[HIGH COURT OF AUSTRALIA.]

OLIVER . . . . . APPELLANT;
PLAINTIFF,

AND

OLIVER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1958.

MELBOURNE, *May* 21, 22;

BRISBANE, *June* 26.

Dixon C.J., McTiernan and Taylor JJ.

Will—Construction—Gift "upon trust . . . for . . . N. but . . . W. . . . shall have . . . right to purchase such . . . property from N. . . . at £6 per acre if he so desires"—Whether option void for repugnancy to gift—Option—Exercise—Whether absolute election to purchase—Whether exercise within six months after death of testator reasonable.

A will contained the following provision "and to hold the rest and residue of my estate Upon Trust as to my house property comprising 544 acres situate on the Yea-Whittlesea Road for my son Walter Charles Oliver and as to my Dairy Creek property for my son Norman but my son Walter Charles shall have the right to purchase such Dairy Creek property from my son Norman at £6 per acre if he so desires and as to the rest and residue of my property for my son Walter Charles Oliver absolutely."

Held, that the option in favour of Walter Charles Oliver was not void for repugnancy to the gift to Norman Oliver.

Six months after the death of the testator Walter Charles Oliver purported to exercise the option by a formal notice signed by him and addressed to Norman Oliver which after setting forth the relevant terms of the will proceeded "Now I Walter Charles Oliver do hereby express my desire and intention to purchase such property from you at the upset price of £6 per acre such price to be paid to you as soon as the necessary financial arrangements can be made".

Held that the notice was an absolute election to purchase the property and it was given within a reasonable time after the death of the testator.

Decision of the Supreme Court of Victoria (*Lowe* J.), reversed.

APPEAL from the Supreme Court of Victoria.

Charles Walter Gordon Oliver, late of Yea, Victoria died on 21st June 1956, leaving a will dated 25th January 1955 probate whereof was on 23rd October 1956 duly granted by the Supreme Court of Victoria to Walter Charles Oliver one of the executors named therein, the other executor Norman Joseph Oliver having renounced. So far as material the will was as follows:—" I Give Devise and Bequeath the whole of my estate both real and personal unto my Trustees Upon Trust after payment thereout of all my just debts funeral and testamentary expenses and all Probate and Legacy Duties to pay to each of my children (save and except my said sons Walter Charles Oliver and Norman Oliver) the sum of Two hundred pounds and to hold the rest and residue of my estate Upon Trust As to my house property comprising 544 acres situate on the Yea-Whittlesea Road for my son Walter Charles Oliver and as to my Dairy Creek property for my son Norman but my son Walter Charles shall have the right to purchase such Dairy Creek property from my son Norman at £6 per acre if he so desires and as to the rest and residue of my property for my son Walter Charles Oliver absolutely."

On 4th January 1957 the said Walter Charles Oliver forwarded to the said Norman Joseph Oliver a notice in writing as follows:—

" To Norman Joseph Oliver
18 Marks Street,
Coburg.
re C. W. G. Oliver deceased

Whereas under the Will (dated the twenty-fifth day of January One thousand nine hundred and fifty-five) of our father Charles Walter Gordon Oliver now deceased it is declared that the Trustees of his Will shall hold his property Upon Trust ' As to my Dairy Creek property for my son Norman but my son Walter Charles shall have the right to purchase such Dairy Creek property from my son Norman at £6 0s. 0d. per acre if he so desires '. Now I Walter Charles Oliver do hereby express my desire and intention to purchase such property from you at the upset price of £6 0s. 0d. per acre such price to be paid to you as soon as the necessary financial arrangements can be made."

Doubts and difficulties having arisen in the administration of the testator's estate the said Walter Charles Oliver on 11th November 1957 caused to be issued out of the Supreme Court of Victoria an originating summons, to which Norman Joseph Oliver was defendant, claiming the determination, without administration, of the

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following questions :—1. Upon the true construction of the said Will and in the events which have happened under the following provision of the said Will " As to my Dairy Creek property for my son Norman but my son Walter Charles shall have the right to purchase such Dairy Creek property from my son Norman if he so desires ". (a) Is the plaintiff entitled to the Dairy Creek property on condition that he pays the defendant the sum of £6. 0s. 0d. for each acre comprising the said property. (b) What estate or interest does the plaintiff take in the said property. (c) What estate or interest does the defendant take in the said property.

The application came on for hearing before *Lowe* J. on 7th February 1958 when the defendant did not appear. At the conclusion of the hearing his Honour answered the questions in the originating summons as follows :— 1. (a) No. 1. (b) None. 1. (c) An absolute interest.

From this decision the plaintiff appealed to the High Court.

L. Voumard Q.C. and *A. Adams*, for the appellant.

Dr. *E. G. Coppel* Q.C. and *R. E. McGarvie*, for the respondent.

Cur. adv. vult.

June 26.

The following written judgments were delivered :—

DIXON C.J. This appeal concerns a trust upon which a country property at Yea in Victoria called Dairy Creek was devised by a testator who died on 21st June 1956 and who is described as a grazier. Among other children the testator left him surviving two sons, Walter Charles and Norman. By a very brief will he appointed these sons his executors and trustees and devised and bequeathed to them his real and personal property upon certain trusts. After payment of liabilities they were first to pay each of the other children of the testator £200. The will proceeded,—" and to hold the rest and residue of my estate Upon Trust as to my house property comprising 544 acres situate on the Yea-Whittlesea Road for my son Walter Charles Oliver and as to my Dairy Creek property for my son Norman but my son Walter Charles shall have the right to purchase such Dairy Creek property from my son Norman at £6 per acre if he so desires and as to the rest and residue of my property for my son Walter Charles Oliver absolutely."

On 4th January 1957, that is to say some six months after the death of the testator, Walter Charles gave Norman a written notice doubtless intended to operate as an exercise of the option expressed

in the trust. The Dairy Creek property was valued for probate duty at £4,480 which if the area given in the affidavit is correct means £14 an acre. Norman being apparently unwilling to concede that Walter Charles was entitled to the Dairy Creek property for £6 an acre, Walter Charles issued an originating summons seeking an answer to the question whether under the provision he was entitled to the property on condition that he paid his brother £6 per acre and answers to the further questions what estates or interests did he and his brother respectively take in the property.

The summons was heard by *Lowe* J. who decided that the option in favour of Walter Charles attached to the trust for Norman was void for repugnancy to the gift. On that ground his Honour answered the questions that Walter Charles was not entitled to the Dairy Creek property and that he took no estate or interest therein but Norman was absolutely entitled thereto. From this decision Walter Charles now appeals.

The view that the option is void for repugnancy means that the intention of the will was to give a full and absolute estate in the land to Norman and then nevertheless to attach to the gift some fetter upon an essential right such as alienation necessarily belonging to the estate. It is unnecessary to remark that such a view defeats the testator's true intention. But apart from that not necessarily fatal consideration, in point of reasoning it depends upon two steps each of which is open to serious dispute. In the first place it assumes that the trust for Norman of the Dairy Creek property gives him a full equitable estate in fee simple from which there can be no detraction of an essential quality such as the right of alienation. In the next place, it treats the provision that Walter Charles shall have the right to purchase at £6 per acre as a fetter on alienation that is repugnant to the interest already given. It is a better understanding of the provision to treat it as giving an equitable interest in the land to Norman subject to an interest in the nature of an option in Walter Charles by the exercise of which he becomes entitled on paying £6 an acre to Norman. Further, upon the proper interpretation of the option, it would appear to require Walter Charles to make his election within a reasonable time. The phrase " if he so desires " points rather to an expression presently of his desire and not at any time during Norman's and his lifetime. Indeed it is in any case the more reasonable and practical construction. So construed the option imposes no fetter on alienation and does not suspend the right. It simply means that within a reasonable time Walter Charles becomes entitled to the land under condition of paying the money.

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A true example of repugnancy may be seen in *In the Will of McKellar (dec'd.)* (1), where there was an express direction against sales within a period of twenty-one years without any beneficial interest flowing therefrom to anyone. In *In re Rosher*; *Rosher* v. *Rosher* (2) there was a legal devise in fee simple with a condition attached that if the devisee or any person claiming under him should ever desire to sell a named person should have a right of pre-emption at a price the will specified. It is self-evident that the right of pre-emption must operate as a restraint on the free alienation of the estate in fee simple and it is not remarkable that it was held void. The decision of *Eve* J. in *In re Cockerill*; *Mackaness* v. *Percival* (3) went further than *In re Rosher* (2) only in holding that such a restraint was void even if it was limited in its operations to a period of twenty years. In *In re Brown (dec'd.)*; *District Bank Ltd.* v. *Brown* (4) *Harman* J. construed the will before him as attempting to place a restraint on alienating, subject to an exception in favour of a very limited class, which restraint would operate as a condition subsequent to and not a conditional limitation upon an otherwise absolute gift, although the restraint was limited to the life of the donees. His Lordship therefore decided that the condition was void. This decision depends on the same reasoning as *In re Rosher* (2) and *In re Cockerill* (3) and has no relation to such a case as this. With all respect the view adopted by *Lowe* J. does not appear well founded. The effect of the disposition was to invest Walter Charles with an election exercisable within a reasonable time to take the property on paying Norman £6 per acre and subject thereto to give an equitable estate in fee simple therein to Norman.

Although the question was not put foremost in the case for Norman, it was objected upon this appeal that the option had not been well exercised by Walter Charles and for two reasons. The first reason given was that the intended exercise of the option was too late; to allow six months to elapse from the testator's death was to fail to elect within a reasonable time. It appears that a grant of probate was made to Walter Charles on 23rd October 1956, Norman having renounced.

There is very little information in the affidavit about the circumstances, and none about the character of the property and its enjoyment. We are told that Walter Charles, after learning of the provision, at all times desired to exercise the option and accordingly consulted his solicitor who obtained an opinion of counsel given on

(1) (1915) V.L.R. 220.
(2) (1884) 26 Ch.D. 801.
(3) (1929) 2 Ch. 131.
(4) (1954) Ch. 39.

9th August 1956. In his affidavit Walter Charles said soon after sending the notice to Norman he obtained a loan of £2,000, the purchase price being £1,920.

On these meagre facts it is impossible to say that a reasonable time had expired before 4th January 1957, the date of the notice.

The second reason why it is said that the option was not exercised depends upon the terms of the notice. This document is drawn up in formal terms. It is signed by Walter Charles before a witness. It is addressed to Norman by his full name and it begins with a recital of the relevant terms of the will. Then the operative part proceeds—" Now I Walter Charles Oliver do hereby express my desire and intention to purchase such property from you at the upset price of £6 0s. 0d. per acre such price to be paid to you as soon as the necessary financial arrangements can be made." The contention is that the foregoing does not amount to an absolute election: it is conditional only, conditional on raising the money. In construing it, the fact should not be lost sight of that it was against Norman's interest that the election should be made and contrary to his desire. Further, the price of £6 0s. 0d. was an undervaluation and it would not be supposed that any difficulty would exist in raising the money. The words " express my desire " clearly enough are an echo of the words of the option " if he so desires ". It seems obvious that the real purpose of the document was to bind Norman by a formal exercise of the option. In all the circumstances the better interpretation of the expression of desire it contains is that it means to convey a definitive election and to state that as soon as, not if but when, the money was available it would be paid over. One may be sure that this was how the notice would be understood by Norman and his advisers.

The result is that the appeal should be allowed and the order of the Supreme Court discharged.

In lieu thereof it should be declared in answer to the questions in the summons that under the trusts of the will with respect to the testator's Dairy Creek property the plaintiff Walter Charles Oliver became entitled to acquire the said property at his election exercisable within a reasonable time at the price of £6 an acre payable to the defendant Norman Joseph Oliver and that the notice dated 4th January 1957 amounts to a sufficient exercise of his said election and subject to his paying or tendering the said price to the said defendant within a reasonable time he is entitled to an equitable estate in fee simple in the said property.

The costs of both parties and of the summons and of the appeal should be paid out of the estate.

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McTIERNAN J. In my opinion this appeal should be allowed. I agree in the view that the gift which the testator makes to his son, Walter Charles, of a right to purchase the testator's " Dairy Creek " property is valid and that this option to purchase was duly exercised. In my opinion the trust of the " Dairy Creek " property which the testator declared by the will for his son, Norman, does not give him an absolute interest. Accordingly, I feel that I need not encounter the question whether the option to purchase is void as being a total or substantial restraint on the alienation of the property by Norman. I think that you cannot infer from the fact that Walter Charles takes under the trust declared for him of the " house property " an absolute interest, that it is the testator's intention to give a similar interest to Norman in the " Dairy Creek " property ; it was by reasoning substantially of this nature that the decision under appeal was reached. It seems to me to be plain from the language of the will, and the dispositions of these properties, that it is the intention of the testator to give an absolute interest in the " house property " to Walter Charles, but an interest modified by the option to purchase in the " Dairy Creek " property to Norman. The words providing for the option to purchase do not, in my opinion, import a condition subsequent but rather the limitation of an equitable interest in the " Dairy Creek " property. " Words expressing a condition may be treated as being words of limitation or merely creating a trust or charge " *Halsbury's Laws of England*, 2nd ed. vol. 34, p. 363 ; (See also *Cheshire's Modern Real Property* 7th ed. (1954) p. 309). The option to purchase is in the nature of a conditional gift of the " Dairy Creek " property (see *Halsbury's Laws of England*, 2nd ed. vol. 34, p. 34). As I have already said, the devise of the right to purchase the property creates an equitable interest in the land. (See *Hutton* v. *Watling* (1) and the cases therein cited). The " Dairy Creek " property, in the hands of Norman, is bound by this interest. The words creating the option to purchase are an executory devise of such interest. The interest which Norman takes under the will in the property in question is a determinable equitable interest ; it determines upon the due exercise of the option to purchase. Subject thereto, it is an equitable interest in fee simple. The testator has by the will devised the whole of his estate in the " Dairy Creek " property, and carved out of that estate the determinable interest given to Norman and the right which is given to Walter Charles to purchase it. The testator by the disposition he made of the " Dairy Creek " property manifests his intention to mould the equitable estate in that property into the determinable

(1) (1948) Ch. 26.

interest, given to Norman, and the option to purchase given to Walter Charles. (See *Cheshire's Modern Real Property*, 7th ed. (1954) at p. 49). The gift of the option of purchase to Walter Charles cannot, in my opinion, be impeached in principle upon the ground of repugnancy to the trust of that property which the will creates in favour of Norman. The other question is whether the option to purchase was duly exercised. I do not desire to add anything to what the Chief Jutice has said on that question.

TAYLOR J. I agree that the questions in the originating summons should be answered as proposed by the Chief Justice. The only difficulty I have felt in the case is whether the notice of 4th January 1957 constituted, in terms, an effective exercise of the so-called option given to the appellant. But upon consideration I am satisfied that the reasons given by the Chief Justice for concluding that it was must determine this issue in his favour.

Appeal allowed. Order of the Supreme Court of Victoria discharged. In lieu thereof declare in answer to the questions in the summons that under the trusts of the will with respect to the testator's Dairy Creek property the plaintiff Walter Charles Oliver became entitled to acquire the said property at his election exercisable within a reasonable time at the price of £6 an acre payable to the defendant Norman Joseph Oliver and that the notice dated 4th January 1957 amounts to a sufficient exercise of his said election and subject to his paying or tendering the said price to the said defendant within a reasonable time he is entitled to an equitable estate in fee simple in the said property. Costs of each party to be paid out of the estate of the testator.

Solicitors for the appellant, *S. H. Austin Embling & Jackson*, Yea, by *Davis, Cooke & Cussen*.

Solicitors for the respondent, *Maddock, Lonie & Chisholm*.

R. D. B.