

Ricard Vs. Williams

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Ricard v. Williams - 20 U.S. 59 (1822)

U.S. Supreme Court Ricard v. Williams, 20 U.S. 59 (1822)

Ricard v. Williams

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ERROR TO THE CIRCUIT

COURT OF CONNECTICUT

SYLLABUS

Possession of land by a party, claiming it as his own in fee, is *prima facie* evidence of his ownership and seizin of the inheritance.

But possession alone, unexplained by collateral circumstances, evidences no more than the mere fact of present occupation by right the law will not presume a wrong, and a mere possession is just as consistent with a present interest under a lease for years or for life as in fee. It must depend on the collateral circumstances what is the quality and extent of the interest claimed by the party, and to that extent only will the presumption of law go in his favor. The declarations of the party while in possession, equally with his acts, must be good evidence for this purpose. If he claims only an estate for life, and that is consistent with his possession, the law will not, upon the mere fact of his possession, adjudge him to be in under a higher right or a larger estate.

If a party be in under title, and by mistake of law supposes himself possessed of a less estate in the land than really belongs to him, the law will adjudge him in possession of and remit him to his full right and title. For a mistake of law shall not in such case prejudice the right of the party, and his possession therefore must be held coextensive with his right.

It is a general rule that a disseizor cannot qualify his own wrong, but must be considered as a disseizor in fee.

But this rule is introduced only for the benefit of the disseizee, for the sake of electing his remedy.

And it must also appear that the party found in possession entered without right, for if his entry were congeable or his possession lawful, his entry and possession will be considered as limited by his right.

Presumptions of a grant arising from the lapse of time are applied to corporeal as well as incorporeal hereditaments.

They may be encountered and rebutted by contrary presumptions, and can never arise where all the circumstances are perfectly consistent with the nonexistence of a grant.

A fortiori they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant.

In general, the presumption of a grant is limited to periods analogous to those of the statute of limitations in cases where the statute does not apply.

Where the statute applies, the presumption is not generally resorted to, but if the circumstances of the case are very cogent and require it, a grant maybe presumed within a period short of the statute.

Under the laws of Massachusetts and Connecticut, the power of an administrator to sell the real estate of his intestate under an order of the court of probates must be exercised within a reasonable time after the death of the intestate.

The case of such a power to sell is not within the purview of the statute of limitations of Connecticut, which limits all rights of entry and action to fifteen years after the title accrues, but the reasonable time within which the power must be exercised is to be fixed by analogy to that statute.

One heir, notwithstanding his entry as heir, may afterwards, by disseizin of his co-heirs, acquire an exclusive possession upon which the statute will run both against his co-heirs and against creditors.

An heir may claim an estate by title distinct or paramount to that of his ancestor, and if his possession is exclusive under such claim against all other persons until the statute period has run, he is entitled to the protection of the bar.

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This was a suit instituted by the defendants in error against the plaintiff in error in the court below. The original action is commonly known in Connecticut by the name of an action of disseizin, and is a real action, final upon the rights of the parties and in the nature of a real action at the common law. The cause was tried upon the general issue, *nul tort, nul disseizin*, and a verdict being found for the demandants, a bill of exceptions was taken to the opinion of the court upon

matters of law at the trial.

The history of the case as it stands upon the record is in substance as follows. The demandants claimed the estate in controversy by purchase from the administrator of William Dudley at a sale made by him for the payment of the debts of his intestate pursuant to the laws of Connecticut, which authorize

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a sale of the real estate of any person deceased for the payment of his debts when the personal assets are insufficient for that purpose. In order to establish the title of William Dudley in the premises, the demandants proved that Thomas Dudley, the father of William, was in his lifetime possessed of the premises as parcel of what were called the Dudley lands, and died possessed of the same in 1769, leaving seven children, of whom William was eldest, being of about the age of fourteen years, and Joseph Gerriel, the youngest, being about four years of age. Upon the death of his father, Joseph Mayhew, the guardian of William, entered into possession of the Dudley lands and of the demanded premises as parcel, taking the rents and profits in his behalf during his minority, and upon his arrival of age, William entered and occupied the same, taking the rents and profits to his own use until his death, which happened in the year 1786, all his brothers and sisters being then living. During the life of William, no other person claimed any right to enter or occupy the premises except that his mother used to receive one-third of the rents and profits, until she died in the year 1783. During his life and while in possession of the premises, William always declared that he held the same only for life, and therefore would not allow any improvements on them at his expense; no leases were made by him except for short periods, and no attempt was made by him to sell or convey the premises, and he declared that he had no right to sell them and that upon his death they would descend to his son Joseph Dudley, under whom the tenant derived

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his title in the manner hereafter stated. No administration was ever taken in Connecticut upon the estate of William Dudley until 1814, and his estate was then declared insolvent, and in 1817 the lands in controversy were sold by the administrator by order of the court of probates for the payment of the debts found due under the commission of insolvency.

To rebut the title of the demandants and to establish his own, the tenant proved that William Dudley died intestate leaving seven children, the eldest of whom was Joseph Dudley. Upon the death of his father, the guardian of Joseph (the latter being within age), entered into possession of the Dudley lands and the demanded premises as parcel and used and occupied the same, receiving the rents and profits in behalf of Joseph until his arrival of age, when Joseph himself entered into possession, claiming them as his own and taking the rents and profits to his own use, and holding all other persons out of possession, until the year 1811 and 1812, when he sold the demanded premises, and the tenant, either by direct or mesne conveyances under Joseph, came into possession, and has ever since held the premises in his own right. In the year 1811, Samuel Dudley, the brother of Joseph, claimed title to some of the Dudley lands possessed by Joseph and brought an action of ejectment for the recovery of them, but the suit was compromised by Joseph's paying him about \$2,000, and about the same time Joseph settled with another of his brothers, but did not pay him anything. But Joseph never admitted that his brothers

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or sister had any interest in the lands, and said he could hold them, and did hold them in the same manner as he held the lands in Massachusetts.

The will of Governor Dudley, which was admitted to probate in Massachusetts in 1720, was also in evidence, but neither party established any privity or derivation of title under it.

Upon these facts, the tenant prayed the court to instruct the jury that the demandants had not made out a title in themselves nor in William Dudley. Not in

themselves, because the sale by the administrator to the demandant was void by force of the statute regarding the sale of disputed titles, the tenant being in possession of the property at the time of the sale, claiming it as his own, and that William Dudley had acquired no title to the property in question by possession, as he claimed to hold the same only during his life and could therefore acquire no title except for life by any length of possession, and that if he could acquire title by possession, if this estate descended from Thomas Dudley, said William could not in seventeen years acquire a title against his brothers and sisters, or at least against those of them who had not been of full age for five years before the death of said William, and if the demandants could recover at all, it could only be for that proportion of the estate which descended from William as one of the heirs of Thomas Dudley.

The tenant further prayed the court to instruct the jury that if they found that Joseph Dudley had, for more than fifteen years before he sold the land in controversy, been in possession of the same, exclusively

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claiming them as his own, and holding out all others, he had gained a complete title to the property.

The tenant further claimed that the court ought to have instructed the jury that under the circumstances attending the possession of said lands by William Dudley, the father, and by Joseph Dudley, and the length of time which had elapsed since the death of said William, without any claim on the part of the creditors of said William, the jury might presume a grant from some owner of the land to William for life, with remainder to his eldest son. But the court did charge and instruct the jury that the sale by the administrator under an order of court was not within the statute regarding disputed titles, and was not therefore void. That William Dudley, by mistaken constructions of the will of governor Dudley, might have claimed an estate for life in the premises, and that such mistake would not operate to defeat his title by possession. That the length of time in which this estate had been occupied by William and Joseph Dudley would bar any claims by

the other children of Thomas Dudley deceased, and that the jury were authorized to presume a grant by said children to their brother William Dudley deceased, and therefore if the demandants recovered, they must recover the whole of the premises.

The court also charged the jury that as against the creditors of William Dudley, neither Joseph Dudley nor the tenant had gained title to the lands in controversy by possession, and that the jury were not authorized to presume a grant to Joseph.

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To which several opinions of the court, the tenant by his counsel excepted.

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MR. JUSTICE STORY delivered the opinion of the Court.

The principal questions which have arisen and have been argued here upon the instructions given by the circuit court, and to which alone the Court deems it necessary to direct their attention are first whether upon the facts stated, a legal presumption exists that William Dudley died seized of an estate of inheritance in the demanded premises, and if so, secondly, whether an exclusive possession of the demanded premises by Joseph Dudley and his grantees after the death of William under an adversary claim for thirty years is a bar to the entry and title of the demandants under the administration sale.

It is to be considered that no paper title, of any sort is shown in William Dudley or his son Joseph. Their title, whatever it may be, rests upon possession, and the nature and extent of that possession must be judged of by the acts and circumstances which accompany it and qualify, explain, or control it. Undoubtedly if a person be found in possession of land claiming it as his own in fee, it is *prima facie* evidence of his ownership and seizin of the inheritance. But, it is not the possession alone, but the possession accompanied with the claim of the fee that

gives this effect by construction of law to the acts of the party. Possession, *per se*, evidences

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no more than the mere fact of present occupation by right, for the law will not presume a wrong, and that possession is just as consistent with a present interest, under a lease for years or for life, as in fee. From the very nature of the case, therefore, it must depend upon the collateral circumstances, what is the quality and extent of the interest claimed by the party, and to that extent and that only will the presumption of law go in his favor. And the declarations of the party, while in possession, equally with his acts, must be good evidence for this purpose. If he claims only an estate for life, and that is consistent with his possession, the law will not, upon the mere fact of possession, adjudge him to be in under a higher right or a larger estate. If, indeed, the party be in under title, and by mistake of law he supposes himself possessed of a less estate in the land than really belongs to him, the law will adjudge him in possession of and remit him to his full right and title. For a mistake of law shall not in such case prejudice the right of the party, and his possession therefore must be held coextensive with his right. This is the doctrine in Littleton, s. 695, cited at the bar, and better authority could not be given, if indeed so obvious a principle of justice required any authority to support it. But there the party establishes a title in point of law greater than his claim, whereas in the case now supposed the party establishes nothing independent of his possession, and that qualified by his own acts and declarations. This is the distinction between

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the cases, and accounts at once for the different principles of law applicable to them.

It has also been argued at the bar that a person who commits a disseizin cannot qualify his own wrong, but must be considered as a disseizor in fee. This is generally true, but it is a rule introduced for the benefit of the disseizee for the

sake of electing his remedy. For if a man enter into possession under a supposition of a lawful limited right, as under a lease, which turns out to be void, or as a special occupant, where he is not entitled so to claim, if he be a disseizor at all, it is only at the election of the disseizee. Com.Dig. Seizin. F. 2 & F. 3; 1 Roll. Abrid. 662, l. 45. *Id.*, 661. l. 45. There is nothing in the law which prevents the disseizee from considering such a person as a mere trespasser at his election, or which makes such an entry, under mistake for a limited estate, a disseizin in fee absolutely and at all events, so that a descent cast would toll the entry of the disseizee. But were it otherwise, in order to apply the doctrine at all, it must appear that the party found in possession entered without right, and was in fact a disseizor, for if his entry were congeable, or his possession lawful, his entry and possession will be considered as limited by his right. For the law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful the commencement and continuance of which is not proved to be wrongful. And this upon the plain principle that every man shall be presumed to act in obedience to his duty

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until the contrary appears. When, therefore, a naked possession is in proof, unaccompanied by evidence as to its origin, it will be deemed lawful and coextensive with the right set up by the party. If the party claim only a limited estate, and not a fee, the law will not, contrary to his intentions, enlarge it to a fee. And it is only when the party is proved to be in by disseizin that the law will construe it a disseizin of the fee and abridge the party of his right, to qualify his wrong.

Now in the case at bar it is not proved of what estate Thomas Dudley died seized in the premises. His possession does not appear to have been accompanied with any claim of right to the inheritance. It might have been an estate for life only, and as such have had a lawful commencement. If it were intended to be argued that he had a fee in the premises, it should have been established by competent proof, that he was in possession, claiming a fee by right or by wrong. No such fact appears. The only fact leading even to a slight presumption of that nature is that

his widow took one-third of the rents and profits during her life. But whether this was under a claim of dower or any other right is not proved. The circumstance is equivocal in its character, and is unexplained, and the inference to be deduced from it of a descendible estate in her husband is rebutted by the fact that immediately on his death, his son William entered into the premises, claiming a life estate, and held them during his life as his own, without any claim on the part of the co-heirs of his father to share in the estate. There is then nothing in the case from which it can be judicially

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inferred that Thomas was ever seized of an estate of inheritance in the premises, and of course none of a descent from him to his heirs.

Then as to the estate of his son William in the premises. It is argued that William had an estate in fee by right or by wrong. That if his entry, either in person, or by his guardian, was without right, it was a disseizin, and invested him with a wrongful estate in fee. If with right, then it must have been as a co-heir of his father, and a grant ought to be presumed from the other co-heirs to him, releasing their title, and confirming his.

The doctrine as to presumptions of grants has been gone into largely on the argument, and the general correctness of the reasoning is not denied. There is no difference in the doctrine whether the grant relate to corporeal or incorporeal hereditaments. A grant of land may as well be presumed as a grant of a fishery or of common or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur unless there was a transmutation of title to or an admission of an existing adverse title in the party in possession. They may therefore be encountered and rebutted by contrary presumptions, and can never fairly arise where all the circumstances are perfectly consistent with the nonexistence of a grant.

A fortiori, they cannot arise where the claim is of such a nature as is at variance with the supposition of a grant. In general, it is the policy of courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations in cases where the statute does not apply. But where the statute applies, it constitutes ordinarily a sufficient title or defense, independently of any presumption of a grant, and therefore it is not generally resorted to. But if the circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other, and where the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant within a period short of the statute of limitations. See Phillips on Evidence ch. 7, s. 2, 126. *Foley v. Wilson*, 11 East 56.

If we apply the doctrines here asserted to the case at bar, we may ask in the first place what ground there is to presume any grant of the premises to William Dudley, and if any, what was the quantity or quality of his estate? It has been already stated that there is no sufficient proof that his father died seized of a descendible estate in the premises, and if so, the entry of William by his guardian or in person cannot be deemed to have been under color of title as heir, and in point of fact he never asserted any such title. For the same reason, no estate can be presumed to have descended to his co-heirs, and if so, the very foundation fails upon which the presumption of a grant from them to William can be built, for if they had no title and asserted no title, there is no reason

to presume that he or they sought to make or receive an inoperative conveyance. There is no pretense of any presumption of a grant in fee from any other person to William, and as there is no evidence of any connection with the will of Governor Dudley or of any claim of title under it by William, there does not seem any room to presume that he was in under that will upon mistaken constructions of his title derived from it. There is this further difficulty in presuming a grant from the co-heirs to William that at the time of his own entry as well as that of his guardian, all of

them were under age, and incapable of making a valid conveyance. During this period, therefore, no such conveyance can be presumed, and yet William, during all this period, claimed an exclusive right, and had an exclusive possession of the whole to his own use, and his subsequent possession was but a continuation of the same claim without any interference on the part of the co-heirs. In point of fact, the youngest brother arrived at age about the time of William's death, and as to two others of the co-heirs, the statute of limitations of Connecticut as to rights of entry would not then run against them. The presumption of a grant from them is therefore in this view also affected with an intrinsic infirmity.

In addition to all this, William never claimed any estate in fee in the premises. His declaration uniformly was that he had a life estate only, and that upon his death they would descend to his son Joseph. Of the competency of this evidence to explain the nature of his possession and title no doubt can reasonably be entertained. His title being evidenced

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only by possession, it must be limited in its extent to the claim which he asserted. If indeed it had appeared that he was in under a written title which gave him a larger estate, his mistake of the law could not prejudice him, but his seizin would be coextensive with and a remitter to that title. But there is no evidence of any written title or of any mistake of law in the construction of it. For aught that appears, William's estate was exactly what he claimed, a life estate only, and the inheritance belonged to his son Joseph. It is material also to observe that the acts of the parties and the possession of the estates during the period of nearly fifty years are in conformity with this supposition and at war with any other. Why should William's brothers and sisters have acquiesced in his exclusive possession during his whole life if the inheritance descended from their father? Why should Joseph's brothers and sisters have acquiesced in his exclusive possession during a period of twenty-five years without claim if their father William was seized of the inheritance? Why should the guardians of William and Joseph have successively entered into the premises, claiming the whole in right of their respective wards, if their title was not deemed clearly and indisputably an exclusive title or if they were

in by descent under the title of their fathers? If, indeed, a presumption of a grant is to be made, it should be of a grant conforming to the declarations and acts of possession of the parties during the whole period, and if any grant is to be presumed from the facts of this case, it is a grant of a particular estate to William, with a remainder of the

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inheritance to Joseph, or in the most favorable view of an estate tail to William, upon whose death the estate would descend to Joseph, as his eldest son, *per formam doni*. If Thomas, the grandfather, were proved to have been the owner of the fee, there is nothing in the other circumstances which forbids the presumption of such a grant from him; but as the cause now stands, it may as well have been derived from some other ancestor or from a stranger. It is therefore the opinion of this Court that the circuit court erred in directing the jury that William, by mistaken constructions of the will of Governor Dudley, might have claimed an estate for life in the premises and that such mistake would not operate to defeat his title by possession, for there was no evidence that William ever claimed under that will, and also erred in instructing the jury that it was authorized to presume a grant by the children of Thomas to William. The compromise entered into by Joseph with two of his brothers is not thought to change the posture of the case, because that compromise was made with an explicit denial of their right and is therefore to be considered as an agreement for a family peace.

The other question in the cause is of great importance, and if decided one way will probably put an end to further controversy. It has been very fully and ably argued at the bar, and does not, from anything before us, appear to have received a final adjudication in the state courts of Connecticut. It must therefore be examined and decided upon principle. By the laws of Connecticut (as has been already

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stated), the real estate of an intestate is liable to be sold for the payment of debts where there is a deficiency of personal estate. The administrator, in virtue of his

general authority, has no right to meddle with the real estate, but derives this special authority from the order of the court of probates, which possesses jurisdiction to direct a sale, upon a proper application, and proof of the deficiency of the personal assets. This power or trust, call it which you please, when granted or ordered, is not understood to convey any estate to the administrator in the lands of the intestate. He derives simply an authority to sell from the court, and upon the sale makes a conveyance to the purchaser, and the estate passes to the purchaser upon his entry into the land by operation of law, so that he is in under the estate of the intestate. As long as an administration legally subsists or may be legally granted, this power over the land may be exercised if the land remains in possession of the heirs, and it is not defeated simply by an alienation or disseizin of the heirs. *Drinkwater v. Drinkwater*, 4 Mass. 354, 359; Jenk.Cent. 184, pl. 85. By analogy also to other cases of a like nature at the common law, as for instance a power given by a will to executors to sell an estate for payment of debts, it may be true that a descent cast will not toll an entry, for there is a distinction between a right of entry and a mere power. Litt. § 169; Jenk.Cent. 184, pl. 85; Bro.Abr. Devise, pl. 36; Litt. § 391; Co.Litt. 240. The former is in general barred by a descent cast, but the

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latter is not. On this, however, it is not necessary to express any opinion.

It does not appear that at the time of granting the administration of this estate, any statutable limitation of the period within which an original administration might be granted existed in Connecticut, though a limitation generally to seven years after the death of the party has been since introduced. [[Footnote 1](#)] And the present administration, though granted after the lapse of 28 years from the death of William Dudley, must be considered as valid, it having been allowed by a court of competent and exclusive jurisdiction, whose decision we are not at liberty to review.

Still, however, the question recurs whether a power of sale thus derived under the law, and not from the act of the party, is to be considered as a perpetual lien on

the land of which the intestate died seized, and capable of being called into life at any distance of time, and under any circumstances, whatever may be the mesne conveyances, disseizins, or descents which may have taken place. If it be of such a nature, great public mischiefs must inevitably occur, and many innocent purchasers, fortified as their possession may be by length of time against all interests in the land, may yet be the victims of a secret lien or power which could not be foreseen or guarded against and which may spring upon their titles when the original parties to the transactions are

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buried in the grave. The principles of justice would seem to require that the law should administer its benefits to those who are vigilant in exercising their rights, and not to those who sleep over them. It is always in the power of creditors to compel an administration to be taken upon an estate by application to a court of probates, and if the next of kin decline the office, it is competent for the court to appoint any other suitable person. So that if creditors do not choose to act, the loss or injury ought rather to fall on them than on those who are meritorious purchasers without the means of knowledge to guard them against mistake. A power to sell the estate for payment of debts, being created by the law, ought not to be so construed as to work mischiefs against the intent of the law. It ought to be exercised within a reasonable time after the death of the intestate, and gross neglect or delay on the part of the creditors for an unreasonable time ought to be held to be a waiver or extinguishment of it. This appears to be the doctrine in Massachusetts, *Gore v. Brazier*, 3 Mass. 523, 542; *Wyman v. Brigden*, 4 *id.* 150, 155, whose laws on this subject are like those of Connecticut, and is so just in itself that unless prevented by authority, we should not hesitate to adopt it. There is no decision in Connecticut which, to our knowledge, controverts this doctrine, and it stands supported by the very learned opinion of her late Chief Justice in the case of *Sumner v. Childs*, 2 Conn. 607. There

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are many cases where indisputable liens on land may be lost by lapse of time and transmutation of the property. And even the rights of mortgagors to redeem and of mortgagees to enforce payment out of the land may be lost by presumptions or laches arising from time.

What then is to be deemed a reasonable time for the exercise of this power to sell? It has been argued that the case of such a power is within the purview of the statute of limitations of Connecticut, and if not, that the reasonable time for its exercise is to be fixed by analogy to that statute. The statute provides that no person shall, at any time thereafter, make entry into any lands or tenements, but within fifteen years next after his right or title shall first descend or accrue to the same, with a saving in favor of infants, *femes covert*, &c., of five years after the removal of the disability. [[Footnote 2](#)] The language of the statute would seem to apply merely to rights of entry, but it has been the uniform construction of the courts of the state that it also takes away all rights of action, and therefore bars all real actions after that period. [[Footnote 3](#)] Now the argument at the bar is that the words right or title first accrued, refer solely to the commencement of the original title under which the party claims, and not to his own accession to the title. But it appears to us that this

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construction of the statute cannot be maintained. The title against which the statute runs is a present right of entry, and it is admitted that when once it so begins to run, no devolution of the same title, and no supervening disability, will stop its operation. When, therefore, it speaks of a right or title first accrued, it means a new right or title first accruing to the party, and not the transfer of an old title. Against titles *in esse* at the time of the adverse possession the statute was intended to run, but titles which should afterwards come *in esse*, were not within the provision of the statute, because they could not be enforced within the period and it would be unjust to bar future rights in respect to which there could by no possibility be an imputation of laches. And such has been the uniform construction of all the statutes which contain a clause of this nature. *Stanford's Case*, cited at the bar and referred to in Cro.Jac. 61, is directly in point, and it would be easy to

multiply instances under the statute of limitations and the statute of fines to the same effect. [[Footnote 4](#)] If, indeed, the construction were otherwise, it would not help the present case, for the right of entry of the purchaser did not accrue until after the conveyance to him, and if he should then be deemed in under the estate of the intestate and in privity of title, it would be a new right growing out of the exercise of a power conferred by law, and no more barred than a right of entry upon an extent after a fine levied,

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and five years past, where the judgment was obtained before the fine. [[Footnote 5](#)]

But we do think it is a case clearly within the same equity as those which are governed by the statute of limitations, and that by analogy to the cases where a limitation had been applied to other rights and equities not within the statute, the reasonable time within which the power should be exercised ought to be limited to the same period which regulates rights of entry. It would be strange indeed that when the estate of the heirs in the land, which is but a continuation of the estate of the intestate, is extinguished by the statute, the estate should still be considered as a subsisting estate of the intestate himself. That the administrator should possess a power over the property which the intestate could not possess if living, and that a lien created by operation of law should have a more permanent duration of efficacy than if created by the express act of the party. The convenience of mankind, the public policy of protecting innocent purchasers, and the repose of titles honestly acquired require some limitation upon powers of this nature, and we know of none more just and equitable than this, that when the right of entry to the land is gone, or the estate is gone by an adverse possession from those who held as heirs or devisees, the whole interest in the land, the power of the administrator to make sale of the land for payment of debts, is gone also. In this opinion we do but follow the doctrine which has been distinctly intimated

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both in the Massachusetts and Connecticut courts. *Gore v. Brazer*, 3 Mass. 523, 542; *Wyman v. Brigden*, 4 Mass. 150, 155; *Sumner v. Childs*, 2 Conn. 607.

The remaining consideration under this head is whether the possession of Joseph Dudley can be considered as an adverse possession so as to toll the right of entry of the heirs, and consequently extinguish by the lapse of time their right of action for the land, as well as extinguish by analogy of principle the power of the administrator to sell the land. It is said that the entry of Joseph into the premises is consistent with the potential right of the creditors; that he had a right to enter as a co-heir of his father, and if he entered as co-heir, his possession was not adverse, but was a possession for the other heirs and creditors, and he could not afterwards hold adversely or change the nature of his possession, for the creditors might always elect to consider him their trustee. There is no doubt that in general the entry of one heir will enure to the benefit of all and that if the entry is made as heir, and without claim of an exclusive title, it will be deemed an entry not adverse to, but in consonance with, the rights of the other heirs. But it is as clear that one heir may disseize his co-heirs and hold an adverse possession against them as well as a stranger. And notwithstanding an entry as heir, the party may afterwards, by disseizin of his co-heirs, acquire an exclusive possession upon which the

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statute will run. An ouster or disseizin is not, indeed, to be presumed from the mere fact of sole possession, but it may be proved by such possession accompanied with a notorious claim of an exclusive right. And if such exclusive possession will run against the heirs, it will, by parity of reason, run against the creditors. For the heirs, *qua* heirs, are in no accurate sense in the estate as trustees of the creditors. They hold in their own right by descent from their ancestor, and take the profits to their own use during their possession, and the most that can be said is that they hold consistently with the right of the creditors. The creditors, in short, have but a lien on the land which may be enforced through the instrumentality of the administrator acting under the order of the court of probates.

But in order to apply the argument itself, it is necessary to prove that the ancestor had an estate of inheritance and that the party entered as heir. Now in the case at bar, all the circumstances point the other way. There is not, as has been already intimated, any proof that William Dudley died seized of an inheritance in the land, and there is direct proof that he asserted the inheritance to be in his son Joseph, and the entry of the guardian of Joseph as well as his own entry after his arrival of age was under an exclusive claim to the whole, not by descent, but by title distinct or paramount. There is certainly no incapacity in an heir to claim an estate by title distinct or paramount to that of his ancestor, and if his possession is exclusive under such claim, and he holds all other persons out until the statute period

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has run, he is entitled to the full benefit and protection of the bar. It appears to us, therefore, that the jury ought to have been instructed that if it was satisfied that Joseph's possession was adverse to that of the other heirs, and under a claim of title distinct from or paramount to that of his father, during his 25 years of exclusive possession, the entry of the purchaser, under the administrator's sale, was not congeable, and that the power of the creditor over the estate was extinguished. There was therefore error in the opinion of the court to the jury that as against the creditors of William Dudley, neither Joseph nor the tenant had gained any title to the land in controversy by possession.

For these reasons the judgment of the circuit court must be

Reversed and the cause remanded with directions to the court to order a venire facias de novo.

[[Footnote 1](#)]

See the statute in Revised Laws of Conn., tit. 59, sec. 1, p. 309; 1 Swift's System 335.

[[Footnote 2](#)]

See the statute in Revised Laws of Conn. tit. 59, § 1, 309; 1 Swift's System 335.

[[Footnote 3](#)]

1 Swift's System 335, 336; *Sumner v. Child*, 2 Conn. 607, 615.

[[Footnote 4](#)]

Bac.Abr. limitations, B; *id.*, Fines and Recoveries, F; Comyn's Dig. Fine, K 2.

[[Footnote 5](#)]

Bac.Abr. Fines, &c.;, F. cites 1 Mod. 217.

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