[HIGH COURT OF AUSTRALIA.]

BELL . . . . . APPELLANT;
PLAINTIFF,

AND

SCOTT . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922.

SYDNEY, *April* 24, 26; *May* 4.

KNOX C.J., ISAACS AND HIGGINS JJ.

Vendor and Purchaser—Contract of sale—Requisitions on title—Title derived through sale by mortgagee—Mortgage by executor before probate—Right of vendor to compel conveyance by executor—Right of purchaser to rescind contract—Wills, Probate and Administration Act 1898 (*N.S.W.*) (*No.* 13 *of* 1898), *sec.* 44*.

Under a contract made in 1921, of which time was not of the essence, for the sale of land in New South Wales, the abstract of title showed that the vendor had purchased the land from a mortgagee who had sold under the power of sale contained in the mortgage; that the mortgagor was executor and the devisee of the land under the will of his wife, who had died in 1904; that he had executed the mortgage before probate had been granted to him, and nothing was said in the mortgage to show that he was executor. In reply to a requisition by the purchaser stating that on these facts there appeared to be a legal estate outstanding (in the mortgagor as executor), and asking the vendor how he proposed to get over the difficulty, the vendor referred the purchaser to sec. 44 of the *Wills, Probate and Administration Act* 1898 (N.S.W.), and submitted that, as the property of the mortgagor's wife vested in the mortgagor as executor as from her death, it was immaterial that the mortgage was executed prior to the grant of probate.

Held, that the purchaser was not entitled summarily to repudiate the contract, and that, assuming that the mortgagor had mortgaged the land as beneficial owner only and that the legal estate was outstanding in him as executor, the

* The *Wills, Probate and Administration Act* 1898 (N.S.W.), by sec. 44, provides that "Upon the grant of probate of the will . . . of any person dying after the passing of this Act, all real and personal estate which any such person dies seised or possessed of or entitled to in New South Wales, shall as from the death of such person pass to and become vested in the executor to whom probate has been granted . . . for all his estate and interest therein."

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vendor was in a position to compel a conveyance of the land by the executor and was entitled to a reasonable time within which to obtain it.

Sidebotham v. *Barrington*, (1841) 3 Beav., 524, distinguished.

Decision of the Supreme Court of New South Wales: *Bell* v. *Scott*, (1921) 21 S.R. (N.S.W.), 706, affirmed.

APPEAL from the Supreme Court of New South Wales.

A written contract was entered into on 28th January 1921 between Augustus Wright Scott and Lewis Bell for the sale by Scott to Bell of certain land in New South Wales, and a deposit of £500 was paid thereon by Bell to Scott. Subsequently, in the circumstances which are set out in the judgment of *Knox* C.J., Bell applied to the Supreme Court, by originating summons, *inter alia* for a declaration that in the circumstances he was entitled to rescind the contract and for an order that the defendant, Scott, be ordered to repay to him the deposit of £500 with interest.

Harvey J., by whom the summons was heard, dismissed it: *Bell* v. *Scott* (1). On appeal the Full Court affirmed the judgment of *Harvey* J.: *Bell* v. *Scott* (2).

From that decision the plaintiff now appealed to the High Court.

S. A. Thompson (with him *Nicholas*), for the appellant. The reply of the vendor to the purchaser's requisition was in effect a denial that there was an outstanding legal estate and a refusal to get it in if it existed, and in those circumstances the purchaser was entitled to repudiate the contract. There was an outstanding legal estate in the executor, for sec. 44 of the *Wills, Probate and Administration Act* 1898 only gives powers to an executor to whom probate has been granted, and does not authorize him as executor to mortgage land of his testator before probate has been granted. All he had before that event happened was an equitable estate as devisee of the land, and all that the vendor acquired when he purchased from the mortgagee was an equitable estate. The legal estate was outstanding in the executor, and he held it, not as a bare trustee, but as a trustee for the payment of the debts of the testatrix. The vendor, therefore, is unable to give a good title, for he is unable to

(1) (1921) 21 S.R. (N.S.W.), 315. (2) (1921) 21 S.R. (N.S.W.), 706.

compel the executor to give him a conveyance of the legal estate in the land (*Sidebotham* v. *Barrington* (1)). The executor cannot give a title freed from the rights of the creditors. If the vendor has not a complete title in himself and cannot compel the giving of a good title, the purchaser, as soon as he knows that to be so, is entitled to rescind the contract. [Counsel also referred to *Halkett* v. *Earl of Dudley* (2); *Dowling* v. *Moore* (3); *Forrer* v. *Nash* (4); *Re Hucklesby and Atkinson's Contract* (5); *Re Hordern and Whelan's Contract* (6); *Howard* v. *Chaffers* (7); *Solomon* v. *Attenborough* (8); *Watkins* v. *Cheek* (9); *Wills, Probate and Administration Act* 1898, secs. 45-48, 83, 84.]

[KNOX C.J. referred to *Smith* v. *Butler* (10); *Webster on Conditions of Sale*, 3rd ed., p. 310.

[ISAACS J. referred to *Brickles* v. *Snell* (11); *Stickney* v. *Keeble* (12); *In re Bayley and Shoesmith's Contract* (13).]

R. K. Manning and *Jordan*, for the respondent, were not called on.

Cur. adv. vult.

May 4.

The following written judgments were delivered:—

KNOX C.J. The appellant, Lewis Bell, took out an originating summons for a declaration that he was entitled to rescind a contract for sale of land dated 28th January 1921, and for an order for repayment by the defendant of a deposit of £500 and payment by him of expenses of investigating title and costs of the application. *Harvey* J. dismissed the summons, and his decision was affirmed by the Supreme Court in Full Court. An appeal was then brought to this Court.

The contract for sale is in a common form, and no time is fixed by it for completion. It is not suggested that time is of the essence of the contract. The abstract of title showed that the vendor deduced his title under a sale by one Charles Gardiner as mortgagee

(1) (1841) 3 Beav., 524.
(2) (1907) 1 Ch., 590.
(3) (1908) 9 S.R. (N.S.W.), 31.
(4) (1865) 35 Beav., 167, at p. 171.
(5) (1910) 102 L.T., 214, at p. 217.
(6) (1901) 1 S.R. (Eq.) (N.S.W.), 165.
(7) (1863) 2 Dr. & Sm., 236.
(8) (1912) 1 Ch., 451.
(9) (1825) 2 Sim. & St., 199.
(10) (1900) 1 Q.B., 694, at p. 699.
(11) (1916) 2 A.C., 599.
(12) (1915) A.C., 386.
(13) (1918) 87 L.J. Ch., 626.

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under the power of sale contained in his mortgage. This mortgage was given by one Frederick May Wilson and contained a recital that Mary Ellen Wilson, in whom the title to the land was vested, died on 31st December 1904, having by her will devised and bequeathed the whole of her real and personal estate to Frederick May Wilson, the mortgagor, there being nothing in the conveyance to show that he was, as in fact he was, executor of the will of Mary Ellen Wilson. On receipt of the abstract of title the plaintiff's solicitors on 18th February 1921 sent in requisitions and objections, one of which was as follows:—"(9) By indenture of mortgage of 19th January 1905, registered number 251, Book 774, Frederick May Wilson purported to mortgage to Charles Gardiner *inter alia* all the real estate devised to him by his wife Mary Ellen Wilson. As probate of the will was not granted to the said Frederick May Wilson till 2nd June 1905, it would appear that the said Frederick May Wilson had no power to mortgage the said land. As the said Charles Gardiner purported to exercise his power of sale under the said mortgage, there would appear to be a legal estate in the said land outstanding. How do you propose to get over this difficulty?" On 2nd March 1921 the defendant's solicitors replied to this objection as follows:—"(9) We refer you to sec. 44 of the *Wills, Probate and Administration Act.* On the grant of probate to Frederick Wilson the property of his deceased wife, Mary Ellen Wilson, vested in him as from her death. We submit therefore that it is immaterial that the mortgage referred to is dated prior to the grant of probate." On 8th March 1921 the plaintiff's solicitors wrote to the solicitors for the defendant a letter as follows:—"We are in receipt of your letter of the 2nd inst. with replies to requisitions herein, and we now make the following observations thereon:—(9) We are of opinion that this difficulty is not covered by sec. 44 of the *Wills, Probate and Administration Act.* There may be something in your contention if Frederick May Wilson had mortgaged as executor, but upon inspection of the mortgage it is perfectly clear he mortgaged as beneficial owner, which he had no power to do. We have consulted our client about the matter, and advised him that in our opinion the vendor's title is defective so far as regards the lands derived through the will of Mary Ellen Wilson,

and he has instructed us to inform you that he does not intend to proceed further with the contract and to demand a refund of the deposit. . . . In view of the fact that the defect in the title is one that should have been known to the vendor, the purchaser also requires the vendor to pay our costs of investigating the title. The purchaser is entitled to recover these costs under sec. 55, sub-sec. 2, of the *Conveyancing Act* 1919." On 14th March the plaintiff's solicitors wrote further:—"Referring to our letter to you of 8th inst., to which we are without reply, we should be glad if you would kindly let us have a cheque for £500 refund of the deposit herein. We have not yet made up our costs in connection with the matter, as stated in our letter, but will let you have a memo. of same as early as possible." On 15th March defendant's solicitors wrote as follows:—"We are in receipt of yours of the 8th inst. We desire to say in answer thereto that, without admitting the necessity for so doing, we are at once taking steps with a view to obtaining from Frederick May Wilson a deed whereby what you allege is an outstanding legal estate may be got in. We submit that the purchaser is not entitled to rescind the contract, and we are instructed to inform you that the vendor holds him to the same." On the same day plaintiff's solicitors replied:—"We are in receipt of your letter of even date herewith, and note contents. The purchaser will not agree to wait until you have obtained the document mentioned in your letter, and has now instructed us to take proceedings under sec. 55, sub-sec. 3, of the *Conveyancing Act* 1919 for the recovery of the deposit and costs. We are accordingly to-day instructing counsel to draw the necessary originating summons for that purpose."

On 24th March the originating summons was taken out. *Harvey* J., without deciding whether the legal estate was outstanding in the executor of Mary Ellen Wilson, held that, assuming that to be so, the plaintiff was not entitled to rescind without giving the vendor an opportunity to get in the outstanding legal estate. The Full Court decided: (1) that the legal estate was outstanding in the executor of Mary Ellen Wilson; and (2) that, nevertheless, the vendor was entitled to have an opportunity of getting in the legal estate and that, as no time was fixed for completion, he was entitled to a reasonable time within which to complete his title, and that

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consequently the plaintiff was not justified in repudiating the contract as he claimed to do. It is against this decision that this appeal is brought.

In the view I take of the case it is not necessary to express an opinion on the question whether the legal estate is outstanding in the executor of Mary Ellen Wilson; for, even assuming this to be so, I think the plaintiff was not on or before 15th March entitled to repudiate the contract or to demand the return of his deposit. In my opinion it is clear that, where there is a contract for the sale of land and time is not of the essence of the contract, the purchaser is not entitled before the time for completion has arrived to treat the contract as no longer binding on him unless it is quite clear that the vendor has no title to the property sold or to a material portion of it, or that his only title is contingent on the volition of a third person (*Webster on Conditions of Sale*, 3rd ed., p. 311). If the vendor shows that he is neither able to convey the property himself nor able to compel a conveyance of it from any other person, the purchaser may repudiate the contract before the time for completion has arrived (*Brewer* v. *Broadwood* (1)). But this principle has no application in cases in which there are outstanding interests which the vendor has the power of getting in. The fact that the legal estate is outstanding does not make out a case of "no title at all" (see *In re Deighton and Harris's Contract* (2)). If the vendor's inability is not clear, the purchaser must wait.

In the present case neither the abstract of title nor the letter of 2nd March amounts to an admission that the defendant was either unable or unwilling to perform his part of the contract. On the assumption that the legal estate was outstanding in the executor of Mary Ellen Wilson, I do not think it can be said that the only title of the vendor is contingent on the volition of a third person, or that he has no power to compel a conveyance of it. The vendor claims title under a conveyance by the devisee under the will of Mary Ellen Wilson of the whole of his equitable interest in the land in question. There is nothing before us to show that there are any unsatisfied creditors of the testatrix, who died more than seventeen years ago. If there are not, then her executor is a bare

(1) (1882) 22 Ch. D., 105.

(2) (1898) 1 Ch., 458.

trustee of the legal estate for the devisee and his assigns, and can be compelled to convey it accordingly. Even if there are such creditors, I see no reason why the executor should not be compellable to convey the legal estate if the devisee or his assigns are prepared to satisfy their claims. Mr. *Thompson* contended that the fact that the executor had statutory duties to perform in regard to payment of debts prevented him from being treated as a bare trustee for the devisee, the real estate being made available for payment of debts by the *Wills, Probate and Administration Act* 1898; and he relied on the decision in *Sidebotham* v. *Barrington* (1) in support of this argument. That decision is, in my opinion, no authority for the proposition that a devisee of real estate is not entitled to compel the executor to convey the real estate devised if the debts and funeral and testamentary expenses have been paid. Nor do I think an executor could resist the claim of the devisee to a conveyance, even if the debts and funeral and testamentary expenses had not all been paid, if the devisee was prepared on conveyance of the real estate to him to furnish the executor with a sufficient sum to provide for payment of the amount owing in respect of these matters.

For these reasons I am of opinion that the appeal fails.

ISAACS J. On 28th January 1921 Scott, by contract in writing, sold to Bell a station called "Scotsdale," consisting of about 4,634 acres of freehold land, about 752 acres of conditionally leased land, and about 2,160 acres of annually leased land leased with plant and implements. The price was £19,000. A cash deposit of £500 was paid at once, and the contract provided for "a further sum of £3,500 upon completion of conveyance and transfers"; possession to be given on completion. Clause 4 provided that (*inter alia*) within a reasonable time an abstract of title to the freehold land not under the *Real Property Act* should be prepared and delivered. Objections to title were provided for. Clause 11 provided for the vendor's right to rescind if unable or unwilling to remove any objection. No day was fixed for completion. An abstract was delivered. It showed that in 1905 Frederick May

(1) (1841) 3 Beav., 524.

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Wilson, by registered mortgage, mortgaged the freehold land to one Gardiner by a mortgage, reciting that the mortgagor was devisee of the land under his wife's will, and containing a power of sale and a purchaser's exoneration clause. On 18th February 1921 an objection was made that there was a legal estate in the land outstanding, as the mortgagor, though executor of his wife's will, did not get probate till after the mortgage; and the vendor was asked: "How do you propose to get over the difficulty?" The answer was a reference to sec. 44 of the *Wills, Probate and Administration Act*, and a contention that, as the estate vested in the executors as from the death of the testatrix, the prior date of the mortgage was immaterial. Both parties seem, so far, to have considered that the date alone constituted the difficulty. Then the purchaser's solicitors on 8th March made a further contention that, as the mortgage was as beneficial owner only, the 44th section did not cover the difficulty; and the purchaser's solicitors there and then intimated that the purchaser would not proceed further, and demanded a return of the deposit and demanded costs. On 14th March another letter was sent insisting on that position. Next day the vendor's solicitors said that, without admitting the necessity, they were at once taking steps to obtain from Wilson a deed whereby the alleged outstanding legal estate might be got in; and the purchaser's right to rescind was denied. On the same day the purchaser's solicitors reiterated their demand, saying that the purchaser would not wait. Thereupon the originating summons was issued. *Harvey* J. decided that the purchaser was not entitled to rescind; and on appeal the Full Court affirmed his judgment. The purchaser has appealed, but I entertain no doubt of the correctness of the decision.

The law is not doubtful on facts such as we have before us. A vendor must show a good title in accordance with the contract into which he has entered (*Lawrie* v. *Lees* (1)). A purchaser of land, sold as "freehold land" *simpliciter*, is entitled to an indefeasible fee simple, and that means an estate in fee simple held under a good safe holding and marketable title (*Esquimalt and Nanaimo Railway Co.* v. *Granby Consolidated Mining, Smelting and Power Co.* (2)). The

(1) (1881) 7 App. Cas., 19, at p. 27. (2) (1920) A.C., 172, at p. 179.

purchaser was therefore entitled to require an abstract showing such a title to convey the land sold, both as to the legal and beneficial estate. If that was shown, the appellant had no right to retire from the contract and treat it as at an end. You may call his action "rescission," as it is sometimes called, or you may call it "renunciation." But the substance is that he has treated the vendor as admitting that he has no title to convey an indefeasible fee in the land sold as freehold. If the vendor has in effect admitted that, then the purchaser was right. A purchaser, as soon as he is told by the vendor that he has not the power to convey within the time required by the contract the land sold, has a perfect right to decline to proceed further, and not to wait to see if the vendor can in some way obtain the power. But has that happened in this case? The vendor, Scott, is the purchaser—through an intermediate purchaser —of whatever title Wilson had in the land as devisee. No objection is taken as to the title of the testatrix. Wilson, as devisee, was the equitable owner of the land subject to the debts of the testatrix. The executor, no doubt, must first apply the estate to the payment of debts, but, subject to that, the devisee is entitled to the land devised to him. *Cooper* v. *Cooper* (1) and *Blake* v. *Bayne* (2) show that, even in an intestacy, the whole estate, subject to the payment of debts, is the absolute property of the next of kin. Much more clearly is this land the absolute property of Wilson, subject to debts, and of course subject to the disposition he has made of the beneficial interest. The purchaser stands in that position, and is the absolute owner in equity of the land and, subject to the clearing of the estate of debts, can compel the executor, Wilson, to convey. Why he has not done so long ago, we may wonder at; but up to the present it is immaterial.

So far a good title has been shown, and as no time for completion has been fixed the time has not arrived for demanding a conveyance. When that time arrives the vendor must be ready, *i.e.*, able, to convey the land in indefeasible fee (*Brickles* v. *Snell* (3)). Unless he fails then, or unless it clearly appears beforehand that he will not be able to do so then, the purchaser cannot repudiate. If the

(1) (1874) L.R. 7 H.L., 53. (2) (1908) A.C., 371, at p. 384.
(3) (1916) 2 A.C., 599.

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facts showed, as contended alternatively, that at the proper time the vendor, on his own admission, would be unable to convey as bargained for, then on the principle of *Hochster* v. *De La Tour* (1) and *Johnstone* v. *Milling* (2) the purchaser could take the vendor at his word and terminate their relations. So far from the facts supporting such a case, their strong tendency is the other way. The time that has elapsed since the death of the testatrix and the absence of any evidence of debts raise a presumption either that there were no debts, or no considerable debts, or that they have been paid or in some way extinguished. And therefore the presumption is that the executor could be compelled to perform his statutory duty to convey to the vendor or his nominee.

Mr. *Thompson* relied very strongly—indeed, chiefly—on the case of *Sidebotham* v. *Barrington* (3). He urged that in that case as in this the holder of the legal title had statutory duties to others (creditors) to perform, and that until those duties were discharged the vendor in each case could not require a conveyance of the legal estate. That is true to a certain extent; but the analogy fails at a crucial point. In *Sidebotham's Case* the holder of the legal title was not in any sense a trustee for the vendor: he was an utter stranger to him—holding in a sense adversely. Here, the holder of the legal title is a statutory trustee of this specific land for the vendor, subject only to other trusts which are mere encumbrances and which the vendor may, if he can and will, satisfy, if anything remains to be satisfied. But certain further observations ought to be added. *Sidebotham's Case* came before the Master of the Rolls twice afterwards, and is reported on these subsequent occasions (4). On the first of these it appeared that the holder of the legal title voluntarily offered to concur in the sale. The Master of the Rolls said he would assume the holder, who was assignee in insolvency, would do his statutory duty when he concurred in the conveyance; and ultimately, on the second of those occasions, a decree for specific performance was made, the Master of the Rolls being satisfied (as appears in *Fraser* v. *Wood* (5)) that the difficulty could be got over in a proper time. This is in line with *Brickles* v. *Snell* (6).

(1) (1853) 2 E. & B., 678.
(2) (1886) 16 Q.B.D., 460.
(3) (1841) 3 Beav., 524.
(4) (1841) 4 Beav., 110; (1842) 5 Beav., 261.
(5) (1845) 8 Beav., 339, at p. 342.
(6) (1916) 2 A.C., 599.

The purchaser's rights depend, therefore, on the construction of the contract, as to whether he can nevertheless repudiate it or not. The construction of the contract is, of course, the same at law and in equity, though the remedies and rights of the parties may differ considerably in relation to law and to equity. The position at law as well as in equity is shown by *Stickney* v. *Keeble* (1). No time being fixed for completion and it being admitted that a reasonable time for completion had not elapsed when the attempted renunciation was made, it is plain that even at law there was no right to rescind for present inability to convey. But at equity the position of the appellant was even worse. Not having shown any unreasonable delay by the vendor and not having fixed a reasonable time for completion, and time not having been made of the essence of the contract either by contract or circumstances, he would have no status whatever for refusing to carry out the contract. Even if he could have shown a failure to perform the contract literally, he might still have been met with the equitable doctrine of regarding the substance rather than the letter in such a case; but that extreme point has not been reached.

The appeal entirely fails from whatever standpoint the case is regarded.

HIGGINS J. The appellant purchaser claims, by originating summons, that he is entitled to rescind a contract of 28th January 1921. The vendor had derived his title to the land through a mortgage made on 19th January 1905 by one Frederick May Wilson, to whom—as recited in the mortgage—his wife, who died on 31st December 1904, had devised and bequeathed all her real and personal estate. Frederick May Wilson was also appointed the executor of the will, and probate was granted to him after the mortgage, on 2nd June 1905. Under the New South Wales law the legal estate vested in the executor as from the death of the testatrix (*Wills, Probate and Administration Act*, sec. 44); but the Full Supreme Court has held that Wilson mortgaged as devisee only, and (though we have not heard the respondent on this point) I think that this decision, which is in accordance with the purchaser's

(1) (1915) A.C., 386.

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view, is right. The solicitors for the purchaser took the objection, after seeing the abstract of title, that the legal estate is outstanding in the executor. The solicitors for the vendor, in reply (2nd March 1921), referred the solicitors for the purchaser to sec. 44, and said that on the grant of probate the property vested in Wilson as from the death of the testatrix: "We submit therefore that it is immaterial that the mortgage referred to is dated prior to the grant of probate." By letter of 8th March the solicitors for the purchaser expressed the opinion that the difficulty was not covered by sec. 44, and said that Wilson had not mortgaged as executor, but as beneficial owner; "which he had no power to do." They said that in their opinion the vendor's title was defective, and that the purchaser "does not intend to proceed further with the contract," and demanded a return of the deposit (£500). The learned Judge of first instance (*Harvey* J.) dismissed the summons on the ground that assuming there was a bare outstanding legal estate the purchaser was "not entitled to rescind *brevi manu*." The Full Court affirmed this decision, and dismissed the appeal. I am of opinion that this decision is right.

As stated by *Street* C.J. in Eq., "peremptory repudiation of a contract is only justifiable if it appears that there is a defect in the title which cannot be cured without the consent of some person who is under no obligation to consent." But in this case the executor is under an obligation to consent. There is nothing to show that there are any debts or obligations of the estate remaining unpaid; and, if all debts and obligations have been paid, the executor, as a bare trustee of the legal estate, must convey it to the sole beneficiary—the vendor—or as he directs. It is urged by Mr. *Thompson* that there may be debts—specialty debts if not simple contract debts—even after the lapse of seventeen years from the death. I am not sure that as the "executors' year" has long expired, and as the executor would be protected under sec. 93 of the Act by the usual advertisement for creditors, the burden does not lie on the appellant to show affirmatively that there is some unpaid claim against the estate, or a danger of such a claim—such as would justify the executor in refusing now to assent to the devise or to sign the acknowledgment prescribed by sec. 83. But, even if that doubt be ignored, the

executor can be compelled to convey the land to the vendor, or as he directs, on the vendor giving the executor any money necessary to pay any debts outstanding. The vendor should be allowed the opportunity; and although (as assumed) the vendor was wrong in his view of the law as expressed in the reply of 2nd March, there has been no such conduct on the part of the vendor as amounts to a definite refusal to get in the legal estate from the executor—no such conduct as justifies the purchaser in peremptorily refusing to perform the contract on his part (*Mersey Steel and Iron Co.* v. *Naylor* (1)). In fact, after the purchaser, on 8th March, announced that he did not intend to proceed further with the contract, the vendor, by his solicitors, said that he was taking steps to get in the outstanding legal estate from Wilson. The purchaser refused to wait for such an event, and took out the originating summons.

As stated in *Forrer* v. *Nash* (2), a purchaser, when he finds that his vendor is neither able to convey himself, nor able to compel a conveyance from any other person, can refuse to wait for the vendor to try to get a title. But here the vendor is able to compel a conveyance from the executor. In the case of mortgaged land, the mortgagor may sell, and on payment of the mortgage debt the mortgagee must reconvey. There is no defect of title in the vendor in such a case: it is a mere matter of conveyance on payment. The title of the vendor is not contingent on the volition of Wilson: Wilson is by law compellable to convey to the devisee as soon as the estate is cleared of obligations.

In my opinion, the purchaser in this case was not entitled to refuse to proceed with the contract in this peremptory fashion; the judgment of *Harvey* J. and of the Full Court should be affirmed, and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *D. L. Aitken & Barron.*

Solicitors for the respondent, *T. Michell & Gee.*

B. L.

(1) (1884) 9 App. Cas., 434.

(2) (1865) 35 Beav., at p. 171.