[HIGH COURT OF AUSTRALIA.]

WOODROFFE . . . . . APPELLANT;
PLAINTIFF,

AND

BOX AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *March* 16;

SYDNEY, *May* 4.

Webb, Fullagar and Kitto JJ.

Contract—Construction—Covenant to give "the right of first refusal" to purchase on happening of specified event—Pre-emptive right—Promise of offer—Duty to offer on happening of event—Equity—Offer arising on happening of event without more.

The term "first refusal" is not a technical term, and a mere promise to give the "first refusal" prima facie confers no more than a pre-emptive right. The justification for this interpretation is to be found in the word "first", but its prima facie significance may be displaced where the right of "first refusal" is to be given on a fixed future date or on the happening of a specified event (whether it be one that may never happen or must eventually happen) and in such circumstances the promise may be construed as meaning that an offer will be made on that date or on the occurrence of the event and that no other offer will be made to anyone else in the meantime. In every case regard must be had to the whole of the contract, and in the light of that whole it must be determined whether the parties have or have not indicated an intention that an immediate offer is being made or is to be made.

By a contract under seal between M., who was the owner of business premises, and W., the lessee of the premises, M. covenanted "that his executors will upon the death of the survivor of the owner and his wife give to the tenant or his executors or administrators or at his or their requests to him or them conjointly with the tenant's son the right of first refusal to purchase the . . . premises for thirteen thousand pounds or should there then be in existence any statutory limitation of the price at which real estate may be bought or sold then at the said price of thirteen thousand pounds or the maximum price for the said premises allowable by such statutory limitation whichever is the lower." M. predeceased his wife. After the death of M.'s

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widow the executors of M.'s estate refused to convey the property to W. and retained it for the beneficiaries under M.'s will. W. contended that the executors were bound in accordance with the covenant in the agreement to convey the property to him for £13,000.

Held, by *Fullagar* and *Kitto* JJ. (*Webb* J. dissenting), that on the true construction of the agreement M.'s executors were bound, on the death of the survivor of M. and his wife, to offer the property to W.—or at W.'s election to W. and his son—for the price of £13,000;

Held, further by *Fullagar* and *Kitto* JJ., that in equity cl. 1 of the agreement operated on the death of the survivor of M. and his wife as an offer capable of being accepted by W. or by W. and his son so as to create an open contract for the sale of the property for £13,000.

County Hotel & Wine Co. Ltd. v. *London & North-Western Railway Co.* (1918) 2 K.B. 251; (1919) 2 K.B. 29; (1921) 2 A.C. 85; *Mackay* v. *Wilson* (1947) 47 S.R. (N.S.W.) 315; 64 W.N. 103 and *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1900) 2 Ch. 352; (1901) 2 Ch. 37, discussed. *Scott* v. *Skinner* (1947) N.Z.L.R. 528, disapproved.

Decision of the Supreme Court of Tasmania (*Morris* C.J.), reversed.

APPEAL from the Supreme Court of Tasmania.

This was an appeal from an order of the Supreme Court of Tasmania (*Morris* C.J.) made on the hearing of an originating summons issued pursuant to O. 61 of the *Rules of Court* under the *Supreme Court Civil Procedure Act* 1932 (Tas.) for the determination of questions arising under a contract under seal dated 15th November 1946 between the late James Murdoch MacLennan and Frank Woodroffe.

At the date of the agreement and up to the date of death of the said James Murdoch MacLennan, Woodroffe was the tenant of business premises situated at Launceston, Tasmania and owned by the said James Murdoch MacLennan. The agreement, which was under seal and expressed to be in consideration of the sum of £100 paid by the tenant to the owner on the signing of the agreement, after reciting that MacLennan was the owner and Woodroffe the tenant of the premises, provided as follows:—"1. The owner hereby covenants that his executors will upon the death of the survivor of the owner and his wife Emily Maria MacLennan give to the tenant or his executors or administrators or at his or their requests to him or them conjointly with the tenant's son Macdonald Woodroffe the right of first refusal to purchase the said premises for thirteen thousand pounds or should there then be in existence any statutory limitation of the price at which real estate may be bought or sold then at the said price of thirteen thousand pounds or the maximum

price for the said premises allowable by such statutory limitation whichever is the lower. 2. In the event of the purchaser or his executors or administrators either solely or in conjunction with the said Macdonald Woodroffe purchasing the said premises pursuant to the said right of first refusal then the sale shall be for cash and the said sum of one hundred pounds the consideration for this agreement shall be credited on account of the purchase money but should no purchase be made in accordance with the terms of this agreement then the said sum of one hundred pounds shall become the absolute property of the owner."

James Murdoch MacLennan died on 25th June 1948 and his wife died on 20th April 1951. After the death of the owner's widow, Woodroffe, who was still the tenant of the premises, requested the executors of MacLennan's will to convey the property to him. The executors, who were the respondents to this appeal, refused to do so, contending that it was only if they decided to sell the property that they were under the obligation to give the first offer of it to Woodroffe for the sum of £13,000, and that as they desired to retain the property for the time being they were under no duty to Woodroffe pursuant to the agreement.

On the hearing of the originating summons which was issued by Woodroffe *Morris* C.J. upheld the contention of the executors, on the ground that the term " right of first refusal " gave " no more than a right in priority to all others to refuse an offer made by the owner to sell, imposing, however, no obligation on the owner to make that offer." The further effect of his Honour's judgment was that if the executors decided to sell the property they must offer it to Woodroffe, in preference to all others, for the sum of £13,000.

From this decision Woodroffe appealed to the High Court.

D. I. Menzies Q.C. (with him *N. L. Campbell*), for the appellant. At the date of the agreement the *National Security* (*Economic Organization*) *Regulations* were still in force. The original agreement was prepared by the solicitors of the owner and accepted by the tenant, and the general impression is that what was successfully attempted was to put the tenant in the same practical position as if an option had been granted, although not in the same legal position. It is not suggested that the agreement amounts to an option. On its proper construction the effect of the agreement is that at the critical date, viz. on the death of the owner's widow, there was an obligation on the executors to offer the property to the tenant for £13,000. It is quite possible to construe the agreement as not amounting to an option but nevertheless as imposing

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an obligation on the executors to make an offer which the tenant could accept. The agreement was carefully drawn to avoid any breach of the law. It was not intended that the tenant should pay £100 for nothing. It is clear that it is part of the obligation imposed by the agreement that the executors will take some steps. The word "upon" in the phrase "upon the death" defines the actual date at which those steps are to be taken. It would have been a breach of the agreement if the owner had sold the premises the day after the agreement was executed. The word "then" in cl. 1 of the agreement refers back to a specified point of time, and the price is to be determined at the date of death of the survivor of the owner and his widow. The crucial question is: Does this agreement fix the time at which the offer is to be made? In *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1), it is clear that the agreement considered by the Court of Appeal was construed to mean that on the happening of one or other events there was an obligation to offer the land to the canal company at a fair and reasonable price. The instant case is stronger, because in the agreement between the owner and the tenant the price is fixed, with an alternative price which is fixed by reference to the time at which the appellant contends the offer is to be made. The appellant concedes that if an owner gives a right of first refusal without more he is not obliged to make an offer to the person to whom the right is given unless and until he chooses to sell the property. The appellant does not have to go to the length of submitting that the phrase "first refusal" of itself imports an obligation to make an offer. However, if there is coupled with a right of first refusal a point of time at which that refusal should be made, then the obligation which is imposed by the agreement can only be satisfied by the person who gives the right of first refusal making an offer at the specified time. In this case the date is fixed, and to construe the agreement in any other way would be to deprive the tenant of the very thing for which he was bargaining and of all advantage under the agreement.

R. M. Eggleston Q.C. (with him *M. G. Everett*), for the respondents. There is no preference shown by the Court of Appeal in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (2) for either the view that there was a mere right of first refusal or for the view that an obligation was created. The legal content of the agreement in the instant case and the agreement considered in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (2) is exactly the same.

(1) (1900) 2 Ch. 352; (1901) 2 Ch. 37. (2) (1901) 2 Ch. 37.

Neither of them is any less an option than the other. There is no justification for any assumption as to what the parties intended. The term " right of first refusal " is an expression familiarly known to lawyers as importing an obligation to sell to one in preference to any other party but not an obligation to sell in any event : *County Hotel & Wine Co. Ltd.* v. *London & North Western Railway Co.* (1). The words " first refusal " are used as an apt description of a preferential right. In *Scott* v. *Skinner* (2), the phrase " first refusal " was construed naturally as giving only a right in preference to others. In *Mackay* v. *Wilson* (3) the expression " first option " was considered, and *Jordan* C.J., said the word " first " clearly implied preference. If the argument of the appellant is correct, the word " first " could have been omitted from the agreement. The word " upon " in the phrase in the agreement " upon the death " means " after ". The words in cl. 2 of the agreement, viz. " should no purchase be made " are completely neutral. The fact that the consideration for the agreement was the sum of £100 does not really matter, because if the property were sold to the tenant the sum of £100 would be credited to the tenant. [He referred to *Poulton* v. *The Commonwealth* (4) .] If the effect of the agreement was to give the tenant a right to purchase the property the parties would have been amenable to prosecution for a breach of the *National Security* (*Economic Organization*) *Regulations*. On the principles of *Poulton* v. *The Commonwealth* (5) and applying the golden rule of interpretation, there is no warrant for holding that the tenant obtained something which he was not entitled to receive in view of the regulations.

D. I. Menzies Q.C., in reply. There is only one point of time expressed in the agreement. If the word " then " in cl. 1 refers back to the date of the death of the survivor of the owner and his wife, the respondent's contention cannot be correct. In the absence of a context which compels another meaning, the word " upon " means " at the time of ". The word " first " is a word of emphasis. It has not been shown that the agreement in the sense for which the appellant contends is an " option " within the meaning of the *National Security* (*Economic Organization*) *Regulations*.

Cur. adv. vult.

(1) (1921) 1 A.C. 85.
(2) (1947) N.Z.L.R. 528.
(3) (1947) 47 S.R. (N.S.W.) 315; 64 W.N. 103.
(4) (1953) 89 C.L.R. 540, at p. 595.
(5) (1953) 89 C.L.R. 540.

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The following written judgments were delivered :—

WEBB J. This is an appeal from an order of the Supreme Court of Tasmania (*Morris* C.J.) made on a summons for the determination under O. 61 of the *Rules* of the Supreme Court of Tasmania of questions arising under an agreement in writing dated 15th November 1946 made between the late James Murdoch MacLennan who then resided at Auburn in Victoria and the appellant Frank Woodroffe who then resided and still resides in Launceston, Tasmania. MacLennan was the owner of premises used as a drapery store situated at the corner of Brisbane Street and the Quadrant in Launceston and had leased them to the appellant in July 1943. The agreement in question recited that, in consideration of £100 paid by the appellant to MacLennan, the latter agreed among other things that his executors would " upon the death of the survivor " of MacLennan and his wife give to the appellant " the right of first refusal " to purchase the leased premises for £13,000 ; or should there then be in existence any statutory limitation of the price at which real estate might be bought or sold, then for £13,000 or the maximum price allowable by such statutory limitation, whichever was the lower. It was further agreed that in the event of purchase pursuant to this right of first refusal the sale should be for cash and the £100 should be credited on account of purchase money ; but should there be no purchase the £100 should become the absolute property of " the owner ". " Owner " was not defined by the agreement to include the executors or administrators of MacLennan ; but no point was made of this in argument.

At the time this agreement was made the *National Security* (*Economic Organization*) *Regulations* provided by reg. 6 (1) (b) that a person should not without the consent of the Commonwealth Treasurer take an option of purchase of land, subject to an exception that did not apply to this case. There appears to have been no application for the treasurer's consent. But by reg. 10A it was also provided that a transaction entered into in contravention of reg. 6 (1) (b), although penalized, should not be invalidated.

MacLennan died on 25th June 1948 and was survived by his wife who died on 20th April 1951. Probate of MacLennan's will was granted to the respondents by the Supreme Court of Victoria on 10th August 1949 and the grant was sealed with the seal of the Supreme Court of Tasmania on 22nd February 1952.

Morris C.J. held that the term " right of first refusal " retained its ordinary meaning in this agreement, and so did not impose on the executors of MacLennan on the death of his widow an obligation to make to the respondent an offer to sell the premises. But his

Honour also held that if the executors decided to sell they must offer the premises for £13,000 to the appellant in preference to all others. His Honour observed that it might be that the will imposed an obligation on the executors to sell the premises at some stage of their administration of the estate; but that this obligation was outside the agreement. He added that the will was not before him for construction; and it is not before this Court.

Mr. *Menzies* of counsel for the appellant referred to *National Security* (*Economic Organization*) *Regulations*, regs. 6 (1) (b) and 10A as providing a possible explanation why what he submitted was tantamount to an option to purchase should be cloaked as a right of pre-emption. But for reasons hereinafter appearing I think this transaction was beyond the scope of those regulations. No doubt it would be immaterial that the right was designated by the agreement as " a right of first refusal " if by the terms of the agreement it was made in substance an option of purchase. But before it can be held to be something other than what it is expressed to be, the terms of the agreement must be such as to leave open no other reasonable conclusion. As pointed out by *Street* J. in *Mackay* v. *Wilson* (1) the words of the agreement should be given their ordinary meaning, unless the context or the subject matter compels another meaning to be adopted. Nothing in the subject matter of this agreement compels another meaning to be adopted. Nor do I see anything in the context which has that effect. It is true that ordinarily a right of first refusal connotes an offer at a price which some third person is willing to give, as stated by *Farwell* J. in *Manchester Ship Canal Co. Ltd.* v. *Manchester Racecourse Co.* (2); whereas the price in this case does not depend on the initiative of a third person in making an offer to buy at a stated price. But Mr. *Menzies* relies also on the provision of what he submits is a fixed point of time for the realization of the right, i.e. " upon the death of the survivor ", as well as on the fixed or maximum price, and on the consideration of £100 paid for the right. However the expression " upon the death of the survivor " does not necessarily fix a point of time, as distinct from a period of time : " upon " may mean either " immediately after " or " thereafter ", depending on the subject matter or the context pointing definitely to one meaning or the other. There is in my opinion no such subject matter or context here. The word " upon " is equivocal apart from subject matter or context and it requires something more than an equivocal term to convert what ordinarily is a right of pre-emption into what

(1) (1947) 47 S.R. (N.S.W.) 315, at p. 325; 64 W.N. 103.

(2) (1900) 2 Ch. 352, at p. 364.

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would be in effect an option of purchase. Again the price of £13,000, or the statutory maximum if less, is quite consistent with the view that the parties intended that if the executors should decide to sell that would be the price to Woodroffe. It would, I think, be to take an extreme view to hold that this provision for a fixed or maximum price implied that there was an obligation on the executors to make an offer for sale when they would not otherwise have sold. That would involve, I think, the disregard of the word "first" in the expression "first refusal" which points to the possibility of there being more than one person in the contemplation of the executors as a possible buyer, and that in turn imports a decision of the executors to sell, quite apart from any obligation contracted to a particular individual. Lastly, as to the consideration of £100 it may well be that it would not be too much to pay for this right of first refusal in the ordinary acceptation of that term, having regard to the prospect of the executors having the authority or obligation to sell, and proceeding to do so at a time not remote from the death of the survivor.

In my opinion then the provisions of the agreement on which Mr. *Menzies* relies are not sufficient to deprive the term "first refusal" of its natural meaning, qualified by the price provision.

I think the decision of the Supreme Court was right and I would dismiss the appeal.

FULLAGAR AND KITTO JJ. This is an appeal from an order made by the Chief Justice of Tasmania on an originating summons, which sought an interpretation of a contract under seal made on 15th November 1946 between the appellant, Frank Woodroffe, and James Murdoch MacLennan, now deceased. The other parties to the proceedings are the executors of the will of James Murdoch MacLennan.

At the date of the contract MacLennan was the owner of certain land, on which a building was erected, in the centre of the city of Launceston. Woodroffe was a tenant of the property under a lease, the term of which does not appear. The document refers to MacLennan as "the owner", and to Woodroffe as "the tenant". It recites the ownership of the land, the tenancy under the lease, and the fact that "the parties have agreed in manner following." It then proceeds:—"Now this agreement witnesseth that in pursuance of the said agreement and in consideration of the sum of one hundred pounds paid by the tenant to the owner, the receipt whereof is hereby acknowledged, the parties hereto mutually covenant and agree in manner following:—1. The owner hereby

covenants that his executors will upon the death of the survivor of the owner and his wife Emily Maria MacLennan give to the tenant or his executors or administrators or at his or their request to him or them conjointly with the tenant's son Macdonald Woodroffe the right of first refusal to purchase the said premises for thirteen thousand pounds or should there then be in existence any statutory limitation of the price at which real estate may be bought or sold then at the said price of thirteen thousand pounds or the maximum price for the said premises allowable by such statutory limitation whichever is the lower. 2. In the event of the purchaser or his executors or administrators either solely or in conjunction with the said Macdonald Woodroffe purchasing the said premises pursuant to the said right of first refusal then the sale shall be for cash and the said sum of one hundred pounds the consideration for this agreement shall be credited on account of the purchase money but should no purchase be made in accordance with the terms of this agreement then the said sum of one hundred pounds shall become the absolute property of the owner."

MacLennan died on 25th June 1948, and his wife, Emily Maria MacLennan, died on 20th April 1951. Immediately after the death of the widow the appellant called upon the respondents, the executors of MacLennan's will, to convey the land to him. He is, and at all material times has been, ready and willing to pay the sum of £13,000 for the land. Statutory control of the prices payable for land had ceased in Tasmania before the death of the widow. The respondents refused to convey the land. Their contention has been, and is, that the agreement binds them, after the death of the survivor of MacLennan and his wife, not to sell the land to any person without first offering it to the appellant at the specified price, but that it does not bind them to anything more than that. At the present time they do not desire to sell the land at all, and, unless and until they do propose to sell it, the agreement, they say, does not bind them to do anything. The appellant contends that, when both of the prescribed events had happened, the respondents became bound to offer, or were to be treated as offering, to sell the land to him for £13,000.

Morris C.J. gave effect to the contention of the respondents. His Honour said that a right of first refusal was a different thing from an option. "It gives", he said, "no more than a right in priority to all others to refuse an offer made by the owner to sell, imposing, however, no obligation on the owner to make that offer." And he quoted a passage from the judgment of *Street* J. (as he then

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was) in *Mackay* v. *Wilson* (1), in which that learned judge, after explaining the effect of the giving of an option, proceeded to contrast the effect of giving a right of pre-emption. *Street* J. said :— " But an agreement to give ' the first refusal ' or ' a right of pre-emption ' confers no immediate right upon the prospective purchaser. It imposes a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer. It is not an offer and in itself it imposes no obligation on the owner of the land to sell the same. He may do so or not as he wishes. But if he does decide to sell, then the holder of the right of first refusal has the right to receive the first offer, which he also may accept or not as he wishes. The right is merely contractual and no equitable interest in the land is created by the agreement " (2).

The question raised is one of some difficulty. It is, of course, purely a question of the construction of a particular document. Because, however, the respondents maintain that the expression " give the right of first refusal " has a recognized legal meaning, we think it is desirable to begin by referring to the authorities mentioned in the judgment of *Morris* C.J. and cited in argument before us. We have not found any other case which appears to us to throw any light on the problem.

In *County Hotel & Wine Co. Ltd.* v. *London & North Western Railway Co.* (3) the relevant words were contained in a lease for 999 years of certain land adjacent to a railway station. The lessee was to erect and maintain a hotel thereon, and it was provided that the lessee should " have the option in preference to any other party " of taking a lease on certain terms of the refreshment rooms on the station, " it being the intention and wish of the parties that the same persons should have the option of occupying both the hotel and the refreshment rooms." The refreshment rooms were at the time let to another tenant on a tenancy from year to year. It was held by the Court of Appeal and the House of Lords that the covenant conferred only a right of preference, and that it did not prevent the lessor from entering into possession itself of the refreshment rooms on the station on the termination of the tenancy from year to year. *Duke* L.J. said : " What they covenanted to do was to give to the tenant of the hotel the first refusal of the tenancy of the refreshment rooms in case of letting " (4). In this case the

(1) (1947) 47 S.R. (N.S.W.) 315 ; 64 W.N. 103.
(2) (1947) 47 S.R. (N.S.W.), at p. 325 ; 64 W.N. 103.
(3) (1918) 2 K.B. 251 ; (1919) 2 K.B. 29 ; (1921) 1 A.C. 85.
(4) (1919) 2 K.B. 29, at p. 38.

words " in preference to any other party " were treated as decisively qualifying the word " option ", and the later reference to the " intention and wish of the parties " was regarded as not detracting from the effect of those qualifying words. In other words, the option referred to in the recital of intention was the same option as that given above, and that option was a qualified option. In the House of Lords Viscount *Cave* said : " If the body of the covenant had stood alone, I should not myself have felt any doubt that it gives no more than a preferential right or ' first refusal ' of a tenancy " (1). He then referred to the later provisions in the lease, saying that they did not justify giving any other meaning to the words of the covenant. It is interesting to note that *McCardie* J. had held the covenant to be void for uncertainty, referring to a decision of *Warrington* J. in *Ryan* v. *Thomas* (2).

In *Mackay* v. *Wilson* (3) to which reference has already been made, the words were contained in an informal document. The words were " first option for purchasing the property is hereby given to Mrs. E. H. Mackay at £1350 ". The question raised was whether these words conferred a true option or merely a right of pre-emption. It was held by *Davidson* and *Street* JJ., *Jordan* C.J. dissenting, that they conferred a true option. Here there was an apparent contradiction between the word " first " and the word " option ", the contradiction being resolved, in the light of all the circumstances of the case, by giving its full natural meaning to the word " option ".

In *Scott* v. *Skinner* (4) the following words occurred in a lease : " ' Three months prior to the expiration of the said term the lessor will grant to the lessee first refusal of a further five years' lease to commence from the date of such expiration . . . provided that the lessee shall signify in writing addressed and delivered to the lessor his acceptance or rejection of such an extension not later than two months before the expiration of the present term—any such extension to contain similar covenants conditions and agreements as are herein set forth excluding only this option of renewal ' " (5). *Johnston* J. held that no more than a preferential right was given to the lessee, so that, if the lessor chose to enter into possession at the expiration of the term, he was at liberty to do so notwithstanding that the lessee had purported within the prescribed time to accept an extension of the lease.

A decision of *Mayo* J. in *Emmett* v. *Kiely* (6) was referred to, but this seems to be a very clear example of a mere right of pre-emption.

(1) (1921) 1 A.C. 85, at p. 96.
(2) (1911) 55 S.J. 364.
(3) (1947) 47 S.R. (N.S.W.) 315 ; 64 W.N. 103.
(4) (1947) N.Z.L.R. 528.
(5) (1947) N.Z.L.R., at pp. 528-529.
(6) (1946) S.A.S.R. 17.

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The last case which it is necessary to mention is one on which reliance was placed by the appellant. It is the case of *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1). In this case the relevant words occurred in an agreement scheduled to an Act of Parliament. The agreement was between a canal company and a racecourse company, and it provided, *inter alia*, that, if and when certain lands belonging to the racecourse company ceased to be used as a racecourse, or should be proposed to be used for dock purposes, then and in either of such cases the racecourse company should give to the canal company the first refusal of the lands *en bloc*. No price or terms of sale were mentioned, but it was held that, since the agreement was scheduled to an Act of Parliament, it could not be attacked as void for remoteness or uncertainty: contrast *Ryan* v. *Thomas* (2). *Farwell* J. said: "Now, a refusal, to my mind, implies an offer. A thing is not in ordinary parlance refused before it is offered" (3). With this observation the Court of Appeal (4) agreed. The actual decision in the case, which was affirmed by the Court of Appeal, may be said to lend no support to the appellant's argument, because at the material time the racecourse company was actually proposing to sell the land to another purchaser. Very considerable importance, however, does, in our opinion, attach to what was said in the judgment of the Court of Appeal, which was delivered by *Vaughan Williams* L.J. His Lordship said:—"There appear to be two possible meanings of the words 'first refusal': one is that they mean the opportunity of refusing a 'fair and reasonable offer' by the racecourse company to sell the lands en bloc to the canal company; the other is that they mean the opportunity of refusing the land at a price acceptable to the racecourse company offered by some person other than the canal company, which is what we understand by the term 'right of pre-emption'" (5). His Lordship then points out that the "obligation to give a first refusal" arises in either of two specified events, and, in the light of this fact, of the main object of the agreement, and of other provisions contained in it, expresses the opinion that "there is at least fair ground for the contention that in either of the prescribed events the racecourse company was to make a fair and reasonable offer to sell the land to the canal company." He proceeds to consider the case on the assumption that this contention is well-founded, regarding the meaning so attributed to the words in question as a meaning more favourable to the

(1) (1900) 2 Ch. 352; (1901) 2 Ch. 37.
(2) (1911) 55 S.J. 364.
(3) (1900) 2 Ch., at p. 364.
(4) (1901) 2 Ch. at p. 48.
(5) (1901) 2 Ch., at pp. 46-47.

defendants than the other. A little later *Vaughan Williams* L.J. says: "If one takes, as we have done in this judgment, the construction of cl. 3 most favourable to the defendants, the racecourse company on the happening of either of the alternative conditions came under the obligation to make a fair and reasonable offer to sell the lands to the canal company, and this, in our opinion, for reasons which we have already given, the racecourse company have never done" (1).

The position revealed by the cases and by what is said in them is precisely what one would, in the absence of authority, have supposed it to be. The term "first refusal" is not a technical term. It is a colloquial term, and indeed a somewhat inept term, because what the potential offeree wants is an opportunity of *accepting* an offer rather than an opportunity of refusing an offer. It may, and does, occur in various phrases, such as "give the first refusal", "have the first refusal", "give the right of first refusal", "have the right of first refusal", etc. And these phrases may be found in various contexts. It seems clear that a mere promise to give the first refusal should be taken prima facie as conferring no more than a pre-emptive right. If I promise to give you the first refusal of my property, I am making prima facie only a negative promise: I am saying: "I will not sell my property unless and until I have offered it to you and you have refused it." But the whole of the burden of justifying this interpretation rests, of course, upon the word "first". "I give you the refusal of my property" can mean nothing but "I offer my property to you". So, if the words used are "first option", the whole argument for the view that no more than a preference is given, rests on the word "first". There may be found, in any particular case, a context, or surrounding circumstances, such as to outweigh the prima facie significance of the word "first", and compel the conclusion that a true option is intended to be given. This was held to be the case in *Mackay* v. *Wilson* (2), and it was held that there was "at least fair ground for the contention" that this was the case in the *Manchester Canal Case* (3). In *Scott* v. *Skinner* (4) there were such very strong indications that a true option of renewal of the lease was intended that one has little hesitation in saying that that case was wrongly decided.

Where the promise is to give the right of "first refusal" on a fixed future date or on the occurrence of a specified event (whether,

(1) (1901) 2 Ch., at p. 49.
(2) (1947) 47 S.R. (N.S.W.) 315; 64 W.N. 103.
(3) (1900) 2 Ch. 352; (1901) 2 Ch. 37.
(4) (1947) N.Z.L.R. 528.

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as in the *Manchester Canal Case* (1), an event which may or may not happen, or, as in the present case, an event which must happen sooner or later), there is evident ground for saying at once that it may not be right to give to the word " first " its full prima facie significance. For it is difficult to suppose that the parties intended that the promisor was not to be bound to do anything *on* the fixed date or *on* the occurrence of the specified event. And it may be said that there is no great difficulty in regarding the words as meaning that an offer will be made on the date or on the occurrence of the event, and that no other offer will be made to anybody else in the meantime—in other words, in treating the promisor as saying: " On that date, or on the happening of that event, I will make you an offer, and it will be the first offer, because I will not make any offer to anybody until that date or the happening of that event." The truth is, indeed, that, in dealing with such a loose and colloquial expression, it may often be a mistake to cling strongly to a preconceived meaning. The safer and sounder course is to regard it as an expression of fairly flexible import, to look at the whole of what the parties to an instrument have said, and in the light of that whole to determine whether they have or have not conveyed an intention that an immediate offer is being made or is to be made.

If the instrument in the present case is approached in this way, it seems to us that the right conclusion is that MacLennan's executors are bound, upon the death of the survivor of himself and his wife, to offer the property to Woodroffe—or, at Woodroffe's choice, to Woodroffe and his son—for the price of £13,000.

It is notable that the covenant in question in this case is not contained in a lease or similar instrument. It is not a mere incident of an instrument which creates numerous rights and duties to be observed and performed by each party over a period. In such cases no special consideration is given for the covenant. But, in the present case, the sole purpose of the agreement is to create the right, and, if the respondents' construction of the agreement be correct, a substantial consideration is being paid for something which is as likely as not to prove wholly illusory. For let it be supposed that the agreement means, as the executors contend, no more than that they will not sell the property to anyone without first offering it to the appellant. It is not clear to us that, *if that be the contract*, any promise should be implied that MacLennan will not dispose of the property in his lifetime by sale or gift or settlement. It is not altogether easy to say that by any such disposition he is preventing his executors from observing a merely negative

(1) (1900) 2 Ch. 352; (1901) 2 Ch. 37.

covenant. But let it be supposed that there is an implied promise by MacLennan that he will not make any disposition *inter vivos* of the property. He may by his will specifically devise the property, or he may by his will settle it in such manner that A is entitled to the rents and profits for life, and B is entitled on A's death to a conveyance of the property. We can see no reason why he should not do this. And we can see no reason for saying, on the assumed construction of the agreement, that the executors will commit a breach of contract if they convey the property to A in the one case, or to B in the other case, without reference to Woodroffe. On the appellant's construction no such possibilities arise. The executors are bound, on the occurrence of the second of the two events, to make an offer to sell the property, and it is clear that there is an implied term of the contract that MacLennan will do nothing to prevent their making an effective offer. Indeed it would seem that on that construction Woodroffe acquires an equitable interest in the land.

Coming to the text of the agreement, we find that cl. 1 purports to give a right immediately upon the occurrence of the second of two specified events, both of which are bound to occur sooner or later. It seems clearly to be intended that something definite is to be done at that fixed point of time. This tends against the view that a merely negative promise is being made. No operative promise is made at all until the second event has occurred. If a merely negative promise were intended, one would have expected it to be made to operate on the execution of the agreement and to continue binding on the executors. If a true option were intended, the whole framework of the clause—" will upon the death of the survivor give "—is natural and is exactly what one would expect. The word " upon " is perhaps not incapable of meaning " after " in the sense of " at some indefinite time after ", but it is far from being its natural meaning in this context, and the word in its context is quite inapt to denote the commencement of an indefinite period during which there may be no duty on the part of the executors to do anything and no right on the part of the promisee to purchase or refuse to purchase.

The fact that the promisee may elect that the " right " shall be " given " to himself and his son " conjointly " tends also to indicate that an offer is required. It would certainly seem that the choice is intended to be made once and for all as soon as the second event has occurred, and that, on the election being made, a present right is conferred. And considerable importance seems to us to attach to the word " then ". It occurs in that part of cl. 1 which fixes

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the price. It *must* refer to the time when an offer is to be made to sell the property. And the only natural way of reading it is to regard it as referring *also* to the occurrence of the death of the survivor of MacLennan and his wife. It strongly indicates, therefore, that an offer to sell is to be made at that time. If the respondents' construction of the operative words of cl. 1 be adopted, it is practically necessary to make the word " then " mean " when, if ever, the executors desire to sell ", and this is an extremely unnatural reading.

Again, when we come to cl. 2, there are two points which support the appellant. In the first place, that clause refers to a " purchase pursuant to the said right of first refusal ". This is a natural and sensible expression if the words " right of first refusal " connote an immediate offer. If such an offer is accepted, a purchase does then truly take place in " pursuance " or " exercise " of a " right " given by the agreement. If the words " right of first refusal " have the other significance, it is awkward and inaccurate to say that any purchase which may ultimately take place is in " pursuance " of the merely negative right " given " by the agreement. In the second place, cl. 2 is concerned with the ultimate fate of the sum of £100 which has been paid as consideration for the agreement. If a purchase is made " pursuant to the right " given by the agreement, this sum is to be credited on account of the purchase money. If no purchase is made " in accordance with the terms of the agreement," it is to " become the absolute property of the Owner." On the appellant's construction of cl. 1, the fate of the sum of £100 will be decided on the occurrence of the second of the two prescribed events—or within a reasonable time (which would, we should think, be a very short time) thereafter. On the respondents' construction, it may not be decided until after the passage of a long period of years, if ever. Clause 2 envisages only two alternatives, and it seems very unlikely that the parties would intend that the solution might remain in abeyance for an indefinite period.

For the above reasons, we are of opinion that the appellant's view of the effect of the agreement is the correct view. We would agree with the learned Chief Justice in thinking that prima facie a " right of first refusal " means a right of pre-emption. But we would not regard the expression as bearing any very strong or clear prima facie meaning. It is easy to miss the true intent by laying too much emphasis on the word " first ". Where there is real ground for thinking that what is intended is to give an immediately effective right or opportunity, the word " first " is not really strong enough to carry the burden put upon it by the respondents'

argument. No clear inconsistency is involved in the appellant's view, for the offer which, according to that view, is made is in a real sense a first offer. When we find, as we do here, quite strong indications that something real and immediately effective is intended to be given as at a fixed point of time, it would, to our minds, be contrary to sound canons of construction to allow those indications to be defeated by attributing a rigid meaning to a word which is not really free from ambiguity.

It may be that, strictly speaking, cl. 1 of the agreement requires the making of a formal offer by the respondents to the appellant. But we think that in equity cl. 1 itself, on the death of the survivor of MacLennan and his wife, operates as an offer capable of being accepted in the manner in which it was accepted, so as to create an open contract for the sale of the land for £13,000. The appeal should be allowed with costs, and the order of *Morris* C.J. discharged. In lieu thereof it should be ordered that question 1 be answered "Yes", that question 2 be not answered, and that the plaintiff's costs of the originating summons be paid by the defendants.

Appeal allowed with costs; order of the Supreme Court of Tasmania discharged except insofar as it certifies for the attendance of counsel. In lieu thereof question (1) *answered "Yes" and question* (2) *not answered: plaintiff's costs of the originating summons to be paid by the defendants.*

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M. G. E.