Jackson Vs. Huntington

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SooperKanoon Citation : sooperkanoon.com/79308

Court : US Supreme Court

Decided On : 1831

Appeal No. : 30 U.S. 402

Appellant : Jackson

Respondent : Huntington

Judgement :

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U.S. Supreme Court Jackson v. Huntington, 30 U.S. 5 Pet. 402 402 (1831)

Jackson v. Huntington

30 U.S. (5 Pet.) 402

ERROR TO THE DISTRICT COURT OF

THE NORTHERN DISTRICT OF NEW YORK

SYLLABUS

Where one having no title conveys to a third person, who enters under the conveyance, the law holds him to be a disseizor.

That an actual or constructive possession is necessary at common law to the transmission of a right to lands is incontrovertible. It is seen in the English doctrine of an heir's entering in order to transmit it to his heirs, but whatever be the English doctrine and of the other states as to the right of election to stand disseized, it is certain that the New York courts have denied that right, both as to devises and common law conveyances, without the aid of a statute repealing the common law.

This Court can only reverse a judgment when it is shown that the court below has erred. It cannot proceed upon conjecture of what the court below may have laid down for law; it must be shown in order to be judged what instructions were in fact given and what were refused.

Adverse possession is a legal idea, admits of a legal definition, of legal distinctions, and is therefore correctly laid down to be a question of law.

Adverse possession may be set up against any title whatsoever, either to make out a title under the statute of limitations or to show the nullity of a conveyance executed by one out of possession.

The common law generally regards disseizin as an act of force, and always as a tortious act; yet out of regard to having a tenant to the precipe, and one promptly to do service to the lord, it attaches to it a variety of legal rights and incidents.

Rights accruing under acts of limitation are recognized in terms as *prima facie* originating in wrong, although among the best protections of right.

If there be a tenancy in common, the law appears to be definitively settled in New York that the grantee of one tenant in common for the whole, entering on such conveyance, may set up the statute against his co-tenants in common.

The plaintiff in error in 1824 instituted an action of ejectment in the District Court of the United States for the Northern District of New York for the recovery of a tract of land situated in the Village of Utica and the County of Oneida in the Northern District of New York. The cause was tried at January term, 1827, and a verdict and judgment were rendered for the defendant. The plaintiff excepted to the opinion of

the court on various points of evidence and of law presented in the course

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of the trial, and the court sealed a bill of exceptions. The plaintiff sued out a writ of error to this Court.

The bill of exceptions states at large all the evidence and proceedings on the trial of the cause.

The title of the lessor of the plaintiff and that of the defendant, as exhibited in the evidence contained in the bill of exceptions, was as follows:

Philip Schuyler purchased Cosby's manor, sold by the Sheriff of the County of Albany for arrears of quit rent, under a warrant from the Chief Justice of the State of New York dated May 7, 1772. This property was conveyed to Philip Schuyler by a deed executed by the Sheriff of the County of Albany dated July 20, 1772.

General John Bradstreet made his last will and testament on 23 September, 1774. The will, after providing for the adjustment of his accounts, he being in the British service, and devising a farm to John Bradstreet Schuyler, son of Colonel Schuyler, and some legacies, proceeds

"All the rest of my estate, real, and personal I devise and bequeath to my two daughters equally, to be divided between them as tenants in common in fee. But I charge the same with the payment of one hundred pounds sterling per annum to their mother during her life. Notwithstanding the former devise for the benefit of my wife and daughters, I empower my executors to do all acts and execute all instruments which they may conceive to be requisite to the partition of my landed estate, and I devise the same to them as joint tenants, to be by them sold at such time and in such manner as they shall think most for the interest of my daughters, to whom the net produce shall be paid in equal shares, the sum of one hundred pounds sterling per annum being first deducted, or a capital to secure the same set apart for an annuity to my wife, as aforesaid. I order that Doctor Bruce have one hundred pounds for his trouble and for his kindness to me; my watch I give to

Mr. Gould as a mark of my friendship. I leave funeral expenses to the discretion of my executors, and I appoint for the execution of this my will the said Colonel Philip Schuyler and William Smith, Esq. New York."

Martha Bradstreet, one of the daughters of General Bradstreet, made her will on 15 May, 1781, and devised to

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her mother, Mrs. Mary Bradstreet, the produce and interest of her estate, real and personal, during her life, and after her decease she devised one equal third of her estate, real and personal, to her sister Elizabeth Livius, her heirs and assigns, to be at her disposal independent of her husband; one-third part to Samuel Bradstreet and Martha Bradstreet, children of her late brother Samuel Bradstreet, and to their heirs, with benefit of survivorship, the produce of such one-third part, and part of the principal, to be applied to their maintenance and education, if necessary. The remaining one-third she gave to her sister Agatha, wife of Charles Du Belamy, during her life, independent of her husband; after his death, she surviving, to her in fee, but if she died before her husband, to her children; but if she survived her husband, and had no children, and should not dispose of the same by will, the same should go to Elizabeth Livius and her heirs. A like devise of the share given to Elizabeth Livius was made in favor of her sister Agatha if she should die without disposing of her share and without issue.

Sir Charles Gould was appointed sole executor of this will, and authorized to act relative to the estate of the testatrix in America, by the following provision:

"And I do authorize my said executor to sell and dispose of such real estate as I may be entitled to in North America or elsewhere, and to execute conveyances for the same, and to place out my moneys upon such securities as he shall deem proper, and in such manner and form, as to the shares devised to my sister Agatha, and to my nephew and niece, Samuel and Martha, respectively, as shall be conformable to the provisions of the will in respect to each of those shares."

It was in evidence that Martha Bradstreet, the testatrix, and John and Mary Bradstreet, were deceased.

The will of Elizabeth Livius, deceased, purporting to be executed on 20 November, 1794, was offered in evidence. The court, not considering it duly proved, refused to permit it to be read to the jury, to which opinion an exception was taken by the plaintiff. By that will, Mrs. Martha Bradstreet, the lessor of the plaintiff and the daughter of Samuel Bradstreet, the brother of Mrs. Livius, then deceased, was made her sole heir. The provisions of the will were:

"I hereby constitute and appoint my dear niece, Martha Bradstreet,

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daughter of my late brother Samuel Bradstreet, major of the fortieth regiment of foot, to be my sole heir, to whatever estate, real or personal, I may die possessed of, to be paid or delivered unto her at the age of twenty-one years or day of marriage, whichever may first happen, provided she marries with the consent of my most respected friend, Sir Charles Morgan, Bart., whom I hereby appoint executor of this my last will and testament. But in case she should die before she attain twenty-one years of age or before she be married as aforesaid, I then appoint her brother, Samuel Bradstreet, a lieutenant in the 25th regiment of foot, to be my heir in her place and stead."

Martha Bradstreet, the devisee and the lessor of the plaintiff, afterwards, with the consent of Sir Charles Morgan, married Matthew Codd, but being divorced from her husband, she resumed her original name. The evidence to prove the assent of Sir Charles Morgan to this marriage was excepted to by the counsel for the defendant, and the exception was sustained. To this ruling of the district court the plaintiff excepted.

The plaintiff also gave in evidence a map of the whole tract of land conveyed to Philip Schuyler by the Sheriff of the County of Albany in 1772, and proved by Mr. John R. Bleecker, who was sworn as a witness, that said map was in the handwriting of his grandfather, that he, the witness, received it of his own father,

Rutger Bleecker, deceased, and that he, the witness, holds certain parts of said land under title derived from his said father, who also in his lifetime was in possession of the same pursuant to a partition deed thereinafter mentioned and according to the allotments on the said map, which said map appeared to have been made on 31 August, 1780, and was stated to be in pursuance of a survey of said tract.

And there was also given in evidence a deed of partition between Philip Schuyler and Rutger Bleecker, dated 19 December, 1786, whereby and wherein lot No. 97, as described on the map, was released by Rutger Bleecker to Philip Schuyler, and the counsel for the said James Jackson also gave in evidence and proved that the premises in question, upon the trial of that issue, were part of the lot No. 97.

On 16 May, 1794, a deed was executed by Philip Schuyler and others, of which the following is an abstract:

"The parties were, Philip Schuyler, of the County of Albany in the State of New York, Esquire, executor of the last will and testament of John Bradstreet, deceased and hereinafter mentioned, of the one part, and Agatha Evans, of the City of New York, in the State of New York, widow, one of the daughters of the said John Bradstreet, deceased, and Edward Goold, of the same place, merchant, attorney to Sir Charles Gould, Knight, the only executor of the last will and testament of Martha Bradstreet, deceased, the other daughter of the said John Bradstreet, of the other part."

It recites the will of General John Bradstreet and that Philip Schuyler, at the time of the making thereof, was seized in trust for the said John Bradstreet of one undivided fourth part of the tract of land described in the partition deed executed by himself and Rutger Bleecker (together with other lands), the death of William Smith, his co-executor, and that Agatha Evans, formerly Agatha Du Bellamy, is one of the daughters of John Bradstreet. It also recites the will of Martha Bradstreet, the daughter of John Bradstreet, and the devises in the same of one-

third to Samuel and Martha Bradstreet, children of her brother Samuel Bradstreet, deceased, one-third to his sister Agatha, then the wife of Charles Du Bellamy, afterwards Agatha Evans, the wife of Charles John Evans, and the remaining one-third to her sister Elizabeth Livius, and that partition had been made among the proprietors of the tracts in the manner of Cosby, describing the lots which fell to Schuyler, as trustee of John Bradstreet, and among them lot No. 97; and that the same had, with other lots which fell to Schuyler in his own right, been conveyed to him by the deed of partition. The deed states that the said Philip Schuyler,

"as well to invest the said Agatha Evans with a legal title to her proportion of the said lands and tenements, devised to her by virtue of the will of the said John Bradstreet and Martha Bradstreet, as to convey the rest and residue thereof to the said Edward Goold in trust for the said persons who may be entitled to the benefit thereof under the will of the said Martha Bradstreet,"

and in consideration of ten shillings, &c.;, hath,

"by virtue also of the power and authority with which he is so as aforesaid invested and of all

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other powers which he may lawfully claim as executor,"

and doth "grant, bargain, sell, alien, release, and confirm" to Mrs. Evans and Edward Goold and their heirs and assigns the said lands which fell to the share of the said Philip Schuyler, as a trustee for the said John Bradstreet, (describing them at length, and including lot No. 97) with the reversion and reversions, &c.;, and all the right, title, &c.;, in law or equity, &c.; (in the usual form), to have and to hold, &c.;, to the said Agatha Evans and Edward Goold, their heirs and assigns, in manner following, *viz.,* two equal undivided third part to Mrs. Evans, and the remaining one undivided third to the said Edward Goold, his heirs and assigns,

"and upon the following trusts -- that is to say, to sell the same from time to time as may be most expedient, and every or any parcel thereof, and after deducting the

charges of sale and other contingent expenses attending the said trust, to divide the residue of the money to arise from such sale to and among the said advisees, Samuel Bradstreet and Martha Bradstreet, and the said Elizabeth Livius, and their heirs, executors, and administrators, according to their several interests in the estate of the said Martha Bradstreet, by virtue of her will or to such persons as would be entitled thereto, upon the happening of any of the said contingencies in the said will mentioned,"

&c.; The deed further contains covenants against Schuyler's own acts or encumbrances and for further assurance.

It was in evidence that Mrs. Martha Bradstreet was twenty-one years of age on 10 August, 1801; that she and her husband came to the United States to reside in 1797, and that she has ever since resided therein. The acts of the Legislature of New York, which enable alienees to take and hold lands, were also in evidence.

A deed was given in evidence by the plaintiff of the following purport. It was executed on 22 October, 1804, at the City of New York by Edward Goold to Martha Codd, late Martha Bradstreet, wife of Matthew Codd of Utica, of New York. It recites the conveyance executed by Philip Schuyler on 16 May, 1794, Agatha Evans, and the said Edward Goold, merchant, and attorney to Sir Charles Gould, the only executor of Martha Bradstreet, deceased, a daughter of General Bradstreet, and all the purposes of that indenture, and that Martha Codd, late Martha Bradstreet, by the will of Elizabeth

Livius, has, since the execution of the deed from Philip Schuyler, become entitled to all the estate of Elizabeth Livins, conveyed by the deed of Schuyler to Edward Goold, in trust for Sir Charles Gould, as executor of the will of Martha Bradstreet, not sold or conveyed according to the trust, and that Edward Goold, having became a bankrupt, has been ordered by chancery to transfer and convey to Martha Codd all the estate vested in him as trustee, and that he is willing to convey to the said Martha Codd all the estate vested in him as aforesaid, as her

trustee, to which she may be entitled to under the will of Martha Bradstreet. The deed then proceeds to convey to Martha Codd, her heirs and assigns, all the real estate held by Edward Goold at the time of his becoming a bankrupt, as aforesaid, as trustee as aforesaid for the said Elizabeth Livius, by virtue of the several indentures of release executed by the said Philip Schuyler, as aforesaid, and the several wills therein referred to, and also all the real estate held by him, the said Edward Goold, at the time of his becoming a bankrupt, as aforesaid, as trustee for the said Martha Codd by virtue of the said several indentures and wills above referred to, to have and to hold unto her, the said Martha Codd, her heirs and assigns, to the only proper use, benefit, and behoof of her, the said Martha Codd, her heirs and assigns forever.

The defendant gave in evidence a deed of indenture executed by Charles John Evans and Agatha his wife and Daniel Ludlow and Edward Goold, conveying lot No. 97, the property in controversy, to Stephen Potter.

The deed dated 24 December, 1790, was executed by Charles John Evans, Agatha Evans, Charles Gould, executor of the last will of Martha Bradstreet, by Daniel Ludlow and Edward Goold, his attorney. The deed is in the following words:

"This indenture made the 24 December, 1790, between Charles John Evans, now of Brooklyn in the County of Kings, gentleman, and Agatha his wife, one of the daughters and devisees of John Bradstreet, Esquire, deceased, and Sir Charles Gould, executor of the last will and testament of Martha Bradstreet, the other daughter and devisee of the said John Bradstreet, by Daniel Ludlow and Edward Goold of the City of New York, merchants, his attorneys, of the one part,

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and Stephen Potter, of Whitestown, Montgomery County, State of New York, of the other part, witnesseth that the said Charles John Evans and Agatha his wife, and Sir Charles Gould, for and in consideration of the sum of four hundred pounds, lawful money of the State of New York, to them in hand paid by the said Stephen Potter at or before the ensealing and delivery of these presents, the

receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, and confirmed, and by these presents do clearly and absolutely grant, sell, alien, release, and confirm unto the said Stephen Potter and his heirs and assigns forever all that certain lot, piece, or parcel of land situate lying and being in the County of Montgomery and State of New York, part of a larger tract granted to Joseph Worrell and others, by patent dated the 2 January, 1734, which lot upon a late division of the said tract was distinguished by number ninety-seven, and contains four hundred acres of land, with the rights, members, and appurtenances thereof, and all easements, advantages, and hereditaments whatsoever to the same belonging or in anywise appertaining, and the reversion and reversions, remainder, and remainders, rents, and services of the same, and all the estate, right, title, interest, property, claim, and demand whatsoever, either at law or in equity, of them the said Charles John Evans and Agatha his wife, and Sir Charles Gould, and every of them, of in and to the same, and of in and to every part and parcel thereof, with the appurtenances, to have and to hold the same lot of land, hereditaments, and premises unto the said Stephen Potter, his heirs and assigns, to the only proper use and behoof of the said Stephen Potter, his heirs and assigns forever. And the said Charles John Evans, for himself, his heirs, executors, and administrators doth hereby covenant and agree to and with the said Stephen Potter, his heirs and assigns, that he the said Stephen Potter, his heirs and assigns forever, shall and may peaceably and quietly have, hold, and enjoy the said lot of land, hereditaments, and premises free and clear of all encumbrances titles and charges made by the said John Bradstreet or any person or persons claiming or to claim by, from, or under him. And that the said Charles John Evans and his heirs, the said lot of land, hereditaments, and premises, with the appurtenances, to the said

Stephen Potter, his heirs and assigns, against all and every person or persons whomsoever, shall and will warrant and forever defend by these presents. Received on the day of the date of the within indenture of the within Stephen Potter, the sum of four hundred pounds, being the full consideration money within

mentioned. Charles John Evans, Ludlow & Goold."

It was proved on the part of the defendant that Stephen Potter, the grantee, entered upon and took possession of lot No. 97 under this deed immediately on its execution, claiming to be sole and exclusive owner of the same, and continued in such possession until his death fifteen or sixteen years before the trial, having made large and valuable improvements thereon. That after his decease, his son, with other members of his family, succeeded to and continued in possession of such parts of the lot as remained unsold by their father, claiming to be owners of the land, and that being in possession and so claiming the land, Stephen Potter, the son, conveyed the premises in the ejectment to Henry Huntington, the defendant. No deed was produced, or proved except by parol, as stated, and the son of Stephen Potter and other persons deriving title from his father to parts of the lot continued in possession of the residue of the lot, claiming the absolute ownership thereof, and the defendant has ever since been in possession and actual occupancy of the same, claiming the ownership in fee by virtue of his purchase. But no buildings had been erected on that part of lot No. 97 for the recovery of which this suit is brought until since 1824, and at that time a part of the premises were without fence.

The death of General John Bradstreet prior to the death of his daughter Martha Bradstreet, and the death of Philip Schuyler on 18 November, 1804, were also admitted.

The bill of exceptions concludes as follows:

"Whereupon the said counsel for the said James Jackson did then and there insist before the said judge, on the behalf of the said James Jackson, that the said matters so produced and given in evidence on the part of said James Jackson, as aforesaid, were sufficient, and ought to be admitted and allowed as decisive evidence to entitle the said James Jackson to a verdict

on the said issue in this cause. And the said counsel for the said James Jackson also insisted that the said deed from Charles John Evans and Agatha his wife, and Daniel Ludlow, and Edward Goold, as attorney of Sir Charles Gould, executor of the last will and testament of Martha Bradstreet, deceased, to the said Stephen Potter, for the said lot No. 97, was void as to all, except the interest of the said Charles John Evans and Agatha his wife, and could not be the foundation of an adverse possession. And the said counsel for the said James Jackson also insisted and objected that there was no proof of the existence of any power of attorney from the said Sir Charles Gould, the executor of the said last will and testament of the said Martha Bradstreet, to the said Daniel Ludlow and Edward Goold, authorizing them to sell and convey the estate or interest of the said testatrix in the said lot No. 97, nor indeed of any power of attorney whatever."

"And the said counsel for the said James Jackson also insisted that if the deed aforesaid to the said Stephen Potter were valid and sufficient to pass anything more than the rights and interests of the said Charles John Evans and Agatha his wife, yet that from the recitals in the said deed, the said Stephen Potter had notice that he could only purchase an equitable interest, the rights merely of *cestuis que trust,* and could not therefore hold adversely to the said Philip Schuyler, the trustee and executor of the said will of the said John Bradstreet."

"And the counsel for James Jackson also insisted that the said Stephen Potter, claiming to hold the same identical title of the lessor of the plaintiff, neither he nor those claiming under him could set up his possession as adverse to that title."

"And the counsel for James Jackson did then and there pray the judge to admit and allow the said matters, so produced and given in evidence for the said James Jackson, to be conclusive in favor of the said James Jackson, to entitle him to a verdict in this cause, and to this the counsel learned in the law, for the said Henry Huntington, did then and there insist before the said judge, that the said matters so given in evidence on the part of the said James Jackson, were not sufficient, nor ought to be admitted or allowed to entitle

the said James Jackson to a verdict; but that the said matters so produced and given in evidence on the part of the said Henry Huntington were sufficient, and ought to be admitted and allowed to bar the said James Jackson of his action aforesaid."

"And the judge did then and there deliver his opinion to the jury that although the several matters so produced and given in evidence on the part of the said plaintiff made out a clear paper title to the equal undivided part claimed of that parcel of the said lot No. 97 which was in the possession of the said defendant, and were therefore sufficient in law to entitle the said plaintiff to recover unless such title was defeated by the adverse possession set up on the part of defendant, and that although the above recited deed from Charles John Evans and Agatha his wife, and Sir Charles Gould, executor of the last will and testament of Martha Bradstreet, deceased, by Daniel Ludlow and Edward Goold, his attorneys, to Stephen Potter, without further proof of the authority of Daniel Ludlow and Edward Goold to execute the same, was insufficient of itself to convey a legal title to the undivided share of the premises sought to be recovered in the present action, yet that there was nothing appearing upon the face of this deed, nor anything in the circumstances connected with its execution, as far as they had been shown, which in law would preclude the defendant from availing himself of possession under it as a bar to the plaintiff's action or prevent the possession of the said Stephen Potter taken under and in virtue of the said deed from being considered adverse to the title of the lessor of the plaintiff and to the title of the said Philip Schuyler, the executor and trustee of the said John Bradstreet, provided the proof was sufficient in other respects to establish the fact of such adverse possession, and the judge did then and there also further deliver his opinion to the jury that the effect of an adverse possession in the said Stephen Potter at the time of the execution of the said above mentioned and recited deed from the said Philip Schuyler, executor as aforesaid to the said Agatha Evans, and Edward Goold, would be to render the said deed inoperative and void as to the said lot No. 97, and prevent any title from the said Philip Schuyler to the said Agatha Evans and Edward

Goold passing by the said deed in or to the said lot No. 97, and the said judge did then and there further deliver his opinion to the jury that although it was generally true that one tenant in common was not permitted to set up his possession as adverse to the title of his co-tenant, yet that one entering into possession of land under a deed for the whole, and claiming the entire interest, would not be thus precluded, although it should subsequently appear that such deed conveyed only an undivided share."

"Whereupon the said counsel for the said James Jackson did then and there, on the behalf of the said James Jackson, except to the aforesaid opinion of the said judge and insisted on the said several matters as sufficient to sustain the said action on the part of the said James Jackson."

"And thereupon the judge, after explaining to the jury what in law constitutes an adverse possession and submitting to them as a question of fact whether such a possession had been proved, directed them, with the assent of the counsel on both sides, if they should agree upon their verdict before the opening of the court next morning, to seal up their verdict. And upon the opening of the court on the next morning, the jury came in with a sealed verdict in favor of the said Henry Huntington, but upon being called upon by the clerk at the request of the counsel for the said James Jackson severally to answer whether such was their verdict, two of the said jurors dissented therefrom."

"One of the jurors thereupon stated to the court that the doubt in his mind was whether he was bound to decide according to law or according to evidence, and that it appeared to him that according to the evidence. the plaintiff ought in justice to have the land. And the judge thereupon replied to the juror that a juror was certainly not at liberty, in making up his verdict, to disregard the law; that if the law required alteration, it was the province of the legislature to alter it; but that it was the duty of judicial tribunals to administer it as they found it; that it was the province of the judge to decided questions of law, and that the jury was bound to respect such decision; that the question whether or not it was competent for the defendant to set up the defense of adverse

possession under the deed to Stephen Potter, was a question of law, and had been decided against the plaintiff; that what in law constitutes an adverse possession was also a question of law, and that it was for the jury to say under the instructions which had already been given to it upon that point whether such possession had been proved; that if it believed from the evidence that such a possession had been established, it was bound to find a verdict in favor of the defendant. Whereupon the said juror, after some hesitation, assented to the said verdict, and the said counsel for the said James Jackson did then and there, in behalf of the James Jackson, except to the opinion of the said judge so declared to the said juror. By the direction of the court, the other juror who dissented was then called upon by the clerk to answer whether he agreed to the said verdict. But the said juror still persisted in his dissent and stated that he entertained the same doubts which had been expressed by his fellow juror. Whereupon the said judge directed the said jury to retire and again deliberate upon its verdict. And the said counsel for the said James Jackson did then and there, in behalf of the said James Jackson, except to the said last mentioned direction of the said judge. And the jury thereupon retired, and after a short absence returned again into court with a verdict in favor of the said Henry Huntington. Whereupon the said jury was again polled at the request of the counsel for the said James Jackson, and severally assented to the said verdict."

The points presented for the consideration of the court on the part of the plaintiff in error were:

1. That Martha Bradstreet, formerly Martha Codd, the lessor of the plaintiff, acquired the equitable interest in and title to the one equal undivided fourth part of the premises in question, by virtue of the respective wills of Martha Bradstreet (one of the two daughters and devisees of general John Bradstreet) and Elizabeth Livius.

2. That the deed from Edward Goold to Martha Codd (now Martha Bradstreet), the lessor of the plaintiff, by virtue of the decree of the Court of Chancery of the State

of New York, conveyed to her the legal title to the one equal undivided fourth part of the premises in question.

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3. That even if the deed from Edward Goold to the lessor of the plaintiff did not convey the legal title, yet that on the death of General Philip Schuyler on 18 November, 1804, without having executed the will of General John Bradstreet, the legal estate in the whole premises in question vested in the heirs of General John Bradstreet or in their legal representatives.

4. That the respective wills of Martha Bradstreet (one of the two daughters and devisees of General John Bradstreet) and of Elizabeth Livius (one of the devisees of the said Martha Bradstreet) vested in the lessor of the plaintiff the legal as well as the equitable title to the one equal undivided fourth part of the premises in question.

5. That upon the whole record, the judgment rendered in the court below in favor of the defendant in the court below is erroneous, and ought to be reversed.

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MR. JUSTICE JOHNSON delivered the opinion of the Court.

The principles of law involved in this cause are few and simple and well established, and all the difficulties consist in so arranging the facts as to apply the principles correctly, or rather, to determine whether they have been correctly applied in the court below.

The plaintiff here was plaintiff there, and the action being ejectment, a remedy rigidly legal, it behooved her to make out a title of the same character.

The title made out by the plaintiff consisted

1. Of a series of documentary and other evidence, received without exception at the trial, which vested in Philip Schuyler an estate which to all legal intendment was an absolute fee simple in him and his heirs, without trust or reservation or any evidence, intrinsic or extrinsic, of his holding it or any part of it in a fiduciary capacity.

2. John Bradstreet's will, dated 23 September, 1774, in which he first devises all his estate to his two daughters in common in fee and then says

"Notwithstanding the former devise for the benefit of my wife and daughters, I empower my executors to do all acts and execute all instruments which they may conceive to be requisite to the partition of my landed estate, and I devise the same to them as joint tenant, to be by them sold at such time, and in such manner as they shall think most for the benefit of my daughters,"

&c.;

3. The will of Martha, one of the daughters of John Bradstreet, under which Martha, the present plaintiff, acquires an interest of one-sixth in John Bradstreet's estate, real and personal. Of this will Sir Charles Gould is appointed sole executor, with power to sell the lands in America and apply the proceeds to the use of the plaintiff.

4. A deed from Philip Schuyler, dated May 16, 1794, by which, reciting that he is executor of John Bradstreet, he conveys the plaintiff's interest in the subject in controversy to

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Agatha Evans, widow, the other daughter of John Bradstreet, and Edward Goold, naming him attorney of Sir Charles Gould, in trust to sell and dispose of it and apply it according to the interest created by the wills of John and Martha Bradstreet.

This deed recites that Philip Schuyler was, at the time of making John Bradstreet's will and from thence to the decease of John Bradstreet, seized in fee as tenant in

common of and in two equal undivided fourth parts of and in all that parcel or certain tract of land, &c.;,

"(being the same of which lot 97 is part and parcel) as to one equal undivided fourth part of which said tract of land the said Philip Schuyler was seized in trust for the said John Bradstreet."

This whole fourth part he conveys to Agatha Evans and Edward Goold, to the use of Agatha, as to two-thirds in fee, and as to the remaining third to the use of Edward Goold, in trust to sell and apply the proceeds as before stated.

The above recital is the only evidence in the cause to show that the conveyance was anything but a mere bounty from Schuyler to these parties. And notwithstanding that recital, it is perfectly clear that the case makes out the legal estate to have been in him; that the conveyance is a common law conveyance, and operates to convey a legal estate to Mrs. Evans and Goold, as to her two-thirds clearly so and as to the remaining third equally so, since the fee vested in Goold, and the interest of this plaintiff under that deed is a mere equity.

5. That equity was not turned into a common law right until 1804, when Goold, who survived Agatha Evans, by a deed in which he sets out all the facts, on which this plaintiff's equity rested, and among them his character of attorney to Sir Charles Gould, and in compliance with a decree of the court of equity, invests her with the legal estate.

The defense set up is adverse possession in Potter, for the double purpose of avoiding Schuyler's deed and to maintain a bar under the statute. And to maintain this defense, a deed is introduced, executed four years prior to that of Schuyler, by which Agatha Evans in her own right, and Edward Goold and another, professing to be attorney to Sir Charles Gould, executor of Martha Bradstreet the elder, convey the lot 97 to Stephen Potter by words calculated to vest a legal fee simple, with a General warranty by Evans and a special covenant against all claiming under John Bradstreet. But in the actual

state of the title at that time, in the eye of the common law, this deed conveyed nothing; there was no seizin, actual or constructive, no legal right to possession, nor any remedy except in equity for acquiring a legal estate to the parties who executed this deed.

The bill of exceptions shows that the evidence proved in substance that under this deed and immediately after its execution, Potter entered, and from that time he and those claiming under him have held it as sole and exclusive owners against all the world.

It is not questioned that the plaintiff is within the savings of the statute under a continuing disability unless the statute began to run as against Schuyler, and with equal reason as against Evans and Goold, Schuyler's grantees, in which case it continued to run so as to bar her.

On this state of facts, the parties below moved for instructions, and the court gave a charge, and the verdict was rendered for the defendant.

The questions which the court has to consider are:

1. Whether the plaintiff was entitled to the instruction she prayed.

2. Whether there was any error in the instruction as given.

The prayer was a general one that on the case made out after the whole evidence and argument were gone through, she was entitled to a verdict.

This of course implies that she had made out a good title and that the defendant had made out no better title nor bar. The words of the prayer are that the matters and things so given in evidence were conclusive to entitle her to a verdict. From which it follows that if there were a flaw in her title, or that the facts made out a better title in the defendant, or a bar to the action under the statute, the plaintiff was not entitled to this instruction.

The charge admits the validity of the plaintiff's deduction of title, unless interrupted by the invalidity of Schuyler's deed resulting from an adverse possession in Potter,

in which case Edward Goold took nothing and could transmit nothing to her by his conveyance in 1804. The defendant's case the court puts upon the possession under the statute alone. Now although the court may have overlooked something in the cause, yet if the consequence is that the charge is more favorable to

the plaintiff than it should have been, that is no ground of complaint on her part. And individually, I think there were some very important views of the case overlooked -- views on which I doubt if lord Coke would have hesitated a moment to decide the better title to be in Potter, independent of the bar.

1. Then I care not, for the purposes of my argument, whether the deed of 1790 to Potter be regarded as the sole deed of Agatha Evans and her husband or their joint deed with Edward Goold and Ludlow, attorneys to Sir Charles Gould, or of Sir Charles Gould, executed by his attorneys; either view leads to the same result. But the correct legal view leads more immediately to it, which is that whether from the absence of proof of the power of attorney or from an incapacity to delegate his authority, Sir Charles Gould's name must be stricken from the deed. It is the deed of Agatha Evans and husband, conveying, in language the most full and unequivocal, the whole land and the whole fee in the land.

There is not a word in it that can give it the character of a conveyance in severalty, each conveying a distinct interest. And more emphatically so as to Evans, who warrants the whole and covenants expressly against the plaintiff's title.

This, then, is, as to the plaintiff's interest, a conveyance by one having no title to a third person who enters under that conveyance. The fact of Potter's possession is distinctly affirmed, and whether by actual forcible ouster or by a peaceable possession acquired by fraud, the law holds him to be a disseizor. The first alternative makes him so in terms, and the second is an old but well settled doctrine. Such is the case in Roll's Abridgement of a husband and wife, joint tenants in fee; the husband commits treason, and the King seizes the land. The King cannot be a disseizor, but the lord of whom it was held, upon a false

suggestion that it is his proper escheat, is put in possession by the King. The lord is adjudged a disseizor as to the joint tenancy of the wife, and the reason assigned is

"that he got possession of the freehold by misrepresentation, by injustice, and falsehood; that therefore the possession acquired by it must be looked upon as a possession acquired by violence open and avowed."

1 Roll's Abr. 658. So where a guardian in chivalry, having of course the possession in him, assigns dower to one as wife of the deceased

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tenant, who is not wife, and she enters; she is a disseizress, and the reason assigned is that "her possession being acquired by an act of fraud and injustice, the possession acquired by it is tortious." Bro. Tit. Disseizin 7. 1 Roll's Abr. 662. So also of a possession delivered or permitted under void titles, as in the case of two infants joint tenants, and one, being under age, releases to the other, by which the other holds the whole; he is a disseizor, and the reason assigned is "that the title is utterly void." He was not held to be in of the original estate, although a joint tenant, but to have committed a disseizin against the clear state of positive fact, being considered as entering according to the release, not according to the State of actual title after the release was executed, which being void, left the title unaltered. Bro. Tit. Disseizin 19. And the same law was ruled in another case of much the same nature against the notoriety of an actual feoffment, where the invalidity of the title was combined with a breach of duty, as between guardian and ward.

It is also laid down that if A executes to B a lease for the lands of C and B enters, this is a disseizin by A and the reason assigned is that the demise to B is equivalent to a command to enter the land of C. Bro. Tit. Disseizin 7; 1 Roll's Abr. 662.

At the date of the deed to Potter, the legal title was in Schuyler, and he only could be legally disseized. It is not necessary to recur to authority to prove that a release

to the disseizor, by the disseizee in fee, is as good a conveyance as can be executed, or that an absolute conveyance in fee, especially with words of release, to a disseizor is a release to the disseizor or to his feoffee.

This last principle is expressly ruled in the case of *Jackson v. Smith,* decided in the New York courts. 13 Johns. 406.

Here, then, we have a conveyance from Schuyler, the disseizee, to Agatha Evans, the disseizress, operating in favor of Potter, her grantee, which makes out a common law conveyance. It is seldom that a case in our time savors so much of the black letter, but the course of decisions in New York renders it unavoidable, and the whole course of this argument has been calculated to involve us in it.

If the conveyance of 1709 to Potter could admit of being

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considered as only purporting to convey severally the interest of the parties grantors, still we are led to the same result. It must in that view be considered as the several conveyance of Sir Charles Gould by Edward Goold and Ludlow, his attorneys. But then it is in the same character, reciting himself such in his indenture, which he is estopped from contradicting, that he receives the conveyance from Schuyler. From this two consequences follows: 1st, that he receives the release from Schuyler in the same right and character in which he conveyed to Potter, and therefore in point of right as well as form, is the grantor of plaintiff's interest to Potter, and as such the release of Schuyler to him is a release to Potter; 2d, that as it is through him that Mrs. Bradstreet makes title, and his deed contains the same recital, exhibiting him in the character of attorney to Sir Charles Gould; she also is estopped from denying him in that character. In this view also, then, Potter would hold a good estate at common law.

It may be objected that if Schuyler was disseized so as to invalidate his deed as to the title of the plaintiff, then he was disseized so as to invalidate the deed to the disseizor. But this is not the law, for the principle does not operate as between the disseizor and the disseizee, but only as between the disseizee and a stranger. So

is the common law, and so is the New York decision before alluded to in express terms. *Jackson v. Smith,* 13 Johns. 406. Besides, if void against her, it is immaterial whether, void or not against the defendant; her title, then, breaks off midway. Thus far for my individual views.

It is objected to the charge as it regards the plaintiff's title that it was incorrect in stating

"That the effect of an adverse possession in Potter, at the time of the execution of Schuyler's deed to Evans and Goold, would be to render the deed inoperative and void and prevent any title from passing under it to Evans and Goold."

If the judge could be considered as having passed upon the sufficiency of the evidence to establish the adverse possession, there might be just grounds of complaint found to this charge; but that question he expressly leaves to the jury, and then it is obvious that if such be the law of New York, it is idle to go further and inquire whether disseizin and adverse possession

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be convertible terms at common law or whether either at this day should invalidate a transfer of property. That an actual or constructive possession is necessary at common law to a transmission of right is incontrovertible. It is seen in the English doctrine of the necessity of an heir's entering in order to transmit to his heirs; but whatever be the English doctrine and that of other states as to the right of election to stand disseized or not, it is certain that the New York courts have denied that right, both as to devises and common law conveyances, without the aid of a statute repealing the common law.

After the case of *Jackson v. Dimont,* it is in vain to contest the point, and the principle is established by various other cases. It was then incontrovertible in that state that if the jury found an adverse possession (for such is the language of the New York cases, not actual ouster or disseizin), the conveyance was void, and such was the charge of the judge.

It seems to have been supposed in the argument that the judge founded his instructions on this point upon the statutes of maintenance. This, however, is not the fact, for it will be seen in the case of *Jackson v. Dimont* that the courts of that state go upon a principle having no relation whatever to the statute of maintenance. They apply to adverse possession the common law doctrine on the effect of disseizin, according to which the deed of one disseized of his freehold is held to be utterly void. His freehold was then held to be out of him, to be converted into a right of entry or right of action, and as such no more the subject of legal transfer at common law than an ordinary chose in action. It being so settled in New York, it is in vain to inquire further, but, *en passant,* it may be observed that there are few principles of more ancient or more dignified origin. It is the law of Kings that the fact of possession proves the right of possession, and the idea is thrown out by Blackstone that it probably passed down from greater to less until it extended to every man's close.

There are, however, less questionable reasons for it to be found in the practice and policy of the feudal and common law. But the charge is said to be erroneous in those passages which relate to the bar of the statute.

There is something unique in the form of this bill of exceptions, since, after setting out the facts, it gives us the

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arguments of counsel, instead of prayers for specific instructions, and contains but one prayer on each side, each for a general instruction in the party's favor. So that we have to examine this instruction as rendered, and reduce it from generals into particulars by reference to the evidence, perhaps aided by the specific propositions, exhibited by the arguments.

The instruction, then, commences by admitting hypothetically that the deduction of title to the plaintiff was complete and that the deed from Agatha Evans and Ludlow and Goold to Potter was void as to conveying away the interest of the plaintiffs; "yet," the judge affirms,

"there is nothing appearing on the face of this deed (*i.e.* the deed to Potter), nor anything in the circumstances connected with its execution, as far as they had been shown, which in law would preclude the defendant from availing himself of possession under it as a bar to the plaintiff's action or prevent the possession of the said Stephen Potter, taken under and in virtue of the said deed, from being considered adverse to the title of the lessor of the plaintiff and to the title of the said Philip Schuyler, the executor and trustee of the said John Bradstreet, provided the proof was sufficient in other respects to establish the fact of such adverse possession."

And again,

"That although it was generally true that one tenant in common was not permitted to set up his possession as adverse to his co-tenant, yet that one entering into possession of land under a deed for the whole, and claiming the entire interest, would not be thus precluded although it should subsequently appear that such deed conveyed an undivided share."

It then goes on to state that the judge,

"after explaining to the jury what in law constitutes an adverse possession, and submitting to it as a question of fact whether such a possession had been proved, directed it,"

&c.; And finally, the judge instructed the jury that

"the question whether or not it was competent for the defendant to set up the defense of adverse possession under the deed to Stephen Potter was a question of law, and had been decided against the plaintiff; that what in law constitutes an adverse possession was also a question of law, and that it was for the jury to say, under the instructions that had already been given to it upon that point, whether such possession had been proved; that if it believed from the evidence that

such a possession had been established, it was bound to find a verdict in favor of the defendant."

Some difficulties were presented in the argument as to the effect to be given to the words "after explaining to the jury what in law constitutes an adverse possession." But it must always be recollected that this Court can only reverse a judgment when it is shown that the court below has erred. It cannot then proceed upon conjecture as to what the court below may have laid down for law; it must be shown in order to be judged what instructions were in fact given and what were refused. The passage alluded to can only be held to affirm what it expresses, to-wit "that the judge instructed the jury as to what in law constitutes an adverse possession." And in doing so, certainly there was no error -- adverse possession is a legal idea, admits of a legal definition, of legal distinctions, and is therefore correctly laid down to be a question of law. The whole argument in this case proves it.

The whole purport of this part of the charge, then, reduced to its elements with reference to the points in argument, is this:

1. That adverse possession is a question of law on which the court has a right to instruct the jury.

2. That the fact of adverse possession, in its legal sense, was a question for the jury.

3. That the defendant in this case was not precluded from setting up an adverse possession, whether we regard him in the character of one holding under a void deed or of a trustee or *cestui qui trust,* or of a tenant in common, or of one holding the same, or by the same title. Or in more unequivocal terms, that an adverse possession, where it actually exists, may be set up against any title whatsoever, either to make out a title under the act of limitations or to show the nullity of a conveyance executed by one out of possession. On the two first of these propositions there can be no doubt, and none has been expressed, and as to the third it is equally clear that disseizin or adverse possession, as a fact, is always a possible thing, and may occur wherever force may be applied. The

common law, generally speaking, regards it as an act of force, and always as a tortious act, and yet out of regard to having a tenant to the precipe and one promptly to do service to the lord,

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attaches to it a variety of legal rights and incidents. Rights accruing under acts of limitations are recognized in terms, as *prima facie* originating in wrong, although really among the best protections of right, and if anyone who can commit a disseizin may claim under an adverse possession, it is not easy to preclude anyone. An infant, a *feme covert,* a joint tenant in common, a guardian, and even one getting possession by fraud may be a disseizor. 1 Roll's Abr. 658, 662; Bro. Tit. Disseizor 7; Salkeld Joint Tenant and Tenant in Common.

The whole of this doctrine is summed up in very few words as laid down by Lord Coke, 1. Inst. 153, and recognized in terms in the case of *Blunden v. Baugh,* 3 Coke 302, in which it underwent very great consideration. Lord Coke says

"A disseizin is when one enters intending to usurp the possession and to oust another of his freehold, and therefore *querendum est a judice quo animo hoc fecerit,* why he entered and intruded."

So the whole inquiry is reduced to the fact of entering and the intention to usurp possession. These are the elements of actual disseizin, and yet we have seen that one may become a disseizor though entering peaceably under a void deed or a void feoffment or by fraud, and that the intention to disseize may, under circumstances, be imputed to those who by a general rule of law are in ordinary cases incapable of willing, or not bound by an exercise of the will. This analogy has been freely extended to adverse possession, and even gone beyond it, as well by the decisions of New York, as will hereafter appear, as by the repeated ruling of this Court. In the case of *Pawlet v. Clarke,* 4 Pet. 504, it is distinctly intimated that a possession may be adverse wherever an ouster may be presumed, and also unanimously ruled that it may be adverse and maintain a bar under the statute even where ouster is in terms repelled, and not to be presumed from the very

circumstances of the case. The words of the court are

"A vendee in fee derives his title from the vendor, but his title, though derivative, is adverse to that of the vendor. He enters and holds possession for himself, and not for the vendor. Such was the doctrine of this Court in *Blight's Lessee v. Rochester,* 7 Wheat. 535."

If this be the correct doctrine of this

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Court, and there can be no doubt it is, it seems to follow that wherever the proof is that one in possession holds for himself, to the exclusion of all others, the possession so held must be adverse to all others, whatever relation in point of interest or privity he may stand in to others. Such certainly is the view taken of the law in the reasoning of this Court in the case of *Willison v. Watkins,* 3 Pet. 43, and with express reference to lessors, mortgagors, trustees, and tenants in common. In the case of *McClung v. Ross,* 5 Wheat. 116, THE CHIEF JUSTICE says

"that one tenant in common may oust his co-tenant and hold in severalty is not to be questioned. But a silent possession, accompanied with no act that can amount to an ouster or give notice to his co-tenant that his possession is adverse ought not, we think, to be construed into an adverse possession. The principles laid down in *Barr v. Gratz,* 4 Wheat. 213, apply to this case."

This is perfectly consistent with the language of the case of *Town of Pawlet,* for the fact to be determined is whether the party holds possession for himself or for another, and this can only be determined by evidence or circumstances to prove the one or the other. It is the inquiry into the *"quo animo."* In all these cases, there is no intimation found that the adverse possession may not be set up; the only point maintained is that the *"quo animo"* must be established, as well as the fact. But in finding the *quo animo,* the jury must of course be left to their own view of the effect and sufficiency of the evidence. Actual ouster is clearly not requisite, either to be presumed or proved; adverse possession may exist without it, and

notice, as a fact, may clearly be deduced from circumstances, as well as be positively proved.

The bill of exceptions states that the defendant proved (that is the word used) that Potter 1. entered under his deed and by virtue thereof; 2. immediately after the execution thereof; 3. claiming to be sole and exclusive owner thereof, and in a subsequent part it is amplified by the expressions, claiming the absolute ownership and the ownership in fee.

Much of the discussion has turned upon the sufficiency of proof to the effect stated to sustain the finding of an adverse possession, and it has been insisted that it neither supplies the exigency of actual ouster or notice. The only prayer of the plaintiff, it will be recollected, is for a general instruction in

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her favor "upon the matters so produced and given in evidence in her behalf." The court was therefore not called upon by the plaintiff to instruct the jury upon the competency of this evidence to sustain a finding of adverse possession, and accordingly gave none, unless it was incidentally, and if therefore the evidence was insufficient, it could only be the ground of a motion for a new trial, with which we have no concern.

The views which I have taken of the doctrine of adverse possession would not have been necessary but for the supposed bearing of the instructions actually given by the court upon the verdict, and particularly in relation 1st, to that part of the bill of exceptions in which it is said "that the court explained to the jury what in law constitutes an adverse possession," which, if correctly explained, it is supposed could not have sanctioned the verdict upon that evidence. But on this it must be observed that in a case where the *quo animo* alone, with which a defendant entered and held, was the question, and the proof was that he entered and held to be the sole and exclusive owner of the land, and to hold an absolute ownership in fee, if ouster and notice, like other facts, may be presumed from long and undisturbed possession or other circumstances; it would be difficult to say that

the testimony in this cause was not competent to sustain a finding of an adverse possession. It is impossible, upon this view of the case, to impute to the court any other instruction than what may be covered by the terms of the proof in the case -- that is, that if the judge instructed the jury

"that one who enters under a deed purporting to convey to him an estate in fee, claiming to be sole and exclusive and absolute owner in fee thereof for forty years may be regarded as holding adverse to all the world,"

it would be difficult to find any legal exception to such a charge, since it is left open to the jury to judge of the sufficiency of the evidence to prove the fact of a claiming to be sole and exclusive and absolute owner in fee. Notice and actual ouster are among the most direct and ordinary proofs of such a holding, and may have been the proved or presumed ground of this verdict.

2. These views taken of the law of adverse possession, were necessary to precede an analysis of the general

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instruction given by the court upon the competency of the bar under the statute.

On this instruction it is necessary to bear in mind that it is strictly confined to this -- 1st, that there is nothing on the face of the deed under which Potter claims that precludes him from setting up this bar; 2d, that there was nothing in the circumstances connected with its execution that would preclude him; 3d, that there is nothing in the possession acquired under that deed to prevent the possession acquired under it from being held adverse to the lessor of the plaintiff or to Schuyler, provided the proof was sufficient in other respects to establish the fact of adverse possession. There is no affirmation by the court of the sufficiency of that deed to constitute an adverse possession or of the sufficiency of the possession acquired under it. But all the court becomes responsible for is the negative proposition that there is nothing in the deed or in the circumstances attending its execution which precludes the defendant from setting up and proving adverse possession.

Now it is difficult to see how this proposition can be controverted. If in the very nature of things there is no one who may not be actually ousted and actually held out of possession, whether lessor, mortgagor, trustee, or tenant in common, as is affirmed in the case of *Willison v. Watkins* and other cases; how is it possible that any deed or any circumstance should preclude a resort to proof of absolute adverse possession where it exists in fact? The charge of the court amounts to no more than a limited affirmance of that general proposition.

But as the chief difficulty in the cause arises out of that specification under the general proposition which relates particularly to a tenancy in common, we will consider that with due attention. The instruction of the court is

"That although it is generally true that one tenant in common was not permitted to set up his possession as adverse to the title of his co-tenant, yet that one entering into possession of land under such a deed for the whole, and claiming the entire interest, would not be thus precluded, although it should subsequently appear that such deed conveyed only an undivided share."

The words "thus precluded" have reference to the same

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terms used in the general instruction, and make this part of it to mean

"that one tenant in common entering into possession of land under a deed for the whole, and claiming the entire interest, would not be precluded from setting up an adverse possession, provided the proof was sufficient in other respects to establish the fact of such adverse possession."

And where is the objection to such an instruction? If one tenant in common may be disseized by another, if one tenant in common may set up an adverse possession against his cotenant, provided he has adequate proof of the fact of its adversary character, it would seem that this instruction imports no more.

On this part of the case, however, there exists a division of opinion on the construction of the charge, three of the judges thinking that it falls short of the

proposition as I have stated it and two others concurring in my view of its construction. In support of the construction, which those who concur with me adopt, I have further to remark:

1. That the court below might very well have withheld this instruction, since in fact there is no legal tenancy in common in the case. The action of ejectment deals altogether with legal estates. Mere equities are unknown to it, and yet the tenancy in common set up in this case is altogether destitute of a legal character. At no time had the plaintiff's lessor a scintilla of right known to the common law until she received the deed of 1804. Until that time, the only estate that can be recognized in this form of action was in Schuyler, or in Evans and Goold, if not in the defendant Potter, as has before been noticed. It surely cannot be contended that Potter held as tenant in common with Goold, since Goold, either in his own right, as assuming a false character, or in the right of Sir Charles Gould, as having acted in his true one, was one of the grantors under whom and against whom Potter entered.

2. There was no tenancy in common, because Potter entered in fact in his own right, under a deed conveying a fee simple in the entirety. Such it is as to the act of Evans and wife, and such it purports to be as to the act of Edward Goold or of Sir Charles Gould. It has been earnestly insisted that the entry of Potter under that deed must be presumed to be according to the title actually acquired under it, supposing it

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to be void as to Sir Charles Gould, and not according to the estate which it purports to convey. But to this there are several answers, and the first alone is conclusive -- to-wit, that the evidence expressly repels the presumption. He entered under that deed as the sole, exclusive, absolute owner in fee; this is altogether inconsistent with an entry to the use of himself and another. And this seems to be no longer an open question in New York, even on the subject of legal inference. For in the case of *Jackson v. Smith,* which was the case where one tenant in common conveyed the whole, and this very point was made, the court

repels the inference in favor of the entry as tenant in common and declares the contrary to be the proper inference. And in the case of *Clapp v. Bromagham,* 9 Cowan 551-553, which was another case of a conveyance of the whole by one tenant in common, the same doctrine is repeated in terms. That part of this bill of exceptions which relates to the proof seems to have been nearly copied from the case of *Clapp v. Bromagham,* in which the bill of exceptions stated that the defendant entered as purchaser of the whole and held as tenant in severalty, claiming to be sole and exclusive owner.

Again, although it were the true inference of law, nothing can be clearer than that it might be repelled by proof, and that the jury might well find the contrary to be the fact: their verdict in this case in equivalent to such a finding, and for ought that we can judicially know, such a finding may have been sustained by proof of ouster, notice, forcible repulsion, leasing and receiving rents, or any other competent proof of the character of his entry and the assertion of rights under it.

3. If there was a tenancy in common, the law appears to be definitively settled in New York that the grantee of one tenant in common for the whole, entering on such conveyance and holding as sole owner, may set up the statute against his co-tenants in common. And to this effect we have before us an adjudged case in which there seems to have been neither an actual ouster nor actual or constructive notice to the cotenants. This is the case of *Clapp v. Bromagham,* decided in 1827 and before referred to for another purpose, in which one of nine tenants in common sold the whole premises to the defendant, who entered and held as his sole and exclusive

property. It is distinctly shown by the court that the only question in that case was whether the defendant might set up his possession, to the exclusion of his co-tenants, and decided that he might upon the most elaborate argument and profound examination.

In that case, the decision of this Court in the case of *Ricard v. Williams,* is cited, 7 Wheat. 60, and recognized as laying down the true principle by which this class of cases must be governed, to-wit that in the absence of all controlling circumstances to the contrary, the entry of one having right shall be held to be according to that right; that an ouster or disseizin is not to be presumed from the mere fact of sole possession, but that "it may be proved by such possession," accompanied by a notorious claim of an exclusive right. This decision, according to our view of it, leaves no scope for speculation.

4. On the subject of this equitable tenancy in common, against which we must again enter our protest as a *novus hospes* in the action of ejectment, it may be further remarked that if it is to be regarded in our deliberations on the law of the case, it is to be presumed that it must be treated as if we were sitting in a court of equity, and then it would certainly be appropriate to examine it in all its equitable aspects.

And first, is the deed to Potter to be regarded as the deed of Sir Charles Gould, or is it not? If not, then clearly Potter is not to be affected by any equity which Mrs. Bradstreet might set up against Sir Charles Gould. If it is to be considered his deed, then other equitable considerations present themselves. It is his deed, executed by his attorney, Edward Goold. But Mrs. Bradstreet also makes title through Edward Goold, naming himself attorney to Sir Charles Gould and reciting that as his character in conveying to her.

Then, if Potter is to be affected with equitable notice, or equitable duties, as being his substitute, why is not Mrs. Bradstreet to be similarly affected in the character of his alienee or substitute? If so, she is bound to do whatever Potter might in equity have claimed of Edward Goold, and that is a conveyance in fee, in severalty, of the land in question. But I repeat, this is involving the action of ejectment in subtleties that are unknown to it.

5. But it is insisted that though the point of tenancy in common be got over, there are others in the case that are to be removed, and 1st, that as there is no proof of the power from Sir Charles Gould to Ludlow and Goold, that deed to Potter places him as to the interest of Mrs. Bradstreet in the relation of one having no title or a void title.

As to an entry under a void title, that has met with such pointed answers from this Court and the courts of New York that it can scarcely require a labored examination. The bar of the statute is acknowledged to originate in wrong. In the case of *LaFranboise,* 8 Cowan 594, 596, the supreme court of New York said "that if a party has a deed, he need not produce it, and if on production it proves defective, that does not affect the character of the possession." And when the Court of Errors came to examine that doctrine, it affirm it in more general and emphatic language. The only case which suggests a doubt as to its applicability is that of *Jackson v. Waters,* 12 Johns. 365, decided in the same courts. But though that case be not shaken by subsequent decisions, it is enough to observe of it that it had its origin in a peculiar policy, or rather in the common law principle that the King cannot be disseized or be a disseizor. It was the case of a Canadian grant conflicting with a New York grant, and the case of *Clapp v. Bromagham,* as well as other adjudged cases, show that as between parties to mesne conveyances, the principle ceases to apply. Thus, though the King cannot be a disseizor, his grantee shall be held such, and the reason given is "because he has time and leisure to inquire into the legality of his title, which the King is supposed to want leisure for." Bro. Tit. Disseizin 65.

6. It is further urged that the bar is set up against the same title, and therefore incompetent. But this reason has been repeatedly disposed of by this Court, and most recently in the case of *Town of Pawlet,* in which it is ruled that it is no objection to setting up a possession as adverse. The passage has been already in part quoted.

7. That the deed of 1790 places Potter either in the relation of Sir Charles Gould, who was trustee to Mrs. Bradstreet, or of Mrs. Bradstreet, who was *cestui qui trust.* But this admits of two answers: either the deed as to her was void or it

was not. If not, it destroys her interest by an effectual transfer to Potter; and if it was void, then it could not create the relation contended for. If the confirmation through the deed of Schuyler is resorted to, then the answer is still more complete, for that deed expressly recognizes the right to sell, and if it does put Potter upon inquiry, the result is that he might fairly and honestly acquire a complete title by sale, discharged of her equity, since either Schuyler or Gould might sell consistently with the trust. So that he may have taken a void title from one or the other; but the integrity of his conduct in taking it is such that no principle of equity can make him either trustee or *cestui qui trust* under either the original or confirmatory deed. He may have been ill advised, in a legal point of view, in taking the one or the other title, but if there is no immoral act on his part, merely taking a void deed will not make him a trustee, nor taking an effectual deed from one who has the power to sell, and is expressly charged to sell for the benefit of plaintiff. He is not to be affected by the fraud of the trustee when he so clearly appears to have acted innocently and in good faith.

If in taking a title of the whole from Evans and wife, he has in fact taken a void title from them for Mrs. Bradstreet's interest, he has a right to put himself upon his wrong, and if he has proved an actual adverse possession under it, he has a right to the benefit of his bar. The Evans' never were trustees to Mrs. Bradstreet either under any of the wills or under Schuyler's deed. Edward Goold alone was the trustee for her under the latter, legally in his own right, equitably as attorney to Sir Charles Gould.

No fiduciary relation therefore is imputable to Potter, as claiming under the Evans', because they themselves were never affected with the character of trustees, and not through Goold, because his deed, if good, was absolute against the plaintiff, and if bad conveyed nothing to Potter.

If the attempt is to impute to Potter the relation of trustee because Schuyler was trustee and he claims through or under Schuyler, the answer is that if his paper title, as it is termed is the subject to be considered, then he claims from Schuyler

through Evans and Goold, and as Goold had the legal estate in him, so must Potter have, and Mrs. Bradstreet must seek

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her redress in equity. Against Goold at law she certainly could not recover. But even in equity, how would her right stand? A sale by Goold was perfectly consistent with the trust for her benefit, and considering the *bona fide* character of Potter's purchase, I can see no ground for granting her relief as against him. Notice of her equity, without fraud or collusion, can afford none, since notice of the right in her trustee to sell must accompany it, or rather is a part of it. If the subject of inquiry as it relates to Schuyler is respecting the maintenance of Potter's bar, then he need not assert his possession as adverse to Schuyler; it is enough for his purpose if adverse to Evans or Evans and Goold, and that it might well be so held although he claims under them has been, as we have seen distinctly and repeatedly laid down in this Court. If it began to run against them, it continued for the necessary length of time.

That one may hold adversely to him from whom he purchases has long been settled both in this Court and in the courts of the states of the United States; the fact of possession and the *quo animo* being still the legal subjects of inquiry.

8. It has been argued that whatever may be the rule in ordinary cases, in this the proof of notice was indispensable, since these lands were wild or waste lands, notoriously uninhabited, and mere possession of which was not enough to put the trustee or co-tenants upon their remedy.

To this it may be answered that for anything appearing in the bill of exceptions, the lands may not have been waste or wild, and the proof of Potter's entering immediately and claiming to be sole and exclusive owner would seem to repel the fact.

But the true answer is the general one, which was before given on the subject of notice, that we know not but proof of notice, or presumption of notice, may have been the grounds on which the jury found their verdict. As a proof of a "claiming to

be sole and exclusive owner," it was an adequate and natural ground, and certainly as a fact may have been inferred from length of possession and other circumstantial evidence, of the weight of which they must be the judges.

Judgment affirmed with costs.