[HIGH COURT OF AUSTRALIA.]

RAY AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

DAVIES . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, *Aug.* 20.

Griffith C.J., O'Connor and Isaacs JJ.

Vendor and purchaser—Contract for sale of land—Vendor to procure loan of balance of purchase money—Implied obligation on purchaser to execute mortgage—Qualified refusal to execute—Rescission by vendor—Specific performance.

A contract for the sale of land provided for payment of a deposit at once, and the balance of the purchase money by instalments extending over eighteen years, and also provided that, if the vendor should arrange a mortgage for the balance on the same terms as those contained in the contract as to interest and payment of principal and interest, "such mortgage to be for a term of not less than three years," the vendor should pay the costs of the mortgage and half the costs of its discharge. The purchaser paid the deposit and went into possession, and paid interest and instalments in accordance with the contract for eighteen months. The vendor then arranged for a mortgage in accordance with the contract, but the purchaser refused to execute it unless the vendor paid a certain sum claimed by the purchaser for costs of the mortgage. The vendor contending that he was not liable, declared his intention to rescind the contract, and issued a writ of ejectment.

In a suit by the purchaser against the vendor:

Held, that, assuming that there was an implied obligation on the part of the purchaser to execute a mortgage if arranged by the vendor, the refusal to execute the mortgage, whether the purchaser's claim for costs was justified or not, being only a qualified refusal and not going to the root of the contract, did not entitle the vendor to rescind, and the purchaser was therefore entitled to an injunction to restrain the action of ejectment and to a decree for specific performance, subject to payment of compensation if necessary.

Semble, that under the rule stated by Lord *Blackburn* in *Mackay* v. *Dick*, 6 App. Cas., 251, at p. 263, there was an implied obligation on the part of the purchaser to execute a mortgage if the vendors arranged for a loan on the terms stated in the contract.

Decision of *A. H. Simpson* C.J. in Equity (3rd March 1909) affirmed.

THE appellants, H. S. Ray and Robert Ray, entered into a contract with the respondent, Marion Davies, to sell to her a piece of land and a house thereon for £675. The material terms of the contract were as follows:—The purchaser shall pay a deposit of £100 on the execution of the contract and the balance by quarterly instalments at the rate of twelve shillings per week, the first of such payments to be made on a date mentioned. Clause 2 provided for the payment of interest by the purchaser at the rate of 5 per cent. per annum on the balance of purchase money quarterly on dates mentioned. Clause 3 provided that the purchaser should from the date of the contract pay rates and taxes and should be entitled to possession or to collect the rents so long as the payments provided for in the contract should be punctually paid. Clause 4 was as follows:—"If the vendors arrange a mortgage for the balance of purchase money owing by the purchaser on the terms hereinbefore contained as to rate of interest and time and manner of payment of principal and interest such mortgage to be for a term of not less than three years the vendors agree to pay the costs of such mortgage and also half the costs of the discharge of the said mortgage." The purchaser paid the deposit and went into possession in accordance with the contract, and paid instalments of purchase money and interest for about 18 months. At the end of that time the vendors arranged for a loan of the balance of purchase money and tendered a mortgage for execution by the purchaser. The mortgage was treated by the parties as being in accordance with the provisions of the contract. The purchaser, however, before executing the mortgage demanded of the vendors the sum of £2 2s. as the costs of her solicitor in connection with approving the mortgage, and £1 17s. 9d., half the costs of discharge of the mortgage. The vendors disputed their liability to pay the amount claimed, whereas the purchaser insisted that by the terms of the

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contract she was entitled to be indemnified all costs incurred by her in connection with the mortgage, and refused to complete until the amount was paid. The vendors thereupon declared their intention to rescind the contract, and issued a writ of ejectment against the purchaser, to eject her from the land the subject matter of the contract. The purchaser brought this suit to have the vendors restrained by injunction from proceeding with the action of ejectment and to have it declared that the vendors were not entitled to rescind, and claiming specific performance of the contract. The vendors in their statement of defence set up that the written contract did not represent the real agreement between the parties, but that there was a term verbally agreed upon providing that, in the event of the vendors procuring at their own expense a loan to the purchaser upon mortgage over the land sold of a sum sufficient to pay them the balance of the purchase money after payment of the deposit, and undertaking to pay one half the costs of discharging the mortgage when it should be discharged, the mortgage to provide for payment of interest at 5 per cent. per annum and the repayment of principal and interest by weekly instalments payable quarterly, the purchaser would pay the balance of the purchase money immediately upon receiving the loan upon the mortgage and that, if the purchaser failed to comply with the terms of this agreement, all moneys, &c., paid on account of the purchase should be absolutely forfeited and the vendors should have power to resell the land, and it was alleged that this agreement was not reduced to writing nor was there any note or memorandum sufficient to satisfy sec. 4 of the *Statute of Frauds*. It was also denied that the payment of deposit or entry into possession or payment of instalments was made in pursuance of the agreement, and it was alleged that the vendors had so far as they were able fulfilled the agreement on their part and were ready and willing to complete in accordance with the agreement.

A. H. Simpson C.J. in Equity, before whom the suit came for hearing made a decree in terms of the prayer in the statement of claim (3rd March 1909). From that decision the present appeal was brought.

Loxton (*Davidson* with him), for the appellants. The real contract between the parties, which was proved in evidence, was not that which appeared in the document. There was a mutual arrangement for payment of the principal and for the provision that was to be made to secure that in the mortgage, but the written contract made no reference to the matter. The agreement was that the vendors should obtain a loan of the balance, and that the purchaser should then execute a mortgage. The defendants were, therefore, entitled to rely on the *Statute of Frauds*. The Judge really granted relief on the basis of the verbal contract alleged by the defendants, though he held that it was really contained in the writing and that there was a sufficient compliance with the Statute. The mortgage was in accordance with the actual agreement, though not in accordance with the document. Even if the Judge was right in holding as he did on this point the purchaser was in default. There was an implied obligation on her part to execute the mortgage when tendered for execution. The vendor was not bound to pay the costs of approving the mortgage. That is a luxury for which the mortgagee must pay, and is not part of the ordinary costs of mortgage within the meaning of the contract. The costs of discharge had not yet been incurred, and therefore the purchaser had no claim on the vendors for them at that stage. [He referred to *Williams' Vendor and Purchaser*, 1904 ed., p. 548; *Scott* v. *Parker* (1); *Wales* v. *Carr* (2).] At any rate, even if the claim was justifiable, in whole or in part, the vendors' refusal to satisfy it was not a sufficient ground for the purchaser refusing to execute the mortgage: *Mersey Steel and Iron Co. Ltd.* v. *Naylor, Benzon & Co.* (3). If the vendors were liable only for part of the amount claimed the purchaser was in the wrong in demanding the whole. The vendors were not bound to tender the part. If both are in the wrong as to these costs, the Court should not relieve the party who has refused to carry out the contract in other respects. The vendors' refusal was on a trivial matter, whereas the refusal to execute the mortgage was a substantial failure to carry out the contract. The promise to execute a mortgage and

(1) 1 Q.B., 809. (2) (1902) 1 Ch., 860.
(3) 9 App. Cas., 434, at p. 443.

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the promise to give possession were mutually dependent. The purchaser's refusal to do the one entitled the vendors to recall the other. [He referred to *Stavers* v. *Curling* (1).] The possession of the purchaser was not necessarily permanent, it depended for its continuance on performance of the obligations imposed on her by the contract. The purchaser was not in fact ready and willing to perform the contract on her part. She did not unconditionally offer to do what she had failed to do, and is not entitled to specific performance.

[GRIFFITH C.J.—The vendor could have got relief by a counterclaim. The remedy at common law would be damages.

ISAACS J.—Failure to fulfil a condition precedent is not necessarily a bar to specific performance. It must be as to an essential term: *Oxford* v. *Provand* (2); *Fry on Specific Performance*, pars. 935, 956; *Lamare* v. *Dixon* (3).]

If the appeal is allowed the respondent should be ordered to pay the appellants' costs, as the respondent's default was the cause of the trouble. The vendors have always been ready and willing to complete the contract if the purchaser would execute the mortgage. The dispute as to the costs could have been left till after completion.

Harvey and *Perry*, for the respondent, were not called upon.

GRIFFITH C.J. This is a suit for specific performance of a contract by which the defendants agreed to sell to the plaintiff certain land and a house thereon for £675, payable £100 in cash and the remainder by quarterly instalments at the rate of twelve shillings a week, interest to be paid at the rate of 5 per cent. on the unpaid balance.

These instalments would have extended over a period of 18 years. The first clause of the agreement in writing provided that the purchaser should pay a deposit of £100. [His Honor then read the rest of that clause and also the second and fourth clauses as already set out, and continued.]

It is to be observed that the contract does not in terms create

(1) 3 Bing. N.C., 355.
(2) L.R. 2 P.C., 135.
(3) L.R. 6 H.L., 414.

any obligation on the part of the purchaser to give a mortgage, but it may be that it is implied. It is also obvious that the words "such mortgage to be for a term of not less than three years" may indicate that the balance of the purchase money not paid at the end of that period is to become then payable, which is apparently inconsistent with the first clause. As a matter of construction I take it that the two clauses read together mean this, that if a mortgage is arranged by the vendors providing for the payment of the instalments for three years, with acceleration of payment of the balance at the end of three years, and the purchaser executes such a mortgage, the vendors agree to pay the costs of the purchaser. That seems to me to be the ordinary and plain construction of the agreement. I remark that that is the construction which was put upon it by both parties from the first, and by the learned Judge from whom the appeal is brought. The plaintiff paid the £100, entered into possession, and paid instalments as they became due. A mortgage was prepared based on the view of the contract that I have stated, and tendered for execution. Then a question arose as to the defendants' liability to pay the costs of the mortgage, and over this and other trifling differences, involving less than £4, all this absurd litigation began. The defendants refused to pay what was asked, and because the plaintiff insisted that she was entitled to the amount claimed and objected to execution of the mortgage until it should be paid, the defendants attempted to rescind the contract.

The first defence set up is that the written agreement does not represent the agreement between the parties. It appears on the evidence that there was a considerable amount of correspondence and discussion between the parties in regard to the signing of the document. A draft agreement was first prepared and was put in evidence, and it appears, upon a comparison of that draft with the completed contract, that the words which I have read, "such mortgage to be for a term of not less than three years," were inserted after the first draft was prepared, and after discussion had taken place. So that they evidently embodied the concluded intention of the parties. Upon the evidence it is, in my opinion, impossible to hold that there is any foundation at all for the contention that this document does not express the concluded

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agreement between the parties. The only question is as to its meaning.

The contention for the defendants is, first, that it imposed an obligation on the part of the plaintiff to execute a mortgage if the defendants could procure anybody to lend the money. If that is the true construction, the defendants might, I suppose, procure the loan at any time during the currency of the agreed period of 18 years. I will assume that there is some such obligation imposed by implication. What, then, is the substance of the contract? First of all, an absolute agreement to which effect is to be given by immediate delivery of possession. Then for a period indefinite in time there is an obligation on the part of the purchaser to execute a mortgage if its terms are in accordance with the contract. It is impossible to say that the obligation to execute a mortgage at some time indefinitely subsequent to the obligation of the vendors to put the purchaser in possession is a condition precedent to the right to have possession. No rule that has ever been laid down for the interpretation of contracts would justify holding these to be mutually dependent covenants, so that a wrongful refusal by one party after five years to fulfil one covenant would entitle the other party to re-open what had been completed five years before. It would not be so at law, and it is not suggested that equity would apply a different rule. It follows that the only remedy that the defendants could have if the plaintiff wrongly refused to execute a mortgage would be a claim for damages. They might be large or they might be very small. Whether they are entitled to any depends, first of all, upon the language of the contract, and secondly, on whether the plaintiff has broken it. Assuming that the plaintiff did break it and ought to have executed the mortgage, that is not a sufficient reason why she should not get specific performance of the contract on paying compensation. That was a matter for which the defendants might have been compensated if they had put it forward by counterclaim. If they had done so the whole matter would have been disposed of in the suit. Or they might possibly have obtained compensation by an action for damages. Regarded from any point of view it is not a ground for preventing the Court from granting discretionary relief.

I do not think it worth while to express an opinion as to whether the vendors were or were not liable to pay the two guineas to the plaintiff for the costs of the purchaser's solicitors advising her as to the proper form of the mortgage. I have heard all that Mr. *Loxton* has urged upon that subject, and the impression left on my mind is that in this contract the stipulation that the vendor should pay the costs of the mortgage meant that the mortgagor was not to be put to any costs in connection with the mortgage. The stipulation was entirely for the benefit of the vendors, and if they took advantage of it they were bound to indemnify the purchaser against any expense to which she might be put in connection with it.

With respect to the other item, £1 17s. 9d., I really do not feel called upon to express any independent opinion at all. But I think that the opinion of the learned Judge below is the only one that can be reasonably entertained.

O'CONNOR J. I am of the same opinion, and have very little to add. The rights of both these parties are regulated entirely by the contract between them which is evidenced in writing. Their rights are to be found within the four corners of that document. Under it the respondent took possession and remained in possession for some 18 months before the issue of the writ, and had in the meantime been complying with the contract, paying instalments and interest as they became due. In pursuance of one of the clauses of the contract the vendors had obtained a mortgage which they put before her for execution. All parties agree that that was the proper way to carry out the contract, but a difference arose about the sum of two or three pounds. As to that difference I do not think it necessary to say anything more than this: as to the two guineas the appellants were probably bound to pay it; as to the other sum in dispute very likely the appellants are right. However, this dispute having arisen, the appellants took it upon themselves to rescind the contract, and issued a writ in ejectment. They had the legal title. The respondent's rights under the contract were entirely equitable, and as the law stands in New South Wales there was no defence to the action of ejectment, no matter how wrong the appellants

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may have been in the view which they took of their rights under the contract. The respondent was consequently driven into equity to stop the action, and asked the Court to restrain the action by injunction and to grant specific performance of the contract. As to staying the action the first matter to be determined was whether the appellants were entitled to rescind the contract. It is clear to my mind that they had no such right. After the respondent had been in possession of the property for eighteen months, fulfilling all the conditions, and ready and willing to perform all except one term that really did not go to the root of the contract, the vendors were certainly not entitled to rescind the contract, and there is no provision in the contract which affords any foundation for the argument that they were entitled to do so. Under these circumstances, whether the appellants are right or wrong as to the trifling sum in dispute which has caused the whole trouble, it is plain that the Court could not do anything else than hold that the vendors had no right to rescind, and, therefore, that the action of ejectment ought not to be allowed to proceed. The Court went beyond that and granted a decree for specific performance. There is on the evidence nothing to show that the respondent on her part failed to carry out the contract in such a way as to disentitle her to specific performance, and under those circumstances I agree that the learned Chief Judge was right as to both parts of his order, and that the appeal must be dismissed.

ISAACS J. I agree that this appeal should be dismissed, and I agree very much in all the reasons given by my learned brothers. There is only one slight point of difference not material in this case. The contract is in writing, and unless some case is made to show that the writing did not embody the real agreement between the parties, then, apart altogether from the question of part performance, the contract must stand as written. The evidence discloses no vestige of any case whatever to show that the written document does not state the real contract between the parties, as I read the document. All that is alleged is quite consistent with the document as it now stands, and there is no mistake alleged, nothing included by inadvertence, and no circum-

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stance whatever such as is usually recognized as a ground for rectification of the document. We therefore only have to construe it according to its terms. Now the first condition is that a deposit of £100 is to be paid on execution of the contract and the balance of the purchase money, according to the first and second conditions, in a specified manner at specified times, £575 to be paid by quarterly instalments at the rate of twelve shillings a week, the first payment to be made on the day specified. Then the purchaser is to pay interest on the balance at 5 per cent. by four quarterly instalments on the dates mentioned. As between the vendors and the purchaser that represents the terms of the contract. We can see from the document that the purchaser is not willing or not in a position to pay the whole purchase money at once, and the contract gives her about 18½ years to pay it off. In paragraph 4 there was a provision for the benefit of the vendor in these words:—"If the vendors arrange a mortgage for the balance of purchase money owing by the purchaser on the terms hereinbefore contained as to rate of interest," that is 5 per cent., "and time and manner of payment of principal and interest," that is upon 4th June and the other months mentioned in each year at 12s. per week, "such mortgage to be for a term of not less than three years," it may be for any longer term, "the vendors agree to pay the costs of such mortgage and also half the costs of the discharge of the said mortgage." I take it that you have to give effect to every part of that clause and not to allow one part to outweigh another if you can possibly help it, unless there is some absolute inconsistency, some necessary inconsistency, between the different parts of the document. Now there is no inconsistency that I can see in having a mortgage of not less than three years, and mentioning the time and manner of payment of the unpaid purchase money. It may be for the whole unexpired time over which the payments are to be distributed, but it is provided that it is not to be for less than three years. Therefore I can see no reason for acceleration of payment of the purchase money at all if that became material. There is not in the clause any express provision that the purchaser shall execute a mortgage, but there is a principle of construction expressed by Lord *Blackburn*, in

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the case of *Mackay* v. *Dick* (1), where he says this:—"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." I think that applies in this case, and as there is a clause here for the benefit of the vendors, and this is one of the terms of the contract, there is an implication that the purchaser shall execute a mortgage if consistent with the terms of that paragraph. Now the vendors did arrange a mortgage which, I think, speaking for myself, did not strictly agree with that term of the paragraph. But it was treated as if it did agree with it, and no objection was taken upon this ground. I am not aware that the learned Judge expressed any opinion on the point, and it is not necessary to do so. Assuming then that the mortgage was in compliance with the contract, then the purchaser was bound to execute it, and if she had absolutely refused to do so, I do not say, and it is not necessay to say, that she would have been entitled to insist upon specific performance. But she did not. There was a miserable difference about something less than £4, really as to something less than £2, and on that the vendors gave notice on 11th September 1908 that they would rescind the contract unless the document was signed. Well, as far as I can see there is no power to rescind under these circumstances. The main defence in the case was that the vendors had power to rescind and did rescind, and forfeited the whole deposit. Within six days after that they issued a writ in ejectment at common law seeking to eject the purchaser from the land, and the purchaser had no option but to go into equity and restrain them. It was not a matter of choice but of compulsion. Then the only objection is that there was not a strict compliance with the terms of the agreement. I am not sure, having regard to the duty of the appellants here, that that is a really good defence or answer. But suppose there was not a strict compliance, I do not think that the default was such as equity regards as a bar to

(1) 6 App. Cas., 251, at p. 263.

specific performance. It was not an out and out refusal, and cannot be regarded as a refusal to perform an essential part of the contract, and, as the learned Chief Justice has said, there would have been sufficient compensation given by an action for damages if there was a cause of action at all.

For these reasons I agree with the judgment proposed, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, *S. E. Pile.*

Solicitors, for the respondent, *Henry Davis & Wolstenholme.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

HENRY CADD . . . . . APPELLANT;
DEFENDANT,

AND

WILLIAM CADD . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Principal and agent—Purchase of land—Creation of trust—Evidence.

In an action whereby the plaintiff sought a declaration that the defendant bought certain land as agent for the plaintiff and held it as a trustee for him, the plaintiff's case rested upon oral testimony. The Judge of first instance accepted the plaintiff's version of the facts and gave judgment for him. On appeal to the High Court,

Held, that the evidence did not establish the relation of principal and agent, and that the action failed.