[HIGH COURT OF AUSTRALIA.]

BALLAS . . . . . APPELLANT;
PLAINTIFF,

AND

THEOPHILOS . . . . . RESPONDENT.
DEFENDANT,

[No. 2].

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 22, 23;

SYDNEY, *Dec.* 19.

Dixon C.J., McTiernan, and Williams JJ.

Contract—Option—Partnership—Option to surviving partner to purchase share of deceased partner—No provision as to time during which option exercisable—Implication of reasonable time—Whether option exercisable prior to issue of probate to executrix of deceased partner—Nature of option—Whether irrevocable offer or conditional contract.

A partnership deed contained a clause giving to the surviving partner an option to purchase the share of the deceased partner in the capital and assets of the business upon certain terms. The deed did not provide any specific time during which the option was to be exercised. The surviving partner purported to exercise the option sixteen months after the death of the deceased partner.

Held, that it was necessary that the option be exercised within a reasonable time and this had not been done.

Per Williams J.: An option to purchase the share of a deceased partner may be exercised although probate has not issued to his executors.

Kelsey v. *Kelsey* (1922) 127 L.T. 86, applied.

The nature of an option discussed, and the authorities on whether an option is personal to the offeree or offeror or may be exercised by or enforced against executors referred to, by *Williams* J.

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

APPEAL from the Supreme Court of Victoria.

On 21st October 1955 Harry Ballas commenced an action in the Supreme Court of Victoria against Efstratia Theophilos, as executrix of the will of Michael Theophilos, deceased. The plaintiff claimed, *inter alia*, a declaration that he had duly exercised an

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option to purchase the share of the deceased in the capital and assets of a business carried on at 175 Collins Street, Melbourne, under the name of " The Milky Way ", under an agreement with the deceased dated 2nd April 1948.

The action was heard before *Smith* J., who, in a written judgment delivered on 14th December 1956, ordered that the plaintiff's action be dismissed and declared that the partnership between the plaintiff and the deceased was dissolved by the death of the deceased on 18th March 1954 and made certain consequential orders with respect to the winding up of the partnership.

From this decision the plaintiff appealed to the High Court. The facts and the arguments of counsel are sufficiently set out in the judgments hereunder.

Gregory Gowans Q.C. and *H. Ball*, for the appellant.

M. Ashkanasy Q.C. and *M. V. McInerney* Q.C., for the respondent.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

DIXON C.J. This appeal appears to me to turn upon a very limited question. It is an appeal from a judgment given by *Smith* J. in an action the hearing of which occupied many days and the decision in which covered a number of matters. The action was brought by a surviving partner against the executrix of the will of his deceased partner. The partnership deed contained a clause conferring upon the surviving partner an option of acquiring the share of the deceased partner. The plaintiff, who is the appellant in this appeal, maintained that he had exercised his option. By the judgment or decree under appeal *Smith* J. dismissed the plaintiff's claim. On the counter-claim of the defendant, the respondent in the appeal, who is the executrix of the will of the deceased partner, a declaration was made that the partnership between the plaintiff and the deceased subsisted until dissolved by the death of the deceased, and an order for winding up and consequential relief was made. The business the subject of the partnership was, at all events ostensibly, a milk bar called " The Milky Way ". The business was carried on in Collins Street, Melbourne. The partnership deed is dated 2nd April 1948 and was made between the plaintiff and the deceased. The clause in the partnership deed conferring the option provided that if either partner should die during the continuance of the partnership and in certain other events then the

surviving or continuing partner should have the option of purchasing the share of the deceased partner in the capital and assets of the business upon the terms which were set out. The first term related to the purchase price. The clause provided that the amount at which the share should stand in the last balance sheet prior to the death of the deceased, together with a share of the undrawn profits from the date of the balance sheet and together with goodwill, if any, should constitute the purchase price. It was provided too that in case of dispute as to the value of the goodwill, if any, it should be valued by the manager of the bank at the time or, should he be unable or unwilling to act, then by a person nominated by him to effect the valuation. The clause went on to provide that the amount representing such share of profits should be paid immediately on the completion of the balance sheet at the date of dissolution. There followed a provision as to the payment of the balance of the purchase price. The balance of the purchase price was to be payable on the completion of the balance sheet or by twelve equal quarterly instalments over three years with interest on the balance from time to time owing payable quarterly at the then current trading bank overdraft rate. The deed contained a provision that if the surviving partner should not exercise the option of purchasing the share and interest of the deceased partner the partnership should be wound up.

The question in the case upon which, in my opinion, the appeal turns is simply whether the option was duly exercised by the plaintiff as the surviving partner. From the death of his partner the plaintiff appears to have made it clear enough that he was desirous of exercising the option but with equal clearness as it appears to me, he manifested at first an intention of doing so upon his own terms. By that I mean that he put forward a claim as to the amount of the purchase price which he was required to pay which in fact was open to dispute and appeared to assert a purpose of acquiring the deceased's share only on those terms.

The deceased partner died on 18th March 1954. Writing to the solicitors for the executrix on 7th June 1954, the solicitor for the plaintiff informed them that his client desired to exercise the option conferred upon him by the partnership deed. The letter went on to put forward the plaintiff's claim in relation to the purchase price. If this letter had stood, on one conceivable construction it might have amounted to an exercise of the option notwithstanding the claim it asserted. It might have done so, that is to say, if it had been construed as an expression of an intention there and then to exercise the option of purchase coupled with an independent and

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therefore severable assertion as to what amounted to the purchase price. The solicitors for the executrix, the defendant, did not accept it in this sense. They replied under date 24th June 1954, that the letter was not a proper exercise of the option, that the price was not properly computed; they put forward arguments as to the errors of the plaintiff's claim which it is unnecessary to traverse. To this the solicitor for the plaintiff replied in a letter dated 6th July 1954 which began by expressing agreement that the previous letter of 7th June was not an exercise of the option. "It was", said the letter, "merely a notification to you as solicitors for the executrix named in the deceased's will that my client intends to purchase the share of the deceased in the capital and assets of the business on the terms set out in the paragraph referred to. The agreement does not appear to provide for the giving of any notice. The share will be purchased as soon as the executrix is in a position to give title and a receipt for the purchase money." When you turn from a consideration of the contents of the two letters that had passed between the solicitors to the statement made in the letter just quoted, it seems obvious that as between the parties no exercise of the option could be regarded as having taken place up to this time. There is no need to doubt that from that time the solicitors for the executrix appreciated the fact that the plaintiff proposed to exercise the option. But it is equally free from doubt that both parties took the stand at that time that the option had not yet been exercised. It was indeed a long time before there was any communication from the plaintiff's side which could be regarded as an exercise *de praesenti* of the option. It may well be suspected that on the side of the defendant executrix there was a strong hope that the option would not be regularly exercised and possibly a planned avoidance of communication on the subject with the solicitor for the plaintiff. Clearly enough, however, it was the business of the plaintiff to exercise the option. The clause contains no express provision saying how he is to do it and any definitive communication of an election would suffice. But it was necessary that the communication should express clearly and unequivocally the fact that the surviving partner, the plaintiff, then and there elected to acquire the deceased's interest upon the terms of the clause. It is unnecessary to go over the facts but it seems reasonably plain that on the side of the plaintiff it was considered that no exercise of the option need take place until the executrix had obtained probate of the will of the deceased. Perhaps on the side of the executrix nothing was done affirmatively to discourage that view but on the other hand nothing was done by way of acquiescence in or confirmation

of such a position. The parties stood apart, the advisers of the executrix left the plaintiff to take his own course. The plaintiff's solicitor inquired on 22nd November 1954, that is to say over eight months after the deceased's death, whether probate had been obtained, adding " my client is anxious to complete the purchase of the deceased's interest in the partnership business as soon as possible ". This may read somewhat like an exercise of the option but really it is still an expression of an intention *de futuro* and, if the boot were on the other foot, the plaintiff might well succeed in denying that as yet he had definitively bound himself. But in any case eight months is a very long time. Finally, on 28th July 1955, that is to say more than a year and four months after the death of the deceased, a formal exercise of the option to purchase the share of the deceased was communicated to the executrix by the service upon her of a notice. The notice professed to confirm an exercise by the letter of 7th June 1954, but that is immaterial. This, in my opinion, was far too late. The partnership deed limits no time for the exercise of the option. The implication of law is that it must be exercised within a reasonable time. What is a reasonable time is of course affected by the stipulations contained in the option clause itself. That means that due time must be allowed for the calculation of the amounts to be added to the share disclosed by the last balance sheet and the completion of the balance sheet to the date of death, and for the valuation of goodwill if that be required. It means too that a reasonable time must be allowed for the consideration by the surviving partner of the information thus obtained. But thereafter he must act with that promptness which is always required in the case of the exercise of an option to acquire an asset the value of which is affected by the changing conditions which time and the vicissitudes of business bring. It appears to me quite impossible to say that a period of one year and four months is reasonable. If the paragraph in the letter of 22nd November 1954 be relied upon, eight months is really more than a reasonable time. The learned judge took this view. His Honour considered six months from death to constitute an extreme limit. The question what is a reasonable time is of course a question of fact depending upon circumstances and his finding must receive effect unless we are satisfied that it was wrong. So far from being so satisfied, I think that he could not have arrived at any other conclusion. For that reason there was no exercise within due time of the option conferred by the clause in the partnership deed. Beyond that it seems unnecessary to go. Without going into any further question I think that the foregoing requires the dismissal of this appeal.

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McTIERNAN J. I agree that this appeal should be dismissed. It is impossible in my opinion to find that before 28th July 1955 any communication was made to the executrix which constituted a valid exercise of the option. The option could only be exercised within a reasonable time from the death of the appellant's late partner. He died on 18th March 1954. Clearly, the period until 28th July 1955 was too long to be regarded as reasonable in the circumstances.

WILLIAMS J. The question at issue on this appeal is whether the plaintiff-appellant duly exercised an option of purchase in a partnership agreement bearing the date of 2nd April 1948 made between him and one, Michael Theophilos, now deceased. The partnership business is that of a milk bar, confectionary and cafe, carried on at 175 Collins Street, Melbourne. Michael Theophilos died on 18th March 1954. Probate of his will was issued to his widow, the defendant-respondent the executrix named therein on 12th October 1955. The option is contained in cl. 17 of the partnership agreement. So far as material it is in the following terms: " If either partner shall die during the continuance of the partnership . . . then the surviving . . . partner shall have the option of purchasing the share of the deceased partner in the capital and assets of the business upon the following terms:—(a) the purchase price shall be the amount at which such share shall stand in the last balance sheet which shall have been prepared prior to the death of the deceased together with his share of the undrawn profits from the date of such balance sheet and together with goodwill (if any) which shall in case of dispute be valued by the manager of the bank of the firm at that time or should he be unable or unwilling to act then by any person nominated by him to effect such valuation; (b) the amount representing such share of profits shall be paid immediately on the completion of a balance sheet to the date of dissolution; (c) the balance of such purchase price may be paid on the completion of such balance sheet or by twelve equal quarterly instalments over three years with interest on the balance from time to time owing payable quarterly at the then current trading bank overdraft rate And any person or persons entitled to a deceased partner's share shall be entitled to inspect the accounts of the firm ".

The plaintiff claimed that he had duly exercised this option and sued the defendant in the Supreme Court of Victoria for specific performance. The defendant denied that the option had been duly exercised and counter-claimed, *inter alia*, for a winding-up

of the partnership by the court. The action was tried by *Smith* J. who dismissed the plaintiff's action and on the counter-claim ordered the partnership to be wound up by and under the direction of the court. The question whether or not the option was duly exercised requires in the first place an examination of the terms of the option in order to ascertain the requisites for its exercise and in the second place an examination of the evidence to ascertain whether these requisites were complied with. Clause 17 does not require that the option should be exercised in any particular manner, no specific time is mentioned within which it must be exercised, and the price that the surviving partner must pay if he exercises the option is not a sum certain but is to be derived from a formula. In the absence of any specific time, there is an implication that an option of purchase must be exercised within a reasonable time, and what is a reasonable time depends on all the circumstances of the particular case. In *Collingridge* v. *Niesmann* (1) *Harvey* J., as he then was, said :—" It is a general principle of law that an offer not otherwise limited must be accepted within a reasonable time : see *Meynell* v. *Surtee* (2) ; and *Ramsgate Hotel Co.* v. *Montefiore* (3). I see no reason why the same rule should not apply with equal, if not greater, force to an option for value under which one party only is bound. I, therefore, hold that the option must be read as being an option for a reasonable time only " (4). This case was affirmed on appeal : *Niesmann* v. *Collingridge* (5) ; see also *Reid* v. *Moreland Timber Co. Pty. Ltd.* (6). If a specific price had been fixed by the option there could be little doubt that, having regard to its terms and to the nature of the business, this time would have been of short duration. Since no such price was fixed, and the calculation of the price required the preparation of a balance sheet of the business from the date of the last balance sheet prepared in the lifetime of the partners to the death of the partner, and the valuation of the goodwill of the business by the bank manager or his nominee, a reasonable time would have to include a sufficient period for these purposes and some short additional period to allow the surviving partner to decide whether he was prepared to pay the resultant price for the business. Admittedly the balance sheet for the period 1st July 1953 to 2nd April 1954 had been prepared early in June 1954 and after that only a short time could reasonably have been required for the plaintiff to decide whether to exercise the option or not.

(1) (1920) 37 W.N. (N.S.W.) 224.
(2) (1855) 25 L.J. Ch., at p. 260.
(3) (1866) L.R. 1 Ex. 109.
(4) (1920) 37 W.N. (N.S.W.), at p. 226.
(5) (1921) 29 C.L.R. 177.
(6) (1946) 73 C.L.R. 1, at p. 13.

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The first step taken on behalf of the plaintiff towards the exercise of the option was a letter written by his solicitor to the defendant's solicitors. The letter which is dated 7th June 1954 was in the following terms :

" Messrs. Fenton & Dunn, Solicitors,
422 Collins Street, Melbourne, C.1.

Dear Sirs,

Harry Ballas re Estate of Michael
Theophilos Deceased.

I understand that you act for the executor of the above estate.

Up to the date of Mr. Theophilos' death on 18th March 1954, Mr. Ballas for whom I act and the deceased carried on business in partnership at 175 Collins Street, Melbourne, under the firm name of ' The Milky Way '. I am instructed to inform you that my client desires to exercise the option conferred upon him by par. 17 of the partnership agreement dated 2nd April 1948.

The purchase price for the deceased's one-half interest is according to the balance sheet of the partnership as at 18th March 1954, the sum of £4,366 16s. 11d., but against this purchase price must be set off the sum of £3,000 0s. 0d. which has already been paid by the partnership to Mrs. Theophilos during the deceased's lifetime.

From 1st July 1953 to 18th March 1954 the deceased's share of the profits of the business amounted to £1,657 14s. 6d. but, according to the balance sheet as at 18th March 1954, the sum of £1,703 14s. 0d. was drawn by the deceased during that period so that there is no money payable by my client to the estate pursuant to sub-par. (b) of par. 17 of the partnership agreement.

For your information I forward herewith copy of balance sheet as at 30th June 1953, and copy balance sheet as at 18th March 1954. The latter balance sheet has just recently been completed by the partnership's accountant.

Yours truly,

Enc. 2 E. L. Moran."

To this letter the defendant's solicitors replied on 24th June 1954 :

" Mr. E. L. Moran,
281 Collins Street, Melbourne. C.1.

Dear Sir,

Estate of Michael Theophilos Deceased
and Harry Ballas.

We are instructed to reply to your letter of the 7th instant as follows :

1. Your letter is not a proper exercise of the option.

2. The price is not properly computed.

3. The bringing into account of the sum of £3,000 is irrelevant, it being on the evidence before us, a gift by the partners to Mrs. Theophilos.

4. In any event the offer takes no account of the value of the goodwill of the business which is valued at £25,000. We understand that Mr. Ballas has already stated that he will not take less than £25,000 for the business and unless he agrees that this figure is the proper value of the goodwill at some stage hereafter, a valuation of the goodwill must be made by the manager of the Commercial Bank of Australia Limited, 250 Swanston Street, Melbourne, or his nominee. This of course we do not agree to at this stage as it is clear that your exercise of option is not in proper form.

Yours faithfully,

Fenton & Dunn."

To this letter the plaintiff's solicitor replied on 6th July 1954 :

" Messrs. Fenton & Dunn, Solicitors,
422 Collins Street, Melbourne.

Dear Sir,

Ballas re Estate of M. Theophilos deceased :

Receipt is acknowledged of your letter of the 24th ultimo.

It is agreed that my letter to you of the 7th ultimo is not an exercise of the option conferred by par. 17 of the partnership agreement. It was merely a notification to you, as solicitors, for the executrix named in the deceased's will that my client intends to purchase the share of the deceased in the capital and assets of the business on the terms set out in the paragraph referred to. The agreement does not appear to provide for the giving of any notice. The share will be purchased as soon as the executrix is in a position to give title and a receipt for the purchase money.

It will be appreciated if you will let me know as soon as probate of the will issues.

It is denied that the sum of £3,000 0s. 0d. referred to in the balance sheet as at 18th March 1954 was a gift.

Would you be good enough to let me know whether you will bring this letter to the notice of the executrix or whether you would prefer me to communicate with her direct as to the proposed purchase.

Yours truly,

E. L. Moran."

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To this letter the defendant's solicitors replied on 21st July 1954 :

" Mr. E. L. Moran, Solicitor,
281-5 Collins Street, Melbourne C.1.

Dear Sir,

re Theophilos Dec'd. & Ballas :

We have received your letter of the 7th July, and have to inform you that we do not withdraw our former contentions. As regards the last paragraph of your letter, we have to inform you that you must take such action as you think advisable.

Yours faithfully,
Fenton & Dunn."

On 22nd November 1954, 4th February 1955 and 29th March 1955 the plaintiff's solicitor wrote the following letters to the defendant's solicitors :

22nd November 1954.

" Messrs. Fenton & Dunn, Solicitors,
422 Collins Street, Melbourne.

Dear Sirs,

Ballas re Theophilos deceased :

I refer to my letter of 6th July 1954.

It will be appreciated if you will let me know whether probate of the above estate has yet issued.

If it has not issued it will be appreciated if you will let me know when it is expected that probate will issue.

My client is anxious to complete the purchase of the deceased's interest in the partnership business as soon as possible.

Yours truly,
E. L. Moran."

4th February 1955.

" Messrs. Fenton & Dunn, Solicitors,
422 Collins Street, Melbourne.

Dear Sirs,

Ballas re Theophilos deceased :

I refer to my letter of 22nd November 1954 to which I have received no reply. I shall be glad to know whether probate of the above estate has yet been issued or applied for.

Yours truly,
E. L. Moran."

29th March 1955.

" Messrs. Fenton & Dunn, Solicitors,
422 Collins Street, Melbourne.

Dear Sirs,

Ballas re Theophilos deceased :

I have received no acknowledgment of the receipt by you of my letters of 22nd November 1954, and the 4th ultimo respectively.

May I assume that you propose to disregard my inquiry as to whether or not probate is to be applied for ?

Yours truly,
E. L. Moran."

Finally on 29th April 1955 the defendant's solicitors replied as follows :

" Mr. E. L. Moran, Solicitor,
281 Collins Street, Melbourne C.1.

Dear Sir,

Re Theophilos and Ballas :

We are in receipt of your various letters in this matter, but we have not answered them because there has been nothing to tell you. It now looks as if the matter will have to be settled by litigation.

We have advertised our intention to apply for probate and will do so shortly.

Yours faithfully,
Fenton & Dunn."

Thereupon the plaintiff's solicitor, on 28th July 1955, served the following notice upon the defendant by registered post :

" To Mrs. Efstratia Theophilos of 9 Maby Avenue East St. Kilda
Executrix of the Will of Michael Theophilos Deceased.

Take Notice that I Harry Ballas of 175 Collins Street Melbourne hereby confirm the notice given by my solicitor, Mr. E. L. Moran to your solicitors, Messrs. Fenton and Dunn, by letter dated 7th June one thousand nine hundred and fifty-four that I desired to exercise the option conferred upon me by par. 17 of the partnership agreement dated 2nd April one thousand nine hundred and forty-eight between the late Michael Theophilos and myself in the business of a milk bar, confectionery and cafe at 175 Collins Street, Melbourne, and I do exercise such option. I have instructed my solicitor to take immediate action to enforce my right under the said agreement without further notice to you.

Dated this 28th day of July, 1955.

H. Ballas."

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Williams J.

In addition to the letters that passed between them, conversations took place between the solicitors for the parties from which it appears the solicitor for the plaintiff continued to be under the misapprehension seen in the letter of 6th July 1954 that the plaintiff could not exercise the option to purchase the share of the deceased partner until probate had been issued to his executrix. That this was a misapprehension is made clear by *Kelsey* v. *Kelsey* (1). If there was evidence that the defendant's solicitors had agreed to extend the time to exercise the option until the issue of probate or had induced the plaintiff's solicitor to believe that they agreed that the option could not be exercised until then, it may well be that the period within which the option could have been exercised would have extended to a reasonable time after the issue of probate. But there is no evidence that the defendant's solicitors did so. The most that can be gleaned from the evidence as a whole is that the defendant's solicitors did nothing to dispel this misapprehension. They did not actively encourage it or even pretend to acquiesce in it. Their letter of 24th June 1954 denied that the letter of the plaintiff's solicitor of 7th June 1954 was a proper exercise of the option principally, it would seem, for the reason that the price was not properly computed. The fact that probate had not been issued was not relied upon. In the subsequent correspondence they made it clear that the parties must be considered to be completely at arm's length and to be standing on their legal rights. His Honour held that in all the circumstances of the case a period of six months from the death was the longest possible period which could reasonably have been allowed for the plaintiff to exercise the option. This period would have given the plaintiff more than three months after the preparation of the balance sheet within which to exercise the option. On this ground, amongst others, his Honour held that the purported exercise of the option by the formal notice of 28th July 1955 was too late. With this I agree. The balance sheet had been prepared early in June 1954 and the plaintiff should have been in a position to decide whether or not to exercise the option at the latest by the end of that month.

The plaintiff must therefore rest on the letter of 7th June 1954. The particular words relied upon in that letter are: "I am instructed to inform you that my client desires to exercise the option conferred upon him by par. 17 of the partnership agreement dated 2nd April 1948". If those words stood alone a great deal could be said in support of the view that the option had been duly exercised. Options

(1) (1922) 127 L.T. 86.

have been held to have been exercised, where the context is sufficient, although the document, instead of stating unequivocally that " the optionee hereby exercises the option," or words to that effect merely states that he desires or intends or is prepared to exercise it: *Mills* v. *Haywood* (1); *Nicholson* v. *Smith* (2); *Collingridge* v. *Niesmann* (3). But they do not stand alone. In the third and fourth paragraphs of the letter the solicitor for the plaintiff claimed that the plaintiff was entitled to set off against the purchase price of £4,366 16s. 11d. two sums of £3,000 and £1,703 14s. 0d. " so that there is no money payable by my client to the estate pursuant to sub-par. (b) of par. 17 of the partnership agreement ". His Honour examined the validity of this claim and decided that the plaintiff was not entitled to deduct either of these sums from the purchase money, so that the plaintiff was wrong in law in contending that, upon the exercise of the option, nothing would be payable by him to the estate of his deceased partner pursuant to this sub-clause. His Honour then said " If the third and fourth paragraphs had been omitted from the letter of 7th June 1954 I am disposed to think that it would have been an effective exercise of the option. But in view of what I have said in relation to the sums of £3,000 and £1,703 I am of opinion that the inclusion of those paragraphs had the effect of negativing any implication which might otherwise have arisen from the language of the second paragraph that the plaintiff was electing to be bound by the terms set out in the option clause. The plaintiff contended that this was not so. The letter, he urged, amounted to a communication of an election to be bound by the terms of the option clause coupled merely with an invitation to discuss, and reach agreement upon the precise amounts that would have to be paid in order to discharge the obligations which have been created by the election in the second paragraph of the letter. In support of this view it was argued that the letter cannot be taken as asserting a right to have the goodwill valued at the figure of £2,000 at which it appears in the balance sheets referred to in the letter, and that therefore the words ' according to the balance sheet ' in the third and fourth paragraphs must mean ' If the balance sheet is to be taken as a basis '. The two paragraphs, it was said, are therefore, on their true construction, merely argumentative and the expressions ' must be set off ' and ' there is no money payable ' are to be understood in that sense. In my view, however, these two last mentioned expressions, even though, upon a literal construction, they related

(1) (1877) 6 Ch. D. 196.
(2) (1882) 22 Ch. D. 640.
(3) (1920) 37 W.N. (N.S.W.) 224.

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only to an assumed basis of computation, showed quite plainly that the plaintiff did not intend to accept any obligation in any circumstances to pay over more than the purchase price less a deduction of £3,000, or to pay any moneys under sub-cl. (b) of the option clause. The plaintiff's construction must therefore, in my opinion, be rejected. There are, I think, two possible constructions of the letter read as a whole. One is that it amounted merely to an invitation to the defendant to enter upon a negotiation with a view to agreeing upon a figure to be paid for the deceased's share if the option should be exercised, coupled with an assertion by the plaintiff that consistently with a due performance of his obligations under any exercise of the option he had the right to take over the deceased's share without paying anything under sub-cl. (b) and without paying over more than the purchase price less £3,000. The other is that he was saying in the letter that he elected to accept the obligations of a purchaser as set out in the option clause but was saying, at the same time, that those obligations did not require him to pay, and that he accepted no obligation to pay anything at all under sub-cl. (b) or any sum or sums totalling more than the purchase price less £3,000. Upon the first construction there was no attempt to exercise the option; and upon the second there was no effective exercise of the option because, in the facts which existed, the assertion of rights made by the plaintiff in relation to sub-cl. (b) and the £3,000 was inconsistent with an intention to accept the full obligations of a purchaser as set out in the option clause."

In order to understand his Honour's reference to the second construction, it is necessary to turn to an earlier part of his Honour's reasons where he discussed at considerable length what he conceived to be the true character of an option. He said that there were two rival views, the one being that it is a conditional or contingent contract of sale and the other that it is merely an offer to sell coupled with a contract not to revoke the offer. His Honour, after citing a large number of cases, reached the conclusion that the first of these views was correct. He said: "I therefore consider that I should adopt the first of the two conflicting views as to the nature of an agreement to give an option to purchase. And for reasons which I have already indicated I think that, consistently with the view, what it was necessary for the plaintiff in the present case to do in order to exercise the option given by cl. 17 was to make by a communication to the defendant or her agent in that behalf, an election to assume thenceforth the rights, and be bound thenceforth by the obligations, of a purchaser of the deceased's share upon the

terms set out in the clause." Earlier his Honour had said : " More fully stated the right intended to be conferred (that is by an option) is, I think, a right to make an election to assume thenceforth the rights, and be bound thenceforth by the obligations, of a purchaser of the property upon the terms set out in the option agreement and, upon performance of those obligations, to compel a conveyance of the property ".

With all respect to his Honour, I do not think that it is necessary to decide whether an option should be characterised as a conditional or contingent contract of sale or as an offer to sell coupled with a contract not to revoke the offer. The two views appear of course in *Goldsbrough, Mort & Co. Ltd.* v. *Quinn* (1), *Griffith* C.J. (2) expressing the former and *Isaacs* J. (3) the latter view, but there can be few documents with respect to which it is not true that, as *Isaacs* J. said in *Carter* v. *Hyde* (4) : " it matters not a straw which view was right in *Goldsbrough, Mort & Co. Ltd.* v. *Quinn* (1) " (5). We are concerned here not with an option to purchase or lease property conferred upon an optionee by the trusts of a will or deed, but with an option given to the surviving partner by the partnership agreement to purchase the share of the deceased partner.

Such an option is not merely personal to the partners because its effective exercise requires that it should be binding upon the executor, executrix or personal representative of the deceased partner. But its legal efficacy is derived from the contract of partnership. The executor of the deceased partner becomes bound to sell the share of the deceased partner to the surviving partner if the latter duly exercises the option of purchase, and the option is therefore in essence an irrevocable promise by one partner binding upon his executor that in the event of his death his executor will sell his share in the partnership assets to the surviving partner provided the latter complies with the prescribed conditions. It was pointed out in *Helby* v. *Matthews* (6) by Lord *Herschell* and Lord *Watson* that it is only in a popular sense that the giving of an option creates a conditional contract of sale because there can be no contract of sale until there is not only a person who has contracted to sell the property but also a person who has contracted to purchase it and until an option has been exercised there is only the former and not the latter person. Lord *Herschell* said : " It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to

(1) (1910) 10 C.L.R. 674.
(2) (1910) 10 C.L.R., at p. 678.
(3) (1910) 10 C.L.R, at p. 691.
(4) (1923) 33 C.L.R. 115.
(5) (1923) 33 C.L.R., at p. 123.
(6) (1895) A.C. 471.

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buy. This is undoubtedly true if the words 'agreement to sell' be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case" (1).

Lord *Watson* said: "From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy . . . . Whilst, in popular language, the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. There can, in such a case, be no agreement to buy, within the meaning of the Act of 1889, until the purchaser has exercised the option given him in terms of the agreement" (2).

It is the due exercise of the option, or in other words the acceptance by the optionee of the offer contained in the option that creates the contract of sale. Once the option has been duly exercised, the relationship of the parties becomes that of vendor and purchaser of the property and their rights and obligations are exactly the same as those which arise where a contract of sale is made by persons between whom no legal relationship existed prior to the making of the contract. If the contract is one which a court of equity would order to be specifically performed, the purchaser would acquire an equitable interest in the land. If the option to purchase relates to property of such a character that the court of equity would order the contract of purchase created by the exercise of the option to be specifically performed, then the option to purchase would create an equitable interest in the land, the extent of the equitable interest depending upon the terms of the option. The question whether the option creates an equitable interest in the property would become important if for instance the owner of the property should attempt to alienate it to a third party during the currency of the option in which case the optionee, if he duly exercised the option and performed the consequential contract of sale, would be entitled to have the property conveyed to him in priority to the third party; or if during its currency the property should be compulsorily acquired in which case the optionee, upon exercising the option, and paying

(1) (1895) A.C., at p. 477. (2) (1895) A.C., at p. 480.

the purchase money would become entitled to receive the compensation moneys in lieu of his original right to a conveyance or transfer of the property.

Two other questions which frequently arise are whether the option is personal to the offeree or can be exercised by his executors, administrators and assigns and whether the irrevocable offer is personal to the offeror or can be enforced against his executors, administrators and assigns. These questions have been discussed in this Court in *Goldsbrough, Mort & Co. Ltd.* v. *Quinn* (1); *Carter* v. *Hyde* (2); *Commissioner of Taxes (Q.)* v. *Camphin* (3); *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (4); *Sharp* v. *Union Trustee Co. of Australia Ltd.* (5); *O'Neill* v. *O'Connell* (6); *Cavallari* v. *Premier Refrigeration Co. Pty. Ltd.* (7) and *MacDonald* v. *Robins* (8).

But where the issue whether the option has been duly exercised is confined to the parties themselves, such questions are irrelevant. The only question is whether the optionee has complied with the conditions of the option. All that the plaintiff had to do in the present case in order to exercise the option was to notify the executrix of the deceased partner within due time that he was exercising the option. If he had done this, the relationship of purchaser and vendor would have been created between the parties and the purchase price would have been the price properly ascertained in accordance with the partnership agreement. The question what was the true purchase price would arise if the vendor refused to accept the amount tendered by the purchaser. Even if the purchaser had tendered the wrong amount, he could still in a suit for specific performance obtain a decree if he was ready and willing to pay what was found to be the true purchase price by the court: *Berners* v. *Fleming* (9). If the intention to exercise an option is sufficiently clear, it matters not that the optionee at the same time wrongly asserts that the purchase price is £x whereas the true purchase price is £x + £y. By exercising the option he contracts to pay this price whatever it may be. If the intention to exercise the option is not sufficiently clear, and it is left in doubt whether the optionee is intending thereby to exercise the option or merely attempting to obtain the concurrence of the vendor to what he asserts will be the price in the event of its exercise, then a claim such as that put forward in the third and fourth paragraphs of the letter of

(1) (1910) 10 C.L.R. 674.
(2) (1923) 33 C.L.R. 115.
(3) (1937) 57 C.L.R. 127.
(4) (1944) 69 C.L.R. 270.
(5) (1944) 69 C.L.R. 539.
(6) (1946) 72 C.L.R. 101.
(7) (1952) 85 C.L.R. 20.
(8) (1954) 90 C.L.R. 515.
(9) (1925) Ch. 264.

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7th June 1954 might well induce the court to hold that the latter construction is correct. I cannot agree with his Honour that these paragraphs could have any greater effect. If the words quoted from the letter of 7th June 1954 should be read as a clear and definite intimation to the defendant's solicitors that the plaintiff was thereby intending to exercise the option, this would be the end of the matter, and in deciding whether such an intimation had been given the question would be, as *Isaacs* J. said in *Carter* v. *Hyde* (1) (after referring to *Jones* v. *Daniel* (2)) "'Now, what would anybody when he received that letter fairly understand to be the meaning of it . . . in the circumstances of its receipt'" ? (3).

His Honour said that the third and fourth paragraphs of the letter of 7th June 1954, even though upon a literal construction they related only to an assumed basis of computation, showed quite plainly that the plaintiff did not intend to accept any obligation in any circumstances to pay over more than the purchase price less a deduction of £3,000, or to pay any moneys under sub-cl. (b) of the option clause. This led his Honour to adopt the second of the two alternative constructions already mentioned and to hold that there had not been a valid election because of the assertion of rights by the plaintiff inconsistent with an intention to accept the full obligations of a purchaser as set out in the option clause. With all respect to his Honour, I am of opinion that the construction the plaintiff's counsel sought to place upon these paragraphs would be correct if the letter as a whole could be construed as a notification to the defendant's solicitors that the plaintiff thereby intended to exercise the option. They would not amount to more than an argumentative assertion of what, in the plaintiff's opinion, his obligations as the purchaser would be after the accounts had been adjusted. If the letter of 7th June 1954 stood alone, the fair understanding of its meaning might well be that it was intended to be an exercise of the option. But unfortunately for the plaintiff the letter of 7th June 1954 does not stand alone. It is followed by several more letters and was written, on his behalf, like the subsequent letters, by a solicitor who was under the misapprehension that the option could not be exercised until probate had issued. It has been clear law ever since *Hussey* v. *Horne-Payne* (4) that where a court has to find a contract in correspondence and not in a formal document the whole of that which has passed between the parties must be taken into consideration. Accordingly, although at one stage it may look as though a contract has been concluded between

(1) (1923) 33 C.L.R. 115.
(2) (1894) 2 Ch. 332, at p. 335.
(3) (1923) 33 C.L.R., at p. 126.
(4) (1879) 4 App. Cas. 311.

the parties, the subsequent correspondence may prove the contrary. It is only when it is clear at some stage that there is a complete contract between the parties that further negotiations cannot, without the consent of both, get rid of the contract already arrived at: *Perry* v. *Suffields Ltd.* (1). If in answer to the letter from the defendant's solicitors of 24th June, the plaintiff's solicitor had in his letter of 6th July asserted that the option had been exercised by his previous letter, the plaintiff would have been in a strong position. But instead, he hastened to agree that his previous letter was not intended to be an exercise of the option but merely a notification to the defendant that his client intended to exercise the option at a future date. The rest of the correspondence until the formal notice of 28th July proceeds on the same basis. Until that notice was given nothing further occurred that could be regarded as an exercise of the option and that notice, as has been said, was too late.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Molomby & Molomby.*

Solicitors for the respondent, *W. R. R. Blair & Son.*

R. D. B.

(1) (1916) 2 Ch. 187.