

£40 was paid down and the balance was to be paid in equal quarterly instalments, and in default of payment of any one instalment for thirty days all of the remaining instalments were at once to become payable, and in default of payment the vendor was to have power to sell the land, retain the unpaid instalments out of the proceeds, and pay the balance to the purchaser. The plaintiff went into possession, and in August, 1891, had paid all the instalments but one. No further payment was made, and in 1896 he left the premises, the land being then of less value than the total amount of the instalments paid. The defendant being unable to find the plaintiff, took possession and advertised the property for sale but was unable to find a purchaser. He then let the property in 1898, and gave the tenant an option to purchase. After this tenant had built a house, the plaintiff returned and tendered the remaining instalment, and claimed a conveyance, which being refused the present action for specific performance was brought. Cosens-Hardy, J., tried the action. It was conceded by plaintiff's counsel at the trial that specific performance of the contract could not be granted, and the learned Judge was of opinion that the plaintiff was not entitled to any damages against the defendant for non-performance of the contract, on the ground that his conduct shewed that he had abandoned the land and repudiated the contract, and that the defendant's rights could not be limited to the exercise of the power of sale conferred by the contract, when once it was held that the plaintiff was no longer owner in equity of the land, or entitled to a lien upon it for his purchase money. He held also that the plaintiff had resumed possession as owner, and in that capacity had made the lease with the right of purchase. He also held that the purchase money could not be recovered as money had and received to the use of the plaintiff because, the plaintiff having been let into possession, there could not be said to have been a total failure of consideration, and the action was, therefore, dismissed without costs. The learned Judge in the course of his judgment expresses the opinion that the statement that the effect of a contract of sale is to make the purchaser from that moment in equity owner of the land, needs to be modified by the proviso that the contract is one of which the Court will decree specific performance.