

Cons Australian Coarse Grains Pool v Barley Marketing Board [1989] 1 QdR 499	Appl CSS Investments Pty Ltd v Lopiron Pty Ltd 16 FCR 15	Appl CSS Investments Pty Ltd v Lopiron Pty Ltd 76 ALR 463	Dist Wilson In- ternational v International House Pty Ltd [1983] WAR 243	Cons Meehan v Jones 149 CLR 571	Appl Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd 149 CLR 600	Cons Garns v Bimzweig [1990] 2 QdR 336	Cons Pizzale v Gumina Enterprises Pty Ltd (1994) 13 WAR 88	Appl Flumor Pty Ltd v Handley (1996) 134 FLR 265
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[HIGH COURT OF AUSTRALIA.]

BUTTS AND ANOTHER APPELLANTS ;

DEFENDANTS,

AND

O'DWYER AND ANOTHER RESPONDENTS.

PLAINTIFF AND DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Crown Lands—Transfer inter vivos—Lease—Registration—Absence of Minister’s consent—Validity—Operation as agreement for lease—Implied term to obtain consent—Part of term of lease—Quaere, executory—Availability of consent—Option to purchase—Exercise—Construction—Validity until consent obtained—Specific performance—Crown Lands Consolidation Act 1913-1952 (Act No. 7 of 1913—Act No. 44 of 1952) (N.S.W.), s. 272.

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By a document in the form of a memorandum of lease under the provisions of the *Real Property Act* 1900-1940 (N.S.W.), which was not registered, T.B. purported to lease to O., for a term of five years, land registered under the provisions of that Act, which was also subject to s. 272 of the *Crown Lands Consolidation Act* 1913-1952 (N.S.W.). That section invalidated, with certain exceptions, a sale or lease of land subject to the section without the consent of the Minister for Lands. The document contained an option to purchase exercisable by notice in writing within two calendar months from the date of the expiration of the term “ provided that in the event of the death of the lessor prior to the expiration hereof then the lessee shall forthwith have the right to exercise the option ”. The Minister’s consent had not been obtained either to the leasing or sale of the land. O. went into possession of the land in March 1949. T.B. died in May 1949. By notice in writing given to T.B.’s executors in April 1951, O. purported to exercise the option. A writ of *habere facias* was issued on a judgment in ejectment obtained in September 1951, by T.B.’s executors after a suit in equity had been commenced by O. in which he sought specific performance of the terms of the memorandum of lease as an agreement for a lease, and of the contract for sale of the land alleged to have been made by his exercise of the option to purchase contained

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in the memorandum. The writ was handed to the sheriff for execution, whereupon the suit was amended by joining him as a defendant and by seeking appropriate injunctions against him and T.B.'s executors to prevent the latter obtaining possession of the land. The Supreme Court held that O. was entitled to specific performance of the agreement and to the injunctions as asked, but was not entitled to specific performance of a contract for sale of the land alleged to be constituted by the purported exercise of the option. On appeal,

Held, (1) that the memorandum of lease was not an executory agreement but evidenced a concluded agreement and, apart from s. 272 of the *Crown Lands Consolidation Act 1913-1952* (N.S.W.), only required registration under the *Real Property Act 1900* (N.S.W.) in order to operate as a memorandum of lease under its provisions ;

(2) that by virtue of s. 272 parties may enter into a transfer subject to a condition that it is not to become effective unless the Minister's consent has been obtained, and there was an implied condition on the part of the transferor to do all things reasonable on his part to obtain the Minister's consent ;

(3) that the application for consent could be made at any time during the term of the lease and, if obtained, the transfer would become capable of valid operation and O. would be in a position to register the memorandum of lease under the *Real Property Act* ;

(4) that the option to purchase, apart from the failure to obtain the Minister's consent, became immediately exercisable upon the death of T.B. and continued to be exercisable during the term of the lease, and, possibly, during the period of two months thereafter ;

(5) that the provision creating the option was inter-dependent with the demise, and the option would not therefore come into force as a binding obligation before the Minister gave his consent ; upon that consent being obtained the option would take effect according to its tenour ;

(6) that by reason of s. 272 (2) the consent of the Minister would also be necessary to the transfer by way of sale ; and

(7) that the executors were bound by an obligation implied in the transaction to do all such acts and execute all such documents as may be reasonable and proper on their part to enable O. to apply to the Minister for Lands for his consent to the transfer by way of lease of the subject land in accordance with such transaction.

Held, further, by *Taylor J.*, that sub-s. (2) of s. 272 of the *Crown Lands Consolidation Act 1913-1952*, strikes at dealings and not at instruments, and there is nothing in that sub-section to forbid the making of an agreement to lease.

Decision of the Supreme Court of New South Wales (*Roper C.J. in Eq.*) : *O'Dwyer v. Butts* (1952) 52 S.R. (N.S.W.) 256 ; 69 W.N. 198, subject to variation of the decree, affirmed.

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In a suit brought in the equitable jurisdiction of the Supreme Court of New South Wales by Patrick Thomas O'Dwyer against Catherine Agnes Butts, James Butts and Roland Oliver Elliott the statement of claim, as amended, was substantially as follows :—

By an agreement in writing made on or about 18th March 1949, Thomas Butts of Methul, New South Wales, farmer, agreed to lease to O'Dwyer and O'Dwyer agreed to lease from Thomas Butts a piece of land containing 647 acres 3 roods situate at Methul, being the whole of the land comprised in Crown Grant dated 2nd May 1939, registered volume 5,047, folio 3, to be held by O'Dwyer as a tenant for the term of five years computed from 1st March 1949, at the yearly rental of £184 14s. 6d. At the time such agreement was made and until his death Thomas Butts was registered as proprietor under the provisions of the *Real Property Act* 1900 for an estate in fee simple of the said land. On 31st May 1949, Thomas Butts died and probate of his will dated 4th November 1942 was, on 17th August 1949, granted to the defendants Catherine Agnes Butts and James Butts. At the time of the issue of the said Crown Grant the subject land was held as an original conditional purchase under the *Crown Lands Consolidation Act* 1913-1938 and such original conditional purchase was applied for after 1st February 1949. By a provision in such agreement it was also agreed by and between O'Dwyer and the said Thomas Butts that O'Dwyer should have the right at the expiration of the lease to purchase the land at the price of £6 10s. 0d. per acre less the usual auctioneer's commission such option to be exercised by notice in writing within two calendar months from the date of the expiration of the lease provided that in the event of the death of Thomas Butts prior to the expiration thereof then O'Dwyer should forthwith have the right to exercise the option. On 6th April 1951, by notice in writing, O'Dwyer duly exercised the option. The consent of the Minister for Lands under s. 272 of the *Crown Lands Consolidation Act* 1913-1952, had not been received to a lease in terms of the agreement. O'Dwyer alleged : (1) that he had repeatedly requested the defendants, other than Elliott, (a) to apply for such consent or join with the plaintiff in applying for such consent, and (b) to apply or join with O'Dwyer in applying to the Minister for Lands under the said s. 272 for his consent to the agreement to sell the land created by the exercise of the option—but the said defendants, other than Elliott, neglected and refused to do so ; (2) that he had suffered and continued to suffer great loss and damage by reason of that neglect and refusal ; and (3) that he had at all times and

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still was ready and willing and offered to complete and carry out the agreements so far as they remained to be performed by him and to perform all such other acts as might be necessary to be performed by him in order to enable all consents to be obtained and all documents duly registered. On or about 8th May 1951, the said defendants issued out of the Supreme Court a writ of ejectment addressed to O'Dwyer and all persons entitled to defend the possession of the land wherein the said defendants claimed possession of the land and the ejectment therefrom of all other persons. On 24th September 1951, the said defendants signed judgment in default of appearance and on 14th November 1951, they caused a writ of *habere facias* to be issued to give them possession of the land. That writ was addressed to the defendant Elliott, who was the sheriff in and for the State of New South Wales. The plaintiff claimed, *inter alia* ; (i) a declaration that the agreement to lease ought to be specifically performed and carried into effect and that it be so decreed ; (ii) an order that within fourteen days after service upon them of an office copy of that decree the said defendants other than Elliott do all things and execute all documents proper and necessary for the presentation of a proper application to the Minister for Lands for his consent to a lease in terms of the agreement ; (iii) an order that if that application be granted the said defendants do all things and execute all documents proper and necessary in order that a proper memorandum of lease be duly registered in the office of the Registrar-General ; (iv) a declaration that the agreement for sale ought to be specifically performed and carried into effect and that it be so decreed ; (v) an order that within fourteen days after service upon them of an office copy of that decree the said defendants do all things and execute all documents proper and necessary for the presentation of a proper application to the Minister for Lands for his consent to the agreement for sale ; (vi) an inquiry as to the loss and damage suffered by him and an order that the amount of such damage be paid to him ; (vii) and (viii) orders that the said defendants, their servants and agents, and Elliott be restrained until the hearing of the suit or further order from respectively taking any further steps to recover possession of the land, or executing the said writ or otherwise giving possession of the land to the said defendants or either of them.

In their statement of defence the defendants Catherine Agnes Butts and James Butts alleged substantially as follows :—In and prior to March 1949, and until his death, Thomas Butts was the registered proprietor under the *Real Property Act* 1900, as amended,

of the land referred to and described by the plaintiff; in or about March 1949, Thomas Butts, as lessor, executed in favour of the plaintiff, as lessee, a lease of that land for the term of five years computed from 1st March 1949, at the yearly rental of £184 14s. 6d.; the lease was in registrable form and was on the form prescribed by the provisions of the *Real Property Act* 1900, as amended. It contained the following clause "And it is hereby lastly agreed and declared by and between the said parties hereto that the said Lessee shall have the right at the expiration hereof to purchase the said demised lands at the price of six pounds ten shillings per acre less the usual auctioneer's commission such option to be exercised by notice in writing within two calendar months from the date of the expiration hereof Provided that in the event of the death of the Lessor prior to the expiration hereof then the Lessee shall forthwith have the right to exercise this option". After the making of that lease and in pursuance thereof the plaintiff entered into possession of the land and paid the rent reserved by the lease to Thomas Butts. Thomas Butts died on 31st May 1949, and probate of his will dated 4th November 1942, was granted on 17th August 1949, to the said two defendants, the executors named in the will. The consent of the Minister for Lands to the lease was required by s. 272 of the *Crown Lands Consolidation Act* 1913, as amended, but it had never been applied for by the plaintiff or by Thomas Butts or by the said defendants and such consent had not in fact been given or obtained. In or about May 1951, the plaintiff requested the said defendants to make an application to the Minister for Lands for his consent to the lease, and later in that month, to make an application to the said Minister for his consent to a contract for sale of the land, but the said defendants refused to make those applications. Save as stated above the said defendants denied the making of a lease in the terms alleged by the plaintiff, and, save as stated above, also denied the other allegations made by the plaintiff. The said defendants said, *inter alia*, that if the plaintiff had a right or option to purchase the land, which they denied, then he did not exercise that right duly or at all; that the alleged agreement to sell brought about by the alleged exercise of the alleged option was a transfer within the meaning of s. 272 of the *Crown Lands Consolidation Act* 1913, as amended, and required the consent of the Minister for Lands thereto and such consent had not been given or obtained, and the alleged agreement to sell was an agreement for sale within the meaning of s. 272 and was made without the permission of that Minister and was not submitted to him for his approval within three months

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from the execution thereof and the alleged agreement was void and illegal by virtue of the provisions of that Act ; the said defendants did not admit any damage to the plaintiff by reason of any neglect or refusal on their part, nor that the plaintiff had always been and still was ready and willing to complete and carry out the said agreements in order to enable all consents to be obtained and all documents registered. The said defendants claimed that the lease was a lease within the meaning of s. 272 of the *Crown Lands Consolidation Act* 1913, as amended, and that that lease and the taking of possession thereunder was a transfer of the land within the meaning of s. 272, and such transfer and lease were effected without the consent of the Minister for Lands being obtained thereto and the lease was void and illegal by virtue of the provisions of that Act.

Roper C.J. in Eq., held that the plaintiff was entitled to a decree in the form appropriate to the circumstance for specific performance of the agreement for a lease but not for specific performance of any contract for the sale of the land and to the appropriate injunctions to restrain the defendants from taking any further steps to recover possession of the land and to restrain the defendant Elliott from executing the writ which had been delivered to him. A decree was made on terms of the plaintiff's claims (i), (ii), (iii), (vii) and (viii) stated above (*O'Dwyer v. Butts* (1)).

From that decision the defendants Catherine Agnes Butts and James Butts appealed to the High Court, the respondents to the appeal being the plaintiff and the defendant Elliott. The plaintiff cross-appealed.

Elliott submitted to any order the Court might make.

E. Lusher, for the appellants. Section 272 of the *Crown Lands Consolidation Act* 1913-1952 (N.S.W.), as amended, makes a transfer invalid in the absence of the consent of the Minister. "Transfer" &c. means an instrument or document of transfer ; it does not mean an instrument or document that does not in fact transfer ; it is enough if it purports to be such a transfer or lease. "Effected" means carried out or entered into as opposed to conveying the legal estate. Section 272 assumes that it will operate before registration of the instrument because once registered there cannot be any invalidity as the *Real Property Act* 1900-1940 (N.S.W.) gives indefeasibility of title : see s. 42. Thus s. 272 presumes a transfer &c., prior to it being registered. Otherwise it would be impossible to have the section operate at all to invalidate any dealing. This

(1) (1952) 52 S.R. (N.S.W.) 256; 69 W.N. 198.

is not a case like *Roach v. Bickle* (1) where the lease was itself subject to the consent being obtained; nor like *Egan v. Ross* (2) where it was held that the agreement there under consideration was not a dealing under s. 274 of the *Crown Lands Consolidation Act* 1913, as amended. In *Duncan v. Mell* (3) it was implied that neither party would do anything to prevent consent. There was ample evidence in *Marks v. Jolly* (4) that the clause re obtaining consent was waived, therefore the transaction was clearly illegal and moneys could not be recovered because they were paid in execution of a transaction prohibited by law. There was not anything in the Act which prohibited the sale (*Dougan v. Ley* (5)). Section 272 of the *Crown Lands Consolidation Act* 1913, as amended, was considered in *Minister for Lands (N.S.W.) v. King* (6). A lease can be made subject to consent. Such a lease is construed as provisional lease only. An agreement for sale which does not provide for consent is not a dealing, &c. It is construed as an agreement to obtain consent and then transfer. The subject memorandum of lease is invalid by virtue of the fact that it is prohibited by law. It will not be registered because of an illegality, not because of an informality. Being invalid for that reason it cannot be construed as an agreement, for that would only be an attempt to validate an illegal transaction. *Parker v. Taswell* (7), and similar cases, only operate where there is an informal document. The void lease may only be looked at as evidence of the agreement if there was in fact no other agreement. "Informal" means fails for want of form. At law no term can be obtained unless the instrument is both registrable and registered. An informal instrument may be treated as evidence of an agreement to grant a formal lease (*Carberry v. Gardiner* (8)). Clearly the informal lease in this case cannot be a lease in a registrable form because if so it would not be (a) informal, and (b) necessary to grant a formal lease. The instrument in *Wellington City Corporation v. Public Trustee* (9) was not in registrable form. *Carberry v. Gardiner* (10) was a case where there was a common law lease of land under the *Real Property Act* and clearly *Parker v. Taswell* (7) applied.

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(1) (1915) 20 C.L.R. 663, at pp. 668, 672.

(2) (1928) 29 S.R. (N.S.W.) 382; 46 W.N. 90.

(3) (1914) 14 S.R. (N.S.W.) 333; 31 W.N. 113.

(4) (1938) 38 S.R. (N.S.W.) 351, at p. 353; 55 W.N. 125, at p. 126.

(5) (1946) 71 C.L.R. 142, at p. 154.

(6) (1916) 22 C.L.R. 193.

(7) (1858) 2 De G. & J. 559 [44 E.R. 1106].

(8) (1936) 36 S.R. (N.S.W.) 559, at p. 569; 53 W.N. 168, at pp. 169, 170.

(9) (1921) 40 N.Z.L.R. 1086.

(10) (1936) 36 S.R. (N.S.W.) 559; 53 W.N. 168.

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Australian Provincial Assurance Association Ltd. v. Rogers (1) was a similar case, where there was a formal lease in registrable form but never in fact registered. There is not any case where the doctrine of the informal agreement has been applied to a registrable formal instrument under the *Real Property Act*. Observations to the contrary in *Australian Provincial Assurance Association Ltd. v. Rogers* (1) are *obiter* and incorrect. The doctrine of the informal agreement only applies where there is an informality evidenced *ex facie* in the document itself, otherwise one cannot speak of an informal agreement. The only illegal leases are those where a specific agreement to violate the statute are entered into. An implied term, if any, must be to apply for consent within a reasonable time, and if not so applied for the lease would be invalid. There is not any question of construing the subject lease as an agreement. The instrument itself gives the equitable interest for years (*Abigail v. Lapin* (2); *National Trustees, Executors and Agency Co. of Australasia Ltd. v. Boyd* (3); *Brunker v. Perpetual Trustee Co. (Ltd.)* (4); *Australian Provincial Assurance Association Ltd. v. Rogers* (1); *Barry v. Heider* (5)). The memorandum of lease is a completely formal document. If it is looked at as an agreement the document speaks for itself, and terms cannot be implied into it. Terms may be implied only if the parties have agreed to them (*Heimann v. Commonwealth* (6)). To imply a term it is necessary that the express terms of the contract are such that it is clearly necessary to imply the term in order to make the contract operative according to the intention of the parties. In this case the express terms of the contract are not known, there being only the memorandum of lease which is the result of the contract. Even assuming a term as to consent could be implied, it has been waived (*Marks v. Jolly* (7)). The Minister cannot grant consent retrospectively to the lease. The application for specific performance was not "prompt and eager": *Fry on Specific Performance*, 6th ed. (1921), p. 515; *Milward v. Thanet (Earl)* (8). The option was conditional upon a valid lease being granted. As it was not for consideration and not by deed it was a voluntary offer only and was revoked by death. The lessee was required to exercise the option within two months of the date of death.

(1) (1943) 43 S.R. (N.S.W.) 202; 60 W.N. 111.

(2) (1934) 51 C.L.R. 58, at p. 64.

(3) (1926) 39 C.L.R. 72, at pp. 81, 82, 84.

(4) (1937) 57 C.L.R. 555.

(5) (1914) 19 C.L.R. 197, at p. 216.

(6) (1938) 38 S.R. (N.S.W.) 691, at p. 694; 55 W.N. 235, at pp. 236, 237.

(7) (1938) 38 S.R. (N.S.W.) 351; 55 W.N. 125.

(8) (1801) 5 Ves. 720 [31 E.R. 824].

M. F. Hardie Q.C. (with him *R. Fox*), for the respondent O'Dwyer. The document could not operate as a lease until registration: *Real Property Act* 1900-1940 (N.S.W.), ss. 41, 53. It could not be registered until the Minister's consent was given. Until registration it should be treated as evidencing an agreement to give a valid lease, or as raising an obligation to effectuate the transaction intended (*Parker v. Taswell* (1)). This obligation is strengthened by what the parties have done since the execution of the document. There is not any evidence of any intention to deliberately contravene s. 272 of the *Crown Lands Consolidation Act* 1913-1952. *Duncan v. Mell* (2) and *Egan v. Ross* (3) show that there is an obligation, primarily upon the lessor, to seek consent. Both parties are bound to do everything necessary to effectuate the intention of the parties. The execution of the instrument is not a contravention of s. 272. An agreement for a lease is not within that section. Section 272 (3) deals with mortgages and par. (6) thereof would not affect an agreement for sale. Section 272 (2) is only directed at the effecting of transfers (cf. *Minister for Lands v. King* (4) and *Minister for Lands (N.S.W.) v. Jeremias* (5)).

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[TAYLOR J. It is directed at dealings, and not instruments.]

Yes. A lease has not been effected here. Sections 259 and 261, and the regulations and prescribed forms (see reg. 325, form 129) show that some formal act of registration is necessary and that an instrument can be executed before consent is obtained.

[TAYLOR J. referred to the article in 1 A.L.J. 80.]

Consent can now be given. If the instrument as a whole is valid, the option will also be valid, and will be supported by the consideration contained in the instrument as a whole. If the instrument is bad in part, the option, which is severable, will still stand, and will still be supported by consideration, viz., the execution of the document. The option has in either case been validly exercised. On the death of the lessor, the right to exercise arises forthwith and remains available until two months prior to the expiration of the period for which the lease was intended to be operative. The option is not in terms dependent upon the grant of a term or any other condition, and no such restriction should be implied.

[DIXON C.J. Is the relief sought appropriate?]

(1) (1858) 2 De G. & J. 559 [44 E.R. 1106].

(2) (1914) 14 S.R. (N.S.W.) 333; 31 W.N. 113.

(3) (1928) 29 S.R. (N.S.W.) 382; 46 W.N. 90.

(4) (1916) 16 S.R. (N.S.W.) 513, at p. 521; 33 W.N. 152, at pp. 154, 155.

(5) (1917) 23 C.L.R. 322.

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The decree may need some variation, but neither here nor in the Court below has the form of relief been attacked.

E. Lusher, in reply.

Cur. adv. vult.

Dec. 23.

The following written judgments were delivered:—

DIXON C.J., WILLIAMS, WEBB and KITTO JJ. This is an appeal by two of the defendants Catherine Agnes Butts and James Butts from a decree of the Supreme Court of New South Wales in its equitable jurisdiction declaring that the agreement to lease referred to in par. (1) of the statement of claim ought to be specifically performed and carried into effect and granting certain consequential relief. There is another defendant Roland Oliver Elliott who is the Sheriff of New South Wales, but he was a submitting defendant in the suit and is a submitting respondent in the appeal. The other respondent is the successful plaintiff in the suit, Patrick Thomas O'Dwyer. In order to understand the nature of the proceedings it is necessary to refer to some of the facts. They commence with a memorandum of lease of 647 acres of country land in New South Wales in the form of the Eighth Schedule to the *Real Property Act* 1900-1940 (N.S.W.) executed by the plaintiff as lessee and his grandfather, Thomas Butts, as lessor, on or about 18th March, 1949, whereby the lessor demised this land to the plaintiff for the term of five years computed from 1st March, 1949, at the yearly rental of £184 14s. 6d. The memorandum of lease contains the following option of purchase: "And it is hereby lastly agreed and declared by and between the said parties hereto that the said Lessee shall have the right at the expiration hereof to purchase the said demised land at the price of six pounds ten shillings per acre less the usual Auctioneers Commission such option to be exercised by notice in writing within two calendar months from the date of the expiration hereof Provided that in the event of the death of the Lessor prior to the expiration hereof then the Lessee shall forthwith have the right to exercise this option."

The title to the land the subject of the memorandum of lease is a Crown grant dated 2nd May, 1939, registered vol. 5047 folio 3. The land was, prior to the grant, an original conditional purchase within the meaning of s. 272 (1) of the *Crown Lands Consolidation Act* 1913 (N.S.W.) and remains subject to the provisions of that section after the issue of the Crown grant by virtue of sub-s. (6) which enacts that the provisions of s. 272 are extended so as to apply *inter alia* to any such original conditional purchase whether

the grant in respect of the same has or has not issued. Sub-section (1) of s. 272 provides that holdings to which the section applies shall not be transferable except by way of mortgage or discharge of mortgage to a person who at the date of the proposed transfer already holds an area of lands that under the provisions of the Act are to be taken into account, which area when added to the area proposed to be acquired by transfer will in the opinion of the Minister substantially exceed a home maintenance area. Sub-section (2) provides that application for permission to transfer by way of sale lease or otherwise except by way of mortgage or discharge of mortgage any such holding shall be made to the Minister in the prescribed form and such transfer shall not be effected, or if effected shall not be valid, unless the Minister's consent thereto has been obtained. No application was made to the Minister to transfer the present holding and no attempt was made to register the memorandum of lease under the *Real Property Act*, but the lessee went into possession of the land and paid to the lessor or his executors amounts equivalent to the rent reserved by the memorandum of lease up to 28th February, 1952. The memorandum of lease was not and could not have been registered under the *Real Property Act* because the Crown grant contains a notification to the effect that the land is subject to the provisions of s. 272 of the *Crown Lands Consolidation Act* and the Registrar-General would have refused to register the instrument until the Minister's consent had been obtained.

The lessor died on 31st May, 1949, and the appellants are the personal representatives of his estate. By a notice in writing dated 5th April, 1951, the plaintiff gave the appellants final notice that he exercised the option to purchase the land at £6 10s. 0d. per acre less the usual auctioneer's commission. The appellants refused to accept the notice as a binding exercise of the option. On 23rd May, 1951, the solicitors for the plaintiff forwarded to the solicitors for the appellants the necessary documents to apply for the Minister's consent to the sale of the land and requested them to complete the application and have it lodged for the Minister's consent, together with a copy of the contract. The letter concluded "We have previously requested you to submit a contract for signature but you have failed to do so. Please now submit this forthwith so that the application may proceed without delay". On 25th May, 1951, the solicitors for the appellants replied that they had already informed the solicitors for the respondent that the appellants did not recognize the purported exercise of the option as binding on them, nor did they admit that, if the option was valid, it had

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been duly exercised. After further correspondence the appellants issued a writ of ejectment in the Supreme Court at common law to recover possession of the land from the plaintiff and signed judgment in ejectment on 24th September, 1951, and shortly afterwards caused a writ of *habere facias* to be issued to the sheriff. In the meantime, the plaintiff had commenced the present suit against the appellants and upon the issue of this writ joined the sheriff as a defendant. The writ has not been executed, its period has expired, and the decree contains an injunction restraining its execution.

In his statement of claim the plaintiff alleges that by an agreement in writing made on or about 18th March, 1949, Thomas Butts agreed to lease the subject land to him for the term of five years computed from 1st March, 1949, at the yearly rental of £184 14s. 6d. and craves leave to refer to the agreement when produced. He alleges the other facts to which we have referred, including the purported exercise of the option and the refusal of the appellants to apply to the Minister for his consent, and prays that it may be declared that this agreement ought to be specifically performed and carried into effect and that the same may be decreed accordingly. The positive relief sought includes a prayer for an order that the appellants shall do all things and execute all documents which are proper and necessary for them to do and execute in order that a proper application may be presented to the Minister for his consent to a lease in terms of the agreement and a further order that if such application is granted they shall do all things and execute all documents which are proper and necessary for them to do and execute in order that a proper memorandum of lease may be duly registered in the office of the Registrar-General. The suit was heard by *Roper* C.J. in Eq. who held that the plaintiff had proved an agreement for a lease of which specific performance should be granted and that on its true construction the plaintiff became entitled to exercise the option immediately upon the death of his grandfather and continued to be entitled to exercise it at any subsequent time thereafter up to two calendar months from the date of the expiration of the term. His Honour held that the consent of the Minister under s. 272 of the *Crown Lands Consolidation Act* was a condition precedent to the agreement becoming operative, but that it was open to the parties to apply to the Minister for his consent at any time during its term and that if the Minister consented it would prevent the agreement being invalidated under the section. But his Honour considered that the exercise of the option on 5th April, 1951, was not effective because the right to exercise the option

was dependent upon there being a valid lease and that the option amounted to an agreement by the intending lessor to give an option to the intending lessee in the terms set out in the document subject to the Minister consenting to the lease and the lease being effectively granted. "He cannot exercise his option unless and until the conditions precedent to the exercise of the option have been complied with, that is he cannot exercise it unless and until he is lessee of the land for it is only as lessee of the land that it is open to him". In the statement of claim the memorandum of lease is pleaded as an agreement by Thomas Butts to lease the land to the plaintiff and it is this agreement that his Honour decreed should be specifically performed. But the memorandum of lease is not an executory agreement to grant a document in the form of a lease. It evidences a concluded agreement and apart from s. 272 only requires registration under the *Real Property Act* in order to operate as a memorandum of lease under its provisions. If the plaintiff is entitled to any specific relief, it should be directed to the specific enforcement against the appellants of any promise express or implied on their part to do all such acts and execute all such documents as may be reasonable and proper to remove any obstacles preventing the plaintiff from becoming the registered proprietor of the memorandum of lease under the provisions of the *Real Property Act*. The obstacle to the registration of the instrument under the Act is that the consent of the Minister has not been obtained under s. 272 of the *Crown Lands Consolidation Act* 1913-1952 to the transfer which it embodies.

Accordingly, the crucial question is whether it is now too late to apply to the Minister for his consent. In our opinion it is not too late. Section 272 (2) provides that a transfer shall not be effected, or if effected shall not be valid, unless the Minister's consent thereto has been obtained. If the sub-section simply provided that a transfer should not be effected unless the Minister's consent thereto had been obtained, it would be open to the construction that every memorandum of transfer given without his previous consent should be invalid. But the sub-section also provides that such a transfer shall not be valid unless his consent thereto has been obtained. This provision appears to us to mean that an application may be made for the consent of the Minister not only before but also after the instrument of transfer has been given and that upon obtaining his consent the transfer shall be valid according to its tenour and, in the case of dealings under the *Real Property Act*, when registered effective to pass the legal estate or interest. In other words the parties may enter into a

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transfer subject to a condition that it is not to become effective unless the Minister's consent has been obtained. Prima facie this would import an obligation on the part of the person giving the transfer to do all that was reasonable on his part to the end that the Minister's consent might be obtained. Such a condition could be either express or implied. There is in the present case no express condition as in *Roach v. Bickle* (1), but we think that such a condition should be implied. It has been held in cases too numerous to mention both before and after the classic statement of Bowen L.J. in the case of *The Moorcock* (2) that the law raises an implication from the presumed intention of the parties where it is necessary to do so in order to give to the transaction such efficacy as both parties must have intended that it should have. Similar implications were raised under other sections of the *Crown Lands Consolidation Act* in *Duncan v. Mell* (3), and *Egan v. Ross* (4). Section 272 does not limit the time within which the application for the Minister's consent must be made and, in the absence of such a limitation, there is no reason why the application should not be made at any time before it is too late for his consent to make the transfer effective. Sub-section (3) of s. 272 provides that a foreclosure or transfer in contravention of the section shall be void and any agreement or contract for the sale of any holding made without the permission of the Minister shall render such holding liable to forfeiture if such agreement or contract be not submitted for the approval of the Minister within three months from the date of execution thereof. These provisions, we think, relate to transfers and agreements and contracts by mortgagees exercising their powers of sale and not to transfers and agreements and contracts of sale generally. Even if they do apply generally, their effect is not to prevent the Minister giving his consent where the approval is not sought within three months but only to make the holding liable to forfeiture. In the present case we agree with his Honour that the application could be made at any time during the term of the lease. If the Minister's consent is obtained the transfer will become capable of valid operation and the plaintiff will be in a position to register the memorandum of lease under the *Real Property Act*. The question the Minister will have to consider will be whether the plaintiff's holding, when added to the area proposed to be acquired by transfer, would in the opinion

(1) (1915) 20 C.L.R. 663.

(2) (1889) 14 P.D. 64, at p. 68.

(3) (1914) 14 S.R. (N.S.W.) 333, at p. 339; 31 W.N. 113, at p. 114.

(4) (1928) 29 S.R. (N.S.W.) 382; 46 W.N. 90.

of the Minister substantially exceed a home maintenance area. The material date is the date of the proposed transfer, and the same question arises whether the proposal is to transfer the land by way of sale lease or otherwise. There is of course a question whether the sub-section requires a further consent of the Minister to a transfer by way of sale if the option is exercised. We agree with his Honour's view of the meaning of the option of purchase and think that, apart from the failure to obtain the consent of the Minister, it became immediately exercisable upon the death of the lessor and that it continued to be exercisable from that date until the expiry of the period the parties intended to define by the use of the words "within two calendar months from the date of the expiration" of the lease. Literally, these words appear to mean what his Honour held they meant, namely, that the option was exercisable in the lifetime of the lessor during a period of two months commencing upon the expiration of the lease. But this would involve a holding over by the lessee until he exercised the option and it may be that the words are capable of referring to a period of two months before the expiration of the lease. It would be unnecessary to resolve the difficulty if the exercise of the option rested on the notice of 5th April, 1951, which was given at a time which satisfies either construction. And we cannot agree with his Honour that the notice of 5th April, 1951, is necessarily invalid in the sense that it can never fulfil the condition on which the exercise of the option depends because it was given before the Minister's consent had been obtained and the memorandum of lease registered under the *Real Property Act*. The consent is a condition precedent to the validity of the transfer as a whole, and if it can now be obtained the condition will be satisfied for non-fulfilment of which it lacked validity.

There remains the question how s. 272 (2) affects the option and its purported exercise by the notice of 5th April 1951.

Now in the first place s. 272 (2) has nothing to say against the grant or the exercise of an option as such. It is the "transfer" that s. 272 (2) says "shall not be effected or if effected shall not be valid" not the executory contract, that is so long as the executory contract contemplates no violation of s. 272 (2). But the provision for the option forms part of the lease and is inter-dependent with the demise. As the demise cannot take effect without the Minister's consent, the option cannot come into force as a binding obligation before the Minister gives his consent. When it comes into effect it binds the lessor as a conditional or contingent contract of sale. But in the meantime, although it cannot be considered a source

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of immediate obligation, it is an expression of the parties' actual intention. If and when the Minister does give his consent to the "transfer by way of lease" *i.e.* the demise, the option takes effect according to the intention so expressed. Thus, if the death in the meantime of the lessor, that is before the Minister consents, is intended to be a fulfilment of the condition expressed by the words "provided that in the event of the death of the lessor prior to the expiration hereof", the option will take effect on the granting of consent on the footing that the condition is already satisfied. In the same way if the intention is that, notwithstanding that the Minister has not yet consented, the notice may then be given so as to suffice as a fulfilment of that particular requirement in the event of consent, then if and when the Minister does consent the option will take effect on the footing that its exercise has been notified and the condition has been fulfilled making an absolute contract of sale. The question whether this is the meaning of the option may perhaps be regarded as depending on the effect of the condition precedent implied that the Minister's consent must be obtained. Is not the condition simply that the Minister's consent must be obtained in order that the instrument may take effect as a transfer by way of lease operating according to the events as they have occurred and as they then stand? We think that this is the true sense of the transaction.

Accordingly the notice of 5th April 1951 will on the Minister's consent being given have the effect of a valid notice operating as an exercise of the option. Then the question arises whether a transfer executed pursuant to the contract of sale which would thus be formed will suffice without any further consent of the Minister, his consent to the lease containing the option being enough.

On the construction of the sub-section we think not. It provides with respect not only to a transfer by way of lease but also a transfer by way of sale that "such transfer shall not be effected or if effected shall not be valid, unless the Minister's consent *thereto* has been obtained". The exercise of the option would form but the executory contract of sale and the Minister's consent to the lease comprising it would not cover more. What the sub-section requires is a consent to the transfer. In such a case as this that must mean the transfer pursuant to the option exercised. That instrument will not be effectual unless consent is obtained to the transfer it embodies.

We think that there should be a declaration that the defendants appellants as executor and executrix of Thomas Butts deceased

are bound by an obligation implied in the transaction in the pleadings mentioned to do all such acts and execute all such documents as may be reasonable and proper on their part to enable the plaintiff to apply to the Minister for his consent to the transfer by way of lease and to support such application and that there should be a decree that the defendants appellants do perform and carry out such obligation. The appellants should be ordered to pay the costs of the plaintiff and of the respondent Elliott up to and inclusive of the decree, Elliott's costs to be those of a submitting defendant. Further consideration of the suit and all further questions of costs should be reserved. If the Minister gives his consent and further relief is found to be necessary, it may be given on such further consideration. If on the other hand the Minister's consent is definitively refused the suit can be disposed of finally. The existing decree should be varied to this extent. Subject to this variation the appeal should be dismissed with costs. The cross-appeal should be dismissed without costs.

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TAYLOR J. The appellants are the executors of Thomas Butts who died on 31st May, 1949, and who at the time of his death was, pursuant to the *Real Property Act* 1900-1940 (N.S.W.), registered as the proprietor for an estate in fee simple of the lands in dispute in this case. The dispute arises out of the execution by Thomas Butts and the respondent on or about 18th March, 1949, of a memorandum of lease in the form prescribed by the Act. This memorandum purported to lease the subject land to the respondent for a period of five years from 1st March, 1949, at a specified annual rent and subject to the covenants, conditions and restrictions set out in the memorandum. These covenants were of a usual type but the memorandum contained an option of purchase in the following terms:—"and it is hereby lastly agreed and declared by and between the said parties hereto that the said lessee shall have the right at the expiration hereof to purchase the said demised land at the price of six pounds ten shillings per acre less the usual Auctioneers Commission such option to be exercised by notice in writing within two calendar months from the date of the expiration hereof provided that in the event of the death of the Lessor prior to the expiration hereof then the Lessee shall forthwith have the right to exercise this option".

The memorandum of lease was not and has not been registered under the provisions of the *Real Property Act* and, by reason of the provisions of s. 41, was not at any material time effective to pass any estate or interest in the land. A further difficulty arises

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because the subject land was formerly held, pursuant to the *Crown Lands Consolidation Act* 1913 (N.S.W.) as an original conditional purchase and notwithstanding the fact that a Crown grant has issued and that the title to the land is now under the *Real Property Act*, the provisions of s. 272 of the *Crown Lands Consolidation Act* 1913-1952 still apply to it. Section 272 (6) provides that the provisions of the section are thereby extended so as to apply to any original or additional conditional purchase whether a grant in respect of the same has or has not issued but this is subject to the proviso that the provisions of the sub-section shall not apply to the transfer of any parcel of land being part of that comprised in any such grant where the Minister so certifies in the prescribed form. The subject land is, however, still subject to the provisions of s. 272 and the certificate of title bears an appropriate notification.

Section 272 (2) of the *Crown Lands Consolidation Act* provides that application for permission to transfer by way of sale lease or otherwise except by way of mortgage or discharge of mortgage any such holding as is thereinbefore mentioned shall be made to the Minister in the prescribed form, and such transfer shall not be effected, or if effected shall not be valid, unless the Minister's consent thereto has been obtained. It is of importance to observe that neither party to the memorandum of transfer applied to the Minister for his *permission* to transfer the land by way of lease and the Minister's *consent* thereto has not been obtained.

Disputes having arisen between the parties concerning their respective rights and obligations the respondent in September 1951, instituted a suit in which he sought, *inter alia*, a decree for the specific performance of an agreement, alleged to have been made on or about 18th March, 1949, for the lease by the appellant to the respondent of the subject land. The agreement upon which the respondent relied was claimed by him to be contained in the memorandum of lease above referred to, and it was argued that since the memorandum itself could not be held to be effective to transfer the specified leasehold interest, it should be regarded as an agreement to grant a lease upon the terms therein set out. The respondent was substantially successful before the Supreme Court though his claim that the purported exercise of the option provision of the memorandum had resulted in a contract for the sale and purchase of the land was rejected. In the result the Court declared that the agreement to lease, referred to in the statement of claim, ought to be specifically performed and carried into effect and, having decreed accordingly, ordered the appellants to do all things and execute all documents which might be proper and

necessary for them to do and execute, in order that a proper application might be presented to the Minister for Lands for his consent to a lease in terms of the agreement and further ordered that if such application should be granted the appellants should do all things and execute all documents which might be proper and necessary for them to do and execute in order that a proper memorandum of lease be duly registered in the office of the Registrar-General at Sydney.

The submissions of counsel for the appellants involved several questions, some of which, however, are already the subject of well-established authority. In the first place, he argued that it is impossible in the circumstances of this case to regard the memorandum of lease as an agreement for a lease since so to regard it would be inconsistent with the clear intention of the parties. It was, he claims, their clear intention not to make an agreement for a lease but to make and accept a demise of the land. I should have thought that such an argument is quite inconsistent with the principles applied in such cases as *Burton v. Reeve* (1); *Tidey v. Mollett* (2); *Hayne v. Cummings* (3); *Bond v. Rosling* (4); *Rollason v. Leon* (5) and *Parker and Taswell* (6). Moreover, it seems to me it is inconsistent with the principles, concerning the effect of unregistered instruments in relation to land under the provisions of the *Real Property Act*, established in this Court as early as the decision in *Barry v. Heider* (7), and in later years applied in *National Trustees, Executors and Agency Co. of Australasia Ltd. v. Boyd* (8) and *York House Pty. Ltd. v. Federal Commissioner of Taxation* (9). Reference to these cases also disposes of the appellants' contention that the principles applied in the earlier cases apply only where the instrument under consideration is not in proper form. Again, it was contended that it was impossible to import into any such agreement an undertaking on the part of the appellants to endeavour to obtain the consent of the Minister. This argument also was based on the form chosen by the parties for the expression of their intention. But if effect should be given to the intentions of the parties, so far as they may lawfully be effectuated, it is unnecessary to import anything into the agreed terms beyond that which obviously must be deemed to have been their intention, for

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| (1) (1847) 16 M. & W. 307 [153 E.R. 1206]. | (5) (1861) 7 H. & N. 73 [158 E.R. 398]. |
| (2) (1864) 16 C.B.N.S. 298 [143 E.R. 1143]. | (6) (1858) 2 De G. & J. 559 [44 E.R. 1106]. |
| (3) (1864) 16 C.B.N.S. 421 [143 E.R. 1191]. | (7) (1914) 19 C.L.R. 197. |
| (4) (1861) 1 B. & S. 371 [121 E.R. 753]. | (8) (1926) 39 C.L.R. 72. |
| | (9) (1930) 43 C.L.R. 427. |

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it is impossible to regard as an agreement for a lease of land subject to the provisions of s. 272 of the *Crown Lands Consolidation Act* any agreement to lease otherwise than in accordance with the provisions of that section. As *Harvey* C.J. in Eq. said in *Egan v. Ross* (1): "As I said in *Duncan v. Mell* (2) 'Where a contract for the sale of such an interest is made, and nothing is said about the subject of the Minister's consent, it appears to me it must be implied in such contract that if things are left as they are at that date and the consent of the Minister is refused, the contract would go off. *Prima facie* it would be the duty of the vendor under such circumstances to procure the consent, that being necessary to complete his power to transfer; but if he does not obtain it, it seems to me it must be implied that the contract goes off, and, under those circumstances, he would have to return his deposit'".

The substantial objection to the granting of any relief to the respondent appears to me to turn upon three provisions of s. 272 for, in the absence of these provisions, the memorandum of transfer in its present form should, I think, be regarded as evidencing an agreement to grant a lease and properly the subject of a suit for equitable relief. Perhaps it may be more accurate to say that the memorandum, in those circumstances, is binding between the parties and, subject to the consent of the Minister being obtained, confers upon the respondent "an equitable claim or right to the land recognised by the law" (*Barry v. Heider* (3), per *Griffith* C.J.). The first of the provisions of s. 272 which are relied upon is contained in sub-s. (2) of that section and to this I have already referred. The other provisions respectively are contained in the sixth paragraph of sub-s. (3) and in sub-s. (5) which are, respectively, in the following terms: "A foreclosure or transfer in contravention of this section shall be void and any agreement or contract for the sale of any holding made without the permission of the Minister shall render such holding liable to forfeiture if such agreement or contract be not submitted for the approval of the Minister within three months from date of execution thereof." (5) "It shall be immaterial for the purposes of the provisions of this section whether a transfer mortgage or devolution takes place before or after the passing of this Act; and no transfer or conveyance or assignment in contravention of such provisions shall be valid for any purposes whatsoever."

(1) (1928) 29 S.R. (N.S.W.) 382, at p. 387; 46 W.N. 90, at p. 92.

(2) (1914) 14 S.R. (N.S.W.) 333, at p. 339; 31 W.N. 113.
 (3) (1914) 19 C.L.R. 197, at p. 248.

If the transaction so far as it has been carried out is unlawful or if the parties have acted in contravention of a statutory prohibition, there could be little doubt that the respondent was not entitled to any relief in the suit which he instituted. But, in my opinion, they have not acted in contravention of any statutory prohibition. It is true that s. 272 (2) provides that, in cases such as this, applications for permission to transfer by way of lease shall be made to the Minister in the prescribed form and that such transfer shall not be effected, or, if effected, shall not be valid unless the Minister's consent thereto has been obtained but this sub-section seems to be concerned rather with dealings than with instruments. In relation to this provision it is of importance to observe that the Act makes special provision with respect to the transfer of land conditionally purchased. Section 261 of the Act provides as follows:—"Every transfer of land conditionally purchased if made by a person not under legal disability shall subject to the provisions and conditions of this Act be deemed to pass to the transferee the whole estate and interest, whether at law or in equity, of the transferor of such land as effectually to all intents and purposes as if a conveyance or assignment under seal of such estate and interest to such transferee had been duly executed by such transferor, but this enactment shall be subject to the conditions following, that is to say:—(1) The equities of all persons claiming any estate or interest in any such land by matter prior to the date of execution of any such transfer shall not be affected by this section, but shall be capable of assertion and enforcement as if this Act had not been passed. (2) No transfer shall have the effect hereinbefore expressed unless such transfer has been made executed and lodged in accordance with the regulations. (3) No such transfer shall prejudice or affect any conveyance or assignment or any other assurance under seal relating to land conditionally purchased if such conveyance assignment or assurance shall have been previously registered as by law required in the office of the General Registry of Deeds in Sydney".

Accordingly, there is no effective dealing unless and until the transfer has been made executed and lodged in accordance with regulations. There is nothing in s. 272 (2) to forbid the making of an agreement to lease; what is required by that sub-section is that applications shall be made for the Minister's permission before transfers are *effected*. And this is followed by the provision that if a transfer is *effected* without the Minister's consent, it shall not be valid. As I have already said, this sub-section strikes at dealings and not at instruments. There would be no point in

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providing that the Minister's consent should be obtained before an instrument is executed when the instrument itself is quite ineffective, without compliance with s. 261 (2), to transfer any interest in the land and, equally, there would be no point in providing that an instrument which, alone, is ineffective to transfer any interest should not be valid. The view which I have expressed is, I think, the natural consequence of the language of the sub-section prescribing as it does that transfers shall not be effected without the consent of the Minister, or if effected without that consent shall not be valid. A not dissimilar view of the meaning of the sub-section appears to have been entertained by *Harvey J.* in *Egan v. Ross* (1). In that case his Honour was concerned with the provisions of s. 274 (2) of the *Crown Lands Consolidation Act* 1913 and appears to have taken the view that that section was concerned with dealings and not with instruments. It is true that that sub-section required that applications for permission "to transfer or otherwise deal with any holding" should be made to the Minister, but in my view there is no real difference between the language of the two sub-sections.

It has, I think, been proper to consider the meaning and effect of s. 272 (2) in the light of the provision made by s. 261 with respect to the manner in which transfers may be effected. The title to the subject land, however, is now under the *Real Property Act*, but since registration under that Act is necessary in order to render instruments effective to transfer interests in land, the views already expressed are not affected by this circumstance. In my opinion, the parties have not, by the execution of the memorandum of transfer, contravened any provision of s. 272 (2), nor do I think that any inference adverse to the respondent's claim can be drawn from the fact that the parties neglected or failed for a long time to seek the Minister's consent.

The other provisions of s. 272 to which reference was made in argument do not affect the matter. Even if the sixth paragraph of sub-s. (3), upon its proper construction, extends to all contracts for the sale of holdings and not only to contracts made by mortgagees in exercise of a power of sale that paragraph does not affect, or even purport to affect, the validity of such contracts. The only effect of neglect or failure to obtain the permission of the Minister to a contract of sale within three months from the date of execution thereof, is to render the holding liable to forfeiture. Moreover, the instrument of transfer in this case could not, on any view, be held to be a contract for the sale of a holding. Finally, sub-s. (5)

(1) (1928) 29 S.R. (N.S.W.) 382; 46 W.N. 90.

does not carry the matter any further. Its invalidating provision applies only to transfers or conveyances or assignments made in *contravention* of the Act, and it was not suggested that the execution of the transfer contravened any provision of the Act other than s. 272 (2) and the sixth paragraph of sub-s. (3).

The final point, which was the subject of a cross-appeal by the respondent, is concerned with the purported exercise by the respondents of the option provision of the memorandum of transfer. On this point I have nothing to add to the observations and conclusions contained in the joint judgment.

I am also of opinion that there should be some variation in the form of relief granted in the suit and I agree with the variation proposed and that, subject thereto, the appeal should be dismissed.

Decree below varied by omitting therefrom the following declaration and orders, namely the declaration that this Court doth declare that the agreement to lease referred to in par. (1) of the statement of claim ought to be specifically performed and carried into effect the order that this Court doth order and decree the same accordingly the order that within fourteen days after service upon the defendants Catherine Agnes Butts and James Butts of an office copy of this decree they do all things and execute all documents which are proper and necessary for them to do and execute in order that a proper application may be presented to the Minister for Lands for his consent to a lease in terms of the said agreement the order that if such application be granted the said defendants do all things and execute all documents which are proper and necessary for them to do and execute in order that a proper memorandum of lease be duly registered in the office of the Registrar-General, Sydney, and the order as to costs and substituting therefor a declaration that the defendants-appellants as executor and executrix of Thomas Butts deceased are bound by an obligation implied in the transaction in the pleadings mentioned to do all such acts and execute all such documents as may be reasonable and proper on their part to enable the plaintiff to apply to the Minister for Lands for his consent to the transfer by way of lease of the land comprised in Crown Grant dated 2nd May 1939 Registered Vol. 5047 folio 3 in

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accordance with such transaction and to support such application and decree and order that the said defendants appellants do perform and carry out such obligation. Liberty to apply to the Supreme Court if necessary to fix a time or times within which this obligation or any part thereof must be performed. Order the defendants-appellants to pay the costs of the plaintiff and of the respondent Elliott up to and inclusive of the decree, Elliott's costs to be those of a submitting defendant. Further consideration of the suit and all further questions of costs reserved. Subject to this variation appeal dismissed with costs. Cross-appeal dismissed without costs.

Solicitors for the appellants, *Lusher, Young & Stellway*, Wagga Wagga, by *Mackenzie Russell*.

Solicitors for the respondent plaintiff, *Thompson & Hogan*, Coolamon, by *Anthony B. Bradfield & Johnson*.

J. B.