[HIGH COURT OF AUSTRALIA.]

FACEY AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

RAWSTHORNE AND ANOTHER . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 27, 28; *May* 7.

Knox C.J., Isaacs and Higgins JJ.

Vendor and Purchaser—Sale of land—Decree for specific performance—Assignment by vendor for benefit of creditors—Act of bankruptcy by vendor—Objection to title of vendor—Order allowing purchaser to rescind and staying decree—Bankruptcy Act 1898 (*N.S.W.*) (*No.* 25 *of* 1898), *secs.* 4 (*g*), 57, 58, 63 (2), 67—*Conveyancing Act* 1919 (*N.S.W.*) (*No.* 6 *of* 1919), *secs.* 187-195.

A obtained a decree in the Supreme Court of New South Wales on 26th February 1924 for the specific performance by B of two interdependent contracts, one for the sale by A to B of certain real property and the other for the sale by B to A of other real property, the time fixed for the completion of the contracts having then expired. Shortly afterwards A by deed assigned all his property to trustees for the benefit of his creditors. Cross-appeals from the decree were withdrawn on terms, including a term that the properties sold should be transferred to the respective purchasers. Subsequently, on 23rd August, A committed an act of bankruptcy by failing to comply with a bankruptcy notice served on him by a creditor. B having objected that A was unable to give a good title to the property to be transferred by him, the Master in Equity certified that A was unable to give a good title as there might be a sequestration (based on the act of bankruptcy) at any time before 23rd February 1925. On a summons to vary the Master's certificate, which was heard when two months had still to run within which a petition in bankruptcy might be instituted founded upon the act of bankruptcy, *Harvey* J., having allowed the trustees of the deed of assignment to be added as plaintiffs, upheld the Master's

certificate, and made an order declaring that B was entitled to rescind the two contracts, and ordering that the decree for specific performance should be stayed. On appeal to the High Court,

Held, by *Isaacs* and *Higgins* JJ. (*Knox* C.J. dissenting), that in the circumstances of the case the order was wrongly made:—

By *Isaacs* J.: The matter should have been deferred until the two months above mentioned had expired, when a good title could be given by the plaintiff or the trustees;

By *Higgins* J.: There was no ground whatever for rescission as the decree was binding on the trustees of the deed and would be binding on the official assignee if the estate of A should be sequestrated; but even if the decree were not thus binding, the discretion of the primary Judge, if exercised, was wrongly exercised: after a decree for specific performance a defendant purchaser cannot repudiate the title or the contract without the leave of the Court (*Halkett* v. *Earl of Dudley*, (1907) 1 Ch. 590, at p. 601); and, under the circumstances, leave ought not to have been granted.

Quære, per *Higgins* J., as to the meaning and effect of an inquiry as to title limited to facts that have occurred since the decree.

Lowes v. *Lush*, (1808) 14 Ves. 547, and *Powell* v. *Marshall, Parkes & Co.*, (1899) 1 Q.B. 710, distinguished.

Sidebotham v. *Barrington*, (1841) 3 Beav. 524; (1841) 4 Beav. 110; (1842) 5 Beav. 261, and *Fraser* v. *Wood*, (1845) 8 Beav. 339, applied.

Decision of the Supreme Court of New South Wales (*Harvey* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

A suit was on 15th May 1923 instituted in the Supreme Court, in its equitable jurisdiction, by Edward Facey against Joseph Edward Rawsthorne and, by amendment made on 19th October 1923, Winchcombe Carson Ltd., in which Facey claimed (*inter alia*) specific performance of two interdependent agreements made on 1st January 1923, by one of which Rawsthorne agreed to sell to Facey a station property known as "Eulandool" and 3,000 sheep, and by the other of which Facey agreed to sell to Rawsthorne certain land known as the "Burwood Markets." The day fixed for completion of both contracts was 15th January 1923. On 26th February 1924 a decree was made ordering (*inter alia*) specific performance by Rawsthorne of both agreements, payment by Rawsthorne of occupation rent of Eulandool and by Facey of the rents and profits of the Burwood Markets from 24th

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February 1923, a reference to the Master in Equity to inquire as to the damages caused to Facey by the delay in performance of the agreements and to ascertain the occupation rent of Eulandool and the rents and profits of the Burwood Markets, and payment by Rawsthorne of the costs of the suit; further consideration was reserved with liberty to apply. In March 1924 Facey by deed purported to assign all his estate to Joshua Evans, Clarence Brooke and William Munro Walker as trustees for his creditors. The decree was, on 28th August 1924, registered as a *lis pendens* in respect of the Burwood Markets. Cross-appeals to the High Court from that decree having been instituted by Rawsthorne and Facey, an agreement was, in July 1924, arrived at between them that the appeals should be withdrawn on certain terms, among which were that the Burwood Markets should be transferred to Rawsthorne and that Eulandool should be transferred to Facey. Certain disputes having arisen as to the ability of Facey to give a good title in respect of the Burwood Markets, an application was made by Rawsthorne to the Master in Equity, with the consent of Facey, for an inquiry as to Facey's title to that property, such inquiry being limited to what had taken place since the decree. On 11th November 1924 the Master certified that on that date a good title could not be made by Facey to Rawsthorne, on the grounds (*inter alia*) that Rawsthorne had notice that Facey had committed an act of bankruptcy in that on or before 23rd August 1924 he had failed to comply with the requirements of a bankruptcy notice served on him on 16th August 1924 at the instance of Herbert Harvey Tompson, and that Facey's title was defeasible upon any sequestration order being made against him which was grounded upon that act of bankruptcy. Facey then applied on summons to *Harvey* J. to discharge or vary the certificate of the Master in Equity, and Rawsthorne by cross-summons applied that if the Master's certificate were upheld a decree should be made declaring that he was entitled to be discharged from both contracts, for an order dismissing the suit and for certain consequential relief. The summons came on for hearing on 11th December 1924, when the learned Judge granted leave for the trustees of the deed of assignment of March 1924 to be added as plaintiffs, and they were accordingly added. On 24th December 1924 *Harvey* J. delivered his judgment,

in the course of which he said :—" The only matters with which the Court is now concerned are the effect of the assignment to creditors and of the notice of the act of bankruptcy on the plaintiff's capacity to give a good title to the defendant. I allowed the trustees of the assignment deed to join with the plaintiff in the present application so that there would be no difficulty about any outstanding title in them if the defendant was willing to complete and so that they might, if they were entitled to, get the benefit of the decree made in favour of their assignor. The defendant is an unwilling purchaser and wishes to take advantage of any right he may have to put an end to his obligations under the decree and the terms of the settlement. In my opinion, I need not consider whether the assignment for creditors gives him the right to rescind because in my opinion the existence of the act of bankruptcy, which is still available, is such a blot on the plaintiff's title that the defendant ought to be relieved of his liability. During the six months for which the act of bankruptcy remains available, the purchaser cannot safely complete with the vendor in consequence of the relation back of the title of the official assignee to the date of the act of bankruptcy. This is clearly so where no decree for specific performance has been made (see *Powell* v. *Marshall, Parkes & Co.* (1)), and in my opinion the decree for specific performance makes no difference on this point. It may be, and I think probably is, the result of a decree for specific performance before the act of bankruptcy that the official assignee has to step into the shoes of the bankrupt and carry out the terms of the decree. He takes the property not merely subject to the contract but also to all qualifications attaching to it as a result of the decree of the Court. But if the defendant in this case were to take a transfer of the Burwood Markets from the plaintiff and the trustees of his assignment deed and conveyed to them Eulandool and paid them the moneys payable under the decree and settlement, he might be called upon by the official assignee to pay the moneys over again to him, and his title to the Burwood Markets would be affected by the title thereto of the official assignee being antedated to the act of bankruptcy. There is no authority dealing directly with a decree for specific performance, but I cannot

(1) (1899) 1 Q.B. 710.

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see any principle upon which the defendant in consequence of a decree for specific performance is to be relieved from the effect of notice that the other party to the decree has committed an available act of bankruptcy since the decree was pronounced. I am of opinion, therefore, that the Master's ruling was correct and that this does constitute a defect in the title to the Burwood Markets, and that the defendant ought not any longer to be held to the contracts. The result is that the terms of settlement cannot be carried out, nor can the original decree. In my opinion the defendant is now entitled to a decree on further consideration declaring that he is entitled to rescind the agreements mentioned in the statement of claim and that the decree for specific performance and the consequential inquiries should be stayed. The order for costs in the original decree, of course, will not be affected."

By the decree (which was ordered to date as of 3rd January 1925) it was (*inter alia*) declared that Rawsthorne was entitled to rescind the agreements of 1st January 1923, and it was ordered that the decree for specific performance and consequential relief should be stayed.

From that decision Facey and the trustees now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Alroy Cohen, for the appellants. After the decree for specific performance the only duty of Facey as to the Burwood Markets was to give a good title within a reasonable time. A person who wants to be relieved from a contract, after a decree against him for specific performance of it, is asking the Court for an indulgence and the Court will consider which of the parties brought about the difficulty (see *Halkett* v. *Earl of Dudley* (1)). Here it was Rawsthorne. Apart from the *Bankruptcy Act* 1898 (N.S.W.) any dealing with the land by Facey after the decree was of no avail to Rawsthorne, and sec. 57 of that Act has not affected the law with respect to the effect of a bankruptcy notice or an act of bankruptcy upon a decree for specific performance. The decree is a final declaration that as from that time the vendor is a trustee of the land for the purchaser

(1) (1907) 1 Ch. 590, at pp. 597, 601.

and the purchaser a trustee of the purchase-money for the vendor.

[ISAACS J. referred to *Central Trust and Safe Deposit Co.* v. *Snider* (1).]

Either Facey had an absolute right to have the purchase-money paid to him in trust for those to whom it was afterwards proved to belong, or the Court should have ordered the purchase-money to be paid into Court. At the date of the assignment for the benefit of creditors Facey had a good title to the Burwood Markets. The fact that if there was a subsequent bankruptcy they would have vested in the assignee as from a prior date only raises a question as to conveyance. The learned Judge should have fixed a time for giving title to the Burwood Markets (*Coffin* v. *Cooper* (2)). [Counsel also referred to the *Conveyancing Act* 1919 (N.S.W.), secs. 186, 188, 195; *In re Bannister*; *Broad* v. *Munton* (3); *Williams* v. *Dunn's Assignee* (4).]

Miles, for the respondent Rawsthorne. The learned Judge exercised a discretion which, on the authorities, compelled him to act as he did (*Doherty* v. *Allman* (5)), and he exercised his discretion on the merits as to whether a reasonable time for giving title had elapsed. After the decree for specific performance all the delay was caused by Facey. Where a necessary party to a conveyance is not under the control of the vendor, the Court will not force the purchaser to accept title (*Esdaile* v. *Stephenson* (6); *Brewer* v. *Broadwood* (7); *Bell* v. *Scott* (8); *Lowes* v. *Lush* (9); *Fry on Specific Performance*, 6th ed., pars. 1384, 1385; *Williams on Vendor and Purchaser*, 3rd ed., 520; *Sidebotham* v. *Barrington* (10)).

[ISAACS J. referred to *Franklin* v. *Lord Brownlow* (11); *Fraser* v. *Wood* (12).

[HIGGINS J. referred to *Forrer* v. *Nash* (13); *Paton* v. *Rogers* (14).]

Even if the Court would extend the time for giving title where there is a person who could convey, that has never been applied

(1) (1916) 1 A.C. 266, at p. 272.
(2) (1807) 14 Ves. 205.
(3) (1879) 12 Ch. D. 131, at p. 145.
(4) (1908) 6 C.L.R. 425.
(5) (1878) 3 App. Cas. 709.
(6) (1822) 6 Madd. 366.
(7) (1882) 22 Ch. D. 105, at p. 109.
(8) (1922) 30 C.L.R. 387, at pp. 392, 396.
(9) (1808) 14 Ves. 547.
(10) (1841) 3 Beav. 524; 4 Beav. 110; (1842) 5 Beav. 261.
(11) (1808) 14 Ves. 550.
(12) (1845) 8 Beav. 339.
(13) (1865) 35 Beav. 167.
(14) (1822) 6 Madd. 256.

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to a case where there is no such person in existence and a person may come into existence who may prevent a conveyance, as, in view of a possible bankruptcy, is the case here. If in the case of bankruptcy the official assignee were to disclaim this contract, Rawsthorne would be the only person who could compel him to carry it out. If he attempted to do so, it might involve a lawsuit, and the Court will not treat as an indefeasible title one to enforce which a lawsuit may be necessary (*Esquimalt and Nanaimo Railway Co.* v. *Granby Consolidated Mining, Smelting and Power Co.* (1)). The decree for specific performance was subject to good title being made, and is, therefore, only conditional; it is wrong to say that it stands as a decree which finally settles the matter.

Alroy Cohen, in reply, referred to *Cornwall* v. *Henson* (2); *Parnham* v. *Hurst* (3).

Cur. adv. vult.

May 7. The following written judgments were delivered.

KNOX C.J. On 26th February 1924 the appellant Facey—the plaintiff in the suit—obtained a decree for the specific performance by the respondent Rawsthorne of two interdependent contracts—one for the sale by the appellant to the respondent of a property known as "Burwood Markets," the other for the sale by the respondent to the appellant of a station property known as "Eulandool." By this decree the respondent was ordered to pay to the appellant £2,000 in lieu of the delivery of certain sheep, and directions were given (a) for the ascertainment and payment of occupation rent and rents and profits of the respective properties from 24th February 1923, (b) for an inquiry as to damages sustained by the appellant and (c) for payment by the respondent of the costs of the suit. In March 1924 the appellant assigned all his estate to trustees for the benefit of his creditors.

The respondent instituted an appeal to this Court from the decree of 26th February, and in the month of July 1924 the parties agreed that the appeal should be withdrawn on terms set out in three letters.

(1) (1920) A.C. 172. (2) (1899) 2 Ch. 710, at p. 714.
(3) (1841) 8 M. & W. 743, at p. 749.

On 7th July the appellant's solicitor wrote to the respondent's solicitor as follows:—"The tentative settlement arrived at involves the transfer of the two properties to be effected with as little delay as possible. All adjustments to be made as on this date, and four promissory notes to be handed over to-day as follows: £1,000 drawn in favour of E. H. Ward, payable 1st November 1924; £500 drawn in favour of Dalgety & Co. Ltd., payable 1st March 1925; £1,000 drawn in favour of Dalgety & Co. Ltd., payable 1st November 1925; £500 drawn in favour of Dalgety & Co. Ltd., payable 1st March 1926. An arbitrator to be mutually agreed upon has to be appointed to decide on the amount Mr. Rawsthorne should pay for the occupation rental of Eulandool and a bill payable not later than 1st January next to be given for any moneys found to be due after the set off of the rents of the Burwood Markets, in all other respects judgment to stand, both appeals to be withdrawn. An undertaking to be given that Mr. Rawsthorne will provide security for the payment of the above bills. All costs up to to-day are included in the above settlement but, should it be necessary to incur further costs, these will have to be met by Mr. Rawsthorne." On the same day respondent's solicitor wrote in reply as follows:—"Your letter of even date herewith to hand, and my client agrees to the terms of settlement of the suits set out therein, provided that with regard to the security referred to he will only undertake to give a second mortgage over certain town property he holds in Forbes, also that the £3,000 represented by the promissory notes is in full settlement of all moneys payable under the decree or otherwise except any sum that may be found to be due on setting off rents and profits from Markets against occupation rent to be agreed upon for Eulandool, and making the usual adjustments under the contracts on settlement, such adjustments to be made up to this date. Of course the promissory notes are handed over subject to your client giving mine a good title to the Markets. This now disposes of both suits, and the appeals are to be withdrawn and each party is to sign any necessary consent or other document to enable such appeals to be withdrawn without costs and to give effect to the settlement. I enclose herewith the four promissory notes representing the £3,000 and shall be glad of your acknowledgement of the same." On

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8th July appellant's solicitor wrote to the respondent's solicitor acknowledging receipt of his letter of the 7th and of the promissory notes enclosed in it, and confirming a conversation in which the parties had agreed on the arbitrator who was to decide the amount of the occupation rent of Eulandool. On 18th July respondent's solicitor wrote to appellant's solicitor requesting an abstract of the deed of assignment executed by appellant, asking whether the trustee of the assigned estate intended to take a transfer of Eulandool, and saying that, as the respondent was anxious to get the matter finalized, he would be glad of a reply without delay. On 31st July appellant's solicitor wrote to respondent's solicitor a letter, the material portion of which is as follows :—" I have gone into this matter exhaustively with my clients and also with counsel, and it appears quite unnecessary for the persons mentioned as trustees in the deed of assignment, which I hold in escrow (this document not having been signed by several creditors), to clog the title by this document. Therefore, the transfer of Eulandool will be made to Facey direct, and Facey will convey the Markets to Joseph Edward Rawsthorne. Kindly submit draft conveyance of Burwood Markets and also let me have particulars of title of the town property at Forbes over which Mr. Rawsthorne has to provide security for the payment of the bills." On 8th August appellant's solicitor, having had no reply to his letter of 31st July, threatened to move to strike out the respondent's appeal to this Court for want of prosecution, and, on the same day respondent's solicitor replied to the letters of 31st July and 8th August in the following terms :—" What is bothering me in the matter is the question of title. You will remember that you mentioned to the Bankruptcy Court some months ago that Facey had assigned his estate, and you also wrote me confirming this and giving me the names of the trustees. The whole of the negotiations for settlement have been with you and Messrs. Minter, Simpson & Co. on behalf of the trustees, and the trustees finally fixed the terms of settlement and received the promissory notes. Now you say the trustees are not concerned with the title and the deed was only held in escrow, but I am of the opinion, in view of the non-registration of such deed and the way the trustees have taken charge of and acted in the matter, that there is very grave doubt whether Facey can give a

good title to my client. I have, as you know, written you twice asking for an abstract of the deed of assignment, but for some reason you will not furnish me with this and merely state that it is not necessary for the trustees to clog the title with such deed, but it seems to me unreasonable to take up this attitude after the very active part the trustees have taken in the matter. As I have told you previously, I do not feel at all happy about my client taking title from Facey in the events which have happened and think that perhaps the best thing to do is to take out an appointment before the Master to inquire into the title. I would remind you that the promissory notes were handed over subject to the terms of settlement being carried out and the titles to the properties being found satisfactory, and must ask the trustees not to part with same pending completion of the matter."

To this letter appellant's solicitor replied on 14th August agreeing to an appointment being taken out for an inquiry by the Master into the title. An appointment having been taken out accordingly, the respondent on 8th September lodged particulars of objections to appellant's title. The objections taken were (1) that appellant committed an act of bankruptcy on 23rd August 1923 and that a petition for sequestration founded on such act of bankruptcy had not been disposed of and was still pending; (2) and (3)—these objections were based on the execution of the deed of assignment, and need not be stated more particularly; (4) that on 23rd August 1924 appellant committed an act of bankruptcy by failing to comply with the bankruptcy notice served on him on 16th August 1924. The inquiry was limited to matters which took place since the decree of February 1924. Having heard evidence and argument, the Master in Equity on 13th October delivered his decision that the grounds of objection based on the deed of assignment should be disallowed, but that the objections stated above as 1 and 4 were valid objections to the title of the appellant. The Master therefore decided that he would certify that the appellant had not at that time a good title to the property in question inasmuch as his title was defeasible on any sequestration order being made against him grounded on either of the acts of bankruptcy mentioned in those objections.

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On 22nd October 1924 the appellant's solicitor, in breach, as I think, of his undertaking, discounted the promissory note for £1,000 made by the respondent in his favour in pursuance of the terms of settlement of the appeal. The indorsee subsequently sued the respondent on the promissory note. While the inquiry was proceeding in the Master's office the mortgagee of Eulandool advertised that property for sale and, in order to stop the sale, the respondent was compelled to pay the mortgagee the sum of £1,500, in consideration of which payment the mortgagee agreed not to proceed with the sale before 9th December 1924.

By his certificate dated 11th November 1924 the Master in Equity certified as follows:—"A good title cannot be made by the plaintiff to the said property to the defendant Rawsthorne at the date hereof because (1) (a) the defendant Joseph Edward Rawsthorne has had notice of the act of bankruptcy referred to in par. 1 of the particulars of objections and such act of bankruptcy was an available act of bankruptcy within the meaning of the *Bankruptcy Act* 1898 at the date of the presentation of the petition referred to in the said paragraph and still remains available as an act of bankruptcy upon which a sequestration order based upon the said petition could be made, the hearing of the said petition having by the order of this Court in its bankruptcy jurisdiction been ordered to stand adjourned generally and the said hearing still standing so adjourned, and (b) the said defendant has had notice of the act of bankruptcy referred to in par. 4 of the said particulars of objections and such act of bankruptcy is still available for a petition in bankruptcy against the plaintiff upon which a sequestration order could be made; and (2) the plaintiff's title to the said property is defeasible upon any sequestration order being made against him which is grounded on either of the said acts of bankruptcy."

Both parties applied to vary the Master's certificate; the appellant asking that the finding that a good title could not be made should be omitted, and a finding inserted that no event subsequent to the decree had affected his title, the respondent asking for the insertion of a finding in his favour on the objection based on the deed of assignment. The respondent also gave notice that on the hearing of these applications he intended, in the event of the Master's

certificate being upheld, to ask the Court for a decree on further consideration declaring that he was entitled to be discharged from both contracts and for an order dismissing the suit and for certain consequential relief. These applications were heard by *Harvey* J., who upheld the decision of the Master that the appellant had not a good title to the property in question, discharged the respondent from the contracts and ordered that the decree for specific performance and the consequential inquiries should be stayed.

In my opinion the learned Judge was clearly right in holding that the appellant had not a good title, and I agree with the reasoning by which he supported that conclusion. He thought it was proper to discharge the respondent from the contracts. He had power to make this order if he thought proper in the exercise of his discretion, and in the circumstances of this case I am not prepared to hold that he exercised his discretion wrongly in doing so.

In my opinion the appeal should be dismissed.

ISAACS J. The main facts relevant to this question are these :— On 1st January 1923 Facey, the owner of certain land called "Burwood Markets," agreed to sell that land to Rawsthorne for £16,518. On the same day Rawsthorne, the owner of a station called "Eulandool," agreed to sell it to Facey at a stipulated acreage price and that he would further sell certain sheep. The agreements were made interdependent. The common day for completion was fixed as 15th January 1923. Rawsthorne failed to perform his part of the contracts by the day of completion. On 15th May 1923 Facey instituted a suit for specific performance, and on 26th February 1924 obtained a decree as to both contracts with a variation as to the sheep. The decree ordered Rawsthorne (*inter alia*) to pay to Facey occupation rent of Eulandool as from 24th February 1923, and similarly that Facey pay to Rawsthorne as from the same date the rents and profits of Burwood Markets. No day was fixed for completion. No inquiry as to title was asked by either party. In fact at the date of the contract, and at the date for completion, the titles were perfect. If we pass by, unnoticed, certain events which before 24th December 1924 ceased to have any significance, we may say, as I think we ought to say, that on that date, except

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for two things, the title of Facey to Burwood Markets was still perfect. Those two things were (a) a deed of assignment executed by Facey on 12th March 1924 and (b) an act of bankruptcy on 23rd August 1924.

The deed may be shortly disposed of. After the statutory period had expired it ceased to be available as an act of bankruptcy, but on 24th December 1924 it was, and still is, an instrument by which the trustees, Joshua Evans, Wilfred Clarence Brooke and William Munro Walker, were and are the legal owners of the land sold to Rawsthorne upon the trusts of the deed. But on 12th December 1924, during the hearing of the application now under review, leave was given to the appellant to add the trustees as co-plaintiffs with Facey. On 16th December this was done, and all the plaintiffs were represented by the same counsel. The trustees with Facey are appellants against the judgment of *Harvey* J. The trustees, therefore, are not only consenting to Facey conveying to Rawsthorne but are joining in the claim he makes, and therefore in the offer to give title (*Brickles* v. *Snell* (1)).

That leaves only the second circumstance adverted to, namely, the act of bankruptcy, to be dealt with. It was the only matter argued, and it is upon the effect of that event that this appeal depends. On 14th August 1924 one Tompson, a judgment creditor of Facey for £50 debt and £20 9s. costs, issued a bankruptcy notice against Facey. The notice was served on 16th August and was not complied with within seven days. On 24th August, therefore, there was apparently an act of bankruptcy committed by Facey within the meaning of sec. 4 (*g*) of the *Bankruptcy Act* 1898. No bankruptcy petition had by 24th December 1924 been presented, though four months had elapsed since the act of bankruptcy occurred.

In the meantime Rawsthorne, unsuccessful in the suit, had lodged an appeal to this Court within the time allowed. In July 1924 an agreement was made between the parties whereby the mutual transfer of properties was to be effected with as little delay as possible, certain terms of payment arranged and the litigation ended, the decree to stand except so far as modified by the agreement and the appeal to be withdrawn. Promissory notes agreed upon were handed

(1) (1916) 2 A.C. 599.

over subject to Facey giving Rawsthorne a good title to the Burwood Markets. Up to that time—7th July 1924—the title was, of course, quite unaffected by the act of bankruptcy referred to, which occurred several weeks afterwards. But there had been dealings by Facey which led to an inquiry as to his title, and the Master reported adversely on 10th November in consequence of the act of bankruptcy. Facey appealed from the finding, and Rawsthorne asked to be allowed to rescind the contracts. On 24th December 1924 *Harvey* J. delivered judgment declaring that Rawsthorne was "entitled to rescind the agreements" and that the decree for specific performance and the consequential inquiries in the suit be stayed. From this judgment Facey brings the present appeal.

The appellant raised two grounds to support the appeal, namely, (1) that the declaration of right to rescind was wrong and that the Court should have in its discretion allowed a reasonable time to give a secure title, and (2) that, the decree having been made in the terms stated, the official assignee in the event of Facey's bankruptcy would have been bound by it. I do not find it necessary to determine the second point because on the first I am of opinion that the appeal should be sustained. The case was well argued on both sides.

Reading the terms of the formal order as quoted and the reasons of the learned primary Judge, I entertain no doubt he decided that, having regard to the imperfection of title as existing on 24th December 1924, there was then an absolute right in the present respondent to rescind. I am disposed to agree with Mr. *Miles* that the right of the respondent in that sense meant the right to obtain a declaration to that effect from the Court based on the principle that the Court's judicial discretion, having regard to settled authority, could not properly, as a matter of recognized practice, be exercised in any other way. But that is precisely the reason why I am of opinion the appellant is entitled to succeed. The Court's judicial discretion, as I read the relevant authorities, should in such a case be directed to considering whether, having regard to all the circumstances, justice would be better served by allowing the matter to wait until by time or otherwise the danger of bankruptcy was finally determined. This question was clearly not dealt with in the judgment appealed

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from, and it is much too important a matter to have escaped some reference by so experienced a Judge, if *Harvey* J. had intended to found his decision upon it. There are several observations which indicate the contrary. I accept the assurance at the Bar that time was asked for, but I feel confident that the attention of the learned Judge was not directed to this phase of the matter so clearly as it was to us, or in such a way by argument or citation of authorities as to indicate its importance. In arriving at a different ultimate conclusion, therefore, I do so on grounds not presented to the learned primary Judge for his consideration.

The proper determination of this question depends on the effect of the authorities in point. The case which seems to have been regarded as decisive was *Powell* v. *Marshall, Parkes & Co.* (1). The point of that case, however, is that, time being of the essence of the contract and a day fixed for completion, the vendor was not able to complete on that day. The purchaser sued to recover the deposit. *A. L. Smith* L.J. says (2):—"The question whether he" (the plaintiff) "can recover it turns on this: Was the vendor in a position to complete on the day fixed for completion?" The facts showed he was not. An act of bankruptcy occurred on 2nd December and the day fixed for completion was 15th December. Obviously the contract was broken and the purchaser could not be compelled to wait beyond the day fixed for completion, time being of the essence of the contract. That case, therefore, has no bearing here, since the decree fixes no time for the conveyance and the payment nor does the agreement of July 1924. We have, then, to find the principle on which the Court acts when the vendor commits an act of bankruptcy there being no time fixed for completion and time not being of the essence. Will the Court on the mere application of the purchaser at once declare him entitled to rescind, or will the Court according to the circumstances grant or refuse a reasonable time to perfect his title? It may be conceded that if "A, with reference to an estate which he knows to belong to B, contracts to sell it to C; . . . it is a very wholesome rule that this Court ought not to aid such a contract." So said *Shadwell* V.C. in *Chamberlain* v. *Lee* (3). "But,"

(1) (1899) 1 Q.B. 710. (2) (1899) 1 Q.B., at p. 712.
(3) (1840) 10 Sim. 444, at p. 450.

continued the learned Vice-Chancellor, "general rules do certainly admit of variation; and in my opinion, it would be vastly too harsh an interference with the common mode of the management of the business of mankind, if such a rule were taken to be applicable to a case where a party, apparently in the ownership and prima facie appearing to have a title, sells land; and it afterwards turns out that a very small portion of it is not his, (although he was in possession,) but is the property of another person. It would be a harsh application of the first principles of this Court, were I to say that, in such a case, the contract was so radically bad that, even if the vendor could honestly procure his title to be made good by purchasing the property for himself from the rightful owner, in order that he might hand it over to the purchaser, he should not be at liberty to do so." That was in 1840, and indicates the view of the Court of Chancery as to the wide range of the Court's discretion in allowing an honest vendor who in a substantial degree has title to the property he sells, a reasonable opportunity to give title according to his contract. I say "according to his contract," because where there is a day fixed for completion and time is not merely a secondary consideration but is of the essence of the contract the purchaser has a right to adhere to that. That is one of the two really important points in this appeal. Besides *Chamberlain* v. *Lee* (1) there are other cases of considerable authority. In *Sidebotham* v. *Barrington* (2) Lord *Langdale* M.R. dealt with this subject in stages. In the first report he held that the assignee in bankruptcy had not the power to make a good title to property he had sold. The Master had reported against the title and the Master of the Rolls upheld the report. The objection was one of title because the assignee in bankruptcy, though he had the usual conveyance from the bankrupt, took it while the estate was vested in the assignees of the grantor's insolvency. But afterwards the insolvency assignee consented to concur in the sale. On further directions, as appears by the second report, Lord *Langdale* referred it again to the Master to inquire whether the consent of the insolvency assignee with the other facts would enable the vendor to make good title. On that reference (see the third report)

(1) (1840) 10 Sim. 444.
(2) (1841) 3 Beav. 524; 4 Beav. 110; (1842) 5 Beav. 261.

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the Master reported favourably and accordingly a decree for specific performance was made sixteen months after the first decision. In 1845 the same learned Judge, in *Fraser* v. *Wood* (1), dismissed a bill where the Master had reported against the title. But he said (2): —" The question is, whether this is one of those cases in which the Court has given time to the plaintiff to set the matter right. I did so in *Sidebotham* v. *Barrington* (3), but each case must depend on its peculiar circumstances. I must see that the parties have not been in grievous error; and I ought also to see some probable chance of the difficulty being got over in a short time. I do not see either." The Master of the Rolls (4) had stated the issue before him in these terms :—" It is clear that there is at present no title: the only question is, whether the vendors are entitled to any further inquiry." As against those authorities, there was cited *Lowes* v. *Lush* (5). There Sir *William Grant* M.R. refused to force on a purchaser the title of a vendor who had committed an act of bankruptcy, and dismissed the bill. But it does not appear what the nature of the purchase was or whether time was either by stipulation or otherwise of the essence of the contract. The only point contested was whether there could be a reference as to any debt for which a commission might issue. In the immediately succeeding case in the report (*Franklin* v. *Lord Brownlow* (6)) the bill was also dismissed. The report is fuller. It appears that a day was fixed for completion, namely, 5th April 1804. The vendor committed an act of bankruptcy and the learned Judge would not decree the purchaser to accept the title. But Sir *William Grant* made some observations which are important. He says (7) that in *Lowes* v. *Lush* " there was *no defect in the title, properly speaking*: but my opinion was, that the party *could not give the estate*; as *ultimately* it might not be his, but the estate of the assignees. There is just the same inability to give a *secure* title to the money, as there was in that instance to give a secure title to the land." The point there, which is the second important point of this appeal, is that the objection in such a case is, not absence of title owing to the necessity of

(1) (1845) 8 Beav. 339.
(2) (1845) 8 Beav., at p. 342.
(3) (1841) 3 Beav. 524; 4 Beav. 110; (1842) 5 Beav. 261.
(4) (1845) 8 Beav., at p. 341.
(5) (1808) 14 Ves. 547.
(6) (1808) 14 Ves. 550.
(7) (1808) 14 Ves., at p. 557.

concurrence of an independent person as in *Esdaile* v. *Stephenson* (1), but absence of *indefeasible* title in the vendor. The title cannot be in abeyance, it cannot be in a non-existent person by virtue of a non-existent event. It is still in the vendor, judging by all events that have so far happened, but there has happened an event and if another event occurs which is possible but not certain, then the title will, by force of law, be deemed not to be in the vendor now. If he conveys now and the possible events do not occur, the grantee has a perfect title, which could not be unless the grantee now has the title. That is the force of Sir *William Grant's* language. He dismissed the bill, but the purchaser was entitled in equity to a conveyance on a day then past, fixed as the day of completion, and a later day was actually fixed as the day of execution of the conveyances. I am unable to regard *Lowes* v. *Lush* (2) in 1808 as an authority in conflict with, or sufficient to override, the much later cases I have mentioned which declare the Court's refusal in cases of merely insecure title to apply as rigid a rule as in cases of really defective title. The true effect of the relevant cases is, in my opinion, correctly stated in *Williams on Vendor and Purchaser*, 3rd ed., at p. 520. There, speaking of a purchaser's objection to title on the ground of the vendor's act of bankruptcy, the learned author says: "And it is submitted that if the purchaser make this objection and *at the time fixed for completion* the vendor *still remain unable* to make a valid conveyance, either alone or with the concurrence of the trustee under an adjudication of bankruptcy against him, the *purchaser, not being in default* with regard to the performance of his part of the contract, will be entitled to treat the contract as broken." This is in accord with what is stated n *Halsbury's Laws of England*, vol. xxv., p. 383, sec. 649, par. 2.

Now, what day, having regard to the terms of the decree as modified by the subsequent agreement of the parties, could Rawsthorne require to be observed as the day of completion? None, so far as I can see, or could be suggested at the Bar. There was nothing, and there is still nothing, in view of the title—though defeasible—in the vendor, to oppose to the just and elastic rule expressed by

(1) (1822) 6 Madd. 366. (2) (1808) 14 Ves. 547.

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Shadwell V.C. in *Chamberlain* v. *Lee* (1), and repeated by Lord *Langdale* M.R. in *Fraser* v. *Wood* (2). *Sidebotham* v. *Barrington* (3), decided with great deliberation, is an *a fortiori* case.

Applying the principle to this case, the question is what order should have been made on 24th December 1924 as the matter then appeared to the Court. There is no doubt—it is not denied—that the respondent was in default on the day for completion. He wrongly, however honestly, resisted the claim for specific performance. He was responsible for considerable delay. Later the appellant, perhaps by misfortune, contributed to, it may be, by the respondent's default, was also responsible for complicating the position by assignment for creditors and by failure to comply with the bankruptcy notice. But the broad facts at 24th December 1924 were that the original and long continuing fault was the respondent's, that but for that fault the present difficulty would never have arisen, that, while he should not and could not be forced to take a doubtful or insecure title, the appellant had done nothing inequitable, and the probabilities were that in two months the title would be secure. Creditors were not likely to imperil the payment of the promissory notes for £2,000 by resort to bankruptcy. There were no facts showing any serious loss or inconvenience to the respondent by waiting. The balance of justice—as between the appellant and the respondent—was, in my opinion, decidedly in favour of deferring the matter until the two months had expired. The course indicated in *Fraser* v. *Wood* (2) and followed in *Sidebotham's Case* (3), namely, reference back to the Master, was the proper course then to adopt, and should now be adopted.

In my opinion, since the act of bankruptcy of 23rd August 1924 is admittedly no longer available, the appeal should be allowed, the order of 3rd January 1925 discharged, and, in lieu thereof, it should be ordered that there be a reference to the Master to further inquire and report whether a good title can now be given to the land in question, and that this cause be remitted to the Supreme Court of New South Wales to be dealt with consistently with this judgment.

(1) (1840) 10 Sim. 444. (2) (1845) 8 Beav. 339.
(3) (1841) 3 Beav. 524 ; 4 Beav. 110 ; (1842) 5 Beav. 261.

HIGGINS J. In my opinion this appeal should be allowed. I cannot help thinking that any confusion which has arisen is due to both parties treating transactions since the decree—the assignment for creditors, and the plaintiff's other act of bankruptcy—as if they prevented, or might prevent, the purchaser (the respondent here) from securing eventually all his rights under the decree. Unless they did so prevent the purchaser, I cannot conceive how this order could be made, summarily and absolutely depriving the plaintiff of all the rights given him by the decree for specific performance.

There were two contracts, mutually dependent, made on 1st January 1923—a contract of the plaintiff Facey to sell to the defendant Rawsthorne Burwood Markets, and a contract of the defendant to sell to the plaintiff Eulandool. The contracts fixed the time for completion—mutual conveyances, and final settlement of the payments—for about 15th January 1923. The defendant refused to complete; he admits frankly that he was and is unwilling to complete. In May 1923 the plaintiff brought an action for the specific performance of both contracts. On 26th February 1924 the Supreme Court made a decree for specific performance. On 12th March following the plaintiff assigned his estate for the benefit of his creditors; but it does not appear whether or not this act was due to the refusal of the defendant to complete the contracts. On 23rd August the plaintiff committed an act of bankruptcy by failing to comply with a bankruptcy notice; and if the act of bankruptcy were followed by a petition for sequestration based thereon within six months, and if the petition were successful, the title of the official assignee would relate back to 23rd August. On 28th August plaintiff's counsel consented before the Master to an inquiry as to the plaintiff's title, but limited to facts since the decree. There had been no inquiry as to title directed by the decree, as neither party asked for it. I confess that I have never known of an inquiry as to title limited to facts since a decree; for the very good reason that usually all rights created since a decree are subject to the rights and duties established by the decree. The mere fact that there was a pending suit would ordinarily prevent a title from being acquired by dealings during the suit, such as would prejudice the title of the opposite party. Lord *Hardwicke* gravely based this doctrine on the

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quaint ground that, as a suit "is a transaction in a sovereign Court of justice, it is supposed that all people are attentive to what passes there." This doctrine was so hard on innocent purchasers and mortgagees that there was legislation providing for the registration of any *lis pendens*, and no purchaser or mortgagee is to be bound by an unregistered *lis pendens* unless he has express notice thereof (*Conveyancing Act* 1919, secs. 187-195). But the old rule remains, of course, as to voluntary assignees and as to assignees in bankruptcy (see *Bellamy* v. *Sabine* (1); *Price* v. *Price* (2)). Therefore, even if there should be a bankruptcy following on the act of bankruptcy, the official assignee would have to give effect to the rights of the purchaser Rawsthorne under the decree. As stated by *Parker* J. in *Halkett* v. *Earl of Dudley* (3), "a decree for specific performance enures for the benefit of *both* parties"; and the Court would compel the official assignee (if there should be a bankruptcy) to do and permit everything necessary to give to the purchaser his full rights under the decree.

Bearing this position in mind, I look more closely at the decree, 26th February 1924. It orders the defendant to perform specifically both the contracts. It contains also an order that the defendant, instead of delivering sheep and executing a second mortgage, as provided by the contracts, shall pay to the plaintiff £2,000 with interest. This variation from the contract is not impugned; but it is not expressed to have been made by consent. Moreover, the defendant was ordered to pay occupation rent as from 24th February 1923 for Eulandool, and the plaintiff was ordered to pay as from the same date the rents and profits of Burwood Markets; and there was to be an inquiry as to the damages which the plaintiff had suffered from the defendant's delay, and a set off of the amounts due on either side. The defendant was ordered to pay the taxed costs of the plaintiff up to the decree. Further consideration was reserved, with liberty to apply.

It appears from the correspondence that the solicitors for the parties came to an agreement on 7th July 1924 for settling details in working out the decree; and under this agreement cross-appeals

(1) (1857) 1 DeG. & J. 566. (2) (1887) 35 Ch. D. 297.
(3) (1907) 1 Ch., at p. 601.

to the High Court from the decree were to be withdrawn, and the decree was to "stand." Four promissory notes, amounting in all to £3,000, were handed over to plaintiff's solicitors, but (as the defendant's solicitor wrote) "subject to your client giving mine a good title to the Markets." The existence of the deed of assignment gave the defendant's solicitor concern, not merely as a possible act of bankruptcy (bankruptcy founded thereon would not relate back to a date before the decree), but as affecting the power of the plaintiff Facey to convey. In August the act of bankruptcy took place which I have already mentioned; and in pursuance of the consent of the plaintiff's counsel to the investigation of title so far as related to facts since the decree, defendant's solicitor lodged, on 8th September, particulars of objections. One objection—the objection which the order before us treats as fatal—is the act of bankruptcy of 23rd August. On 13th October the Master decided that the plaintiff Facey has not "*at the present time* a good title to the property in question" (Burwood Markets) "inasmuch as his title is defeasible upon any sequestration order being made against him which is grounded on" the act of bankruptcy of 23rd August. But the Master added: "If however *at the time fixed for completion* that act of bankruptcy should have ceased to be available, or Facey has been made bankrupt, *he or his official assignee*, as the case may be, will be entitled to specific performance of the contract." The certificate of the Master, 11th November, was to the same effect.

This decision and certificate do not treat the deed of assignment as having any effect. At the date of the decision, the six months had expired within which a petition for bankruptcy could have been based on the deed; but the Master, for reasons which are stated in his decision and which I need not for the present purpose discuss, treated the deed as not depriving Facey of his title to the property in question. At that same date there had been no order of sequestration; and it was for the trustees of the deed, not Facey, to convey the property to Rawsthorne. The trustees of the deed ought to have been added to the suit, and ought to have been parties to the inquiry. Strictly speaking, they were not even bound by the result. Strictly speaking, the inquiry whether Facey could give a good title was futile; a proper inquiry would be, could the assignees

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under the deed give a good title. There is nothing in the *Bankruptcy Act* that made the deed void up to the time of the inquiry. Under sec. 58 of the *Bankruptcy Act* 1898 " every *distribution* of property which is under this Act an available act of bankruptcy shall be void as against the official assignee or trustee " ; but there was no official assignee or trustee, as there was no bankruptcy. Nor would the assignment to trustees for creditors be void, although a *distribution* under the assignment might be void had bankruptcy supervened (see *Williams* v. *Dunn's Assignee* (1)). The learned Judge evidently saw that the assignees under the deed ought to be parties ; for when the certificate came before him in November and December he amended the proceedings by adding the assignees as plaintiffs. As plaintiffs, they took thenceforward the same attitude as Facey.

Assuming, however, that the assignees under the deed can be treated as if they were parties to the inquiry by consenting to be made plaintiffs on 12th December (they could not be made plaintiffs without their consent), the question is, was the order of 3rd January 1925 a proper order to make at that date under the circumstances. At that date there was still the possibility that a petition for sequestration based on the act of insolvency of 23rd August might be presented before 23rd February 1925. The order recites the summonses for variation of the certificate, but it does not expressly confirm the certificate, or dismiss the summonses. The order declares that the defendant Rawsthorne is " entitled to rescind " the two contracts of 1st January 1923 ; and it orders that the decree for specific performance be " stayed." The form of the order, " entitled to rescind," is unusual ; it appears to assume that, if the Court upholds the finding against the title, the defendant had, as of course, the right to rescind the contracts as to which specific performance had been decreed. But, as pointed out by *Parker* J. in *Halkett* v. *Earl of Dudley* (2), " after a decree of specific performance, a defendant purchaser cannot repudiate the title or the contract without the leave of the Court." I should not lay stress on the form of this part of the order if it were clear *aliunde* that the learned Judge addressed his mind to the exercise of his discretion—a judicial discretion—as to giving or refusing leave to the plaintiffs to try again,

(1) (1908) 6 C.L.R. 425.

(2) (1907) 1 Ch., at p. 601.

or as to giving leave to the defendant to repudiate the contracts and the decree under the circumstances. But this is just what is not clear. There is no rule established that if the vendor cannot make a title at the date of the report the purchaser had a right to be discharged; and "where the Master's report is, that the vendor, getting in a term, or getting administration, &c., will have a title, the Court will put him under terms to procure that speedily" (per *Eldon* L.C. in *Coffin* v. *Cooper* (1)). In the case of *Eyston* v. *Simonds* (2) a person contracted to sell an estate as to which he had actually no title whatever, because one of those under whom he claimed had been an alien. Pending the suit, the plaintiff vendor obtained a grant of the estate from the Crown; and specific performance was enforced. The Vice-Chancellor, *Knight Bruce*, pointed out that the title was good subject to the Crown's power to defeat it; that the grant merely relieved from this defeasibility—was not a new title within the rule; and that the case fell within the established rule which allows a vendor to make good the title before the Master. In *Paton* v. *Rogers* (3) the Master reported that a good title could be made except as to the dower to which a widow was entitled, and that she refused to join in the conveyance to the purchaser. Afterwards the widow expressed herself as ready to release her dower and to join in the conveyance; the defendant urged that as no good title could be made at the time of the report specific performance could not be completed: but the Vice-Chancellor said the vendor was in time to cure the objection. In *Sidebotham* v. *Barrington* (4) there was an objection to title, and the Master rightly reported that the vendor could not make title. It was a matter of title and not of mere conveyance—an assignee in insolvency had the title; but on its being represented at the hearing that the assignee would join in the conveyance and within a limited time, the Master of the Rolls referred it to the Master to inquire whether with the concurrence of the assignee in insolvency the vendors could make a good title; and the Master having reported that the vendors could, an order was made in favour of the vendors for specific performance (see

(1) (1807) 14 Ves. 205.
(2) (1842) 1 Y. & C.C.C. 608.
(3) (1822) 6 Madd. 256.
(4) (1841) 3 Beav. 524; 4 Beav. 110; 1842) 5 Beav. 261.

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also *Fraser* v. *Wood* (1)). As to *Lowes* v. *Lush* (2), on which Mr. *Miles* so strongly relied, there was in that case an inquiry as to title before decree ; and the deed of assignment for creditors, which was the act of bankruptcy, was executed before the suit was instituted—even before the contract of sale, one would infer ; for it was, according to the report (3), executed "*with a view to the sale.*" If bankruptcy should follow on this act of bankruptcy in that case, the title of the official assignee would not be *subject* to the rights of the purchaser under the decree (as in this case it would be), but would have priority to those rights, by virtue of priority in time. In the very next case reported (*Franklin* v. *Lord Brownlow* (4)) the Master of the Rolls says of *Lowes* v. *Lush*, "I refused to execute the contract." It is one thing to refuse to order the discretionary remedy of specific performance ; and quite another thing to allow a "rescission" or repudiation of the contract after specific performance has been decreed. The case of *Powell* v. *Marshall, Parkes & Co.* (5), on which the learned Judge relied in his reasons, was a case of repudiation by the purchaser *before suit*, for want of title ; and, time being of the essence of the contract, the vendor obviously could not give a secure title by the appointed day for completion. For the act of bankruptcy was committed on 2nd December ; the title of the trustee in bankruptcy, if bankruptcy came, would relate back to that date ; and if the purchaser paid the money on 15th December, the day for completion, he would pay it for a title that might be worthless.

Clearly, there is no rule that failure to show title at the time of the certificate is in itself a ground for refusing to carry out the decree for specific performance. But in this case the Court by its order deprives the plaintiffs (Facey and his assignees under the deed) of their vested right to specific performance—vested by the decree ; not because the property has become vested in some outsider, not because it has become vested in an assignee in bankruptcy, but because at the time of the certificate, and of the order thereon, there had been an act of bankruptcy, and that act of bankruptcy

(1) (1845) 8 Beav. 339.
(2) (1808) 14 Ves. 547.
(3) (1808) 1 Ves., at p. 548.
(4) (1808) 14 Ves. 550.
(5) (1899) 1 Q.B. 710.

might be used by some creditor as a ground for a petition in bankruptcy, and that petition might be successful—a possibility upon a possibility. But, as the Master had pointed out, if there should be no successful petition presented before 23rd February 1925, the plaintiffs would be in a position to give good title. Even if there should be such a petition filed, and the estate and interest of Facey become vested in an official assignee, the defendant purchaser could safely pay that assignee, and get a complete discharge; and that assignee's conveyance would be effectual (*Bankruptcy Act* 1898, secs. 63 (2), 67). Moreover, if the official assignee were to resist, the Court would compel him to carry out the decree; for, as I have already said, he would be bound by the decree, his title being subsequent to the decree. It has to be remembered that the time for completion of the contracts—15th January 1923—had long since passed, owing to the purchaser's default; and I am strongly inclined to think that there was no right at all to "rescind," or to give leave to rescind, until a new time for completion should have been fixed, and unless the plaintiffs failed in showing title by that time. But in any event, whether this impression is well-founded or not, whether the learned Judge actually applied himself to exercise his discretion or not, I cannot but hold that the order must be set aside. If the discretion was in fact exercised, it was, in my opinion, wrongly exercised.

In order to make clear the vital position, I have refrained from mentioning several matters which were much discussed. The 23rd February has come and gone, and there has been no petition for sequestration; but I think the order of 3rd January must be considered on the facts as they then stood. I do not see the propriety of the absolute "stay" of proceedings under the decree, as it would deprive the plaintiff of the costs up to the decree, which the decree gave him. The promissory notes were to cover these costs (*inter alia*), but the order upsets this arrangement. The petition in bankruptcy of 11th February 1924, to which the learned Judge refers in his reasons, need not now be considered, for the debt on which it was founded was admittedly paid on 10th December 1924. Neither party makes any point as to the mortgages referred to by the Master as having been mentioned in the contract for sale

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of Burwood Markets; and we, like the Master, do not know even whether they were legal or equitable. We have not seen the contracts; they are not part of the case. It appears also that in spite of the understanding as to the four promissory notes—that they were not to be used unless the vendor gave a good title—the vendor's solicitor took it on himself to discount one of the notes, a note for £1,000 payable to himself. I have not heard anything that justifies this conduct; but it does not affect my opinion as to the merits of this appeal.

Appeal allowed. Order appealed from discharged. Direct further reference to the Master in Equity to inquire and report whether a good title to the Burwood Markets can be given to the respondent Rawsthorne. Parties to abide their own costs from the date of the decree to the date of the order of 3rd January 1925. *Costs of this appeal when taxed to be paid by the respondent Rawsthorne to the appellants. Case remitted to the Supreme Court to be further dealt with consistently with this judgment.*

Solicitor for the appellants, *E. H. Ward.*

Solicitor for the respondent Rawsthorne, *G. C. Driffield*, Condobolin, by *F. H. Greaves.*

B. L.