tiff is entitled to compel a conveyance under the purchase covenant in his lease—and first, as to the non-payment of the agreed purchase money—the date of the death of the lessor, Mrs. *Connolly*, is not shewn, but in July, 1854, the defendant acted as owner, whether as heir-at-law or devisee of the lessor, does not appear, but it is to be presumed that Mrs. *Connolly* was then dead; and the first question is, whether there was any hand to receive the purchase money. It seems to have been assumed by both parties that the plaintiff had declared his option to purchase; upon which the purchase money would belong to the personal estate of Mrs. *Connolly*, and it is not shewn that the estate had then any personal representative. If there was no hand to receive the purchase money there could be no default in not paying it. We express no opinion as to whether the defendant's repudiation of plaintiff's right to purchase for £37 10*s*. and offering to sell at £75, would have excused the plaintiff from a tender of the £37 10*s*. if there had been any person duly authorised to receive it.

1857. Forbes v. Connolly.

Judgment.

The defendants right to resist a conveyance must rest then upon the plaintiff's default in the payment of rent: and we think upon a covenant of this nature when the covenantor cannot enforce a sale, but it is entirely in the option of the covanantee whether he will purchase or not, and where he is at liberty to exercise his option only upon the performance of certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for the sale and purchase of land, and that a party entitled to purchase or not at his option must shew that he has performed all the terms, upon the performance of which alone he is entitled to exercise that option.

This distinction is fully recognised by the English authorities, and is applicable to this case—the plaintiff had a privilege and was not bound to purchase, but he