

defence the vendor relied on the plaintiff's delay as justifying the rescission of the contract. The contract contained no clause as to what was to be done with the deposit if the contract was not performed. That was a strong case, because the purchaser was insisting on specific performance, but, as pointed out by Lord Justice Bowen, he may look as if he wished to perform the contract, but in reality he had put it out of his power to do so—he had, in the language of the Roman law, receded from his contract. Lord Justice Fry in the course of his judgment said that money paid as a deposit must be paid on some terms express or implied, and that the terms most naturally to be implied appeared to him to be that in the event of the contract being performed it should be brought into account, but that if the contract was not performed by the payer it should remain the property of the payee; that it was not merely a part payment, but was then also an earnest to bind the bargain so entered into, and created by the fear of its forfeiture a motive in the payer to perform the rest of the contract. In *Jackson v. De Kadich* (1904), W.N. 168, on signing the contract the purchaser paid the auctioneers a deposit of £1,000 as stakeholders. The contract did not contain a clause forfeiting the deposit if the purchaser made default in completing. The vendor brought an action for specific performance and obtained the usual judgment for it. The purchaser failing to complete, the vendor subsequently moved for an order in the usual form asking for rescission of the contract and a stay of proceedings, except for the purpose of taxing and paying the costs of the action and motion. The notice of motion also asked for a declaration that the vendor was entitled to the deposit of £1,000 and any interest thereon. The judge refused to declare that the vendor was entitled to the deposit, on the ground that he could not have rescission and at the same time damages for the breach of the contract. The judge also made the observation that in *Hou v. Smith* there was in fact no rescission. The question came before Mr. Justice Eve in the recent case of *Hall v. Burnell*, 105 L.T. Rep. 409, (1911) 2 Ch. 551. The facts were very similar