Green Vs. Liter

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Appellant : Green

Respondent : Liter

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Green v. Liter

12 U.S. (8 Cranch) 229

ON CERTIFICATE OF DIVISION OF OPINION AMONG THE

JUDGES OF THE CIRCUIT COURT FOR THE KENTUCKY DISTRICT

SYLLABUS

The circuit courts of the United States have jurisdiction in write of. right where the property demanded exceeds $500 in value, and if, upon the trial, the demandant recover leas, he is not to be allowed his costs, but at the discretion of the court

may be adjudged to pay costs.

At common law, a writ of right will not lie except against the tenant of the freehold demanded. If there are several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ, and if they are, they may plead in abatement of the writ. If the demandant demands against, any tenant more land than he holds, he may plead nontenure as to the parcel not holden, but the writ shall abate only as to the parcel whereof poll tenure is pleaded, and admitted or proved.

Under the act of Kentucky to amend process in chancery and common law, the party may recover although he prove only part of the claim in his declaration, but it does not enable him to join parties in an action who could not be joined at the common law.

The act of Virginia of 1786 reforming the method of proceeding in writs of right did not vary the rights or legal predicament of the parties as they existed at the common law. It did not therefore change the nature and effect of the pleadings, and notwithstanding that act, the tenant shall still have the full benefit of the ordinary pleas in abatement. The clause of the act which provides that the tenant at the trial may, on the general issue, give in evidence any matter which might have been specially pleaded is confined to matters in bar.

Under the act of Virginia of 1786, the tenant may, at his election, plead any special matter in bar in a writ of right or give it in evidence on the mise joined. The act is not compulsive, but cumulative.

The act of Virginia of 1786 did not change the nature of the inquiry as to the titles of the parties to a writ of right.

In order to support a writ of right, it is not necessary to prove an actual entry under title or actual taking of esplees. A constructive seizin in deed is sufficient.

Under the land law of Virginia, the whole legal estate and seizin of the commonwealth pass to the patentee upon the issuing of his patents in as full and

beneficial a manner (subject only to the rights of the commonwealth) as the commonwealth itself held them. A conveyance of wild and vacant lands gives a constructive seizin thereof in deed to the grantee, and attaches to him all the legal remedies incident to the estate. *A fortiori* this principle applies to a patent.

In Kentucky, a patent is the completion of the legal title, and it is the legal title only that can come in controversy in a writ of right.

A better subsisting adverse title in a third person is no defense in a writ of right.

If tenants, claiming different parcels of land by distinct titles, omit to plead that matter in abatement and join the mise, it is an admission that they are joint tenants of the whole, and the verdict, if for the demandant, for any parcel of the land may be general, that he hath no more right to hold the same than the tenants, and if of any parcel for the tenants, that they have no more right to hold the same than the demandant.

If a men enter into lands having title, his seizin is not bounded by his actual occupancy, but is held to be coextensive with his title.

But if a man enter without title, his seizin is confined to his possession by metes and bounds.

An entry into a parcel which is vacant will not give seizin of a parcel which is: in an adverse seizin, but an entry into the last parcel in the name of the whole will enure as an entry into the vacant parcel.

Under a conveyance taking effect under the statute of uses, the bargainee has a complete seizin in deed without actual entry or livery of seizin.

This was a writ of right brought by Green, the demandant, against the tenants to recover seizin of a large tract of land lying in Kentucky and set forth in the count. The writ of right was sued out under the act of the Virginia Assembly entitled "an act for reforming the method of proceeding in writs of right."

At the trial in the Circuit Court for the Kentucky District, several questions arose upon which the court was divided, whereupon those questions were certified for the opinion of the Supreme Court. They are as follows:

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1st. Has the circuit court of the United States jurisdiction in a writ of right where the land claimed by the demandant is above the value of $500, but the tenement held by the tenant is of less value than $500?

2d. Can the demandant join in the writ and count several tenants claiming under several distinct, separate, and independent original titles, all of which interfere with the land of the demandant? If he can, must he demand of them the tenements they severally hold, or may he demand a tenement to the extent of his own title? If it comprises a part not claimed or held by any of the said tenants, may he demand, in his count against the several tenants, his own tenement, or must he demand of each tenant the tenement he severally holds?

3d. Can the tenant, under the act of the Virginia Assembly for reforming the method of proceeding in writs of right, plead in abatement either the plea of nontenure, joint tenancy, sole tenancy, several tenancy, or never tenant of the freehold, or any of them, or other pleas in abatement necessary to his case, or is he compellable to join in the mise in the form prescribed by the said act? If he can, when or at what stage of the proceedings? If he cannot, may he give it in evidence on the mise joined?

4th. May the tenant, under the said act, plead specially any matter of bar, or must he join the mise, without other plea, in the form prescribed by the said act?

5th. Can a demandant who has regularly obtained a patent from the land office of the State of Virginia for the land in contest, under the act of the Virginia Legislature passed in the year 1779, commonly styled the land law, maintain a writ of right under such patent against a person claiming and holding possession under a younger patent from the said state without having first taken the actual possession

of the land under his patent held by the tenant? If he can maintain a writ of right without such proof in the general, can he do it where his right of entry is barred by an actual adverse possession of twenty years?

6th. Is the eldest patent obtained, as aforesaid, for

the land in controversy, sufficient proof of the best mere right, or can the demandant be put on the proof that, in the incipiency, and in the different steps necessary to complete his title, he has complied with the requisites prescribed by the acts, the one entitled

"An act for adjusting and settling the titles of claimants to unpatented lands under the present and former government previous to the establishment of the commonwealth land office,"

and the other "An act for establishing a land office and ascertaining the terms and manner of granting waste and unappropriated lands," and the subsequent laws of Virginia on the same subject, in force at the time of the erection of the District of Kentucky into a separate state?

7th. If the demandant is not compellable to show anything beyond his patent, can the tenant holding the younger patent be permitted to impeach the demandant's patent to show the incipiency and completion of his own title and the relative merits of his own and the demandant's title?

8th. Can the defendant defend himself by showing an older and better existing title than the demandant's, in a third person?

9th. Where several tenants, claiming in severalty, are joined in a writ of right, should the finding of the jury be several of the mere right between the demandant and each tenant, or may it be a general finding that the demandant hath the most mere right?

10th. The commonwealth having first made and granted a patent to the demandant, and afterwards, by her patent, granted a part of the same land to the defendants, who entered and obtained the first possession, the demandant afterwards entered and took possession, under his first grant, of that part of his land not within the patent of the first grantee -- who has the best mere right to the land, where the patents conflict, outside of the actual close of the last grantee?

11th. Will an entry upon part, and taking the esplees under the elder grant from the commonwealth, and making claim to the whole land included within the bounds of the elder grant, authorize the demandant to maintain

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his writ of right against the tenants holding the previous possession under a younger patent interfering with the elder grant?

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STORY, J. delivered the opinion of the Court as follows:

This is a writ of right brought by the demandant against the tenants, to recover seizin of a large tract of land set forth in the count. At the trial in the Circuit Court for Kentucky District, several questions arose upon which the court was divided, and these questions are now certified for the opinion of this Court.

As to the first question, we are satisfied that the circuit court had jurisdiction of the cause. Taking the 11th and 20th sections of the Judicial Act of 1789, ch. 20, in connection, it is clear that the jurisdiction attaches where the property demanded exceeds $500 in value, and if, upon the trial, the demandant recover less, he is not allowed his costs, but, at the discretion of the court, may be adjudged to pay costs.

As to the second question, we are of opinion that at common law, a writ of right will not lie except against the tenant of the freehold demanded. If there are several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ, and if they are, they may plead in abatement of the writ. If the

demandant demands against any tenant more land than he holds, he may plead nontenure as to the parcel not holden, and this plea, by the ancient common law, would have abated the whole writ. But the statute 25 Edw. III, ch. 6, which may be considered as a part of our common law, having been in force at the emigration of our ancestors, cured the defect and declared that the writ should abate only as to the parcel whereof nontenure was pleaded and admitted or proved. In fact, the Act of Virginia of 1792, ch. 125, which is in force in Kentucky, enacts substantially the same provision as the statute of Edward.

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But it is supposed in argument that the act of Kentucky to amend proceedings in chancery and common law, which provides that if the plaintiff at law shall prove part of his demand or claim set up in his declaration, he shall not be nonsuited, but shall have judgment for what he proves, entitles the demandant in this case to join parties who hold in severalty by distinct titles.

To this doctrine the Court cannot accede. At common law, in many instances, if the party demanded in his writ more than he proved was his right, he lost his action by the falsity of his writ. It was to cure this ancient evil that the act of Kentucky was made. It enables the party to recover, although he should prove only part of the claim in his declaration. But it does not tend to enable him to join parties in an action who could not be joined at the common law. It could no more entitle a demandant in a real action to recover against several tenants claiming by distinct and separate titles than it could entitle a plaintiff to maintain a joint action of assumpsit where the contracts were several and independent. Infinite inconvenience and mischief would result from such a construction, and we should not incline to adopt it unless it were unavoidable.

As to the third question, it is clear at the common law that nontenure, joint tenure, sole tenure and several tenure were good pleas in abatement to a writ of right. But they could only be pleaded in abatement, for the tenant, by joining the mise or pleading in bar, admitted himself tenant of the freehold. Such pleading in bar was

an admission that he had a capacity to defend the suit, and he was estopped by his own act from denying it. The Act of Virginia of 1786, ch. 27, reforming the proceedings on writs of right was not intended to vary the rights or legal predicament of the parties. It did not, therefore, intend to change the nature and effect of the pleadings, and notwithstanding that act, the tenant shall still have the full benefit of the ordinary pleas in abatement. It is true that the act provides that the tenant, at the trial, may, on the general issue, give in evidence any matter which might have been specially pleaded. But this provision is manifestly confined to matters in bar. It would be absurd to suppose that the legislature meant to give to a mere

exception in abatement the full effect of a perfect bar on the merits, which would be the case if such an exception would authorize a verdict for the tenant on issue joined on the mere right. The time and manner of filing the pleadings must, of course, be left to the established practice and rules in the circuit court.

As to the fourth point, we are of opinion that under the act of Virginia of 1786, the tenant may, at his election, plead any special matter in bar in a writ of right or give it in evidence on the mise joined. The act is not deemed compulsive, but cumulative.

The fifth question is that which has been deemed most important, and to this the counsel on each side have directed their efforts with great ability.

It is clear by the whole amount of authority that actual seizin, or seizin in deed, is, at the common law, necessary to maintain a writ of right. Nor is this peculiar to actions on the mere right. It equally applies to writs of entry, and the language of the count in both cases is that the demandant or his ancestor was, within the time of limitation, seized in his demesne as of fee, &c.;, taking the esplees, &c.; It is highly probable that the foundation of this rule was laid in the earliest rudiments of titles at the common law. It is well known that in ancient times no deed or charter was necessary to convey a fee simple. The title, the full and perfect dominion, was

conveyed by a mere livery of seizin in the presence of the vicinage. It was the notoriety of this ceremony, performed in the presence of his peers, that gave the tenant his feudal investiture of the inheritance. Deeds and charters of feoffment were of a later age, and were held not to convey the estate itself, but only to evidence the nature of the conveyance. The solemn act of livery of seizin was absolutely necessary to produce a perfect title, or, as Fleta calls it, *juris et seizinae conjunctio.* But whatever may be its origin, the rule as to the actual seizin has long since become an inflexible doctrine of the common law.

It has been argued that the Act of Virginia, of 1786, ch. 27, meant in this respect to change the doctrine of the common law, because that act has given the form of

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the count in a writ of right, and omits any allegation of seizin and taking esplees. There is certainly some countenance in the act for the argument. But on mature consideration we are of opinion that it cannot prevail. The form of joining the mise in a writ of right is also given in the same act, and that form includes the same inquiry, *viz.,* "which hath the greater right," as the forms at common law. It would seem to follow that the legislature did not mean to change the nature of the facts which were to be inquired into, but only to provide a more summary mode of proceeding. The clause in the same act allowing any special matter to be given in evidence on the mise joined may also be called in aid of this construction. That clause certainly shows that it was not intended to relieve the demandant from the effect of any existing bar, and want of seizin was, at the common law, a fatal bar. The statute of limitations of Virginia of 19 December, 1792, ch. 77, which, as to this point is a revival of the old statute, limits a writ of right upon ancestral seizin to 50 years, and upon the demandant's own seizin to 30 years next before the teste of the writ. It is therefore incumbent on the demandant to prove a seizin within the time of limitation; otherwise he is without remedy, and if so it must be involved in the issue joined on the mere right. We are therefore of opinion that the act of 1786 did not mean to change the nature of the inquiry as to the titles of the parties, but merely to remedy some of the inconveniences in the modes of proceeding.

If, then, an actual seizin or seizin in deed be necessary to be proved, it becomes material to inquire what constitutes such a seizin. It has been supposed in argument that an actual entry under title and perception of esplees were necessary to be proved in order to show an actual seizin. But this is far from being true even at the common law. There are cases in which there is a constructive seizin in deed, which is sufficient for all the purposes of action in legal intendment. In Hargrave's note, 3 Co.Litt. 24a, it is said that an entry is not always necessary to give a seizin in deed, for if the land be in lease for years, curtesy may be without entry or even receipt of rent. The same is the doctrine as to seizin in a case of *possessio fratris.* So if a grantee or heir of several parcels of land in the same county enter into one parcel

in the name of the whole, where there is no conflicting possession, the law adjudges him in the actual seizin of the whole. Litt. s. 417-418.

In like manner, if a man have a title of entry into lands, but dare not enter for fear of bodily harm, and he approach as near the land as he dares and claim the land as his own, he hath presently, by such claim, a possession and seizin in the lands as well as if he had entered in deed. Litt. s. 419. And living within the view of the land will, under circumstances, give the feoffee a seizin in deed as effectually as an actual entry. There are therefore cases in which the law gives the party a constructive seizin in deed. They are founded upon this plain reason that either the claim is made sufficiently notorious by an actual entry into part, of which the vicinage can take notice, or the party has done all that, under the circumstances of the case, he was bound to do. *Lex non cogit seu ad vana aut impossibilia.* The same is the result of conveyances deriving their effect under the statute of uses, for there, without actual entry or livery of seizin, the bargainee has a complete seizin in deed. Com.Dig. uses, B. 1. I.; Cro.Eliz. 4; 1 Cruise Dig. 12; Shep.Touch. 223, &c.; Harg. Co.Litt. 271, note. And the Kentucky act respecting conveyances, which is in substance like the statute of uses, gives to private deeds the same legal effect.

It has, however, been supposed in argument that not only an actual seizin or complete investiture of the land, but also a perception of the profits, or, as it is technically called, a taking of the esplees, is absolutely necessary to support a writ of right. It cannot, however, be admitted that the taking of the esplees is a traversable averment in the count. It is but evidence of the seizin, and the seizin in deed once established, either by a *pedis positio* or by construction of law, the taking of the esplees is a necessary inference of law. If, therefore, a seizin be established, although the lands be leased for a term of years and thereby the profits belong to the tenant, still the legal intendment is that the esplees follow the seizin. And so it would be although a mere trespasser, without claiming title, should actually take the profits during the time of the seizin alleged and proved. And indeed of certain real property, as a barren rock, a complete seizin may exist without the existence of esplees.

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The result of this reasoning is that wherever there exists the union of title and seizin in deed, either by actual entry and livery of seizin or by intendment of law, as by conveyances under the statute of uses, or in the other instances which have been before stated, there the esplees are knit to the title, so as to enable the party to maintain a writ of right. And it will be found extremely difficult to maintain that a deed, which, by the *lex loci,* conveys a perfect title to waste and vacant lands, without further ceremony, will not yet enable the grantee to support that title by giving him the highest remedy applicable to it without an actual entry.

Let us consider how far a perfect title to waste and vacant lands can be considered as having passed by a patent under the land law of Virginia of 1779, ch. 13. It is argued that such a patent conveys only a right or title of entry, which, until consummated by actual possession, gives the patentee no actual investiture or seizin of the land, and it is likened to the case of a patent from the Crown. Some countenance is lent by authority to this position, so far as respects patents from the Crown, but a careful examination will be found by no means to establish its correctness. No livery of seizin is necessary to perfect a title by letters patent. The

grantee in such case takes by matter of record, and the law deems the grant of record of equal notoriety with an actual tradition of the land in the view of the vicinage. The contrary is the fact as to feoffments. The deed is inoperative without livery of seizin. This difference alone would seem to carry a pretty strong implication that actual seizin passed by operation of law on a patent from the Crown, for it is the union of a right and seizin that constitutes a perfect title, and when once the law has declared a title perfect, it must include everything necessary to produce that effect. Accordingly we find it expressly held in *Barwick's Case,* 5 Co. 94, that letters patent under the great seal do amount to a livery in law. What is a livery in law but such an act as in legal contemplation amounts to a delivery of seizin? If, for instance, a feoffment include divers parcels of land in the same county, livery of seizin of one parcel in the name of the whole is livery of all not in an adverse seizin. This, therefore, as to all the parcels except that whereof livery is actually made, is but a livery

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in law, and yet to all intents and purposes it is as effectual as livery in deed. And it was upon the footing of this doctrine that, in *Barwick's Case,* the court held that the conveyance of a freehold by letters patent to commence *in futuro* was void as much as if the conveyance had been by feoffment, because in neither case could there be a present livery of the future freehold estate. The livery must operate at the time when it is made or not at all. It is not, therefore, admitted by this Court that letters patent of the Crown do not convey a perfect title where there is no interfering possession.

But even admitting it were otherwise, still we think a patent under the land law of Virginia must be considered as a statute grant, which is to have all the legal effects attached to it which the legislature intended. It cannot be doubted that the legislature was competent to give its patentees a perfect title and possession without actual entry. Has it so done? We think that it is impossible, looking to the language of their acts or the state of the country, to doubt that the whole legal estate and seizin of the commonwealth in the lands passed to the patentee upon the issuing of his patent in as full an extent and beneficial a manner (subject only

to the rights of the commonwealth) as the commonwealth itself held them. At the time of the passing of the act of 1779, Kentucky was a wilderness. It was the haunt of savages and beasts of prey. Actual entry or possession was impracticable, and if practicable it could answer no beneficial purpose. It could create no notoriety; it could be evidence to no vicinage of a change of the property. An entry therefore would have been a vain and useless and perilous act, and if there ever was a case in which the maxim would apply that the law does not oblige to vain or impossible things, we think it is such a one as the present. There is no pretense that the legislature has expressly made an entry a prerequisite to the completion of the title. Such a prerequisite, if it exist at all, must arise from mere implication only and under circumstances which would render it nugatory or absurd. We do not, therefore, feel at liberty to insert in the operation of the grant a limitation which the law has not of itself interposed.

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And this leads us to say that even if, at common law, an actual *pedis positio,* followed up by an actual perception of the profits, were unnecessary to maintain a whit of right, which we do not admit, the doctrine would be inapplicable to the waste and vacant lands of our country. The common law itself in many cases dispenses with such a rule, and the reason of the rule itself ceases when applied to a mere wilderness. The object of the law in requiring actual seizin was to evince notoriety of title to the neighborhood and the consequent burdens of feudal duties. In the simplicity of ancient times there were no means of ascertaining titles but by the visible seizin, and indeed there was no other mode, between subjects, of passing title but livery of the land itself by the symbolical delivery of turf and twig. The moment that a tenant was thus seized, he had a perfect investiture, and if ousted, could maintain his action in the realty although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety, to prevent frauds upon the land and upon the other tenants. But in a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of beasts of prey, what notoriety could an entry, a gathering of a twig or an acorn convey to civilized man at the distance of hundreds

of miles? The reason of the rule could not apply to such a state of things, and *cessante ratione, cessat ipsa lex.* We are entirely satisfied that a conveyance of wild or vacant lands gives a constructive seizin thereof, in deed, to the grantee, it attaches to him all the legal remedies incident to the estate. *A fortiori,* this principle applies to a patent, since, at the common law, it imports a livery in law. Upon any other construction infinite mischiefs would result. Titles by descent and devise and purchase, where the parties from whom the title was derived was never in actual seizin, would, upon principles of the common law, be utterly lost.

As to the sixth question, we are of opinion that in Kentucky a patent is the completion of the legal title of the parties, and it is the legal title only that can come in controversy in a writ of right. The previous stages of title are merely equitable, which a court of chancery may enforce but a court of common law will not entertain. In this opinion, we adopt the principles which the

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courts of Kentucky have been understood uniformly to sanction. And this opinion is also an answer to the seventh question.

As to the eighth question, we are of opinion that a better subsisting adverse title in a third person is no defense in a writ of right. That writ brings into controversy only the mere rights of the parties to the suit.

As to the ninth question, we have already expressed our opinion that tenants claiming different parcels of land by distinct titles cannot be joined in a writ of right. If, however, they omit to plead in abatement and join the mise, it is an admission that they are joint tenants of the whole, and the verdict, if for the demandant for any parcel of the land, may be general, that he hath more mere right to hold the same than the tenants, and if of any parcel for the tenants, that they have more mere right to hold the same than the demandant.

As to the tenth question, the general rule is that if a man enter into lands having title, his seizin is not bounded by his actual occupancy, but is held to be coextensive with his title. But if a man enter without title, his seizin is confined to

his possession by metes and bounds. In the case put by the court below, the first patentee had the better legal title, and his seizin presently, by virtue of his patent, gave him the best mere right to the whole land upon the principles which we have already stated. *A fortiori,* he must have the best mere right to the land not included in the actual close of the second patentee. For by construction of law, he has the eldest seizin as well as the eldest patent.

As to the eleventh point, we are of opinion that if a man having title to land enter into a part in the name of the whole, he is, upon common law principles, adjudged in seizin of the whole notwithstanding an adverse seizin thereof. But if the land be in seizin of several tenants claiming different parcels thereof in severalty, an entry into the parcel held by one tenant will not give seizin to the parcels held by the other tenants; but there must be an entry into each. Co.Litt. 252b. By parity of reason, an entry into a parcel which is vacant will not give seizin of a parcel which is in an adverse seizin. But an entry into the last parcel in the name of the whole will enure as an entry

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into the vacant parcel. It does not appear in the question put by the court below into which parcel the entry is supposed to be made.

Such are the unanimous opinions of this Court, which are to be certified to the Circuit Court of Kentucky.