

Bank of Columbia Vs. Hagner

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SooperKanoon Citation : sooperkanoon.com/79159

Court : US Supreme Court

Decided On : 1828

Appeal No. : 26 U.S. 455

Appellant : Bank of Columbia

Respondent : Hagner

Judgement :

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Bank of Columbia v. Hagner

26 U.S. (1 Pet.) 455

ERROR TO THE CIRCUIT COURT

OF THE DISTRICT OF COLUMBIA

SYLLABUS

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.

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 intention clearly appears.

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.

In such cases, if either vendor or vendee wishes to compel the other to fulfill 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.

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

The time fixed for the performance of a contract is, at law, deemed the essence of the contract, and if the seller is 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.

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

If before the period fixed for the 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.

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

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

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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.

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 31 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 31 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 29 April, 1821, conveyed the same to Peter Hagner, the defendant.

The conveyance, by Walter Smith to Templeman and from Templeman to Mr. 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 14 May, 1817, and ending on 19 May, 1821, numbered from 1 to 11.

No. 1, dated 14 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 16, 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 17, 1817, communicated an offer of ten cents per square foot, which, by letter dated 17 December, 1817, No. 4, 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 27 April, 1818, the memorandum bearing date April

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25, 1818, and stating that the lots were on that day sold to Mr. Hagner at twenty-five cents per square foot, "payable at such periods as the bank may approve."

On 27 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, conditioned 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 27, 1818, from General Mason to Mr. Hagner, enclosed the memorandum, No. 5, and mentions that his proposition would be submitted to the Board.

On 7 October, 1818, Mr. Hagner wrote to Gen. Mason (No. 8) stating that he was prepared to pay the installment falling due on 1 October and requesting a bond of conveyance. December 26, 1820 (No. 9), Mr. Hagner, by letter, states that a long time had passed since his purchase, without the title to the lots having been completed, and the bank continues 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 someone 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 communicates his determination to relinquish the purchase.

On 8 May, 1821, Mr. Hagner notifies General Mason (No. 10) that he considers his agreement to purchase the lots void, and that he has no claim or title to them. In reply to this letter, upon 19 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 26 December last, when I informed you that that letter had been submitted

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to the 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 *bona 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 nonpayment by him of any part of his debt to the plaintiffs. That on 28 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 3 April, 1821, was recorded by the consent without prejudice.

A witness also proved that in the month of June, 1818, he was employed by defendant to enclose the two lots in question, and did enclose them with a board fence; that before enclosing 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 enclosure; that sometime 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 30 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 19 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 that 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 not entitled to recover in this

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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 it 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 exception was then tendered by the counsel of the plaintiffs to the instructions given by the court on the prayers of the counsel for the defendant 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, 19 September, 1801. Liber G. fol. 490.

A deed, Templeman & Stoddart to Bank of Columbia, 19 January, 1802. H. 386.

A deed, Stoddart to Templeman, 25 September, 1804. M. No. 12,151.

A deed, Templeman to Bank of Columbia, 7 March, 1807, No. 18,346.

The deed of 7 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.

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MR. JUSTICE THOMPSON 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. The

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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 25 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 8 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 28 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 25 April, 1818, and the letter of Mason of

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that date, and signed by him as president of the bank, has been considered as closing the 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 installments 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 27, 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 given 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 "accept 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 25 April, it was certainly waived by an acceptance of the modification contained in the letter of 27 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

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take 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 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 installments 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's being done on the part of the bank to close the contract or to intimate that it 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 7 October, 1818, gave the plaintiffs notice that he was prepared to pay the first installment, 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 anyone of the instruments paid or demanded, although the whole purchase money became payable by 1 January, 1820, according to the proposed terms of the contract.

Upon this view 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 thought 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

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contrary intention clearly appears. A different construction would in many cases lead 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 a vendee wish to compel the other to fulfill 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 make a conveyance of a good title, and offered so to do on 28 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 8 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 is 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

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agreement into execution although the time 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 Wheaton Selwyn 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

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performance when the 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 had 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*, 4 Taunt. 334, the rule is recognized 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 1 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 8 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 nonperformance which he himself has occasioned. But that rule can never apply except in cases where the act which

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is construed into a waiver occurs previous to the time fixed for performance.

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 it. 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 would have sustained an action to recover back the purchase money had it been paid. Sug. 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 31 March, 1809. Whereas Templeman had previously conveyed the same lots to the plaintiffs by his deed of 7 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 supplies 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 further 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 lawsuit instead of the land for which he contracted.

Judgment affirmed with costs.

