[HIGH COURT OF AUSTRALIA.]

MacDONALD . . . . . APPELLANT;
DEFENDANT,

AND

ROBINS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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1953, PERTH, *Oct.* 19.

1954, MELBOURNE, *March* 4.

Dixon C.J., Webb and Taylor JJ.

Landlord and tenant—Unregistered lease of Crown lands to partners—"lessees and each of them"—Option to purchase—Condition precedent—Due observance and performance of covenants—Covenant against assignment—Equitable assignment of interest in term to co-tenant—Whether in breach of covenant—Dissolution of partnership—Exercise of option by continuing partner—Effectiveness—Specific performance.

An assignment by one co-tenant of his share in the demised premises operating in equity only, and not at law, to vest his share in his co-tenant does not constitute a breach of a covenant in a lease forbidding the lessees "to transfer assign sublet or part with possession of the said land" and accordingly an option to purchase the demised premises, the exercise of which is conditional upon the due performance by the lessees of such a covenant (*inter alia*), is not in such circumstances avoided.

A lease for a term of years granted by the appellant to the respondent and his brother, then carrying on business in partnership, contained a proviso: "Provided always . . . that the lessees . . . shall have the option at any time during the said term upon giving one calendar month's notice in writing thereof to the lessor of purchasing the said lands . . . hereby demised". The term "the lessees" was defined by the lease to include the lessees and each of them and their respective executors, administrators and permitted assigns unless repugnant to the sense or the context. The respondent, having by means of an assignment effective in equity acquired his brother's interest in the lease and option upon the dissolution of their partnership, gave to the appellant during the term of the lease one calendar month's notice of his exercise of the option. The notice identified the option as contained in the lease, the parties, premises and chattels being fully described, and notified the appellant that the brother had sold and transferred his interest in the option to the respondent and that the respondent was by such notice exercising the option. The notice was dated and signed by the respondent.

Held, by *Dixon* C.J., and *Webb* J. (*Taylor* J. dissenting) that the respondent had effectively exercised the option. *Per Dixon* C.J.: Upon the assumption that the definition of the word "the lessees" did not operate to enable the respondent independently altogether of his brother as co-tenant, to exercise the option, nevertheless the respondent as the equitable assignee of his brother

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under the deed of dissolution occupied a position enabling him to exercise the option so as to bind his brother as well as himself, and the notice given by the respondent, indicating as it did that he relied upon the transaction with his brother as basing his right to exercise the option, showed that he was acting under his brother's implied authority coupled with his own right. *Per Webb* J.: An option to " the lessees and each of them " is a single option to be exercised by both or either of them. *Per Taylor* J.: The option clause contained a continuing offer to sell, addressed to the respondent and his brother jointly, but there was no effective exercise of the option by " the lessees " for, whilst the respondent could have required his brother to join with him in exercising the option and would if necessary, have been entitled to act in his brother's name as well as his own in doing so, he had at all times purported to be acting for himself alone as the purchaser of his brother's share, and it is not open to the Court to give to the notice the effect which it would have had if the respondent had purported to act not only on his own behalf, but also on behalf of his brother.

Decision of the Supreme Court of Western Australia (*Virtue* J.) affirmed.

APPEAL from the Supreme Court of Western Australia.

The appellant Ada Blanche MacDonald, by agreement in writing dated 14th March 1946, leased to the respondent and his brother in the lease described as " carrying on business together as pastoralists under the firm name and style of ' Robins Bros.' (hereinafter called ' the lessees ' which expression shall include the lessees and each of them and their respective executors administrators and permitted assigns unless repugnant to the sense and context)" the station property consisting of three pastoral leases containing in the aggregate 302,987 acres, together with certain plant and livestock for a term of six years from 1st March 1946 expiring on 29th February 1952. The lease contained a covenant by the lessees :— " Not to transfer assign sub-let or part with the possession of the said land without the consent in writing of the lessor first had and obtained . . . " The lease further provided :—" That the lessees having duly observed performed . . . all the covenants . . . herein contained or implied and on their part to be observed performed . . . and the lessor's right of re-entry not having otherwise arisen shall have the option at any time during the said term upon giving one calendar month's notice in writing thereof to the lessor of purchasing the said lands livestock plant machinery furniture chattels and effects hereby demised at and for the sum of eight thousand pounds." The consent of the Minister for Lands to the lease as required by s. 143 of the *Land Act* 1933 (W.A.) was not obtained. Nor was the lease registered under s. 151 of such Act.

During the term of the lease by deed dated 28th March 1951, the partnership between the lessees was dissolved as from 31st December 1951 and the deed provided that the brother should sell and the respondent purchase " all that the one-half part or share

of the vendor in the said business and in the assets thereof (including the benefit of the said lease and the option of purchase therein contained)."

By notice dated 15th January 1952 the respondent purported to exercise the option. Such notice, after referring to the lease in detail and naming the parties and premises leased, informed the lessor that the interest of the brother in the option to purchase had been sold and transferred to the respondent and that he was by such notice exercising the option. The notice was dated and signed by the respondent.

The lease having expired on 29th February 1952 the appellant contended that the option had not been validly exercised, whereupon the respondent issued a writ claiming, *inter alia*, a declaration that the option had been duly exercised by the notice dated 15th January 1952 and an order that the appellant specifically perform the contract formed by the exercise of the option.

The action was heard before *Virtue* J. who found for the respondent, made the declaration asked for and ordered that such contract be specifically performed.

From this decision the appellant appealed to the High Court.

J. P. Durack Q.C. (with him *B. G. Marshall*), for the appellant.

T. S. Louch Q.C. (with him *O. J. Negus* Q.C. and *T. A. S. Davy*), for the respondent.

Cur. adv. vult.

March 4, 1954.

The following written judgments were delivered :—

DIXON C.J. This is an appeal from a judgment of *Virtue* J. decreeing that a contract formed by the exercise of an option be specifically performed. The option is contained in an unregistered lease in which the plaintiff respondent and his brother are lessees and the defendant appellant is the lessor. The subject of the lease and the option is a station called " Lochada " at Perenjori in the Bowgada District of Western Australia, an area of about 302,987 acres held by the defendant under three pastoral leases.

The defendant appellant relies upon two grounds for her contention that she is not bound to sell and transfer the property as a result of the purported exercise by the plaintiff respondent of the option. The first is that the option is subject to the due observance of the covenants of the lease and that this condition precedent to its exercise was not satisfied because the plaintiff's brother transferred his interest as co-tenant to the plaintiff, a thing which, according to the defendant's contention, was a breach of covenant. The second ground is that the purported exercise of the option was

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not in accordance with the requirements of the provision conferring the option because the notice was not given by both brothers as lessees. The defendant is a widow who, with the help of a son, was attempting in 1945 amid the difficulties of the time to carry on Lochada station; she resolved to dispose of it as a going concern. The plaintiff and his brother were desirous of buying it but they were unable at the time to find sufficient money. In these circumstances it was arranged that they should lease the property from the defendant for six years with an option of purchase exercisable during the lease. It was anticipated by both parties that the option would be exercised. The price was fixed at £8,000. The parties executed a lease dated 14th March 1946. The term was six years from 1st March 1946 expiring on 29th February 1952, and it contained an option of purchase exercisable at any time during the term on one month's notice in writing. The instrument was not registered under s. 151 of the *Land Act* 1933-1948 (W.A.) nor was it submitted to the Department of Lands and Surveys for approval under s. 143. The two lessees, however, went into possession, worked the property, paid the rent reserved to the defendant as lessor and discharged her obligations for rent under the pastoral leases to the department, which, in at least one receipt for rent, described them as "unregistered holders for" the defendant.

The plaintiff and his brother worked the station under a partnership agreement into which they had entered on taking the lease, but by a deed dated 28th March 1951 the partnership was dissolved as from 31st December 1951. The plaintiff bought out his brother's interest in the partnership for £7,000. The defendant had done the financial and other business of the station with the Perth branch of Dalgety & Co. Ltd. and through that house had disposed of the wool and bought and sold livestock. The lease required the plaintiff and his brother to dispose of wool and livestock through Dalgety & Co. and to obtain their approval of stud rams, but the company remained the defendant's business advisers and agents. In the beginning she told the plaintiff that they always did her business and that he was to discuss the transaction with them, and afterwards she said that he could refer everything to them and they would protect her interest. This course the plaintiff adopted, though at times he did mention some matters to her personally. The brothers made improvements on the land relying upon their right to purchase the property and this she as well as Dalgety & Co. knew. The dissolution of partnership was discussed with that company, who were fully informed of the terms and were told that the plaintiff intended to exercise the option. Dalgety & Co., however, were unwilling to provide the money for the purchase by

the plaintiff of his brother's share and he went to another pastoral company for the purpose. After the deed of dissolution, with the knowledge of Dalgety & Co., he went on spending money on the property on the footing that he would exercise the option and he was permitted to do so. No suggestion was made that the lease or the option had been forfeited by the transaction with his brother. The plaintiff notified the defendant by a letter dated 15th January 1952 of the exercise of the option. The letter began by referring to the option as contained in the lease which it went on to describe, naming the parties and identifying the pastoral leases and the chattels comprised therein. The letter then proceeded to state that the interest of the plaintiff's brother in such option of purchase had been sold and transferred by him to the plaintiff. The letter concluded that in terms of the clause, specifying it, by which the lease conferred the option, the plaintiff gave the defendant formal notice of the exercise of such option of purchase. Then followed the date and the plaintiff's signature. The lease expired on 29th February 1952 and on that day the defendant's solicitors requested to see the document by which the plaintiff's brother had in the words of his letter " sold and transferred " the option to the plaintiff. On 13th March 1952, the defendant's solicitors expressed her refusal to recognize the plaintiff as a purchaser and to execute the transfer to him, which in the meantime had been tendered.

In support of the position which the defendant so adopted, reliance is first placed upon the condition precedent to which the option is subject. The condition precedent is expressed in the covenant in the lease by the defendant, which confers the option, by the words " the lessees having duly observed performed fulfilled and kept all the covenants conditions agreements and stipulations herein contained or implied on their part to be observed performed fulfilled and kept ". No doubt these words make it essential to the right to exercise the option that the lessees' covenants in the lease " have been so observed and performed that there is no existing right of action under them at the time when the " option comes to be exercised, cf. per *Mellish* L.J., *Finch* v. *Underwood* (1); *Bastin* v. *Bidwell* (2); *Wilson* v. *Stewart* (3). Moreover it is immaterial that the forfeiture arising from the breach of covenant has been waived as a breach of condition: *Finch* v. *Underwood* (1); *Wilson* v. *Stewart* (4). But the question is whether the covenant upon which the defendant depends in this appeal was broken. It is a covenant by the lessees not to transfer assign sublet or part

(1) (1876) 2 Ch. D. 310, at p. 316.
(2) (1881) 18 Ch. D. 238.
(3) (1889) 15 V.L.R. 781.
(4) (1889) 15 V.L.R. 781, at pp. 791, 801, 803.

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with the possession of the land without the consent in writing of the lessor first had and obtained. Now the consent in writing of the defendant as lessor to the agreement of dissolution was not sought or obtained. What is said to be a breach of the covenant is the making over to the plaintiff of his brother's interest in the lease and the surrender by him to the plaintiff of sole possession of the land. But the deed of dissolution did not assume to vest in the plaintiff his brother's legal interest in the term of years. It contained no words of assignment or transfer. After reciting the partnership and the fact that the parties thereto held a lease of Lochada station containing an option of purchase and that the parties had agreed on the sale to the plaintiff of his brother's share in the partnership, the deed began by expressing an agreement that the partnership should cease on 31st December 1951. The second clause then provided that the brother should sell and the plaintiff should purchase as from that date all the one-half share of the former in the business and in the assets thereof (including the benefit of the lease and the option of purchase therein contained) in consideration of £7,000. That is all there is by way of assignment. If the lease was operative to create a term of years, the clause amounts at most to an equitable assignment of the brother's interest in the term. An assignment by one co-tenant of his share in the demised premises operating at law, as distinguished from equity, to vest his share in his co-tenant would constitute a breach of such a covenant as the present against transfer or assignment of the land. At all events it has been so held : *Varley* v. *Coppard* (1) ; *Horsey Estates Ltd.* v. *Steiger* (2) ; *Langton* v. *Henson* (3). In the last case, as in *Varley* v. *Coppard* (1) the co-tenants themselves took by assignment and a reason given for the result was that the one co-tenant by assigning to the other destroyed the privity of estate between himself and his landlord. It may be remarked that in the case of lessees, parties to the lease, the liability on the covenants is not affected by the assignment. But probably this is an insufficient ground for distinguishing the decisions. An equitable assignment, however, is an entirely different matter. The privity of estate and the liability on the covenants of the lease all remain. Even when the entirety as distinguished from an undivided share in the term is equitably assigned there is no breach of such a covenant against assignment : *Gentle* v. *Faulkiner* (4) ; *Martin* v. *Coultas* (5). It is also settled that for one co-tenant to retire from the possession of the demised premises and leave his co-tenant in sole possession

(1) (1872) L.R. 7 C.P. 505.
(2) (1898) 2 Q.B. 259, at pp. 263-264.
(3) (1905) 92 L.T. 805.
(4) (1900) 2 Q.B. 267, at pp. 274, 277.
(5) (1911) S.A.L.R. 1.

does not amount to a breach of the covenant not to part with the possession of the land: *Corporation of Bristol* v. *Westcott* (1). On the footing that the lease operated to vest a term of years in the plaintiff and his brother, it will be seen, therefore, that nothing in the dissolution of partnership would amount to a breach of covenant. But s. 143 of the *Land Act* provides that no transfer mortgage or sublease of any lease or licence under the Act shall be valid or operative until the approval in writing of the minister or an officer of the department authorized in that behalf by the Governor is obtained. Section 151 says that no transfer lease mortgage charge or other instrument shall be effectual to pass any estate or interest in any land under the operation of this Act . . . until such instrument is registered in the Office of Land Titles or in the Department of Lands and Surveys as the case may be. On the failure to comply with either of these provisions an argument for the defendant appellant is constructed that a different meaning should be placed upon the covenant against assignment. It is said that it should be construed as relating to assignments giving no more than an equitable right, if that. The answer is that the instrument was drawn as a registrable document and cannot change its meaning because neither of the parties troubled themselves to submit it for approval and register it. No further point was made for the defendant appellant upon s. 143 or s. 151, possibly because of an apprehension lest the argument might react against her if the option were treated as outside the operation of the sections and notwithstanding *Butts* v. *O'Dwyer* (2) as severable, or possibly for other and more commendable reasons.

On the ground that there was no breach of covenant the defendant appellant's argument must fail that the option ceased to be exercisable because the condition precedent expressed in the option clause was not fulfilled. The plaintiff respondent maintained that, even had it been otherwise, it would have been inequitable to permit the defendant appellant to rely on the dissolution of partnership and his acquisition of his brother's share as a breach spelling the destruction of the option. The reason given is that the plaintiff had proceeded with the dissolution, neglecting the need of the defendant's written consent, with the full knowledge of the defendant's agent and they and the defendant stood by while he spent money on the land supposing himself, as they knew, to be entitled to purchase the property. It is unnecessary to examine this contention, but as the facts stated earlier show, it could not lightly be dismissed.

(1) (1879) 12 Ch. D. 461.

(2) (1952) 87 C.L.R. 267, at pp. 281-282.

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The second ground upon which the defendant appellant relies in support of her appeal simply means that the option was not exercised according to its terms. It requires, however, a close consideration of the clause conferring the option, of the rights derived by the plaintiff from his brother, and of the nature and effect of the notice he gave in purported exercise of the option.

Omitting the words creating the condition precedent that covenants must be observed, the terms in which the option is granted are these: "Provided always and it is hereby expressly agreed (inter alia) that the lessees . . . shall have the option at any time during the said term upon giving one calendar month's notice in writing thereof to the lessor of purchasing the said lands livestock plant machinery furniture chattles and effects hereby demised at and for the sum of £8,000. Such sum shall be payable to the lessor in cash against acceptance for registration of a transfer of the said land free of incumbrances within one calendar month of the exercise of the said option." In an earlier part of the instrument the expression "the lessees" is defined to include the lessees and each of them and their respective executors administrators and permitted assigns unless repugnant to the sense or the context. Now in such a provision the word "assigns" and still more the words "permitted assigns" are to be understood as referring to the persons who are entitled to the term as between the lessor and them, the assigns of the leasehold interest, and not as extending to persons entitled only in equity under an equitable assignment of the term: *In re Adams and the Kensington Vestry* (1); *Friary Hobroyd & Healey's Breweries Ltd.* v. *Singleton* (2); *Manchester Brewery Co.* v. *Coombs* (3).

Accordingly the defendant contends that the right to exercise the option alone had not devolved upon the plaintiff and that his attempt to exercise it was nugatory. For the plaintiff, in answer to this objection, it was contended that by force of the definition of "the lessees" the lessor's covenant creating the option of purchase conferred on either of the lessees, parties to the lease, the right to exercise the option. This contention was accepted by *Virtue* J. The application of the definition to the option provision is, however, attended with difficulties. It is true that it is by the definition that the defendant introduces into the option the words "permitted assigns" upon which she relies as excluding the plaintiff in his character of an equitable assignee of his brother's interest in the term. A lessee's option to purchase, however, devolves with

(1) (1884) 27 Ch. D. 394, at p. 404.
(2) (1899) 1 Ch. 86; (1899) 2 Ch. 261, at p. 263.
(3) (1901) 2 Ch. 608, at p. 618.

the term where executors administrators and assigns are not mentioned and the person in whom the term is vested as legal personal representative or assignee of the leasehold interest may exercise the option; *Morrissey* v. *Clements* (1); *Shearer* v. *Wilding* (2). In such a case there is nothing to suggest that a person taking under a mere equitable assignment may in his own right and as a privy of the lessor exercise the option as distinguished from doing so in right of his assignor. But whether it is necessary or not for the plaintiff to use the definition and treat it as applicable to the option provision, there is obviously much to be said for the view that in so far as the definition of the words "the lessees" extends them to the executors administrators and permitted assigns the context and subject matter requires its application, which must have been intended.

Nevertheless the words in the definition "and each of them" create difficulties. Clearly only one option is given and yet to insert the words "and each of them" into the covenant for the option after the word "lessees" and then read them literally would mean grammatically that each of the lessees should have the option of purchasing the land. It could not have been intended that they could severally exercise separate rights to buy the same land or that one could buy it to the exclusion of the other. To read the words as applicable only to the extent of giving to each a separate right to exercise an option of purchase under which both would become purchasers is to take a course which, instead of rejecting so much of the definition as is embodied in the words "and each of them" as being inapplicable by reason of the context and subject matter, applies the words with a modified meaning. To do this seems unsatisfactory in point of logic.

But upon the assumption that the definition of the words "the lessees" did not operate to enable the plaintiff, independently altogether of his brother as co-tenant, to exercise the option, there remains the question whether as his brother's equitable assignee under the deed of dissolution he did not occupy a position enabling him to exercise the option so as to bind his brother as well as himself and whether the notice he gave was not sufficient for the purpose. For the purpose of this question it is assumed that the proper construction of the covenant granting the option is that, unless and until there is a devolution by death or permitted assignment, an exercise of the option makes both lessees purchasers and the election must be made by, or under the authority, of both.

(1) (1884) 11 V.L.R. 13, at p. 22.

(2) (1915) 15 S.R. (N.S.W.) 283, at p. 286; 32 W.N. 83, at p. 84.

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Making them purchasers means that both become liable for the purchase money, not that the transfer must be to them both, whether as joint tenants or tenants in common. An exercise of the option results in a contract of sale and " an ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct ", per *Jessel* M.R., *Earl of Egmont* v. *Smith* (1).

Clearly enough the terms of the deed of dissolution meant that as between the plaintiff and his brother, the plaintiff was entitled to have a transfer of the pastoral leases from the defendant in his name as transferee on the exercise of the option. Moreover it meant that as between him and his brother he was entitled to exercise the option. His brother being still in law co-owner with the plaintiff of the option, the provisions of the deed of dissolution show that, as between himself and his brother, the plaintiff is entitled to all his brother's rights and, if necessary for the enforcing of such rights, to use his brother's name : cf. per *Weigall* J., *McMahon* v. *Swan* (2). It must be remembered that at common law the assignee of a chose in action might bring an action in the assignor's name to enforce the obligation, relying upon the assignment to him as sufficient authority for the purpose : 2 *Stephens Commentaries*, 6th ed. (1868), 45-46 ; *Pickford* v. *Ewington*, (3) ; *Auster* v. *Holland* (4) affords an example of a wife who sought to recover arrears of maintenance from her husband under a deed of separation, suing him at common law in the name of the trustee of the deed though he refused his consent. The court or a judge at chambers might require the real plaintiff to indemnify the nominal plaintiff against costs but the authority to sue in the former's name arose from the transaction itself.

In accordance with these general principles the plaintiff was entitled to exercise the option in whatever way was necessary to comply with the requirements of the option provision, using his brother's name if need be and if he chose calling for a transfer to himself. That his brother might be required to join in the transfer as a directing party is beside the point. In view of the defendant's repudiation it is immaterial what form of transfer was actually tendered, and indeed it does not appear. Nor does it matter that the plaintiff was bound to indemnify his brother if the latter were called on to pay any part of the purchase money. He was bound to do so as a result of the transaction embodied in the deed. What is in point is the power of the plaintiff to exercise the option under his brother's implied authority combined with his own right.

(1) (1877) 6 Ch. D. 469, at p. 474.
(2) (1924) V.L.R. 397, at p. 405.
(3) (1835) 4 Dowl. P.C. 453.
(4) (1846) 3 Dow. & L. 740.

The ultimate question in the case is whether the notice to the defendant of 15th January 1952 is sufficient to amount to a use of this power. The answer depends, not upon the plaintiff's appreciation of the niceties of the legal situation in which he stood, but upon the character of the document and the information it conveyed. The first thing to be observed is that the notice explicitly states that the lease containing the option was between the defendant as lessor and the plaintiff and his brother (*scil.* as lessees). Then it is stated that the interest of his brother in such option of purchase has been sold and transferred to the plaintiff. The defendant is thus informed that the claim of the plaintiff to exercise the option was based on the transaction with his brother by which the option was " sold and transferred " to him. The defendant had not given her consent to any formal transfer of the brother's interest in the term, as she knew, and her agents doing her business were aware of the character of the transaction. They knew that the brother remained a co-tenant bound by the lease which included the option. It is not likely that they understood the legal consequences but they and the defendant must have understood from the notice that whatever these consequences were it was in virtue of the rights which ensued to the plaintiff that he proceeded to the exercise of the option. In doing so he expresses the fact that he gives the notice " in terms of paragraph (d) of clause 3 of the said lease ". That is the provision conferring the option on " the lessees ". He was therefore claiming to make absolute by the exercise of a choice belonging to him the contingent contract of purchase contained in the clause, contingent upon an election to be made by, or under the authority of, the two lessees. The contract of purchase contained in the clause was between the defendant as vendor and himself and his brother as purchasers. He showed the defendant by his notice that he claimed that the choice belonged to him because of the transaction with his brother. He made the election accordingly but it was an election in terms of the clause, and that is that the option should operate as a contract according to its terms.

From this it seems to follow with sufficient clearness that he was acting under the authority which the transaction with his brother gave him combined with his own right. Whatever legal and equitable title he derived from the facts stated in the notice enabling him to elect under the option, that title he manifested his reliance upon for the exercise of the option. As in fact and in law the plaintiff did occupy a situation which in the manner stated enabled him to exercise the option, surely that is enough.

For these reasons the points made for the defendant appellant fail and the appeal should be dismissed.

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WEBB J. I would dismiss this appeal for the reason given by *Virtue* J., i.e. because of the definition of the term " the lessees " in the lease in which the option to purchase appears. If the definition of this term, which includes " the lessees and each of them ", were expressly applied by the lease to the option clause I would not feel obliged to hold that the option would thereby be rendered unworkable. But unless that result would follow I am unable to see how it can properly be held that the definition is inapplicable to the option clause as being " repugnant to the sense or context " of the clause. An option to " the lessees and each of them " is a single option to be exercised by both or either. There can be only one purchase and sale and the definition does not require more than one. As to what the position would be if one of the lessees exercised the option while the other was also prepared to exercise it, I express no opinion in the absence of fuller argument. The possible result of the determination of the position seems to me to have no bearing on the meaning to be given to the option clause. If it means that the first lessee to exercise the option does so for both, there is nothing repugnant in that to the sense or context of the clause. If it means that he does so for himself alone, this may well be unusual, but that does not make the definition repugnant to, i.e. inconsistent with, the sense or context of the clause. The test supplied by the parties themselves is repugnancy to the sense or the context and nothing less. The definition would be repugnant to the option clause if it created more than one option; but in my opinion it has not that effect.

On other questions argued I agree with the reasons for judgment of the Chief Justice.

TAYLOR J. The lease under consideration in this case purported to create a sub-lease of the lands comprised in three pastoral leases, of which the appellant was the holder, granted under the provisions of the *Land Act* 1933 (W.A.), as amended. The creation of the sub-lease was, apparently, permissible with the consent of the Minister of Lands but not otherwise, and it is common ground that the minister's consent was not obtained nor was the sub-lease registered either under the *Transfer of the Land Act*, as appears to have been necessary to give full legal effect to it, or with the registrar under the provisions of the *Land Act* itself. In these circumstances serious questions might have arisen whether the demise of the specified term to the respondent and his brother ever took effect and accordingly, whether the option, purporting, as it did, to be exercisable " at any time during the said term ", ever really became exercisable. But no point was made of these matters upon the

appeal and the parties were content to deal with the case on the footing that the instrument created a valid and effective option.

On this basis I agree with the Chief Justice that at the time of its purported exercise the option was still valid and subsisting, and I also agree with the reasons which led the Chief Justice to that conclusion.

The case of the respondent before the Supreme Court of Western Australia was that the option was capable of being exercised by the respondent alone in view of the terms of the definition of the expression " lessees " contained in the lease. *Virtue* J. considered that the option provision, read in conjunction with the definition of " lessees ", gave to either of the lessees the right to exercise the option. In my view such an interpretation is not warranted. The expression " the lessees " where it first appears in the lease is defined to include " the lessees and each of them and their respective executors, administrators and permitted assigns unless repugnant to the sense or context ". But to apply this definition to the option provision and read that provision as conferring upon the lessees " and each of them " a right to exercise the option would be, substantially, to alter the very obvious character of the option thereby conferred. It is, in my opinion, clear that only one option is created by the relevant provision, and it would be repugnant to that clause to hold that it creates both an option jointly exercisable by both lessees and also options exercisable by each lessee severally. To give such effect to the clause would, I think, be to transform its real character. I agree also with the reasons of the Chief Justice on this point.

I find myself, however, unfortunately in disagreement with the Chief Justice on the question whether the form of notice which was given in purported exercise of the option should be regarded as a proper and effective exercise of the option. I fully agree, of course, that the respondent was in a position to require his brother to join with him in exercising the option and, indeed, that, if necessary, the respondent was entitled to act in his brother's name as well as in his own in exercising it. But the matter cannot, in my opinion, be concluded by a favourable view of the respondent's right to act in his brother's place. A conclusion that there was an effective exercise of the option requires the antecedent finding that, having the right to act in his brother's name or place he did, in fact, do so. On the view which I have formed of the option clause, it contained a continuing offer to sell, addressed to the respondent and his brother jointly and the offer therein contained could, so long as they remained the " lessees " be accepted by their own act of acceptance

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or by the acceptance on their behalf of some person or persons having the appropriate authority. In either case the acceptance would be, in law, the act of the lessees. In my view, however, there was no acceptance or exercise of the option by the lessees. The facts indicate rather that the respondent did not intend to act in any way for his brother in exercising it. It is true that the notice expressly indentified the option which the respondent wished to exercise and also that the respondent indicated that he wished to exercise it. But it is also true that the notice alleged that the interest of the respondent's brother in the option had been sold and transferred to him. In these circumstances I do not think it is open to us to give to the notice the effect which it would have had if the respondent had purported or intended to act not only on his own behalf but also on behalf of his brother. No such case was made on the pleadings or at the trial and, indeed, the form of the notice seems to me to be inconsistent with any such intention on his part. He purported, as a person to whom his brother's interest in the option had been *sold and transferred*, to exercise the option on his own behalf. The fact was, of course, that his brother's interest had not been *transferred* to him and his brother was still, at law, jointly bound by the lessees' covenants and entitled to the benefit of the lessor's covenants. This circumstance was fatal to the respondent's primary contention but, notwithstanding, it was, as previously indicated, argued that since, under the terms of the lease, the option was exercisable by the lessees " and each of them " there had been a valid exercise thereof. At no time, however, was it claimed or suggested that the respondent purported or intended, in attempting to exercise the option, to act on behalf of his brother and himself. Indeed the notice itself rather indicates that he intended to act on his own behalf and no attempt was made to establish that he intended to act for himself and his brother jointly. In these circumstances it is, I think, impossible to hold that the notice should be regarded as one given on behalf of them both, or as one having the effect of investing them jointly with legal rights and imposing upon them joint legal obligations.

In the circumstances I am of the opinion that the appeal should be allowed, the order of *Virtue* J. discharged and the suit dismissed.

Appeal dismissed with costs.

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Solicitors for the respondent, *Parker & Parker.*

F. T. P. B.