CASE LAW

CASES ON PART II OF THE THIRD SCHEDULE TO THE WILLS PROBATE AND ADMINISTRATION ACT, 1898 (AS AMENDED)

I. *Varying the Statutory Order: Permanent Trustee Co. Ltd.* v. *Temple.*

Permanent Trustee Co. Ltd. v. *Temple,*[1] a recent decision of Hardie, J., is an interesting case on what provisions in a will suffice to vary the order of the application of a deceased's assets prescribed by Part II of the Third Schedule to the Wills Probate and Administration Act, 1898 (as amended) by taking gifts of assets specifically appropriated or set aside for the payment of debts or of assets charged with the payment of debts, out of the third and fourth classes of the Schedule. The problem arises out of the inherently contradictory drafting of the Schedule. On the one hand, s.46C[2] of the Act bids one apply the statutory order outlined in the Schedule subject to any contrary intention appearing in the will, thereby preserving the principle that a testator may dispose of his assets in any order he thinks fit. On the other hand, the Schedule[3] itself contemplates assets specifically appropriated for, etc., or charged with, etc., the payment of debts to be ranked only third and fourth respectively in the order of payment of those debts. Thus, while the Act enjoins the courts to effectuate a testator's intentions, its terminology prevents their doing so.

It is proposed at the outset to consider briefly the construction of the Schedule. It lays down the order in which the assets of a solvent estate are to be applied for the payment of a testator's debts, funeral and testamentary expenses in the absence of a contrary intention by dividing them into six classes and arranging the classes in an order of priority consecutively and not alternatively. *A fortiori*, a testator should be able to create a gift falling into any of the classes; and one would suspect that he could pursuant to the Schedule so frame his will that his estate could be divided into those six classes without expressing any intention at all as to the order in which his assets are to be applied. If it were contended that merely by combining in his will assets falling into two or more categories a testator intended to vary the Schedule, one would expect the reasoning behind such a contention to be anathema. One would also expect that if a testator's language has one

[1] (1957) S.R. (N.S.W.) 301. These reports are here cited also as "S.R.".

[2] S. 46C(2). "Where the estate of a deceased person is solvent his real and personal estate shall subject to the provisions of any Act as to charges on property of the deceased and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administrative expenses, debts and liabilities, payable thereout in the order mentioned in Part II of the Third Schedule to this Act".

[3] Part II of the Third Schedule reads as follows: "Order of Application where the Estate is Solvent. 1. Assets undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies. 2. Assets not specifically disposed of by

legal effect and one only, that this effect should be given to his will whatever one might conjecture was the testator's real intention. And, finally, one would expect that a testator would be presumed to intend compliance with rather than departure from the order of the Schedule, as s.46C of the Act requires the application of the statutory order subject to a contrary intention in the will, and not only if on a fair construction of the will it is manifest that the testator meant to apply it.

Thus, one would imagine that a devise "to give Blackacre to A" would fall into the sixth class; if the devise read "I give Blackacre to A for the payment of my debts" it would be in the third class; if it read "I give to A Blackacre subject to a charge for the payment of my debts" it would fall into the fourth class. But if the testator's assets in classes one and two are sufficient to pay the debts of the estate, the assets appropriated to, or subject to a charge for, the payment of debts would never be used for the payment of the debts. It is here contended that what the Act has done in effect is to alter the normal legal meaning of the words "charge", "appropriate", etc. Ordinarily, a chargee has the right to look to the specific fund charged for repayment of his charge (or to the proceeds of the realisation of the specific property charged); under the general law this right is considered an ordinary incident of a charge; but the Schedule acts to transform the rights of some "chargees" under a will by limiting their right to look to the fund or property charged to those cases only where the assets falling into prior classes of the Schedule are insufficient to discharge the estate's liability. In some cases, therefore, the expressions "charged with", "appropriated to", etc., are formulae only; but that is not to say that they are meaningless, as their presence takes assets which would otherwise fall into the fifth or sixth classes of the Schedule out of those classes into the third or fourth classes If the testator meant to create a genuine charge or appropriation, one would think that some wording equivalent to the following would be needed: "I give to A Blackacre charged with the payment of my debts in priority to all other classes of my assets". This somewhat artificial situation is not as foreign to the law of succession as it sounds, as a similar rule applied under the general law with regard to gifts of realty specifically appropriated.[4]

In the only reported English case in which the matter was argued before an appellate tribunal, *Re Kempthorne*,[5] the Court of Appeal has upheld the approach here advocated. That case involved the rights of residuary legatees taking under a gift of residue charged with the payment of debts, etc. In the court below, Maugham, J. had concluded that the gift fell within class four and applied the above reasoning to exempt the legatees from the primary liability of the debts of the testator. On appeal, the Court of Appeal held that Maugham, J's. approach was logical but inapt. Their Lordships considered that classes three and four of the Schedule cannot comprehend a residuary legacy or bequest; they approved of the reasoning of Maugham, J. in the court below insofar as it was applicable to gifts which did fall into those classes, but held that different considerations arose in determining the liability of a residuary gift appropriated to or charged with the payment of debts. The point under consideration here was therefore dealt with only in their Lordships' *obiter dicta;* however, their *dicta* on this point were weighty and distinct. Lord Hanworth, M.R. said:[6] "My own view, however, is that those paragraphs (3 and 4) operate where the payment of debts is

will but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for aforesaid. 3. Assets specifically appropriated or disposed of by will (either by a specific or general description) for the payment of debts. 4. Assets charged with or disposed of by will (either by a specific or general description) subject to a charge for the payment of debts. 5. The fund, if any, retained to meet pecuniary legacies. 6. Assets specifically disposed of by will, rateably according to value".

[4] *Cf. Re Smith* (1913) 2 Ch. 216. [5] (1930) 1 Ch. 288.

[6] *Id.* at 296.

specifically charged upon some particular property, or where some property is dealt with and subjected to the payment of debts". Lawrence, L.J. said:[7] "Property in a residuary gift would have to be exhausted before the property comprised in either the third or fourth items could be resorted to", and later, that this would hold good "even if it had the *apparent* effect of overriding the testator's intention" (italics supplied). Russell, L.J. agreed in a separate judgment.[8]

The problem came before the N.S.W. Supreme Court in *Fuller* v. *Fuller*,[9] where the testator by will, having made a gift of residue to one beneficiary (i.e. a gift in the second class), directed that certain land be sold and "from the proceeds of the sale and after payment of all outstanding debts" bequeathed certain pecuniary legacies(i.e. gifts in the third class). Maughan, A.J. held that as no intention to override the statutory order could be discovered, the general personalty was primarily liable for the payment of debts.[10] In so deciding, the learned Justice applied the basic principles of statutory interpretation outlined above and the dicta of *Re Kempthorne*[11] supporting them. He assented to the proposition of Wallace *arguendo*[12] that to find in such a will an intention to vary or displace the order of application of assets laid down by the Schedule would almost make it impossible to create a gift in the third or fourth classes.

Another method of interpreting the construction of wills containing gifts in classes 3 and 4 of the Schedule is suggested by a group of decisions which may be compendiously designated "the English cases". The earliest of them, and the source of the later ones is *Re Littlewood*,[13] where Maugham, J. considered a will under which an express charge of debts, etc., upon specific bequests was followed by an absolute gift of residue, and held that the testator had successfully varied the statutory order of assets. The reasoning is curious and interesting. His Lordship held that where a will contains both a gift of residue and a gift specifically appropriated for or charged with the payment of debts, the mere presence of an appropriation or charge necessarily operates to exonerate all other gifts in the will, including the residuary gift. His Lordship paid no attention to the special and restricted meaning which "appropriation" and "charge" must bear in the context. In *Re Gordon*,[14] where the will in issue contained only one disposition — a gift of personalty charged with the payment of debts, etc. — Bennett, J. held that the assets as to which there was an intestacy bore the primary liability of discharging the estate's debts. Although clearly correctly decided in its result, much of the learned Justice's reasoning was based on the reasoning of Maugham, J. in *Re Littlewood*,[15] as his Lordship suggests that a different conclusion would ensue if the will contained a residuary gift. The doctrine of *Re Littlewood*[16] was further followed by Roxburgh, J. in *Re James*[17] and Upjohn, J. in *Re Meldrum*,[18] although both cases would probably have yielded the same result if the principles of *Fuller* v. *Fuller*[19] had been adopted. Unhappily *Fuller* v. *Fuller*[20] which contains a decisive analysis of *Re Littlewood*,[21] was not brought to the notice of the court in any of the later cases. It might be noted, in passing, that the final enunciation of the *Re Littlewood*[22] doctrine by Roxburgh, J. in *Re James*[23] is that in cases involving charges, appropria-

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[7] *Id.* at 299.
[8] *Ibid.*
[9] (1936) 36 S.R. 600.
[10] *Quaere* whether or not on a proper construction of the will in question the asset was given subject to a charge for the payment of debts? This aspect of the case is not here relevant.
[11] (1930) 1 Ch. 288.
[12] (1936) 36 S.R. 600 at 603.
[13] (1931) 1 Ch. 443.
[14] (1940) Ch. 769.
[15] (1931) 1 Ch. 443.
[16] *Ibid.*
[17] (1947) 1 Ch. 256; *cf.* R. E. Megarry, Note 63 *L.Q.R.* 287.
[18] (1952) 1 Ch. 208.
[19] (1936) 36 S.R. 600.
[20] *Ibid.*
[21] (1931) Ch. 443.
[22] *Ibid.*
[23] (1947) 1 Ch. 256.

tions, etc., the statutory order for the application of assets cannot apply unless three elements concur: firstly, a disposition falling within classes 3 and 4; secondly, the absence from the will of other dispositions of the testator's property; and, thirdly, the absence of any other indication of his wishes by the testator. The "English cases" have been followed in Victoria in *Re Williams*[24] (Dean, J.) and perhaps other cases.

A simple illustration demonstrates the difference of approach of *Fuller* v. *Fuller*[25] and the "English cases". Suppose a testator leaves the following simply phrased will: "I leave to A my X assets which I appropriate to the payment of my debts, etc.; I leave to B my Y assets subject to a charge for the payment of my debts, etc., and I direct that the residue of my estate be divided into equal shares between C and D", and that C predeceases the testator. On the principles of *Fuller* v. *Fuller*[26] and respectfully advocated here, C's lapsed share would fall into class 1, being an asset as to which there was an intestacy or which was undisposed; D's residuary share would fall into class 2; A's into class 3; and B's into class 4. No intention to dispose of the assets in a different manner from the statutory order appearing in the will, the Schedule would apply. (It is hard to imagine a clearer case of compliance with the Schedule). The principles of the "English cases" would yield these results: the mere existence of a specific charge and appropriation in the will would exonerate all other express dispositions; it would not suffice to exonerate C's lapsed share, but it would exonerate D's share of residue, with whose existence it is apparently incompatible to have a gift in classes 3 or 4; and no express intention to apply the statute is manifested in the will. Therefore, on this interpretation, the order of the application of assets would be, firstly, C's lapsed share of residue; secondly, the gifts to A and B, and thirdly, D's share of residue.

The one virtue of the construction advocated by the "English cases" is that at first blush it does seem to yield more or less definite conclusions, but its fundamental reasoning, it is submitted, is extraordinarily arbitrary. Firstly, as can be seen above, it makes it impossible for a testator to comply with the provisions of the Schedule by combining gifts in class 1, class 2 and class 3 in the one will, unless there be an express direction by him that the order of the Schedule is to be applied. Secondly, if a charge or appropriation of assets for the payment of debts necessarily exonerates all assets disposed of by the testator, why does it not exonerate his "undisposed" of assets in class 1 as well? Presumably many testators do not make a comprehensive will precisely because they rely on the law of intestacy. Thirdly, if both a charge and an appropriation exonerate other dispositions from primary liability, how does one ascertain whether the charge or the appropriation has primary liability as between those two classes?[26a] The fatal defect of this method of construction, in short, is that it disregards the statute. Dean, J. has even expressed the opinion that in construing most wills one need not look at the Schedule at all.[27]

In *Temple's Case*[28] there was a clear necessity for the court to adopt one interpretation of the Schedule or the other. Testator had disposed of his assets in a manner substantially as follows (simplified by the writer for the

[24] (1950) 57 A.L.R. 751.
[25] (1936) 36 S.R. 600.
[26] *Ibid.*
[26a] Many other difficulties would confront one if one tried to apply the tests of Roxburgh, J. in *Re James* (1947) 1 Ch. 256. For example: (1) Is it not circular reasoning to maintain that one of the conditions precedent to the existence of classes 3 and 4 is the existence of classes 3 and 4? (2) Again, if testator left a will as follows: "Blackacre to X; my manor of Dale to Y charged with the payment of my debts in priority to all other classes of my assets whatsoever", would not one be compelled to hold that the Schedule had not been varied (because of the existence of a class of assets other than in classes 3 or 4) although testator had manifested every intention of varying it?
[27] In *Re Williams* (1950) 57 A.L.R. 751, 757.
[28] (1957) 57 S.R. (N.S.W.) 301.

purposes of this article[29]): a fund specifically appropriated for the payment of debts, to A; assets charged with the payment of debts, to B; and residue to C. On the reasoning of *Fuller* v. *Fuller*[30] one would expect that, unless some other intention appeared, C's gift would fall into class 2, A's into class 3 and B's into class 4, and that, as testator had not given any indication that the charge and the appropriation were to be used in other than the statutory sense outlined above, the Schedule applied. On the reasoning of the "English cases", the liability to pay debts would be primarily A's, then B's and then C's. Hardie, J. held that the latter result was correct, and that the Schedule had been varied or displaced accordingly. However, while relying largely on the "English cases", his Honour's reasoning manifested a reluctance to elect for either *Fuller* v. *Fuller*[31] or the "English cases". His Honour held that (1) *Fuller* v. *Fuller*[32] was probably authority only for the proposition that in the particular circumstances of that case there was no intention to vary the Schedule, and that it did not lay down any special canon of construing wills which contained gifts of assets being the subject of appropriations or charges; (2) the "English cases" laid down that every case must be decided on the construction of the particular will involved; (3) if *Fuller* v. *Fuller*[33] did lay down a special canon of construction, it was to that extent inconsistent with the "English cases" which his Honour preferred; and (4) in the circumstances of the case before him the Schedule had been varied.

It is respectfully suggested that his Honour's mode of reasoning is open to criticism. In the first place, it is abundantly clear that *Fuller* v. *Fuller*[34] does lay down a special canon of construction, *viz.* that in the construction of wills, for assets charged with or appropriated for the payment of debts, etc., to vary the statutory order of the disposition of assets it is necessary to discover in the will an intention that such assets charged or appropriated bear a greater liability than residuary or "undisposed" assets. In the second place, it is equally clear that the "English cases" also lay down a special canon of construction, *viz.* that if, and only if, certain elements are present in the will (i.e. a gift of residue, assets falling in classes 3 or 4, and the absence of other indications of the testator's intention), the order of the Schedule is upset by *any* charge or appropriation therein. Finally, it is submitted with respect that it is beating the air to say that

> the only rule of construction applicable is that the whole of the provisions of the will, including the provision creating the charge, must be examined in order to ascertain whether the testator has expressed an intention as to the manner in which the burden of debts, funeral and testamentary expenses is to be borne as between the various assets comprised in the estate, or as between the beneficiaries taking the various assets and has, thus, displaced either in whole, or *pro tanto*, the statutory order.[35]

If it is meant that in every case the will in question must be construed to find out if the Schedule is varied or not the proposition is self-evident; but if it is meant to imply that no question of law can arise it is, the writer respectfully suggests, misleading. For each case on the point is concerned not with what the will means by itself but with what is the effect of the constant Schedule on the variable will. In every case one must decide if the will has varied the Schedule, and in order to decide this point certain definite (and conflicting) tests have been formulated, the question of which test is correct being hardly a matter of construing the will in issue.[36]

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[29] There were other complicating features in the case not relevant to this Note, e.g. the lapse of one share in the property charged with the payment of debts.
[30] (1936) 36 S.R. (N.S.W.) 600.
[31] *Ibid.* [32] *Ibid.* [33] *Ibid.* [34] *Ibid.*
[35] (1957) 57 S.R. (N.S.W.) 301, 304.
[36] The discussion of his Honour's judgment is concerned with the reasoning alone; whether or not the facts of the will in question would satisfy the test laid down in *Fuller* v. *Fuller* (1936) 36 S.R. 600) is not here canvassed.

His Honour cited certain authorities in support of his stand-point. One was the *dictum* of McTiernan, J. in *Roman Catholic Archbishop of Melbourne* v. *Lawlor*[37] that "a will does not vary the statutory order in which the assets are applicable unless it discloses an intention that as between the beneficiaries the burden shall be borne differently from the manner provided by the Schedule". But this is to state the difficulty, not to solve it; the point in dispute is the correct mode of determining whether such an intention has been in fact disclosed. His Honour also quoted the *dictum* of Dean, J. in *Re Williams*[38] that because the Act makes the provisions of the Schedule "subject to the provisions of the will", it follows that "the will must be first construed to discover its meaning and effect, and if testator has dealt with the incidence of debts, etc., then there is no need to refer to the Schedule at all". This is true enough as far as it goes but is really a *petitio principii* in that it neglects to emphasise that a rather artificial construction needs must be given to expressions *ejusdem generis* with "charge" and "appropriation", and that therefore a distinction has to be drawn between dispositions which manifest an effective intention to vary the statutory order and dispositions which display no more than what Lawrence, L.J. has described as "an apparent intention".[39]

The writer, therefore, submits that, firstly, the construction of the Schedule by Maughan, A.J. in *Fuller* v. *Fuller*[40] was correct, and, secondly, that it is to be regretted that Hardie, J. in *Temple's Case*[41] did not find it necessary to define in sharper outline the nature of the alternatives before him (with a consideration of their rationale and effects), and then indicate his support more unequivocally for the one or the other.

II. *Classifying an Option: Re Eve National Provincial Bank Ltd.* v. *Eve and Others.*

In this remarkable case[42] a testator by will gave to B an option to purchase at par 1,000 of his ordinary £1 shares in E. Co. Ltd., not subject to any condition imposing an obligation. It was agreed between the revenue authorities and the executors of the testator's estate that each ordinary share was worth £5, so that the option enabled B for the purchase price of £1,000 to acquire property worth £5,000. The benefit of the option, then was £4,000, being the difference between the purchase price of the shares and their market value. The plaintiff executor sought the advice of the court by originating summons to determine the position of the benefit of the option in the hierarchy of assets for the payment of debts in a solvent estate in view of the provisions of the English equivalent of our Part II of the Third Schedule to the Wills, etc., Act. Testator's estate was solvent in the sense that the purchase price of the shares together with testator's other assets available for the payment of debts were sufficient to pay them, but his residuary estate was insufficient to pay his debts, funeral and testamentary expenses. Presumably the purchase price of £1,000 fell into residue.

Re Eve[43] appears to be a true case *novae impressionis*. In a perhaps regrettably short judgment of just under one page, Roxburgh, J. laid down seven important rules for determining the relation of options to the statutory Schedule. They are summarised hereunder.

(1) Obviously enough, an option to purchase shares cannot be treated as a gift of the shares.

(2) Less obviously, the benefit of the option (here £4,000) is not an "asset specifically disposed of" within the meaning of the sixth class of the

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[37] (1934) 51 C.L.R. 1, 56.
[38] (1950) 57 A.L.R. 751, 757.
[39] (1930) 1 Ch. 288, 299, *per* Lawrence, L.J.
[40] (1936) 36 S.R. (N.S.W.) 600.
[41] (1957) 57 S.R. 301.
[42] (1956) 2 All E.R. 321.
[43] *Ibid.*

Schedule. In *Bothamley* v. *Sherson*,[44] Jessel, M.R. in attempting a definition of a specific bequest[45] indicated that two elements were necessary, that the subject of the bequest be a part of the testator's property and, in the second place, that it be "a part as distinguished . . . from the whole of the residue". Roxburgh, J. pointed out[46] (it is respectfully submitted, rightly) that by "distinguished", Jessel, M.R. meant distinguished by the testator, not by a court's analytical interpretation of his will. Looked at from another view, an option is not a gift but a right to purchase which when exercised "involves a contract between the trustees as vendors to sell and the purchaser to buy the shares at a stated price".[47] As this is so, his Lordship argued, the donee of the option does not receive a gift of any specific property but of the value of the benefit of the option. In view of this contractual relationship *semble* Roxburgh, J. would hold that it would be impossible for a testator so to "distinguish" the benefit of an option that it became a specific bequest or devise.

(3) By implication his Lordship must have held that the benefit of the option could not be correctly fitted into any other class of assets specified in the Schedule. It is submitted that it cannot stand in the first, second, third, or fourth classes. It is perhaps tenable that, in view of the strong element of bounty involved, the benefit of an option might be classified as a general legacy subject to a condition and thus within the fifth class of the relevant English Schedule; but even if this were correct, it would be a moot point whether or not it fell within the fifth class of our Schedule, which deals only with "pecuniary" legacies. The fate of non-pecuniary legacies in New South Wales is unknown.

(4) The benefit of an option must therefore have no place in the Schedule, and is never available for the payments of debts.

(5) Insofar as the purchase price (here £1,000) together with the other available assets suffice to pay the estate's debts, it and not the shares constitutes the fund available for the purpose.

(6) Insofar as the purchase price of the shares and the other assets do not suffice, the property subject to the option (the shares) must be applied for the payment of debts and the option over that property cannot to that extent be exercised, its benefit abating accordingly. *Semble*, by implication from the foregoing, if the purchase price of the shares together with the other assets available do not suffice, the executors of the estate cannot be compelled to transfer the shares which are the subject of the option to the acceptor of the benefit of the option *in specie* on condition that he tenders such an amount above the purchase price of the shares as will suffice to pay the debts, etc., of the estate as well as the purchase price itself.

(7) The main effect of the decision is to add a new class of asset to the hierarchy of assets already specified in the Schedule. This will, if correct, have interesting repercussions in the law relating to the administration of assets in New South Wales, as there are certainly one, and possibly two, other classes of assets available which are not mentioned in the Schedule. In England, "property appointed by will under a general power" is a seventh class; we have no specifically mentioned seventh class. But by virtue of s. 46B of the Wills, etc., Act, 1898, such property vests in the legal personal representative as if the testator had been entitled to it at his death,[48] and s. 46A makes both the realty and personalty of testators dying after the first of January 1931 disposed of by will assets for the discharge of funeral, testamentary and administrative expenses, debts and liabilities. *Semble*, "property appointed by will under a general power" is "assets disposed of by will" and therefore available after assets in the six specified classes have been exhausted (*sed*

[44] (1875) L.R. 20 Eq. 304.
[45] *Id.* at 309.
[46] (1956) 2 All E.R. 321, 322.
[47] *Ibid.*
[48] *Cf. Re Carter* (1944) 44 S.R. (N.S.W.) 285.

quaere the position if disposed of by deed to a volunteer, unmentioned in the Act). Such property would presumably be available to creditors as an equitable asset of the estate in its order under the general law, i.e. after all other assets have been applied. The other class of assets available is *donationes mortis causa,* which although not vesting in the legal representative may be deemed fraudulent and be recovered by estate creditors in equity. If, then, in New South Wales it is necessary for the legal representatives to have recourse to assets the subject of an option, assets being properly disposed of by will under a general power of appointment, and assets passing under a *donatio mortis causa,* which constitutes the seventh, which the eighth and which the ninth classes? As between assets passing by the exercise of a general power of appointment and assets transferred by *donatio mortis causa, semble* the former are primarily available only by virtue of the general law. *Semble,* also, assets subject to an option are available before either of the other classes since they are legal assets not equitable assets only.

It is hoped that the above is an accurate account of the reasoning and practical effects of his Lordship's decision in *Re Eve.*[49] It is now pertinent to consider briefly his Lordship's fundamental premise, namely the contractual nature of an option.[50] At the outset it must be emphasised that the term "option" is not a term of art and is therefore without precise legal significance.[51] According to its context it may bear different meanings. As Mr. Fox has pointed out,[52] it may be merely a revocable offer; it may constitute an irrevocable offer (this is by far the most usual case); or a conditional unilateral contract; or a right of pre-emption or some analogous right; or some other legal conception. Options under a will seem to be in a distinct class. In nearly all these cases special problems arise, many of them as yet unsolved. In fact, "an option is nearly always a ticklish thing", as Jordon, C.J. said in *Mackay* v. *Wilson.*[53] The writer does not intend to consider comprehensively the situations to which an option may give rise, much less to solve them, but merely to indicate in a general way some of the difficulties involved in considering options under a will, with a view to submitting that there was no compulsion for his Lordship to adopt the view of the effect of an option which he took in *Re Eve.*[54]

His Lordship considered that on exercising an option by will an optionee enters into a valid and binding contract, and that no rights under the will creating the option pass to him apart from the right to enter such a contract by accepting the offer contained in the will. It is contended, with respect, that this view may be misleading. Firstly, if the testator be the offeror, would not his death terminate the offer, and the optionee's knowledge of his death prevent the latter from accepting it? If, on the other hand, the offeror is regarded as the executor and the creation of the option under the will is regarded as a direction to the executor to make an offer, then further difficulties arise as the decided cases show that an option by will has perhaps different results to those consequent on a testator's direction to his executor to enter into a contract. Secondly, and what is far more important, existing authorities seem to indicate that an optionee under a will far from being confined to contractual rights has an immediate equitable interest in the subject-matter of the option. The leading Australian case on the point is *O'Neill* v. *O'Connell,*[55] where, although the case went off on another point,

[49] (1956) 2 All E.R. 321.

[50] There is an ever-increasing volume of cases, articles and general literature on options. The writer has found especially useful as starting points the cases of *Re Busby* (1930) 30 S.R. (N.S.W.) 399 and *O'Neill* v. *O'Connell* (1946) 72 C.L.R. 101; and for articles R. W. Fox "Options" (1950) 24 *A.L.J.* 7, 50. Note, "Effect of Optional Contract to Buy Land" (1913) 26 *Harv. L.R.* 747-48.

[51] *Cf.* Pool, J. in *Nicholls* v. *Lovell* (1923) S.A.S.R. 542, 545.

[52] *Op. cit.,* n. 8.

[53] (1947) 47 S.R. (N.S.W.) 315, 318.

[54] (1956) 2 All E.R. 321.

[55] (1946) 72 C.L.R. 101.

the High Court dealt at length with the nature of an option by will. The will under consideration in that case contained this clause: "I give to the said D.O. an option to purchase the freehold of the premises of the said business at £6,500, for which my executors may allow terms the option to be exercised within twelve months of my death". Latham, C.J. sitting on the case at first instance said:

> I am of opinion that an option by will to purchase property does not in itself and independently of its exercise give an equitable interest in that property, whether or not the right of the optionee can properly be described as itself being property. The true position is, I suggest, that, if the option is exercised, and if in a proper course of administration the executors are in a position to make and do make a contract of sale to the optionee, the optionee will then under the contract obtain an equitable interest in the property in respect of which the option is given . . . as already stated, there is in such a case a contract between the testator and the optionee.[56]

This view of an option by will perhaps supports Roxburgh, J's. view in *Re Eve*.[58] However, on appeal, Dixon and Williams, JJ. expressed a different and, with respect, a more correct view, the third member of the Court (Starke, J.) being silent on this point. Dixon, J. said that by the provision of the will in this case the optionee had

> an immediate right, if he should so elect, to become the owner of the land at the fixed price of £6,500. Such a provision imparts to the donee of the option a beneficial right in reference to or an interest in the land. Substantially the same result might be produced by a devise of the land conditional upon the devisee paying the sum named. A not very different result might be produced by a direction to the executors or trustees to propose a contract of sale to the intended donee of the option upon terms and conditions stated in the will or to be settled in some manner indicated by the will. But in form the disposition now in question stands between a conditional devise and a direction to propose a contract. It gives an immediate, though innominate, beneficial interest, one of the many miscellaneous rights and interests which under the wide power of testamentary disposition allowed by English law a testator may create . . . . The exercise of a testamentary option by the donee makes absolute his immediate right to the property, except insofar as the will makes payment of the price or the performance of any other obligation laid upon him an essential condition.[59]

Williams, J. said:

> The authorities establish in my opinion that an option to purchase land whether created by an instrument *inter vivos* or by will creates an immediate equitable interest in the land. . . . A donee of an option to purchase land given by a will is a beneficiary of that beneficial interest. The executors have as against him the same overriding common law or statutory power as they have against a devisee to sell the land to pay the funeral and testamentary expenses, death duties and debts of the deceased. But the donee of the option is still entitled to exercise the option, and upon such exercise and performance of its conditions to follow the proceeds of sale in the hands of the executors.[60]

That an optionee in these circumstances has a proprietary interest in addition to his contractual rights is further suggested by such cases as *Re Armstrong's Will Trusts*,[61] where it was held that an optionee under a will could

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[56] *Id.* at 106.

[57] "Perhaps" because it might make a difference if the creation of an option vests "property" in the donee of the option in the opinion of Latham, C. J.

[58] (1956) 2 All E.R. 321.

[59] (1946) 72 C.L.R. 101, 119.

[60] *Id.* at 129.

[61] (1943) 2 All E.R. 537.

exercise an option to purchase settled land although the life-tenant had used his statutory powers to effect a sale of the land, by following the proceeds of the sale.[62] A learned writer has stated that the most precise definition of the juristic nature of an optionee's rights in the case of options created by will is contingent equitable interests analogous to springing uses.[63] If, then, a will gives to the donee of the option created therein such an immediate equitable interest, why cannot the creation of the option be classified as a devise or bequest of that interest? And if this reasoning is not fully applicable to personalty, it is clear that the optionee still has an equitable right *in personam* before exercising the option. Even if the donee of an option by will has no rights other than in contract, the writer submits that this fact alone does not compel a court to hold that an option falls outside the Schedule. This question would raise an interesting problem on the interaction of legal categories already commented on by Professor Stone in another connection.[64] The classic example of this kind of jurisprudential problem is *Hynes v. N.Y.C.R.R.*[65] (*The Springboard Case*) in which Cardozo, J. pointed out that a proposition as to the ownership of fixtures in the law of real property was not necessarily applicable to problems of ownership in torts. In the case under discussion, by parity of reasoning, it is suggested that the distinction drawn by the common law between gifts and contracts need not necessarily apply to succession, which governs the disbursement of benefits under wills and intestacies. If a benefit be given by will, cannot there be a devise or bequest of that benefit whether or not it needs to be perfected by contract in order to be rendered legally effective? In fact there is authority for regarding options by will as conditional devises, for some purposes at least.[66]

III. *Conclusions with Regard to the Schedule.*

From the two recent cases which are here discussed, it can be fairly concluded that the mysteries and entanglements posed by the curious drafting of the Schedule constantly proliferate. Decided cases have proved that its express provisions are obscure and its silences ambiguous and that the case for its legislative rationalisation is unanswerable. If it were amended to change the existing third and fourth classes into new second and third classes, and to depress the present second class into fourth position, no problems of the variety of *Temple's Case*[67] would occur. If the Schedule were amended to make explicit the order of assets whose availability is now implied from the *lacunae* of the statute only, *Re Eve*[68] would no longer vex the courts, and other future forensic battles would remain unfought. But the legislature is doubtless preoccupied with amending laws which affect other classes of the community who, unlike the dead, have the right to vote.

R. P. Meagher, B. A., Case Editor — Fourth Year Student.

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[62] *Cf. Re Fison's Will Trusts* (1950) 2 All E.R. 501; *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation (Milne's Case)* (1944) 69 C.L.R. 270.

[63] 26 *Harv. L.R.* 747.

[64] See, for example, *The Province and Function of Law* (1950) 140-141.

[65] (1921) 231 N.Y. 229.

[66] *Cf. Buhlmann* v. *Nilsson* (1921) 29 C.L.R. 417.
Another comment which may be in point is to query whether Roxburgh, J. in *Re Eve* (1956) 2 All E.R. 321) did not confuse the notions of specificity and tangibility.

[67] (1957) 57 S.R. (N.S.W.) 301.

[68] (1956) 2 All E.R. 321.