

OPTIONS

I. Contractual Options and Related Legal Rights

It is firmly settled that an offer is a mere *nudum pactum* without any immediate legal effect¹; this is true even where the offeror has made a promise, unsupported by consideration, that he will not retract his offer for a specified period². If, however, the offeror has received consideration for his promise not to retract, then the offeree can be certain that the offer will stand for the agreed period: he is no longer a mere offeree but the holder of a binding option (an optionee³).

The common law recognizes and enforces not only options created by *inter vivos* transactions, but also options created by wills. The creation of the latter type of option is not subject to contractual principles, but the rules of construction which apply to both types are largely identical. For example, *Sharp v. The Union Trustee Co. of Australia Ltd.*⁴ involved an option to A and B to purchase the optionor's share in a business "should both A and B be living at the time of my decease or the survivor of them if one be deceased". The question was whether A could exercise the option after B's death which had occurred after the death of the optionor. As the judgment of the High Court shows, problems of this kind raise questions of construction which do not turn on the distinction between contractual options and options contained in wills.

Although options are rather special contractual arrangements, they seem to be subject to the usual canons of construction. *Australian Can Co. Pty. Ltd. v. Levin & Co. Pty. Ltd.*⁵, to take a random example, demonstrates the application of the rule *ut res magis valeat quam pereat*. The lessor of a piece of land purported to give the lessee an option "at any time during the currency of this lease . . . to purchase the premises hereby demised as a freehold for the sum of £12,500 and in the event of its exercising this option the terms of such purchase shall, *inter alia*, be . . . (here follow terms concerning payment) and in any contract the provisions of Table A of the Transfer of Land Act 1928 together with all such further provisions and agreements as may be determined

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1. *Dickinson v. Dodds* (1876) 2 Ch. D. 463, at 472 per James L.J., and at 475 per Mellish L.J.; Lücke, "Striking a Bargain" (1962) 1 Adelaide Law Review 292, at 304 *et seq.*
2. *Routledge v. Grant* (1828) 4 Bing. 653.
3. The words "optionor" and "optionee" may not be elegant, they are, however, clear and most convenient and are therefore coming into use more and more [cf. Cheshire & Fifoot: *Law of Contract* (Aust. edition by J. G. Starke and P. F. P. Higgins, 1966) at 539; *Huppert v. Stock Options of Australia Pty. Ltd.* (1965) 112 C.L.R. 414, at 418 per Barwick, C.J.].
4. (1944) 69 C.L.R. 539.
5. [1947] V.L.R. 332.

upon by the parties shall be incorporated and apply in relation thereto . . ."⁶ If this meant that the terms of the contract of sale were, at least partly, still to be agreed, then the "option" was illusory and its exercise could not have produced a binding contract. Construing the option so as to make it effective, the Full Court of the Supreme Court of Victoria considered, in the words of Fullagar J., that "the parties have directly or by reference provided for all the terms of their formal contract, and have merely added—unnecessarily it is true—that, if they should agree upon further terms, those further terms are to be added to the formal contract . . . if further terms are agreed upon, they are to go into the formal contract; if not, the terms stated or indicated will be the terms of the formal contract"⁷. Macfarlan J.'s order that the defendant should execute a proper contract of sale, was thought appropriate and affirmed by the Full Court. Options granted to several optionees tend to give rise to difficult problems of construction: is the option to be exercised jointly or severally? Can a purported exercise by one be regarded as an exercise on behalf of both?⁸

Perhaps the most common problem of construction encountered in the field of option contracts lies in the delimitation of options from similar contractual arrangements, particularly "rights of first refusal"⁹. Rights of first refusal are often found in the context of land sales and are then also referred to as "rights of pre-emption"¹⁰. A right of refusal (or pre-emption) has been described judicially as "a negative obligation on the possible vendor requiring him to refrain from selling the land to any other person without giving to the holder of the right of first refusal the opportunity of purchasing in preference to any other buyer"¹¹. Unlike an option, a right of first refusal does not force a grantor to make a contract: where, for instance, he has granted a right of pre-emption over his land, he is free to keep the land forever. But if he does want to sell, he will have to make the first offer to the grantee¹². In *Emmett v. Kiely*¹³ it was argued that a typical right of first refusal in a lease¹⁴ turned into a "right to buy" (i.e. an option) as soon as the grantor made up his mind to sell¹⁵. Even though Mayo J. found no fault with the suggestion that a right should be made to depend on the existence of a state of mind¹⁶, he still

6. *Id.*, at 335 *et seq.*

7. *Id.*, at 339 *et seq.*

8. See *MacDonald v. Robins* (1953-54) 90 C.L.R. 515.

9. See *Mackay v. Wilson* (1947) 47 S.R. (N.S.W.) 315, at 325 per Street J.

10. *Ibid.*

11. *Ibid.* In *Woodroffe v. Box* (1954) 92 C.L.R. 245, Eggleston Q.C. stated in argument:

"The term 'right of first refusal' is an expression familiarly known to lawyers as importing an obligation to sell to one in preference to any other party but not an obligation to sell in any event."

12. *Supra*, n. 9.

13. [1946] S.A.S.R. 17.

14. "The lessee to have the first chance of buying the fee simple of the land hereby demised . . . for the sum of £6,000 if the lessor desires to sell and if he does not want to resume possession of the said hotel."—*id.*, at 19.

15. *Id.*, at 21.

16. His Honour characterized a state of mind as a fact and pointed out that its existence was open to proof by direct admission, or by statements and general conduct showing that the contemplated state of mind existed—*id.*, at 21 *et seq.*

remained critical of the argument, since it seemed to him incompatible with the words "first chance"¹⁷. On principle it would appear that **only** the actual conclusion of a contract with a third party, not mere negotiations, can give the holder of a right of first refusal a cause of action for breach of contract. However, it must be conceded at once that much depends on the construction of the instrument which creates the right. "First refusal" is not a technical, but a colloquial expression¹⁸, and a misleading one at that, since the grantee does not really want an opportunity of refusing an offer; he wants an opportunity of accepting it¹⁹. The most common "first refusal" is the right to have property offered (if the owner decides to sell) at the price at which a third party is willing to buy²⁰. But it is equally possible to agree that the property is to be offered to the grantee at a specified price before a sale to a third party (at whatever price) can be concluded²¹. Indeed, the contractual arrangements which can be described as "first refusals" show many variations; one learned writer has identified five distinctly different types²².

It is often difficult to decide whether a contract is meant to confer an option or a right of first refusal; the parties' choice of terms is not necessarily decisive. *Mackay v. Wilson*²³ involved a contract for the sale of a business combined with a lease of the land on which the business was conducted. In addition the contract contained the following provision: "First option for purchasing the property is hereby given to [the lessees] at £1,350"²⁴. The lessees claimed that this conferred on them an option to purchase and, after its purported exercise, sued for specific performance. Nicholas C.J. in Eq. found for the plaintiffs and his decree was upheld on appeal (Jordan C.J. dissenting). The four judges involved in the litigation adopted four different interpretations of the clause. Nicholas C.J. in Eq. decided to ignore the word "first" which preceded the term "option" and was thus able to regard the clause as creating a simple option²⁵. Jordan C.J. thought that "first" was all-important and that it turned what would otherwise have been an option into a right of first refusal²⁶. Davidson J. considered that the meaning of "first" was to create immediately an option to purchase, continuing during the term of the lease but remaining first only if exercised at once should competitors intervene²⁷. Similarly, Street J. suggested that the lessee's right, though a genuine option, was qualified by

17. *Id.*, at 20 *et seq.*

18. See *Woodroffe v. Box* (1954) 92 C.L.R. 245, at 257, per Fullagar and Kitto JJ.

19. *Ibid.*

20. *Id.*, at 251, *per* Webb J.

21. Cf. *Emmett v. Kiely* [1946] S.A.S.R. 17.

22. *Corbin on Contracts* (1950), §261.

23. (1947) 47 S.R. (N.S.W.) 315.

24. *Id.*, at 316.

25. *Id.*, at 317.

26. *Id.*, at 318 *et seq.* The learned Chief Justice concluded:

"I think that what the clause means is that the Wilsons agree not to sell the property to anyone else without first giving [the lessees] an opportunity of buying it for £1350."—*Id.*, at 319.

27. *Id.*, at 321.

the lessors' right to seek another purchaser, provided they gave, on finding such a person, the lessees the opportunity of buying first²⁸.

There are contractual rights which are closely akin to both options and rights of first refusal and which defy precise classification. *Woodroffe v. Box*²⁹ provides an example. The tenant of certain business premises at Launceston, Tasmania, agreed to pay to the owner £100 and in consideration thereof the owner covenanted that upon his death his executors "will . . . give to the tenant . . . the right of first refusal to purchase the said premises for thirteen thousand pounds"³⁰. In the Supreme Court of Tasmania Morris C.J. held that the contract conferred no more than an ordinary first refusal, i.e. "no more than a right in priority to all others to refuse an offer made by the owner to sell, imposing however, no obligation on the owner to make that offer"³¹. On appeal Fullagar and Kitto JJ. (Webb J. dissenting) disagreed with Morris C.J. Although they did not go so far as to regard the clause as conferring an ordinary option, they considered that it stood for more than a mere right of first refusal:

"Where the promise is to give the right of 'first refusal' on a fixed future date or on the occurrence of the specified event (whether . . . an event which may or may not happen, or, as in the present case, an event which must happen sooner or later), there is evident ground for saying at once that it may not be right to give the [words 'first refusal' their] full prima facie significance. For it is difficult to suppose that the parties intended that the promisor was not to be bound to do anything on the fixed date or on the occurrence of the specified event"³².

Accordingly their Honours regarded the clause as a promise that the executors would, upon the owner's death, offer the property to the tenant at £13,000³³. This is not a right of first refusal, since the owner (or his estate) was not free to retain the land. It is not an option since it is not exercisable by the tenant until after the executors had actually made the offer. Their Honours regarded it as a right *sui generis* at common law, but as an option in equity, since they thought the equitable maxim applicable that equity regards that as done which ought to be done. This meant that for equitable purposes the offer was regarded as made by the executors regardless of the actual facts³⁴. The tenant had paid £100 for his right to have an offer made³⁵; needless to say, this was essential, since equitable intervention depended on valuable consideration having been given by the tenant: equity will not assist a volunteer.

28. *Id.*, at 327.

29. (1954) 92 C.L.R. 245.

30. *Id.*, at 246. The actual arrangement was more complex; unessential features have been omitted here.

31. *Id.*, at 247.

32. *Id.*, at 257 *et seq.*

33. *Id.*, at 258.

34. *Id.*, at 261.

35. This circumstance assisted Fullagar and Kitto JJ. in construing the clause: ". . . if the [executors'] construction of the agreement be correct, a substantial consideration is being paid for something which is as likely as not to prove wholly illusory."—*id.*, at 258.

II. Options and the Doctrine of Consideration

So far only the "ticklish" problems of construction associated with options and related legal rights have been examined³⁶. The general legal problems which arise from options are hardly less intricate.

Options can be valuable; they are often traded like other commercial commodities³⁷. Substantial sums are often paid as consideration for options³⁸. However, the consideration given for an option need not be adequate or valuable to be legally effective³⁹. In *Niesmann v. Collingridge*⁴⁰, for instance, an option to purchase a house property was granted in exchange for the payment of sixpence; there was no doubt that this was a sufficient consideration. In the real estate business option money is often paid on the understanding that it will be returned to the optionee if he does not exercise the option; it seems probable that even the temporary possession of the money will be regarded as a sufficient benefit to the optionor to bind him to the option⁴¹.

It has been said that any consideration sufficient to support an ordinary contract will support an option⁴². Speaking generally, counter-promises (even where no option money is paid at all) must be regarded as sufficient to make options binding. This is borne out by the common case of an option embodied in a wider bilateral contract; leases, for example, often contain options to purchase in favour of the lessee⁴³, as do hire-purchase agreements in favour of the hirer⁴⁴. It seems doubtful, however, whether a nominal promise (for example the promise to pay sixpence) would be just as effective as a nominal actual payment⁴⁵. In such a case the bare logical sufficiency of the nominal promise would scarcely conceal the parties' intent to avoid the consideration requirement and the fact that actual payment of the promised amount is not really contemplated. If invited to recognize the sufficiency of such a promise the courts would probably feel, as Pollock C.B. did in a similar context, that "by the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts"⁴⁶.

36. It was with reference to problems of construction that Jordan C.J. observed in *Mackay v. Wilson* (1947) 47 S.R. (N.S.W.) 315, at 318: "An option is nearly always a ticklish thing."

37. Cf. *British South Africa Co. v. Varty (Inspector of Taxes)* [1965] 3 W.L.R. 47; *Huppert v. Stock Options of Australia Pty. Ltd.* (1965) 112 C.L.R. 414.

38. Cf. *A.P.A. Fixed Investment Trust Co. Ltd. v. Federal Commissioner of Taxation* (1948) 8 A.T.D. 369.

39. *Corbin on Contracts* §263.

40. (1921) 29 C.L.R. 177.

41. *Williston on Contracts* (3rd ed., by W. H. E. Jaeger, 1957) §61, denies this, asserting that "the offeror receives no consideration and the offeree parts with nothing." The offeree, however, loses to the offeror temporary possession of the money and Williston does not explain why that cannot be regarded as sufficient consideration.

42. *Williston on Contracts* (3rd ed.) §61B, n. 9.

43. Cf. Halsbury: *Laws of England* (3rd ed., by Viscount Simonds, 1952), vol. xxiii, 1090-1093.

44. See *Helby v. Matthews* [1895] A.C. 471.

45. It seems, however, that the sufficiency of such promises has been recognized in the United States—cf. *Corbin on Contracts* §263, at 500.

46. *White v. Bluett* (1853) 23 L.J.Ex 36, at 37. A similar reception would be given

Consideration given for options must comply with all the rules on sufficiency of consideration. For example, the requirement that the consideration move from the promisee must be satisfied⁴⁷; it is this rule which makes doubtful the complete effectiveness of the commonly-found option in favour of the optionee "or his nominee"⁴⁸.

Lawyers bent on reforming the common law by legislation have displayed impatience with the rule that a mere promise not to retract an offer is without legal effect. In 1937 the Law Revision Committee recommended legislation to make binding an agreement to keep an offer open even in the absence of consideration⁴⁹. Fortunately this proposal has not been implemented. The need for consideration provides a simple and legally certain means of distinguishing between mere offers and options. Moreover, this legal requirement is widely known amongst laymen and thus rarely a trap for parties who contract without the assistance of legal advisers. Were it to be removed its place would soon be taken by a multitude of confusing cases, all concerned with drawing an elusive line between proposals intended as options, and proposals intended as mere offers.

III. The Legal Nature of Options

Consideration or the presence of a sealed document⁵⁰ makes the option binding on the optionor. The optionor cannot withdraw without thereby breaking the option contract. This, however, does not necessarily imply that a purported withdrawal is legally ineffective. The exact legal effect of such a wrongful withdrawal by the optionor was examined by the High Court in *Goldsbrough, Mort & Co. v. Quinn*⁵¹. The defendant had granted to the plaintiffs for five shillings an option for the purchase of a tract of land situated in New South Wales. The defendant repudiated the arrangement alleging that it had been made under a mistake. The plaintiffs disregarded the repudiation and exercised the option within the set time of one week. Subsequently, they sued for specific performance. Simpson C.J. in Eq. dismissed the suit⁵², and this was plainly correct if the defendant's attempted retraction had in fact terminated the option. On appeal before the High Court, the defendant supported Simpson C.J.'s judgment on this basis:

"... the parties were never *ad idem*. Before the plaintiffs accepted the offer it had been withdrawn. The only contract proved is a contract to give an option. Assuming the defendant committed a breach of that contract, it is not the contract of which the plaintiffs are seeking

to the argument, advanced unsuccessfully in an American case, that the consideration was the optionee's agreement "to keep in consideration the expediency" of accepting the offer—cf. *Williston on Contracts* (3rd ed.) §61.

47. *Cheshire & Fifoot: Law of Contract* (6th ed., 1964) 64 *et seq.*

48. Cf. *Clark v. Lonergan* (1961) 78 W.N. (N.S.W.) 367.

49. Law Revision Committee 1937, Cmd. 5449, 6th interim report, 22 *et seq.*

50. *Williston on Contracts* (3rd ed.) §61B, at n. 14.

51. (1910) 10 C.L.R. 674.

52. *Goldsbrough Mort and Co. Ltd. v. Quinn* (1909) 10 S.R. (N.S.W.) 170.

specific performance. It has never been judicially decided that an offer is irrevocable when consideration is given"⁵³.

If it is required that the parties be *ad idem*, or even that they appear externally to be *ad idem* at the time at which the option is exercised, then this argument was indeed sound. However, the High Court held that the purported retraction by the defendant was without legal effect. This unanimous conclusion of the Court is reflected in Isaacs J.'s dictum: "... the law forbids the offeror retracting [the option]. He may attempt to do so . . . but his attempt is in sight of the law ineffectual"⁵⁴. It followed that the plaintiff's exercise of the option had brought a complete contract of sale and purchase into existence; accordingly the Court awarded specific performance to the plaintiffs. This result accords with the law in other common law countries⁵⁵, it has been re-affirmed in Australian judicial pronouncements in subsequent cases and must be regarded as firmly settled. There has been a good deal of speculation and debate in the Australian courts about the legal explanation for the irrevocability of the option in cases such as *Goldsbrough v. Quinn*⁵¹. Sir Owen Dixon has referred to that debate as a "standing controversy"⁵⁶, thus indicating that, in his view, the matter still awaits final clarification. It seems surprising that the problem has not been settled ere this, since in *Goldsbrough v. Quinn* itself Griffith C.J. presented a convincing analysis of the problem. The learned Chief Justice considered that the problem before him called for an exact analysis of the legal nature of options. His Honour stated:

"... an offer may be withdrawn at any time before acceptance. A mere promise to leave it open for a specified time makes no difference, because there is, as yet, no agreement, and the promise, if made without some distinct consideration, is *nudum pactum*, and not binding. But if there is a consideration for the promise it is binding. This is often expressed by saying that an option given for value is not revocable . . . I think that the true principle is that in such a case the real transaction is not an offer accompanied by a promise, but a contract for valuable consideration, viz., to sell the property (or whatever the subject matter may be) upon condition that the other party shall within the stipulated time bind himself to perform the terms of the offer embodied in the contract"⁵⁷.

This dictum has given rise to some difficulties of interpretation. In *A.P.A. Fixed Investment Trust Co. Ltd. v. Federal Commissioner of Taxation*⁵⁸ the question was whether payments received for an option to purchase certain land were income and therefore taxable. Barwick K.C.'s argument for the taxpayer, as described by Owen J., was "that the grantee of an option to purchase land thereby and immediately becomes a purchaser subject to a right to disclaim the purchase; and that these . . . payments were therefore at the time of their

53. (1910) 10 C.L.R. 674, at 676 *et seq.*

54. *Id.*, at 691.

55. See *Williston on Contracts* (3rd ed.) §61C: the rule seems to be assumed in *Morland v. Hales* (1910) 30 N.Z.L.R. 201.

56. *Braham v. Walker* (1960-61) 104 C.L.R. 366, at 376.

57. (1910) 10 C.L.R. 674, at 678.

58. (1948) 8 A.T.D. 369.

receipt instalments of the purchase price received by the taxpayer . . ."⁵⁹. In support of this submission Barwick K.C. cited Griffith C.J.'s dictum from *Goldsbrough v. Quinn*⁶⁰. It was essential to the taxpayer's case that the transaction under review should be such as to make the grantee of the option a purchaser. The common law has no quarrel with the concept of a purchaser who possesses a contractual right to rescind⁶¹. Barwick K.C.'s difficulty, however, was that Griffith C.J.'s dictum in no way equated the holder of an option with a purchaser who possesses a contractual right to rescind the contract. Rather, Griffith C.J. described the option as a "contract . . . upon condition that the other party (i.e. the optionee) shall within the stipulated time bind himself . . ."⁶². Nor can we accuse Griffith C.J. of having given any support to the notion that the optionee can be described as a purchaser who has already agreed to purchase on condition that he will later bind himself to the contract by an exercise of the option. This would have involved the concept of a present obligation, conditional upon the promisor's binding himself to it, which is a legal and logical absurdity. We must surely share Owen J.'s strong doubts whether Griffith C.J. had meant to imply that there was such a legal proposition⁶³. Indeed, Griffith C.J. must have known that such an interpretation of options to buy had been decisively repudiated by the House of Lords in the leading case of *Helby v. Matthews*⁶⁴. If the learned Chief Justice was guilty of any heresy, it was the very minor one of having employed the expression "contract to sell" to describe a situation which only one of their Lordships in *Helby v. Matthews*⁶⁴ considered could be so described in strict legal terminology. Lord Macnaghten in that case characterized an option to buy (which was coupled with a contract of hire in a typical hire-purchase transaction) as "a conditional contract or undertaking to sell"⁶⁵ and further intimated that he considered the optionee bound by nothing but the contract of hire—until he exercised the option. Lord Herschell L.C. regarded this choice of terms as admissible in a popular sense, but misleading legally:

"It was said in the Court of Appeal that there was an agreement . . . to sell, and that an agreement to sell connotes an agreement to 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

59. *Id.*, at 370.

60. *Supra*, at n. 57.

61. A contract of sale "on approval" or on "sale or return"—cf. section 18, rule 4 of the Sale of Goods Act (U.K.)—is an example of this type of arrangement. It may be somewhat doubtful whether such a right can—consistently with the existence of a bilateral contract—be completely unfettered.

62. (1910) 10 C.L.R. 674, at 678.

63. (1948) 8 A.T.D. 369, at 371.

64. [1895] A.C. 471. It was held in *Helby v. Matthews* that a hirer of goods who had been given the option to purchase upon payment of the total hire was not "a person having agreed to buy goods" within section 9 of the Factors' Act 1889 (U.K.). As Lord Herschell L.C. stated: "I cannot think that an agreement to buy, 'if he does not change his mind', is any agreement to buy at all in the eye of the law. If it rests with me to do or not to do a thing at a future time, according to the then state of my mind, I cannot be said to have contracted to do it."—*id.*, at 476.

65. *Id.*, at 482.

have agreed to sell, though an agreement to sell in this sense . . . certainly does not connote an agreement to buy . . ."⁶⁶

Lord Watson, too, conceded that the option could, in popular language, be described as an agreement to sell; but his Lordship also insisted that the existence of a seller in that sense did not imply the existence of a buyer. As a matter of strict legal terminology, his Lordship protested that the option contract was neither an agreement to sell nor an agreement to buy: "In order to constitute an agreement for sale and purchase, there must be two parties who are mutually bound by it"⁶⁷.

Whether Griffith C.J.'s use of the term "contract to sell" accords with strict legal terminology is, perhaps, a problem of secondary importance which can be allowed to rest. The important substantive point made by the learned Chief Justice is that the granting of a binding option produces the legal effect of binding the grantor immediately to the performance of the terms of the contract envisaged by the option, and this seems undeniable. Admittedly, the optionor's duty to perform is conditional, the condition being that the optionee exercises the option. However, this condition, an act of volition on the part of the optionee, in no way depends upon the will of the optionor (it is a "casual" as distinct from a "potestative" condition, to use a phrase current in the civil law⁶⁸). Thus, the optionor's duty to perform, though conditional, is in no sense illusory. Accurate analysis seems to require that we think of an option as a *proposed* bilateral contract to which the optionor binds himself before the optionee does and which, while it is an option, constitutes a unilateral contract with a special condition attached, viz. exercise of the option by the optionee. Terminologically, this analysis may seem unusual, but conceptually it is surely the simplest explanation⁶⁹. It is not a valid objection to this proposed analysis that the optionor is not bound to perform the terms of the main contract unless the option is exercised. An agreement can be described as a unilateral contract, even though the promisor's duty of performance depends on a chance condition. To illustrate the point one need go no further than to refer to *Carlill v. Carbolic Smoke Ball Co.*⁷⁰ where nothing was payable unless the plaintiff caught influenza. To analyse options in this way has the obvious advantage of explaining the central feature of options, that is, their irrevocability, by reference to the familiar, indeed the axiomatic, rule that a party can no longer effectively withdraw from a proposed contract after he has become bound by it⁷¹.

A markedly different analysis of options was advanced by Isaacs J. in *Goldsbrough v. Quinn*⁵¹, and this became the basis of the "standing controversy". Having stated that an attempted revocation by the optionor is ineffectual, Isaacs J. explained: "He has parted with the right to alter his mind for the period limited, and he cannot in breach of his contract be heard to say

66. *Id.*, at 477.

67. *Id.*, at 479 *et seq.*

68. See *Black's Law Dictionary* (4th ed., 1951) "Condition".

69. Some American courts seem to have adopted this analysis—see *Williston on Contracts* (3rd ed.) §61B.

70. [1893] 1 Q.B. 256.

71. See *Offord v. Davies* (1862) 12 C.B. (N.S.) 748.

the contrary"⁷². The option contract, so the learned judge continued, "does not alter the nature of the offer, it merely ensures its continuance, by creating a relation in which the law forbids the offeror retracting it"⁷³. The essence of this view seems to be that the law renders an attempted revocation ineffectual by treating it as not having been uttered⁷⁴; however emphatically the optionor may be protesting, the law has irrevocably cast him into the posture of an offeror who continues to adhere to his offer and thus co-operates in the making of the contract at the time of acceptance. Options, so Isaacs J. observed, are different from offers only insofar as the continuance of an offer depends on the subsequent conduct of the offeror, whilst the continuance of an option is ensured by the option contract, whatever the optionor's subsequent conduct⁷⁵. This also implies that the option contract (a contract to keep the offer open) is distinct and separate from the final contract which results from the exercise of the option. The fiction implicit in this analysis (that the grantor is adhering to his option when in fact he is not) and the fact that it is conceptually somewhat complex, have not prevented it from gaining wide support⁷⁶. Latham C.J., for instance, stated in *Commissioner of Taxes (Qld.) v. Camphin*⁷⁷:

"An option given for value is an offer, together with a contract that the offer will not be revoked during the time, if any, specified in the option . . . If the offeror, in breach of his agreement, purports to revoke his offer, his revocation is ineffectual to prevent the formation of a contract by the acceptance of an offer within the time specified"⁷⁸.

To think of an option as an irrevocable contractual proposal seems natural enough; however, the legal concept "offer" has been given a rather special content by the cases. In the common law, offers derive their legal effectiveness not so much from their communication as from their continuation, that is, from the fact that at the time of acceptance the offeror still appears to be adhering to the contractual consent which he tentatively manifested in the offer⁷⁹. To a Common Lawyer, conditioned to think of offers in this way, "irrevocable offer" must indeed have a strange ring. Some of the most eminent early writers on the law of contract felt this difficulty acutely. Ashley thought that the notion of an "irrevocable offer" was "contrary to the legal conception of an

72. (1910) 10 C.L.R. 674, at 691.

73. *Ibid.*

74. McGovney, "Irrevocable offers" in (1913-14) 27 Harvard Law Review 644, at 645 *et seq.*

75. "[The option contract] does not alter the nature of the offer, it merely ensures its continuance by creating a relation in which the law forbids the offeror retracting it."—(1910) 10 C.L.R. 674, at 691, per Isaacs J.

76. See for example, Cheshire and Fifoot: *Law of Contract* (Aust. ed., 1966) 539.

77. (1937) 57 C.L.R. 127.

78. *Id.*, at 132. Isaacs J.'s analysis had, perhaps, been foreshadowed by Owen C.J. in *Eq. in Burns v. Allen* (1889) 10 L.R. (N.S.W.) 218. The learned judge there stated that he found it impossible to see any difference between a contract by the exercise of an option and a contract entered into by the acceptance of an offer:

"In both instances the contract is originally unilateral, but ceases to be so in the one case when the option is exercised, in the other, when the offer is accepted . . ." *id.*, at 225.

79. Cf. Lücke, "Striking a Bargain" in (1962) 1 Adelaide Law Review 293, at 304 *et seq.*

offer"⁸⁰. Similarly, Langdell considered that "an offer . . . which the party making it has no power to revoke, is a legal impossibility"⁸¹. These voices have been decried⁸², but never silenced. The difficulties which Ashley and Langdell saw have only recently again been made explicit by a distinguished English judge: "To speak of an enforceable option as an 'irrevocable offer' is juristically a contradiction in terms, for the adjective 'irrevocable' connotes the existence of an obligation on the part of the offeror, while the noun 'offer' connotes the absence of any obligation until the offer has been accepted"⁸³.

Isaacs J.'s view may possess a superficial attraction, since it purports to explain options in familiar terms ("offer and acceptance"). In truth, however, the advocates of this view are not able to explain the irrevocability of options at all. To say that the attempted revocation of an option is ineffective because it constitutes a breach of the contract not to revoke and therefore an unlawful act, means that reliance is placed on a form of promissory estoppel which is otherwise unknown to the law of contract. As Smith J. pointed out, commenting on Isaacs J.'s view, in *Ballas v. Theophilos*⁸⁴: ". . . the sweeping principle upon which this reasoning is based does not appear to be supported by the authority cited for it, and it was not adopted by the other members of the Court"⁸⁵.

Although the controversy about the nature of options is frequently mentioned in the courts, judges have tended to avoid committing themselves to one or the other view. An exception in Australia is the closely reasoned judgment of Smith J. in *Ballas v. Theophilos*⁸⁶, in which Griffith C.J.'s view is adopted⁸⁷. The only further judicial support for the same viewpoint was provided by Dixon C.J. in *MacDonald v. Robins*⁸⁸, where his Honour described the exercise of an option in the following terms: "[the optionee] was . . . claiming to make absolute by the exercise of a choice belonging to him the contingent contract of purchase contained in the clause, contingent upon an election to be made by, or under the authority of, the two lessees"⁸⁹.

There are judicial statements which could be interpreted as meaning that the controversy about the true nature of options is merely a dispute about words, about "descriptive names or labels"⁹⁰. With respect, it may not matter which of several synonyms we employ for legal description; but it can surely not be

80. *The Law of Contracts* (1911) at 26.

81. *Summary of Contracts* (1880) §178.

82. Cf. McGovney, "Irrevocable offers" in (1913-14) 27 *Harvard Law Review* 644, at 646.

83. *Varty (Inspector of Taxes) v. The British South Africa Co.* [1964] 3 W.L.R. 698, at 708, per Diplock L.J.

84. [1958] V.R. 576.

85. *Id.*, at 579.

86. [1958] V.R. 576.

87. A recent example in England is the judgment of Diplock L.J. in *Varty (Inspector of Taxes) v. The British South Africa Co.* [1964] 3 W.L.R. 698, 706-709.

88. (1953-54) 90 C.L.R. 515.

89. *Id.*, at 525.

90. *British South Africa Co. v. Varty* [1965] 3 W.L.R. 47, at 55, per Lord Morris of Borth-y-Gest.

seriously suggested that it is of no consequence whether a situation is analysed in terms of one or of another legal concept, when differing rules attach to these concepts.

The Australian judges have not gone to the extreme of branding the controversy under discussion as a mere quarrel about words. But there are *dicta* asserting its irrelevancy for another reason. In *Carter v. Hyde*⁹¹ Isaacs J. suggested that a decision in favour of one or other of the competing views was not possible in the abstract. The case raised the question whether an option to purchase the lease of a hotel was exercisable by the personal representatives of the optionee after the latter had died. Isaacs J. again felt that the decision turned, or at least might turn, on the true nature of the option involved in the case. The learned judge felt that he could sidestep his earlier controversy with Griffith C.J. by pointing out that on either view the document involved was an irrevocable offer. Having briefly set out the controversy as it appears in *Goldsbrough v. Quinn*⁹², the learned judge continued: ". . . be that as it may with respect to . . . 'options' in general, it is unquestionable law that the bargain of two parties must always be ascertained by reference to the words those particular individuals have themselves selected"⁹³. Isaacs J. then pointed out that the option contract before him contained the words "place under offer to him" and the words "agree that this offer shall not be revoked by me" and continued: "The very words of this document place it within the category of an offer created by a contract and irrevocable, and not in the category of an instant sale of the property . . . subject to a subsequently performed condition"⁹⁴. On the other hand, Dixon C.J. in *Braham v. Walker*⁹⁵ observed "that there does not seem to be much reason why the parties if they choose may not throw an option into the form of a conditional contract of sale"⁹⁶. When read in conjunction, these judicial pronouncements convey the impression that parties to an option have a choice between an irrevocable offer and a unilaterally binding contract, and that the words of the contract will tell us which they have chosen⁹⁷. If this were so, the Griffith-Isaacs controversy about the true nature of options would be deprived of much of its practical content; as Williams J. stated in *Ballas v. Theophilos* [No. 2]⁹⁸: ". . . there can be few documents with respect to which it is not true that, as Isaacs J. said in *Carter v. Hyde*: 'it matters not a straw which view was right in *Goldsbrough Mort & Co. Ltd. v. Quinn*'"⁹⁹.

91. (1923) 33 C.L.R. 115.

92. (1910) 10 C.L.R. 674.

93. (1923) 33 C.L.R. 115, at 123.

94. *Ibid.*

95. (1960-61) 104 C.L.R. 366.

96. *Id.*, at 376.

97. Similar views have been advanced in the United States—see *Williston on Contracts* (3rd ed.) §61C.

98. (1958) 98 C.L.R. 193.

99. *Id.*, at 207. The controversy would still be important in cases where the language used by the parties in creating the option is either not conclusive, because the contract is oral—cf. *Chalk v. O'Brien* [1932] S.A.S.R. 328—or where it is compatible with either construction—cf. *Clark v. Lonergan* (1961) 78 W.N. (N.S.W.) 367.

A variety of practical issues depend on the question whether options are irrevocable offers or conditional (unilaterally binding) contracts. Whether parties couch their option in terms of one or the other concept, however, seems in most cases purely fortuitous and certainly does not indicate that they intend their options to produce differing legal effects. To make the parties' choice of language the controlling consideration would therefore be undesirable. Fortunately, the conclusion which Isaacs J. advanced and which Dixon C.J. and Williams J. seemed willing to accept, is really a *non sequitur*. If the law regards options as unilaterally binding contracts, then the mere fact that the parties have described an option they have created as an "irrevocable offer" (no doubt to a layman a perfectly apt description which accords entirely with common sense) is a harmless *falsa demonstratio* which does not prevent the option from taking effect in the usual way¹⁰⁰. There is little doubt that Isaacs J.'s suggestion in *Carter v. Hyde* has bedevilled the law relating to options and will continue to do so for some time. It has been echoed too often to be simply forgotten; all hope must be pinned on an authoritative rejection by the High Court. Once this has occurred, the original Griffith-Isaacs controversy can be settled. As regards that controversy, the analysis expounded by Griffith J. in *Goldsbrough v. Quinn* seems clearly preferable. It explains the rights and duties of the parties without the help of unnecessary fictions. Because it is theoretically more satisfactory, it also yields better practical results. With its help, numerous practical issues can be resolved more simply, more consistently, and more justly than would be possible if Isaacs J.'s view were adopted.

(1) Options and the Statute of Frauds

It is a problem of obvious practical importance whether an option to conclude a contract which falls within the Statute of Frauds does itself have to be in writing to be enforceable. Some jurisdictions in the United States regard oral options of this kind as enforceable, whilst others consider that the provisions of the Statute of Frauds apply to options as well as to main contracts¹⁰¹. The latter cases are applauded by Williston who argues that to hold options exempt from the Statute would amount to exempting the main contract too, and would thus mean an evasion of the Statute of Frauds¹⁰². Although this is an understandable anxiety, it could not be relieved by equally generous reasoning in Australia with its more conservative principles of statutory construction. The applicability of the Statute of Frauds to options was discussed in the Supreme Court of South Australia in *Chalk v. O'Brien*¹⁰³. The plaintiff agreed in writing to hire and later purchase from the defendant a plant for distilling eucalyptus oil, and in consideration of this the defendant orally granted the plaintiff an option that he (the defendant) would purchase all the oil, at specified prices, which the plaintiff should be able to produce. The plaintiff produced one ton of oil and tendered it to the defendant who

100. This submission is not intended to deny the complete efficacy of an express or implied agreement that a revocation of the "option", though a breach of contract, should be legally effective; no case of this type has been encountered.

101. Cf. *Williston on Contracts* (3rd ed.) §491, at 540.

102. *Ibid.*

103. [1932] S.A.S.R. 328.

refused to accept or pay for it. The plaintiff claimed as damages, *inter alia*, the purchase price for this oil and the defendant pleaded that the contract was unenforceable under section 4 of the Sale of Goods Act, 1895 (S.A.). In the Local Court the Special Magistrate gave judgment for the plaintiff and the defendant appealed on the ground, *inter alia*, that the contract should have been held enforceable. Napier J. accepted this argument and allowed the appeal. The learned judge gave his reasons as follows:

"I think the fallacy in the plaintiff's argument may be that it treats the action as a claim to enforce the plaintiff's option, whereas the substance of the matter . . . is the contractual right that arises out of the oral agreement upon the exercise of the option . . . the exercise of the option was the acceptance of the standing offer, whereupon the oral agreement fructified, as or in the bilateral contract for sale which the plaintiff is now seeking to enforce"¹⁰⁴.

If it is true that the plaintiff was basing his action on an ordinary contract of sale and purchase, then it did indeed follow (the value of the goods being in excess of £10) that it was not enforceable for lack of writing. A difficulty with Napier J.'s judgment is that the defendant seems to have repudiated the option prior to the plaintiff's tender of the oil. This appears from the plaintiff's argument and is not denied in the judgment. Plaintiff's counsel strongly relied on this fact, claiming that the defendant had not, or not only, broken the final main contract, but the option contract; that, however, so the argument continued, was not subject to section 4 of the Sale of Goods Act, since it was not a contract "for the sale of any goods" but a contract to keep an offer open¹⁰⁵. Assuming that there had been a repudiation of the option, should the plaintiff not have been entitled to recover damages for it? The answer, it seems, depends entirely on the true nature of options. If they are contracts to keep offers open, then they are not required in writing. If, however, Griffith C.J.'s view is correct then the option was the nascent contract of sale itself, conditionally binding on the defendant, though not yet on the plaintiff, and then an action based on a repudiation can be brought only if the option is in writing. It is submitted that this latter view is preferable. Needless to say, the analysis here suggested would apply *mutatis mutandis* to other provisions of the Statute of Frauds.

(2) Options extended to nominees

Another problem which Griffith C.J.'s analysis of options helps resolve

104. *Id.*, at 331; this *dictum* makes it appear as though Napier J. favoured Isaacs J.'s view of options. The judgment is, however, equivocal in this respect, since the learned judge also stated:

"When the oral agreement was made the right of the plaintiff was an option to sell; but the obligation of the defendant was a conditional contract to purchase (Salmond and Winfield on Contracts, pp. 64-65)." *id.*, at 331.

Salmond and Williams' approach is, however, identical with that of Griffith C.J. —cf. *Ballas v. Theophilos* [1958] V.R. 576, at 581, per Smith J.

105. The plaintiff's argument is reported somewhat briefly; it has here been made more explicit —cf. *id.*, at 329 *et. seq.* See also Napier J.'s description of the plaintiff's argument —*id.*, at 330.

satisfactorily arises from the fact that some options are granted not just in favour of the immediate grantee, but in favour of the grantee or, alternatively, his nominee. The problem is not without practical importance, since such options occur frequently in commercial practice¹⁰⁶. If effective, such arrangements enable the option-holder to assign the benefit of the option in an informal manner. "Nominee" clauses can give rise to difficulties of construction¹⁰⁷. In *Grant v. MacDonald* an option contract stated: "This option may be exercised by the Purchaser or by its duly appointed nominee"¹⁰⁸. The Full Court of the Supreme Court of Queensland construed this clause as enabling the nominee merely to exercise the option on the purchaser's and not on his own behalf. There must have been special circumstances to justify this construction; usually, it would be avoided, because it renders the nominee clause inoperative: that the purchaser can exercise his option through agents already follows from the general law. Nevertheless, it seems advisable to state expressly in option contracts that the option is to be exercisable by the nominee on his own behalf.

In *Clark v. Lonergan*¹⁰⁹ an option to purchase certain land was given to a firm of auctioneers "or their nominee" and exercised by the auctioneers on behalf of a nominee. To the latter's action for specific performance the defendant pleaded lack of privity. Wallace J., without further analysis, simply stated that he could see no merit in this argument¹¹⁰. As Cheshire and Fifoot point out, the nominee's right to accept derives from an offer to the nominee himself, an offer which the immediate grantee has been given authority to communicate¹¹¹. More doubtful, with respect, is the learned authors' further contention that this construction is consistent only with the view which regards options as irrevocable offers and not with the view which considers that they are conditional, unilaterally binding contracts¹¹². There seems to be no reason why a contract of the latter type between the grantor and the immediate optionholder should not be capable of going hand in hand with an offer in identical terms in favour of a nominee, an offer which the optionholder has authority to communicate. A question of some practical importance in cases such as *Clark v. Lonergan*¹⁰⁹ is whether the nominee shares the optionholder's right to regard the option as continuing even in the face of a purported revocation. Unlike the optionholder, the nominee has not given any consideration. It follows that the grantor can freely retract if he happens to know the identity of the nominee. This conclusion seems inevitable. However, if Griffith C.J.'s view of options is correct, such a revocation does not detract significantly from the protection of the nominee's position. Since the optionor has become conditionally bound to the main contract, the immediate optionholder possesses a conventional chose in action which he can now assign to the nominee in the form of a statutory assignment.

106. See, for example, *Sidney Eastman Pty. Ltd. v. Southern* [1963] N.S.W.R. 815.

107. *A. F. Grant Pty. Ltd. v. MacDonald* [1960] Qd.R. 465.

108. *Id.*, at 467.

109. (1961) 78 W.N. (N.S.W.) 367.

110. *Id.*, at 370.

111. Cheshire & Fifoot: *Law of Contract* (Aust. ed., 1966) 539.

112. *Ibid.*

(3) *Options and equitable interests*

It is well-settled that an agreement to sell land vests in the purchaser an equitable interest in the land. The same rule applies to the holder of an option for the purchase of land: "When an option to purchase property has been given for value and the option contract is one which would be specifically enforced in equity, a court of equity attaches to it the consequence that it creates an equitable interest in the property which is the subject matter of the option"¹¹³. The rule also applies to options for the purchase of leasehold estates and perhaps also of other personal property, provided always that the agreement is capable of specific performance¹¹⁴. The application of this rule to options to sell is readily explained if it is conceded that such an option imposes on the optionor an actual duty to convey. It could be objected that the optionor is not like a vendor, because the optionor's duty to convey is subject to a special condition precedent: exercise of the option by the optionee. However, a vendor's duty to convey can be dependent on stipulated conditions precedent, and it is thought that this does not deprive the purchaser of his equitable interest in the property. It has been held, for example, that the equitable doctrine of conversion (which assumes an equitable interest in the purchaser) applies to a contract for the sale of land, even though that contract is subject to a contractual right of rescission vested in the purchaser¹¹⁵. The legal treatment of options in equity, as outlined above, seems to lend strong support to the analysis of options suggested by Griffith C.J. In *Ballas v. Theophilos*¹¹⁶ Smith J. stated the same point of view as follows:

"... the right intended to be conferred [by an option to purchase property] 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. It is because the right of election agreed to be conferred is, in effect, a right to elect to compel a conveyance that the agreement, if specifically enforceable, is regarded in equity as creating an interest in the property... it appears to me to follow that an agreement which is expressed to confer an option to purchase property is rightly characterized as a conditional or contingent contract of sale of the property"¹¹⁷.

There is no legal principle which declares void an option merely because the parties have not stipulated a period during which it should be exercised; there appears to be no reason in law why parties should not create an option exercisable in perpetuity. However, such an option, could not give rise to an equitable interest, since this would offend against the perpetuities rule. Since

113. *Commissioner of Taxes (Q.) v. Camphin* [1937] 57 C.L.R. 127, at 132, per Latham C.J.

114. *Ibid.*

115. *Hudson v. Cook* (1872) L.R. 13 Eq. 417; see also: Pettit, "Conversion under a contract for the sale of land" (1960) 24 *The Conveyancer* (N.S.) 47, at 58 *et seq.*

116. [1958] V.R. 576.

117. *Id.*, at 580.

*Hutton v. Watling*¹¹⁸ it has been clear in England that the failure of such an option in equity does not affect the complete validity and enforceability of the option contract itself at common law. This aspect of *Hutton v. Watling* has been expressly endorsed in the High Court by Kitto J.¹¹⁹; it seems correct in principle, but cannot be regarded as completely settled in Australia¹²⁰.

(4) *Assignment of the benefit of options*

Some options can only be exercised by the optionee personally; this may be due to an express clause to this effect in the option contract¹²¹, or it may appear by necessary implication from the subject matter or the circumstances, as where the option is for an agreement which requires the exercise of personal skill or discretion by the optionee¹²². But in the absence of such limitations, the authorities establish that the benefit of an option is "an ordinary assignable chose in action"¹²³. There is substantial authority for the view that the benefit of such options is assignable in equity¹²⁴. Indeed, there appears to be no reason why it should not be capable of a statutory assignment. Neither equitable nor statutory assignability could be readily explained if options were irrevocable offers since there is no basis for characterizing an offer, whether revocable or not, as a chose in action. Griffith C.J.'s view on the other hand, necessarily implies that the optionholder's rights are a conventional chose in action. The rules on assignability of options thus provide added support for the latter view.

(5) *Exercise of options by the personal representatives of the optionee*

Closely related to the problem of assignability is the question whether the benefit of options passes to the optionee's personal representatives. There is authority for the proposition that an offer terminates when the offeree dies¹²⁵. In *Carter v. Hyde*¹²⁶ Isaacs J. observed that a bare offer is not transmissible to personal representatives, since it can be retracted at any time and creates

118. [1948] Ch. 26.

119. *Trustees Executors and Agency Co. Ltd. v. Peters* (1959-60) 102 C.L.R. 537, at 546.

120. The problem was argued but not resolved in *De Leuil v. Jeremy* (1964) 65 S.R. (N.S.W.) 137, at 150, per Asprey J.

121. For examples, see *Carter v. Hyde* (1923) 33 C.L.R. 115, at 131 *et seq.*, per Higgins J.

122. *Id.*, at 120 *et seq.*, per Knox C.J.

123. *Id.*, at 121, per Knox C.J.

124. *Buckland v. Papillon* (1866) L.R. 1 Eq. 477. *Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd.* [1903] A.C. 414. See also: *Carter v. Hyde* (1923) 33 C.L.R. 115.

125. *Reynolds v. Atherton* (1921) 125 L.T. 690, at 695 *et seq.*, per Warrington L.J. The suggestion advanced by the learned Lord Justice was reserved for consideration by Lord Dunedin in the House of Lords—(1922) 127 L.T. 189, at 191. Warrington L.J.'s suggestion, however, has been endorsed by textbook writers—cf. Cheshire & Fifoot: *Law of Contract* (Aust. ed., 1966) at 141.

126. (1923) 33 C.L.R. 115.

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126. (1923) 33 C.L.R. 115.

as a conclusive authority in the plaintiff's favour. Isaacs J. conceded that bare offers do not pass to personal representatives on the death of the offeree; an "irrevocable offer", so the learned judge continued, was transmissible, since "the very word 'irrevocable' imports a right in the other party to hold the offeror to his offer and to have the benefit which acceptance linked with the offer would confer"¹³⁵. It seems at least doubtful whether this reasoning successfully reconciles Isaacs J.'s understanding of options with the undeniable fact that the benefit of options passes to executors. At any rate, Griffith C.J.'s analysis does so more readily since it characterizes the option as a conventional chose in action.

(6) *Options and the rules concerning the termination of offers*

It is often said that offers terminate when the offeror dies or loses his contractual capacity by becoming insane¹³⁶. Other authorities hold that notice to the offeree of the offeror's death is required before the offer comes to an end¹³⁷. Whichever be the true view, it seems clear that neither is appropriate to options. Unless the contrary is provided expressly or by necessary implication, options will be binding on the optionor's estate¹³⁸ and may be exercised by notice to his personal representatives.

The rejection of the offer by the offeree terminates the offer. If an offeree were to reject the option (or notify the optionor that he does not intend to exercise it), the optionor might well be able to raise the defence of promissory estoppel under the *High Trees* principle¹³⁹, but at common law the rejection would hardly terminate the option. The option has been "purchased" for a consideration and should therefore be construed as running its full term unless terminated by mutual agreement. Indeed, if Griffith C.J.'s understanding of options is correct, it seems to follow that an agreement to discharge the option is ineffective unless the optionor provides consideration for it¹⁴⁰.

The communication of a counter-offer implies a rejection of the offer and therefore terminates the offer just as effectively as an express rejection would. Again, there is no room for such a principle in the case of options. In *Gilbert J. McCaul (Aust.) Pty. Ltd. v. Pitt Club Ltd.*¹⁴¹ a purported exercise of an option was held ineffective because the optionee had failed to comply with the conditions laid down by the option contract. The Full Court of the Supreme Court of New South Wales characterized the optionee's action as a "counter-offer". Their Honours did not state, and presumably did not mean to imply,

135. (1923) 35 C.L.R. 115, at 123 *et seq.*

136. Notably the dictum by Mellish L.J.: "It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead . . ."—*Dickinson v. Dodds* (1876) 2 Ch. D. 463, at 475. See also the dictum by Smith J. quoted *supra* n. 128.

137. See Cheshire & Fifoot: *Law of Contract* (Australian ed., 1966) at 140 *et seq.* See also *Bradbury v. Morgan* (1862) 1 H. & C. 249.

138. *Ballas v. Theophilos* [1958] V.R. 576, per Smith J.

139. See *Central London Property Trust Ltd. v. High Trees House, Ltd.* [1947] K.B. 130.

140. *Foakes v. Beer* (1884) 9 App.Cas. 605.

141. [1959] S.R. (N.S.W.) 122.

that this "counter-offer" terminated the option—such a statement would have been erroneous. But if the implication is unwelcome, why speak of counter-offer at all and run the risk of being misunderstood? Their Honours probably thought this term appropriate because they committed themselves to the view that an option is an irrevocable offer. The judgment doubtless adds some weight to Isaacs J.'s understanding of options, but it must be remembered that their Honours apparently did not have cited to them, and thus failed to consider, either Griffith C.J.'s *dictum* in *Goldsbrough v. Quinn*¹⁴² or any of the judicial pronouncements in Australian courts supporting that view¹⁴³. Their Honours placed reliance solely upon statements from *Williston on Contracts*¹⁴⁴. In view of this, the judgment cannot, with respect, be regarded as conclusive, or even as strongly persuasive authority in favour of Isaacs J.'s view.

(7) Conditional options

The continued availability of options is often made to depend on conditions. A provision frequently found in leases in conjunction with options to purchase is to the effect that the lessee can exercise the option only if he has duly performed all his obligations under the lease¹⁴⁵. In the absence of specific indications to the contrary, these provisions are construed as preventing the exercise of the option whenever there is a right of action against the lessee for breach of the lease in existence at the time when the lessee purports to exercise the option¹⁴⁶. This is true even where the forfeiture arising from the breach of covenant has been waived qua breach of condition¹⁴⁷. A different question is whether compliance with such conditions can be waived by the optionor. This problem was before the Full Court of the Supreme Court of New South Wales in *Gilbert J. McCaul (Aust.) Pty. Ltd. v. Pitt Club Ltd.*¹⁴⁸. The case was concerned with a lease which contained the following option clause:

"If the Tenant shall desire to take a renewed Lease of the demised premises for a further term of five years from the expiration of the term of this Lease [he] shall prior to the expiration of the said term give to the Lessors three calendar months' previous notice in writing and shall in the meantime duly and punctually pay the rent reserved by this Lease at the time herein appointed for payment thereof . . ."¹⁴⁹.

During the currency of the lease the tenant frequently failed to pay the rent on time, but the lessor did not object to these irregularities. The tenant

142. Cf. *supra*, at n. 57.

143. Cf. *supra*, at nn. 86-89.

144. [1959] S.R. (N.S.W.) 122, at 123.

145. For examples of such provisions, see *Gilbert J. McCaul (Aust.) Pty. Ltd. v. Pitt Club Ltd.* [1959] S.R. (N.S.W.) 122, and *MacDonald v. Robins* (1953) 90 C.L.R. 515.

146. *MacDonald v. Robins* (1953-54) 90 C.L.R. 515, at 519, per Dixon C.J. citing *Finch v. Underwood* (1876) 2 Ch. D. 310, at 316; *Bastin v. Bidwell* (1881) 18 Ch.D. 238; *Wilson v. Stewart* (1889) 15 V.L.R. 781.

147. *Ibid.*

148. [1959] S.R. (N.S.W.) 122.

149. *Id.*, at 122.

afterwards purported to exercise the option and sued for specific performance. The court of the first instance found for the plaintiff and the defendant appealed to the Full Court. The main problem before the Full Court was whether the defendant could be said to have waived compliance with the condition of due and punctual payment. The simple answer given by the Court was that the condition was not capable of being effectively waived. The Court considered that this followed from the supposed legal rule that an option is an offer. An ineffective exercise of the option must, under those circumstances, be characterized as a counter-offer, which could lead to a concluded contract only through an acceptance by the optionor and not through a waiver of any kind. As already suggested, the terminology used by the court seems unfortunate; however, the result seems sound. Conditions such as that in *McCaul's Case* have been described judicially as "conditions precedent"¹⁵⁰. It might be more accurate to regard the optionee's failure to pay punctually as a condition subsequent, the occurrence of which has the effect of terminating the option. This would provide an alternative and, it is submitted, a more convincing reason for the rule that such conditions cannot be waived.

As the foregoing discussion has shown, most of the rules concerned with the termination of offers have no application to options. There are only a few exceptions: (1) both offers and options terminate upon lapse of the stated time, or, in the absence of an express statement, upon lapse of a reasonable time¹⁵¹, (2) both offers¹⁵² and options¹⁵³ can be subject to implied conditions subsequent. Although similar in general terms, it seems probably that these rules will produce markedly different results in their actual applications within the two spheres: even where the circumstances are otherwise identical, the determinations as to what is a reasonable time and what, if any, implied limitations there are, is likely to be strongly influenced by the fact that the Court is dealing with either a freely revocable offer or an irrevocable option.

IV. The Exercise of Options

The explanation of options in terms of "irrevocable offers" has the apparent advantage that the binding force of the exercise of an option can be explained by reference to the familiar offer-acceptance dichotomy. A different explanation is appropriate to Griffith C.J.'s view. Smith J.,¹⁵⁴ the most explicit supporter of Griffith C.J.'s view, considered that the exercise of an option constitutes a form of election. Referring to that view and to the concrete facts before him, his Honour stated: ". . . I think that, consistently with that view, what it was necessary for the plaintiff in the present case to do in order to exercise the option . . . was to make an election to assume thenceforth the rights, and be

150. *MacDonald v. Robins* (1953-54) 90 C.L.R. 515, at 519, per Dixon C.J.

151. *Ramsgate Victoria Hotel Co. Ltd. v. Montefiore* (1866) L.R. 1 Ex. 109 (concerning offers); *Ballas v. Theophilos (No. 2)* (1957) 98 C.L.R. 193 (concerning options).

152. *Financings, Ltd., v. Stimson* [1962] 3 All E.R. 386.

153. In *Shearer v. Wilding* (1915) 15 S.R. (N.S.W.) 283 the Court held that an option to purchase contained in a lease was exercisable only during the currency of the lease. See also: *Mackay v. Wilson* (1947) 47 S.R. (N.S.W.) 315.

154. *Ballas v. Theophilos* [1958] V.R. 576.

bound thenceforth by the obligations of a purchase of the deceased's share upon the terms set out in the clause"¹⁵⁵. With respect, "election", though an accurate description of the exercise of options, does not convey a sufficiently specific picture of the legal process which is involved. It seems that the exercise of options bears a double aspect:

1. The optionee undertakes to be bound by the terms of the proposed contract (i.e. he makes a contractual promise). The binding force of this promise must derive from the fact that the optionor's counter-promise (which is already binding) is a sufficient consideration. Usually the common law regards promises not exchanged at the same moment as *nuda pacta*¹⁵⁶: that rule, however, does not apply when the first promise, as is the case with options, has been made binding by a special consideration. In such circumstances the first promise must be regarded—to invoke an ancient and respectable common law concept—as a continuing consideration¹⁵⁷, capable of supporting the promise implied in the act of exercising the option.
2. The exercise of an option constitutes a condition on which the optionor's duty to perform the contract depends. Prior to the exercise of the option by the optionee the optionor has at least one duty of immediate performance: he must not repudiate his obligation and will be answerable in damages if he does¹⁵⁸. But all other obligations are conditional and do not call for performance unless the optionee binds himself by an effective exercise of the option.

An offeror can prescribe effectively that his offer shall be accepted only in a particular manner, for example by letter of acceptance, sent by return of post¹⁵⁹. Similarly, option contracts sometimes provide how the option is to be exercised (e.g. by written notice)¹⁶⁰. A purported exercise of an option which fails to comply with such provisions is ineffective¹⁶¹.

In ordinary informal contracts, the question whether the parties have exchanged contractual promises, though controlled by numerous presumptions, is basically one of fact¹⁶². The question, however, whether an option has been exercised effectively, raises first and foremost a question of construction¹⁶³: what does the option contract require the optionee to do if he wants to exercise the option? It is only the second question: has he done it?—which is one of

155. *Id.*, at 581. Dixon C.J. used the same terminology in *MacDonald v. Robins* (1953-54) 90 C.L.R. 515, at 525.

156. *Nichols v. Raynbred* (1615) Hob. 88; *Routledge v. Grant* (1828) 4 Bing. 653; *Dickinson v. Dodds* (1876) 2 Ch.D. 463.

157. Lücke: "Slade's Case and the origin of the Common Counts" (1965) 81 Law Quarterly Review 422, at 436, 439 *et seq.*, 549 *et seq.*

158. *Frost v. Knight* (1872) L.R. 7 Ex. 111.

159. Cheshire & Fifoot: *Law of Contract* (Aust. ed., 1966) 126 *et seq.*

160. *Ballas v. Theophilos* [1958] V.R. 576, at 578 per Smith J. See also *Hollies Stores Ltd. v. Timmins* [1921] 2 Ch. 202.

161. *Gilbert J. McCaul (Aust.) Pty. Ltd. v. Pitt Club Ltd.* [1959] S.R. (N.S.W.) 122, at 123.

162. *Eccles v. Bryant & Pollock* [1948] Ch. 93, at 104, per Lord Greene, M.R.

163. *Colonial Bank of Australasia v. Buckland* (1883) 9 V.L.R. (E.) 29.

fact. In *Australian Hardwoods Pty. Ltd. v. Commissioner for Railways*¹⁶⁴ an option to purchase a sawmill provided that the option could be exercised "upon the Contractor giving three months notice in writing by prepaid registered post . . ." and further stipulated that the purchase money was to be paid upon the exercise of the option. As Lord Radcliffe observed in the Privy Council, the clauses were "so worded that it is a matter of considerable difficulty in determining what is to constitute the 'exercise' of the option in the sense of some act or event which is to fix the right of the appellant to take over the purchase items and the right of the respondent to have cash in exchange for them"¹⁶⁵. The Privy Council denied specific performance on purely equitable grounds and thus did not find it necessary to decide conclusively whether the option had been validly exercised even though the purchase price had never been tendered by the plaintiff. But in the lower Court Evatt C.J., Herron and Sugerman JJ., having characterized the question as one of the proper construction of the option contract, had decided that the tender of the money, not the giving of notice, was intended to be the operative act which exercised the option¹⁶⁶.

At first sight *Gilbert J. McCaul (Aust.) Pty. Ltd. v. Pitt Club Ltd.*¹⁶⁷ appears to be authority for the view that the optionor cannot effectively waive compliance with such self-imposed formalities. However, the exercise of an option is in the eyes of the law an *assumpsit*, that is, an undertaking which for its effectiveness does not need to comply with any indispensable formal requirement. In view of this it is difficult to see why a waiver of a self-imposed formal requirement should not be effective. On close analysis it appears that *McCaul's Case* is not really concerned with the manner in which the option must be exercised but with the question whether a condition on which the continued existence of the option depended could be waived retrospectively¹⁶⁸. The distinction between such conditions and matters pertaining to manner of exercise must be carefully observed. In exceptional situations, waiver of formal requirements contained in the option contract may indeed be impossible: when as in *Australian Hardwoods Pty. Ltd. v. Commissioner for Railways*¹⁶⁹ the option contract provides that the option can be exercised only by tender of performance, a unilateral waiver would not be effective, since it would result in a change of the terms of the final contract.

Once the option is effectively exercised, a complete bilateral contract comes into being which, in its structure and its general legal effects, is indistinguishable from a bilateral contract concluded without the medium of an option¹⁷⁰. The fact that the final contract was once an option remains relevant only in a few isolated respects. An example would be the inquiry: "where was the contract made?", which question seems important only in the narrow procedural context of service out of the jurisdiction. The fact that the parties have bound themselves at different times to render their respective performances

164. (1960-61) 34 A.L.J.R. 491.

165. *Id.*, at 493.

166. (1960) 77 W.N. (N.S.W.) 392, at 396 *et seq.*

167. [1957] S.R. (N.S.W.) 122.

168. *Supra*, at nn. 145-150.

169. (1960-61) 34 A.L.J.R. 491.

170. *Cf. Burns v. Allen* (1889) 10 L.R. (N.S.W.) Eq. 218.

under the contract implies that they might have done so in different places. Accordingly the optionor could be sued on the final contract in the jurisdiction in which he entered into the option contract¹⁷¹.

CONCLUSIONS

This examination of the Australian decisions concerned with options leads to the following conclusions:

1. As regards the legal nature of options, there is authority in the Australian decisions for the following viewpoints:
 - (a) Options are irrevocable offers;
 - (b) Options are conditional contracts, i.e. unilateral contracts which can, by election, be converted into bilateral contracts;
 - (c) Whether any particular option falls into category (a) or (b) depends on the construction of the option agreement.

It is submitted that propositions (a) and (c) should be rejected as erroneous and that proposition (b) represents the true view.

2. The conclusion just advanced accords well with the actual legal treatment of options in the courts; it lends rational unity to the detailed rules and can serve as a useful pointer to a number of legal problems yet to be determined by the courts.
3. The exercise of an option constitutes a promise as well as a condition on which the optionor's duty to perform depends. The consideration for this promise is simply the optionor's counter-promise, embodied in the option contract and already binding.

171. If the matter were simply one of offer and acceptance, the place at which the acceptance became effective would be controlling—see *Entores, Ltd. v. Miles Far Eastern Corporation* [1955] 2 Q.B. 327.