

## SCOTT ET AL. V. WIDDINGTON.

[1 McLean, 193.]<sup>1</sup>

Circuit Court, D. Kentucky.

May Term, 1833.

WRIT OF RIGHT—TITLE  
ALLEGED—PROOF—VARIATION.

This was a writ of right brought by Robert E. Scott, Susan Scott and James C. Madison, citizens of Virginia, in which they demanded of the defendant [Henry Widdington] the land in controversy, &c. whereupon the said Robert G. Scott and Susan Scott say that they have a right to the farm and tenement aforesaid, with the appurtenances, and offer proof, &c. and issue, &c. After the evidence was heard, the defendant's counsel moved the court to instruct the jury to find for the defendant as the evidence did not correspond with the title alleged in the count the demandants having sued and counted as three separate demandants, each, equally interested, and entitled to the land in contest: whereas the proof is of title in Susan R. Scott and James C. Madison only, or of title in the said Robert E. Scott and Susan his wife, with the said James C. Madison in fee; and in Robert E. Scott for life, and said Susan in remainder, after the death of Robert E. Scott.

OPINION OF THE COURT. In this action great strictness is observed. The proof must correspond with the count. As the issue is on the title, and not on the right of possession only, as in the action of ejectment, the evidence of title must strictly conform to the title as set out in the count And the court think that there is in this case such a variance as must be fatal to the plaintiffs in their action. 851

The plaintiffs' counsel asked leave to suffer a non-suit, which the court granted, with the understanding that

the defendant's counsel should be heard against the right of the demandants to suffer a non-suit in this action.

<sup>1</sup> [Reported by Hon. John McLean, Circuit Justice.]

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