right as against the Thelussons, it was a mere general equity, which *could only have been asserted in a court of equity. At law, in this indirect mode, it could not have been asserted, if it could have availed them at all.

I, at least, would have it understood, that I concurred in the judgment in the case of *Thelusson* v. *Smith*, on no other ground than the want of privity between the parties. Nor can I acknowledge it as authority to any other point; since the United States were satisfied, and the assignees could not be regarded in any view, at law, as succeeding to the priority of the United States, if the United States had priority; and since that priority could not come in question, in a case in which the sale of the land was a mere nullity; as is distinctly affirmed in the present decision, because the assignment divested all the interest of the insolvent, so as to place it beyond the action of the *fieri facias*, issuing on the judgment of the United States.

Judgment affirmed, with costs.

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*The President, Directors & Company of the Bank of Columbia *v.* Peter Hagner. [*455

Dependent and independent contracts.

When no specific time for the payment of money is fixed in a contract, by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand. p. 463.

In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears.[1] p. 464.

Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, the intimation of courts have strongly favored the latter construction, as being obviously the most just. p. 465.

In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal. p. 465.

An averment of performance is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof. p. 465.

The time fixed for the performance of a contract, is at law, deemed its essence, and if the seller be not ready and able to perform his part of the agreement, on that day, the purchaser may elect to consider the contract at an end. But equity, which, from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed. p. 465.

It may be laid down as a rule, that at law, to entitle the vendor to recover the purchase-money,

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[1] Covenants are to be construed as dependent or independent, according to the intention of the parties, and the good sense of the case; technical words must give way to such intent. McCrelish *v.* Churchman, 4 Rawle 26; Bredin *v.* Agnew, 3 W. & S. 300; Wright *v.* Smith, 4 Id. 527. The intention is to be sought for, rather in the order of time, in which the acts are to be done, than from the structure of the instrument. Goodwin *v.* Lynn, 4 W. C. C. 714; Grant *v.* Johnson, 5 N. Y. 247. When the acts are to be performed at different times, the covenants will be construed as independent. Goldsborough *v.* Orr, 8 Wheat. 217; Philadelphia, Wilmington and Baltimore Railroad Co. *v.* Howard, 13 How. 306, So, a stipulation which goes only to a part of the consideration, will, in general, be treated as an independent covenant. Fame Insurance Co.'s Appeal, 83 Penn. St. 396.

he must aver in his declaration performance of the contract on his part, or an offer to perform at the day specified for the performance; and this averment must be sustained by proof, unless the tender has been waived by the purchaser. p. 467.

If, before the period fixed for a delivery of a deed for lands, the vendee has declared, he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed, before the institution of a suit, unnecessary; but this rule can never apply, except in cases, where the act which is construed into a waiver, occurs previous to the time for performance. p. 467.

The taking possession of property by the vendee, before conveyance, is a circumstance from which may be inferred, that he considered the contract closed, but will not deprive him of the right to relinquish the property, if the vendor can not make a title, or neglect to do so. After a relinquishment, for such causes, the vendee may sustain an action to recover back the purchase money, if it has been paid. p. 468.

Where the legal title cannot be conveyed to the vendee, by the vendor, and the vendee must resort to a court of equity to establish his title, *notwithstanding a conveyance of all the right of the vendor to him, the court will not compel him to pay the purchase-money—it would be compelling him to take a law-suit, instead of the land.[1] p. 468.

*456]

Error to the Circuit Court of the District of Columbia. The plaintiffs instituted their suit in the circuit court for the county of Washington, against the defendant, on a special agreement to purchase two lots of ground, in the city of Washington. The plaintiffs, to support the issues joined on their part, offered in evidence certain deeds, papers and letters; the handwriting of the parties and the delivery of the letters, at their several dates, being admitted.

John Templeman, being indebted to the plaintiffs in a large amount, conveyed, by deed, dated 31st of March 1809, to Walter Smith, in trust to secure the debt, certain lots in the city of Washington, the two lots alleged to have been sold to the defendant included; the said trustee being authorized to sell, at public sale, the property conveyed. On the 31st of March 1821, the bank, under seal, authorized Walter Smith to release the two lots to John Templeman, and under this authority, the trustee conveyed the property to Templeman, who, by deed, dated 29th April 1821, conveyed the same to Peter Hagner, the defendant. The conveyance by Walter Smith to Templeman, and from Templeman to Hagner, were made by the direction of the bank, for the purpose of vesting a title to the two lots in Mr. Hagner, in execution of their part of the agreement upon which the suit was founded, and before the suit was commenced.

The material evidence offered by the plaintiffs to establish their claim upon Mr. Hagner, and to prove a contract made by him, for the purchase of the two lots, was contained in a correspondence, &c., between General John Mason, the president of the bank, and Mr. Hagner; commencing on the 14th May 1817, and ending on the 19th of May 1821, numbered from 1 to 11.

No. 1, dated 14th May 1817, letter, Peter Hagner to General Mason, expressed a wish to purchase the lots, if the bank was disposed to sell them, at a reasonable price. No. 2, from General Mason to Mr. Hagner, dated October 16th, 1817, stated, that the board of directors had fixed the price of the lots at twenty-five cents per square foot. No. 3, from Mr. Hagner to General Mason, dated October 17th, 1817, communicated an offer of ten cents per square foot, which, by letter dated 17th December 1817, No. 4,

[1] Sitzel *v.* Kopp, 9 W. & S. 29.

was extended to fifteen cents per square foot. No. 5 was a memorandum sent by Mr. Hagner to General Mason, to be signed by him, and which was so done, on the 27th of April 1818; the memorandum bearing date April *25th, 1818, and stating, that the lots were on that day sold to Mr. [*457
Hagner, at twenty-five cents per square foot; "payable at such periods as the bank may approve."

On the 27th April 1818, No. 6, Mr. Hagner wrote to General Mason, desiring to have the payments for the lots purchased by him, at twenty-five cents per square foot, to meet his income; and proposed to have the same divided into six quarterly payments, the first to be made on the first day of the following October; offering his notes, and asking for a deed; or if this should not be agreed to, stating that he would bind himself to pay the money as proposed, "and receive a bond of conveyance, conditional to give a full title, when the money should be paid." This letter requested a return of the memorandum, No. 5. Upon this letter, there was written, in pencil, in the handwriting of General Mason, according to the usual practice at the sittings of the board of directors, "accepted—interest on each note, as it becomes due." No. 7, April 27th, 1818, from General Mason to Mr. Hagner, inclosed the memorandum, No. 5, and mentioned that his proposition would be submitted to the board.

On the 7th October 1818, Mr. Hagner wrote to Gen. Mason (No. 8), stating that he was prepared to pay the instalment falling due on the 1st October, and requesting a bond of conveyance. December 26th, 1820 (No. 9), Mr. Hagner, by letter, stated that a long time had passed since his purchase, without the title to the lots having been completed; and the bank continued without authority to convey. The bank, at the time of the purchase, had no authority to sell at *private* sale, and must have made title by a circuitous and doubtful process of a public auction, at which some one might have interposed and obtained the lot. That the bank might have held him bound to take the property, although not reciprocally bound; and that the answer of the president of the bank, was not certain and absolute, but was referred to and made dependent on the determination of the board of directors. Under these, and other circumstances stated by him, he communicated his determination to relinquish the purchase.

On the 8th May 1821, Mr. Hagner notified General Mason (No. 10), that he considered his agreement to purchase the lots void, and that he has no claim or title to them. In reply to this letter, upon the 19th May 1821 (No. 11), Gen. Mason says:—"You will no doubt, Sir, recollect a conversation I had with you soon after the reception of your letter of the 26th December last, when I informed you that that letter had been submitted *to the [*458
board of directors, and that it had been determined, that the purchase by you of the lots in question being considered in all respects a firm and *bonâ fide* purchase, it would not be relinquished, and that measures would be taken to make you a title valid in law. I am now instructed to inform you, that those measures have been taken; that deeds to that effect have been made by the proper parties, which are expected to be soon received here, when they will be tendered you, and a compliance with your part of the contract expected."

Evidence was also given, on the part of the plaintiffs, to prove the entire insolvency of John Templeman, and the non-payment by him of any part of

his debt to the plaintiffs. That on the 28th September 1821, a tender of the deeds already mentioned was made by an officer of the bank to the defendant, who refused to accept them. The deed of Templeman to Hagner, dated 3d of April 1821, was recorded by consent, without prejudice. A witness also proved, that in the month of June 1818, he was employed by defendant to inclose the two lots in question, and did inclose them with a board fence; that before inclosing the said lots, an old house was pulled down, by order of the defendant, and some part of the materials used in making the said inclosure; that some time afterwards, the witness was employed by defendant to pull down the fence, which was done, and the lots left open; that the said house was a small frame house, very old, and in bad repair; that it had been inhabited, some time before, but was not in tenantable order and condition; that if the house had been put in good repair, which would have cost half as much as building a new house of the same size and kind, it would have rented for about three dollars per month.

The clerk of the circuit court of the district of Columbia certified, that there was no judgment in force, on the 30th day of March 1821, against John Templeman, and proof was also made, that the taxes on the two lots of ground, from 1809 to 1821 inclusive, had been assessed to, and paid by the Bank of Columbia. On the 19th of May 1821, the situation of the lots was examined by order of the president of the bank, and it was found "that the fence had been removed, apparently that spring, and the lots appeared to have been cultivated the fall before."

Upon this evidence, the defendant, by his counsel, prayed the court to instruct the jury, that upon the evidence so given on the part of the plaintiffs, though found by the jury to be true, as above stated, the plaintiffs are
*459] not entitled to recover in this *action, the purchase-money for the lots in the declaration mentioned; which instruction the court gave as prayed.

The plaintiffs prayed the court to instruct the jury, that upon the evidence, the plaintiffs were entitled to recover such damages, as the jury should think the plaintiffs had sustained, by the defendant refusing to comply with the contract stated in the declaration, if they should believe, from the said evidence, that the defendant consented to the delay on the part of the plaintiffs to make a deed, or give a bond of conveyance for the lots mentioned in the declaration; which instruction the court refused to give.

A bill of exceptions was then tendered, by the counsel of the plaintiffs, to the instructions given by the court on the prayers of the counsel for the defendants, and also to their refusal by the court to give the instructions to the jury prayed for by the counsel for the plaintiffs.

While the bill of exceptions was preparing, the following additional evidence was discovered by the plaintiffs, and was offered and read to the jury: —A deed, commissioners to J. Templeman, 19th Septembtr 1801: Liber G. fol. 490. A deed, Templeman & Stoddart to Bank of Columbia, 19th January 1802: H. 386. A deed, Stoddart to Templeman, 25th September 1804: M. No. 12, 251. A deed, Templeman to the Bank of Columbia, 7th March 1807: No. 18, 346. The deed of 7th March 1807, conveyed *inter alia* to the plaintiffs, the two lots alleged to have been sold by Mr. Hagner, and authorized the bank to sell the property vested in them, by private or public sale. This evidence being exhibited, the court adhered to the instructions

and opinions given to the jury, and an additional exception was taken thereto by the counsel for the plaintiffs, and a writ of error was prosecuted to this court.

For the plaintiffs in error, it was contended, that upon the evidence, the plaintiffs were entitled to recover, and that the circuit court ought to have so instructed the jury.

Key, for the plaintiffs.—1. A contract for the purchase and sale of the two lots of ground was made between Mr. Hagner and the Bank of Columbia, the president of the bank having full authority from the board of directors to conclude the same. That the defendant had no evidence of the authority of the president to make the contract, was his own neglect, and he dealt with him as the agent of the bank, and under the contract, took possession of the property. *By the contract, the defendant was to pay for the lots, according to his proposition in the letter of the 27th of April [*460 1817, and the acceptance "noted in pencil," is the agreement in writing by the bank to the terms proposed, of which, sufficient evidence exists, in addition to the circumstances of the defendant's entry on the lots, showing that he knew of the agreement of the bank.

2. The contract subsisted down to the period of the defendant's refusal to fulfil it. It subsisted on the 7th October 1818, as shown by his letter referring to his propositions of payment upon the 27th April 1817; by his remaining in possession, and this continued until January 1820, when all the payments became due, no application having been made to complete the title, although it may be inferred, that he knew some measures would be required for the purpose. The acquiescence of the defendant in the delay, bound him during its existence.

3. When, on the 26th December 1820, he communicated his determination to withdraw from the contract, he had no such privilege. He was bound to wait, if the title was not incurably bad, a reasonable time, until it should be completed. Sugden 252–5. If aware of the difficulties in the title, arising from the sale made under the deed of trust by Walter Smith, by which a public and not a private sale of the lots was to be made, he should have tendered performance on his part, and demanded performance of the vendors. Instead of this, if, by that letter, he intended to renounce at once, this could not be done, legally, unless in the case of an incurably bad title. The formal relinquishment is made on the 8th of May 1821, and this being the first complaint of non-performance by the bank, it was promptly attended to. Sugden on Vendors, 157, 249–52, 34, 35. The refusal on the part of the defendant made a tender of performance by the plaintiffs, previous to a bill of specific performance on this action, unnecessary. Sugden 162–3; 3 Doug. 684. But no such tender was necessary. Sugden on Vendors 160, 164.

The bank did offer a good title, as is shown by the evidence. Templeman had no ultimate interest; it was released, and his deed, made with the consent of the bank, gave a good title. Those who are entitled to the money, which may arise from the sale of an estate, are the substantial owners of it. Sugden 300. To sustain this suit, it is sufficient, if a good title can now be made, and this can be done under the deed of 7th March 1807. Sugden 250–1.

Jones, for the defendant.—1. There never was a complete contract
*461] entered into by Mr. *Hagner. He made propositions, and they were never fully accepted by the bank; nor was he at any time informed of the order or determination of the bank thereon. It was the duty of the plaintiffs, when the money became due, to have tendered a performance of their contract, and not to have postponed the same until September, 1821, the day before the action was instituted.

No purchaser is bound to take an equitable title, and in this case, the bank had not a legal title, under the conveyance to Walter Smith, under which the title tendered was derived. The title must be complete at the time of performance of the contract. Sugden on Vendors 158.

When the original security is in form of a trust, it must remain so until the trust is executed, by a sale of the property in the time prescribed. A court of equity would not have confirmed the title to the defendant, they would have said to the trustee, Walter Smith, go and execute your trust.

As to the title of the 28th of September 1821, tendered to the defendant, it was not a valid title. By the law of Maryland, no land can be conveyed by a power of attorney; it was not made by the bank, and it passed through Templeman, who was insolvent. The defendant could not be compelled to accept such a title. There is no authority to be found, by which a vendor can call on another to complete a title which he contracted to give.

Entry on the property does not furnish anything but a presumption, that a title would be made; and this was never done.

As to the time which will be allowed for completing a title, the following cases were cited. Sugden on Vend. 284; 1 Marsh. 583; 6 Taunt. 259; 5 East 198; 1 Smith 390.

The plaintiffs, after the case had gone to the jury, exhibited a new title. The first was as a creditor, and the conveyance was to be derived from the trustee; the second title was under an old deed, by which the bank was authorized to convey. The deed of 1807 was controlled or revoked by the subsequent deed; and notwithstanding that deed, the trustee alone could make the sale. 1 Marsh. 285; 5 Taunt. 282; 3 Bos. & Pul. 181.

Thompson, Justice, delivered the opinion of the court.—This case comes up from the circuit court of the district of Columbia, upon a writ of error. It was an action against the defendant Hagner, on a special agreement to purchase of the plaintiffs two lots of ground, in the city of Washington.
*462] The *court below, on the prayer of the defendant, instructed the jury, that upon the evidence given on the part of the plaintiffs, though found by them to be true, would not entitle the plaintiffs to recover in this action, the purchase-money for the lots mentioned in the declaration. Under which instruction, a verdict was found, and judgment rendered for the defendant; to reverse which, the present writ of error has been brought.

The special agreement, as stated in the declaration, is substantially, that on the 25th of April 1818, it was agreed between the plaintiffs and defendant, that the plaintiffs should sell to defendant lots No. 1 and 2, in square 141, in the city of Washington, the property of the plaintiffs, at and for the price of twenty-five cents for each and every square foot contained in said

lots; and that defendant agreed to purchase the lots, at that price, and to pay for the same, when thereunto required by the plaintiffs; setting out the quantity of land and amount of the purchase-money, with an averment, that the plaintiffs had full power and authority to make the sale, and that they then were, and ever since have been, fully competent and able to make and deliver a good and sufficient deed, conveying to the defendant a good title in fee to said lots. And that, afterwards, on or about the 8th day of May 1821, the defendant declared and gave notice to the plaintiffs, that he considered the agreement and sale void, and would not comply with the same, and discharged the plaintiffs from making or causing to be made any deed of conveyance. And the plaintiffs further aver, that afterwards, on the 28th of September, in the year 1821, they being willing and able to make a conveyance of a good title to said lots, offered so to do, and requested the defendant to pay the purchase-money, according to the terms of the agreement, which he refused to do. The first inquiry that naturally arises, is, whether any contract was, in point of fact, concluded between the parties. It has been objected, that it does not appear, that General Mason, through whom, in behalf of the bank, the negotiation was carried on, had any authority for that purpose. There is certainly great plausibility in this objection. There is no evidence, expressly showing such authority. But this perhaps ought to be considered as having been waived by the defendant; as that part of the correspondence from which the contract is supposed to be collected, was carried on with him in his official character of president of the bank. And the defendant, at no time, puts his objection to carrying the contract (if any was made) into execution, upon the want of authority in Mason, to make it.

The contract is alleged, in the declaration, to have been made on the 25th of April 1818, and the letter of Mason, of *that date, and signed by him, as president of the bank, has been considered as closing the [*463 contract. This letter is as follows:—"I have this day sold to Peter Hagner, of Washington city, lots No. 1 and 2, in square 141, in Washington city, and belonging to the Bank of Columbia, at twenty-five cents per square foot; payable at such periods as the bank may approve."

The time of payment being left to the option of the bank, it is said, that in judgment of law, the purchase-money was payable on demand; and this is no doubt true, if the bank had then closed the negotiation, and apprised the defendant that such was their determination, as to the payment of the purchase-money. But this was not done; and the terms of the letter look to, and necessarily imply some further negotiation. The payment was to be at such periods as the bank may approve. It was, therefore, clearly understood to be payable by instalments; and the periods to be approved by the bank, which would seem to leave the subject open to propositions to be made on the part of Hagner, and submitted to the bank to be approved. And that such was the understanding of the parties, is evident from the letter written by the defendant, two days after, April 27th, 1818, to the president of the bank, as follows:

"It would be desirable to me to have the payments to make for the lots No. 1 and 2, in square 141, purchased of you, by me, on Saturday, at 25 cents per square foot, in proportions and at periods, to be met by my income. I accordingly propose, that the whole amount of the purchase-money be

divided into six quarterly payments, the first to be on the first of October next. If this be approved by the bank, I will give my notes, and I presume the bank will have no objections to give me a deed. If, however, it be preferred, I will bind myself to pay the money, at the times stated above, and receive a bond of conveyance, conditional to give a full title, when the money is paid. Do me the favor to send me, in return, a memorandum of our agreement on Saturday." Upon this letter was written in pencil, by General Mason, "accepted—interest on each note as it becomes due."

Whatever, therefore, might have been the right of the bank to have closed the contract, in the terms of the letter of the 25th of April, it was certainly waived, by an acceptance of the modification, contained in the letter of the 27th of April. Nor would any contract seem to be closed by this letter. It contained two distinct propositions, by the defendant; the one to give his notes for the purchase-money, payable in six quarterly payments, the first to be made on the 1st of October then next, and *take
*464] a deed from the bank; the other, to bind himself to pay the money at the times stated, and take a bond for a deed, to be given when the whole purchase-money was paid. This necessarily required some further answer from the plaintiffs, not only to signify their election between the propositions; but to do some further act, in confirmation of such an election. Either to give the deed, or a bond for the deed. The note in pencil, made by the president of the bank, upon the letter, could not fairly be understood, as implying anything more than an acceptance of the proposition to pay by instalments; and settling the terms of the contract, to be concluded between the parties, upon the bank's electing which proposition to accept, as to the mode of concluding the contract. But the contract could not be said to be consummated, until such election was made and the writings executed.

Here the matter rested for nearly three years, without anything being done on the part of the bank to close the contract; or to intimate, that they considered any contract in force, in relation to the purchase; and that, not until after the defendant had given them formal notice, that he considered the agreement void, and at an end. And he certainly had very good reason to think the bank so considered it; or that no agreement had in fact ever been concluded. For the defendant, by his letter of the 7th of October 1818, gave the plaintiffs notice, that he was prepared to pay the first instalment; which, according to his proposition, fell due on the first of that month; and requesting of them a bond for a deed; to which no answer appears to have been given, nor any one of the instruments paid or demanded; although the whole purchase-money became payable by the first of January 1820, according to the proposed terms of the contract. Upon the review of the case, it is at least very doubtful, whether any contract was concluded between the parties; and if the cause turned upon this point alone, the judgment of the court below would be affirmed, by a division of opinion in this court. But as there are other questions in the cause, the determination of which leads to the same result, and upon which no difference of opinion exists, it has been throught proper to notice them.

Admitting, then, that a contract was entered into between the parties, the inquiry arises, whether the plaintiffs have shown such a performance on

their part, as will entitle them, in a court of law, to sustain an action for the recovery of the purchase-money?

In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a *contrary intention clearly appears. A different construction would, in many cases, lead [*465 to the greatest injustice, and a purchaser might have payment of the consideration-money enforced upon him, and yet be disabled from procuring the property for which he paid it. Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, the inclination of courts has strongly favored the latter construction, as being obviously the most just. The seller ought not to be compelled to part with his property, without receiving the consideration; nor the purchaser to part with his money, without an equivalent in return. Hence, in such cases, if either a vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without an actual performance of the agreement, on his part, or a tender and refusal. And an averment to that effect, is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof. And that the one now before the court, must be considered a contract of this description, cannot admit of a doubt.

The plaintiffs, however, aver that they were willing and able to made a conveyance of a good title, and offered so to do, on the 28th day of September 1821; but this was only the day before the suit was commenced, and nearly two years after the time fixed for performance; and they set up, as an excuse for the delay in making the tender of a deed, the notice received from the defendant on the 8th of May 1821, that he considered the agreement void, and refused to carry it into effect.

The time fixed for performance, is, at law, deemed of the essence of the contract. And if the seller be not ready and able to perform his part of the agreement, on that day, the purchaser may elect to consider the contract at an end. In Sugden's Law of Vendors 275, it is said, "The general opinion has always been, that the day fixed was imperative on the parties, at law. This was so laid down by Lord KENYON, and has never been doubted in practice. The contrary rule would lead to endless difficulties, if, in every case, it must be referred to a jury to consider, whether the act was done within a reasonable time; and the precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. But equity, which from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the *agreement into execution, although the time [*466 appointed has elapsed." But he justly adds, perhaps, there is cause to regret, that even equity assumed this power of dispensing with the literal performance of contracts, in cases like those.

It was urged at the bar, that the rule on this subject was the same at law and in equity, and the case of *Thompson* v. *Miles*, 1 Esp. 184, was referred to, in support of this proposition. And it is true, that some of the remarks which fell from Lord KENYON on the trial of that cause, would

seem to countenance such an opinion. For he permitted the seller to prove he had a good title; although the power of making that title was attained after the action was brought. This was certainly going great lengths for a court of law. But it ought to be observed, that in that case, no time appears to have been fixed for completing the contract; and an application for the title had not been made by the purchaser, previous to the action brought by the vendor for breach of the contract; which it seems was considered necessary in that case. But, that Lord KENYON did not mean to be understood, as holding that the evidence would have been admissible to sustain the action, if there had been a time fixed for the performance of the contract, is very evident, from his doctrine in numerous other cases before him. Thus, in the case of *Bury* v. *Young*, 2 Esp. 641, he says, a seller of an estate ought to be prepared to produce his title deeds, at the particular day. That a court of equity will, under particular circumstances, enlarge the time. And in the case of *Cornish* v. *Rowley*, 1 Wheat. Selw. 137, the action was for money had and received, to recover back money paid as a deposit, on an agreement for the purchase of an estate, the defendant having failed to make out a good title, on the day when the purchase was to be completed; the counsel for the defendant said they were ready to make out a good title; to which Lord KENYON replied: "As to the sentiments I have long entertained relative to the purchase of real estate, I find no reason for receding from them; they have been confirmed by conversing with those whose authority is much greater than mine; the vendor must be prepared to make out a good title on the day when the title is to become completed." On which, the counsel for the defendant asked, "Do I understand your lordship to say, that though the defendant can now make out a good title, yet, as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance?" To which Lord KENYON answered, "he certainly may; and avoid the contract:" and he directed the jury to find a verdict for the plaintiff, for the deposit money.

In the case of *Davis* v. *Hone*, 2 Sch. & Lef. 347, Lord REDESDALE said, a court of equity frequently decrees specific *performance, when the *467] action at law has been lost, by the default of the very party seeking the specific performance. To sustain an action at law, performance must be averred, according to the very terms of the contract. And again, in the case of *Lennon* v. *Napper*, 2 Sch. & Lef. 684, he reiterates the same doctrine, that courts of equity, in all cases of contracts for lands, have been in the habit of relieving, where the party, from his own neglect, has suffered a lapse of time, and from that and other circumstances, could not sustain an action to recover damages at law; for, at law, the party plaintiff must have strictly performed his part of the contract. And in the case of *Wilde* v. *Fort and others*, 4 Taunt. 334, the rule is recognised, that if the vendor of an estate at auction, does not show a clear title, by the day specified, the purchaser may recover back his deposit, and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not. A purchaser is not bound to accept a doubtful title.

From these authorities, it may be laid down as a settled rule, that at law, to entitle the vendor to recover the purchase-money, he must aver in his declaration a performance of the contract on his part, or an offer to perform,

at the day specified for the performance. And this averment must be sustained by proofs, unless the tender has been waived by the purchaser.

The time fixed for the performance of the contract, in this case, must be understood to have been the 1st of January 1820. The payment of the consideration-money was to have been completed on that day, and no part of it having been paid, the defendant had a right to abandon his contract, unless the plaintiffs were then ready and offered to perform, on their part; of which there was no evidence whatever offered upon the trial. They have attempted, however, to show, that a tender of a deed was rendered unnecessary, by reason of the letter of the defendant, of the 8th of May 1821; in which he gave notice of rescinding the contract. But this letter can have no such effect; it was written sixteen months after the time fixed for the delivery of the deed, and when the defendant had a right to rescind the contract. If, before the period had arrived, when the deed was to be delivered, the defendant had declared, he would not receive it, and that he intended to abandon the contract, it might have dispensed with the necessity of a tender, as the conduct of the defendant might, in such case, have prevented the act from being done; and he who prevents a thing from being done, shall never be permitted to avail himself of the non-performance, which he himself has occasioned. But that rule can never apply, except in cases where the act which *is construed into a waiver, occurs previously to the time fixed for performance. [*468

The possession taken of the lots by the defendant could, at most, only be considered a circumstance from which to infer, that he considered the contract closed; but could not deprive him of the right of relinquishing it, and restoring the possession, if the plaintiffs were unable to make a title to him, or neglected to do so. The possession was taken, doubtless, under a belief that the contract would be performed by the plaintiffs, and a full title conveyed to him; but if the contract was unexecuted, the defendant had a right to disaffirm it, and restore the possession; and could have sustained an action to recover back the purchase-money, had it been paid. Sugd. on Vend. 173, 183, and cases there cited. The plaintiffs have, therefore, clearly failed to show such a performance, on their part, as to entitle them, in a court of law, to call upon the defendant for payment of the purchase-money.

But admitting, that no objection, in point of time, lay to the tender of the deeds, the day before the commencement of the present action; no title was thereby conveyed to the defendant, or, at all events, not such a one as he would, at any time, have been bound to accept. It was a title derived from John Templeman, under the deed of the 31st of March 1809. Whereas, Templeman had previously conveyed the same lots to the plaintiffs, by his deed of 7th of March 1807, in trust, with authority to sell the same for the payment of a debt due to the bank, and to pay over to him the surplus, if any there should be. The legal title to these lots is, therefore, still in the bank, and may be subject to the trust declared in the deed, from anything that appeared upon the trial, And to allow the bank to recover the purchase-money, and turn the defendant over to a court of chancery, to obtain a title, would be going farther than any known principles in courts of law will warrant; no act whatever having been done by the plaintiffs, to transfer to the defendant the title vested in them under the deed of 1807. To substantiate

the present action, under such circumstances, would be compelling the defendant to take a law-suit, instead of the land for which he contracted.

Judgment affirmed, with costs.

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*469] *Doe, on the demise of John A. Elmore, Plaintiff in error, *v.* William A. Grymes and John J. Beatie, Defendants in error.

Nonsuit.

The courts of the United States have no authority to order a peremptory nonsuit, against the will of the plaintiff, on a trial of a cause before a jury; the plaintiff may agree to a nonsuit, but if he do not so choose, the court cannot compel him to submit to it.[1] p. 471.

Where the state of the record does not show a judgment of nonsuit to have been entered, although the bill of exceptions state the fact, the plaintiff may apply for a *certiorari*, to bring up a perfect record, or dismiss the writ of error, and proceed *de novo*. p. 472.

Error to the Circuit Court of Georgia. An action of ejectment was instituted in the circuit court of the United States for the district of Georgia, for the recovery of 287½ acres of land, in which the plaintiffs claimed title as follows:

A grant from the state of Georgia to Samuel Alexander; and a deed from John Cessna, styling himself "sheriff of Greene county in the state of Georgia," purporting to convey to Buckner Harris, by virtue of a sale under an execution against Herod Gibbs, "two hundred and eighty-seven and a half acres of land in said county, on Little Beaver dam, on the waters of Richland creek, and bounded on Academy lands, and land belonging to William Alexander, which land was formerly the property of Samuel Alexander;" a deed from Buckner Harris to Ezekiel E. Park, for a tract of land "containing two hundred and eighty-seven and a half acres, in the county of Greene, and state of Georgia, on the Little Beaver dam of Richland creek; being an equal half of the double bounty of land granted to Samuel Alexander, adjoining Academy lands."

The plaintiff then introduced a witness, who testified, that "Ezekiel Park was in possession of a tract of land, lying in Greene county, usually called Park's old mill tract, on Beaver dam creek, for about twenty years." He then produced a deed from Ezekiel E. Park to John A. Elmore, for a tract of land "in the county of Greene, and state of Georgia, on the Little Beaver dam creek, or fork Richland creek, being one equal half of a double bounty tract, originally granted to Samuel Alexander, adjoining lands belonging to the University; being the same originally sold and conveyed to Herod Gibbs, by the grantee, on the 14th of March 1790." He then exhibited a deposition of the county-surveyor, stating that he had made a re-survey of the premises in dispute, agreeable to a plot annexed to his deposition, which corresponded in its outlines with that annexed to the original grant, "com-

*470] pletely *covering the premises in dispute;" which he designated on the plat. The plaintiff then called a witness, who testified that W.

[1] De Wolf *v.* Rabaud, *post*, p. 476; Crane *v.* Morris, 6 Pet. 598; Silsby *v.* Foote, 14 How. 219; Castle *v.* Bullard, 23 Id. 172; Schuchardt *v.* Allen, 1 Wall. 369; Insurance Co. *v.* Folsom, 18 Id. 250; Carr *v.* Gale, 3 W. & M. 38; Boucicault *v.* Fox, 5 Bl. C. C. 87.