

Taylor v. Myers.

the simple contract. The whole objection was to the payment of that under the sealed instrument, out of which he claimed a right to deduct \$1000, on account of a failure in the performance of that contract. Under these circumstances, we think, that the money retained must be considered as reserved out of the sum due on that contract, and that the simple contract was discharged.

The court erred, then, in this direction to the jury, and the judgment must be reversed, and the cause remanded for a new trial.

CERTIFICATE.—This cause came on to be heard, on the transcript of the record of the circuit court for the district of Columbia, in the county of Washington, and was argued by counsel: On consideration whereof, it is the opinion of this court, that the said circuit court erred in instructing the jury, "that it was competent to the plaintiff to recover the said \$1000, in this action, unless they should be satisfied by the evidence, that the defendant, at the time of paying the money, had expressly directed the same, or a sufficient part thereof, to be applied to the extinguishment of the \$1500, due on simple contract." It is, therefore, adjudged and ordered, that the judgment of the said circuit court, in this case, be and the same is hereby reversed and annulled, and it is further ordered, that the said cause be remanded to the said circuit court, with directions to issue a *venire facias de novo*.

*TAYLOR's Lessee v. MYERS.

[*23]

Land-law of Ohio.

The owner of a survey, made in conformity with his entry, and not interfering with any other person's right, may abandon his survey, after it has been recorded.

The proviso in the act of March 2d, 1807, § 1, which annuls all locations made on lands previously surveyed, applies to subsisting surveys; to those in which an interest is claimed, not to those which have been abandoned, and in which no person has an interest.

This cause was argued at the last term, by *Doddridge* and *Scott*, for the plaintiff in error, and by *Brush*, for the defendant.

February 12th, 1822. MARSHALL, Ch. J., delivered the opinion of the court.—This case comes on, upon two questions, certified by the circuit court for the district of Ohio, in which the judges of that court was divided in opinion. The following is stated as the case on which the question arose:

"The plaintiff's claim is founded on an entry dated the 17th of February 1817, surveyed the 19th of February 1817, and on a patent founded thereon, dated the 18th of July 1818, covering the premises in question. The defendant showed that the plaintiff, on the 27th of February 1797, made an entry on the premises in question, on another warrant, surveyed the *same the 15th of April 1797, and recorded the plat, on the 20th of June of [*24 the same year. That before making the entry on which his patent is founded, he had withdrawn his said first entry and survey, by a marginal note on the record thereof, made on the surveyor's book (if a survey so circumstanced, could be so withdrawn), and located the warrant elsewhere. The parties further agreed, that such withdrawals were customary, ever since the year 1799."

The questions are, 1. Can the owner of a survey, made in conformity

Taylor v. Myers.

with his entry, and not interfering with any other person's right, abandon his survey after it has been recorded? 2. Can the defendant, upon these facts, protect himself, at law, under the act of congress, passed on the 2d of March 1807, entitled; "an act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands, for the use of schools in the Virginia military reservation, in lieu of those heretofore appropriated;" and the several subsequent acts on the same subject?

The military warrants, to which these questions refer, originate in the land-law of Virginia. The question, whether a warrant, completely executed by survey, can be withdrawn, and so revived by the withdrawal, as to be located in another place, has never, so far as is known, been decided in the courts of that state. In Kentucky, where the same law governs, *it
*25] has been recently determined, that a warrant once carried into survey, with the consent of the owner, cannot be re-entered and surveyed in any other place. In Ohio, it is not understood, that the question has been decided.

The first question, however, does not involve the right of the owner of a warrant, which has been surveyed, to enter and survey it elsewhere; but his right to abandon it entirely. It draws into doubt, the right of an individual, to refuse to consummate a title once begun.

In this respect, no coercive principle is to be found in the act. An entry is forfeited, if not surveyed within a limited time. A survey is forfeited, if not returned to the land-office by a specified time. In these cases, the right of abandonment is recognised. An individual may abandon his survey, by not returning it to the land-office within the time prescribed by law. Why may he not abandon it, by any other unequivocal act? This is not prescribed as a single mode by which a right is to be exercised; but is annexed as a penalty for not proceeding to complete a title. The legislature determined, that no man should be allowed to lock up land from others, without such an appropriation as would subject it to the common burdens of society. He was at liberty to perfect his title, or to lose it; but was required to do the one or the other.

It seems to be an ingredient in the character of property, that a person who has made some advances towards acquiring it, may relinquish it, provided, the rights of others be not affected by such relinquishment.

*This general principle derives great strength from usage which has
*26] prevailed among these military surveys. The case states, that it has been customary, ever since the year 1799, to withdraw surveys, after they have been recorded. The place surveyed has, of course, been considered as having again become vacant, and has been appropriated by other warrants, which have been surveyed and carried into grant. It would be a serious mischief, the extent of which cannot be calculated, to declare these grants void. No subject requires to be treated with more delicacy than the land titles of a country, where a law has been explained by usage. Upon the general principle which has been stated, and upon the custom of the country in this respect, the court is of opinion, that the owner of a survey, under the circumstances stated in the first question, may abandon it; but by doing so, he will not cancel the rights of others.

If the plaintiff was at liberty to withdraw his survey, the defendant could not protect himself, under the act of congress, to which the second question

Green v. Watkins.

refers. The proviso of that act, which annuls all locations made on lands previously surveyed, applies to subsisting surveys, to those in which an interest is claimed; not to those which have been abandoned, and in which no person has an interest. A certificate is to be given in conformity with these principles.

CERTIFICATE.—This cause came on to be heard, on the facts agreed by the parties, and on the question on which the judges of the circuit court were *divided, and was argued by counsel: on consideration whereof, this court doth order, that it be certified to the circuit court of the United States for the district of Ohio: 1. That the owner of a survey, made in conformity with his entry, and not interfering with any other person's right, may abandon his survey, after it has been recorded: 2. That the defendant, on the facts stated in the case, cannot protect himself at law, under the act of congress, passed the 2d of March 1807, entitled, "an act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the secretary of the department of war, and appropriating lands for the use of schools in the Virginia military reservation, in lieu of those heretofore appropriated," and the several subsequent acts on the same subject. [*27]

GREEN v. WATKINS.

Real action.—Writ of right.

In a writ of right, the tenant cannot give in evidence the title of a third person, with which he has no privity, unless it be for the purpose of disproving the demandant's seisin.

Therefore, where the demandant proves an actual seisin, by a *pedis possessio*, the tenant cannot be permitted to prove a superior outstanding title, since it does not disprove the demandant's seisin.

But where the demandant relies for proof of seisin, solely upon a constructive *actual seisin in virtue of a patent from the state, of vacant lands, the tenant may show that the land has been previously granted by the state, for that divests the title of the state, and disproves the demandant's constructive seisin. [*28]

A writ of right brings into controversy only the titles of the parties to the suit, and is a comparison of those titles; and either party may, therefore, prove any fact which defeats the title of the other, or shows it never had a legal existence, or has been parted with.

The case of *Green v. Lister*, 8 Cranch 229, commented on and explained.

ERROR to the Circuit Court of Kentucky.

February 5th, 1822. This cause was argued by *Montgomery*, for the plaintiff in error, and by *B. Hardin*, for the defendant.

February 12th. *Story*, Justice, delivered the opinion of the court.—The record in this case presents a great variety of facts, out of which several important questions have arisen; but as the merits of the cause may, in the opinion of the court, be completely disposed of by the decision of a single point, the facts which illustrate that point will alone be mentioned.

This is a writ of right, originally brought by the plaintiff in error, against the defendant in error, to recover a certain tract of land, in Kentucky, described in the writ. Issue being joined on the mere right between the parties, the demandant, to sustain his suit, gave in evidence a patent of the land in question, granted to him by the Commonwealth of Virginia, and dated the 28th day of January 1784, and offered proof of the boundary. But