of six per cent. per annum, from the time of the allowance of the present appeal, unto the final execution of this decree, and that the stipulation stand security therefor.

DECREE.—This cause came on, &c.: On consideration whereof, it is ordered, adjudged and decreed, that the decree of the circuit court in the premises be and hereby is affirmed, except in disallowing the item stated in the petition of the claimants, paid for duties, and except so far as is otherwise directed by this decree: And this court, proceeding to pass such decree as the circuit court ought to have given, do hereby further order, adjudge and decree, that the said items of duties, amounting to the sum of $1945.14, be deducted from the appraised value of the property, as ascertained in the stipulation; and that the libellant have restitution of the residue of the appraised value; and that upon so much of the *said residue as has not already been paid to the libellant, interest at the rate of six per centum per annum be allowed to the libellant, from the time of the present appeal, until this present decree shall be executed upon mandate by the circuit court, together with all the costs of suit on the present as on the original appeal; and that the said stipulation do stand as security therefor; and that the circuit court do award execution upon the said stipulation, for the amount of principal and interest so ordered, adjudged and decreed. [*449

DAY and others *v.* CHISM.

Pleading in covenant.

In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount;[1] but no formal terms are prescribed in which the averment is to be made.

Where it was averred in such a declaration, "that the said O. had not a good and sufficient title to the said tract of land, and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises, by due course of law," it was held sufficient, as a substantial averment of an eviction by title paramount.[2]

Where the plaintiffs declared in covenant, both as heirs and devisees, without showing in particular how they were heirs, and without setting out the will, it was held not to be fatal, on general demurrer.

Such a defect may be amended, under the 32d section of the judiciary act of 1789, c. 20.

ERROR to the Circuit Court of Tennessee.

*February 11th, 1825. This cause was argued by *Bibb*, for the plaintiff in error; and by *Eaton*, for the defendant in error. [*450

February 23d. MARSHALL, Ch. J., delivered the opinion of the court.—This is an action of covenant brought by the heirs and devisees of Nathaniel Day, in the court for the seventh circuit, for the district of Tennessee, on a covenant contained in a deed from the defendant to the said Nathaniel Day, purporting to convey a tract of land therein mentioned.

The declaration, which contains six counts, states the covenant in the fourth in the following words: That the said Obadiah Chism, the defendant,

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[1] Rickert *v.* Snyder, 9 Wend. 415.

[2] See Townsend *v.* Morris, 6 Cow. 122.

"then and there, by the said indenture, covenanted and agreed with the said Nathaniel Day, his heirs and assigns, to warrant and defend the title to the said premises against the claim of all and every other person whatsoever, as his own proper right in fee-simple." In the fifth count, the covenant alleged is, "to warrant and defend the land against all and every person whatever." In some of the counts, the only breach assigned is want of title in the defendant. The fourth and fifth counts charge, that "the said Obadiah, the defendant, hath not kept and performed his covenant so made with the said Nathaniel aforesaid, with the said Nathaniel in his lifetime, nor with the plaintiffs since his death, but hath broken it, in this, that he hath not warranted and defended the title to said premises, described in said covenant,
*451] *against all and every person whatsoever, to said Nathaniel Day, his heirs and assigns; and also in this, that the said Obadiah had no title to said tract of land, but it was vested in the state of Tennessee; and the said plaintiffs aver, that by reason of said want of title in said Obadiah, the said Nathaniel, in his lifetime, and the plaintiffs since his death, were unable to obtain possession thereof, or to derive any benefit therefrom; and also in this, that the said Obadiah had not a good and sufficient title to the said tract of land, and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises by due course of law; and also in this, that the said Obadiah had no title to the said premises, but the same was in the state of North Carolina, by reason whereof the said Nathaniel, in his lifetime, and the plaintiffs since his death, were and are unable to obtain possession of the said premises.

The defendant demurred to the declaration, and assigned for cause of demurrer, that, 1st. "It does not appear in and by the said declaration, any averment or allegation therein, that the said plaintiffs have been evicted by a title paramount to the title of the defendant; and 2d. The said declaration is, in other respects, defective, uncertain and informal."

The covenant stated in the declaration is, we think, a covenant of warranty, and not a covenant of seisin, or that the vendor has title. In an action on such a covenant, it is undoubtedly necessary to allege, substantially, an eviction by title paramount, but we do not think that any
*452] *formal words are prescribed, in which this allegation is to be made. It is not necessary to say, in terms, that the plaintiff has been evicted by a title paramount to that of the defendants. In this case, we think such an eviction is averred substantially. The plaintiffs aver, "that the said Obadiah had not a good and sufficient title to the said tract of land; and by reason thereof, the said plaintiffs were ousted and dispossessed of the said premises, by due course of law." This averment, we think, contains all the facts which constitute an eviction by title paramount. The person who, from want of title, is dispossessed and ousted, by due course of law, must, we think, be evicted by title paramount. We think, then, that the special cause assigned for the demurrer will not sustain it.

There are other defects in the declaration, which are supposed by the counsel for the defendants in error to be sufficient to support the judgment. The plaintiffs claim both as heirs and devisees, and do not show in particular how they are heirs, nor do they set out the will, It is undoubtedly true, that their title cannot be in both characters, and that the will, if it passes the estate differently from what it would pass at law, defeats their title as

heirs. But a man may devise lands to his heirs, as well as his devisees, though not a strictly artificial mode of declaring, is an error of form and not of substance. Of the same character is, we think, the omission to state how the plaintiffs are heirs, or to set out the will. *Although in the [*453
case of *Denham* v. *Stephenson* (1 Salk. 355, 6 Mod. 241), the court says, "that where H. sues an heir, he must show his pedigree, and *coment heres*, for it lies in his proper knowledge," the court does not say, that the omission to do this would be fatal on a general demurrer, or that it is an error in substance. The plaintiff must show how he is heir on the trial; and the 32d section of the judiciary act of 1789, c. 20, applies, we think, to omissions of this description. The judgment may be given, "according to the right of the cause, and matter in law," although the declaration may not show whether the plaintiff is the son or brother of his ancestor, or may not set out the will at large. An averment that he is the heir or the devisee, avers substantially a valid title, which it is incumbent on him to prove at the trial.

The declaration presents another objection, respecting which the court has felt considerable difficulty. In the same count breaches are assigned which are directly repugnant to each other. The plaintiffs allege, that from the defect of title in the vendor, they have not been able to obtain possession of the premises; and also that they have been dispossessed of those premises by due course of law. These averments are in opposition to each other. But the allegation that possession has never been obtained is immaterial, because not a breach of the covenant, and the majority of the court is disposed to think, may be disregarded on a general demurrer.

*It is the opinion of the court, that the fourth and fifth counts, [*454
however informal, have substance enough in them to be maintained against a general demurrer, and that the judgment must be reversed, and the cause remanded for further proceedings. It will be in the power of the circuit court to allow the parties to amend their pleadings.

Judgment reversed accordingly.

McDowell *v.* Peyton and others.

Land law of Kentucky.

The following entry, "I. T. enters 10,000 acres of land, on part of a treasury-warrant, No. 9739, to be laid off in one or more surveys, lying between Stoner's fork and Hingston's fork, about six or seven miles nearly north-east of Harrod's lick, at two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hington's fork, on the east side of the branch, then running a line from said ash saplings, south 45° east, 1600 poles, thence extending from each end of this line north, 45° east, down the branch, until a line nearly parallel to the beginning line shall include the quantity of vacant land, exclusive of prior claims," is not a valid entry, there being no proof that the "two white-ash saplings from one root, with the letter K marked on each of them, standing at the forks of a west branch of Hingston's fork," had acquired sufficient notoriety to constitute a valid call for the beginning of an entry, without further aid than is afforded by the information that the land lies between those forks.

Appeal from the Circuit Court of Kentucky.

February 21st, 1825. This cause was argued by *Wickliffe*, for *the [*455
appellant; and by *Talbot*, for the respondents.