The judgment of the court was delivered by. 1857.

Mellish et al. v. Brown et al.

ESTEN, V. C.—We think the injunction should be made perpetual in these cases, and that the plaintiffs should have their costs of suit. The case of *Mayhew* v. *Crickitt* (*a*), shews that a creditor may remain passive but cannot forego any advantage he has gained to the prejudice of the surety. He is a trustee of it, in fact, for him. In the present case the creditors had obtained and registered judgment, which therefore formed a charge upon the real estate of the debtor. They thought fit, without the consent of the surety, to release this real estate which formed a sufficient and almost the only fund for the payment of their debts from a moiety of such debts, the other moiety being paid at the time. It would be highly unjust that they should throw the remaining moiety on the surety, who, we think, therefore, is very clearly discharged. We have no doubt that the relation of principal and surety exists in these cases, and that all the law affecting that relation applies to them with full force.

FORBES V. CONNOLLY.

Specific performance—Option to purchase.

September, 1856, and April 27, 1857.

A lessee under a lease containing a clause giving him the right to purchase upon certain terms, neglected to pay the rent and perform the conditions specified, and his landlord wrote stating that the lease under which he held was void, and offering the tenant other terms: twenty months after such letter the lessee filed a bill to enforce the contract contained in the lease; or failing that, then a conveyance on the terms set forth in the letter, which the tenant alleged he had accepted, but the evidence wholly failed to establish that fact: the court dismissed the bill with costs.

Where, by the terms of a covenant to sell the option to purchase is entirely with the covenantee upon certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for sale and purchase of land; and the party entitled to the option must shew that he has performed all the terms, upon the performance of which alone he is entitled to exercise that option.

This bill was filed on the 27th of March, 1856, by

(*a*) Sw. 2 185.