in that example does not seem to me to raise any presumption against an intention to ban past issues of the publications with which this case is concerned. Certainly no such absurdity would arise in the present case if the past issues had always been devoted to objects or doctrines which the enactment of the Suppression of Communism Act was designed to combat.

In my view, the plain meaning of the language used in the respective Proclamations is wide enough to embrace a prohibition against the dissemination of past issues of the publications concerned. Furthermore, if regard be had to the mischief aimed at in these Proclamations, then it would seem that there is full justification for the interpretation that the State President intended to prohibit dissemination of past issues, because it was consideration of past issues which must have led the State President to conclude that such publications should be banned. This point is of particular force in the case of *The Guardian*, where the Governor General was obviously referring to past issues, in declaring in the preamble to the Proclamation that he was satisfied that the publication was offensive under sec. 6 of the Act.

We were referred in the course of argument to an unreported decision in the Cape Provincial Division in the case of *S.* v. *La Guma*, decided on 31st August, 1964, in which ROSENOW, A.J., with whom VAN HEERDEN, J., concurred, took a similar view on a charge of being in possession of 22 back issues of the publication known as *Fighting Talk*. I am in respectful agreement with that decision.

The appeal against the conviction on the second count ought therefore, to fail, and I would dismiss it.

There remains for consideration the question of sentence on the second count. Evidence was given in mitigation by a lecturer in the University of the Witwatersrand, who said, in effect, that the appellant had made application for his acceptance as a candidate for the degree of Doctor of Philosophy, and for the acceptance of a thesis in respect thereof, being the thesis to which I have referred earlier in this judgment. The inference from the evidence, both as extracted in the cross-examination of the State witnesses and as given by the lecturer, was that the appellant had come into possession of these publications for the purpose of and in connection with the preparation of that thesis. In other words, his motivation had been scholarship and study. Nothing was proved in rebuttal of that. Moreover, the possession of these past issues had not always been unlawful, and the issues had come into existence lawfully. Furthermore, the evidence indicated that the appellant in respect of his possession of those publications, had been quite open in his attitude; he had approached the Witwatersrand University authorities in that regard, and also the Minister of Justice in the letter to which I have already referred.

In the light of those considerations, I am of the opinion that a sentence of nine months' imprisonment, even though it was suspended for three years, is altogether too heavy, and on that basis I consider that we are entitled to interfere.

Regard being had to the mitigating factors to which I have referred, I consider that an appropriate sentence would be one of 30 days' imprisonment, suspended for three years on condition that the appellant is not convicted of a contravention of sec. 11 (*e*) *bis* of Act 44 of 1950, as amended, committed during the period of suspension. I would accordingly allow the appeal against the sentence on the second count, and substitute for that sentence the one to which I have just referred.

HIEMSTRA, J., I concur. The following order is made:

1. The appeal is allowed on count 1 and the conviction and sentence are set aside.
2. The appeal against the conviction on count 2 is dismissed, but the sentence is altered to read 30 days' imprisonment suspended for three years, on condition that the accused is not found guilty of the contravention of sec. 11 (*e*) *bis* of Act 44 of 1950, committed during the period of suspension.

Mr. *Wentzel* applied for leave to appeal to the Appellate Division against the dismissal of the appeal in respect of the conviction on count 2.

Mr. *van der Merwe*, opposed.

HIEMSTRA, J.: Application has been made for leave to appeal against the dismissal of the appeal against the conviction on the second count. It is purely a point of law on which conceivably another Court might take a different view. In the circumstances we have decided to grant leave to appeal.

Appellant's Attorneys: *Bell, Dewar & Hall.*

SECRETARY FOR INLAND REVENUE v. ESTATE ROADKNIGHT AND ANOTHER.

(APPELLATE DIVISION.)

1973. *August* 24; *September* 10. OGILVIE THOMPSON, C. J. POTGIETER, J.A., JANSEN, J.A., TROLLIP, J.A. and MULLER, J.A.

Revenue.—Transfer duty.—Testator granting option in will to purchase immovable property.—Option duly exercised.—Acquisition by "testamentary succession."—No transfer duty payable.—Exempted under Act 40 *of* 1949, *sec.* 9 (1) (e) (*i*).

The testator had under his will directed his executors to grant his nephew R the option for a period of 60 days to purchase certain farms. R duly exercised the option and the farms were transferred to him. The executors and R had successfully obtained an order that no transfer duty was payable. In an appeal,

Held, that the exercise of the option under the circumstances was more appropriately to be regarded as constituting an unequivocal act of adiation under the will.

Held, further that R had acquired the farms by "testamentary succession" ("by wyse van erfopvolging volgens testament") within the meaning of those expressions as used in section 9 (1) (*e*) (i) of the Act.

Held, accordingly, that the appeal should be dismissed.

The decision in the Durban and Coast Local Division in *Estate Roadknight and Another* v. *Secretary for Inland Revenue*, 1973 (2) S.A. 339, confirmed.

Appeal from a decision in the Durban and Coast Local Division (MILNE, J.). The facts appear from the judgment of OGILVIE THOMPSON, C.J.

D. B. Friedman, S.C., (with him *R. S. Douglas*), for the appellant: The sole point at issue in this appeal is whether or not the acquisition of the immovable property in question was acquired by Raymond by testamentary succession within the meaning of sec. 9 (1) (*e*) of the Transfer Duty Act, 40 of 1949, as amended. Sec. 2 (1) imposes a transfer duty on all forms of acquisition of immovable property whether "by way of transaction or in any other manner", but subject to the exemptions contained in sec. 9. It would appear to be common cause, therefore, that, unless the exemption contained in sec. 9 (1) (*e*) is of application, transfer duty would be payable on the acquisition pursuant to the provisions of sec. 2 (1). As the Transfer Duty Act is a fiscal measure, the question of the "form" of the method of acquisition is important and one must consider whether or not that method falls within the literal meaning of the provisions of sec. 9 (1) (*e*). See *Partington* v. *Attorney-General*, 21 L.T. at p. 375, cited with approval in *Commissioner for Inland Revenue* v. *George Forest Timber Co. Ltd.*, 1924 A.D. at p. 531; *Commissioner for Inland Revenue* v. *Wolf*, 1928 A.D. at pp. 184-185; and *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*, (1921) 1.K.B. at p. 71, cited with approval in *Commissioner for Inland Revenue* v. *Frankel*, 1949 (3) S.A. at p. 738. When sec. 2 (1) of the Act refers to "property . . . acquired", it refers not to the acquisition of *dominium* in the property but to the acquisition of a *jus in personam ad rem acquirendam* in respect of that property. See *Secretary for Inland Revenue* v. *Hartzenberg*, 1966 (1) S.A. 405; cf. *Minister of Finance* v. *Gin Bros. and Goldblatt*, 1954 (3) S.A. 881. So too a legatee under a will simply acquires, in relation to his bequest, *a jus in personam ad rem acquirendam* to be exercised by him against the executor. See *Estate Smith* v. *Estate Follett*, 1942 A.D. at pp. 367, 383. Accordingly to qualify for the exemption contained in sec. 9 (1) (*e*) the heir or legatee must, by means of testamentary succession, acquire a *jus in personam ad rem acquirendam* in respect of the property concerned. The respondent, Raymond, acquired the immovable property in question (in the sense of having acquired a *jus in personam ad rem acquirendam* thereto) by means of an agreement of sale concluded between him and the executors of the estate. This agreement of sale was concluded when Raymond duly exercised the option to purchase granted to him by the executors. What Raymond acquired by testamentary succession was the "right" to be granted an option in respect of the property in question by the executors. That option was duly granted to him by the executors but the option thus granted included a number of terms to which no express reference was made in the will. Certain other clauses embodied the exercise by the executors of discretionary powers granted to them by the will to fix the time for payment. The mere grant to Raymond of the option did not result in his acquiring, as against the executors and in respect of the property in question, a *jus in personam ad rem acquirendam*. He acquired merely a right, to buy the property from the estate. Cf. *Hersch* v. *Nel*, 1948

(3) S.A. at p. 695. The *jus in personam ad rem acquirendam* was only acquired, and could only be acquired, if and when, and provided that the option was exercised in the time and manner prescribed by it. The fact that the parties could have avoided the levying of transfer duty by the conclusion of a suitable re-distribution agreement and thereby have circumvented the Act is entirely irrelevant. Cf. *Inland Revenue Commissioner* v. *The Duke of Westminister*, 1936 A.C. at pp. 19, 20. The exemption contained in sec. 9 (1) (*e*) is concerned solely with the method of acquisition and the learned Judge *a quo* was incorrect in taking an opposite view. Accordingly the fact that a similar result falling within the exemption might have been created had there been a conditional bequest of the property, is also entirely irrelevant. It begs the question to state, as did the learned Judge *a quo*, that the proper test as to whether or not the acquisition was "volgens testament" or "under the will" is whether the real and substantial cause of the acquisition was the will. Even on this test, the application ought to have failed since the real and substantial cause of the acquisition was the contract of sale concluded between the respondents. The fact that the *fons et origo* of that contract was the will and nothing else (which is not conceded by the appellant since this overlooks the necessity for the option to be exercised in a particular time and in a particular manner) is irrelevant since it does not follow from that fact that the property was therefore acquired by testamentary succession. The provisions of sec. 5 (6) of the Act do not assist the respondents. It does not follow from the fact that the appellant is given the express power to "look beyond the consideration payable", that is considering whether or not any exemption is of application, that one is not confined to looking at the contract alone but that one must look to all the surrounding circumstances and, in particular, to the origin of the contract. *Hart* v. *Commissioner for Inland Revenue*, 1953 (2) S.A. 271, was correctly decided and is indistinguishable.

D. J. Shaw, Q.C., for the respondent: The respondents concede that the word "acquired" in sec. 2 of the Transfer Duty Act, 40 of 1949, denotes the acquisition of a right to acquire ownership as laid down in the cases cited by the appellant and in *Secretary for Inland Revenue* v. *Wispeco Housing (Pty.) Ltd.*, 1973 (1) S.A. at p. 791, and also that the form of the method of acquisition is important. The question here, however, is in essence what is meant by the phrases "property acquired by succession" in the English version and "eiendom wat by wyse van erfopvolging . . . verkry is" in the Afrikaans version which is the signed text. It is material to this question that the Act itself appears by no means clear that but for the proviso to sec. 1 (ii) (the definition of "date of acquisition") the date of the grant and not the date of the exercise of an option would not be the date of acquisition. The basis of this conclusion would be that the acquisition of the option is a conditional acquisition, the condition being the exercise of the option. Further, testamentary dispositions by which an heir or legatee is required to make some payment to the estate or to some beneficiary are very common and must be taken to have been present to the mind of the Legislature. *Estate Higginson* v. *Commissioner for Inland Revenue*, 1931 W.L.D.

at p. 142. The meaning of the phrases used in sec. 9 (1) (*e*) is that the real and substantial cause of the acquisition must be the succession. *Receiver of Revenue* v. *Hancke*, 1915 A.D. at p. 75. It is irrelevant for the consideration of this question that there should be the performance of a "juristic act" to complete the acquisition by virtue of the succession; *Commissioner for Inland Revenue* v. *Estate Kirsch*, 1951 (3) S.A. at p. 506. *Hart* v. *Commissioner for Inland Revenue*, 1953 (2) S.A. 271, is incorrectly decided. In any event it seems to be common cause that the "juristic act" constituted by adiation by an heir or legatee does not prevent the property being acquired by succession for the purposes of sec. 9 (1) (*e*). The exercise of the option by Raymond in this case constitutes his decision to accept the relevant benefits under the will and is therefore indistinguishable in any relevant respect from an adiation.

Friedman, S.C., in reply.

Cur. adv. vult.

Postea (September 10th).

OGILVIE THOMPSON, C.J.: The last will and testament of the late William George Roadknight, who died on 3rd August, 1970, and is hereinafter referred to as "the testator", contained a provision reading as follows:

"I direct my executors to grant my nephew Raymond George Roadknight the option to purchase as a going concern my farms described as:
(1) U 183 in the District of Hlabisa.
(2) U 221 in the District of Lower Umfolozi together with:
(1) All farming implements and other movables used in connection therewith.
(2) All cattle situate thereon.
(3) The cane quotas attached to the said farms.
(4) All buildings thereon.
(5) All standing crops and trees growing thereon.
(6) 100 Shares of my shareholding in the Umfolozi Co-operative Sugar Planters Ltd.
upon the following terms and conditions:
(*a*) The option shall be granted for a period of sixty (60) days from the grant of the option.
(*b*) the assets above-mentioned are to be purchased only as a whole.
(*c*) the purchase price is to be the sum of twelve thousand pounds (£12 000) and is to be paid within a time to be fixed by my executors.
(*d*) interest on the purchase price shall be paid at the rate of six per cent per annum payable quarterly and reckoned from the date of the exercise of the option.
Payment of the said purchase price and interest shall be secured to the satisfaction of my executors. Any exercise of the option must be in writing under the hand of my said nephew Raymond George Roadknight.
In the event of the said Raymond George Roadknight failing to exercise the said option then I direct that the assets, the subject of the option as set out above, shall fall in and form part of the residue of my estate in the hands of my executors to be dealt with by them in terms of this my will."

The above-mentioned farms remained registered in the name of the testator at the date of his death. In terms of a later clause in the will, it was provided that if the said Raymond George Roadknight—hereinafter referred to as "Raymond"—did not exercise the above-mentioned option, he should share equally with other named beneficiaries in the residue of the testator's estate but that, in the event of his exercising

the said option, he should have no share in the said residue. Another clause in the will similarly provided that a contingent right conferred upon Raymond to share in the ultimate distribution of the capital of a £10 000 trust fund established by the will for the benefit of the testator's stepdaughter should only apply if Raymond "fails to exercise the option hereinbefore referred to".

On 30th June, 1971 Raymond duly exercised the option which had, pursuant to the above-cited direction in the will, been communicated to him in written form by the executors of the testator. Transfer of the farms was registered into Raymond's name on 8th October, 1971. In respect thereof transfer duty was paid on 4th August, 1971, in the sum of R830,84, being the duty calculated on R24 000 less R729 in respect of the moveables mentioned in the above-cited clause of the will. Under date 8th November, 1971, appellant's representative advised respondents' attorneys that the fair value of the two farms had, in terms of sec. 5 (6) of the Transfer Duty Act, 40 of 1949, as amended, hereinafter referred to as "the Act", been determined at R140 000.

Thereafter, in motion proceedings instituted by them in the Durban and Coast Local Division, the testator's executors and Raymond were successful in obtaining an order declaring that, other than the aforementioned R830,84, no transfer duty is payable in respect of Raymond's acquisition of the aforementioned two farms (*vide* 1973 (2) S.A. 339 (D)). Against that decision appellant now, with the consent of all parties, appeals direct to this Court.

On 24th April, 1973—that is to say, after the record on appeal had already reached this Court—Raymond died. At the hearing of the appeal, the executrix dative in his estate was, by consent, substituted as the second respondent.

From the form of the order sought in the Court below and from the remarks of the learned Judge *a quo* at p. 340F-G of the report, it appears that, without raising any issue regarding the aforesaid R830,84 paid on 4th August, 1971, the present respondents based their contentions foursquare upon the exemption contained in sec. 9 (1) (*e*) (i) of the Act. The present appeal is resisted on the same ground.

In the papers before us the aforementioned "fair value" of R140 000, determined pursuant to sec. 5 (6) of the Act, has not been called into question. Appellant's contention that further transfer duty is indeed payable is directly supported by the decision in *Hart* v. *C.I.R.*, 1953 (2) S.A. 271 (C), which, although decided on somwhat different facts, is admittedly indistinguishable in principle from the present case. The learned Judge *a quo* (MILNE, J.), however, found the reasoning of HALL, J., in *Hart's* case, *supra*, unacceptable, and accordingly declined to follow that decision.

Under sec. 2 (1) of the Act, transfer duty is, subject to the provisions of sec. 9, payable

"on the value of any property . . . acquired by any person . . . by way of a transaction or in any other manner".

"Property", as defined in sec. 1 of the Act, *inter alia*, means "land and any fixtures thereon", while "transaction" is defined as:

"an agreement whereby one party thereto agrees to sell, grant, donate, cede, exchange, lease or otherwise dispose of property to another, or any act whereby

any person renounces any interest in or restriction in his favour upon the use or disposal of property".

Sec. 3 (1) of the Act provides that duty is payable "within six months of the date of acquisition". These last three words are also defined in sec. 1 of the Act, viz.:

A "'Date of acquisition' means, in the case of the acquisition of property by way of a transaction, the date on which the transaction was entered into, irrespective of whether the transaction was conditional or not . . . and, in the case of the acquisition of property otherwise than by way of a transaction, the date upon which the person who so acquired the property became entitled thereto: Provided that where property has been acquired by the exercise of an option to purchase or a right of pre-emption, the date of acquisition shall be B the date upon which the option or right of pre-emption was exercised."

It is well established that the word "acquired" in sec. 2 (1) of the Act ordinarily denotes, not ownerhsip already obtained, but the acquisition of a right to obtain *dominium*. The concept is sometimes expressed by saying that "acquired" includes the acquisition of a *jus in personam ad rem acquirendam*. (See *S.I.R.* v. *Wispeco Housing (Pty.) Ltd.*, 1973 C (1) S.A. 783 (A.D.) at p. 791, and *S.I.R.* v. *Hartzenberg*, 1966 (1) S.A. 405 (A.D.) at p. 409).

Appellant contends that the exemption set out in sec. 9 (1) (*e*) (i) of the Act relied upon by respondent has no application, and that duty is payable because, as appellant maintains, Raymond in the premises D "acquired" the farms in issue by a "transaction" to wit: the contract of purchase and sale concluded when Raymond exercised the option on 30th June, 1971. Sec. 9 (1) (*e*) (i) of the Act reads:

"9. (1) No duty shall be payable in respect of the acquisition of property by—

(*e*) an heir or legatee in respect of—

E (i) property acquired by *ab intestato* or testamentary succession or as a result of a re-distribution of the assets of the deceased estate in the process of liquidation."

The Afrikaans text of the Act is the signed version, and in that text the relevant provision reads:

"9. (1) Geen hereregte is betaalbaar nie ten opsigte van die verkryging van eiendom deur—

F (*e*) 'n erfgenaam of legataris ten opsigte van—

(i) eiendom wat by wyse van erfopvolging *ab intestato* of volgens testament of as gevolg van 'n herverdeling van die bates van 'n afgestorwe boedel onder likwidasie, verkry is."

It was—in my view, rightly—conceded by counsel for appellant that it is immaterial that the will directed the executors to grant the option G to Raymond, as distinct from a grant of option contained in the will itself. Emphasising that we are concerned with the construction of a fiscal statute, and citing well-known passages relating to the construction of such statutes to be found in *C.I.R.* v. *Wolf*, 1928 A.D. 177 at pp. 184-5, and *C.I.R.* v. *Frankel*, 1949 (3) S.A. 733 (A.D.) at p. 738, counsel for appellant argued that the particular form and manner where- H by these farms were acquired by Raymond constitute the decisive criterion. Neither the will itself nor the written option communicated to Raymond by the executors—so the argument continued—conferred upon Raymond any *jus in personam ad rem acquirendam*, but merely a right to purchase the farms (and movables) should he so elect. The farms were accordingly—so the argument concluded—"acquired" by Raymond, not by "testamentary succession", but only when, as the result of exercising the option and thus concluding a contract of purchase,

a "transaction" was established whereunder Raymond became for the first time vested with a *jus in personam ad rem acquirendam*.

The present is manifestly not a case of an ordinary commercial option to which the terms of the proviso to the above-quoted definition of "date of acquisition" plainly apply. The solvency of the estate is A undisputed. It is obvious from the other provisions of the will mentioned above that the testator wished Raymond to benefit substantially from his will. Raymond thus entirely fits the description of a legatee under the will. It was under the will that Raymond became entitled to claim—subject to implementing the option conditions—ultimate deli- B very into his name of these two farms. Nor—again, in my view, correctly—did counsel for appellant dispute that had the testator left the farms in issue (together with the other items mentioned in the will) to Raymond for a bequest price of £12 000, and had Raymond adiated, his acquisition of the farms would have been by "testamentary succession" within the meaning of sec. 9 (1) (*e*) (i) of the Act. The C circumstance that the testator chose to confer his bounty upon Raymond by way of the option procedure (thereby enabling Raymond to elect between exercising the option and sharing in the residue of the estate) is, however, contended by appellant radically to change the situation and to take the case out of the ambit of the exemption created D by sec. 9 (1) (*e*) (i) of the Act. For the reasons which follow, that contention is, in my judgment, unsound.

Postulating a solvent estate, a legatee of immovable property becomes vested, upon the death of his benefactor, not with *dominium* but with the right—provided he adiates—to claim transfer of the property after E confirmation of the relevant liquidation account in the estate (*Greenberg and Others* v. *Estate Greenberg*, 1955 (3) S.A. 361 (A.D.) at pp. 364-365). It is perhaps worthy of mention in passing that SCHREINER, J., (the Judge of first instance in *Estate Smith* v. *Estate Follett*, one of the decisions of this Court referred to in *Greenberg's* case, *supra*) favoured the view (*vide* 1942 A.D. at pp. 364, 367) that it was appro- F priate to describe an heir's right—an heir is but a residuary legatee—as a *jus in personam ad rem acquirendam* against the executor. As already mentioned, it is rightly conceded that a legatee's rights are not in any material respect different if the immovable property is left to him subject to a bequest price. In such a case the bequest is conditional; G but, subject to adiation and implementation of the condition, the legatee has the same vested rights as has an ordinary legatee. In both situations the legatee's acquisition of the immovable property falls within the exemption conferred by sec. 9 (1) (*e*) (i) of the Act. The circumstances of the present case do not appear to me to be different in any material respect. H

The position of an option-holder is closely analogous to the legatees above-mentioned. An option is itself an agreement giving rise to legal rights even before the option is exercised. It is an agreement whereunder "the giver grants and the holder acquires a right to buy" (*Hersch* v. *Nel*, 1948 (3) S.A. 686 (A.D.) at p. 695; *Venter* v. *Bircholtz*, 1972 (1) S.A. 276 (A.D.) at p. 283). While it is undoubtedly correct that, until he exercises the option, the holder cannot claim transfer, the cardi-

nal fact remains that, at his sole election at any time during the period of the option, the holder can, by merely exercising the option, claim transfer against payment of the price and fulfilling the conditions (if any) of the option.

When an option such as that in issue in the present case is conferred by will upon a legatee, the executors under the will are bound by the terms of the option in the same way as the giver of an ordinary commercial option is bound. Whenever a legatee exercises such an option, it is, in my view, unrealistic to dissociate the exercise from the provisions of the will and to regard the concluded contract of sale as a "transaction" quite independent of the testament conferring the option. In my judgment, the exercise of the option under such circumstances is more appropriately to be regarded as constituting an unequivocal act of adiation under the will. In my opinion the view—expressed by HALL, J., at p. 273B and *in fine* of *Hart's* case, *supra*—that such a legatee merely acquires "the right to acquire land for a price" and that the form of the testamentary disposition renders it "necessary for the legatee to enter into a transaction with the executor for the purpose of acquiring landed property" pays insufficient regard to the foundational fact that the legatee's rights originate in, and are inextricably associated with, the will and require only the unilateral exercise of the option (the virtual equivalent of adiation) to perfect them.

Likewise in the present case. It appears to me to be wholly artificial to say that, because of the option which had to be exercised, Raymond acquired these farms by a "transaction", and therefore not by testamentary succession. Such a conclusion would, in my view, accord undue importance to ultimate form (i.e., the exercise of the option), while unwarrantedly ignoring the true nature and origin of the acquisition. Appellant's contention in seeking to relate Raymond's "acquisition" of the farms in question solely to a supposed "transaction" created by the exercise of the option ignores the fact that the *fons et origo* of Raymond's rights lie in the will itself, and that the option procedure was manifestly intended by the testator merely as the method whereby Raymond, if he so desired, could acquire the farms by testamentary succession. On that ground also the contention is, in my view, unsound and unacceptable. (Cf. *C.I.R.* v. *Estate Kirsch and Others,* 1951 (3) S.A. 496 (A.D.) at pp. 506-507). Nor, in my opinion, do the provisions of sec. 9 (4) (*b*) of the Act afford any support to the construction appellant seeks to apply to sec. 9 (1) (*e*) (i). The exemption created by sec. 9 (4) (*b*), in my view, merely recognises that an administrator is often but the conduit pipe or administrative peg between the estate of the testator and the beneficiaries. In *Receiver of Revenue* v. *Hancke and Others,* 1915 A.D. 64, it was held (at p. 75) that, inasmuch as "the real and substantial cause of the heirs' rights was the will", and because (*vide* p. 81) the personal right of the heirs against their mother (the survivor) "was one which they acquired from their father's will", the heirs had become entitled to the survivor's share "by way of legacy, testamentary or other inheritance", and that they were accordingly not liable for transfer duty thereon under the provisions of the Estate Proclamation, 28 of 1902 (T). Similarly, in the present case the correct

view appears to me to be that the real and substantial cause of Raymond's acquisition of these farms was the testator's will.

According full weight to the circumstance that we are concerned with a fiscal statute, and paying due regard to the fact that, so far as form is concerned, a contract of sale was undoubtedly concluded by the exercise of the option, I am nevertheless of opinion that, on a proper analysis of all the facts, Raymond acquired the farms in issue "by testamentary succession" ("by wyse van erfopvolging volgens testament") within the meaning of those expressions as used in sec. 9 (1) (*e*) (i) of the Act. Without identifying myself entirely with every aspect of the learned Judge *a quo's* reasoning—I have in mind more particularly certain portions of what appears at p. 343E-H of the report—I am, for the reasons set out above, of opinion that his conclusion was correct and that *Hart's* case, *supra,* must be regarded as incorrectly decided.

The appeal is dismissed with costs.

POTGIETER, J.A., JANSEN, J.A., TROLLIP, J.A. and MULLER, J.A., concurred.

Appellant's Attorneys: *Deputy State Attorneys,* Durban and Bloemfontein. Respondents' Attorneys: *Goodrick & Son,* Durban; *Hill, McHardy & de Bruyn,* Bloemfontein.

FARRELL v. ROODT, N.O.

(APPELLATE DIVISION.)

1973. *September* 7, 28. VAN BLERK, J.A., HOLMES, J.A., WESSELS, J.A., JANSEN, J.A. and RABIE, J.A.

Sale.—Hire-purchase agreement.—Sale of immovable property.—Agreement drawn up by estate agent on seller's behalf.—Balance of purchase price in monthly instalments.—Full balance to be paid at end of first year "subject to a building society loan".—Agreement to stand until bond available.—Loan not procurable.—Seller seeking to cancel contract.—Purchaser held not to be in breach of any of terms of the hire-purchase agreement.

In terms of a hire-purchase agreement for the sale and purchase of immovable property, as drawn up by estate agents acting on behalf of the seller, it was provided in clause 1 that the purchase price should be secured as to R1 000 in cash on 8th January, 1970, the balance of R19 600 together with interest thereon to be paid in monthly instalments of R128 each. The balance was to bear interest at 8½ per cent per annum calculated annually in advance. Clause 2 provided that "notwithstanding anything herein contained, it is specially agreed that whatever amount shall be owing . . . on 1st February, 1971, in respect of the balance of the purchase price and interest shall be paid in full on that date, subject to a building society loan and the purchaser may in any event at any time make payments of larger instalments than are provided herein". Clause 9 provided that the purchaser should pay all transfer expenses but that the seller should pay the agent's commission. Clause 11 provided that "the purchaser declares