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**Green Vs. Biddle**

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**Court** : US Supreme Court

**Decided On :** 1823

**Appeal No.** : 21 U.S. 1

**Appellant** : Green

**Respondent** : Biddle

**Judgement** :

Green v. Biddle - 21 U.S. 1 (1823)
U.S. Supreme Court Green v. Biddle, 21 U.S. 8 Wheat. 1 1 (1823)

**Green v. Biddle**

**21 U.S. (8 Wheat.) 1**

*ON DIVISION OF OPINION AMONG THE JUDGES*

*OF THE CIRCUIT COURT OF KENTUCKY*

## SYLLABUS

The Act of the State of Kentucky of 27 February, 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the Constitution of the United States, but it was repealed by a subsequent Act of 31 January, 1812, to

amend the said act, and the last mentioned act is also repugnant to the Constitution of the United States, as being in violation of the compact between the States of Virginia and Kentucky contained in the Act of the Legislature of Virginia of 18 December, 1789, and incorporated into the Constitution of Kentucky.

By the common law, the statute law of Virginia, the principles of equity, and the civil law, the claimant of lands who succeeds in his suit is entitled to an account of mesne profits, received by the occupant from some period prior to the judgment of eviction or decree.

At common law, whoever takes and holds possession of land to which another has a better title, whether he be a *bonae fidei* or a *malae fidei* possessor, is liable to the true owner for all the rents and profits which he has received, but the disseizor, if he be a *bonae fidea* occupant, may recoup the value of the meliorations made by him against the claim of damages.

Equity allows an account of rents and profits in all cases from the time of the title accrued (provided it does not exceed six years), unless under special circumstances, as where the defendant had no notice of the plaintiff's title, nor had the deeds in which the plaintiff's title appeared in his custody, or where there has been laches in the plaintiff in not asserting his title, or where his title appeared by deeds in a stranger's custody, in all which, and other similar cases, the account is confined to the time of filing the bill.

By the civil law, the exemption of the occupant from an account for rents and profits is strictly confined to the case of a *bonae fidei* possessor, who not only supposes himself to be the true owner of the land, but who is ignorant that his title is contested by some other person claiming a better right. And such a possessor is entitled only to the fruits or profits which were produced by his own industry, and not even to those unless they were consumed.

Distinctions between these rules of the civil and common law and of the court of chancery and the provisions of the acts of Kentucky concerning occupying claimants of land.

The invalidity of a state law as impairing the obligation of contracts does not depend upon the extent of the change which the law effects in the contract.

Any deviation from its terms by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation.

The compact of 1789 between Virginia and Kentucky was valid under that provision of the Constitution which declares that "no state shall, without the consent of Congress, enter into any agreement or compact with another state, or with a foreign power" -- no particular mode in which that consent must be given, having been prescribed by the Constitution, and Congress having consented to the admission of Kentucky into the union as a sovereign state upon the conditions mentioned in the compact.

The compact is not invalid upon the ground of its surrendering rights of sovereignty, which are unalienable.

This Court has authority to declare a state law unconstitutional upon the ground of its impairing the obligation of a compact between different states of the union.

The prohibition of the Constitution embraces all contracts, executed or executory, between private individuals, or a state and individuals or corporations, or between the states themselves.

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This was a writ of right, brought in the Circuit Court of Kentucky by the demandants, Green and others, who were the heirs of John Green, deceased, against the tenant, Richard Biddle, to recover certain lands in the State of Kentucky in his possession. The cause was brought before this Court upon a division of opinion of the judges of the court below, on the following questions:

1. Whether the acts of the Legislature of the State of Kentucky, of 27 February, 1797, and of 31 January, 1812, concerning occupying claimants of land are constitutional or not, the demandants and the tenant both claiming title to the land in controversy under patents from the State of Virginia prior to the erection of the district of Kentucky into a state.

2. Whether the question of improvements ought to be settled under the above act of 1797, the suit having been brought before the passage of the act of 1812, although judgment for the demandant was not rendered until after the passage of the last mentioned act?

The ground upon which the unconstitutionality of the above acts was asserted was that they impaired the obligation of the compact between the states of Virginia and Kentucky contained in an act of the legislature of the former state, passed 18 December, 1789, which declares

"That all private rights and interests of lands within the said district [of Kentucky] derived from the laws of Virginia prior to such separation shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state."

This compact was



ratified by the convention which framed the Constitution of Kentucky and incorporated into that Constitution as one of its fundamental articles.

The most material provisions in the act of 1797, which were supposed to impair the obligation of the compact of 1789 and therefore void, are the following:

1. It provides that the occupant of land from which he is evicted by better title shall in all cases, be excused from the payment of rents and profits accrued prior to actual notice of the adverse title, provided his possession in its inception was peaceable and he shows a plain and connected title in law or equity deduced from some record.

2. That the successful claimant is liable to a judgment against him for all valuable and lasting improvements made on the land prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained by waste or deterioration of the soil by cultivation.

3. As to improvements made and rents and profits accrued after notice of the adverse title, the amount of the one shall be deducted from that of the other, and the balance added to, or subtracted from, the estimated value of the improvements made before such notice, as the nature of the case may require. But it is provided by a subsequent clause that in no case shall the successful claimant be obliged to pay for improvements made after notice more than what is equal to the rents and profits.

4. If the improvements exceed the value of the



land in its unimproved state, the claimant shall be allowed the privilege of conveying the land to the occupant and receiving in return the assessed value of it without the improvements, and thus to protect himself against a judgment and execution for the value of the improvements. If he declines doing this, he shall recover possession of his land, but shall then pay the estimated value of the improvements and also lose the rents and profits accrued before notice of the claim. But to entitle him to claim the value of the land as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions:

1. That the peaceable occupant of land who supposes it to belong to him in virtue of some legal or equitable title, founded on a record shall be paid by the successful claimant for his improvements.

2. That the claimant may avoid the payment of the value of such improvements, at his election, by relinquishing the land to the occupant and be paid its estimated value in its unimproved state.

Thus, if the claimant elect to pay for the value of the improvements, he is to give bond and security to pay the same with interest at different installments. If he fail to do this or if the value of the improvements exceeds three-fourths of the unimproved land, an election is given to the occupant to have a judgment entered against the claimant for the assessed value of the improvements or to take the land, giving bond and security to

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pay the value of the land, if unimproved, by installments with interest.

But if the claimant is not willing to pay for the improvements, and they should exceed three-fourths of the value of the unimproved land, the occupant is obliged to give bond and security to pay the assessed value of the land, with interest, which if he fail to do, judgment is to be entered against him for such value, the claimant releasing his right to the land and giving bond and security to warrant the title.

If the value of the improvements does not exceed three-fourths of the value of the unimproved land, then the occupant is not bound (as he is in the former case) to give bond and security to pay the value of the land, but he may claim a judgment for the value of his improvements or take the land, giving bond and security, as before mentioned, to pay the estimated value of the land.

3. The exemption of the occupant from the payment of the rents and profits extends to all such as accrued during his occupancy, before judgment rendered against him in the first instance, but such as accrue after such judgment, for a term not exceeding five years, as also waste and damage, committed by the occupant after suit brought, are to be deducted from the value of the improvements, or the court may render judgment for them against the occupant.

4. The amount of such rents and profits, damages and waste, and also the value of the improvements, and of the land without the improvements,

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are to be ascertained by commissioners, to be appointed by the court, and who act under oath.

MR. JUSTICE STORY delivered the opinion of the Court.

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The first question certified from the Circuit Court of Kentucky in this cause is whether the Acts of Kentucky, of 27 February, 1797, and of 31 January, 1812, concerning occupying claimants of land, are unconstitutional?

This question depends principally upon the construction of the seventh article of the compact made between Virginia and Kentucky upon the separation of the latter from the former state, that compact being a part of the Constitution of Kentucky. The seventh article declares

"That all private rights and interests of lands, within the said district derived from the laws of Virginia shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state."

We should have been glad in the consideration of this subject to have had the benefit of an argument on behalf of the tenant, but as no counsel has appeared for him and the cause has been for some time before the Court, it is necessary to pronounce the decision which, upon deliberation, we have formed.

As far as we can understand the construction of the seventh article of the compact contended for by those who assert the constitutionality of the laws in question, it is that it was intended to secure to claimants of lands their rights and interests therein by preserving a determination of their titles by the laws under which they were acquired. If this be the true and only import of the article, it is a mere nullity, for by the general principles of law and from the necessity of the case, titles to

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real estate can be determined only by the laws of the state under which they are acquired. Titles to land cannot be acquired or transferred in any other mode than that prescribed by the laws of the territory where it is situate. Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries, and this right must remain until it yields it up by compact or conquest. When once a title to lands is asserted under the laws of a territory, the validity of that title can be judged of by no other rule than those laws furnish, in which it had its origin, for no title can be acquired contrary to those laws, and a title good by those laws cannot be disregarded but by a departure from the first principles of justice. If the article meant, therefore, what has been supposed, it meant only to provide for the affirmation of that which is the universal rule in the courts of civilized nations professing to be governed by the dictates of law.

Besides, the titles to lands can in no just sense, in compacts of this sort, be supposed to be separated from the rights and interests in those lands. It would be almost a mockery to suppose that Virginia could feel any solicitude as to the recognition of the abstract validity of titles when they would draw after them no beneficial enjoyment of the property. Of what value is that title which communicates no right or interest in the land itself?, or how can that be said to be any title at all which cannot be asserted in a court of justice

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by the owner to defend or obtain possession of his property?

The language of the seventh article cannot, in our judgment, be so construed. The word "title" does not occur in it. It declares in the most explicit terms that all private rights and interests of lands, derived from the laws of Virginia, shall remain valid and secure under the laws of Kentucky, and shall be determined by the laws then existing in Virginia. It plainly imports, therefore, that these rights and interests, as to their nature and extent, shall be exclusively determined by the laws of Virginia and that their security and validity shall not be in any way impaired by the laws of Kentucky. Whatever law, therefore, of Kentucky does narrow these rights and

diminish these interests is a violation of the compact, and is consequently unconstitutional.

The only question, therefore, is whether the acts of 1797 and 1812 have this effect. It is undeniable that no acts of a similar character were in existence in Virginia at the time when the compact was made, and therefore no aid can be derived from the actual legislation of Virginia to support them. The act of 1797 provides that persons evicted from lands to which they can show a plain and connected title in law or equity, without actual notice of an adverse title, shall be exempt from all suits for rents or profits prior to actual notice of such adverse title. It also provides that commissioners shall be appointed by the court pronouncing the judgment of eviction to assess the value of all lasting and valuable improvements

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made on the land prior to such notice, and they are to return the assessment thereof after subtracting all damages to the land by waste, &c.;, to the court, and judgment is to be entered for the assessment in favor of the person evicted, if the balance be for him, against the successful party, upon which judgment execution shall immediately issue, unless such party shall give bond for the payment of the same, with five percent interest, in twelve months from the date thereof. And if the balance be in favor of the successful party, a like judgment and proceedings are to be had in his favor. The act further provides that the commissioners shall also estimate the value of the lands, exclusive of the improvements, and if the value of the improvements shall exceed the value of the lands, the successful claimant may transfer his title to the other party and have a judgment in his favor against such party for such estimated value of the lands, &c.; There are other provisions not material to be stated.

The Act of 31 January, 1812, provides that if any person hath seated or improved or shall thereafter seat or improve any lands supposing them to be his own by reason of a claim in law or equity, the foundation of such claim being of public record, but which lands shall be proved to belong to another, the charge and value

of such seating and improving shall be paid by the right owner to such seater or improver or his assignee or occupant so claiming. If the right owner is not willing to disburse so much, an estimate is to be made of the value of the lands exclusive of the seating

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and improvements and also of the value of such seating and improvements. If the value of the seating and improving exceeds three-fourths of the value of the lands if unimproved, then the valuation of the land is to be paid by the seater or improver, if not exceeding three-fourths, then the valuation of the seating and improving is to be paid by the right owner of the land. The act further provides that no action shall be maintained for rents or profits against the occupier for any time elapsed before the judgment or decree in the suit. The act then provides for the appointment of commissioners to make the valuations and for the giving of bonds, &c.;, for the amount of the valuations by the party who is to pay the same, and in default thereof provides that judgment shall be given against the party for the amount, or if the right owner fails to give bond, &c.;, the other party may, at his election, give bond, &c.;, and take the land. And the act then proceeds to declare that the occupant shall not be evicted or dispossessed by a writ of possession until the report of the commissioners is made and judgment rendered or bonds executed in pursuance of the act.

From this summary of the principal provisions of the acts of 1797 and 1812 it is apparent that they materially impair the rights and interests of the rightful owner in the land itself. They are parts of a system the object of which is to compel the rightful owner to relinquish his lands or pay for all lasting improvements made upon them without his consent or default, and in many cases

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those improvements may greatly exceed the original cost and value of the lands in his hands. No judgment can be executed and no possession obtained for the lands unless upon the terms of complying with the requisitions of the acts. They

therefore, in effect, create a direct and permanent lien upon the lands for the value of all lasting improvements made upon them, without the payment of which the possession and enjoyment of the lands cannot be acquired. It requires no reasoning to show that such laws necessarily diminish the beneficial interests of the rightful owner in the lands. Under the laws of Virginia, no such burden was imposed on the owner. He had a right to sue for, recover, and enjoy them without any such deductions or payments.

The seventh article of the compact meant to secure all private rights and interests derived from the laws of Virginia as valid and secure under the laws of Kentucky as they were under the then existing laws of Virginia. To make those rights and interests so valid and secure, it is essential to preserve the beneficial proprietary interest of the rightful owner in the same state in which they were by the laws of Virginia at the time of the separation. If the Legislature of Kentucky had declared by law that no person should recover lands in this predicament unless upon payment by the owner of a moiety or of the whole of their value, it would be obvious that the former rights and interests of the owner would be completely extinguished *pro tanto.* If it had further provided that he should be compelled to sell the same at



one-half or one-third of their value or compelled to sell, without his own consent, at a price to be fixed by others, it would hardly be doubted that such laws were a violation of the compact. These cases may seem strong, but they differ not in the nature, but in the degree only of the wrong inflicted on the innocent owner. He is no more bound by the laws of Virginia to pay for improvements which he has not authorized, which he may not want, or which he may deem useless than he is to pay a sum to a stranger for the liberty of possessing and using his own property according to the rights and interests secured to him by those laws. It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and

interests.

It is the unanimous opinion of the Court, that the acts of 1797 and 1812 are a violation of the seventh article of the compact with Virginia, and therefore are unconstitutional. This opinion renders it unnecessary to give any opinion on the second question certified to us from the circuit court. *

* Present MR. CHIEF JUSTICE MARSHALL, and Justices JOHNSON, LIVINGSTON, TODD, DUVALL, and STORY.

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*ON MOTION FOR REHEARING*

MR. JUSTICE WASHINGTON delivered the opinion of the Court.

In the examination of the first question stated by the court below, we are naturally led to the following inquiries:

1. Are the rights and interests of lands lying in Kentucky derived from the laws of Virginia prior to the separation of Kentucky from that state, as valid and secure under the above acts as they were under the laws of Virginia on 18 December, 1789? If they were not, then,

2dly. Is the circuit court, in which this cause is depending, authorized to declare those acts, so far as they are repugnant to the laws of Virginia, existing at the above period, unconstitutional?

The material provisions of the act of 1797, are as follows:

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1st. That the occupant of land from which he is evicted by better title is in all cases excused from the payment of rents and profits accrued prior to actual notice of the adverse title, provided his possession in its inception was peaceable and he

shows a plain and connected title, in law or equity, deduced from some record.

2d. That the claimant is liable to a judgment against him for all valuable and lasting improvements made on the land prior to actual notice of the adverse title, after deducting from the amount the damages which the land has sustained by waste or deterioration of the soil by cultivation.

3d. As to improvements made and rents and profits accrued after notice of the adverse title, the amount of the one was to be deducted from that of the other, and the balance was to be added to or subtracted from the estimated value of the improvements made before such notice, as the nature of the case should require. But it was provided by a subsequent clause that in no case should the successful claimant be obliged to pay for improvements made after notice more than what should be equal to the rents and profits.

4th. If the improvements exceed the value of the land in its unimproved state, the claimant was allowed the privilege of conveying the land to the occupant and receiving in return the assessed value of it without the improvements, and thus to protect himself against a judgment and execution for the value of the improvements. If he should decline doing this, he might recover possession of



his land, but then he must pay the estimated value of the improvements and lose also the rents and profits accrued before notice of the claim. But to entitle him to claim the value of the land as above mentioned, he must give bond and security to warrant the title.

The act of 1812 contains the following provisions:

1. That the peaceable occupant of land who supposes it to belong to him in virtue of some legal or equitable title founded on a record is to be paid by the successful claimant for his improvements.

2. But the claimant may avoid the payment of the value of such improvements, if he please, by relinquishing his land to the occupant, and be paid its estimated

value in its unimproved state, thus:

If he elect to pay for the value of the improvements, he is to give bond and security to pay the same, with interest, at different installments. If he fail to do this or if the value of the improvements exceed three-fourths the value of the unimproved land, an election is given to the occupant to have a judgment entered against the claimant for the assessed value of the improvements or to take the land, giving bond and security to pay the assessed value of the land, if unimproved, with interest and by installments.

But if the claimant is not willing to pay for the improvements and they should exceed three-fourths the value of the unimproved land, the occupant is obliged to give bond and security to pay the assessed value of the land, with interest, which, if he fail to do, judgment is to be entered against

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him for such value, the claimant releasing his right to the land and giving bond and security to warrant the title.

If the value of the improvements does not exceed three-fourths that of the land, then the occupant is not bound (as he is in the former case) to give bond and security to pay the value of the land, but he may claim a judgment for the value of his improvements or take the land, giving bond and security, as before mentioned, to pay the estimated value of the land.

3. The exemption of the occupant from the payment of the rents and profits extends to all such as accrued during his occupancy before judgment rendered against him in the first instance. But such as accrue after such judgment, for a term not exceeding five years, as also waste and damages committed by the occupant after suit brought are to be deducted from the value of the improvements, or the court may render judgment for them against the occupant.

4. The amount of such rents and profits, damages and waste; also the value of the improvements, and of the land, clear of the improvements, are to be ascertained

by commissioners, to be appointed by the court, and who act on oath.

These laws differ from each other only in degree; in principle they are the same. They agree in depriving the rightful owner of the land of the rents and profits received by the occupant up to a certain period, the first act fixing it to the time of actual notice of the adverse claim and the latter

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act to the time of the judgment rendered against the occupant. They also agree in compelling the successful claimant to pay, to a certain extent, the assessed value of the improvements made on the land by the occupant.

They differ in the following particulars:

1. By the former act, the improvements to be paid for must be valuable and lasting. By the latter, they need not be either.

2. By the former, the successful claimant was entitled to a deduction from the value of the improvements for all damages sustained by the land, by waste or deterioration of the soil by cultivation during the occupancy of the defendant. By the latter, he is entitled to such a deduction only for the damages and waste committed after suit brought.

3. By the former, the claimant was bound to pay for such improvements only as were made before notice of the adverse title; if those made afterwards should exceed the rents and profits which afterwards accrued, then he was not liable beyond the rents and profits for the value of such improvements. By the latter, he is liable for the value of all improvements made up to the time of the judgment, deducting only the rents and profits accrued and the damage and waste committed after suit brought.

4. By the former, the claimant might, if he pleased, protect himself against a judgment for the value of the improvements by surrendering the land to his adversary and giving bond and security to warrant the title. But he was not

bound to do so, nor was his giving bond and security to pay the value of the improvements, a prerequisite to his obtaining possession of his land, nor was the judgment against him made a lien on the land.

By the latter act, the claimant is bound to give such bond, at the peril of losing his land, for if he fail to give it, the occupant is at liberty to keep the land upon giving bond and security to pay the estimated value of it unimproved, and even this he may avoid where the value of the improvements exceeds three-fourths that of the land, unless the claimant will convey to the occupant his right to the land, for upon this condition alone is judgment to be rendered against the occupant for the assessed value of the land.

The only remaining provision of these acts which is at all important and is not comprised in the above view of them is the mode pointed out for estimating the value of the land in its unimproved state, of the improvements, and of the rents and profits, and this is the same, or nearly so, in both, so that it may be safely affirmed that every part of the act of 1797 is within the purview of the act of 1812, and consequently the former act was repealed by the repealing clause contained in the latter.

In pursuing the first head of inquiry, therefore, to which this case gives rise, the Court will confine its observations to the act of 1812 and compare its provisions with the law of Virginia as it existed on 18 December, 1789.

The common law of England was, at that period,



as it still is, the law of that state, and we are informed by the highest authority that a right to land, by that law, includes the right to enter on it when the possession is withheld from the right owner; to recover the possession by suit; to retain the possession, and to receive the issues and profits arising from it. *Altham's Case,* 8 Co. 299. In *Liford's Case,* 11 Co. 46, it is laid down that the regress of the

disseizee revests the property in him in the fruits of profits of the land, as well those that were produced by the industry of the occupant as those which were the natural production of the land, not only against the disseizor himself, but against his feoffee, lessee, or disseizor; "for," says the book,

"the act of my disseizor may alter my action, but cannot take away my action, property, or right; to that after the regress, the disseizee may seize these fruits, though removed from the land, and the only remedy of the disseizor, in such case, is to recoup their value against the claim of damages."

The doctrine laid down in this case that the disseizee can maintain trespass only against the disseizor for the rents and profits is with great reason overruled in the case of *Holcomb v. Rawlyns,* Cro.Eliz. 540. *See also* Bull.N.P. 87.

Nothing, in short, can be more clear upon principles of law and reason than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant, or which clogs his recovery of such possession

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and profits by conditions and restrictions tending to diminish the value and amount of the thing recovered impairs his right to and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure according to the nature and extent of such restrictions.

A right to land essentially implies a right to the profits accruing from it, since, without the latter, the former can be of no value. Thus, a devise of the profits of land, or even a grant of them, will pass a right to the land itself. Shep.Touch. 93; Co.Litt. 4b. "For what," says Lord Coke in this page, "is the land but the profits thereof."

Thus stood the common law in Virginia at the period before mentioned, and it is not pretended that there was any statute of that state less favorable to the rights of those who derived title under her than the common law. On the contrary, the act respecting writs of right declares in express terms that

"if the demandant recover his seizin, he may recover damages to be assessed by the recognitors of assize for the tenant's withholding possession of the tenement demanded,"

which damages could be nothing else but the rents and profits of the land. 2 vol. Last, Revisal, p, 463. This provision of the act was rendered necessary on account of the intended repeal of all the British statutes and the denial of damages by the common

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law in all real actions except in assize, which was considered as a mixed action. Co.Litt. 257. But in trespass *quare clausum fregit,* damages were always given at common law. 10 Co. 116. And that the successful claimant of land in Virginia who recovers in ejectment was at all times entitled to recover rents and profits in an action of trespass was not and could not be questioned by the counsel for the tenant in this case.

If, then, such was the common and statute law of Virginia in 1789, it only remains to inquire whether any principle of equity was recognized by the courts of that state which exempted the occupant of land from the payment of rents and profits to the real owner who has successfully established his right to the land either in a court of law or of equity. No decision of the courts of that state was cited or is recollected which in the remotest degree sanctions such a principle.

The case of *Southall v. McKean,* which was much relied upon by the counsel for the tenant, relates altogether to the subject of improvements, and decides no more than this: that if the equitable owner of land, who is conusant of his right to it, will stand by and see another occupy and improve the property without asserting his right to it, he shall not in equity enrich himself by the loss of another which it was in

his power to have prevented, but must be satisfied to recover the value of the land, independent of the improvements. The acquiescence of the owner in the adverse possession of a person who he found engaged in making valuable improvements on the

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property was little short of a fraud, and justified the occupant in the conclusion that the equitable claim which the owner asserted had been abandoned. How different is the principle of this case from that which governs the same subject by the act under consideration. By this, the principle is applicable to all cases, whether at law or in equity -- whether the claimant knew or did not know of his rights and of the improvements which were making on the land, and even after the had asserted his right by suit.

The rule of the English court of chancery as laid down in 1 Madd.Chanc. 72 is fully supported by the authorities to which he refers. It is that equity allows an account of rents and profits in all cases from the time of the title accrued, provided that do not exceed six years, unless under special circumstances, as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared, or where there has been laches in the plaintiff in not asserting his title, or where the plaintiff's title appeared by deeds in a stranger's custody, in all which cases and others similar to them in principle the account is confined to the time of filing the bill. The language of Lord Hardwicke in *Dormer v. Fortescue,* 3 Atk. 128, which was the case of an infant plaintiff, is remarkably strong. "Nothing," he observes,

"can be clearer, both in law and equity and from natural justice, than that the plaintiff is entitled to the rents and profits from the time when his title accrued."

His lordship afterwards adds that

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"where the title of the plaintiff is purely equitable, that court allows the account of rents and profits from the time the title accrued unless under special circumstances, such as have been referred to."

Nor is it understood by the Court that the principles of the act under consideration can be vindicated by the doctrines of the civil law, admitting, which we do not, that those doctrines were recognized by the laws of Virginia or by the decisions of her courts.

The exemption of the occupant by that law from an account for profits is strictly confined to the case of a *bonae fidei* possessor, who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it. Most unquestionably, this character cannot be maintained for a moment after the occupant has notice of an adverse claim, especially if that be followed up by a suit to recover the possession. After this, he becomes a *malae fidei* possessor and holds at his peril, and is liable to restore all the mesne profits, together with the land. Just.Lib. 2, tit. 1, s. 35.

There is another material difference between the civil law and the provisions of this act altogether favorable to the right of the successful claimant. By the former, the occupant is entitled only to those fruits or profits of the land which were produced by his own industry, and not even to those unless they were consumed; if they were realized, and contributed to enrich the occupant,

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he is accountable for them to the real owner, as he is for all the natural fruits of the land. *See* Just.2d, before quoted. Lord Kaimes, B. 2, c. 1, pp. 411 *et seq.* Puffendorf, indeed, B. 4, c. 7, s. 3, lays it down in broad and general terms that fruits of industry as well as those of nature belong to him who is master of the thing from which they flow.

By the act in question, the occupant is not accountable for profits, from whatever source they may have been drawn or however they may have been employed, which were received by him prior to the judgment of eviction.

But even these doctrines of the civil law, so much more favorable to the rights of the true owner of the land than the act under consideration, are not recognized by the common law of England. Whoever takes and holds the possession of land to which another has a better title, whether by disseizin or under a grant from the disseizor, is liable to the true owner for the profits which he has received, of whatever nature they may be and whether consumed by him or not, and the owner may even seize them, although removed from the land, as has already been shown by *Liford's Case.*

We are not aware of any common law case which recognizes the distinction between a *bonae fidei* possessor, and one who holds *mala fide* in relation to the subject of rents and profits, and we understand *Liford's Case* as fully proving that the right of the true owner to the mesne profits is equally valid against both. How far this distinction



is noticed in a court of equity has already been shown.

Upon the whole, then, we take it to be perfectly clear that according to the common law, the statute law of Virginia, the principles of equity, and even those of the civil law, the successful claimant of land is entitled to an account of the mesne profits received by the occupant from some period prior to the judgment of eviction or decree. In a real action, as this is, no restriction whatever is imposed by the law of Virginia upon the recognitors in assessing the damages for the demandant except that they should be commensurate with the withholding of the possession.

If this act of Kentucky renders the rights of claimants to lands under Virginia less valid and secure than they were under the laws of Virginia by depriving them of the fruits of their land during its occupation by another, its provisions in regard to the value of the improvements put upon the land by the occupant can with still less reason be vindicated. It is not alleged by any person that such a claim was ever sanctioned by any law of Virginia or by her courts of justice. The case of Southall v. McKean, has already been noticed and commented upon. It is laid down, we

admit, in *Coulter's Case,* 5 Co. 30, that the disseizor, upon a recovery against him, may recoup the damages to the value of all that he has expended in amending the houses. *See also* Bro. tit. Damages, pl. 82., who cites 24 Edw. III. 50. If any common law decision has ever gone beyond the principle here laid down, we

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have not been fortunate enough to meet with it. The doctrine of *Coulter's Case* is not dissimilar in principle from that which Lord Kaimes considers to be the law of nature. His words are

"It is a maxim suggested by nature that reparations and meliorations bestowed upon a house or on land ought to be defrayed out of the rents. By this maxim we sustain no claim against the proprietor for meliorations if the expense exceed not the rents levied by the *bonae fidei* possessor."

He cites Papinian, L. 48, *de rei vindicatione.*

Taking it for granted that the rule as laid down in *Coulter's Case* would be recognized as good law by the courts of Virginia, let us see in what respects it differs from the act of Kentucky. That rule is that meliorations of the property (which necessarily mean valuable and lasting improvements), made at the expense of the occupant of the land, shall be set off against the legal claim of the proprietor for profits which have accrued to the occupant during his possession. But by the act the occupant is entitled to the value of the improvements to whatever extent they may exceed that of the profits, not on the ground of setoff against the profits, but as a substantive demand. For the account for improvements is carried down to the day of the judgment, although the occupant was for a great part of the time a *malae fidei* possessor, against whom no more can be offset but the rents and profits accrued after suit brought. Thus it may happen that the occupant, who may have enriched himself to any amount by the natural as well as the industrial

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products of land, to which he had no legal title (as by the sale of timber, coal, ore, or the like), is accountable for no part of those profits but such as accrued after suit brought, and on the other hand may demand full remuneration for all the improvements made upon the land, although they were placed there by means of those very profits, in violation of that maxim of equity and of natural law, *nemo debet locupletari aliena jactura.*

If the principle which this law asserts has a precedent to warrant it, we can truly say that we have not met with it. But we feel the fullest confidence in saying that it is not to be found in the laws of Virginia or in the decisions of her courts.

But the act goes further than merely giving to the occupant a substantive claim against the owner of the land for the value of the improvements, beyond that of the profits received since the suit brought. It creates a binding lien on the land for the value of the improvements, and transfers the right of the successful claimant in the land to the occupant, who appears judicially to have no title to it, unless the former will give security to pay such value within a stipulated period. In other words, the claimant is permitted to purchase his own land, by paying to the occupant whatever sum the commissioners may estimate the improvements at, whether valuable and lasting or worthless and unserviceable to the owner, although they were made with the money justly and legally belonging to the owner, and upon these terms only can he recover possession of his land.

If the law of Virginia has been correctly stated,

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need it be asked whether the right and interest of such a claimant is as valid and secure under this act as it was under the laws of Virginia, by which, and by which alone they were to be determined? We think this can hardly be asserted. If the article of the compact applicable to this case meant anything, the claimant of land under Virginia had a right to appear in a Kentucky court as he might have done in a Virginia court if the separation had not taken place, and to demand a trial of his right by the same principles of law which would have governed his case in the

latter state. What those principles are have already been shown.

If the act in question does not render the right of the true owner less valid and secure than it was under the laws of Virginia, then an act declaring that no occupant should be evicted but upon the terms of his being paid the value or double the value of the land by the successful claimant would not be chargeable with that consequence, since it cannot be denied but that the principle of both laws would be the same.

The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation.

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Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged although the change was for his advantage.

2. The only remaining question is whether his act of 1812 is repugnant to the Constitution of the United States and can be declared void by this Court or by the circuit court from which this case comes by adjournment?

But previous to the investigation of this question, it will be proper to relieve the case from some preliminary objections to the validity and construction of the compact itself.

1st. It was contended by the counsel for the tenant that the compact was invalid *in toto* because it was not made in conformity with the provisions of the Constitution of the United States, and if not invalid to that extent, still

2dly. The clause of it applicable to the point in controversy was so, inasmuch as it surrenders, according to the construction given to it by the opposite counsel, rights of sovereignty which are unalienable.

1. The first objection is founded upon the allegation that the compact was made without the consent of Congress, contrary to the tenth section of the first article, which declares that "No state shall, without the consent of Congress, enter into any agreement or compact with another state or with a foreign power." Let it be observed in the first place that the Constitution makes no provision respecting the mode or form in which the consent

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of Congress is to be signified, very properly leaving that matter to the wisdom of that body, to be decided upon according to the ordinary rules of law, and of right reason. The only question in cases which involve that point is has Congress, by some positive act in relation to such agreement, signified the consent of that body to its validity? Now how stands the present case? The compact was entered into between Virginia and the people of Kentucky upon the express condition that the general government should, prior to a certain day, assent to the erection of the District of Kentucky into an independent state, and agree that the proposed state should immediately, after a certain day or at some convenient time future thereto, be admitted into the federal Union. On 28 July, 1790, the convention of that district assembled under the provisions of the law of Virginia and declared its assent to the terms and conditions prescribed by the proposed compact, and that the same was accepted as a solemn compact, and that the said district should become a separate state on 1 June, 1792. These resolutions, accompanied by a memorial from the convention, being communicated by the President of the United States to Congress, a report was made by a committee, to whom the subject was referred, setting forth the agreement of Virginia that Kentucky should be erected into a state upon certain terms and conditions, and the acceptance by Kentucky upon the terms and conditions so prescribed, and on 4 February, 1791, Congress passed an act which, after referring to

the compact and the acceptance of it by Kentucky, declares the consent of that body to the erecting of the said district into a separate and independent state upon a certain day and receiving her into the Union.

Now it is perfectly clear that although Congress might have refused its consent to the proposed separation, yet it had no authority to declare Kentucky a separate and independent state without the assent of Virginia or upon terms variant from those which Virginia had prescribed. But Congress, after recognizing the conditions upon which alone Virginia agreed to the separation, expressed by a solemn act the consent of that body to the separation. The terms and conditions, then, on which alone the separation could take place or the act of Congress become a valid one were necessarily assented to not by a mere tacit acquiescence, but by an express declaration of the legislative mind, resulting from the manifest construction of the act itself. To deny this is to deny the validity of the act of Congress without which Kentucky could not have become an independent state, and then it would follow that she is at this moment a part of the State of Virginia, and all her laws are acts of usurpation. The counsel who urged this argument would not, we are persuaded, consent to this conclusion, and yet it would seem to be inevitable if the premises insisted upon be true.

2. The next objection, which is to the validity of the particular clause of the compact involved in this controversy, rests upon a principle the correctness



of which remains to be proved. It is practically opposed by the theory of all limited governments, and especially of those which constitute this Union. The powers of legislation granted to the government of the United States, as well as to the several state governments, by their respective Constitutions are all limited. The article of the Constitution of the United States involved in this very case is one, amongst many others, of the restrictions alluded to. If it be answered that these limitations were imposed by the people in their sovereign character, it may be

asked was not the acceptance of the compact the act of the people of Kentucky in their sovereign character? If, then, the principle contended for be a sound one, we can only say that it is one of a most alarming nature, but which it is believed cannot be seriously entertained by any American statesman or jurist.

Various objections were made to the literal construction of the compact, one only of which we deem it necessary particularly to notice. That was that if it be so construed as to deny to the Legislature of Kentucky the right to pass the act in question, it will follow that that state cannot pass laws to affect lands, the title to which was derived under Virginia, although the same should be wanted for public use. If such a consequence grows necessarily out of this provision of the compact, still we can perceive no reason why the assent to it by the people of Kentucky should not be binding on the legislature of that state. Nor can we perceive why the admission of the conclusion

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involved in the argument should invalidate an express article of the compact in relation to a quite different subject. The agreement that the rights of claimants under Virginia should remain as valid and secure as they were under the laws of that state contains a plain intelligible proposition about the meaning of which it is impossible there can be two opinions. Can the government of Kentucky fly from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient or even pernicious to the state in some other respect? The Court cannot perceive how this proposition could be maintained.

But the fact is that the consequence drawn by counsel from a literal construction of this article of the compact cannot be fairly deduced from the premises, because, by the common law of Virginia if not by the universal law of all free governments, private property may be taken for public use upon making to the individual a just compensation. The admission of this principle never has been imagined by any person as rendering his right to property less valid and secure than it would be were it excluded, and consequently it would be an unnatural and forced

construction of this article of the compact to say that it included such a case.

We pass over the other observations of counsel upon the construction of this article with the following remark: that where the words of a law, treaty, or contract have a plain and obvious meaning, all construction in hostility with such meaning

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is excluded. This is a maxim of law and a dictate of common sense, for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements or rest upon his own understanding of a law until a judicial construction of those instruments had been obtained.

We now come to the consideration of the question whether this Court has authority to declare the act in question unconstitutional and void upon the ground that it impairs the obligation of the compact. This is denied for the following reasons:

It is insisted in the first place that this Court has no such authority where the objection to the validity of the law is founded upon its opposition to the Constitution of Kentucky, as it was in part in this case. It will be a sufficient answer to this observation that our opinion is founded exclusively upon the Constitution of the United States.

2d. It was objected that Virginia and Kentucky, having fixed upon a tribunal to determine the meaning of the compact, the jurisdiction of this Court is excluded. If this be so, it must be admitted that all controversies which involve a construction of the compact are equally excluded from the jurisdiction of the state courts of Virginia and Kentucky. How then are those controversies which we were informed by the counsel on both sides crowded the federal and state courts of Kentucky to be settled? The answer, we presume, would be by commissioners to be appointed by those states. But none such have

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been appointed. What then? Suppose either of those states, Virginia for example, should refuse to appoint commissioners? Are the occupants of lands to which they

have no title to retain their possessions until this tribunal is appointed, and to enrich themselves in the meantime by the profits of them, not only to the injury of nonresidents but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it.

But how happens it that the questions submitted to this Court have been entertained and decided by the courts of Kentucky for twenty-five years, as we were informed by the counsel? Have these courts, cautious and learned as they must be acknowledged to be, committed the crime of usurping a jurisdiction which did not belong to them? We should feel very unwilling to come to such a conclusion.

The answer, in a few words, to the whole of the argument is to be found in the explicit language of that provision of the compact which respects the tribunal of the commissioners. It is to be appointed in no case but where a complaint or dispute shall arise not between individuals, but between the Commonwealth of Virginia and the State of Kentucky in their high sovereign characters.

Having thus endeavored to clear the question of these preliminary objections, we have only to add by way of conclusion that the duty not less

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than the power of this Court, as well as of every other court in the Union, to declare a law unconstitutional which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the Constitution itself and too firmly established by the decisions of this and other courts to be now shaken, and that those decisions entirely cover the present case.

A slight effort to prove that a compact between two states is not a "case" within the meaning of the Constitution, which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties to do or not to do certain acts, it must be obvious that the propositions offered and agreed to by Virginia,

being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous, and in *Fletcher v. Peck,* THE CHIEF JUSTICE defines a contract to be a compact between two or more parties. The principles laid down in that case are that the Constitution of the United States embraces all contracts, executed or executory, whether between individuals or between a state and individuals, and that a state has no more power to impair an obligation into which she herself has entered than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guaranteed to claimants of land lying in that state under titles derived from Virginia their rights as they existed under the laws of Virginia, was incompetent to violate that contract by passing

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any law which rendered those rights less valid and secure.

It was said by the counsel for the tenant that the validity of the above laws of Kentucky have been maintained by an unvarying series of decisions of the courts of that state and by the opinions and declarations of the other branches of her government. Not having had an opportunity of examining the reported cases of the Kentucky courts, we do not feel ourselves at liberty to admit or deny the first part of this assertion. We may be permitted, however, to observe that the principles decided by the Court of Appeals of that state in the cases of *Haye's Heirs v. McMurray,* a manuscript report of which was handed to the Court when this cause was argued, are in strict conformity with this opinion. As to the other branches of the government of that state, we need only observe that whilst the legislature has maintained the opinion, most honestly we believe, that the acts of 1797, and 1812 were consistent with the compact, the objections of the governor to the validity of the latter act, and the reasons assigned by him in their support taken in connection with the above case, incline us strongly to suspect that a great diversity of opinion prevails in that state upon the question we have been examining. However this may be, we hold ourselves answerable to God, our consciences, and our country to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which

we have laboriously given to the case, it was that it might be favorable to the validity of the laws, our feelings being always on that side of the question unless the objections to them are fairly and clearly made out.

The above is the opinion of a majority of the Court.

The opinion given upon the first question proposed by the circuit court renders it unnecessary to notice the second question.

MR. JUSTICE JOHNSON.

Whoever will candidly weigh the intrinsic difficulties which this case presents must acknowledge that the questions certified to this Court are among those on which any two minds may differ without incurring the imputation of willful or precipitate error.

We are fortunate in this instance in being placed aloof from that unavoidable jealousy which awaits decisions founded on appeals from the exercise of state jurisdiction. This suit was originally instituted in the circuit court of the United States, and the duty now imposed upon us is to decide according to the best judgment we can form on the law of Kentucky. We sit and adjudicate in the present instance in the capacity of judges of that state. I am bound to decide according to those principles which ought to govern the courts of that state when adjudicating between its own citizens.

The first of the two questions certified to this Court is whether the laws, well known by the



description of the occupying claimant laws of Kentucky, are constitutional.

The laws known by that denomination are the Acts passed 27 February, 1797, and 31 January, 1812. The general purport of the former is to give to a defendant in

ejectment compensation for actual improvements innocently made upon the land of another. The practical effect of the latter is to give him compensation for all the labor and expense bestowed upon it, whether productive of improvement or not.

The two acts differ as to the time from which damages and rents are to be estimated, but concur

1st. In enjoining on the courts the substitution of commissioners for a jury in assessing damages.

2d. In converting the plaintiff's right to a judgment, after having established his right to land, from an absolute into a conditional right, and

3d. Under some circumstances, in requiring that judgment should be given for the defendant and that the plaintiff, in lieu of land, should recover an assessed sum of money, or rather bonds to pay that sum, *i.e.,* another right of action, if anything.

The second question certified is on which of these two acts the court shall give judgment, and seems to have arisen out of an argument insisted on at the trial that as the suit was instituted prior to the passage of the last act, it ought to be adjudicated under the first act, notwithstanding that the act of 1812 was in force when judgment was given.



As the language of the first question is sufficiently general to embrace all questions that may arise either under the state or United States Constitution, much of the argument before this Court turned upon the inquiry whether the rights of the parties were affected by that article of the United States Constitution which makes provision against the violation of contracts?

The general question I shall decline passing an opinion upon. I consider such an inquiry as a work of supererogation until the benefit of that provision in the Constitution shall be claimed in an appeal from the decision of a court of the state. There is, however, one view of this point, presented by one of the gentlemen who

appeared on behalf of the state, which cannot pass unnoticed. It was contended that the Constitution of Kentucky, in recognizing the compact with Virginia, recognizes it only as a compact, and therefore that it acquires no more force under that Constitution than it had before, and that but for the Constitution of Kentucky, questions arising under it were of mere diplomatic cognizance, and were not by the Constitution transmuted into subjects of judicial cognizance.

I am constrained to entertain a different view of this subject, and without passing an opinion on the legal effect of the compact in its separate existence upon individual rights, I must adopt the opinion that when the people of Kentucky declared that

"the compact with the State of Virginia, subject to such alterations as may be made therein agreeably to the mode prescribed by the

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said compact, shall be considered as part of this Constitution,"

they enacted it as a law for themselves in all those parts in which it was previously obligatory on them as a contract, and made it a fundamental law, one which could only be repealed in the mode prescribed for altering that Constitution. Had it been enacted in the ordinary form of legislation, notwithstanding the absurdity insisted on of enacting laws obligatory on Virginia, it is certain that the maxim *utile per inutile non vitiatur* would have been applied to it, and it would have been enforced as a law of Kentucky in every court of justice setting in judgment upon Kentucky rights. How much more so when the people thought proper to give it the force and solemnity of a fundamental law.

I therefore consider the article of the compact which has relation to this question as operating on the rights and interests of the parties with the force of a fundamental law of the state, and certainly it can then need no support from viewing it as a contract unless it be that the Constitution may be repealed by one of the parties, but the contract cannot. While the Constitution continues unrepealed, it is putting a fifth wheel to the carriage to invoke the contract into this

cause. It can only eventuate in crowding our dockets with appeals from the state courts.

I consider, therefore, the following extract from the compact as an enacted law of Kentucky:

"That all private rights and interests of lands within [Kentucky] derived from the laws of Virginia prior to [its] separation shall remain valid

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and secure under the laws of the proposed state and shall be determined by the laws [existing in Virginia at the time of the separation.]"

The alterations here made in the phraseology are such as necessarily result from the adaptation of it to a legislative form. The occupying claimant laws, therefore, must conform to this constitutional provision or be void, for a legislature constituted under that Constitution can exercise no powers inconsistent with the instrument which created it. The will of the people has decreed otherwise, and the interests of the individual cannot be affected by the exercise of powers which the people have forbidden their legislature to exercise.

To constitute the sovereign and independent State of Kentucky was unquestionably the leading object of the Act of Virginia of 18 December, 1789. To exercise unlimited legislative power over the territory within her own limits is one of the essential attributes of that sovereignty, and every restraint in the exercise of this power I consider as a restriction on the intended grant, and subject to a rigorous construction. On general principles, private property would have remained unaffected by the transfer of sovereignty, but thenceforth would have continued subject, both as to right and remedy, to the legislative power of the state newly created. The argument for the plaintiff is that the provision now under consideration goes beyond the recognition or enforcement of this principle and restrains the State of Kentucky from any legislative act that can in any way impair or encumber or vary the beneficiary interests

which the grantees of land acquired under the laws of Virginia. Or in other words that it creates a peculiar tenure on the lands granted by Virginia which exempts them from that extent of legislative action to which the residue of the state is unquestionably subjected. It must mean this if it means anything. For supposing all the grantees of lands under the laws of Virginia, in actual possession of their respective premises, unless the lands thus reduced into possession be still under the supposed protection of this compact, neither could they have been at any time previous. The words of the compact, if they carry the immunity contended for beyond the period of separation, are equally operative to continue it ever after.

But where would this land us? If the State of Kentucky had, by law, enacted that the dower of a widow should extend to a life estate in one-half of her husband's land, would the widow of a Virginian whose husband died the day after have lost the benefit of this law because the laws of Virginia had given the wife an inchoate right in but one-third? This would be cutting deep indeed into the sovereign powers of Kentucky, and would be establishing the anomaly of a territory over which no government could legislate -- not Virginia, for she had parted with the sovereignty; not Kentucky, for the laws of Virginia were irrevocably fastened upon two-thirds of her territory.

But it is contended that the clause of the compact under consideration,\ must have meant more



than what is implied in every cession of territory or it was nugatory to have inserted it.

I confess I cannot discover the force of this argument. In the present case, it admits of two answers -- the one is found in the very peculiar nature of the land titles created by Virginia and then floating over the State of Kentucky. Land they were not, and yet all the attributes of real estate were extended to them and intended by the compact to be preserved to them under the dominion of the new

state. There was, then, something more than the ordinary rights of individuals in the ceded territory to be perpetuated, and enough to justify the insertion of such a provision as a necessary measure. But there is another answer to be found in the ordinary practice of nations in their treaties, in which, from abundant caution or perhaps diplomatic parade, many stipulations are inserted for the preservation of rights which no civilian would suppose could be affected by a change of sovereignty. Witness the frequent stipulations for the restoration of wrecked goods or goods piratically taken; witness also the third article of the treaty ceding Louisiana and the sixth article of that ceding Florida, both of which are intended to secure to the inhabitants of the ceded territory rights which under our civil institutions could not be withheld from them.

But let us now reverse the picture and inquire whether this stipulation of the compact or of the Constitution prescribed no limits to the legislative power of Kentucky over the ceded territory. Had the State of Kentucky, immediately after it was organized,

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passed a law declaring that wherever a plaintiff in ejectment or in a writ of right shall have established his right in law to recover, the jury shall value the premises claimed, and instead of judgment for the land and the writ of possession, the plaintiff shall have his judgment for the value so assessed, and the ordinary process of law to recover a sum of money on judgment, who is there who would not have felt that this was a mere mockery of the compact, a violation of the first principles of private right, and of faith in contracts? Yet such a law is, in degree, not in principle, variant from the occupying claimant laws under consideration, and the same latitude of legislative power which will justify the one would justify the other.

But again on the other hand (and I acknowledge that I am groping my way through a labyrinth, trying to lay hold of sensible objects to guide me), who can doubt that where private property had been wanted for national purposes, the Legislature of Kentucky might have compelled the individual to convey it for a value tendered,

notwithstanding it was held under a grant from Virginia and notwithstanding such a violation of private right had been even constitutionally forbidden by the State of Virginia? Or who can doubt the power of Kentucky to regulate the course of descents, the forms of conveying, the power of devising, the nature and extent of liens within her territorial limits? For example: by the civil law, the workman who erects an edifice acquires a lien on both the building and the land it stands upon

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for payment of his bill. Why should not the State of Kentucky have adopted this wise and just principle into her jurisprudence? Or why not have extended it to the case of the laborer who clears a field? Yet in principle the occupying claimant laws, at least that of 1797, was really intended to engraft this very provision into the Kentucky code as to the innocent improver of another man's property. It was thought, and justly thought, that as the State of Virginia had pursued a course of legislation in settling the country, which had introduced such a state of confusion in the titles to landed property as rendered it impossible for her to guarantee any specific tract to the individual, it was but fair and right that some security should be held out to him for the labor and expense bestowed in improving the country, and that where the successful claimant recovered his land, enhanced in value by the labors of another, it was but right that he should make compensation for the enhanced value. To secure this benefit to the occupying claimant, to give a lien upon the land for his indemnity, and avoid the necessity of a suit in equity were in fact the sole objects of the act of 1797. The misfortune of this system appears to have been that to curtail litigation by providing the means of closing this account current of rights and liabilities in a court of law, and in a single suit, so as to obviate the necessity of going into equity, or of an action for mesne profits on the one side, and an action for compensation on the other, appears to have absorbed the attention of the legislature. The consequence of

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which is that a course of proceeding quite inconsistent with the simplicity of the common law process, and a curious debit and credit of land, damages and mesne

profits on the one hand, and of *quantum meruit* on the other, has been adopted, exhibiting an anomaly well calculated to alarm the precise notions of the common law.

But suppose that instead of imposing this complex mode of coming at the end proposed, the Legislature of Kentucky had passed a law simply declaring that the innocent improver of lands, without notice, should have his action to recover indemnity for his improvements, and a lien on the premises so improved, in preference to all other creditors. I can see no principle on which such a law could be declared unconstitutional, nor anything that is to prevent the party from enforcing it in any court having competent jurisdiction.

But the inconsistency which strikes everyone in considering the laws as they now stand is that one party should have a verdict and another, finally, the judgment. That, *eodem flatu,* the plaintiff should be declared entitled to recover land and yet not entitled to recover land.

After thus mooting the difficulties of this case, I am led to the opinion that if we depart from the restricted construction of the article under consideration, we are left to float on a sea of uncertainty as to the extent of the legislative power of Kentucky over the territory held under Virginia grants; that if, obliged to elect between the assumed exercise and the utter extinction of the power of Kentucky over the subject, I would

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adopt the former; that every question between those extremes is one of expediency or diplomacy, rather than of judicial cognizance, and not to be decided before this tribunal. If compelled to decide on the constitutionality of these laws, strictly speaking, I would say that they in no wise impugn the force of the laws of Virginia under which the titles of landholders are derived, but operate to enforce a right acquired subsequently, and capable of existing consistently with those acquired under the laws of Virginia. I cannot admit that it was ever the intention of the framers of this Constitution, or of the parties to this compact, or of the United

States, in sanctioning that compact that Kentucky should be forever chained down to a state of hopeless imbecility -- embarrassed with a thousand minute discriminations drawn from the common law, refinements on mesne profits, setoffs, &c.;, appropriate to a state of society and a state of property having no analogy whatever to the actual state of things in Kentucky -- and yet no power on earth existing to repeal or to alter or to effect those accommodations to the ever varying state of human things which the necessities or improvements of society may require. If anything more was intended than the preservation of that very peculiar and complex system of land laws then operating over that country under the laws of Virginia, it would not have extended beyond the maintenance of those great leading principles of the fundamental laws of that state, which, as far as they limited the legislative power of the State of Virginia over the rights of



individuals, became also blended with the law of the land, then about to pass under a new sovereignty. And if it be admitted that the State of Kentucky might in any one instance have legislated as far as the State of Virginia might have legislated on the same subject, I acknowledge that I cannot perceive where the line is to be drawn so as to exclude the powers asserted under at least the first of the laws now under consideration. But it appears to me that this cause ought to be decided upon another view of the subject.

The practice of the courts of the United States -- that is, the remedy of parties therein -- is subject to no other power than that of Congress. By the act of 1789, the practice of the respective state courts was adopted into the courts of the United States, with power to the respective courts and to the Supreme Court to make all necessary alterations. Whatever changes the practice of the respective states may have undergone since that time, that of the United States courts has continued uniform except so far as the respective courts have thought it advisable to adopt the changes introduced by the state legislatures.

The District of Kentucky was established while it was yet a part of Virginia. Judiciary Act, September 24, 1789. The practice of the State of Virginia, therefore,

was made the practice of the United States courts in Kentucky. Now according to the practice of Virginia, the plaintiff, here, upon making out his title, ought to have had a verdict and judgment in the usual form. Nor can I recognize the right of the State of Kentucky

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to compel him or to compel the courts of the United States to pass through this subsequent process before a Board of commissioners, and afterwards to purchase his judgment in the mode prescribed by the state laws. I do not deny the right of the state to give the lien and to give the action for improvements, but I do deny the right to lay the courts of the United States under an obligation to withhold from a plaintiff the judgment to which, under the established practice of that court, he had entitled himself.

It may be argued that the courts of the United States in Kentucky have long acquiesced in a compliance with these laws, and thereby have adopted this course of proceeding into their own practice. This, I admit, is correct reasoning, for the court possessed the power of making rules of practice, and such rules may be adopted by habit as well as by framing a literal rule. But the facts with regard to the circuit court here could only sustain the argument as to the occupying claimant law of 1797, since that of 1812 appears to have been early resisted. Here, however, I am led to an inquiry which will equally affect the validity of both laws, viewed as rules of practice; as affecting a fundamental right incident to remedies in our courts of law.

It is obviously a leading object of these laws to substitute a trial by a Board of commissioners for the trial by jury as to mesne profits, damages, and a *quantum meruit.* Without examining how far the legislative power of Kentucky is adequate

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to this change in its own courts, I am perfectly satisfied that it cannot be introduced by state authority into the courts of the United States. And I go further: the judges

of these courts have not power to make the change, for the Constitution has too sedulously guarded the trial by jury (seventh Article of Amendments), and the Judiciary Act of the United States both recognizes the separation between common law and equity proceedings and forbids that any court should blend and confound them.

These considerations lead me to the conclusion that the defendant is not entitled to judgment under either of the acts under consideration, even admitting them to be constitutional; but if under either, certainly under that alone which has been adopted into the practice of the United States courts in Kentucky.

CERTIFICATE. This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Kentucky on certain questions upon which the opinions of the judges of the said circuit court were opposed and which were certified to this Court for their decision by the judges of the said circuit court, and was argued by counsel. On consideration whereof, it is the opinion of this Court that the Act of the said State of Kentucky of 27 February, 1797, concerning occupying claimants of land, whilst it was in force, was repugnant to the Constitution of the United

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States, but that the same was repealed by the Act of 31 January, 1812, to amend the said act, and that the act last mentioned is also repugnant to the Constitution of the United States.

The opinion given on the first question submitted to this Court by the said circuit court renders it unnecessary to notice the second question.

All which is ordered to be certified to the said circuit court.

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