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of the premises at the expiration of the period specified in the notice, but nothing in this section shall operate so as to determine any tenancy before the date on which it would have terminated if this section had not been enacted ". Of corresponding provisions it was said by this Court in *Anderson* v. *Bowles* (1) that a body of judicial decision, references to which were given, existed for the view that after a valid notice to quit had been given in accordance with the section and had expired the tenancy was brought to an end by virtue of the section but nevertheless the lessee remained protected against dispossession by the lessor whether by peaceable re-entry or otherwise unless and until an order for possession is made by a court of competent jurisdiction under the statutory provisions and the time for the execution of the order expires, the tenant being liable to pay the rent and observe the other obligations of the tenancy, so far as applicable, in the meantime.

Further support for this view is given by *Andrews* v. *Hogan* (2) and it may be taken to be established.

It follows that in cases within s. 62, until a lessee had ceased, as a result of s. 67, to fulfil that description in a strict sense, he could not be exposed to an order for the recovery of possession and therefore could not require the protection of s. 4 (4) of the *Landlord and Tenant* (*War Service*) *Amendment Act*.

The foregoing shows that unless the word " lessee " in s. 4 (4) has an extended sense the provision can have no sensible operation. Its purpose is manifest, namely to protect servicemen of the last war against ejectment and a strict meaning of the word " lessee " would cause the failure of that purpose. The words " lessor " and " lessee " are defined by s. 4 (2) to mean the parties to a lease or their successors in title and this language does not necessarily connote the continued existence of the lease as a present title to possession. Although great caution must be exercised in giving to such an expression as lessee an extended meaning, it is evident that unless it does possess an extended meaning the real intention of the legislature will be defeated. The meaning which the context and subject matter suggests is a person holding premises in consequence of a lease or tenancy which has been brought to an end so that, apart from s. 4 (4), he is liable to be dispossessed or exposed to proceedings having that object. That meaning is supported by two provisions of the Act. In the definition of " premises " in s. 4 (2) premises are excluded if certain conditions are fulfilled one of which is that that they should have been leased for holiday purposes only for a specified term that has expired. If the expiry

(1) (1951) 84 C.L.R. 310, at p. 320. (2) (1952) 86 C.L.R. 223.

of the term took the occupier out of the category of lessee, it would be unnecessary and incongruous to make that one of the conditions of exclusion from the definition of " premises ". The second provision is s. 4 (6) to which there has already been a reference. By dealing expressly with a sub-lessee whose title has been lost by the termination of the head lease and giving him protection, it lends much support to the view that the landlord was not intended to secure the right to dispossess any protected person, whether immediate lessee or sub-lessee, simply because the lease had terminated. It was suggested that to give s. 4 (4) a sensible operation, it was enough to understand the word " lessee " as extending only far enough to cover persons whose leases had terminated by virtue of s. 67 of the *Landlord and Tenant* (*Amendment*) *Act*.

It was further suggested that the history of the provisions showed that either there was no safe ground for giving " lessee " any extended meaning at all or alternatively no more extended meaning than that just stated.

To the history of the provisions it is unnecessary to refer except briefly. What is s. 4 formerly stood as reg. 30 of the *National Security* (*War Service Moratorium*) *Regulations* and as reg. 30 stood before S.R. 1948 No. 109 was adopted it incorporated the *National Security* (*Landlord and Tenant*) *Regulations* to a sufficient extent (see *Manual of Defence Transitional Legislation*, 2nd ed. as in force on 1st January 1948, p. 445). This meant that reg. 8 (2) of the *National Security* (*Landlord and Tenant*) *Regulations* (corresponding with s. 8 (2) of the *Landlord and Tenant* (*Amendment*) *Act*) applied. That provision made " lessee " include a person who remains in possession after the termination of his lease of the premises.

When in consequence of the *National Security* (*Landlord and Tenant*) *Regulations* going out of force the old reg. 30 of the *National Security* (*War Service Moratorium*) *Regulations* was replaced by that substituted by S.R. 1948 No. 109, no account was taken of the fact that sub-reg. (2) of reg. 8 of the Landlord and Tenant Regulations ceased to apply to the War Service Moratorium Regulations and no provision was made to cover " lessees " whose leases had terminated. Then the State legislation simply copied the Federal regulations in material respects.

This may all show confusion and suggest inadvertence. But the basal cause of the omission, clearly enough, is a belief that the legislation as framed would produce the result that a protected person whose lease had terminated could not be dispossessed, except in the prescribed conditions. The true tendency of the

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history stated is to present the choice between on the one hand understanding the word " lessee " and the definition of that word as having an extended but not unnatural application and on the other hand treating the evident purpose of the legislature as defeated by an error in drafting.

In principle the latter course should not be taken unless no other interpretation is reasonably open.

The better view of the provision is that s. 4 (4) covers persons holding over after the termination of a tenancy, however the termination was brought about.

It follows that on both grounds dealt with, this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Remington & Co.*

Solicitors for the respondent, *Parish, Patience & McIntyre.*

J. B.

[HIGH COURT OF AUSTRALIA.]

SLEE AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

WARKE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 19-21.

SYDNEY, *Dec.* 6.

Rich, Dixon and Williams JJ.

Contract—Rectification—Mistake—Mutual—Unilateral—Specific performance—Damages—Declaratory judgment.

The power of a court to rectify a contract on the ground of mutual mistake is not confined to cases where there was an actual concluded contract antecedent to the instrument sought to be rectified; but a contract cannot be rectified on the ground that it does not represent the common intention of the parties unless it appears clearly what their common intention was.

MacKenzie v. *Coulson*, (1869) L.R. 8 Eq. 368, at p. 375, and *Australian Gypsum Ltd. and Australian Plaster Co. Ltd.* v. *Hume Steel Ltd.*, (1930) 45 C.L.R. 54, distinguished.

Shipley Urban District Council v. *Bradford Corporation*, (1936) Ch. 375, and *Crane* v. *Hegeman-Harris Co. Inc.*, (1939) 1 All E.R. 662; (1939) 4 All E.R. 68, referred to.

The defendant, the owner of a hotel, entered into negotiations for the lease of the hotel to the plaintiff. With a view to their being embodied in a written contract, terms were discussed by the plaintiff and the defendant with the latter's solicitor. One of the terms was that the plaintiff should have an option, to be exercised during the first year of the lease, to purchase the hotel at a price stipulated. The intention of the defendant in fact was that, although the option of purchase was to be exercised during the first year of the lease, the sale was not to be completed before the end of that year. He so informed his solicitor, but it did not appear that the plaintiff was so informed. The defendant's solicitor drew up and submitted to the plaintiff's

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solicitor a draft contract which expressed the option as being exercisable at any time after the expiry of one year from the date of possession by the lessee. The plaintiff's attention was drawn by his solicitor to this departure from the terms which had been expressed in the preliminary negotiations, and the plaintiff—believing that it indicated a change of intention on the part of the defendant—instructed his solicitor that he would accept it rather than lose the hotel. A formal agreement was drawn up, and subsequently an indenture of lease, in which the terms relating to the option were expressed as in the draft contract. The defendant executed the documents without having read them, relying on his solicitor's assurance that they were in proper form and believing that he was contracting for an option exercisable only during the first year of the lease; and the plaintiff executed them in the bona-fide belief that they correctly expressed the defendant's intention as to the option.

Held that, although the defendant was mistaken as to the form of option contained in the contract and indenture, it was a unilateral mistake not contributed to by the plaintiff and it was not such that a court should refuse the plaintiff a decreee for specific performance of the terms relating to the option which were contained in the documents as executed. The case was not one in which a declaration of right should be made except as incidental to the enforcement of the contract either by way of specific performance or damages; and it was unnecessary to decide whether the unilateral mistake would be a defence to an action for a mere declaration of right.

Wood v. *Scarth*, (1855) 2 K. & J. 33 [69 E.R. 682], commented on and distinguished.

Tamplin v. *James*, (1879) 15 Ch. D. 215, and *London Passenger Transport Board* v. *Moscrop*, (1942) A.C. 332, at p. 344, referred to.

Decision of the Supreme Court of Victoria (*Martin* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Veronica Doreen Warke brought an action in the Supreme Court of Victoria against Leslie James Slee and Violetta Slee. The plaintiff was the licensee under the *Licensing Acts* (Vict.) of the Victoria Hotel, Benalla, the freehold of which was owned by the defendants. She was in possession of the licensed premises under a lease which was expressed to confer on her an option to purchase the premises. The plaintiff sought a declaration that she was entitled to require the defendants to sell the premises to her; she also claimed damages and a decree of specific performance of the terms of the lease relating to the option. The claim for specific performance was, however, abandoned at the hearing of the action before *Martin* J. The pleadings and the facts of the case generally are described sufficiently for the purposes of this report in the judgment hereunder.

Martin J. made a declaration that the plaintiff was entitled to require the defendants to sell the licensed premises to her in accordance with the terms contained in the lease.

From this decision the defendants appealed to the High Court.

H. Walker, for the appellants.

T. W. Smith K.C. and *R. A. Smithers*, for the respondent.

Cur. adv. vult.

Dec. 6.

THE COURT delivered the following written judgment :—

This is an appeal by the defendants from a judgment of the Supreme Court of Victoria (*Martin* J.) declaring that the plaintiff, the respondent on the appeal, is entitled at the expiration of three months from 17th November 1948 and not later than 25th March 1949 to require the defendants to sell to the plaintiff the licensed premises known as the Victoria Hotel, Benalla, for the sum of £15,750. The declaration was made on the basis that the option of purchase contained in an indenture of lease of the hotel dated 28th March 1946 made between the plaintiff as lessee and the defendants as landlords for a lease of the hotel in question for three years from 26th March 1946 was a valid option. According to the terms of the indenture the option was exercisable during the second and third years of the lease and the exercise of the option sued on was made on 17th November 1948 and therefore during this period. The indenture provided that three months' notice of the exercise should be given by the lessee to the landlord but the writ was issued on 23rd November 1948 and therefore before the expiry of this period, and although specific performance was claimed in the statement of claim in addition to a declaration of right, we understand that the plaintiff only pressed for a declaration at the hearing. The statement of claim also claimed in the alternative rectification of the option which provides that on its exercise the landlords " may " instead of " shall " sell, but its purport is reasonably clear and no point was made of this on the appeal, counsel for the appellant agreeing that if the grounds argued on the appeal failed the word " may " should be read as " shall " and the option construed accordingly.

The defences pleaded to the statement of claim were four in number, but two of these relating to the rule against perpetuities and to uncertainty were not pressed. The other two defences were, shortly stated, that (1) the only agreement between the

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parties for an option was an oral agreement for an option to be exercised before the expiration of one year from the date of possession but the sale not to be completed until after the expiration of this year, and that the contract for lease and indenture of lease were signed by the plaintiff and defendants in the belief that they embodied this agreement but they do not contain or embody it and were therefore signed under a mutual mistake of fact; (2) shortly after the execution of the indenture of lease the defendants discovered the mistake and informed the plaintiff of the mistake, and that about the same time differences arose about the payment of the sum of £219 15s. 0d. alleged by the plaintiff to be payable to her in respect of the leased premises, and it was agreed between the solicitors for the parties that the terms of the option in the contract and indenture should be amended so that the option should be exercised not later than the expiration of the first year from the date of possession the sale to be completed forthwith after the expiration of the option and the defendants paid this sum to the plaintiff.

For some time during the argument of the appeal we were under the impression that Mr. *Walker* was pressing both these defences, but he finally appeared to abandon them both and to rest on the sole ground that the evidence established that the only option which the appellants were ever prepared to grant was an option the exercise of which was limited to the first year of the lease, and that they executed the contract and indenture in the mistaken belief that these documents contained this option and that they would not have executed either of these documents but for this mistake. He relied on the statement of Sir *W. Page Wood* V.C. (as Lord *Hatherley* then was) in *Wood* v. *Scarth* (1) " that a person shall not be compelled by this Court specifically to perform an agreement which he never intended to enter into, if he has satisfied the Court that it was not his agreement, is well established ". In reply to this ground Mr. *Smith* for the respondent contended that this is not an appeal from a judgment for specific performance but from a declaration of right, and that the equitable defence of unilateral mistake could only be raised if and when the respondent claims specific performance and the respondent has not elected whether to sue for specific performance or damages if the appellants refuse to perform their contract. On the other hand he admitted, rightly we think, that the defences of mutual mistake and variation of the indenture by subsequent agreement are defences to an

(1) (1855) 2 K. & J. 33, at p. 42 [69 E.R. 682, at p. 686].

action for the declaration claimed, so that if either of these defences should be established the appeal should succeed.

The negotiations between the parties which ended in the execution of the contract and indenture appear to have commenced in January 1946. The intending lessees were then the respondent and her husband and the intending landlords the appellants. They all went to see Mr. Coy, the solicitor for the appellants, at the end of that month, and his note of the interview states that the tenant has the right to purchase the property freehold for £15,750, such option to be exercised within twelve months. Mr. Cleary, who was instructed to act for the respondent and her husband, made a note to the same effect on 8th February 1946. At the time of the negotiations the hotel was subject to a lease to one Hackwill, which was about to expire on 23rd March 1946. The hotel was in the hands of one Smythe, who died before the hearing, for sale or lease, and the plaintiff and her husband were desirous of purchasing the freehold. But in January they were unable to arrange finance, and it was for this reason that the negotiations which resulted in the contract of 12th March 1946 and indenture of lease of 28th March 1946 were for a lease of the hotel with an option of purchase. The hotel was at the time in need of repair. The outgoing tenant had deposited £500 with the appellants as security for the performance of the covenants in the lease. The appellants were willing that so much of this sum as they were able to retain as damages for breach of these covenants should be paid to the new lessee to be used towards placing the hotel in repair. It was also agreed that the rent of the new lease should be £30 a week for the last two years, but should only be £25 a week for the first year, the new lessee agreeing to expend the difference, i.e., £260 on repairs. If the intended option had been simply an option to purchase the hotel at any time in the first year, its exercise would have operated to merge the two estates in the lessee and thereby determine the lease during the year. But it is clear from the evidence that the appellants, either initially or at some early stage of the negotiations, decided that they would not give the new lessee an option which could be exercised so as to destroy the lease before the end of the first year. They wanted a full year's rent in any event, so that the option, whilst exercisable only during the first year, was not to be completed before the end of that year. It is not clear whether this proviso to the exercise of the option was disclosed to the respondent and her husband before the interview with Coy. From his diary note and that of Cleary it would appear that it was not. It is clear, however, that

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at the interview with Coy, there was no concluded contract between the parties. They were engaged in the preliminary negotiations and it was intended that Coy should prepare a draft contract which he should submit for approval to Cleary, and that when the solicitors had agreed upon its terms a formal contract should be engrossed and signed by the parties and this should be the commencement of their contractual relations. Coy prepared a draft agreement which was submitted to Cleary and returned by Cleary to Coy with a number of amendments. The draft agreement provided for the exercise of the option at any time after the expiry of one year from the date of possession by the lessees giving three months' notice in writing. It also provided that the purchase price should be £15,750, but should be subject to the payment in addition of the sum spent on any structural alterations which might have to be made during the term to the hotel premises to comply with certain Victorian statutes. Cleary naturally realized when he received the draft that the option was not an option exercisable during the first year but after expiry of that year and consulted his clients, who instructed him to accept the alteration rather than risk losing the hotel. Cleary made several amendments to the form of the option which made it very plain that it was only exercisable after the expiry of one year because he made it provide that the option should be exercisable after the expiry of one year from the date of possession unless the landlord had already exercised or within seven days thereafter exercised the right of re-entry under the lease. These amendments were accepted by Coy, who wrote to Cleary on 7th March 1946 : " We have gone through the draft agreement with our clients and the enclosed engrossment, we think, represents the views of the parties ". The engrossment became the contract of 12th March 1946, which was executed by the appellants and the respondent and her husband. There is nothing in the evidence to suggest that the respondent and her husband did not execute the contract and the subsequent indenture of lease otherwise than in the bona-fide belief that the option had been deliberately changed by Coy from an option exercisable during the first year to an option exercisable after the expiry of that year to give effect to the appellant's insistence on receiving one year's rent in any event. It would appear that Coy failed to call the attention of his clients to the manner in which he had endeavoured to give effect to their wishes and that they executed the contract and indenture without reading them, relying on Coy's assurance that they were in the proper form. Coy gave a copy of these documents to his clients and they soon discovered that the

option did not give effect to their wishes. On 9th April 1946 Coy wrote to Cleary stating that what was actually agreed to by the parties was that the option had to be exercised within one year but the purchase was not to be given effect to by way of completed sale until the first year of the term of the lease had expired. His Honour found, and we accept his finding, that "it is probable that the defendants at all times believed they were contracting for an option exercisable only in the first year". The appellants were therefore mistaken as to the form of option contained in the contract and indenture. But it was a unilateral mistake not contributed to by the respondent. His Honour accepted Cleary's evidence that when discussing the draft agreement with the respondent's husband, he drew the latter's attention to the word "after" and said this is a change, to which Warke replied: "Yes they are not prepared now to sell unless they also get a year's rent in addition to the purchase money. That is why they have made this change. I think it will suit us alright. I have had so much trouble in getting finance, but we will be better off in a year or so". The mistake was therefore one for which the appellants only had themselves to blame. They placed a blind trust in their solicitor and executed the documents without having them read over. The respondent and her husband at the commencement of the negotiations appear to have had a common intention with the appellants that the option should be exercisable during the first year, but there is no evidence that the common intention ever went further and also included an intention that the option should only operate to determine the lease at the end of the year. When the new form of option was submitted to them in the draft agreement they agreed to accept it with the amendments made by Cleary. Coy accepted these amendments and expressly stated that they were acceptable to his clients. This evidence does not establish, and the appellants do not now contend, that the respondent executed the contract or indenture knowing that the option of purchase was not in the form intended by the appellants. The respondent and her husband did nothing to induce any mistaken belief in the appellants as to its form.

The decision of *Page Wood* V.C. in *Wood* v. *Scarth* (1) must be read in the light of the facts of the case. His Lordship evidently considered that it would be a hardship on the defendant to compel him specifically to perform the contract. The defendant had in terms offered a lease of his public house for twenty-five years at an annual rent of £65, but the Vice-Chancellor was satisfied that by

(1) (1855) 2 K. & J. 33 [69 E.R. 682]; 110 R.R. 88.

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mistake he had omitted to say that there was a premium of £500. His letter stated that he was giving brewers the offer in rotation and it was shown that the offer he had so submitted was expressed in the earlier cases to include the premium of £500. The error was clearly of an essential character. But the decision has not escaped the criticism of Sir *Frederick Pollock*. In his *Principles of Contract*, 11th ed., p. 399, he says that, although the authorities admit the possibility that a mistake to which the vendor did not contribute and which he could not be expected to perceive may in circumstances of special hardship be a bar to specific performance, it is certain that such cases are rare. In a note the learned author said: "*Wood* v. *Scarth* (1) is the only authority which appears to have actually decided so much: *quaere* how far it would now be followed. As it was, the dismissal of the suit was without costs". It will be noticed, by his reference to circumstances of special hardship, Sir *Frederick Pollock* introduces the element on which we think the decision must be taken to depend but which is absent from the wide general statement of the law which Mr. *Walker* cites and upon which he rests his case. In his preface to the volume of the *Revised Reports* which contains the case Sir *Frederick Pollock* went further in his comments on the decision. It is enough to repeat the following passage (2):—"The case does not seem to have been judicially observed upon, save as to the minor point of the property being adequately described; and one may be permitted to doubt whether it is quite consistent with *Tamplin* v. *James* (3), or would be followed at this day. The Lord Justice *James*, who took part in deciding the last-mentioned case, had been of counsel in *Wood* v. *Scarth* (1), and therefore it is not probable that the Lords Justices had forgotten it".

Where there is a unilateral mistake on the part of the defendant not contributed to by the plaintiff, the question whether the Court should in the exercise of its discretion make a decree for specific performance or leave the plaintiff to sue for damages must, we think, depend on the circumstances of the particular case. But the general rule governing the exercise of the discretion is, we think, that laid down by *James* L.J. in *Tamplin* v. *James* (4), where he said: "for the most part the cases where a Defendant has escaped on the ground of a mistake not contributed to by the Plaintiff, have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it". There

(1) (1855) 2 K. & J. 33 [69 E.R. 682]; 110 R.R. 88.
(2) (1855) 110 R.R., at pp. v., vi.
(3) (1879) 15 Ch. D. 215.
(4) (1879) 15 Ch. D., at p. 221.

are passages to the same effect in the judgment of *Cotton* L.J. in *Preston* v. *Luck* (1) and in the judgments of this Court in *Gall* v. *Mitchell* (2). It would not, in our opinion, be a sufficient hardship or unreasonable to compel the appellants to perform the option contained in the indenture. The price to be paid is the price at which the appellants were throughout prepared to sell the hotel and the only respect in which the wishes of the appellants are not given effect to is that the option is exercisable during the last two years of the lease instead of during the first year. But during these years the appellants were entitled to a rent of £30 per week, that is, to a rent of £5 a week more than the rent of the first year which they considered so valuable that they were not prepared to forego it in any event. If the appellants were required by law to expend moneys to improve the hotel in this period, they were protected because the purchase price was automatically increased to include this expenditure. Time has perhaps brought a change in the value or the expression of value of money but that is not a consideration affecting the question. It is an accident of the times and of lengthy litigation. In these circumstances, although the appellants have proved a unilateral mistake, they have not in our opinion proved that it would be a hardship to compel them specifically to perform the contract, so that in the discretion of the Court that remedy will be refused.

We have discussed the defence on the basis that this is in substance an action for specific performance although there is only a judgment for a declaration. As we are of opinion that the defence fails in any event it is unnecessary to decide whether it would be a defence to an action for a mere declaration of right. A declaration of right has been transformed into a general discretionary remedy, and it is perhaps better to refrain from discussing the question how far such a mistake may form a ground on which the Court's discretion may be exercised, but as at present advised we are of opinion it would not be more than a ground affecting discretion, because it would not be a defence to an action for damages, and a plaintiff who obtains a mere declaration of right still has the option whether to sue for specific performance or damages. There is no appeal from the form of relief granted to the plaintiff. But we are of opinion that we should call attention to the statement of Viscount *Maugham* in *London Passenger Transport Board* v. *Moscrop* (3) that "it has been stated over and over again, and also in this House, that the jurisdiction to give a declaratory judgment should

(1) (1884) 27 Ch. D. 497, at p. 506.
(2) (1924) 35 C.L.R. 222.
(3) (1942) A.C. 332, at p. 344.