

United States v. Evans.

would not be good ; and we could not compel the purchaser to take a less quantity than he contracted for. So here, the contract was for 6000 acres. The complainants have a title to a part only ; we could not compel the defendant to take that part, and give him damages for the non-conveyance of the residue.

JOHNSON, J., observed, that he had perhaps taken a peculiar view of this subject, but he should be in favor of decreeing a specific performance, generally ; \*leaving Auld to his remedy upon the warranty of the complainants for any defect of title which might appear. Auld, per- [280  
haps, thought it would be a good speculation, and had stipulated for a general warranty. He acquiesced, however, in dismissing the bill, because he considered the judgment in the action at law, brought by Auld against the complainants, as equivalent to a decree for a specific execution of the agreement, inasmuch as it prevents him from obtaining satisfaction, in any other way, for the sum awarded.

MARSHALL, Ch. J., declared the opinion of the court, in the action at law, to be, that the tender of the assignment of Graham's contract, and the power of attorney, was good, as pleaded, and that Auld ought to have accepted it.

Judgment reversed.

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*Ground of error*

It is not a ground for a writ of error, that the judge below refused to re-instate a cause, after nonsuit.

ERROR to the District Court for the Kentucky district.

In the court below, the judge, at the trial, rejected certain testimony which was offered by the attorney for the United States, who thereupon took a bill of exceptions, and became nonsuit, and afterwards, at the same term, moved the court to set aside the nonsuit and grant a new trial, upon the ground, that the judge had erred in rejecting the testimony. But the court overruled the motion, and refused a new trial ; whereupon, the attorney for the United States sued out his writ of error.

The case was submitted by the *Attorney-General* and *Rowan*, without argument.

MARSHALL, Ch. J., delivered the opinion of the court, that in such a case, where there has been a nonsuit, and a motion to re-instate overruled, the court could not interfere.

Judgment affirmed.