless there was something in the nature of the interest, or in the words of the document creating the interest, contradicting the nature of assignability. But his Lordship went on to say that really the option amounted only to "a right to enter into a contract." The suggestion that the mere existence of the option in the will created a vested interest was criticised in *Skelton* v. *Younghouse* (3), where Viscount *Maugham* L.C. expressly reserved his opinion upon the question whether an option to purchase in a will created a vested interest before it was exercised, and pointed out that Lord *Dunedin's* observation was in the nature of an *obiter dictum* and that the point was not argued in *Wright* v. *Morgan* (4).

The matter is by no means free from doubt, but I am of opinion that an option by will to purchase property does not in itself and independently of its exercise give an equitable interest in that property, whether or not the right of the optionee can properly be described as itself being property. The true position is, I suggest, that, if the option is exercised, and if in a proper course of administration the executors are in a position to make and do make a contract of sale to the optionee, the optionee will then under the contract obtain an equitable interest in the property in respect of which the option is given.

It would appear to be easy to hold that an option of purchase given by a will is an offer which by acceptance becomes a contract, but there are difficulties in this apparently simple view. As already stated, there is in such a case no contract between the testator and the optionee. If the exercise of such an option makes a contract of purchase binding upon the executors, then the executors become personally bound to sell the land or other property to the optionee at the price and on the conditions stated in the will. But the executors are entitled to sell the property of the deceased for the purpose of paying debts. They may quite properly, and perhaps necessarily, sell for this purpose the property over which the will has given the option. Such a sale would not necessarily destroy the value of the option for, after payment of debts, there might be a

(1) (1941) Ch. 1, at pp. 7, 8.
(2) (1926) A.C. 788, at p. 796.
(3) (1942) A.C. 571, at p. 575.
(4) (1926) A.C. 788.

sufficient surplus in the estate to give the optionee the difference between the amount at which he was entitled to purchase and the amount realized by the sale (*In re Cant's Estate* (1)). But it may be that, after the sale of the subject matter of the option for the satisfaction of creditors, there will be no beneficial surplus in the estate which can be used in whole or in part to meet the option. It must be the case that the executors are protected in pursuing an ordinary course of administration, and, therefore, in paying creditors before regarding the claims of any persons claiming under the will. Thus, in my opinion, it cannot be held that where an option to purchase is given under a will the person to whom it is given can, by exercising the option, bind the executors (independently of and possibly against their will) by a contract under which they are compellable to sell to him at the price and upon the conditions specified in the will.

The position has been worked out in two cases in which the question of the nature of the rights created by an option given by will was raised very neatly. In *Given* v. *Massey* (2) the will of the testator provided that his trustees should sell and convert his property and that L. should have the option of purchasing certain land at the price of £1,400, the option to be declared in writing within three months after his death. The will contained a direction to the trustees on payment of the said sum to assure the land to the said L. It was contended that L. took as devisee, and therefore that he took the land subject to the incumbrances thereon as provided by *Locke King's Act*. It was held, however, that the testator meant that all his property should be sold, and that if L. chose he and no-one else should be the purchaser of the land. *Porter* M.R. said :—" On the language of this will, it is clear that the testator meant that Loughrey was to be a purchaser, and nothing else—a favoured purchaser no doubt, but still a purchaser. The element of bounty does enter into the matter ; but the bounty conferred is the right to become a purchaser on advantageous terms, and not a devisee of the estate " (3). Accordingly, *Locke King's Act* had no application to the case, as the optionee was not a devisee. His right was a right to become a purchaser of the land and, accordingly, he took the land free from incumbrances.

This case was followed and applied in *In re Wilson* ; *Wilson* v. *Wilson* (4). In that case also the testator devised and bequeathed his residuary real and personal estate to trustees upon trust for sale and conversion, and the will contained a direction that the trustees

(1) (1859) 4 DeG. & J. 503 [45 E.R. 196].
(2) (1892) 31 L.R. Ir. 126.
(3) (1892) 31 L.R. Ir. at p. 130.
(4) (1908) 1 Ch. 839.

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should allow his son the option of purchasing two houses forming part of his real estate for the sum of £450 within a specified time. *Warrington* J. followed and applied *Given* v. *Massey* (1). He read the direction to the trustees with respect to the option in connection with the trust for sale and conversion and held that it meant that the trustees, having a power to sell to anyone they pleased, were bound in the first place to offer the property to the son. The learned judge said :—" If he desires to have it and if he exercises his option, in my opinion he elects to become a purchaser and must be taken to have made an offer to the trustees which they are bound to accept and must be taken to have accepted " (2).

I apply these principles to the present case. The executors are directed by the will to sell and convert all the property of the testator. O'Neill, however, is to be a favoured purchaser of certain land. The executors are bound to offer it to him at the fixed price, but (I add) only if they can do so in a proper course of administration. If the property is worth more than £6,500, and if, in order to pay debts, it was sold for a greater sum, such a sale would be quite proper. But in that case O'Neill, if he exercised the option, would be entitled to receive the value of the option so far as moneys were available to pay that value ; that is, testamentary expenses and debts would be paid first, and the rights of beneficiaries would be adjusted *inter se*.

The result is that I agree with the opinion expressed by *Gavan Duffy* J. in the Supreme Court that the effect of the option given to O'Neill is that the trustees are bound by the will to offer the land to him at a price of £6,500—but, in my opinion, subject to the requirements of the due administration of the estate by the executors. The position is not altered in substance if the view is taken that the trustees are bound to accept (subject to the same qualification) an offer made by O'Neill—instead of being bound to make an offer to him.

No such offer, however, has been made by the executors, because they adopt the position that the acceptance of such an offer would result in the purchase of the land by O'Neill, and that such a purchase would be illegal without the consent of the Treasurer and would subject them to penalties. The offer made by O'Neill (if his exercise of the option is so considered) has not been accepted by the executors. A court will not direct the executors to pursue a course of action (in either making or accepting an offer) which would make them aid and abet O'Neill in the commission of an offence. Regulation 6, it is true, deals with the purchase of land, and does not refer to the sale

(1) (1892) 31 L.R. Ir. 126. (2) (1908) 1 Ch., at p. 843.

of land. But the vendor of land must be regarded as a person aiding and abetting the purchaser when a question of a criminal offence in relation to the transaction of purchase arises (*Fairburn* v. *Evans* (1)). Thus the executors would be guilty of an offence under the *National Security Act* 1939-1943 by virtue of the application of the *Crimes Act* 1914-1941, s. 5, if they made the offer of the land to O'Neill and he accepted it, or if they accepted what is regarded as an offer made by him.

But it is argued that a contract to purchase land is not a purchase of land within the meaning of the Regulations. The contention means that there is no purchase of land unless the contract to purchase is completed by conveyance or transfer. In my opinion this construction should not be adopted. It is an ordinary use of language to say that a man purchases land when he agrees to buy it. This opinion is supported by *George* v. *Greater Adelaide Land Development Co. Ltd.* (2), where the Court considered a provision making it unlawful to sell land except in accordance with the provisions of an Act. *Knox* C.J. drew the distinction between a sale of land and a transfer, conveyance or disposition of the land (3). See also *per Isaacs* J. (4) and *Starke* J. (5)—" Selling, in the case of land, includes the making of agreements for its conveyance in consideration of a price in money."

I am therefore of opinion that an offence against the Regulations would be committed if the trustees agreed to sell the land to O'Neill, whether the sale resulted from the acceptance by the trustees of an offer made by O'Neill, or from the acceptance by O'Neill of an offer made by the trustees. A court would not order the trustees to enter upon, or declare that they were bound to enter upon, a transaction which would involve an offence against the law.

Upon this view it is unnecessary for me to consider the provisions of reg. 6 (1) (*e*) relating to acquisition of land otherwise than in the particular manner stated in the preceding provisions.

It is now necessary to consider reg. 10, which provides that where any transaction is entered into in contravention of the Part of the Regulations containing reg. 6 the transaction shall not thereby be invalidated " and the rights, powers and remedies of any person thereunder shall be the same as if these Regulations had not been made." This is a remarkable regulation, but I am unable to see any escape from the contention that it means what it says, namely, that breach of the Regulations shall not invalidate a transaction or affect

(1) (1916) 1 K.B. 218.
(2) (1929) 43 C.L.R. 91.
(3) (1929) 43 C.L.R., at p. 98.
(4) (1929) 43 C.L.R., at p. 101.
(5) (1929) 43 C.L.R., at p. 104.

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in any way the rights and remedies of any person under a transaction. I am unable to construe the words " a transaction entered into " as limited to transactions which are completed and closed. A contract of sale is a transaction within the meaning of the regulation, even though it is not completed by conveyance or transfer. But if the analysis of the transaction which I have above made is sound there is, up to the present, no transaction between the parties. Upon the view which I have expressed, what is described as the exercise of the option by O'Neill is not an acceptance of an offer so as to make a contract. It can be no more than the making of an offer to the trustees. Apart from the Regulations, the trustees would be bound either to accept the offer, or to make to O'Neill the same offer, which he could accept. But the making of an offer by O'Neill is not a transaction between him and the trustees and the trustees have made no offer to him. Thus reg. 10 has, I think, no application to the present case and the position remains that to require the trustees now to make an offer to O'Neill would be to direct them to join in the commission of an offence against the Regulations.

Upon this view it is not necessary for me to consider the effect of reg. 10B, which relates to the duty of officers concerned with the registration of land titles. I am inclined to agree with the contention for the plaintiff that it has no further effect than to make it lawful to withhold registration until evidence is produced to the officer, but it is not necessary to decide this question.

It is further contended for the plaintiff that the Regulations are invalid because they are beyond the defence power of the Commonwealth.

I see no reason to vary the views upon this matter which I expressed in *Shrimpton* v. *The Commonwealth* (1). The fixing of prices for land appears to me to stand on the same footing as the fixing of prices for commodities: See *Victorian Chamber of Manufactures* v. *The Commonwealth* (*Prices Regulations*) (2). The decision in *Shrimpton's Case* (1) is not a decision of a majority of the Court in favour of the validity of the Regulations, but it is not a decision to the contrary, and I am therefore at liberty, sitting as a single judge, to adhere to the view which I there expressed.

The plaintiff, however, has relied upon a particular contention that the control of dispositions which are made by will and are in the nature of bounty cannot fall within the defence power and that the Regulations should be read down so as to exclude such control. In my opinion it is immaterial for the purposes of the economic organization which it is the purpose of the Regulations to bring about

(1) (1945) 69 C.L.R. 613. (2) (1943) 67 C.L.R. 335.

whether a purchase of land arises from benevolence expressed in a will, or is a sale at a price which the parties regard as an undervalue, or is the result of a hard-driven bargain. The substance of the transaction as a purchase of land is, from an economic point of view, the same in each case. Gifts by will where no consideration is given are excluded from the scope of the Regulations under reg. 8 (*f*), but there is no express exclusion of a contract of purchase because it is brought about or invited or authorized by the terms of a will, and in my opinion there is no reason for construing the Regulations in such a way as to imply any such exclusion.

It is further argued that the cessation of hostilities in the war and the acts of surrender of Germany and Japan have the effect of contracting the extent of the defence power, just as the outbreak of war had the effect of expanding it. I agree with this statement as a general proposition. A good illustration is afforded by the blackout regulations, to which reference was made in argument. It would be quite impossible to justify under the Federal defence power the retention of these regulations when all the fighting had ceased and the danger of fighting in Australia had disappeared.

The question is whether the facts of cessation of hostilities and surrender in themselves, apart from any other considerations, are sufficient to bring about the effect claimed. Though the cessation of hostilities may in effect guillotine some exercises of the war power, it is necessary to draw distinctions. Some war powers must, in the necessity of the case, be continued for a period after the cessation of hostilities. The prosecution of the war referred to in the *National Security Act* 1939-1943 cannot yet be said to have come to an end. The immediate removal of all Commonwealth economic regulation under the defence power would result in economic, and possibly in social, chaos. The Court is not bound to shut its eyes to practical considerations of this character. The defence power (legislative and executive) includes a power to prepare for war as well as to wage war, and it also includes, in my opinion, some power to control readjustment after war towards a return to conditions of peace. It will not be easy to draw the line in particular cases, because questions of degree will inevitably arise. In the present case, however, the question arises within a few months of the cessation of hostilities, when large Australian forces are still abroad upon military service, when the return of servicemen and women to civilian occupations has only just begun, when the whole world is painfully seeking a return to some hitherto undefined more "normal" condition of life, and when the economic instability and uncertainty directly associated with the war is still a preoccupation of all governments.

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These circumstances are facts which, in my opinion, are sufficient to support the continuance, at least for the present, of the economic controls contained in the *Economic Organization Regulations* as a valid exercise of the defence power of the Commonwealth. I refer to *Roche* v. *Kronheimer* (1), where the court upheld under the defence power the validity of the *Treaty of Peace Act* 1919 and Regulations made thereunder to give effect to the terms of the treaty of peace made at the conclusion of the war of 1914-1918 so as to " wind up " after the war.

In my opinion the Regulations were valid when enacted, and their validity is not affected by the facts that hostilities have ceased and that Germany and Japan have surrendered. There are cases pending before the Full Court in which the effect of the conclusion of hostilities will be considered in relation to certain National Security Regulations. I would have preferred to postpone my decision until the Full Court had decided these cases, but I give my decision at once because the plaintiff has pressed for an immediate decision. I answer the questions in the originating summons in the following way:— Question 1 : No. Question 2 : No. Question 3 : No. Costs of plaintiff and defendants out of the estate ; those of the executors as between solicitor and client ; certify for counsel in the Supreme Court.

An application for a mandamus already made and refused by me was renewed by Mr. *Ashkanasy* on behalf of the plaintiff as prosecutor. The application, after I had refused it, was again made to the Full Court under the Appeal Rules, s. 1, rule 7. The Full Court, however, made no order. I refused the application for a mandamus to the Treasurer to consent to the contract of purchase of the land by O'Neill for £6,500. The Court cannot, in my opinion, in effect substitute itself for the Treasurer. I also refused the application for mandamus to the Treasurer to consider and determine the application for his consent. The evidence, in my opinion, showed that the application had been considered and determined in accordance with law and I was not of opinion that in taking into account the value of the land as at 10th February 1942 the Treasurer had taken extraneous matters into consideration. I therefore refused the application as renewed to me. As the applicant may desire to obtain a decision from the Full Court on the matter, I extend the time for making an application to the Full Court for one month from the present date. The application for a mandamus was made *ex parte* and there will be no order as to costs.

(1) (1921) 29 C.L.R. 329.

From this decision the plaintiff appealed to the Full Court of the High Court. When the appeal came on for hearing the Court was constituted by three justices only; it was decided that the question of the validity of the *National Security* (*Economic Organization*) *Regulations* should not be argued at that stage but that, if it became necessary to determine that question, the Court should be reconstituted. The Commonwealth, which had applied for leave to intervene, then withdrew its application.

Ashkanasy K.C. (with him *Rapke*), for the appellant. Regulation 6 (1) of the *Economic Organization Regulations*, in the natural meaning of its words, relates only to transactions *inter vivos*, and does not apply to the taking of a benefit under a will. The conferring by a will of an option to purchase land is a form of conditional devise: See *Halsbury's Laws of England*, 2nd ed., vol. 13, p. 34. *In re Younghouse* v. *Sykes* (1) is not an authority to the contrary, nor is it material to the question which arises in the present case. The option gives the donee an interest in the land immediately on the death of the testator, and there is no element of contract in the matter. The authorities relied on by *Latham* C.J. do not necessitate any conception of a contract. [He referred to *Skelton* v. *Younghouse* (2); *In re Cant's Estate* (3); *In re Armstrong's Will Trusts*; *Graham* v. *Armstrong* (4); *Commissioner of Taxes* (*Q.*) v. *Camphin* (5).] The donee, on exercising the option, takes the land by virtue of the will and not by any transaction whereby, in the ordinary meaning of the words, he can be said to " purchase " or " acquire " the land as in the case of a transaction between living persons. By obtaining a conveyance or transfer from the executors the donee will not " acquire " the land within the meaning of reg. 6 (1) (*e*): The land devolves on him by what is in effect the machinery of testamentary gift. If, however, the exercise of the option or the taking or a conveyance or transfer does involve a transaction to which reg. 6 (1) applies, the transaction is, nevertheless, not invalid: It is saved by reg. 10, which shows that the intention of the Regulations is not to affect civil rights, but merely to penalize transactions covered by reg. 6 (1). The will imposes on the executors a duty to transfer the land in accordance with its terms, and they are not affected by the penal provisions of the Regulations.

Dean K.C. (with him *Frederico*), for the defendants. To obtain the land in accordance with the terms of the will the donee of the option must " purchase " or " otherwise acquire " the land within

(1) (1941) Ch. 1.
(2) (1942) A.C. 571, at p. 581.
(3) (1859) 4 DeG. & J. 503 [45 E.R. 196].
(4) (1943) Ch. 400.
(5) (1937) 57 C.L.R. 127.

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the meaning of reg. 6 (1), which covers all cases in which money or other valuable consideration is given for the transfer of land. The introduction of consideration marks the distinction, for the purposes of the Regulations, between a devise and an option of purchase. There is no conditional devise in this case ; the will contains no words of devise (*Belshaw* v. *Rollins* (1) ; *Abbott* v. *Union Trustee Co. of Australia Ltd.* (2)). The optionee has no interest in the land until he exercises the option (*In re Sykes* (3)). The language of the present will can have only one meaning : The optionee must " purchase " the land *from the executors*, and this involves a contract between the optionee and the executors (*Wright* v. *Morgan* (4)), which necessarily brings the case within reg. 6 (1) (*a*). The will contains a trust for conversion of the whole estate so that the whole of the real estate is to be converted into personalty. The option provision is in substance part of the scheme for conversion, not a devise to the optionee. The appellant's argument does not give sufficient weight to the decision in *In re Wilson* ; *Wilson* v. *Wilson* (5) or to *Given* v. *Massey* (6). If the optionee does not " purchase " the land, within reg. 6 (1) (*a*), he " acquires " it, within reg. 6 (1) (*e*), on transfer, if not at an earlier date. The object of the Regulations is to take full control of investment in land and, therefore, to reach all transactions in which land is exchanged for money or money's worth. By purporting to exercise the option the appellant has not entered into any transaction within the meaning of reg. 10 ; accordingly, there has in this case been no transaction which reg. 10 could validate. [He referred to reg. 10B and to *Smith* v. *Wirth* (7) ; *In re Cary-Elwes' Contract* (8).]

Ashkanasy K.C., in reply. Regulation 10B, like reg. 10A, is directed to enabling the Treasurer to get information of breaches of the Regulations ; it cannot operate to prevent registration of a transfer which is valid under reg. 10.

Cur. adv. vult.

1946, April 11. The following written judgments were delivered :—

STARKE J. Jerome O'Connell, who died on 26th October 1944, made a codicil to his will whereby he gave to Daniel O'Neill an option to purchase the freehold of certain premises at £6,500 for which his executors might allow terms of option to be exercised within twelve months of his death.

(1) (1904) 1 Ir.R. 284, at pp. 286, 289.
(2) (1928) 41 C.L.R. 375, at pp. 382, 383.
(3) (1941) Ch., at pp. 7, 8.
(4) (1926) A.C. 788.
(5) (1908) 1 Ch. 839 : See particularly pp. 833, 834.
(6) (1892) 31 L.R. Ir. 126.
(7) (1945) Q.W.N. 8 ; 19 A.L.J. 52.
(8) (1906) 2 Ch. 143.

Daniel O'Neill purported to exercise this option by notices dated 24th August 1945 and 16th October 1945, the latter notice being given in case the former did not confer upon him an enforceable right to receive a transfer of the freehold.

An originating summons issued out of the Supreme Court of Victoria sought the determination, *inter alia*, of the question whether these notices conferred upon the plaintiff Daniel O'Neill an enforceable right to receive a transfer of the freehold of the testator's business premises upon the terms contained in the codicil to the will of the deceased. *Gavan Duffy* J. was prepared to answer the question in the negative because the notices operated as offers to purchase the land which the executors did not and could not accept by reason of the provisions of the *National Security* (*Economic Organization*) *Regulations*. But, the validity of these Regulations being challenged, the learned judge made no order, having regard to the provisions of the *Judiciary Act* 1903-1940, ss. 38A and 40A.

By s. 38A the jurisdiction of the High Court is exclusive of the jurisdiction of the Supreme Courts of the States in matters involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, and s. 40A provides that when, in any cause pending in the Supreme Court of a State, there arises any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, it is the duty of the State court to proceed no further in the cause which is by virtue of the Act and without any order removed to the High Court.

The cause came before the Chief Justice of this Court, who proceeded on the basis that the cause was removed into this Court. He agreed with *Gavan Duffy* J. that the effect of the option was that the executors of O'Connell were bound to offer the land to O'Neill, that no such offer was made because they adopted the position that the acceptance of the offer would result in the purchase of the land by O'Neill, which was prohibited by the *Economic Organization Regulations* without the consent of the Treasurer of the Commonwealth, which had been refused, and he held that the case fell within the terms of the Regulations, which were valid.

An appeal is brought from that decision to this Court, which directed counsel to confine their arguments, for the time being, to matters that did not touch the constitutional validity of the Regulations.

There are some passages in *R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co. Ltd.* (1) which suggest that only the *inter se* ques-

(1) (1919) 27 C.L.R. 249.

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tion is removed into this Court; that the jurisdiction of this Court is confined to the determination of that question because of the limited nature of the original jurisdiction of this Court: See Constitution, ss. 75 and 76, and *Judiciary Act*, s. 30. It is, however, the cause that is removed by s. 40A. "Once the cause is removed," this Court "is clothed with full authority essential for its complete adjudication: it is the *cause* which is removed, and not merely the question involving the interpretation of the Constitution": Cf. *Ex parte Walsh and Johnson; In re Yates* (1). But the Court must be satisfied that its jurisdiction attaches, that the decision on the constitutional question is necessary for the adjudication of the rights of the parties. And jurisdiction attaches, I gather, at the moment the Supreme Court in the course of its proceedings encounters and not before it encounters the constitutional question. The Supreme Court should not stay its hand until the constitutional question "becomes necessary for the determination of the rights of the parties": See *In re Drew* (2); *R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co. Ltd.* (3); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (4).

Both *Gavan Duffy* J. in the Supreme Court and the Chief Justice of this Court were of opinion that a constitutional question, within the meaning of s. 40A, arose and that its determination was necessary for a complete adjudication of the rights of the parties upon the originating summons.

The option gave Daniel O'Neill a right to acquire the property within a certain time and at a certain sum. It is unnecessary in the present case to consider whether the option gave O'Neill a mere personal right or a right transmissible to his personal representatives or assignees, for he exercised the option in due time: See *In re Cousins*; *Alexander* v. *Cross* (5); *Skelton* v. *Younghouse* (6); *Sharp* v. *Union Trustee Co. of Australia Ltd.* (7).

By the exercise of his option O'Neill became entitled, upon payment of the sum mentioned by the testator, to call for a transfer of the land and to an equitable estate or interest therein (*London and South Western Railway Co.* v. *Gomm* (8)). And it would be the duty of the personal representative of the testator to make this transfer in a due course of administration of the testator's estate, e.g., after payment of his debts, funeral and testamentary expenses. This duty arises not from any agreement or contract made by the personal representative of the testator, but from the disposition of the testator coupled with the exercise by Daniel O'Neill of the option given to him.

(1) (1925) 37 C.L.R. 36, at p. 130.
(2) (1919) V.L.R. 600.
(3) (1919) 27 C.L.R. 249.
(4) (1923) 32 C.L.R. 413, at p. 429.
(5) (1885) 30 Ch. 203.
(6) (1942) A.C. 571.
(7) (1944) 69 C.L.R. 539.
(8) (1882) 20 Ch. D. 562.

No action would lie against the personal representative at law for the breach of any contract with the person to whom the option was given; the remedy for any refusal to carry out the disposition in the testator's codicil would be founded upon equitable principles.

But it was contended that O'Neill was "a purchaser, and nothing else—a favoured purchaser no doubt, but still a purchaser . . . and not a devisee of the estate" (*Given* v. *Massey* (1); *In re Wilson*; *Wilson* v. *Wilson* (2)). Those cases decide that the *Real Estate Charges Act* (*Locke King's Act*) does not apply to the case of a person to whom an option to purchase land at a fixed price is given by will because a disposition of that character signifies, I think, a "contrary or other intention," and also because, in those cases, the intention of the testator was upon the proper construction of the testamentary dispositions before the court to place the beneficiary in the same position as any outside purchaser would have occupied. It is not perhaps inaccurate for the purposes of that Act to say that the person to whom an option to purchase is given occupies the same position as a purchaser and is not in the same position as a devisee of the property.

In my opinion, the right of Daniel O'Neill to call for a transfer to him of the land mentioned in the disposition of the testator is so far clear, but the provisions of the *National Security* (*Economic Organization*) *Regulations*, Part III., must be examined. Clause 6 provides:—

"(1) Except as provided by this Part, a person shall not, without the consent in writing of the Treasurer—

(*a*) purchase any land;

(*b*) take an option for the purchase of any land;

(*c*) take any lease of land;

(*d*) take a transfer or assignment of any lease of land; or

(*e*) otherwise acquire any land.

(2) Nothing in this regulation shall prevent . . .

(*d*) the acquisition of land by way of gift;".

Clause 8 provides:—

"Nothing in this part shall prevent . . .

(*d*) the vesting in the personal representative of a deceased person, in his capacity as such, of any property or any interest in any property;

(*e*) any transaction which vests any property, or any interest in property, in any trustee of the estate of a deceased person . . . in his capacity as a trustee;

(1) (1892) 31 L.R. Ir. 126, at p. 130. (2) (1908) 1 Ch. 839.

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(*f*) any transaction which is without consideration in money or money's worth and the purpose of which is to vest any property, or any interest in property, in any person beneficially entitled thereto under or by virtue of any will or intestacy."

The language of clause 6 is extremely wide and cannot, I should think, be controlled by what is called the *ejusdem generis* rule of construction (*Larsen* v. *Sylvester & Co.* (1); *Thorman* v. *Dowgate Steamship Co. Ltd.* (2)). Still, the provisions of the Regulations lead me to the conclusion that they do not extend to the devolution of property upon death or the disposition of property by will. The words of clause 6 are that a person shall not without the consent of the Treasurer do various acts, e.g., purchase or otherwise acquire land.

A testator does not enter into transactions with anyone, he makes dispositions of his property which in the case of devises of land often operated of their own force and still do in some cases: Cf. *Robertson* v. *Deputy Federal Commissioner of Land Tax* (3). O'Neill purchased nothing, he took no option, he acquired nothing by any transaction with the testator or with his personal representatives. The terms of the testamentary disposition and the exercise by O'Neill of his option gave him whatever interest he has in the land.

Prima facie, therefore, the exercise by O'Neill of his option and the transfer to him of the land by the legal personal representative of the testator does not, on a proper construction of clause 6 (1), fall within its terms.

And this view is strengthened by sub-clause (2) (*d*), which provides that nothing in the regulation shall prevent the acquisition of land by way of gift, which in the main excludes testamentary dispositions.

Again, in clause 8 there is a provision excluding from the operation of the regulation the vesting in the personal representatives of a deceased person in his capacity as such any property and also any transaction which vests any property in any trustee of the estate of a deceased person. And in clause 7 there are provisions excluding from the operation of the Regulations the disposition of shares, stocks and debentures by way of gift, by will or in the exercise of a power of appointment by will.

But there is the provision in clause 8 of the Regulations:— "Nothing in this Part shall prevent . . . (*f*) any transaction which is without consideration in money or money's worth and the purpose of which is to vest any property, or any interest in property,

(1) (1908) A.C. 295.
(2) (1910) 1 K.B. 410.
(3) (1941) 65 C.L.R. 338, at p. 347.

in any person beneficially entitled thereto under or by virtue of any will or intestacy." The exclusion of transactions for consideration in money or money's worth from this exemption assists the argument that the exercise of his option by O'Neill and the execution of a transfer to him upon payment of the sum of £6,500 pursuant to the terms of the will constitutes an acquisition of land by him within the scope of the Regulations. But the exclusion of transactions for consideration in money or money's worth from the operation of Part III. of the Regulations narrows the operation of the Regulations but affirmatively does not enlarge the prohibition contained in clause 6. The words were probably inserted to exclude from the exemption in clause 8 (*f*), transactions for consideration in money and money's worth, beneficiaries under a will or in an intestacy and their assignees. The words cannot be ignored by a court of construction, but they do not compel or require a construction of clause 6 which is opposed to its natural signification and to the scope and provisions of the Regulations as a whole.

The result is that this appeal should be allowed, the answers given by the order of the Chief Justice to the first and third questions set forth in the originating summons set aside, and instead thereof the first and third questions should each be answered: "Yes."

DIXON J. Upon this appeal the respondent has not contested the correctness of the view adopted in the Supreme Court and accepted before the Chief Justice of this Court that the option which the codicil confers upon the appellant to purchase the land is independent of the option to purchase the business and may be exercised by the appellant although his election is against purchasing the business.

The option to purchase the land at £6,500 does not appear to me to be limited to a mere right of pre-emption if and when the trustees convert the real estate. Such a right gives but a prior opportunity of becoming the purchaser at the time when a power of conversion comes to be exercised or a duty to convert is to be fulfilled.

The manner in which the option in the present case is expressed makes it plain that it was intended to confer upon the appellant an immediate right, if he should so elect, to become the owner of the land at the fixed price of £6,500. Such a provision imparts to the donee of the option a beneficial right in reference to or an interest in the land. Substantially the same result might be produced by a devise of the land conditional upon the devisee paying the sum named. A not very different result might be produced by a direction to the executors or trustees to propose a contract of sale to the

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intended donee of the option upon terms and conditions stated in the will or to be settled in some manner indicated by the will.

But in form the disposition now in question stands between a conditional devise and a direction to propose a contract. It gives an immediate, though innominate, beneficial interest, one of the many miscellaneous rights and interests which under the wide power of testamentary disposition allowed by English law a testator may create.

In discussing whether the similarly framed option in *In re Cousins* (1) was transmissible or was exercisable only by the donee, *Cotton* L.J. refers to the argument that it is property and therefore devolves on death as other property. After remarking that the assumption that all property must last after a man's death is a fallacy, as is shown by the example of a life interest, his Lordship says: "The real question is, *although this is property*, is it such a property as can be made valuable at any time after the son's death?" (2).

It is now settled that there is no rule that prima facie such an option is personal to the donee and is not exercisable by his executors, administrators or assigns (*Skelton* v. *Younghouse* (3)). The reasons given by their Lordships in *Skelton's Case* (3) all show that the donee of the option takes on the testator's death an immediate beneficial interest in property. This is well illustrated by the reservation which, in view of the terms employed by Lord *Dunedin* in *Wright* v. *Morgan* (4), Lord *Maugham* thought fit to make concerning the question whether, before the exercise of an option of purchase contained in a will, the interest of the donee of the option in the property is to be considered vested or contingent, *scilicet*, contingent on his electing to take the estate or interest affected by the option. See further *Radnor* (*Earl of*) v. *Shafto* (5); *Brooke* v. *Garrod* (6).

The donee of the option, by electing to take the property at the price fixed or upon the terms indicated by the will, incurs an equitable duty to perform the condition upon which, under the provisions of the will, he becomes entitled to the property: Cf. *Attorney-General* v. *Wax Chandlers' Co.* (7); *Messenger* v. *Andrews* (8). The obligation is independent of contract.

The exercise of a testamentary option by the donee makes absolute his immediate right to the property, except in so far as the will makes payment of the price or the performance of any other obligation laid upon him an essential condition. His position becomes, of course,

(1) (1885) 30 Ch. D. 203.
(2) (1885) 30 Ch. D., at p. 213.
(3) (1942) A.C. 571.
(4) (1926) A.C. 788, at pp. 795, 796.
(5) (1805) 11 Ves. 448 [32 E.R. 1160].
(6) (1857) 2 DeG. & J. 62 [44 E.R. 911].
(7) (1873) L.R. 6 H.L. 1, at p. 19.
(8) (1828) 4 Russ. 478 [38 E.R. 885].

very similar to that of a purchaser. Indeed, questions have been raised as to how far, in connection with what may be called verification of title, rules implied upon an open contract of sale are applicable as between him and the executors or trustees of the will. But, though it has been said that there " must be taken to be " the elements of contract, the relation does not rest upon contract. The executors' obligation arises from the terms of the will, not from contractual promises made by them in exchange for promises made by the donee of the option. Of such promises there are none on either side. If a will, upon its proper interpretation, confers upon the donee of an option a right, upon exercising his option, to call upon the executors to give him a contract for the better evidencing or definition of his rights, a possible case where there are long terms of purchase, the execution of the contract may place the donee of the option on the actual footing of a contractual purchaser in all respects. But until the contract is entered into the rights of the executors and the beneficiary exercising the option do not arise *ex contractu* but depend upon the provisions of the will and the doctrines of equity operating upon the will. Considering the matter apart from the effect of the *National Security* (*Economic Organization*) *Regulations*, it appears to me that on the death of the testator the appellant became entitled to the option as an interest in or beneficial right in relation to the land. By his notices exercising the option he became entitled to the land subject to paying the purchase money and upon payment to call for a transfer.

In these circumstances, even if the provisions of the will, its being brought into operation by the death of the testator and the giving of the notices or any of these matters amounted to a contravention of reg. 6 of the *Economic Organization Regulations*, the case would appear to me to be covered by reg. 10 (1). That regulation expressly provides that where any transaction is entered into in contravention of the Part containing reg. 6, the transaction shall not thereby be invalidated and the rights, powers and remedies of any person thereunder shall be the same as if the Regulations had not been made.

As the notice or notices communicating the appellant's election fixed the rights, I cannot see why, if the facts fall within the prohibitions of reg. 6 at all, the completion of the acquisition of those rights should not fall within the protective provision of reg. 10, as a transaction entered into. The policy of that regulation is plainly to prevent an attempt to create or impart contractual or proprietary rights being considered illegal and void because the attempt infringed the regulations contained in Part III. or Part VI. To achieve the aim of the *Economic Organization Regulations* it doubtless appeared

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sufficient to penalize dealings in land without the Treasurer's consent. To annihilate the dealings themselves was evidently regarded as a further step which it was not necessary to take. It is true that in the subsequent reg. 10B the policy was not followed to its logical conclusion. But reg. 10 stands as the general rule, and reg. 10B affects only registration of transfers and other assurances.

I should therefore be of opinion that, even if reg. 6 did apply to the case, the appellant had become beneficially entitled to the land subject to payment of the price.

But I do not think that the case does fall within the operation of reg. 6. My reason is that I think that the regulation has no application to the devolution of property on death or the acquisition of rights under the dispositions of a will on the death of a testator, and I do not think it applies to the exercise of such rights or the enjoyment of property so devolving. In none of their changing forms do the regulations appear to me ever to have contemplated interference with testamentary dispositions, and neither the policy which they embody nor the economic control they aim at demand that they should do so.

Exclusive reliance upon the reprint of regulations as amended made pursuant to s. 6A (1) of the *Rules Publication Act* 1903-1939 sometimes, in a matter of interpretation, deprives the court of the advantage of seeing how the regulations were developed by amendment and why the amendments were made. Strictly speaking, s. 6A (1) does no more than authorize the printing in a conglutinated form of regulations made as separate pieces of subordinate legislation. It does not relieve the court of the duty of construing the regulations on the footing that they do consist of separate legislative acts.

It is not often that there is either need of or advantage in looking at the more authentic materials from which the Government Printer has reconstructed his convenient and perhaps more intelligible text. But this case happens, I think, to be such a one. Statutory Rules 1942 No. 76, in which the *Economic Organization Regulations* began, shows no intention at all of going beyond dispositions and transactions *inter vivos*. Regulation 6 thereof says that a person must not sell, transfer, convey or otherwise divest himself of an estate or interest in land. Statutory Rules 1942 No. 110 replaced Part III. of those Regulations with a new Part III. containing a more extended catalogue of the transactions which could not lawfully be entered upon without the Treasurer's consent. But it still dealt with the subject from the point of view of the vendor, transferor or disponor.

The regulation also introduced a parallel provision dealing with shares, stocks and debentures. Regulation 6 (1) provided that a person should not, without consent, (*a*) sell land, (*b*) grant an option for the purchase of land, (*c*) grant a lease (subject to an exception), (*d*) assign a lease (subject to an exception), (*e*) " otherwise dispose of land, except by way of gift, by will or in exercise of a power of appointment under a will." Regulation 7 in relation to shares, &c., ended with the like general provision against otherwise disposing of them except by way of gift, by will, or in the exercise of a power of appointment under a will.

It is plain that the draftsman of this regulation considered that the use of the wide and indefinite words " dispose of " made it desirable that he should expressly except gifts and dispositions by will. He was drafting a regulation imposing upon the vendors or disponors of property in land a prohibition against imparting property or contracting to do so without the Treasurer's consent. The person penalized was not the person actively acquiring property, but the person actively selling or otherwise disposing of it. To devise property by will or to exercise a testamentary power is to take active measures for its disposition, to make what on death would become an assurance of the property. It was therefore desirable to make an exception of testamentary dispositions. But by Statutory Rules 1942 No. 425 the policy of laying the prohibition on the vendor or disponor of land and penalizing him was changed and the purchaser or disponee was made the object of the prohibition and of the penal sanctions. The change of policy was restricted to land and reg. 7, dealing with shares, stocks and debentures, was left unaltered in this respect. Regulation 6 (1) provided that a person should not, without the consent of the Treasury, (*a*) purchase any land, (*b*) take an option for the purchase of any land, (*c*) take any lease of land, (*d*) take a transfer or assignment of any land, or (*e*) otherwise acquire any land. It will be seen that the corresponding but converse expressions are used. The change necessitated the removal of the exceptions to a separate sub-regulation. But it is clear, as it seems to me, that the prohibition is still laid on active transactions. To be guilty of a contravention it would be necessary to do something as an active agent. To become by the death of another his devisee, legatee, or beneficiary would not naturally be treated as falling within the prohibition, " A person shall not without consent acquire." The exceptions, now set out in the second sub-regulation of the regulation, cover the acquisition of land by way of gift and exclude it from the prohibition. To acquire a legal estate by way of gift involves

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becoming party to a transfer or assurance, " an active acquisition." In deliberately omitting the rest of the former exception, namely the words " by will or in the exercise of a power of appointment ", it is impossible to believe that the draftsman meant to drag these forms of " acquisition " under the prohibition. The explanation almost certainly is that he considered them to be illogical and unnecessary inasmuch as they were not included in the prohibition.

That this is the explanation is confirmed (1) by the retention of these exceptions in the case of shares, &c., where the prohibition is on the vendor or disponor ; (2) by the circumstance that the Treasurer's consent is required before the " acquisition," and although a will operates on death *eo instanti* to impart a beneficial interest and prior consent is out of the question ; (3) by the references to proposed transactions in all the provisions for obtaining consent (sub-regs. (4) and (6)) ; (4) by the inclusion in the same amending statutory rule of a new reg. 8, which provided that nothing in the Part should prevent (*d*) the vesting in the personal representative of a deceased person, in his capacity as such, of any property or any interest in any property, and (*e*) any transaction which vests any property, or any interest in property, in any trustee of the deceased person.

I am therefore of opinion that the Regulations do not cover the testamentary creation of interests.

It almost necessarily follows that they are not meant to penalize the exercise or enjoyment of the rights or interests given. There are no expressions in reg. 6 apt to cover the giving by the appellant of the notices of his election, and it was not, in my opinion, a contravention of the Regulations. I am therefore of opinion that the appeal should be allowed.

This originating summons was removed into the High Court by the operation of s. 38A and s. 40A of the *Judiciary Act* 1903-1940. It had come before *Gavan Duffy* J. in the Supreme Court and he had adopted views which brought the case within the application of the Regulations and at the same time left the now appellant without the benefit of reg. 10. That meant that his Honour was necessarily confronted with the question whether the Regulations were valid or invalid, a question involving directly or indirectly a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of the States. Upon the narrowest view that has been taken of the application of the words " involving," in s. 38A, and " there arises," in s. 40A, the consequence was that the " cause " or " matter " fell within those provisions and was removed into this Court : See and

compare *In re Drew* (1); *R.* v. *Maryborough Licensing Court* (2); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (3); *Pirrie* v. *McFarlane* (4); *Ex parte Walsh and Johnson*; *Re Yates* (5); *Commonwealth* v. *Kreglinger & Fernau Ltd.* (6); *James* v. *South Australia* (7); *R.* v. *Gates*; *Ex parte Maling* (8); *R.* v. *Carter*; *Ex parte Kisch* (9); *Ffrost* v. *Stevenson* (10); *Hopper* v. *Egg & Egg Pulp Marketing Board* (11); *Joyce* v. *Australian United Steam Navigation Co. Ltd.* (12); *R.* v. *Bevan*; *Ex parte Elias and Gordon* (13). But once the "cause" is lawfully removed here, then the determination of the cause lies within the jurisdiction of this Court, which, unless it exercises the power conferred by s. 42 or exercises its discretion to remit the whole or any part of it, may dispose of the matters in controversy and give what judgment and make what order appears right upon the facts and the law.

Accordingly I think we should allow the appeal and answer the questions in the originating summons :—1. Yes, that of 24th August 1945 was effective. 2. No. 3. Yes.

WILLIAMS J. The testator Jerome O'Connell died on 26th October 1944. By his will made on 15th August 1939 he appointed the respondents to be his executors and trustees and gave, devised and bequeathed his property to them upon trust to sell and convert the same into money, with power to postpone conversion for such period as they in the exercise of their discretion should think fit, and to hold the proceeds of conversion upon the trusts therein mentioned. By a codicil made on 15th October 1944 he gave the appellant an option to purchase the freehold of certain business premises known as the Busy Store at Shepparton for £6,500 and authorized his executors, the respondents, to allow terms, the option to be exercised within twelve months of his death. The appellant exercised this option by two notices in writing, the one dated 24th August and the other dated 16th October 1945. The second notice was given because, while it was considered doubtful whether the exercise of an option given by will was a transaction which was subject to the provisions of the *National Security (Economic Organization) Regulations*, it was considered that these Regulations had ceased to be

(1) (1919) V.L.R. 600.
(2) (1919) 27 C.L.R. 249.
(3) (1923) 32 C.L.R. 413, at pp. 428, et seq.
(4) (1925) 36 C.L.R. 170, at pp. 176, 178-180, 192-198, 223-225.
(5) (1925) 37 C.L.R., at p. 130.
(6) (1926) 37 C.L.R. 393, at pp. 420, 421, 422, 423, 430.
(7) (1927) 40 C.L.R. 1.
(8) (1928) 41 C.L.R. 519.
(9) (1934) 52 C.L.R. 221, at p. 224.
(10) (1937) 58 C.L.R. 528, at pp. 577, 617.
(11) (1939) 61 C.L.R. 665, at pp. 673, 677, 681.
(12) (1939) 62 C.L.R. 160.
(13) (1942) 66 C.L.R. 452, at pp. 465, 486.

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effective upon the unconditional surrender of Japan on 2nd September 1945. The appellant applied to the Treasurer in accordance with the Regulations for his consent to the exercise of the option, but consent was refused on the ground that the sum of £6,500 was considered to exceed a fair and reasonable value of the land on 10th February 1942 and the respondents then refused to complete the transaction. The appellant then filed an originating summons in the Supreme Court of Victoria for the determination, *inter alia*, of the following questions :—

1. Is the notice dated 24th August 1945, or the notice dated 16th October 1945, delivered to the executors an effective exercise of the option to purchase the freehold of the business known as the Busy Store, Shepparton under the terms of the codicil of the deceased dated 15th October 1944 ?

3. Does the notice dated 24th August 1945 or the notice dated 16th October 1945, delivered to the executors confer upon the plaintiff an enforceable right to receive a transfer of the freehold of the testator's business premises upon the terms contained in the codicil of the deceased ?

The cause was removed into this Court under the *Judiciary Act* 1903-1940 by reason of a question arising as to the limits *inter se* of the constitutional powers of the Commonwealth and the States, and was heard by the Chief Justice, who held that the Regulations were valid at the respective dates of each notice and that the exercise of an option to purchase land given by will is a purchase within the meaning of that word in reg. 6 (1) (*a*).

The appeal raises two main questions, the one whether the Regulations were valid at the respective dates of the notices, and the other whether, if they were valid on either of these dates, the exercise of an option to purchase land given by will is a transaction which falls within and is avoided by the Regulations. The Commonwealth sought leave to intervene upon the first but not upon the second of these questions. As it would only be necessary to determine the first question if the appellant failed on the second question, and as the Court was constituted by three justices, it was decided to proceed with the second question, and, if this question was determined adversely to the appellant, to reconstitute the Court and to have the appeal re-argued in part or in whole. The Commonwealth then withdrew its application to intervene at this stage and argument was heard on the second question.

This question raises two points. The first whether the exercise of the option was a purchase or other acquisition of land within the meaning of the Regulations; and the second whether, if it

was, the failure to obtain the Treasurer's consent had the effect of avoiding the transaction, or the Regulations are so framed that the transaction was not avoided although the appellant became liable to a prosecution.

As to the first point: The principal regulation is reg. 6. Regulation 6 (1) provides that a person shall not, without the consent in writing of the Treasurer, (*a*) purchase any land; (*b*) take an option for the purchase of any land; (*c*) take any lease of land; (*d*) take a transfer or assignment of any land; or (*e*) otherwise acquire any land. Regulation 6 (2) excepts certain transactions from the operation of reg. 6 (1). One of the excepted transactions is reg. 6 (2), "the taking of an option for the purchase of any land where the period within which the option may be exercised is limited to one month after the taking of the option." This exception would appear to have been made because the exercise of the option would make a binding contract for the purchase of the land and the consent of the Treasurer would be required to the purchase, and it would seem that, although the Treasurer had consented under reg. 6 (1) (*b*) to the taking of an option for more than this period, his consent would also be required to its exercise. Regulation 8 (*b*) therefore excepts the exercise of any option in writing given before 20th February 1942.

Regulation 6 (2) (*d*) excepts the acquisition of land by way of gift. The *Oxford Dictionary* states that a "gift" is "a transference of property in a thing by one person to another voluntarily and without any valuable consideration." There are three kinds of gifts in law, namely, gifts *inter vivos*, gifts *mortis causa*, and gifts by will. The meaning of "gift" in reg. 6 (2) (*d*) depends to a great extent upon the meaning to be attributed to the words "other acquisition of property" in reg. 6 (1) (*e*). The preceding paragraphs of reg. 6 (1) all apply to the acquisition of property by virtue of an immediate transaction, and do not include interests in land acquired by devolution on death under the will or intestacy of a deceased person. The excepted transactions, omitting for the moment reg. 6 (2) (*d*), also refer to immediate transactions, and the machinery contained in reg. 6, sub-regs. (3) to (10) inclusive, for obtaining the Treasurer's consent also contemplates that the transaction under which the land or an interest in the land is to be acquired is a transaction about to be entered into in the immediate future, or is a transaction which has just been entered into subject to an application being made to obtain his consent within the following three months. These provisions would be quite unworkable with respect to the interest which is acquired upon the death or intestacy of a deceased person.

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In the case of land, the prohibition is expressly imposed upon its acquisition without the consent of the Treasurer, whereas in the case of shares the prohibition is expressly imposed upon their disposal without his consent, but the effect upon the validity of the transaction would be the same in each case. Regulation 7 (1) (*c*) provides that dispositions by way of gift, by will or in the exercise of a power of appointment under a will, are to be an exception from the prohibited dispositions of shares. The inclusion of dispositions by will as well as by way of gift shows that the word " gift " when used in reg. 6 (2) (*d*) does not include testamentary gifts. In the context of the Regulations as a whole it would appear, therefore, that the words " otherwise acquire any land " in reg. 6 (1) should be read *ejusdem generis* with the provisions which precede and succeed them and that they do not include the devolution of land on death, and by parity of reason that the acquisition of land by way of gift mentioned in reg. 6 (2) (*d*) must refer only to gifts *inter vivos*.

In this connection there are two provisions in reg. 8 which require consideration. This regulation provides that nothing in this Part shall prevent (*d*) the vesting in the personal representative of a deceased person, in his capacity as such, of any property or any interest in any property, or (*f*) any transaction which is without consideration in money or money's worth, and the purpose of which is to vest any property, or any interest in property, in any person beneficially entitled thereto under or by virtue of any will or intestacy.

The first of these provisions appears to assume that under the laws of each State both the real and personal property of a deceased person, upon the grant of probate or letters of administration, will vest in the personal representative of that person, but does not deal with the equitable interests in property that arise upon death under, for instance, a specific bequest of shares or a specific devise of land.

The second of these provisions appears to assume that under the laws of each State it is necessary for the personal representative to assent to or execute some instrument of conveyance or transfer of land or shares to the devisee or legatee. The purpose of the words " any transaction which is without consideration in money or money's worth " appears to be to confine the vesting to a transfer of the legal and beneficial interest to the person beneficially entitled under the will or intestacy and not to include some other person to whom the beneficiary has assigned his interest for valuable consideration.

The Chief Justice considered that an option given by will to purchase property does not in itself and independently of its exercise give an equitable interest in that property, whether or not the right of the optionee can properly be described as itself being property; and that it is only if the option is exercised, and if in the proper

course of administration the executors are in a position to make and do make a contract of sale to the optionee, that the optionee will then under the contract obtain an equitable interest in the property in respect of which the option is given. But, with respect, I am unable to agree with this view. The authorities establish in my opinion that an option to purchase land whether created by an instrument *inter vivos* or by will creates an immediate equitable interest in the land (*Oppenheimer* v. *Minister of Transport* (1); *In re Cant's Estate* (2); *In re Kerry*; *Bocock* v. *Kerry* (3); *In re Armstrong's Will Trusts*; *Graham* v. *Armstrong* (4); *Commissioner of Taxes* (*Queensland*) v. *Camphin* (5); *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (6)). A donee of an option to purchase land given by a will is a beneficiary of that beneficial interest (*Re Busby*; *Busby* v. *Busby* (7)). The executors have as against him the same overriding common law or statutory power as they have against a devisee to sell the land to pay the funeral and testamentary expenses, death duties and debts of the deceased. But the donee of the option is still entitled to exercise the option, and upon such exercise and performance of its conditions to follow the proceeds of sale in the hands of the executors (*In re Armstrong's Will Trusts* (8)). As Lord *Romilly* said in *Ex parte Hardy* (9), referring to a compulsory purchase of land subject to such an option: "The option will remain, whether the fund continues, as it is, in stock, or is reinvested in land." This is because the option creates an equitable interest in the land at the date of death. The donee, therefore, upon exercising the option in accordance with the conditions contained in the will, acquires against the executors, irrespective of whether a contract is entered into or not, all the rights intended to be thereby conferred upon him, and if a contract is entered into, it cannot override but will be subject to these conditions (*Brooke* v. *Garrod* (10)). In this case, in the Court below, the option was described by Sir *W. Page Wood*, as he then was, as a trust to convey the property to the optionee provided he complied with the conditions of the option, and in *Radnor* (*Earl of*) v. *Shafto* (11) Lord *Eldon* pointed out that the remedy of the optionee would be to bring a suit to administer the trust. Thus, an option has been described by Lord

(1) (1942) 1 K.B. 242.
(2) (1859) 4 DeG. & J. 503 [45 E.R. 196].
(3) (1889) W.N. (Eng.) 3.
(4) (1943) Ch. 400.
(5) (1937) 57 C.L.R. 127.
(6) (1944) 69 C.L.R. 270, at pp. 285, 298.
(7) (1930) 30 S.R. (N.S.W.) 399; 47 W.N. 155.
(8) (1943) Ch. 400.
(9) (1861) 30 Beav. 206, at p. 208 [54 E.R. 867, at p. 868].
(10) (1857) 3 K. & J. 608 [69 E.R. 1252]; (1857) 2 DeG. & J. 62, at p. 66 [44 E.R. 911].
(11) (1805) 11 Ves. 448, at p. 454 [32 E.R. 1160, at p. 1162].

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St. Leonards in his book on *Vendors and Purchasers*, in a passage cited with approval in *In re Davison and Torrens* (1), as in substance a devise of the estate itself if the favoured object elects to take it, and in *Williams* on *Vendor and Purchaser*, 4th ed. (1936), at p. 571, note (*m*), it is stated that " in order that an option to purchase land may be well exercised, the terms of the . . . devise, which created the option, must in all respects be strictly pursued ": Cf. also *Seton's Judgments and Orders*, 7th ed. (1912), vol. 2, at pp. 1487, 1488.

The respondents, as I understood their argument, did not contend that the vesting of the option was an acquisition of land within reg. 6 (1) (*e*), but they did contend that, in order to make its exercise effective, it would be necessary for them to enter into a contract with the appellant, and that this contract would be a purchase of the land by him from them within the meaning of reg. 6 (1) (*a*).

They relied strongly upon the decision of *Warrington* J., as he then was, in *In re Wilson* (2). There a testator devised and bequeathed his real and personal property to his trustees upon trust for sale and conversion, and directed that they should allow his son the option of purchasing two houses forming part of his realty for £450. These houses were subject to a mortgage of £300. The son exercised the option, and it was held that he was entitled to have the land conveyed to him free from the mortgage. His Lordship, following *Given* v. *Massey* (3), held that *Locke King's Act* did not apply because the son was a purchaser and not a devisee of the land within the meaning of the Act. He also held, in case this was not the true view, that the intention of the testator was to place the son in the same position as any outside purchaser would have occupied, or in other words that the will manifested a contrary intention within the meaning of the Act. He remarked that the testator " made it incumbent on the trustees, if the son expressed his desire to purchase the property, to sell it to him at a particular price. They are just as much acting under the trust for sale as in the case of any other purchaser " (4). But these remarks must be read in their context, and were only intended, it seems to me, to mean that because the exercise of the option made it incumbent upon the trustees to sell the land to the son, he was to be regarded, for the purposes of the Act, as being in the same position as any other person to whom the trustees sold the testator's land. They do not, in my opinion, throw any light on the meaning of the relevant provisions in reg. 6 (1), and lend no support to the view

(1) (1866) 17 Ir. Ch. 7, at p. 10.
(2) (1908) 1 Ch. 839.
(3) (1892) 31 L.R. Ir. 126.
(4) (1908) 1 Ch., at p. 845.

that an optionee does not acquire an equitable interest in the property until the trustees accede to the exercise of the option and make a contract with him. Further, it does not appear that any contract had in fact been entered into between the trustees and the son. If trustees in the case of such an exercise are acting just as much under the trust for sale as in the case of any other sale, and the rights of the optionee are merely incidental to and dependent upon the exercise of the trust as they are in some forms of pre-emptive rights, the right of the optionee to a conveyance of the land upon the exercise of the option would be subject to the trustees' rights to postpone conversion, and would be liable to be defeated if all the persons beneficially entitled to the proceeds of sale elected to take the land *in specie*. But, subject to the exercise of an overriding power of sale, the right of the optionee is to acquire the subject land upon the exercise of the option, and this right is independent of and overrides the general right of the trustees to decide to sell or postpone the sale of the trust estate under a general trust or power of sale. The creation of such an option, as the Court of Session pointed out in *Lord Advocate* v. *Meiklam* (1), indicates a wish by the testator that the holder of the option should have the particular land, and only to make that land subject to the general trust or power of sale if the donee declines to exercise the option.

In the light of all these considerations it does not appear to me that the exercise of an option to purchase land given by will is a purchase or other acquisition within the meaning of reg. 6 (1). The acquisition of the option without the Treasurer's consent is not, as I have said, prohibited by the Regulations, and the optionee becomes a beneficiary and liable to pay Federal estate duty on the value of the benefit conferred upon him (*Re Busby* (2)). It would be highly anomalous if he could lawfully acquire the option without the consent of the Treasurer, but after being subjected to duty, could not lawfully exercise it without such consent. An exercise of such an option in the case of shares would, it seems, fall within the exception contained in reg. 7 (1) (*c*), and it would be anomalous that such an option should be exercisable in the case of shares but not in the case of land. Regulation 6 (1) must be construed against the background of the national purposes for which the Regulations were enacted, and upon which their validity as an exercise of the defence power must depend. These purposes were to guard against land and shares being bought and sold during the war at inflated prices, and possibly to promote the investment of money in war loans rather than in such

(1) (1860) 22 Sess. Cas. 1427, at pp. 1431, 1435.

(2) (1930) 30 S.R. (N.S.W.) 399; 47 W.N. 155.

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property. Regulation 8 indicates that they were not intended to operate so as to restrict testamentary capacity, and indeed such an operation would afford a strong argument against their validity. The purpose of reg. 6 (1) (*a*) and (*b*) is to prohibit the making of contracts of sale between persons who prior to entering into such contracts are free either to contract or not, and the acquisition of contractual options from persons who are in a similar position unless the consent of the Treasurer be obtained. As I have said, the reference in reg. 6 (6) to a proposed transaction is apt to apply to the making of such contracts and the taking of such options, but is inapt to apply to the acquisition of a testamentary option which is dependent upon the uncertain event of death. For these reasons I am of opinion that the consent of the Treasurer was not required to a valid exercise of the option under discussion.

On the assumption, however, that this opinion is wrong, the appellant also relies on reg. 10, which provides that: (1) Where any transaction is entered into in contravention of this Part or of Part VI. of these Regulations, or where any condition to which the transaction is subject is not complied with, the transaction shall not thereby be invalidated, and the rights, powers and remedies of any person thereunder shall be the same as if these Regulations had not been made. (2) Nothing in this regulation shall affect the liability of any person to any penalty in respect of any contravention of these Regulations.

The ordinary principle is that, in the absence of a sufficient indication of intention to the contrary, a transaction which is made illegal by statute is void. But the statute may indicate, either expressly or by implication, that it is not intended that the illegality shall avoid the transaction, but only that the wrongdoer shall incur some punishment. Regulation 10 falls into the latter category, because it provides expressly that where a transaction is entered into in contravention of the Regulations *the transaction shall not thereby be invalidated*. There are other provisions in the Regulations which appear to be inconsistent with this regulation. Regulation 6 (10) provides that where a transaction is entered into subject to the consent of the Treasurer, the transaction shall not have any effect unless the Treasurer gives his consent thereto. Regulation 10B (1) provides that Registrars of Titles may, upon submission to them for registration of any instrument, require evidence that the transaction to which the instrument relates is not in contravention of the Regulations, and may refuse to register the instrument until such evidence is submitted. It is the duty of the court to construe the Regulations as a whole and to reconcile and give effect as far as possible to all

their provisions. So construed, reg. 6 (10) would appear to mean that the transaction shall not be lawful in the sense that it cannot be carried into effect without incurring a penalty unless the Treasurer gives his consent thereto. Regulation 10B (1) would appear to mean that the Registrar of Titles may delay the registration of an instrument until evidence is submitted to him of its validity. But if the evidence shows that the transaction is in breach of the Regulations I am unable to see, as at present advised, how he could do more than inform the Treasurer to that effect. As the transaction is expressly validated by reg. 10, the purchaser would be liable to pay the purchase money, and therefore entitled to have the land transferred to him, and the Registrar could not refuse to register the instrument indefinitely. The Chief Justice considered, and I agree, that reg. 10 means what it says, but held that there had been up to the present no transaction between the parties, because the exercise of the option was an offer which did not bind the respondents prior to acceptance and the respondents had made no offer to the appellant. For the reasons already mentioned, I am of opinion that the exercise of the option was more than the making of an offer to the respondents, and it bound them, subject to the payment of the purchase money, to convey the land to the appellant. If, therefore, contrary to my opinion, this exercise was a purchase within the meaning of reg. 6 (1) (*a*), it was a transaction within the meaning of the Regulations which would expose the appellant to a prosecution, but would be validated between the parties by reg. 10.

For these reasons I would allow the appeal, and answer questions 1 and 3 in the originating summons in the affirmative with respect to the exercise of the option by the notice of 24th August 1945.

Appeal allowed. The answers "No" in the order of 24th October 1945 *to questions numbered* 1 *and* 3 *in the originating summons herein set aside and instead thereof the questions are answered* (1) *Yes: the notice of 24th August* 1945; (3) *Yes. Costs of all parties appearing on this appeal to be paid out of the estate of Jerome O'Connell, those of his executors as between solicitor and client.*

Solicitor for the appellant, *A. Sacks.*

Solicitor for the respondents, *P. V. Feltham*, Shepparton, by *Morrison, Sawers & Teare.*

Solicitor for the Commonwealth (intervening), *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.