Ref to at p 473. (1972) 1 NSWLR 529
App at p 473. 1972 SR 436
NOT FOLL. [1987] 162 CLR 221

Dist [1985] 3 NSWLR 134.

Disd [1974] App. 80 WN 336
Foll'd (1983) 1 NSWLR 252.
Reg to (1983) 1 NSWLR 259.

Cons [1984] 2 NSWLR 280.
Cons [1985] 3 NSWLR 114.

[HIGH COURT OF AUSTRALIA.]

TURNER . . . . . APPELLANT;
DEFENDANT,

AND

BLADIN AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 9; *April* 20.

Williams, Fullagar and Kitto JJ.

Contract—Specific performance—Outstanding obligations on either side—Contract of sale completely performed by vendor—Decree of specific performance against purchaser to enforce payment of purchase price.

Statute of Frauds—Action—Debt—Sale of interest in land—Contract not evidenced by writing—Consideration fully executed by vendor—Action by vendor in indebitatus assumpsit to recover purchase price or instalments thereof—Instruments Act 1928-1936 (*No.* 3706—*No.* 4370) (*Vict.*), *s.* 128.*

It is not a defence to a suit for specific performance of a contract that some part of the contract is not immediately performable. Proceedings for the specific performance of a contract which is of such a kind that it can be specifically enforced can be commenced as soon as one party threatens to refuse to perform the contract or any part thereof or actually refuses to perform any promise for which the time of performance has arrived. The court can then make a decree that the contract ought to be specifically performed and carried into execution and can so mould its decree and order such inquiries, accounts and other proceedings under the decree as may be necessary to carry into effect all the promises of both parties, whether they are presently performable or are only performable in the future.

Nives v. *Nives*, (1880) 15 Ch. D. 649, applied.

Foll'd 55 S.R. 357; 72 W.N. 314.

* The *Instruments Act* 1928-1936 (Vict.) provides, by s. 128: "No action shall be brought . . . upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them or upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

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Where a contract of sale is of such a kind that the purchaser can sue for specific performance, the vendor can also sue for specific performance although the claim is merely to recover a sum of money, and he can do so although at the date of the writ the contract has been fully performed except for the payment of the purchase money or some part thereof.

Eastwood-Epping Ice & Fuel Co. Ltd. v. *Pittock*, (1938) 38 S.R. (N.S.W.) 671, at p. 677; 56 W.N. 26, at p. 27, approved.

Decision of the Supreme Court of Victoria (*Herring* C.J.) affirmed.

Where the consideration moving from the vendor of an interest in land to the purchaser has been fully executed so that the purchaser has become indebted to the vendor for the purchase money or instalments thereof, the vendor can recover the money which has become due in an action at law notwithstanding that the contract of sale is not evidenced by writing in accordance with s. 128 of the *Instruments Act* 1928 (Vict.). The action would not be brought on the agreement but would be one of *indebitatus assumpsit* to which the statute would not be a bar.

APPEAL from the Supreme Court of Victoria.

In an action in the Supreme Court of Victoria by George Leslie Bladin, Harold Waller and Neil Ewan Wanliss against Harry Turner the statement of claim was substantially as follows :—

1. In or about October 1945 the plaintiffs agreed to sell and the defendant agreed to purchase for £7,500 the plant, fittings, effects and goodwill of the business of quarry masters theretofore conducted by the plaintiffs at Ferntree Gully.

2. Pursuant to the agreement the defendant paid £2,100 but failed to pay the balance of purchase money.

3. It was a term of the agreement that the defendant should pay the plaintiffs three per cent per annum on the unpaid purchase money.

The plaintiffs claimed £5,400 and £608 interest.

Pursuant to the defendant's request, the plaintiffs supplied further and better particulars, from which it appeared that the agreement alleged was oral; otherwise the particulars appear sufficiently in the judgment hereunder.

The defendant's defence to the statement of claim was substantially as follows :—

1. He admitted an agreement in or about October 1945 for the sale and purchase of a quarry business at Ferntree Gully but otherwise denied par. 1.

2. He admitted payment of £2,100, but otherwise denied par. 2.

3. He denied par. 3.

4. He agreed to pay £2,100 and no more.

5. The agreement was one not to be performed within the space of one year from the making thereof, and he relied on s. 128 of the *Instruments Act* 1928 (Vict.) (Statute of Frauds).

The plaintiffs' reply joined issue and also alleged that the agreement had been wholly or partly performed by the plaintiffs.

At the trial of the action the pleadings were, by leave, amended, or treated as having been amended, as follows:—The plaintiffs added a claim for specific performance of the agreement and the defendant amended his defence by basing his plea of the Statute of Frauds on the additional allegation that the agreement was one for the sale of an interest in land.

The defendant also added the following paragraphs to his defence:—6. If a contract as alleged in par. 1 of the statement of claim was made it was a term thereof (*a*) that the plaintiffs would assign to the defendant any licence they had from the owner of the land to quarry thereon and obtain the consent of such owner to the said assignment, or, alternatively, (*b*) that the plaintiffs would obtain from the owner of the land a licence to the defendant allowing him to quarry thereon, or, alternatively, (*c*) that the plaintiffs would grant the defendant a licence for a term of five years to quarry on the said land. 7. The plaintiffs did not perform any of the terms set forth in par. 6.

The plaintiffs' amended reply alleged fulfilment or waiver of the matters raised by par. 6 of the amended defence.

Herring C.J., by whom the action was tried, decreed specific performance of the agreement pleaded in the statement of claim.

From this decision the defendant appealed to the High Court.

L. Voumard K.C. (with him *D. M. Little*), for the appellant. The findings of *Herring* C.J. leave doubt as to what precisely was the agreement found. It may have been that the assets and quarrying rights of the plaintiffs were not to pass to the defendant until the whole of the purchase money had been paid; on the other hand, it may have been that the assets and rights were to pass when the defendant was let into possession of the quarry. In either event, there was no writing to satisfy the Statute of Frauds and, therefore, no right of action enforceable at common law. In the former alternative the Statute of Frauds would be a bar because the agreement would be one not to be performed within a year; in either alternative, the agreement would be one for the sale of an interest in land. So far as equity is concerned, it is conceded that the statute would not be a bar if the agreement was such that specific performance could properly be decreed. It is

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submitted, however, that the case is not a proper one for such a decree. In the first of the alternatives which may result from the findings of the primary judge, obligations remain outstanding on the part of the plaintiffs and the defendant. In such circumstances a decree of specific performance would involve a supervision by the court of the conduct of the parties which a court of equity would not undertake. Specific performance is the appropriate remedy only where complete and final relief can be given. See *J. C. Williamson Ltd.* v. *Lukey* (1); *Reynolds* v. *Fury* (2) and cases there cited. In the second alternative that may result from the findings, the only obligation on the part of the defendant is to pay a sum of money, and the plaintiff's remedy is at law in an action of debt (*Brough* v. *Oddy* (3)). As this is a matter which would be within the cognizance of a court of common law, it is not apt for an equitable decree. Moreover, the findings leave the matter in such a state of uncertainty that it is impossible to say what the agreement is to which a decree of specific performance could be directed.

D. I. Menzies K.C. (with him *A. H. Mann*), for the respondents. There is no uncertainty in the agreement as pleaded and as found by *Herring* C.J. The agreement is not such as to attract the Statute of Frauds. It is not one which according to its terms is not to be performed within a year, and it is not one for the sale of an interest in land. It is a novel proposition, and an unsound one, that there cannot be specific performance where the agreement provides for payment by instalments and some instalments are not yet due. This proposition is inconsistent with the decision in *Nives* v. *Nives* (4), which is directly in point. There must be mutuality in the remedy of specific performance. Where a contract of sale is such that specific performance could be decreed against the vendor in the event of default by him, it follows that, where the vendor has performed his part and nothing remains to be done except payment of the price by the purchaser, specific performance can be decreed as against the purchaser. [He referred to *Cheshire's Modern Law of Real Property*, 5th ed. (1944), p. 671; *Halsbury's Laws of England*, 2nd ed., vol. 29, p. 388.]

L. Voumard K.C., in reply.

Cur. adv. vult.

(1) (1931) 45 C.L.R. 282, at p. 297.
(2) (1921) V.L.R. 14.
(3) (1829) 1 Russ. & M. 55 [39 E.R. 22].
(4) (1880) 15 Ch. D. 649, at p. 650.

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THE COURT delivered the following written judgment:—This is an appeal by the defendant from a judgment of the Supreme Court of Victoria (*Herring* C.J.) for the specific performance of the agreement referred to in the statement of claim. This is an oral agreement made in October 1945 for the sale by the plaintiffs to the defendant for the sum of £7,500 of the plant, fittings, effects and good will of the business of quarry masters carried on by them at Ferntree Gully.

The defendant required particulars of the agreement and the following particulars were supplied. The agreement was oral or implied or both. So far as it was oral it was constituted by conversations between the defendant and the plaintiff Bladin shortly prior to 15th October 1945, when the following material terms were agreed on:—(a) a deposit of two thousand one hundred pounds was to be paid forthwith; (b) five hundred pounds was to be paid twelve months thereafter; (c) a further five hundred pounds was to be paid at the expiration of every six months thereafter; (d) at the expiration of five years from the date of the payment of the said deposit, the balance then outstanding was to become due and owing; (e) one hundred pounds or any multiple thereof could at any time be paid off the purchase money; (f) the defendant was to pay interest at the rate of three pounds per centum per annum on the balance of purchase money from time to time outstanding, such interest to be paid every six months; (g) the plaintiffs were to arrange at their own expense between the said Arthur Augustus Brahe and the defendant a licence similar to that under which they the plaintiffs worked the land; (h) the defendant was not without the consent of the plaintiffs to remove, alter or damage any of the plant, fittings and sundries until all moneys had been paid under the agreement; (i) if the defendant failed to comply with any of the conditions of the agreement or failed to pay any of the purchase money or interest as agreed, then all moneys previously paid to the plaintiffs were to be forfeited and the plaintiffs were to be entitled to rescind the agreement without notice to the defendant and to repossess and again take over the business.

The plaintiffs admitted that the defendant had paid £2,100 of the purchase money but claimed that he had failed to pay the balance or any of the interest payable thereon. In his statement of defence the defendant admitted that he had agreed to purchase the plant, fittings and effects of the business, but alleged that the sum of £2,100 which he had paid the plaintiffs represented the whole of the purchase money payable under the agreement. He

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also pleaded that the agreement alleged by the plaintiffs was an agreement not to be performed within the space of one year from the making thereof and that he would rely on s. 128 of the *Instruments Act* (Vict.). This section, which re-enacts s. 4 of the Statute of Frauds, provides, *inter alia*, that no action shall be brought to charge any person upon any contract or sale of lands or any interest in or concerning them or upon any agreement that is not to be performed within the space of one year from the making thereof unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

At the hearing the defendant was allowed to amend his statement of defence by adding par. 6 : " If a contract as alleged in par. 1 of the statement of claim was made it was a term thereof—(a) that the plaintiffs would assign to the defendant any licence they had from the owner of the land to quarry thereon and obtain the consent of such owner to the said assignment; or, alternatively, (b) that the plaintiffs would obtain from the owner of the land a licence to the defendant allowing him to quarry thereon; or, alternatively, (c) that the plaintiffs would grant the defendant a licence for a term of five years to quarry on the said land ", and par. 7 that the plaintiffs did not perform any of the terms set forth in par. 6. The plaintiffs were allowed to amend their reply and allege fulfilment or waiver of the matters raised by par. 6. It would seem that the defendant was also allowed to rely on the reference in his statement of defence to s. 128 of the *Instruments Act* as applying to agreements for the sale of an interest in land as well as to agreements not to be performed within the space of one year from the making thereof.

The principal question of fact that the learned Chief Justice had to determine was whether the purchase price was £7,500 as the plaintiffs claimed or £2,100 as the defendant claimed. His Honour found that the purchase price was £7,500, of which £2,100 was a deposit and had been paid, that the balance was payable by instalments of £500 with interest at three per cent on so much of the purchase money as was outstanding from time to time, that the first instalment became payable in October 1946, and the remaining instalments at intervals of six months thereafter. Discussing the subject matter of the agreement, his Honour said that " they (the plaintiffs) owned the plant and had the right to carry on their quarrying operations unmolested in the buildings they had erected on the land and at the site of the quarry, quarrying

the stone and taking it away over the road they had built. It was the whole of their interest in the quarry and its operations, including such rights as they had to enter on the land and quarry the stone and take it away, that made up the subject matter that the parties described during the course of their negotiations as 'the quarry'. It was 'the quarry' in this sense that the plaintiffs wished to sell and that the defendant ultimately bought through Bladin from the plaintiffs. It was 'the quarry' in this sense into possession and enjoyment of which the defendant was let by the plaintiffs as from 1st October 1945, a possession and enjoyment that continued until the defendant in September 1948 sold to F. C. Kerr Pty. Ltd. 'the quarry' along with the land he purchased from Brahe on the day of such sale".

At the date of the agreement the land on which the quarry was situated belonged to one Brahe. The plaintiffs did not have any document giving them the right to enter on Brahe's land and quarry for stone. But they had been doing so with his permission since 1941, paying a royalty of threepence per cubic yard on the stone they removed. The royalties were payable to Brahe every six months. The defendant sent his first cheque for the royalties to the plaintiffs in April 1946 but thereafter paid them direct to Brahe.

Before us no attempt was made by counsel for the appellant to attack his Honour's findings except the finding that the allegations in par. 6 (a) of the amended statement of defence were not proved. Otherwise the attack was confined to certain points of law. It was submitted that the agreement found by his Honour was open to two alternative constructions—(1) that the property in the assets sold was not to pass to the defendant and the transfer of whatever rights the plaintiffs had to enter on Brahe's land and quarry for stone was not to take place until the purchase money had been paid in full; (2) that the property in the assets sold was to pass to the defendant and the transfer of these rights to take place when the defendant was let into possession of the quarry in October 1945.

It was submitted that on either construction the agreement was not one which was enforceable at law in the absence of writing because, if the first construction was correct, it was both an agreement not to be performed within the space of one year and an agreement for the sale of an interest in land, and, if the second construction was correct, it was still an agreement for the sale of an interest in land. It was admitted that, whichever construction of the agreement was correct, there had been part performance

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when the defendant was let into possession of the quarry and other assets of the business so that, if the agreement was specifically enforceable in equity, s. 128 of the *Instruments Act* was not a defence. But it was submitted that, if the first construction of the agreement was correct, the agreement was not specifically enforceable in equity because at the date of the writ the whole of the purchase money had not fallen due, there were future obligations on both sides, and a court of equity cannot specifically enforce a contract until the whole of the obligations of both parties have become performable. It was submitted that, if the second construction of the agreement was correct, the agreement was also not specifically enforceable because at the date of the writ the only part of the contract still remaining unperformed was the payment of the balance of purchase money by the defendant and this was a mere money claim justiciable only at law and not in equity. It was also submitted that on either construction the agreement was not specifically enforceable because the plaintiffs had failed to fulfil the condition set out in par. 6 (a) of the amended statement of defence and because the agreement was too uncertain to be enforced.

We shall now proceed briefly to discuss these submissions. The terms of the agreement as found by his Honour did not expressly provide that possession of the property sold was to be given on payment of the deposit, but we think that this is a necessary inference to be drawn from the conduct of the parties, for the defendant did in fact enter into possession of the quarry and thereafter carried on the business for his own benefit. Further, the term of the contract that the defendant should pay interest at three per cent on the balance of purchase money leads to the same conclusion because it would be unreasonable that interest should commence to run before the defendant became entitled to the profits of the business. The agreement was an agreement for the sale of the quarry business on a walk-in walk-out basis, and the defendant was to become the owner of the business and entitled to possession on payment of the deposit. There was no written instrument entered into between the plaintiffs and Brahe which defined the rights of the plaintiffs to work the quarry, but his Honour was satisfied that there was an oral agreement under which the plaintiffs were authorized to enter on the land and quarry for stone and erect the necessary buildings and other fixtures for this purpose, and that this agreement conferred on the plaintiffs rights which would have been a *profit à prendre* if granted by deed and rights which were assignable to the defendant. His Honour

found it impossible on the evidence to ascertain the precise terms of the agreement between the plaintiffs and Brahe, and it was unnecessary for him to do so, because he had found that all that the defendant purchased from the plaintiffs was whatever right, title and interest the plaintiffs had to enter on Brahe's land and quarry for stone. There was nothing uncertain about such an agreement. It was a matter of inquiry in order to ascertain what rights the plaintiffs had against Brahe: *id certum est quod certum reddi potest.* The plant, fittings and effects of the business were capable of identification *ab initio.* Even if there was any initial uncertainty, there could be no longer any uncertainty as to the items that were included in the sale after the defendant had entered into possession of the plant, fittings and effects, and the defendant himself, in his answers to interrogatories, gave particulars of these items.

We are also of opinion that there is no substance in the submissions relating to par. 6 of the amended statement of defence. The only condition pressed before us was that contained in par. 6 (a). It is true that in their particulars the plaintiffs stated that they were to arrange at their own expense for a licence between Brahe and the defendant similar to that under which they were working the quarry themselves; his Honour was not satisfied that any such term was a condition of the sale. Such a finding may be open to comment, seeing that in their particulars the plaintiffs themselves said that such a condition was a term of the agreement. But his Honour did not find that some of the other terms included in the particulars were part of the agreement. Applying well-settled principles, we are of opinion that the case is essentially one of those cases where the facts depend upon the credibility of the witnesses and in which we would not be justified in overruling his Honour's findings of fact. Even if, contrary to his Honour's finding, such a term formed part of the agreement, it would not now avail the defendant. The defendant, in his answers to interrogatories, said that in October 1946 he acquired a licence from Brahe to be implied from the payment by him to Brahe of royalties and Brahe's acceptance thereof. The defendant remained in possession of the quarry until he sold the business to F. C. Kerr Pty. Ltd. in September 1948, paying the royalties to Brahe which, at the date he entered into possession of the quarry, he knew he would have to pay to maintain a licence to remove the stone. He therefore made his own arrangements directly with Brahe for a licence to the same effect as any licence the plaintiffs could have promised

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him. He never complained to the plaintiffs that they had not secured such a licence, and he was able to work the quarry throughout the whole period of his ownership in the manner contemplated. In these circumstances we are of opinion that fulfilment of any promise the plaintiffs may have made to obtain a licence from Brahe was waived by the defendant.

Accordingly the position at the date of the writ was that the contract had been fully performed by the plaintiffs or, alternatively, that it had been fully performed except to the extent to which performance had been waived by the defendant and that the defendant had not paid the instalments or interest which had then become payable. If, in these circumstances, the contract was specifically enforceable, it was admitted, as we have said, that s. 128 of the *Instruments Act* is not a defence.

We are of opinion that the contract was specifically enforceable. We reject the contention that a contract, some part of which is not immediately performable, is not capable of specific performance. In our opinion proceedings for the specific performance of a contract which is of such a kind that it can be specifically enforced can be commenced as soon as one party threatens to refuse to perform the contract or any part thereof or actually refuses to perform any promise for which the time of performance has arrived. The court can then make a decree that the contract ought to be specifically performed and carried into execution, and can so mould its decree and order such inquiries, accounts and other proceedings under the decree as may be necessary to carry into effect all the promises of both parties whether they are presently performable or are only performable in the future. The statement of *Dixon* J. in *J. C. Williamson Ltd.* v. *Lukey* (1) that " the remedy (of specific performance) is not available unless complete relief can be given, and the contract carried into full and final execution so that the parties are put in the relation contemplated by their agreement " relied upon by counsel for the appellant lends no support to his submission. His Honour was discussing the kind of contract that is capable of specific performance and not the time at which a suit for the specific performance of such a contract may be instituted. In the present case the only terms of the agreement not presently performable at the date of the writ were the terms for the payment of the instalments which had not then become payable and *Nives* v. *Nives* (2) is a direct authority that a vendor whose purchase money is payable by instalments, some of which are not yet pay-

(1) (1931) 45 C.L.R. 282, at p. 297. (2) (1800) 15 Ch. D., 649.

able, can obtain a decree for specific performance and an order for payment of the instalments that are overdue, the plaintiff to have liberty to apply in respect of future instalments as they become payable. We are of opinion that where the contract is of such a kind that the purchaser can sue for specific performance, the vendor can also sue for specific performance, although the claim is merely to recover a sum of money and that he can do so although at the date of the writ the contract has been fully performed except for the payment of the purchase money or some part thereof. The law is, we think, correctly stated by *Nicholas* J. (as he then was) in *Eastwood-Epping Ice & Fuel Co. Ltd.* v. *Pittock* (1): "The right of a vendor to sue for a decree in equity that payment should be made according to a contract, although it is a claim for a money payment only, appears to be an additional right recognized in every case in which the other party to the contract might have sued for specific performance had he been the party complaining of the breach (see *Fry* on *Specific Performance*, 6th ed. (1921) p. 33; *Maitland* on *Equity*, 1st ed. (1936), p. 239). In *Clifford* v. *Turrell* (2) it was said by *Knight-Bruce* V.C.—'A case is stated in which, setting the Statute of Frauds out of the question, a bill might have been maintained by the defendant against the plaintiff, to compel him to execute the assignment. That, therefore, is a reason to compel the performance of the terms upon which the plaintiff agreed to execute the assignment.' This decision was confirmed by Lord *Lyndhurst* (3) on this aspect upon the ground that damages would have proved an inadequate remedy. But in *Walker* v. *Eastern Counties Railway Co.* (4), *Wigram* V.C. used similar reasoning to that of *Knight-Bruce* V.C., saying that the jurisdiction cannot be denied in a converse case in which the vendor is plaintiff". The case of *Cogent* v. *Gibson* (5) is directly in point. There Lord *Romilly* held that a contract for the sale of a patent was specifically enforceable at the suit of the vendor, although all he required was the payment of the purchase money. The case of *Brough* v. *Oddy* (6) was relied on by counsel for the appellant. But the contract there in question was simply a contract under which one party upon the happening of an event agreed to pay periodical sums of money to the other party. It was not a contract of the class which would have attracted the

(1) (1938) 38 S.R. (N.S.W.) 671, at p. 677; 56 W.N. 26.
(2) (1841) 1 Y. & C.C.C. 138, at p. 150 [62 E.R. 826].
(3) (1845) 9 Jur. 633.
(4) (1848) 6 Hare 594, at p. 602 [67 E.R. 1300, at p. 1303].
(5) (1864) 33 Beav. 557 [55 E.R. 485].
(6) (1829) 1 Russ. & M. 55 [39 E.R. 22].

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equitable remedy of specific performance at the suit of either party.

We are therefore of opinion that his Honour had jurisdiction to give judgment for specific performance. But we do not think that the decree is as clear and precise as it should be. The agreement as found by his Honour could not be adequately described as the agreement referred to in the statement of claim. It contained terms that are not mentioned in the statement of claim. It did not correspond in all respects with that agreement as amplified by the particulars. The only terms still to be performed relate to the payment of the balance of purchase money. The first instalment of purchase money became payable in October 1946 and the succeeding instalments in April and October of the following years. At the date of the writ six instalments had become payable. Since then three further instalments have become payable, leaving the instalments payable in October 1951 and April 1952 still outstanding. We think that an order should be added to the judgment below ordering payment to the plaintiffs within twenty-eight days of the nine instalments of £500 that are now overdue and for payment of interest at the rate of three per cent on £5,400 from 1st October 1945 to this date, and that there should be liberty to apply to the Supreme Court in respect of the instalments and interest that will become payable in the future.

We consider that we should add that, though the agreement sued on was found to be an agreement for the sale of an interest in land, we do not think that s. 128 of the *Instruments Act* was any defence to the plaintiff recovering at law in an action of *indebitatus assumpsit* the amount of the instalments which had become payable at the date of the writ and overdue interest to the date of judgment in the action. The consideration moving from the plaintiffs to the defendant was fully executed with the result that the defendant became indebted to the plaintiffs for the balance of purchase money and interest. An action to recover these sums would not be an action brought on the agreement but an action of *indebitatus assumpsit*. We accept with respect the views expressed by A. T. *Denning* (now *Denning* L.J.) in the articles in 41 *Law Quarterly Review*, p. 79 and 55 *Law Quarterly Review*, p. 63. His Lordship has now expressed his adherence to these views as a member of the Court of Appeal in *James* v. *Thomas H. Kent & Co. Ltd.* (1). In our opinion *Koellner* v. *Breese* (2) was rightly decided. *Cocking*

(1) (1951) 1 K.B. 551.

(2) (1909) 9 S.R. (N.S.W.) 457; 26 W.N. 92.

v. *Ward* (1); *Kelly* v. *Webster* (2); *Sanderson* v. *Graves* (3) are cases where the action was brought on the agreement and are therefore distinguishable. *Phillips* v. *Ellinson Bros. Pty. Ltd.* (4) was also a case where the action was brought on the agreement. Accordingly, if an *indebitatus* count had been added to the statement of claim, the learned Chief Justice could have given judgment at common law for the sum of £3,000, together with interest on £5,400 from 1st October 1945 to the date of judgment. Since, however, there were instalments and interest to become payable after the date of the writ and no provision could be made for payment of these instalments and interest in a judgment at common law, it was preferable, as his Honour did, to give judgment for specific performance.

For these reasons we are of opinion that, subject to modifying the judgment below as already mentioned, the appeal should be dismissed with costs.

Judgment below modified by omitting therefrom the words "This Court doth declare that the agreement referred to in the Statement of Claim in this Action ought to be specifically performed and carried into execution and doth order and adjudge the same accordingly", and inserting in lieu thereof the following declarations and orders: Declare that in October 1945 *the plaintiffs agreed to sell and the defendant agreed to purchase from the plaintiffs the plant, fittings, effects and good will of the business of quarry masters then being conducted by the plaintiffs at Ferntree Gully and such rights as the plaintiffs then had to enter on the land upon which they were then conducting the said business and to quarry stone thereon and take it away, for the price of* £7,500, *payable as to* £2,100 *thereof as a deposit, and as to the balance by instalments of* £500 *each with interest at three per cent in the meantime, such instalments being payable the first in October* 1946 *and the remainder at intervals of six months thereafter. Declare that the said agreement, so far as it has not already been performed, ought to be specifically performed and carried into effect except so far as performance has been waived by the defendant, and order and adjudge accordingly. Order that the defendant do*

(1) (1845) 1 C.B. 858 [135 E.R. 781].
(2) (1852) 12 C.B. 283 [138 E.R. 912].
(3) (1875) L.R. 10 Ex. 234.
(4) (1941) 65 C.L.R. 221.

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pay to the plaintiffs within twenty-eight days from this date the sum of £4,500 *together with interest at three per cent on* £5,400 *from* 1*st October* 1945 *to this date, and that the plaintiffs be at liberty to apply to the Supreme Court in the event of non-payment of any instalments or interest that will become payable under the agreement in the future. Otherwise appeal dismissed with costs.*

Solicitors for the appellant, *Gair & Brahe.*
Solicitors for the respondents, *W. B. & O. McCutcheon.*

E. F. H.