Croxall Vs. Shererd

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SooperKanoon Citation : sooperkanoon.com/81431

Court : US Supreme Court

Decided On : 1866

Appeal No. : 72 U.S. 268

Appellant : Croxall

Respondent : Shererd

Judgement :

Croxall v. Shererd - 72 U.S. 268 (1866)
U.S. Supreme Court Croxall v. Shererd, 72 U.S. 5 Wall. 268 268 (1866)

Croxall v. Shererd

72 U.S. (5 Wall.) 268

ERROR TO THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF NEW JERSEY

SYLLABUS

1. As a general thing, any legal conveyance will have the same effect upon an equitable estate that it would have upon the like estate at law, and whatever is true at law of the latter is true in equity of the former. The rule in *Shelley's Case*

applies alike to equitable and to legal estates, and an equitable estate tail may be barred in the same manner as an estate tail at law.

2. A use limited upon a use is not affected by the statute of uses. The statute executes but the first use. In the conveyance by deed of bargain and

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sale, the whole force of the statute is exhausted in transferring the legal title in fee simple to the bargainee, and the second use remains as a trust.

3. A private act of the Legislature of New Jersey (passed in 1818) by which an estate meant to be settled in apparently some sort of tail, but over the deed settling which (executed in 1793) doubts and difficulties of law hung, making the rights of the several parties uncertain, the object of which private act was to dock the entail, unfetter the estate, and divide it equally between children in fee, was held to be a proper exercise of the legislative power to effect an assurance of title through a private statute, and valid, all parties in interest *in esse* at the time having been before the legislature and having either asked for the act or consented that it should pass, and there being no ground for imputation on any of them of fraud, indirection, or concealment, the partition, moreover, having been made by disinterested commissioners, having been equal and fair, and all parties in esse in interest having confirmed it by conveyances and releases mutually made.

4. A purchaser *bona fide* holds adversely to all the world, and may disclaim the title under which he entered and set up, even as against his vendor, any title whatever.

5. A remainder is to be considered as vested when there is a person in being who would have an immediate right to the possession upon the ceasing of the intermediate particular estate. And it is never to be held contingent when, consistently with intention, it can be held vested.

6. Under the Act of the New Jersey Legislature of June 5, 1787 (2), declaring that thirty years' actual possession, where such possession was obtained by a fair and *bona fide* purchase of any person supposed to have a legal right and title shall vest an absolute right and title in the possessor and occupier, no qualification is made as to issue in tail, and where a special verdict found that the defendant obtained possession by a *bona fide* purchase from a party in possession and supposed to have a valid title, and the court held that the estate in remainder of the party in possession and supposed to have the valid title was a vested remainder, not a contingent one, the case was considered to be brought within the meaning of the statute as within its letter.

Robert Morris Croxall, the plaintiff in error, in September, 1863 -- the year is important -- brought ejectment in that court to recover certain premises in New Jersey. The jury found a special verdict in substance thus:

On the 15th of November, 1793, Robert Morris, being seized in fee simple of certain lands in the state just named, an indenture tripartite was made between him, of the first part, Charles Croxall and Mary, his wife, of the second, and

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Robert Morris, Jr., Adam Hoops, and Aaron Dickinson Woodruff, of the third. The deed set forth that for the better settling and assuring of the lands therein described and intended to be conveyed and settled upon the uses and subject to the trusts, and for the purposes thereinafter limited, and in consideration of ten shillings paid to the said Robert Morris by the said Robert, Jr., Adam, and Aaron, the said Robert Morris thereby conveyed to the parties of the third part, and to their heirs, the land situated &c.; The habendum was thus:

"To have and to hold the said messuage, lands &c.;, to the said Robert, Jr., Adam, and Aaron, their heirs and assigns, to the uses, trusts, intents, and purposes hereinafter mentioned, limited, expressed, and declared of and concerning the same -- that is to say to the use and behoof of the said Charles Croxall and his assigns for and during the term of his natural life, and from and immediately after

the decease of the said Charles to the use and behoof of the said Mary, his wife, and her assigns, for and during the term of her natural life, in case she shall happen to survive the said Charles, and from and after the determination of the said estates so limited to them, the said Charles and Mary, his wife, for their several and respective lives, to the use and behoof of the said Robert, Jr., Adam, and Aaron, and their heirs, for and during the lives of them, the said Charles and Mary, his wife, and the life of the longer liver of them, upon trust to preserve the contingent uses and remainders thereof, hereinafter limited, from being destroyed, and to and for that purpose to make entries as occasion shall require, but not to convert any of the profits of said premises to their own uses, but nevertheless in trust to permit and suffer the said Charles and his assigns, during his natural life, and after his death, the said Mary, his wife, and her assigns, during her natural life, to receive and take the rents, issues, and profits of all and singular the said premises, with the appurtenances, to and for their respective uses and benefits; and from and immediately after the death of the survivor of them, the said Charles and Mary, his wife, then to the use and behoof of the heirs of the body of the said Mary, by her present husband lawfully begotten, or to be begotten, and to the heirs of his, her, and their

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bodies lawfully to be begotten, and in default of such issue then to the use and behoof of the said Robert Morris, party of the first part to these presents, and of his heirs and assigns forever, and to or for or upon no other use, trust, intent, or purpose whatsoever."

The grantees thereupon became seized of the premises, and Charles Croxall and his wife, and their assigns occupied and possessed them and received and enjoyed the profits until the premises were divided as hereinafter stated among the children of the said Charles and Mary, Charles Croxall, prior to 1817, having erected a mansion house upon that part of the premises now in dispute.

Mary, the wife of Charles Croxall, was the daughter of the grantor, Robert Morris, and was married to the said Charles long prior to the making the indenture, and

had by him before, as well as after it was executed, several children, all of whom died unmarried and without issue in the lifetime of their parents except four, namely Thomas, Daniel, Ann Maria (who intermarried with Claudius Legrand), and Morris Croxall, who severally survived their parents, the said Charles and Mary -- the said Thomas being the eldest, and having been born prior to the execution of the said deed.

Mary Croxall died in July, 1824, and Charles Croxall in November, 1831. Thomas Croxall was married in the year 1813, and had nine children -- three of whom died without issue in the lifetime of their father. The remaining six, of whom one was Robert Morris Croxall, the plaintiff, survived the said Thomas, and were still living. This Robert Morris Croxall, the only surviving son, was born on the 19th of March, 1821.

Thomas Croxall died in October, 1861.

On the 26th June, 1798, Charles Croxall and Mary, his wife, for the consideration of five shillings, conveyed the land by deed of bargain and sale to J. and W. Gallagher, their heirs and assigns, for and during the life of the said Charles, and after his death during the life of the said Mary, if she should survive him, in trust out of the rents

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and profits to pay certain debts of the said Charles, and to enable the said Mary to receive any sum, not exceeding four hundred dollars per annum, and after the debts were satisfied and the trustees reasonably compensated, to convey back the premises to the said Mary, her heirs and assigns.

On the 11th July, 1804, the Gallaghers conveyed the lands to Mary Croxall, to hold the same during life.

In December, 1807, the Court of Errors and Appeals of New Jersey, in a suit in chancery, wherein the Gallaghers were complainants and Charles and Mary Croxall were respondents, decreed that the appellants, upon certain terms and

conditions set forth, should deliver possession of the entire estate to Charles and Mary Croxall, and that they should convey the same to the said Mary, her heirs and assigns, pursuant to their agreement of June 26, 1798. The conditions of the decree were complied with, and the Gallaghers conveyed to Mary Croxall accordingly.

On the 1st of July, 1814, Charles and Mary Croxall executed to their two sons, Thomas and Daniel, a deed of bargain and sale for one undivided half of the property, with a covenant that they had done nothing to encumber the estate, and that they would warrant and defend against all persons claiming under them, or either of them. There was also a covenant for further assurances.

On the 9th of May, 1808, all the interest of Charles Croxall in the premises was sold under execution to William McCullogh, and a sheriff's deed executed. On the 17th of May, 1808, McCullogh sold and conveyed to one Milner, who on the next day, conveyed the premises to A.D. Woodruff, Peter Gordon, and Jonathan Rhea, their heirs and assigns, to hold them during the natural lives of Charles and Mary Croxall in trust for the sole and separate use of Mary during life and also to preserve the same from waste, so that after her death the same might enure to the heirs of her body by the said Charles Croxall, to the uses declared by the deed tripartite of 15th November, 1793, for the same premises. Shortly after the execution of the deed last mentioned, and before the application to the Legislature of New Jersey,

by Thomas Croxall, hereafter mentioned, Woodruff and Rhea died, leaving Gordon the sole surviving trustee, under the deed executed by Milner. Before that application also, Thomas, Daniel, and Anna Maria Croxall had arrived at majority, and Anna Maria had married, as before stated. Morris Croxall arrived at majority in 1820. Prior to that time and to the application to the legislature, Gordon was his guardian.

In November, 1817, Thomas Croxall presented a petition to the legislature, asking for the partition of the premises. The petition stated that the title and right of possession for life had become vested in Mary Croxall, and that in the year 1814 she had, under the advice of counsel, conveyed to the memorialist all her right and title to the undivided part of the estate to which he, as an heir, laid claim. The aid of the legislature was invoked for the reason, as stated, that difficulties had arisen among the different branches of the family in relation to the property, that the estate was so situated as not to produce to its respective owners the income which it ought to yield, and that causes of litigation frequently occurred. Charles and Mary Croxall, Daniel Croxall, Legrand and wife, and Morris Croxall, by Peter Gordon, his guardian, submitted a remonstrance. The remonstrance was afterward withdrawn, and with the consent of all the parties, *an act of the legislature was passed February 14, 1818, which appointed three commissioners, with power to divide the estate into four equal parts, and to set off and apart to each of the children of Charles and Mary Croxall, one equal fourth part by metes and bounds and in severalty. The was accordingly done. The premises in dispute in this case are a part of the share set off to Morris Croxall.* The heirs afterwards mutually released and quitclaimed to each other according to the partition so made. Charles and Mary Croxall joined in the deeds. The deeds from Morris Croxall and the deed to him were executed after he arrived at the age of twenty-one years. Charles and Mary Croxall reserved for their use during their lives a part of his share. This was not embraced in their deed to him. The premises in dispute are a

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part of what was reserved. Thomas and Daniel Croxall, with Legrand and wife, in 1819, upon the execution of the deeds to them respectively, took possession in severalty of their respective shares and held and enjoyed the same until they severally sold and conveyed to Garrett D. Wall, as hereafter stated. Morris Croxall did the same with respect to his share, except as to the part reserved for the use of his father and mother, which they occupied -- he living with them. Their occupancy continued until the death of Mary, in 1824. Charles continued his

occupancy after her death, until he also sold and conveyed to Wall. *The deeds of the several parties to Wall were all executed in the year 1825.* The deed of Morris includes the land in dispute in this case. At the time of the conveyance by Thomas Croxall, Wall held three mortgages upon the premises constituting his share, and had also bought the same at a sale upon execution and received a deed from the sheriff. When Daniel conveyed, Wall held a mortgage upon his share, and had also bought in the property at a sale under execution, and received the sheriff's deed accordingly. Wall had also taken up a mortgage executed by Morris Croxall before Morris conveyed to him. Wall is dead. The mortgages are held by his family as muniments of title. On the 13th of September, 1825, Charles Croxall, his wife being then dead, released and quitclaimed to Wall all his interest in the entire premises so conveyed to Wall, whether that interest was in his own right or in right of his deceased wife. Wall paid the full value of the several parcels of the property at the times when the same were respectively conveyed. The lands have since been greatly increased in value by improvements put upon them by Wall and those who purchased from him. A large portion of the Town of Belvidere now stood upon them.

On the 25th January, 1827, Wall conveyed to Shererd, the defendant in the case, by deed of bargain and sale, for the consideration of $2,200, the full value of the property at the time, a portion of the premises. They now made part of the Town of Belvidere. *Upon the making of the several deeds to Wall he immediately entered into possession under the conveyances,*

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and Shererd, upon the making of the deed of conveyance to him by Wall, immediately entered into possession as the owner, and has ever since been in possession, and for one year prior to the making of the deed he had been in possession as the tenant of Wall. Possession was obtained by the defendant by a fair bona fide purchase of the property in question, of a party in possession, and supposed to have a legal right and title thereto.

Upon this special verdict, the court below gave judgment for the defendant. The case was now on error in this Court.

To understand the case fully, it is necessary to state that in New Jersey the legislature, by a statute of August 25, 1784 [Footnote 1] (explained by one of March 3, 1786, and repealed apparently by one in 1820), had enacted that:

"All devises heretofore made in tail as aforesaid, which have not already passed through one descent since the death of the testator, and also all such devises which shall hereafter be made in tail of any kind, shall be deemed, taken, and adjudged to vest in and entitle the person to whom the same may descend, agreeably to the devise or entailment, after the decease of the first devisee, to all the estate in the devised premises which the testator was entitled to and might or could have devised; and that *no entailment of any lands or other real estate shall continue to entail the same in any case whatever longer than the life of the person to whom the same hath been or shall be first given or devised by such entailment.*
"

Also that an act to abolish fines and recoveries was passed June 12, 1799, [Footnote 2] as on the following day an act [Footnote 3] declaring that from that day "no statute of the Parliament of England or Great Britain should have force within the State of New Jersey."

Also that (by Act of June 5, 1787, section 2d), [Footnote 4]

"Thirty years' actual possession of any lands, tenements, or other real estate, uninterruptedly continued as aforesaid, . . . wherever such possession was obtained by a fair *bona fide* purchase of such lands, tenements, or other real estate, of any

person or persons whatever in possession, and supposed to have a legal right and title thereto, or of the agent or agents of such person or persons, shall be a good and sufficient bar to all prior locations, rights, *titles, conveyances, or claims*

whatever not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands, tenements, or other real estate."

The act had the usual exceptions in favor of infants, *feme coverts* &c.;, but not others.

The case was argued at much length, and most interestingly, on the whole learning of estates tail, contingent remainders, the rule in *Shelley's Case,* and how far affected by the statutes of New Jersey of 1786, 1799, and 1820, the different qualities of legal and equitable estates in connection with the particular subject, the effects of the different sorts of assurances at common law and under the statute of uses, as also on the more usual learning of the private statute of 1818 and the statute of limitations of 1787. The fact that the court apparently deemed it proper to rest its judgment on these last grounds chiefly and "not to go beyond them" will be a sufficient excuse for a very slight or no report of so able and learned a discussion at the bar.

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MR. JUSTICE SWAYNE delivered the opinion of the Court.

Whether under the deed of Robert Morris of the 15th November 1793, Charles Croxall was tenant for life, remainder to Mary Croxall his wife, for life, remainder to their son Thomas Croxall in tail -- whether Mary Croxall was not the donee in tail under the rule in *Shelley's Case,* and if so, whether her estate was a legal or equitable one -- and whether

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Thomas Croxall was not the donee or first tenant in tail, and if he were the first or the second tenant in tail, whether he took a legal estate by the operation of the statute of uses, then in force in New Jersey, or whether he took an equitable estate, the statute not executing the use created by the deed for his benefit, are questions not without difficulty and upon which the views of some members of the

Court are not in harmony with those of others. As there are grounds of decision not involving these inquiries upon which we are all united in opinion, except one member of the Court, as to one of the propositions, it is deemed proper to place our judgment upon those grounds and not to go beyond them. If Thomas Croxall, and not his mother, was the first tenant in tail, taking under the deed by purchase, and not by limitation, it is immaterial whether his estate was legal or equitable. In the law, if real property, the principles which apply to estates of both kinds, with a few limited exceptions not affecting this case, are the same. In the consideration of a court of equity, the *cestui que trust* is actually seized of the freehold. He may alien it, and any legal conveyance by him will have the same operation in equity upon the trust as it would have had at law upon the legal estate. [Footnote 5]

The trust, like the legal estate, is descendible, devisable, alienable, and barrable by the act of the parties and by matter of record. Generally, whatever is true at law of the legal estate is true in equity of the trust estate. [Footnote 6]

The rule in *Shelley's Case* applies alike to equitable and to legal estates, [Footnote 7] and an equitable estate tail may be barred in the same manner as an estate tail at law, and this end cannot be accomplished in any other way. [Footnote 8]

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In *Doe v. Oliver,* [Footnote 9] the testator had devised lands to his wife for life, remainder to the children of his brother who should be living at the death of his wife. But one child, a daughter, was living at that time. She with her husband, in the lifetime of the devisee of the life estate, levied a fine and declared the use to A. B. after the death of the first devisee and the termination of her life estate.

A. B. brought an action of ejectment for the lands and recovered. It was held that the fine had a double operation, that it bound the husband and wife by estoppel or conclusion, so long as the contingencies continued, and that when the contingency happened, the estate which devolved upon the wife fed the estoppel, that the estate by estoppel created by the fine, ceased to be an estate by estoppel

only, and became an interest, and gave to A. B. exactly what he would have had if the contingency had happened before the fine was levied. If Mary Croxall took under the deed an equitable contingent remainder for life, and Thomas at her death would have taken a legal estate tail, if the estate still subsisted, the statute in his case, executing the use, then the estates could not coalesce, one being legal and the other equitable, and the rule in *Shelley's Case* would not apply. In that view of the subject, Thomas and not his mother was the donee in tail.

A use limited upon a use is not executed or affected by the statute of uses. The statute executes only the first use. In the case of a deed of bargain and sale, the whole force of the statute is exhausted in transferring the legal title in fee simple to the bargainee. But the second use may be valid as a trust and enforced in equity according to the rights of the parties. [Footnote 10]

But without pursuing the subject, let it be conceded, for

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the purposes of this case, that Thomas Croxall was the donee or first tenant in tail and that he took a legal estate, as contended by the counsel for the plaintiff in error.

Taking this view of the subject, the first inquiry to which we shall direct our attention is as to the effect of the act of the legislature of the 14th of February, 1818 and of the proceedings which were had under it. All the parties in interest then *in esse* were before the legislature, and asked for the act or consented that it should be passed.

There is no ground for the imputation upon either of them of any fraud, indirection, or concealment. It is not denied that the act was deliberately passed, nor that the partition made under it by the commissioners was fair and equal; all the parties testified their approbation, and confirmed it by their subsequent conveyances. The legal doubts and difficulties which hung over the deed, the uncertainty of the rights of the several parties; the learned and elaborate arguments, and conflicting views of the counsel, and our differences of opinion in this litigation evince the wisdom

and the equity of the act. It is as clear by implication as it could be made by expression that the object of the legislature was to dock the entail and unfetter the estate. What is implied is as effectual as what is expressed. [Footnote 11] If it were possible for the parties and the legislature to accomplish this object, it was thus done. Had they the power? When the deed was executed, the statute *de donis* was in force in New Jersey, but modified by the Acts of her legislature of the 25th of August, 1784, and of the 3d of March, 1786. Fines and recoveries, as known in the English law, were then a part of her judicial system. They were abolished by the Act of June 12, 1799. By the act of 13th of June, 1799, it was declared that no British statutes should thereafter have any force within the state. The plaintiff's lessor was the son of Thomas Croxall, and was born on the 29th of March, 1821. Estates tail, under the statute *de donis,* were, before the passage of the statute, known in the common

law as conditional fees. Like estates tail, they were limited to particular heirs to the exclusion of others. The condition was that if the donee died without leaving such heirs as were specified, the estate should revert to the grantor. According to the common law, upon the birth of such issue, the estate became absolute for three purposes:

1. The donee could alien, and thus bar his own issue and the reversioner.

2. He could forfeit the estate in fee simple for treason. Before, he could only forfeit his life estate.

3. He could charge it with encumbrances. He might also alien before issue born, but in that case the effect of the alienation was only to exclude the lord, during the life of the tenant, and that of his issue, if such issue were subsequently born, while if the alienation were after the birth, its effect was complete, and vested in the grantee a fee simple estate. [Footnote 12]

In this state of the law, it became usual for the donee, as soon as the condition was fulfilled by the birth of issue, to alien, and afterwards to repurchase the land.

This gave him a fee simple absolute for all purposes. The heir was thus completely in the power of the ancestor, and the bounty of the donor was liable to be defeated by the birth of the issue for whom it was his object to provide. To prevent such results and to enable the great families to transmit in a perpetuity the possession of their estates to their posterity, the statute *de donis* of the 13 Edward I, known as the Statute of Westminster the 2d, was passed. It provided

"That the will of the donor, according to the form in his deed of gift manifestly expressed, should be observed, so that they to whom a tenement was so given upon condition, should not have the power of alienating the tenement so given, whereby it might not remain after their death to their issue, or to the heir of the donor, if the issue should fail."

Under this statute, it was held that the donee had no longer a conditional fee governed by the rules of the common law,

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but that the estate was inalienable, and must descend *"per formam doni,"* or pass in reversion. The evils arising from the statute were found to be very great. Repeated efforts were made by the Commons to effect its repeal. They were uniformly defeated by the nobility, in whose interest the statute was passed. It remained in force and was administered without evasion for about two centuries. In the reign of Edward IV it was held in *Taltarem's Case* [Footnote 13] that the entail might be destroyed by a common recovery. The effect of this process was to bar alike the issue, the reversioner, and all those to whom the donor had given other estates expectant on the death of the tenant in tail without issue. The demandant took an absolute estate in fee simple. [Footnote 14] Fines were subsequently resorted to for the same purpose. A statute of 32 Henry VIII declared a fine, duly levied by the tenant in tail, to be a complete bar to him and his heirs and all others claiming under the entail. Other incidents were subsequently from time to time annexed to such estates. By a statute of Henry VII, they were made liable to forfeiture for treason. At a later period they were made liable for the debts of the tenant to the Crown, due by record or special contract, and still later they

were made liable for all his debts in case of bankruptcy. The power to suffer a common recovery has been invariably held to be a privilege inseparably incident to an estate tail, and one which cannot be restrained by condition, limitation, custom, recognizance, or covenant. [Footnote 15]

Private acts of Parliament are one of the modes of acquiring title enumerated by Blackstone. They are resorted to when the power of the courts of justice is inadequate to give the proper relief and the exigencies of the case require the interposition of the broader power of the legislature. They were very numerous immediately after the restoration of Charles II. The validity of statutes affecting private interests

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in specific real property has been repeatedly recognized by this Court. [Footnote 16]

Blackstone says:

"Nothing also is done without the consent expressly given of all parties in being and capable of consent that have the remotest interest in the matter unless such consent shall be perversely and without any reason withheld. [Footnote 17]"

Here all who were interested consented. No interest vested or contingent of the lessor of the plaintiff in error was involved, and no consent was asked of him, for the reason that he was then unborn.

In *Westby v. Kiernan,* [Footnote 18] it was held that a private act passed to enable the tenant in tail to raise money bound the remainder. This involved the power to destroy the estate by encumbering the property to the full amount of its value.

We entertain no doubt that the act in question was valid and that the partition made under it, and the deeds subsequently executed, vested in each grantee a fee simple estate. This was the necessary result whatever the quantity and character of the estate of Mary and Thomas Croxall at that time.

It remains to consider the effect of the statute of limitation relied upon by the defendant in error. The second section of the Act of the 5th of June, 1787, declares that thirty years' actual possession, where such possession was obtained by a fair and *bona fide* purchase of any person in possession and supposed to have a legal right and title, shall vest an absolute right and title in the possessor and occupier. The deed of Morris Croxall to Garrett D. Wall bears date on the 30th of September, 1825. Wall conveyed to Shererd, the defendant, on the 5th of January, 1827. The special verdict finds that Wall took possession at the date of the deed to him from Morris Croxall, and held it until he conveyed to Shererd on the 5th of January, 1827, and that Shererd was continuously in possession from that time down to the commencement of the suit,

"and that possession was obtained

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by the defendant by a fair and *bona fide* purchase of the lands in question of a party in possession and supposed to have a legal title thereto."

The finding of the jury brings the case exactly within the terms of the statute. And there had been uninterrupted possession for more than the statutory period of thirty years when the action was commenced.

It is said that the possession of the defendant was subordinate to the ultimate right and title of the plaintiff's lessor, and was in effect his possession. This is not so. The defendant was a *bona fide* purchaser. Such a party holds adversely to all the world. He may disclaim the title under which he entered, and set up any other title and any other defense alike against his vendor and against others. [Footnote 19]

It is said also that the remainder to Thomas Croxall was contingent and expectant until the death of his father and mother; that nothing passed by his deed to Wall, and that the statute could not, under these circumstances, affect the rights of his heir in tail. Laying out of view the act of the legislature of 1818 and what was done under it, this is still an erroneous view of the subject. Thomas was living at the time

of the execution of the deed of 1793, and took at once an estate vested in right, and deferred only as to the time of possession and enjoyment. It was in the latter respect only contingent and expectant. If this were not so, upon the death of the remainderman before the vesting of the possession his children could not inherit. [Footnote 20]

The struggle with the courts had always been for that construction which gives to the remainder a vested rather than a contingent character. A remainder is never held to be contingent when, consistently with the intention, it can be held to be vested. If an estate be granted for life to one person and any number of remainders for life to others in succession, and finally a remainder in fee simple or fee tail,

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each of the grantees of a remainder for life takes at once a vested estate, although there be no probability, and scarcely a possibility, that it will ever, as to most of them, vest in possession. [Footnote 21]

Chancellor Kent says the definition of a vested remainder is thus fully and accurately expressed in the Revised Statutes of New York. It is "when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate precedent estate."

It is the present capacity to take effect in possession, if the precedent estate should determine, which distinguishes a vested from a contingent remainder. Where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to the future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue. A remainder, limited upon an estate tail, is held to be vested, though it be uncertain whether it will ever take effect in possession. [Footnote 22] A vested remainder is an estate recognized in law, and it is grantable by any of the conveyances operating by force of the statute of uses. [Footnote 23]

Such an estate, if the entail had not been destroyed, passed by the deed of Thomas Croxall to Morris Croxall, by the deed of Morris Croxall to Garrett D. Wall, and by the deed of Wall to the defendant, Shererd. Whatever interest Charles Croxall had in the property after the death of his wife passed by his deed of the 20th of September, 1825, to Wall, and from Wall, under the covenant of warranty in his deed, to Shererd.

The special verdict having found that the defendant obtained possession by a *bona fide* purchase from a party in

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possession, and supposed to have a valid title, the case is thus, in this view of the state of the title, brought again within the letter, and, as we think, within the meaning of the statute. The statute provides expressly that possession for the period of limitation shall vest in the occupant "an absolute right and title to the land." Such a title thus became vested in the defendant, Shererd. This would have been the effect of the bar without such a provision in the statute. [Footnote 24]

The statute contains no qualification or exception as to issue in tail, and we can interpolate none; nor can we review or reverse the finding of the jury. In *Inman v. Barnes,* [Footnote 25] Mr. Justice Story said:

"I take it to be well settled that if the time limited has once run against any tenant in tail, it is a good bar not only against him, but also against all persons claiming in descent *per formam doni* through him."

In *Wright v. Scott,* [Footnote 26] this same statute came under the consideration of the court. The case involved entailed property. The court gave the same construction to the statute which we have given. Mr. Justice Washington remarked that if such were not the proper construction, the issue in tail could never be barred. In cases of this class, as in all others, when the statute has begun, it continues to run until its effect is complete. It proceeds to throw its protection over the property, and does not stop by the way for any intermediate right which may have arisen during the period of its progress. It allows no immunity beyond the

savings which it contains. Such statutes are now favorably regarded in all courts. They are "statutes of repose," and are to be construed and applied in a liberal spirit.

Our construction of this statute is sustained by the analogies of the English and Massachusetts decisions respecting writs of formidon in descender under the statute of the 21 James I, and other statutes containing similar provisions. [Footnote 27] The law presents other analogies which tend strongly in the same direction. As between trustee and *cestui que trust* -- a

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joint tenant and a tenant in common, and their co-tenants, the bar becomes complete when the period has elapsed, which the statute prescribes, after the commencement of open and notorious adverse possession. [Footnote 28] We think the special verdict sustains conclusively this defense.

The judgment below was properly given for the defendant in error, and it is affirmed.

[Footnote 1]

Paterson's Laws 53, 78.

[Footnote 2]

Ibid., 411.

[Footnote 3]

Ibid., 436.

[Footnote 4]

Ibid.

[Footnote 5]

Burgess v. Wheate, Eden 226; *Boteler v. Allington,* 1 Brown's Chancery 72.

[Footnote 6]

Cholmondeley v. Clinton, 2 Jacob & Walker 148; *Walton v. Walton,* 7 Johnson's Chancery 270; *Doe v. Laming,* 2 Burrow 1109; *Phillips v. Brydges,* 3 Vesey 127.

[Footnote 7]

Garth v. Baldwin, 2 Vesey Sr., 655; *Pratt v. McCawley,* 8 Harris, 264; Fearne on Remainders 121.

[Footnote 8]

Saunders on Uses 280; Williams on Real Property 155.

[Footnote 9]

14 Barnewall & Creswell 181.

[Footnote 10]

Doe v. Passingham, 6 Barnewall & Creswell 305; Gilbert on Uses, Sugden's note, 1; *Jackson v. Cary,* 16 Johnson 304; *Franciscus v. Reigart,* 4 Watts 108; Williams on Real Property 181; *Roe v. Tranmarr,* 2 Smith's Leading Cases 511, note.

[Footnote 11]

United States v. Babbit, 1 Black 55.

[Footnote 12]

Plowden 241.

[Footnote 13]

Year Book, 12 Ed. IV, 14, 19.

[Footnote 14]

2 Blackstone's Comm. 360; Cruise on Recoveries 258.

[Footnote 15]

Knowles' Argument in *Taylor v. Horde,* 1 Burrow 84; *Dewitt v. Eldred,* 4 Sergeant & Rawle 421.

[Footnote 16]

Stanly v. Colt, supra, <72 U.S. 119|>119.

[Footnote 17]

2 Commentaries 345.

[Footnote 18]

2 Ambler 697.

[Footnote 19]

Watkins v. Holman, 16 Pet. 54; *Blight's Lessee v. Rochester,* 7 Wheat. 548; *The Society v. Town of Pawlet,* 4 Pet. 506; *Jackson v. Huntington,* 5 Pet. 402; *Willison v. Watkins,* 3 Pet. 43; *Voorhies v. White's Heirs,* 2 Marshall 26; *Winlock v. Hardy,* 4 Littel 274.

[Footnote 20]

Goodtitle v. Whitby, 1 Burrow 228.

[Footnote 21]

Williams on Real Property, 208.

[Footnote 22]

Goodtitle v. Whitby, 1 Burrow 228; *Wendell v. Crandall,* 1 Comstock 491; *Doe v. Lea,* 3 Durnford & East 41; *Moore v. Lyons,* 25 Wendell 119; *Doe v. Underdown,* Willes 293; *Etter's Estate,* 23 Pa.St. 381; *Vanderheyden v. Crandall,* 2 Denio 18; *Boraston's Case,* 3 Coke 51; 4 Kent's Com. 202; Williams on Real Property 207.

[Footnote 23]

Fearne on Remainders 216; 4 Kent's Com. 205.

[Footnote 24]

Leffingwell v. Warren, 2 Black 605.

[Footnote 25]

2 Gallison 315.

[Footnote 26]

4 Wash.C.C. 24.

[Footnote 27]

Angel on Limitations 360

[Footnote 28]

Angel on Limitations, 425, and 419 to 436.

MR. JUSTICE MILLER.

I concur in the judgment of the Court and in its opinion as to the first ground on which the judgment is based.

In that part of the opinion which declares the statute of limitation to be a good defense, I cannot concur. The facts conceded by both parties show that until the death of Thomas Croxall in 1861, the defendants and those under whom they

claimed had a lawful possession and were at no time liable to an action to disturb that possession until that event, and I do not believe that the statute of limitations of New Jersey or of any other country or any rule of prescription was ever intended to create a bar in favor of parties in possession who were not liable to be sued in regard to that possession.

It was unnecessary to decide this proposition, as the Court were unanimous in the opinion that defendants had a good title in fee simple which needed no statute of limitation to protect it.