It does not seem necessary to pursue this subject further, because here is a clear authority, justifying the admission of the parol evidence, upon the principle of the local jurisprudence. It seems to us a reasonable doctrine, founded in good sense and convenience, and tending rather to suppress than encourage fraud. But whether so, or not, it sustains the opinion of the circuit court, in a manner entirely free from exception.

The next objection to the charge, founded on the variance between the declaration and proofs, has been abandoned at the argument, and need not be dwelt upon. And the last objection, to wit, to the designation of a vessel for the shipment as ineffectually made, has been already in part answered; and we entirely coincide with the views expressed on this point, by the circuit court.

Without, therefore, going more at large into the points of the case, or commenting upon the various authorities and principles so elaborately brought out in the disussions at the bar, it is sufficient to say, that we perceive no error in the judgment of the circuit court, and it is, therefore, to be affirmed, with costs.

Judgment affirmed.

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*503] *John Davis and others, Plaintiffs in error, *v.* Richard B. Mason, Lessee.

Lex loci rei sitæ.—Tenancy by the curtesy.—Execution of will.

In an action of ejectment to recover land in Kentucky, the law of real estate in Kentucky, is the law of this court, in deciding the rights of the parties. p. 505.

It seems, that the rigid rules of the common law do not require, that the husband shall have had actual seisin of the lands of the wife, to entitle himself to a tenancy by curtesy, in waste, or what is sometimes styled, "wild lands."[1] p. 505.

If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists. p. 508.

At present, it is fully settled in equity, that the husband shall have curtesy of trust, as well as of legal, estates; of an equity of redemption, of a contingent use, or money to be laid out in lands.[2] p. 508.

Under the law of the state of Kentucky, and the decisions of their courts upon it, a will, with two witnesses, is sufficient to pass real estate; and a copy of such will, duly proved, and recorded in another state, is good evidence of the execution thereof. p. 508.

It is a settled rule, in Kentucky, that although more than one witness is required to subscribe a will, disposing of lands, the evidence of one may be sufficient to prove it. p. 502.

Error to the Circuit Court of Kentucky. The lessee of Richard B. Mason commenced an action of ejectment, in the circuit court for the district of Kentucky, against John Davis and others, tenants in possession, for the recovery of 8000 acres of land, claiming to recover the same under a right of entry, under and by virtue of, a grant from the state of Virginia to George Mason, of Fairfax, dated 19th of March 1817.

William Mason and others conveyed, by deed, their interest in and to the land in contest (they being children of the patentee), to George Mason, of Lexington, the eldest son of George Mason the patentee. George Mason, the grantee, and the father of the lessor, died the —— day of December

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[1] Beekman *v.* Sellick, 8 Johns. 262; Buchanan *v.* Duncan, 40 Penn. St. 82.

[2] See Dubs *v.* Dubs, 31 Penn. St. 149; Van Rensselaer *v.* Dunkin, 24 Id. 252.

1796, having first made his last will and testament; in a codicil to which, made on the 3d of November 1796, he devised to the child of which his wife was then *enciente*, his Kentucky lands, "if the child should be born alive, and arrive at the age of twenty-one years, or married, whichever may first happen." Richard B. Mason, the lessor of the plaintiff, was, by the evidence in the cause, the posthumous child referred to in the codicil. This will was fully proved, and admitted to record, according to the laws of Kentucky, and was said to vest the title in Richard B. Mason.

At the trial of the cause in the circuit court, the plaintiffs in error requested the court, by instruction to the jury: 1st. *To exclude the depositions of Lund Washington and George Graham, on the alleged [*504 ground, that they were not taken and certified according to law. 2d. To exclude what the defendants designated as "the third codicil" annexed to the will of George Mason, which it is said, was not proved and certified according to law. 3d. That the plaintiff could not recover, unless he could show that the land sued for, was entered, after George Mason, the elder, made his will, and not patented at his death. 4th. That if, from the evidence, they believed that the daughters of the patentee were dead, before the commencement of this suit, they should find for the defendants, as the deed from the husbands did not pass the interest of the *femes;* nor had the husbands a right by curtesy to the lands, as they never had other or further possession of the lands than that given by deed. The court refused to give the several instructions prayed for, and a bill of exceptions was tendered, upon which the case was brought before this court. The facts of the case which appeared upon the record, in connection with the matters contained in the exceptions, are stated in the opinion of the court.

The defendants in error insisted: 1st. That the court should have excluded the third codicil; it was not, upon proof, ordered to be recorded by the county court of Fairfax county; it is not certified, as having been proved, and ordered, or admitted to record; it was not proved upon the trial, by any admissible and competent proof, to have been executed by George Mason. 2d. That there was no competent proof upon the trial, that the lands in contest passed by conveyance to George Mason. It does not appear, that they were not patented, before the date of the will of George Mason, and otherwise disposed of by him in his will. The plaintiff should have proved that the lands were acquired by the said George Mason, after his will, and not having done so, the court should have given the instructions asked for, on that point, by defendants. 3d. The court erred in stating to the jury, that the deed conveyed to George Mason, the curtesy right of the husbands of the *femes covert*, daughters of George Mason, sen. 4th. The court erred in refusing to give the instructions asked for by defendants, upon the other points stated in the bill of exceptions.

The case was argued by *Rowan*, for the plaintiffs in error; and by *Wickliffe*, for the defendant in error. In reference to the rights of the husbands in the estates of their wives, Mr. Wickliffe cited 3 Bos. & Pul. 643.

*Johnson, Justice, delivered the opinion of the court:—The [*505 plaintiffs here were defendants below, to an action of ejectment, brought to recover 8000 acres of land, lying in the state of Kentucky. The

law of real estate in Kentucky, therefore, is the law of this court, in deciding on the rights of the parties.

The plaintiffs below derive title under, 1st, a patent to George Mason, of Gunston, issued in 1787 ; 2d, a deed of bargain and sale, from seven out of nine legal representatives of the patentee, their brother, to George Mason of Lexington, executed in 1794 ; 3d, a codicil to the will of George Mason of Lexington, devising the premises to the lessor of the plaintiffs. Judgment was rendered for plaintiffs, to recover eight-ninths of the premises. The defendants below relied on their possession, affecting to claim through the patent to the elder Mason ; but adducing no evidence to connect themselves with it. The questions to be here decided are brought up by a bill of exceptions, taken by the defendants below ; and they will be considered, as they regard the deduction of title, in the order in which they have been stated above.

The first question, in this order, relates to the deed executed by the representatives of Mason, the elder, to Mason, the younger ; under whose will the lessor of the plaintiffs makes title. No exception was taken to the proof, upon which this deed went to the jury. The exceptions go to the nature and extent of the estate which passed under it. And first, it was insisted, that it could pass nothing, unless the plaintiffs should show, that the land sued for was entered, after George Mason, senior, made his will, and not patented at his death ; on the ground, that, otherwise, it passed under his will, and did not descend to these donors. But it is obvious, that this instruction was properly refused, since the fact nowhere appears in the record, that the elder Mason ever made a will, competent in law to transfer real estate. The deed, it is true, purports to carry into effect his intentions towards his children ; but *non constat*, whether that intention had ever been signified, otherwise than by parol, or by an informal will. If a will had ever been executed, with the formalities necessary to defeat the heir-at-law, the defendants should have availed themselves of it by proof.

The next instruction prayed for by defendants, and rejected by the court, was, "that if, from the evidence, the jury believed, that the daughters of the patentee were dead, before the suit was brought, that then, they ought to find for defendants, as to the undivided interest of such daughters, and that the deed did not pass their interest. The court instructed the *jury, *506] that the deed did not pass the interest of the daughters, but passed the interest of their husbands, who were tenants by the curtesy, although they had never had other or further possession of the land, than what they acquired by deed. To understand this part of the bill of exceptions, it is necessary to notice, that from the record it appears, that among the parties of the first part to the deed to G. Mason, the younger, were four daughters of G. Mason, the elder, and their husbands ; that the daughters had formally executed a release of inheritance, under a commission issued from a court in Virginia ; but because the states were then separated, as a judicial proceeding, it had no validity as to lands in Kentucky ; and the lessor of the plaintiffs was compelled to stand upon the interest conveyed to him by the deeds of the husbands, as tenants by the curtesy.

In order to prove the pedigree of the donors, the marriage, birth of issue, &c., and of the sons-in-law of the elder Mason, the testimony of two witnesses was introduced by plaintiffs, taken under the act of congress. To

the introduction of this testimony, an objection was made and overruled; and this constituted another ground of exception, which, however, has been very properly waived by the counsel, in argument here. It appears, that the requisitions of the act have been well complied with. This testimony, besides establishing the pedigree, marriage and birth of issue, &c., of the husbands and their wives, and identity of the lessor of the plaintiffs, as devisees of G. Mason, the younger, also goes to prove the death of some, if not of all the daughters; and the exception is intended to raise the question, whether, in the absence of evidence of actual seisin, the husbands had good estates as tenants by the curtesy, in the portions of the land belonging to their respective wives; if they had not, then, by the death of their wives, their estates were determined. To repel this objection to the vesting of the estate by the curtesy, evidence is introduced into the bill of exceptions, to prove, that "the adverse possession of the premises, relied on by the defendants, did not commence, until after the execution of the deed, and after the death of George Mason;" in other words, that the land was waste, or as is sometimes styled, "wild lands," at the time of executing the deed, and at all times before and down to the time of the devise, from George Mason, jr., to the lessors of the plaintiff, took effect.

It is believed, that the rigid rules of the common law have never been applied to a wife's estate in lands of this description. In the state of New York (8 Johns. 271), these rules have been solemnly repelled; and we know of no adjudged case, in any of the states, in which they have been recognised as *applicable. It would, indeed, be idle, to compel an heir or purchaser, to find his way to pathless deserts, into lands still overrun [*507 by the aborigines, in order to "break a twig," or "turn a sod," or "read a deed," before he could acquire a legal freehold. It may be very safely asserted, that had a similar state of things existed in England, when the Conqueror introduced the tenure; the necessity of actual seisin, as an incident to the husband's right, would never have found its way across the channel. It is true, that Perkins and Littleton, and other authors of high antiquity, and great authority, lay down the necessity of actual seisin, in very strong terms, and exemplify it, by cases, which strikingly illustrate the doctrine. But even they do not represent it as so unbending as to be uncontrolled by reason. The distinction is taken, between things which lie in livery, and things which lie in grant; and with regard to the latter, the seisin in law, is enough, because they admit of no other; and as Lord Coke observes, "the book says, it would be unreasonable, the husband should suffer, for what no industry of his could prevent;" and further, "that the true reason is, that the wife has those inheritances which lie in grant, and not in livery, when the right first descends upon her, for she hath a thing in grant, when she has a right to it, and nobody else interposes to prevent it." And in another place, he says, "a husband shall be tenant by curtesy, in respect of his wife's seisin in law, where it was impossible for him to get an actual seisin," for "the favor which the law shows to the husband that has issue by his wife, shall not be lost, without some default in him." So, when describing what is livery of seisin, and defining the distinction between livery in deed, and livery in law, he says of the latter, "if the feoffee claims the land, as near as he dares to approach it, for fear of death or battery, such entry, in law, shall execute the livery in law." And as a proof

that even in his time, the common law had begun to untrammel itself of the rigorous rule, that livery of seisin, or entry, was indispensable to vesting a freehold, the fact may be cited, that livery of seisin was held unnecessary to a fine, devise, surrender, release or confirmation to lessee for years. The mode of conveyance, by lease and release, and some other modes, it is well known, arose out of an effort to disembarrass the transfer of titles of an idle form, which had survived the feudal system.

As it relates to the tenure by the curtesy, the necessity of entry grew out of the rule, which invariably existed, that an entry must be made, in order to vest a freehold (Co. Litt. 51) ; and out of that member of the definition of the tenure by curtesy, which requires that it should be inheritable by the issue. When a descent was cast, the entry of the mother was necessary, or the *heir made title direct from the grandfather, or other
*508] person last seised. But in Kentucky, we understand, the livery of seisin is unheard of. Freeholds are acquired by patent, or by deed, or by descent, without any further ceremonies ; and in tracing pedigree, the proof of entry, as successive descents are cast, is never considered as necessary to a recovery ; or in any mode affecting the course of descent.

If a right of entry, therefore, exists, it ought, by analogy, to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists ; as it is laid down in the books relative to a seisin in law, "he has the thing, if he has a right to have it." Such was not the ancient law ; but the reason of it has ceased. It has been shown, that in the most remote periods, exceptions had been introduced on the same ground ; and in the most modern, the rule has been relaxed upon the same consideration. We ought not to be behind the British courts in the liberality of our views, on the subject of this tenure. A husband, formerly, could not have curtesy of a use ; that is, where his wife was *cestui que use* (Perkins, Curtesy, fo. 89), and this continued to be the law, down to the time of Baron Gilbert (Law of Uses and Trusts 239); at present, it is fully settled in equity, that the husband shall have curtesy of a trust, as well as of a legal estate (2 Vern. 536 ; 1 P. Wms. 108 ; Atk. 606); of an equity of redemption ; a contingent use ; or money to be laid out in lands. The case made out in the bill of exceptions, is one in which there could not possibly have been any default in the husbands, since the disseisin by defendants, did not take place until after the death of George Mason, jr., and of consequence, after the transfer of title by the husbands, and after the devise took effect in favor of the plaintiff's lessor.

These points being disposed of, it only remains to consider the questions raised upon the introduction of the will of George Mason, jr., or rather of the codicil, under which the lessor of the plaintiffs makes title. Under a law of the state of Kentucky, and the decision of their courts upon it, a will with two witnesses, is sufficient to pass real estate ; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. The objection here is, that it does not appear from the exemplified copy, that this codicil was duly proved ; because the probate does not go to that codicil, but to another ; and secondly, because it appear to have been admitted to record, on the testimony of a single witness.
*509] *The probate purports "that the two codicils were proved by the oath of Daniel McCarty." From the exemplification, it appears, that

at three several dates, the testator added to his will, what he calls codicils, but as there is no signature to the first, we are satisfied, that the first and second were well considered as making but one ; and therefore, that the probate, although purporting to go to two codicils only, was well considered as going to this ; which but for the want of the signature to the first, could have been the third codicil. What is decisive on this subject, is, that the first two codicils have no subscribing witness, distinct from the last ; and the name of McCarty, the witness sworn, is subscribed to the second, or as the defendants contend it should be considered, to the third codicil.

With regard to the second exception to the sufficiency of the proof of this codicil, it can only be necessary to resort to adjudged cases, as they seem conclusive to this point. There were two witnesses to this codicil, to wit, Thompson Mason and McCarty. McCarty only was sworn, and the probate upon which it was ordered to be recorded, imports, that the two codicils were proved by the oath of Daniel McCarty. In the case of *Harper et al.* v. *Wilson et al.*, decided in the court of appeals of the state of Kentucky, in 1820, in which the right to lands was in controversy, the probate was in these words, "this will was produced in court, proved by the oath of Sarah Harper, a subscribing witness thereto, and ordered to be recorded." There was another subscribing witness to the will, and exception was taken to the sufficiency of the proof. The language of the court in that case was : "As to the proof of the execution of the will, it need only be remarked, that its admission to record, is sufficient to show that the witness by whom it was proven in that court, established every fact essential to its due execution ; and it is a settled rule, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it." 2 A. K. Marsh. 467. The same doctrine has been since fully recognised in the case of *Turner* v. *Turner*, 1 Litt. 103, adjudged in the same court, in 1822 ; and the identity of the certificate and facts in this case with those in the case of *Harper* v. *Wilson*, leaves nothing for this court to deliberate upon.

There is spread upon the record, a considerable body of testimony, taken by the court by which the will had been previously admitted to record, and which, upon its face, appears to have been taken in order to remove all doubt on the sufficiency of the will, and authenticity of the attestations to it. But as it does not appear to have been followed up by any order *of that court, it was not taken into view in the bill of exceptions, and [*510 made no part of the evidence in the court below. It, therefore, only required this remark, in order to prevent any misapprehension on this point. We are of opinion, that there was no error in the judgment below, and that it be affirmed, with costs.

Judgment affirmed.