shall be paid to the master, two to the supercargo, two to the chief mate, one and a half to the second mate, and one to each of the seamen. And that the balance be deposited in the bank of Virginia, to remain subject to the future order of the circuit court.

Judgment reversed.

John Green *v.* John Liter and others.

Real actions.— Writ of right.

The circuit courts of the United States have jurisdiction in writs of right, where the property demanded exceeds $500 in value ;[1] and if, upon the trial, the demandant recover less, he is not to be allowed his costs ; but, at the discretion of the court, may be adjudged to pay costs.[2]

At common law, a writ of right will not lie, except against the tenant of the freehold demanded. If there be 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.[3]

If the demandant demands against any tenant more land than he holds, he may plead non-tenure as to the parcel not holden ; but the writ will abate only as to the parcel whereof non-tenure is pleaded, and admitted or proved.[4]

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 may still have the 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, nor actual taking of esplees : a constructive seisin in deed is sufficient.

Under the land law of Virginia, the whole legal estate and seisin of the commonwealth pass to the patentee, upon the issuing of his patent, 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, give a constructive seisin thereof, in deed, to the grantee and attaches to him all the legal remedies incident to the estate : *à fortiori*, this principle applies to a patent.[5]

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 defence in a writ of right.[6]

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 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.[7]

If a man enter into lands, having title, his seisin is not bounded by his actual occupancy, but is held to be co-extensive with his title : but if a man enter, without title, his seisin is confined to his possession by metes and bounds.[8]

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[1] See Homer *v.* Brown, 16 How. 354.

[2] S. P. Kneass *v.* Schuylkill Bank, 4 W. C. C. 106.

[3] Liter *v.* Green, 2 Wheat. 306.

[4] See Fiedler *v.* Carpenter, 2 W. & M. 211.

[5] Peyton *v.* Stith, 5 Pet. 486 ; United States *v.* Arredondo, 6 Id. 691.

[6] Green *v.* Watkins, 7 Wheat. 27. And see Ingles *v.* Sailor's Sung Harbor, 3 Pet. 133.

[7] See Liter *v.* Green, 2 Wheat. 306.

[8] Peyton *v.* Stith, 5 Pet. 485 ; Clark *v.* Courtney, 7 Id. 320 ; Ellicott *v.* Pearl, 10 Id. 412 ;

Under a conveyance, taking effect under the statute of uses, the bargainee has a complete seisin in deed, without actual entry or livery of seisin.[1]

An entry into a parcel, which is vacant, will not give seisin of a parcel which is in an adverse seisin; but an entry into the last parcel, in the name of the whole, will inure as an entry into the vacant parcel.[2]

THIS was a writ of right, brought by Green, the demandant, against the tenants, to recover seisin 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:

*230] *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 non-tenure, 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?

*231] 6th. Is the eldest patent, obtained as aforesaid, for *the land in controversy, sufficient proof of the best mere right; or can the demadant be put on the proof, that, in the incipiency, and in the different

s. c. 1 McLean 206; Prescott *v.* Nevers, 4 Mason 326; Sparkman *v.* Pistor, 1 Paine 458; Fraser *v.* Hunter, 5 Cr. C. C. 470.

[1] Barr *v.* Galloway, 1 McLean 476.

[2] See Hunt *v.* Wickliffe, 2 Pet. 201.

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 unappropriate 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 compelled 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 elder 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 chose 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, authorise the demandant to maintain *his writ of right against the tenants holding the previous possession, under a younger patent interfering with the elder grant? [*232

Wickliffe, for the demandant.—The court below being divided in opinion upon the several questions already stated, they have been adjourned to this court. The questions themselves sufficiently show the controversy. And the several points will be examined as they present themselves on the record.

1. With regard to the first, we contend, that the circuit court has jurisdiction in the case therein stated; and that the defendant's only remedy, in such case, under the act of congress, is, that he shall be excused from paying costs, and that he may, at the discretion of the court, be allowed his costs. In support of this point, we rely on the judicial act of 1789, §§ 11, 20. (1 U. S. Stat. 78, 83.)

2. Upon the second question, we contend, in behalf of the demandant, that under the act of assembly of Virginia (Rev. Co. P. P. 34), if his tenement is an entire one, and interfered with by divers tenants, he can only demand his tenement as it is, and cannot know how the adverse claimants bound or abut their claims or possession; and that as all claim and obstruct him in the use and possession, he has a right to sue all. We contend further, that although the demandant claim more than the tenants, or either of them, hold, still he may recover as much as is withheld from him by the tenant or tenants. To support this possition, we rely upon the act of assembly

of Virginia of 1792, ch. 125, which is in force in Kentucky, and is the same in substance with the act of 25 Edw. III. c. 16, which enacts, "that by the exception of non-tenure of parcel, no writ shall be abated but for quantity of the non-tenure which is alleged;" and the act of assembly of Kentucky, entitled "an act to amend proceedings in chancery and common law;" the latter of which acts expressly 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. See also, Booth on Real Actions, p. 2.

*233] *3. On the third question, we insist, that under a sound construction of the act of assembly of Virginia of 1786 (Revised Code, vol. 1, p. 33, c. 27), no matter in abatement which does not affect the right, can be pleaded. But if it can be pleaded, yet, under the acts of assembly of Kentucky, and the rules of the circuit court of the district of Kentucky, it ought to be pleaded, during the appearance term, and be supported by oath. It is further insisted, that only such matters as assume the character of abatement at common law, and which affect the mere right, such as non-tenure, can be given in evidence on the *mise* joined. A contrary construction of the act would lead to the worst of consequences. If, upon the *mise* joined, all matter in abatement might be given in evidence, a man might lose his valuable inheritence, by the defendant proving on the trial, that he claimed and held as joint-tenant, and not as sole tenant. It would also involve the monstrous absurdity, of making the jury the sole and exclusive judges of the demandant's count and pleading.

4. The fourth proposition seems to be abstract and indefinite. If the matter in bar affects the mere right, and goes to show substantially that the demandant has no claim in fee-simple, it is submitted to the court to say, whether, under a just construction of the act, he can plead it. But as the act allows him to give such bar in evidence, on the general issue, it is within the sound discretion of the inferior court, to permit the defendant to plead the special matter, or give it in evidence on the general issue; and that must depend upon the time when the application is made. On this point, the case of *Resler* v. *Sheehee*, 1 Cranch 110, and the case of *Fox* v. *White*, in the court of appeals in Kentucky, are relied upon. It is further submitted, whether the mere etiquette of pleading, and the time when that pleading shall be filed, is not a matter of practice only, and proper to be left to the circuit courts to settle, under their own rules, or the statutes and practice in Kentucky.

5. The fifth question seems to be a more important one; and it would have been, perhaps, more regular to have placed that before the other questions, inasmuch as a decision upon that, affirmatively, would preclude the

*234] necessity of deciding several of the others. *Upon this question, we contend, that the demandant can, upon his patent, maintain his writ of right; and that actual possession is not necessary. To maintain this point, it is not at all material to prove, that by the king's letters-patent granting titles to land in England, a writ of right could be maintained. It is believed, that no case has occurred where that point has been directly decided. But titles in England are conditional, not absolute. Since the time of William the conqueror, all grants of land have been made on feudal principles; and a patent in England is not of itself a right, but an author-

ity to the grantee to take a right; that right rests upon conditions; and one of those conditions is entering and taking possession of the land. In the grant, there are two parties supposed, the king and grantee; and the grantee becomes bound to the king, when he accepts the estate, and not until then; the ultimate property remains with the king; and upon the tenant's entering he becomes seised of the use only; and hence exists the reason, in the English books, of requiring the demandant, in the most solemn trial of a right to real estate, to show and prove the highest title the subject ever had, the *dominium utile*, or usufruct of the property; for if neither he nor his ancestor had entered and been seised of the use (the *dominium directum* remaining in the king), they never had a fee-simple estate; the feudal grant not being an estate in fee, but a right to enter and take one; and if that right was never exercised, the estate was never taken. See 2 Bl. Com. 46, 104, 105, 107, 108. It appears also further, from Booth, and Fitz. Nat. Brev. tit. Writ of Right, F, that the demandant had not only to set out when he was seised, but by what service he held the land.

It is important to state the kind of title made by letters-patent such as those under which the demandant claims. In 1777, the legislature of Virginia abolished all servile and feudal tenures; and in 1779, passed her land law, under which we derive title. In one section of that act, the form of an allodial grant is given; and, by way of closing every doubt as to the title, the register was directed to indorse that the patentee had title. Having provided, in that section, for the complete investment of an absolute and unconditional title under that act, and actuated by a laudable desire to place all *her citizens upon the same tenure, in the 19th section of the same act, she declares, "that all reservations and conditions in the patents [*235 or grants of land from the crown of England or of Great Britain, under the former government, are hereby declared to be null and void; and that all lands thereby respectively granted shall be held in absolute and unconditional property, to all intents and purposes whatsoever, in the same manner with lands hereafter to be granted by the commonwealth, by virtue of this act." And by a subsequent section of the same act, all laws requiring the seating or possession of land, to vest title, are expressly repealed. It will be perceived, that the legislature not only gave the form of a patent, such as never had been issued before, in that state, but provided, that an indorsement should appear on the back of the letters-patent, that the grantee had title, no such indorsement ever having been made or allowed during the regal government. But lest the titles might, in some manner, be tinctured with the learning of the feudal law, they explicitly declare that the estate shall be held in absolute and unconditional property. It might here be asked, can any man say that the patent of the commonwealth, issued in strict pursuance of this act, does not convey a fee-simple estate, without any condition being performed by the patentee? To us, it seems, that this is a point too clear for doubt.

The attention of the court is next called to the act of 1786. That act, in its title and context, professes to be an act to reform the method of proceeding in writs of right; and expressly provides, that it shall be lawful for a person claiming a fee-simple title to sue forth the *præcipe quod reddat*, &c. This act gives the writ. If the demandant has a fee-simple estate (and the only question which can be involved is, has the demandant, by these let-

ters-patent, a fee-simple estate), a further argument is drawn from the fact of passing the act itself. The necessity of this reform had become obvious to the legislature and the people of Virginia, from the great and radical change of the land-titles created by the act of 1779. That act had repealed all laws which required claimers of land to settle them ; had repealed and abolished every service and tenure by which lands in that state had been theretofore held. Of course, the form of the count at common law was totally defective and improper ; *because that contained not only the *236] charge of actual seisin, but the time when, and by what kind of service the lands were held. The common-law titles having ceased, the remedy ceased also ; it, then, well became the legislature to give a statutory remedy suited to the statutory and then existing state of titles ; and thus you find a form of *præcipe* and count given, precisely correspondent with the title. The act of 1779 abolished all the feudal tenures, and dispensed with actual possession ; and the old allegations of possession and the kind of tenure are omitted. This omission means something ; and why did it take place, if not for the causes now assigned ? See, on the foregoing points, Cruise on Real Estates 12 ; Co. Litt. 48 ; Ch. Rev. 61. The form of the writ and count is very obviously taken from the British forms ; and is not only the act of a legislature famed for its wisdom and learning, but report makes this form the peculiar work of a committee of the first lawyers then of the Virginia bar. To ascribe such unmeaning omissions to such men and to such a body, is wholly inadmissible.

But surely, on common-law principles, it cannot be fairly contended, that the demandant shall prove actual possession. The statute has given him his count or declaration ; that count will, it is believed, be sufficient for him, after verdict ; and if a man proves everything he has alleged upon a good declaration, we understand the common law to be, that he shall have a verdict. If you require of the demandant to prove more than his count contains, where will you stop ? If you say, that after he proves and exhibits a fee-simple title, he shall also prove possession, why not say that he must prove by what tenure he holds, and whatever else he was bound to prove at common-law ; and which were equally indispensable to be proved before this statute ? The case of *Clay* v. *White*, 1 Munf. 162, will be relied on, to prove that the patentee is, to every legal purpose, possessed of land, in Virginia, by his letters-patent. Upon this point, the attention of the court is further called to the state of the country, at the date of the Virginia land law. It was in the midst of a war with Great Britain ; when sound policy required that many of the grantees, who were engaged in the war (the offi- *237] cers *and soldiers), should remain in it, during its continuance ; and that those not engaged should, to a certain extent, be drawn into its armies. In fact, this very land-office was opened with the two-fold view of raising men and money to carry on the war. It is, therefore, asked, if the objects of the legislature would not have been defeated, if the very bounty offered for the public service, and which might be the price of the blood of the father to the children, should depend upon seating and possessing the land ? For, if the doctrine obtain, that actual possession is necessary to a perfect title, or to give a fee-simple estate, it is incontrovertible (by the rules of the common law), that the death of the grantee, before entry, prevents the estate from descending ; that the grantee cannot sell nor devise a

mere right of entry; and that, by the bare attempt to do the one or the other, he works a forfeiture. See Co. Litt. 214, 266, and Noy's Maxims, 84. It is believed, that one-third of the best lands in Kentucky are held by devise, purchase or descent, without the original grantee ever having been possessed. With what astonishment will the Virginian or Kentuckian learn, for the first time, the monstrous doctrine that destroys every estate of the kind. Again, with the exception of four small forts or stations, the whole territory which now forms the state of Kentucky was, at the date of the law, a wilderness, in the possession and under the power of the Indians. In fact, a considerable part granted out by the state, below the Tennessee, is yet held, and may be held for a century, by the Indians. And can it be supposed, that Virginia could have intended, when she invited the soldier and the capitalist to embark their fortunes in the war, and offered as a reward these lands, to have imposed the necessity of actual settlement, and taking the esplees, as a pre-requisite to title? What are the esplees of a wilderness, under the dominion of the tomahawk and the scalping knife? Are they the game or the wild acorns? If we be correct in supposing that the commonwealth vests in the demandant, in this case, a fee-simple estate, and legally possesses him of that estate, it follows, that nothing less than an adverse possession of thirty years can bar him; and that twenty years is not a sufficient bar. In support of the foregoing observations, see Ch. Rev. p. 97; Ibid. p. 98, § 6; 1 Rev. Code of Virg. Laws, p. 33. Noy's Maxims 160, *Co. Litt. 48, note; Booth 112; Ibid. 98; *Bradford* v. *Patterson*, Hardin 162; *Brown* v. *Quarles*, Sneed 237; Co. Litt. 57; Fitz. N. B. 506, note; Rev. Code, ch. 114. [*238

6. On the sixth question proposed, we contend, that the first patent conveys the legal estate in fee; that the incipiency of title was a matter between the commonwealth and the patentee; and when settled with the commonwealth, and the title made perfect, that it does not lie in contest, between the demandant and defendant. We contend also, that in a trial at law, of a mere legal right, the defendant cannot set up an equity against the elder grant. This point was settled by the court of appeals of Kentucky, in the old case of *Brown* v. *Quarles*, and has ever since been considered the law of that state.

8. On the eighth question, we contend, that the *mise* is joined upon the mere right between the demandant and defendant; and that the jury is to inquire whether the demandant hath more right, &c., or the defendant, &c., and that it will be absurd to inquire, whether the demandant or some one else hath the most mere right.

9. On the ninth, it may be observed, that it must depend upon the manner in which the *mise* is joined. If the tenants jointly and severally join the *mise*, upon the whole land claimed by the demandant in his count, then a general finding will be proper. But if they severally plead as to part, and disclaim or plead non-tenure as to the rest, then the finding should be several, and respond to each issue.

10. On the tenth, we contend, that an entry into part, in the name of the whole, and claiming the whole, will, on common-law authority, sustain the writ and count, as to all claiming under a younger and inferior right, that have not had thirty years' adverse possession; and of course, that the land

in the demandant's patent, and outside of the close of the defendant, belongs to the demandant.

11. The observations upon the tenth question will apply to this also.

*239] *Hughes*, contrà.—The fifth question being the most important, and that to which the demandant's counsel has principally directed his attention in the course of his argument, I shall confine my observations also chiefly to that point. The Virginia act of assembly of 19th December 1792, which declares that "actual possession need not be proved to maintain a writ of right," was passed after the separation of Kentucky from Virginia; and consequently, is not in force in the former state. At common law, a writ of right cannot be maintained, without proof of seisin in the demandant, and actual taking of esplees, within the time of limitation; which, in England, is thirty years on a man's own seisin, and fifty, on the seisin of his ancestors; and such was the law of Virginia until the year 1786, when the act for reforming the method of proceeding in writs of right, was passed. But this act merely changed the mode of trial, not the substance of proof. It did not dispense with proof of the demandant's seisin; and consequently, the law on that subject remains the same as before the passage of the act of 1786. *Vide* Booth 85, 111, 112; Co. Litt. 281, 293, 294; 2 Saund. 45, 46; Bac. Abr. tit. Limitation of Actions, B; *Bevil's Case*, 4 Co. 8; Old Laws of Virginia 147.

From the case of *Tisson* v. *Clarke*, 3 Wils. 419, it appears, that if the tenant did not pay his demi-mark, and deny the seisin of the demandant, such seisin was taken for confessed. Hence, the defendant was put to prove his title, contrary to the general rule. *Vide* the case of *Tisson* v. *Clarke*, 3 Wils. 419; Ibid. 541; Co. Lit. § 514; Booth 113. But the legislature of Virginia, by omitting to require the allegation of seisin, made it necessary that the demandant should prove it. If it had been alleged, and not denied, such proof, on the part of the demandant, would not have been necessary.

Although, according to the decision of the court of appeals of Kentucky in the case of *Innis* v. *Crawford* (2 Bibb 412), the patent conveys a fee-simple estate, yet the patentee must so use it as not to lose his estate,

*240] *and in such a manner as to prevent the operation of the statute of limitations. A patentee may lose his right, by not entering in due time; and, in such case, having nothing superior to a right of entry, he cannot maintain a writ of right. At the time of the separation of Kentucky from Virginia, the statute of limitations of Virginia was, *verbatim*, the same as the statute of 32 Hen. VIII., c. 2, on which it has been decided, that seisin was necessary within fifty years. *Vide* the MS. report of the case of *Spriggs* v. *Griffith*, decided in Kentucky; also the case of *Speed* v. *Buford* (3 Bibb 57), decided in the court of appeals of the same state, in May 1813.

But admit, that a patent is equivalent to livery in law; we contend, that livery in fact is necessary; and so must the case of *White* v. *Clay*, in 1 Munf. 162, be understood. Co. Litt. 240 *b*; Ibid. 111; Shep. Touch. 209, 223.

The reason of the law requiring proof of actual possession, is obvious: such proof was required, in order to secure the peaceable occupany of the land to the rightful proprietor. Investiture and seisin were invented for

the purpose of putting an end to litigation. They were notorious acts in the country, performed in the presence of the vicinage; and where there had been such actual seisin and investiture, the law, after the right of entry was gone, gave the demandant the writ of right, to revive his former possession. 2 Bl. Com. 311, 312; Shep. Touch. 209. It is true, that, according to the old law, a charter of feoffment, without actual livery, only gave an estate at will; and the statute of uses transfers the possession in law to the use; but no change was made thereby in the law respecting writs of right, which requires proof of actual possession.

With regard to the other questions adjourned, the counsel for the tenants contended, as to the 1st and 2d points, that the demandant could not join, in the writ and count, several tenants, claiming under several distinct, separate and independent original titles; and that, as they could not be joined, the circuit court had no jurisdiction; inasmuch *as no one of the tenements in question was of the value of $500. [*241

As to the third point, that non-tenure, no seisin, &c., might be pleaded under the act of Virginia of 1786. The 4th point, he submitted. On the 6th and 7th, he contended, that the patent was not conclusive evidence in a writ of right. On the 8th, he supported the affirmative of the question. The 9th he said respected matter of form merely. As to the 10th, he insisted, that when a man takes possession, he takes possession to the extent of his claim. The 11th, he said, was answered by the observations on the 1st point.

Wickliffe, in reply, contended, that the Kentucky cases cited by the tenant's counsel, not being final and absolute, were not authority; that the court of appeals of Kentucky was, in fact, waiting for the decision of this court, in these cases. But admitting them to be authority, still there was error in the finding of the jury; they had found a special verdict, which, by the common law, they could not do; they ought to have decided the mere right, and nothing more.

In the case of a grant from the crown, of the same land, to two different persons, if the last grantee enter, the former may maintain trespass. In the case of *Innis* v. *Crawford*, the court, in effect, said, that the patent gave seisin; because they dated the disseisin by the tenant, from the date of his entry; but if the demandant was not seised, he could not have been disseised.

*The court of appeals of Virginia, at different times, have decided differently on the same law; but the courts of Kentucky have always decided, that when the reason of the English law ceased, in consequence of the different circumstances of the country, the law itself ceased. [*242

Friday, March 11th, 1814. (Present, all the judges.) 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 seisin 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 were 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 judiciary 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 demand against any tenant more land than he holds, he may plead non-tenure 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., St. 5, c. 16, 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 non-tenure 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.

*243] *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 intend 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 non-tenure, 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

*244] 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 current of authority, that actual seisin, or seisin 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, seised 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 seisin, 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 seisin was absolutely necessary to produce a perfect title, or as Fleta calls it, *juris et seisinæ conjunctio.* But, whatever may be its origin, the rule as to the actual seisin 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 *the count in a writ of right, and omits any allegation of seisin 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. [*245

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 seisin was, at the common law, a fatal bar. The statute of limitations of Virginia, of 19th December 1792, ch. 77, which, as to this point, is a revisal of the old statute, limits a writ of right upon ancestral seisin, to 50 years, and upon the demandant's own seisin, to 30 years next before the *teste* of the writ. It is, therefore, incumbent on the demandant to prove a seisin 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 seisin, or seisin in deed, be necessary to be proved, it becomes material to enquire what constitutes such a seisin. 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 seisin. But this is far from being true, even at the common law. There are cases in which there is a constructive seisin in deed, which is sufficient for all the purposes of action in legal intendment. In Hargrave's note, 3 Co. Litt. 29 *a*, it is said, that an entry is not always necessary to give a seisin 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 seisin 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 conflict-
*246] ing possession, the law adjudges him in the actual seisin of the whole. Litt. § 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 dare, and claim the land as his own, he hath presently, by such claim, a possession and seisin in the lands, as well as if he had entered in deed. Litt. § 419. And livery within the view of the land will, under circumstances, give the feoffee a seisin in deed as effectually as an actual entry. There are, therefore, cases in which the law gives the party a constructive seisin 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 seisin, the bargainee has a complete seisin in deed. Com. Dig. Uses, B. 1. I. ; Cro. Eliz. 46 ; 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 seisin 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 seisin ; and the seisin in deed once established, either by a *pedis possessio*, or by construction of law, the taking of the esplees is a necessary inference of law. If, therefore, a seisin 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 seisin. And so it would be, although a mere trespasser, without claiming title, should actually take the profits, during the time of the seisin alleged and proved. And, indeed, of certain real property, as a barren rock, a complete seisin may exist, without the existence of esplees.

*The result of this reasoning is, that wherever there exists the
*247] union of title and seisin in deed, either by actual entry and livery of seisin, 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 now 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 seisin 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 seisin is necessary to perfect a title by letters-patent.[1] 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 seisin. This difference alone would seem to carry a pretty strong implication that actual seisin passsed by operation of law, on a patent from the crown; for it is the union of a right and seisin 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 seisin? If, for instance, a feoffment include divers parcels of land in the same county, livery of seisin of one parcel, in the name of the whole, is livery of all, not in an adverse seisin. This, therefore, as to all the parcels except that whereof livery is actually made, is but a livery *in law; and yet to all intents and purposes, it is as effectual as livery in deed. [*248 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 were competent to give their patentees a perfect title and possession, without actual entry. Have they 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 seisin 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

[1] United *v.* Schurz, 102 U. S. 378.

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 pretence that the legislature have expressly made an entry a pre-requisite to the completion of the title. Such a pre-requisite, 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.

*249] *And this leads us to say, that even if, at common law, an actual *pedis possessio*, followed up by an actual perception of the profits, were necessary to maintain a writ 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 seisin, was, to evince notoriety of title to the neighborhood, and then consequent burdens of feudal duties. In the simplicity of ancient times, there were no means of ascertaining titles but by the visible seisin; 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 seised, 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 lord 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 seisin thereof, in deed, to the grantee, and attaches to him all the legal remedies incident to the estate: *à 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 party from whom the title was derived was never in actual seisin, would, upon principles of the common law, be utterly lost.

As to the sixth question. We are of opinion, that in Kentuky, 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 inforce, but a court of common law will not entertain. In this opinion, we adopt the

*250] principles which the *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 defence in a writ of right. That writ brings into controversy only the mere rights of the parties to the suit.

At 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 seisin is not bounded by his actual occupancy, but is held to be co-extensive with his title. But if a man enter without title, his seisin 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 seisin, presently, by virtue of his patent, gave him the best mere right to the whole land, upon the principles which we have already stated: *à 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 seisin 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 seisin of the whole, notwitstanding an adverse seisin thereof. But if the land be in the seisin of several tenants, claiming different parcels thereof in severalty, an entry into the parcel held by one tenant will not give seisin of the parcels held by the other tenants; but there must be an entry into each. Co. Litt. 252 *b*. By parity of reason, an entry into a parcel, which is vacant, will not give seisin of a parcel which is in an adverse seisin. But an entry into the last parcel, in the name of the whole, will inure as an entry *into the vacant parcel. It does not [*251
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.

CARTER'S heirs *v.* CUTTING and wife. (*a*)

Appellate jurisdiction.

An appeal lies to this court from the sentence of the circuit court of the district of Columbia, affirming the sentence of the orphans' court of Alexandria county, which dismissed a petition to revoke the probate of a will.

THIS was an appeal from the Circuit Court for the district of Columbia.

E. J. Lee, for the appellants: *Taylor*, for the appellees.

March 11th, 1814. STORY, J., delivered the opinion of the court, as follows:—The appellants, who are heirs-at-law of Sally Carter, deceased,

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(*a*) February 19th, 1814. Absent, WASHINGTON, Justice.