

..... COCK

V.

..... COCK AND OTHERS

**ORIGINAL**

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**REASONS FOR JUDGMENT**

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Judgment delivered at..... Sydney

on Monday, 28th November 1966

COCK

v.

COCK AND OTHERS

ORDER

Appeal dismissed with costs.

COCK

v.

COCK AND OTHERS

JUDGMENT

BARWICK C.J.  
McTIERNAN J.  
MENZIES J.  
WINDEYER J.  
OWEN J.

COCK

v.

COCK AND OTHERS

The Full Court of the Supreme Court of Western Australia, upon appeal, ordered a new trial of an action which the learned trial judge, upon the defendant's motion at the end of the plaintiffs' case, had dismissed. By this appeal the appellant, the defendant in the action, seeks to have the judgment in his favour restored.

The respondent F. J. Cock had for some time carried on business in partnership with his brother, the appellant W. A. Cock, under the name W. A. & F. J. Cock. The business was principally that of pastoralists, but the partnership also owned the Agnew Hotel - which was worth about £7,000 - and a house at Lamington worth about £5,000. The partnership business was carried on upon three stations near Menzies, namely Riverina, Wilbah and Perrinvale, and upon Kaluwiri, a station near Sandstone. It seems that the business upon Kaluwiri was carried on by the brothers under the name W. N. Cock and Sons, but nothing turns upon this and it may be treated as simply part of the business of the one partnership.

On 29th July 1959 W. A. Cock and F. J. Cock each signed a document which had been hurriedly prepared by their accountant. It was in these terms:-

"AGREEMENT between WILLIAM ALFRED COCK and FREDERICK JOHN COCK, of Riverina Station Menzies and elsewhere, Pastoralists. It is agreed that in consideration of Pastoral Leases owned by DOROTHY DEBORAH COCK, being contributed to the partnership

to admit her as a partner as from 15th September 1959, and it is further agreed that WILLIAM ALFRED COCK, will sell his interests in the partnership of W. A. & F. J. Cock to the said DOROTHY DEBORAH COCK and/or the nominee of the said FREDERICK JOHN COCK including Kaluwiri property known as W. N. Cock and Sons, but not including the account of Dalgety and Co. Ltd., or wool on hand or proceeds from stragglers to be shorn up to 15th September 1959, to be shared equally when proceeds are received. Payment to be as follows:

Deposit, to be paid within 7 days	£20000. - -
$\frac{1}{2}$ -interest in Agnew Hotel to be taken over by W. A. Cock: say £3500.	
$\frac{1}{2}$ -interest in House at Lamington being taken over by W. A. Cock	2500.
	6000.
$\frac{1}{2}$ -interests worth say	<u>£3000</u> 3000. - -
Excess of Drawings of W. A. Cock say	<u>24000. - -</u>
	£47000. - -
balance payable from Dalgetys as above	<u>8000. - -</u>
Total purchase consideration	<u>£55000. - -</u>

Subject to the payment of all outstanding accounts at the 15th September 1959 and costs of the above transfer, legal and accountancy fees to 15th September 1959 being paid by W. A. & F. J. Cock, that Frederick John Cock will take over all liabilities of W. A. & F. J. Cock concerning the pastoral properties now owned by them jointly, and that the necessary dissolution deeds and other legal documents will be drawn up in due course."

It is common ground that in this document the figure "£24,000" for "Excess of Drawings of W. A. Cock" should have been £12,000 and that the figure "£8000" for "balance payable from Dalgetys

as above" should have been £20,000. These corrections, although not altering the total purchase consideration payable, do involve a different method of payment than that actually set out.

On 28th August 1959 W. A. Cock, with the consent of F. J. Cock, drew £19,587 10s. Od. on the partnership account with Dalgety & Co. Limited.

In 1960 the appellant repudiated the foregoing agreement and in 1962 he was sued, for specific performance and other relief including the winding up of the partnership, by F. J. Cock and the other respondents who, it is claimed, had pursuant to the agreement been nominated by F. J. Cock to take the partnership interests of W. A. Cock. Assuming that the respondents other than F. J. Cock were in fact nominees of F. J. Cock for the purposes of the document of 29th July 1959, it is nevertheless plain that they had no right of action against W. A. Cock because they were not parties to the only agreement made and they could not be regarded as beneficially entitled to either the rights conferred by that agreement or to any part of the partnership property. At best, they were before the court to manifest a willingness to accept from the defendant the partnership interests dealt with by the agreement.

The first question for consideration is whether F. J. Cock can maintain an action for specific performance of the aforesaid agreement.

Here it should be observed that D. D. Cock never became a partner and that she was not at any time ready and willing to take from W. A. Cock his interests in the partnership.

The first objection to the plaintiffs' action was that the whole agreement depended upon the performance of so much of it as provided "that in consideration of Pastoral Leases owned by DOROTHY DEBORAH COCK, being contributed to the partnership to admit her as a partner as from 15th September

1959". This objection the learned trial judge upheld, but we agree with the Full Court that upon its proper construction the rest of the agreement does not fall simply because D. D. Cock did not become a partner in W. A. & F. J. Cock as from 15th September 1959, or at all. The contemplation of the parties was simply that D. D. Cock might wish to become a partner and the agreement was that, if so and if she would contribute her pastoral leases to the partnership, then F. J. Cock would admit her as a partner as from 15th September 1959. It is apparent that the choice was given to D. D. Cock but there is nothing to warrant the conclusion that, if she chose not to join the partnership, then the whole agreement should be at an end. The words "and it is further agreed" are not conditional and the recognition that the whole partnership interests of W. A. Cock might go to nominees of F. J. Cock rather than to D. D. Cock is hardly consistent with treating the further agreement as conditional upon the first agreement. It is difficult to suppose that D. D. Cock would contribute her pastoral leases and become a partner and yet would decline to take the partnership interests of W. A. Cock which would cost her nothing. The primary object of giving F. J. Cock the right to nominate would seem to be to meet the contingency of D. D. Cock deciding not to become a partner and it seems to us that this is so notwithstanding that the words "DOROTHY DEBORAH COCK and/or the nominee of the said FREDERICK JOHN COCK" would seemingly permit the transfer to D. D. Cock of but part of the partnership interests of W. A. Cock. However this may be, there is no compelling reason why what appear as two independent agreements, each with its own consideration, should be so regarded that the second is made dependent for its existence upon the completion of the first.

The terms of what may be called the second agreement require consideration. Notwithstanding the use of

the word "sell", it is plain that it was not intended that either D. D. Cock or the nominees of F. J. Cock should purchase from W. A. Cock his interests in the partnership. The only agreement made by W. A. Cock was with F. J. Cock and it is clear that it was the obligation of F. J. Cock to pay W. A. Cock in full in the manner provided the total purchase consideration for the partnership interest of W. A. Cock. Furthermore, the terms of the agreement requiring F. J. Cock to pay a deposit of £20,000 within seven days show that the deposit was to be paid when it might not be known to whom the interests would go. The substance of the agreement was that F. J. Cock should pay W. A. Cock £55,000 in the manner provided for the transfer of his partnership interests to D. D. Cock or the nominees of F. J. Cock as from 15th September 1959. It was implicit in the agreement between the two partners that the partnership should be dissolved from 15th September 1959. Accordingly, we read the agreement as providing for the dissolution of the partnerships of W. A. & F. J. Cock and W. N. Cock and Sons on 15th September 1959 and as obliging W. A. Cock to transfer his interest in the partnerships to D. D. Cock or, in the event of F. J. Cock nominating other persons as transferees, to the persons so nominated.

There are, however, two further matters requiring consideration.

The first such matter relates to an objection - which the learned trial judge accepted - to enforcing the agreement in the face of the provisions of the West Australian Stamp Act. At the end of his address to the learned trial judge, counsel for the defendant made the following observations: "There is one other matter which I think I owe, perhaps, to the defendant to mention and it is this; I know the revenue can look after itself and counsel shouldn't take finicky stamping objections, but of course your Honour will

appreciate that under the Stamp Act it is not simply a matter of whether a document can be admitted in evidence before it is stamped; the question goes further than that - can it be sued on before it is stamped? The Stamp Act says it can't.

Perhaps I shouldn't say anything more about it except that the plaintiff is, of course, suing on a contract in writing".

The reference here was to s. 27 of the Stamp Act which provides:

"Except as otherwise provided . . . no instrument executed in Western Australia, . . . shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful, or available at law or equity, unless it is duly stamped . . .". The agreement upon which the plaintiffs

sued had, without objection, been received as evidence in the course of the plaintiffs' case and seemingly it bore a revenue office cancellation stamp dated 21st July 1960. This had presumably been done in accordance with some office practice, without legal sanction. In the Full Court the Chief Justice, with the agreement of Jackson J. and after reference to

Shepherd v. Felt and Textiles of Australia Ltd. (1931) 45 C.L.R.

359, said as to this matter:- "This is a case where the document should have been conditionally received subject to Mr. Ainslie giving an undertaking that he would have the document stamped according to the exigencies of the case, and if necessary judgment could have been withheld until the undertaking was carried out. It was for these compelling reasons that we set this aspect of the matter at rest during the hearing of the appeal and accepted Mr. Ainslie's undertaking". In our judgment, the way in which the Full Court dealt with the matter satisfactorily disposes of the point somewhat obliquely taken at the trial.

The other matter depends upon s. 113 of the Land Act (W.A.). By its defence, the defendant pleaded that, if the document of 29th July 1959 was contractual and upon its

proper construction the plaintiff F. J. Cock acquired the interest which W. A. Cock had in the partnership, then the agreement "was illegal because the plaintiff Frederick John Cock would thereby become beneficially interested in leases of pastoral lands to an extent whereby the aggregate area of pastoral lands in which he was beneficially interested would exceed one million acres contrary to section 113 of the Land Act". Section 113 of the Land Act does, subject to some qualifications, prohibit a person from becoming beneficially interested in any lease of pastoral lands to an extent whereby the aggregate area of the pastoral leases in which such person is beneficially interested would exceed one million acres. The learned trial judge did not deal with this defence but it is now said upon appeal that F. J. Cock, by virtue of the agreement, became beneficially interested in the partnership interests of W. A. Cock and to give effect to the agreement would involve an infringement of the prohibition in s. 113. It seems, however, that because of s. 113 of the Land Act or for some other reason, the parties framed their agreement to avoid giving F. J. Cock any beneficial interest in the partnership interests of W. A. Cock and that this purpose was achieved by leaving the actual partnership interest with W. A. Cock, notwithstanding the dissolution of the partnership, until he transferred the interests for which F. J. Cock had, or was liable, to pay, to D. D. Cock and/or the nominees of F. J. Cock. W. A. Cock did not agree to transfer his interests to F. J. Cock or to hold them for him, and had F. J. Cock attempted to compel W. A. Cock to transfer his interests to him, his difficulty would have been not s. 113 of the Land Act but the absence from the agreement of an obligation to do so and the presence in the agreement of provisions inconsistent with such a right in F. J. Cock and such an obligation in W. A. Cock. We are disposed to think - but we do not find it necessary to decide - that the

rights which F. J. Cock obtained by virtue of the agreement in relation to the destination of W. A. Cock's share in the partnership were not more than contractual rights against W. A. Cock.

If the view which we have tentatively expressed were to be established as the correct view, this would probably altogether dispose of the point about illegality, but in any case we find ourselves in agreement with Wolff C.J. and Jackson J. that, upon appeal, it is not possible to uphold the original judgment on the ground that the agreement was illegal by reason of s. 113 of the Land Act. The matter was not really investigated at the trial, which concluded upon a successful submission not relating to s. 113 and without counsel for the defendant having elected not to call evidence. There are, it seems to us, a number of points not determined at the trial which would have to be determined against the plaintiffs before s. 113 of the Land Act would afford the defendant a defence to the action, including as it did a claim for the winding up of the partnership. The proper place to determine these, if they should arise, is at a new trial. For these reasons, the Court is not prepared to restore the judgment in favour of the defendant on the ground that it has been established upon appeal that the agreement could not be sued upon or the relief claimed granted because of the provisions of s. 113 of the Land Act.

We are satisfied that the judgment of the Full Court was correct and that this appeal must be dismissed.

CORAM:     WOLFF C.J., JACKSON J., VIRTUE J.

FREDERICK JOHN COCK, THOMAS  
HENRY COCK, ALMA JOAN GODFREY  
and BEATRICE GRACE RIDLEY

Appellants  
(Plaintiffs)

- and -

WILLIAM ALFRED COCK

Respondent  
(Defendant)

WOLFF C.J.:

This is an appeal from a decision of D'Arcy J. in an action by the abovenamed plaintiffs against the defendant claiming specific performance of an alleged agreement to dissolve a partnership between Frederick John Cock one of the plaintiffs, and his brother, William Alfred Cock, the defendant. There is an alternative claim for an order for dissolution. At the conclusion of the case for the plaintiffs the Trial Judge acceded to a motion on behalf of the defendant that no case had been made out in law. He also upheld a stamp objection that the document on which the plaintiff Frederick John Cock rested his claim to a dissolution could not be received or considered in evidence as it had not been duly stamped as required by law. The appellants now challenge the Trial Judge's order as being erroneous.

The partnership was a pastoral business. The main capital consisted of a number of pastoral leases in the Murchison, the total area of which was near enough to two million acres. Later in these reasons more will be said about the total area of the holdings. Besides the pastoral leases and the stock and plant which went with them, the partners had a hotel at Agnew and a house at Lamington. The value of the hotel was approximately £3,500 and of the house approximately £2,500.

In July 1959, disputes arose. Matters came to a head on the 29th July 1959, in the office of the partners' accountants in Perth, when the partners signed a document which reads as follows:-

AGREEMENT between WILLIAM ALFRED COCK and FREDERICK JOHN COCK, of Riverina Station Menzies and elsewhere, Pastoralists.

It is agreed that in consideration of Pastoral leases owned by DOROTHY DEBORAH COCK, being contributed to the partnership to admit her as a partner as from 15th September 1959, and it

is further agreed that WILLIAM ALFRED COCK, will sell his interests in the partnership of W.A. & F.J. Cock to the said DOROTHY DEBORAH COCK and/or the nominee of the said FREDERICK JOHN COCK including Kaluwiri property known as W.N. Cock and Sons, but not including the account of Dalgety and Co.Ltd., or wool on hand or proceeds from stragglers to be shorn up to 15th September 1959, to be shared equally when proceeds are received. Payment to be as follows:

Deposit, to be paid within 7 days	£20,000	
$\frac{1}{2}$ -interest in Agnew Hotel to be		
-taken over by W.A. Cock: say	£3,500	
$\frac{1}{2}$ -interest in House at Lamington		
being taken over by W.A. Cock	<u>2,500</u>	
	£6,000	
$\frac{1}{2}$ -interests worth say	3,000	3,000
Excess of Drawings of W.A.Cock, say		<u>24,000</u>
		47,000
Balance payable from Dalgetys as above		<u>8,000</u>
Total purchase consideration		<u>£55,000</u>

Subject to the payment of all outstanding accounts at the 15th September 1959 and costs of the above transfer, legal and accountancy fees to 15th September 1959 being paid by W.A. & F.J.Cock, that Frederick John Cock will take over all liabilities of W.A. & F.J. Cock concerning the pastoral properties now owned by them jointly, and that the necessary dissolution deeds and other legal documents will be drawn up in due course.

Signed at Perth this 29th July 1959:

Witness (Sgd) V. HALL by the said FREDERICK JOHN  
COCK (Sgd) F.J. COCK

(Sgd) V. HALL and by the said WILLIAM  
ALFRED COCK (Sgd) W.A. COCK

William Alfred Cock, the defendant, had drawn an amount of approximately £12,000 over his entitlement. In the document the excess of drawings is specified as £24,000, but the parties agree this is a mistake. The alteration of the figure from £24,000 to £12,000 necessitates the increase of the sum set out as the balance payable from Dalgetys, namely £8,000 to £20,000.

On the 28th August 1959 the defendant drew £19,587.10.0 on the partnership account at Dalgety & Co. Ltd., being approximately the amount of the deposit payable under the agreement. Shortly after he repudiated any suggestion that he had dissolved the partnership. Some time later (1961) he moved to one of the stations of the partnership, known as "Kaluwiri", which he has since carried on refusing to give up possession and to acknowledge the validity of the document of July 1959 on which his brother, Frederick John Cock, depends as affecting a dissolution.

While the plaintiff claimed specific performance of the alleged agreement and also asked in the alternative that the partnership be wound up with ancillary orders for accounts and enquiries, the statement of claim does not set up any case for the dissolution other than the facts relating to the signing of the document of 29th July 1959: the alternative claim does not purport to be independently based on an alleged state of affairs that it is "just and equitable" that the partnership should be wound up (paragraph (g) of section 46, Partnership Act 1895). The evidence before the Judge might, however, support such a claim.

The defendant further set up the contention that the remaining plaintiffs in the action, apart from Frederick John Cock, have no right to sue, and in any case that the document does not create any contractual relationship; and (even if it be conceded that it does) that it is conditional on Dorothy Deborah Cock, a sister of the partners, making a contribution of certain pastoral leases towards the capital of a proposed new partnership to be formed on dissolution and becoming a partner. It is alleged that the contribution was never made and she never became a partner and so a condition said to be precedent to the operation of the agreement was not fulfilled and for that reason it is claimed that the agreement is unenforceable. There is a further allegation that if the agreement were carried out it would result in Frederick John Cock acquiring an interest in pastoral lands in excess of one million acres in contravention of section 113 of the Land Act. The effect of a breach of this section of the Land Act is that the leases are liable to forfeiture to the Crown. That phase of the matter was not dealt with by the Trial Judge, but the respondent asked us to consider it on the hearing of this appeal.

When the evidence for the plaintiffs was concluded (with the exception of one item which need not be considered), defence counsel, Mr. Burt moved to dismiss the claim. He was not asked to declare whether

he would rely on his submissions and not call any evidence as to the facts. Mr. Burt then raised the legal issues already mentioned, some of which involve questions of fact.

It was proved in the plaintiffs' case that although Dorothy Deborah Cock had been at first willing to come in under the agreement she had changed her mind. The plaintiffs contend that the introduction of Dorothy to the new partnership contemplated on dissolution of the old one was not a matter in which William Alfred Cock was concerned legally. Once he was out of the partnership it would be giving the agreement an unlikely twist to say that it imported a condition that there was no dissolution unless she elected to join the continuing partner. The right to enter the new partnership and bring in her leases was a choice reserved to her and on the construction of the agreement she specifically could come in bringing her leases with her but if she did not want to enter the partnership, she kept her leases. I entertain no doubt that the provision for nominees was made in contemplation of section 113 of the Land Act. As between the continuing partner and the retiring partner the stipulation for nominees was to protect the leases against possible forfeiture.

The instrument on which the plaintiffs sue is not elegantly drafted. It was drawn up by a member of a firm of accountants looking after the partnership accounts and perhaps in some haste in order to get the partners down to finality in a difficult situation.

I am unable to agree with the contention by the defendant that the document has no contractual effect. The document shows it was the intention of the parties to dissolve the partnership; specify terms of dissolution; and provide for the admission of other partners, and that they were ad idem on this point. As Frederick John Cock might not be able to hold the whole of the pastoral leases in his own name it became necessary to seek others to whom the retiring partner could be asked to transfer an interest in the pastoral leases and thus avoid infringement of section 113 of the Land Act. As will be seen later this question is clouded with some doubt when it comes to an examination of the facts. But the main argument addressed to the Trial Judge and to us on appeal centred around (a) whether the document which evidenced the contract was subject to a condition precedent, i.e. the admission of Dorothy Deborah Cock into the partnership; and if so (b) whether the fulfilment of that condition was essential before any enforceable

rights accrued to the plaintiff, Frederick John Cock, or any other persons. It is true that the document does say "it is agreed in consideration of pastoral leases owned by Dorothy Deborah Cock being contributed to the partnership to admit her as a partner from the 15th September 1959" and then goes on to say "and it is further agreed that William Alfred Cock will sell his interests in the partnership of William Alfred Cock and Frederick John Cock to Dorothy Deborah Cock and/or the nominee of Frederick John Cock, including Kaluwiri." The words "in consideration of pastoral leases owned by Dorothy Deborah Cock" do suggest that it was part of the consideration for the making of the agreement, but when one reads lower down it does appear that it was intended to give Frederick John Cock the right to nominate other persons whether or not Dorothy came into the partnership. Just why her leases were to be thrown in in the event of her coming into the partnership is not clear. It is said that those leases might be of some value as adjoining the town site of Agnew. They abutted on the north boundary of Kaluwiri. The plaintiff, Frederick John Cock, could not have safely concluded an agreement with his sister alone, because the area of the pastoral land she held, together with the total area of all the leases formerly held by the members of the partnership exceeded two million acres, but the question is whether on a fair construction the agreement provides for her to come in solely. The words "and/or" could be read "Dorothy or such other persons as might be nominated". If Dorothy were the only partner coming in the forfeiture provisions of section 113 would apply, but the right of nomination belongs to the continuing partner and the awkward words "and/or" in their context could mean that the new partners must include Dorothy (if she chose to come in) with such others as the continuing partner might nominate if she does so elect, or in the alternative any others that the continuing partner might select if she did not exercise her choice. In this case the continuing partner selected the other plaintiffs as his nominee, one is his brother, the other two are his sisters. In my opinion the proper construction of the document is that Frederick John Cock had the right to nominate another or others in addition to Dorothy if she chose to come in; or if she did not to nominate in the alternative another or such other persons as he might select.

In my opinion the agreement for dissolution took effect immediately. The provision for admission of Dorothy and such other nominees as Frederick John might select was put in for the protection

of the leaseholds in case he could not find partners to come in with him. Looked at in this light it might be considered as a condition subsequent which if not performed served to preserve the status quo.

As to the question of stamp duty: The document was put in evidence in the course of the plaintiffs' case. No objection was made at the time to its not having been stamped. There was a revenue office cancellation stamp on its face, this bore date the 21st July 1960 - approximately one year after its execution. The cancellation stamp is commonly put on a document by arrangement with the stamp office when the party liable for the duty desires to postpone payment and stamping owing to some difficulty in assessment, but there is no legal sanction for such a practice. When Mr. Burt was moving for dismissal of the claim he mentioned that the document was not properly stamped and therefore could not lawfully be accepted in evidence. At no stage had Mr. Ainslie been confronted with the question of payment of the stamp duty until the point was mentioned by Mr. Burt and then there was little or no opportunity for Mr. Ainslie to get the document stamped or to give an undertaking that he would see that the appropriate stamp duty was paid. Nor did the Judge make any specific demand that it should be paid. The assessment of the proper stamp duty relating to this document presents some difficulties: on the one hand the plaintiffs are claiming that it was an effective document to dissolve the partnership and on the other, the defendant is claiming that the document had no legal effect at all and if that were the case no stamp duty would be attracted. Then assuming the document does create enforceable contractual rights the question of assessing the value of what passed under the agreement presents some difficulties. Section 27 of the Stamp Act 1921-1962 precludes reception of any document in evidence in a civil case if the document is not properly stamped. Subsection 2 of section 29 provides the machinery for stamping an unstamped document which is tendered in evidence. The court may assess the duty and fines and then the document may be received in evidence. At the conclusion of argument on Mr. Burt's motion to dismiss, the Judge granted the motion without giving reasons. It was not until the following day when the reasons were delivered, that Mr. Ainslie learned that one of the reasons was the rejection of the document on the ground that it was not stamped. But the stamp duty depended on the contractual validity of the document and (if it was to be considered as a contract) whether it had become moribund by reason of the non-performance of the alleged condition precedent.

The position is that on a court being asked to receive a document in evidence as proof of some act, no resort to admission of the fact or to secondary evidence is available to obviate the consequences of section 27, which reads: "Except as otherwise provided ..... no instrument executed in Western Australia ..... shall except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful, or available at law or equity, unless it is duly stamped ..... " (see *Dent v. Moore*, 26 C.L.R. 316). However as Dixon J. (as he then was) points out in *Shepherd v. Felt and Textiles of Australia* 45 C.L.R. 359; at p. 383, the condition expressed in the section is prefaced by the word "unless" and that once the stamp has been affixed even though out of time the instrument operates ab initio. At p. 384 he says:

"In *Chevret v. Jones* (1822, 6 Madd. 267; 56 E.R. 1093) Sir John Leach V.C. directed that a suit upon an unstamped instrument should go on, but that before the decree was delivered the instrument should be produced to the Registrar, stamped"

and he (Dixon J.) proceeded to point out that the principle had been applied in numerous cases (and see per Isaacs J. in *Dent v. Moore*, supra at p. 334).

This is a case where the document should have been conditionally received subject to Mr. Ainslie giving an undertaking that he would have the document stamped according to the exigencies of the case, and if necessary judgment could have been withheld until the undertaking was carried out.

It was for these compelling reasons that we set this aspect of the matter at rest during the hearing of the appeal and accepted Mr. Ainslie's undertaking.

On this appeal the respondent raised matters other than those on which the Trial Judge dismissed the action. It is necessary to mention only three. The first is the question of illegality already touched on. In paragraph 4 of the defence the defendant alleges:

"If it be held that the document .....  
was contractual ..... then the same (sic) was illegal  
because the plaintiff Frederick John Cock would thereby

become beneficially interested in leases of pastoral lands to an extent whereby the aggregate area of pastoral lands in which he was beneficially interested would exceed one million acres contrary to section 113 of the Land Act."

It has been pointed out that the term "illegal" is not a happy way of expressing a class of contract to which the law refuses to lend its aid as being contra bonos mores or contrary to public policy or plainly an agreement to commit a crime, crime being construed in its plainest sense - e.g., to commit a murder or to do some act which is expressly forbidden by Statute under pain of a penalty the nature of which is such that the law may punish with such severity as to leave no illusion that it is regarded so seriously as to be forbidden as contrary to the criminal law. Many statutes leave no doubt about the matter by declaring that a contract which infringes its terms shall be illegal null and void.

Performance of the contract is the test which is material in considering any agreement which is claimed to be unenforceable by the court; would its performance involve doing anything which falls in any of the categories mentioned.

The first problem is to construe the legislation.

Section 113 of the Land Act is an important policy provision relating to pastoral leases which presents difficulties of construction. It declares that the maximum area of pastoral land which may be held by one person or by two or more persons jointly . . . . shall not exceed one million acres (sub-s. (1) ) and that includes a person who takes an equitable title (sub-s. (2)) or who takes a transfer of a legal title and acquires an equitable title in other pastoral leasehold lands (sub-s. (2a)). The section provides a penalty of £5 a day while the person concerned holds or is beneficially interested in an area of pastoral land in excess of the maximum (sub-s.(3)) and further declares that the lease or leases are liable to forfeiture (sub-s.(4)). I have underlined the words "liable to forfeiture" in order to stress the point that the forfeiture need not necessarily come about. That question is left for the determination of the responsible minister of the Crown.

Sub-s (9) covers cases which clearly should be exempted; that is pastoral leases held by an executor, administrator or trustee as personal representative or trustee; or pastoral leases acquired on intestacy or by legacy or right of survivorship in which event the person entitled is given a reasonable time to dispose of his excess holdings. Sub-s. (10) gives protection to a mortgagee against forfeiture if the mortgagee has not been in possession for two years or more; or if the mortgage has not been foreclosed.

We were told that the area held by the partners in this case was two million acres; and that although it was in excess of the million acres allowed by sub-s. (1) of section 113, that the partners held it lawfully (see subsection 11). If that were so, there was nothing to prevent Fred from getting an enlarged interest in the same two million acres of pastoral land although as the subsection shows he would not have been able in the circumstances to qualify for an interest in Dorothy's leases. The difficulty of construing the section stands out when a few of the cases which may arise are considered: a person may become unwittingly entitled to an area in excess of the permitted maximum. For example, one may declare himself to be a trustee for another who already has pastoral land. A valid trust may be declared without the necessity for obtaining the consent of the cestui qui trust and without his knowledge. The declarant may know nothing of the extent of the holdings of the cestui qui trust. Should the legislation then be construed so strictly as to ipso facto not only destroy the estate of the cestui qui trust in the land passing to him but in other lands he already holds. Questions of knowledge, motive and intention may well come into the factual consideration of the legal quality of an act. In this connection sections 177 and 560(1) of the Criminal Code could have some bearing, but it does not seem necessary or advisable to go into this now.

Mr. Burt's submission to the trial judge at the conclusion of the plaintiffs' case was very brief, and it is difficult to see to what point he was directing his argument, unless it was to say that for some interval pending the selection of nominees the plaintiff Fred held an area in excess of one million acres, that is assuming (what the defendant denies) that the document had contractual force. The same point is briefly raised at p. 35 of the transcript on appeal.

It might be urged here that both named parties to the document (the plaintiff Fred and his defendant brother Bill) were intending to use a method of carrying out the dissolution which would not infringe section 113. Indeed Mr. Ainslie asserts that here were two pastoralists of many years standing who might be expected to be well aware of the position.

If there were a lacuna it might be argued that Bill held the legal and beneficial title until Fred found and appointed a nominee, a matter which well might take some time. If it should be considered that Fred's beneficial interest was enlarged in the pastoral leases already held, the question may arise did Fred acquire anything in contravention of the Act? Sub-s. (11) of s. 113 has been already referred to. Paragraph (a) of subsection (11) saves from liability to forfeiture and permits the lawful holding of areas and beneficial interests in areas exceeding one million acres where such excess areas and interests were acquired consistently with legislation in force prior to the enactment of subsection (2a) which in 1939 widened the conception of the million acre limitation. Paragraph (b) of subsection (11) provides that no further area is to be acquired unless the person concerned can qualify under sub-s. (2a) but if it is not so acquired a penalty of five pounds per day - a fairly light penalty in the circumstances - is payable. There is no provision for forfeiture in this case.

In my opinion in this case the contract evidenced by the writing was not shown to contemplate an illegal object (cf. *Waugh v. Morris* (1873) L.R. 8 Q.B. 202, at p. 208). Nor does the evidence demonstrate that an illegal act would necessarily result if it were carried out (cf. *Smith v. White* (1866) L.R. 1 Eq. 626). The allegation of illegality has not been made out as the case stands.

My own predilection would have been to leave this point alone. True Mr. Burt is entitled to raise it notwithstanding the trial judge did not make it a ground for dismissing the plaintiffs' claim. It is possible (I do not say probable) that there could be some evidence relating to this issue which the defendant may want to advance.

As to the question of parties, it is clear that Fred has a right to sue. As to the other plaintiffs, their case might well be distinguished from that of a person not a party to but purporting to be given a benefit under a contract (*Midland Silicones v. Scruttons*, 1959, 2 All E.R. 289) and the present case where an outsider claims by subsidiary contract or assignment to take part of the benefit of a proprietary interest which is the subject matter of a contract.

The question of laches, I reject from consideration. I just mention it with the caution that it should not have been raised at the hearing. It was not pleaded by the defendant. Even if Mr. Burt had raised it he should not have been allowed to do so without being put to his election as to calling evidence.

The appeal should be allowed and a new trial ordered.

I certify the above and the foregoing ten pages to be a true and correct copy of the reasons for judgment given by the Honourable the Chief Justice in the above matter on 8th October 1965.

John R. Rineford

ASSOCIATE.

12th October 1965.

Heard: 20th & 22nd July, 1965  
Delivered: 8th October, 1965.

IN FULL COURT:

JACKSON J:

C. No 58/1962

FREDERICK JOHN COCK, THOMAS  
HENRY COCK, ALMA JOAN GODFREY  
and BEATRICE GRACE RIDLEY

Appellants  
(Plaintiffs)

v.

WILLIAM ALFRED COCK

Respondent  
(Defendant)

Counsel: Mr R.I. Ainslie QC and with him Mr D.M. Watt for  
appellants.  
Mr F.T.P. Burt QC and with him Mr R. Chappell for  
respondent.

The plaintiffs (appellants) sued for specific performance of and agreement of the 29th July 1959, the terms of which have been stated in the judgment of the Chief Justice. Considered in the light of the circumstances then existing, the general intention of the two actual parties to the agreement, as disclosed in the document, becomes reasonably clear, notwithstanding some textual difficulties and lack of precision. According to my construction of the document, F.J. Cock and W.A. Cock agreed to dissolve their partnership as at the 15th September, 1959; if Dorothy Cock wished to join with F.J. Cock in a new partnership, she was to bring in the pastoral leases held by her; the interest of W.A. Cock in the partnership assets (with certain stated exceptions) was to be transferred to F.J. Cock's nominees, including Dorothy Cock if she wished to come in; the consideration to be received by W.A. Cock was £55,000 to be paid from various sources by F.J. Cock, who was to assume all the liabilities of the partnership. On this view, the first part of the agreement referring to Dorothy Cock should not be interpreted as constituting a condition precedent to the operation of the agreement. I agree entirely with the opinion of the Chief Justice on that matter and do not wish to add anything for myself. I also agree with his judgment in relation to the stamp objection.

Thus it follows, in my view, that the suit should not have been dismissed, on the grounds given by the learned trial Judge, at

the close of the plaintiffs' case. But the defendant contended before this Court, as he was entitled to do, that there were also other grounds on which the same result should follow. He raised a defence of laches, but this was not pleaded and in any case it depends so much on a review of the whole evidence at the trial that effect should not be given to it at this stage. He also contended that the agreement was defective in that it contained no express covenant by anyone to buy W.A. Cock's interest in the partnership; but this objection has, I consider, no substance if I am right in the construction I have placed on the agreement. He next claimed that the plaintiffs other than F.J. Cock had no right to sue because they were not parties to the agreement and took no beneficial interest under it, being unnamed and unascertained at the time when the document was executed. As at present advised, it seems to me that there is much force in this argument, but I need not express any final opinion on it, because it still leaves F.J. Cock as a competent plaintiff able to enforce the agreement. Then it is said that there never has been a nomination by F.J. Cock of nominees to take an assignment of W.A. Cock's interest in the partnership. This may be a sound contention, but I think it should be resolved at the trial and not on the present appeal. It involves a careful consideration and evaluation of the evidence which has not yet been undertaken. It may also involve some clarification of the statement of claim, for nowhere is it pleaded that the plaintiffs other than F.J. Cock were his nominees to take the defendant's interest in the partnership. Paragraph 4 of the Statement of Claim alleges that "the plaintiffs Thomas Henry Cock, Alma Joan Godfrey and Beatrice Grace Ridley as nominees of the plaintiff F.J. Cock purchased the share or interest of the defendant in Riverina, Wilbah and Perrinvale Stations near Menzies for the sum of £37,500". From p.30 of the Appeal Book it appears that leave was given at the trial to amend this paragraph to include a reference to Kaluwiri Station, subject to the precise terms being formulated; but this does not appear to have been done. It is not in accordance with the facts as I understand them that there was any "purchase" by the plaintiffs other than F.J. Cock; and in any

event it is not clear that the four stations comprised the whole of the partnership assets, other than those which W.A. Cock was taking as part of his consideration. But the resolution of this problem, if it can be resolved, depends partly on the evidence, and it is not a ground upon which the suit should be dismissed without the defendant being put to his election not to call evidence.

The last matter raised for the defendant was that the agreement was illegal and therefore would not be enforced by a Court. This matter is pleaded in para. 4 of the defence in these terms :-

"4. Further as to paragraph 3 of the statement of claim the defendant says that if it be held that the document therein referred to was contractual and that upon its proper construction the plaintiff Frederick John Cock acquired an interest in its subject matter then the same was illegal because the plaintiff Frederick John Cock would thereby become beneficially interested in leases of pastoral lands to an extent whereby the aggregate area of pastoral lands in which he was beneficially interested would exceed one million acres contrary to section 113 of the Land Act." It may be taken for granted that the partners were well aware of the provisions of s.113 which prohibit one person holding more than one million acres under a pastoral lease, or becoming beneficially interested in a lease of pastoral land of an area exceeding that acreage. For a breach of the section a daily penalty is prescribed and in addition the leases are liable to forfeiture. It is said that the four station properties of the partnership had an aggregate area of nearly two million acres, but the holding of this area by the two partners may have been permitted by sub-s. (8) of s.113. If, as is suggested, F.J. Cock was in effect buying out W.A. Cock's interest in the partnership, it might be open to infer from the evidence that the partners sought to avoid any breach of s.113 by providing in their agreement for the transfer of that interest, including the pastoral leases, to F.J. Cock's nominees. For if, by the 15th September, the date of dissolution, the nominees had been appointed and F.J. Cock had made appropriate arrangements with them to ensure that the transfer to them did not lead to a resulting

trust in his favour, it could be argued that the beneficial interest in one-half of the leases would have passed on that date to the nominees and no infringement of s.113 would have occurred. But if by then no-one had been nominated to take over W.A. Cock's interest in the partnership, then it might follow that his beneficial interest in the leases passed on the date of dissolution to F.J. Cock.

Assuming, but without deciding, that this would involve an infringement of s.113, it does not follow merely because a contravention of a statute occurs incidentally in the course of performance of a contract, that the contract itself becomes illegal and unenforceable. This agreement was not on its face illegal; it would appear that it could have been performed entirely in a legal manner and without any breach of s.113. If it is desired to avoid a contract not ex facie illegal on the ground of illegality, it must be shown that the parties intended that it should be illegally performed, and this will not be presumed in the absence of proof - indeed the presumption is the other way. Authority for these propositions may be found in Hutchinson v. Scott, 3 C.L.R. 359, citing Lord Blackburn in Waugh v. Morris, L.R. 8 Q.B. 202; a modern instance may be found in Patterson v. Lowe, 1955 St. R.Qd. 437. In the absence of evidence from the defendant, there appears to be nothing to rebut the presumption that the parties did not intend any illegality in the course of performance. Moreover, in this suit, the plaintiffs are seeking an assignment of the defendant's interest not to F.J. Cock, but to the remaining plaintiffs and this does not appear to involve any illegality. But the ultimate decision on this aspect of the case depends in part on a consideration of the terms of s.113 of the Land Act and in part on conclusions of fact to be reached after hearing and weighing all the evidence on both sides. It would be most unsatisfactory for this issue to be decided at this stage of the proceedings.


For these reasons, I consider the appeal should be allowed and the judgment dismissing the plaintiffs' claim should be discharged. There should be an order for a new trial. I do not think in the circumstances it is desirable that the trial should merely be

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continued. The Judge at the trial had plainly reached some firm conclusions adverse to the plaintiffs and I think it is better in those circumstances that the matter should begin de novo before another Judge.

I CERTIFY the above and foregoing four pages to be a true and correct copy of the Reasons for Judgment given by the Honourable Mr Justice Jackson in the above action on the 8th day of October, 1965.

DATED this 13<sup>th</sup> day of October 1965.

  
ASSOCIATE