OPINION

To S. W. Jones Esq the Judge who delivered it —

OF THE

HON. ALFRED CONKLING,

DISTRICT JUDGE OF THE UNITED STATES

FOR THE

NORTHERN DISTRICT OF NEW YORK;

ON A MOTION IN BEHALF OF THE TENANT

For a New Trial,

IN

THE CASE OF MARTHA BRADSTREET

vs.

HENRY HUNTINGTON,

DELIVERED AT THE MAY TERM OF THE COURT

IN

1834.

UTICA:

PRESS OF WILLIAM WILLIAMS,

60 GENESEE STREET,

MDCCCXXXIV.

Utica, August 28, 1834.

Hon. Judge Conkling.

Sir: The subscribers, members of the bar, who were attending the District Court of the United States, when your honor delivered your opinion in the case of Martha Bradstreet *vs.* Henry Huntington, are very desirous of having copies of it for their instruction and guidance; and respectfully request your honor to permit it to be published.

Very respectfully,

Your Obt. servants,

John C. Spencer,
Sam'l Beardsley,
C. P. Kirkland,
J. Kirkland,
W. C. Noyes,
B. F. Cooper,
Chas. A. Mann,
E. A. Wetmore.

Ethan B. Allen,
J. H. Ostrom.
J. A. Spencer,
S. D. Dakin,
W. Crafts,
T. R. Walker.
Jno. Bradish,
Ward Hunt,

Utica, August 29, 1834.

Gentlemen:

I have not the slightest objection to the publication of my opinion in the case of Bradstreet *vs.* Huntington, as proposed in your note of yesterday, and

I am with great respect,

Your Obt. servant,

A. Conkling.

To the Hon. John C. Spencer and others,
members of the bar attending the District Court.

OPINION.

CONKLING, Judge.

This is a writ of right, in which, the grand assize having at the last January session of the Court found a verdict in favor of the ~~defend~~ dem- ant, a motion founded upon a case has been made by the tenant for a new trial.

The defendant claims a right to recover one undivided fourth part of certain premises situate in the city of Utica.

At the trial, the tenant, (being in this form of action required to begin,) gave in evidence.

1. A conveyance bearing date in the year 1790, in which the grantees were described as Charles John Evans, 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 Gould, of the city of New York, merchants, his attornies, to Stephen Potter, of Whitestown, &c. for 400 acres of land including the premises in question. The consideration of this deed was 400 pounds, a receipt for which was indorsed upon the deed, and it contained a covenant of warranty by Evans and wife.

2. The will of Stephen Potter, made in 1808, devising his farm comprising the tements in question to his son, William Potter.

3. A conveyance with warranty, in consideration of 13,950 dollars, from William F. Potter to the tenant, executed in 1816 for about 70 acres of land, being the tenements in dispute in this action.

The tenant then called William Alverson as a witness, who testified, in substance, that he went to reside in the immediate vicinity of the premises in 1789, and had resided there ever since. That he saw Stephen Potter's deed soon after he received it: that Potter entered into possession in 1790, and continued in possession, claiming and using the land as his own, until his death in 1810: that during his life tim a considerable part of the land embraced in his deed was cleared, and the part conveyed to the tenant was inclosed by a fence; and that since Stephen Potter's death the premises had in like manner been possessed successively by his son and devisee William F. Pot er and the tenant.

The tenant having then rested the demandant in support of her claim of superior right, proceeded to adduce evidence to the following effect.

A large tract of land, of which the tenements demanded are a part, was granted to Joseph Worrel and others, by Letters Patent bearing date January 2d, 1734.

In 1772, this tract, (which was called Cosby's manor,) was sold by Philip Ten Eyck, then Sheriff of the county of Albany, forarrears of quit rents due to the Crown of Great Britain. At this sale, Philip Schuyler became ostensibly the sole purchaser, and received a conveyance in the usual form, from the Sheriff. [Three other persons, *of whom John Bradstreet was one*, were however interested in this purchase, as will be explained in the sequel. The interest thus acquired by Bradstreet constitutes the foundation of the demandmant's claim of title.]

On the 23d of September, 1774, John Bradstreet made and published his last will and testament, as follows:

This is the last will and testament of John Bradstreet, Major General in his Majesty's army, as follows. I revoke all former wills and testaments; I appoint Philip Schuyler to take all my books and papers, and settle and transmit my public accounts to Charles Gould, Esquire, of London; and I discharge the said Col. Philip Schuyler from all demands and debts except one thousand pounds currency, which shall be paid to Elizabeth Bradstreet, daughter to my wife: I devise the farm which I have a lease of in fee, and which is now farmed by Tonycliff, to John Bradstreet Schuyler, son of the said Col. Philip Shuyler, and to his heirs and assigns forever, together with my arms, books, and apparel; I give all my horses, carriages and tackle, to Mrs. Schuyler, wife of the said Col. Philip Schuyler. The money due to me from Parson Johnson, of Cory's Bush, by bond, I give his daughter, Margaret Schuyler. *All the rest of my estate real and personal, I devise and bequeath to my two daughters, equally to be divived 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 nettproduce shall be paid in equal shares, the sum of one hundred pounds sterling 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 expences to the discretion of my executors; and I appoint for the execution of this my will, the said Col. Philip Schuyler and

Wm. Smith Esq. of New-York, who penned this will according to my dictate while much indisposed, but in the enjoyment of my usual share of understanding. In testimony whereof &c.

General Bradstreet died a few days after the date of this will.

His two daughters mentioned in his will, were Martha Bradstreet, and Agatha, then or afterwards the wife of Charles du Bellamy, who subsequently took the name of Charles John Evans.

On the 15th of May, 1781, Martha Bradstreet made her will, the material parts of which are as follows.

"I give and devise to my dear mother Mrs. Mary Bradstreet, the produce and interest of my estate, real and personal, during her life and the sum of one thousand pounds, principal,.....And as to my said real estate and the residue of my personal estate, and the rents, issues, interest and profits of both, after my dear mother's death, I give, devise and bequeath the same and whatsoever I may any wise be entitled to, as follows: one third part thereof to my sister, Elizabeth Livius, her heirs and assigns forever, to be at her own disposal and independent of her husband by will or otherwise; one other equal third part to Samuel Bradstreet and Martha Bradstreet, children of my late brother, Samuel Bradstreet, deceased, and to their heirs and assigns forever, equally to be divided between them and with benefit of survivorship in case of the death of either of them before the age of twenty-one years;.....but it is my will that the produce of the said one third part of my estate, and if necessary, part of the principal shall be applied to the maintenance and education of the said Samuel and Martha during their infancy; and as to the remaining one third part of my estate, I give and devise the produce, income, and profits of the same to my sister Agatha, wife of Charles du Bellamy, for and during her life and at her own disposal, and altogether independent of the control of her said husband; and in case she shall survive him, then I give and devise the said one third part to my said sister and her heirs and assigns forever.....Lastly I constitute and appoint Sir Charles Gould, knight, sole executor of this my last will; &c..... 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 also to place out my moneys upon such securities as he shall deem proper, and in such manner and form as the shares devised to my said sister Agatha, and my nephew and niece, Samuel and Martha, respectively, as shall be conformable to the provisions I have above made with respect to each of the said shares.

Martha Bradstreet died, in March 1782. Her devisee, Elizabeth Livius, was her half sister, being the daughter of her mother by a former marriage with *Major* John Bradstreet, whose son, Samuel,

by the same marriage, was the father of the demandant and her brother Samuel.

Mrs. Mary Bradstreet made her will on the 23d of March, 1782, devising all her property to her daughter Elizabeth Livius, except one hundred pounds to Sir Charles Gould, whom she also appointed her executor.

An instrument in writing, purporting to be the last will of Elizabeth Livius, was also read in evidence, as follows:

"In the name of God amen. I, Elizabeth Livius, wife of Peter Livius, Esquire, of Lincoln Inn Fields; being in a weak state of health, though of a sound, disposing mind and memory, do hereby make my last will and testament in manner following—I hereby constitute and appoint my dear niece Martha Bradstreet, daughter of my late brother Samuel Bradstreet, Major of the 40th Regiment of foot, to be my sole heir to whatsoever 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, which ever may first happen, provided she marries with the consent of my most respected friend Sir Charles Morgan, Bart. whom I appoint executor of this my last will and testament. But in case she should die before she attains twenty-one years of age, or before she be married as aforesaid, I then appoint her brother Samuel, a Lieutenant in the 25th Regiment of foot to be my heir in her place and stead. In witness &c."

The reading of this paper in evidence was objected to by the counsel for the tenant: and its admission by the court, is now relied upon, as it will be necessary hereafter more particulaly to state, in support of this motion.

Mrs. Livius died in May, 1795.

On the 16th of April, 1799, the demandant, at the age of eighteen or nineteen was married to Mathew Codd, in Ireland. In November, 1799, she came with her husband to this state, and not long after went to reside in Utica. No application having been made to Sir Charles Gould for his consent to her marriage, previous thereto, he afterwards gave a written certificate, dated June 4th, 1800, expressing his willingness to consent and ratify the marriage as far as he then had power to do so. In 1805, a proceeding was instituted in the Supreme Court of this state, by the demandant and her husband for the partition of certain lots in Cosby's manor between them and the representatives of the other devisees. The record of this partition was however introduced as tending to authenticate the instrument offered as the will of Mrs. Livius, by showing that the parties claimed and held the lots divided, in conformity with its provisions. A deed bearing date July 26th, 1802, from Samuel Bradstreet to the demandant was also read in evidence, conveying to her whatever interest he

might be entitled to claim in virtue of the testamentary disposition of Mrs. Livius.

The demandant having thus been shown, as the devisee of Martha Bradstreet, and, as was contended, as the devisee also of Mrs. Livius, to be entitled to a beneficial interest in the estate of General John Bradstreet, her counsel, in order to show that General Bradstreet died seized of a legal interest in the premises demanded, offered in evidence the answer of Philip Schuyler, sworn to in 1789, to a bill in chancery filed against him by Charles John Evans, and Agatha his wife. Mrs. Evans, as already stated, was one of the two daughters and devisees of John Bradstreet.

The bill alleged that during the life of Bradstreet great friendship and intimacy subsisted between him and the defendant Schuyler; by reason whereof the latter became entrusted with the affairs of the former, and especially with large sums of money as his agent and trustee, to be placed out at interest in the name of Schuyler, or in the name or names of some other person or persons, but for the benefit of Bradstreet, and to be invested in the purchase of lands to be made in the name of Schuyler, or in the name or names of some other person or persons, but *in trust* for Bradstreet, his heirs and assigns: that Bradstreet being possessed of a large personal estate, and having a large real and personal estate so held in trust for him, on the 24th of September, 1774, made and published his will. [The will is set forth in the bill, and is the same already recited.] That Schuyler took upon himself the execution of the will, and that by reason of the refusal of Smith, the other person named as executor, to take upon himself the burthen of its execution, and of his removal and continued abscence from the state, Schuyler, by force of the statute of the state, entitled &c. became invested with all the powers &c. given to the executors or the survivor of them, in the said will. The prayer of the bill was that Schuyler be required to discover and render an account of all the property in his hands, belonging to the estate of Bradstreet, that he be decreed to pay over to the complainants whatever they should appear to be entitled to receive under the will of Bradstreet, and to *convey* to Mrs. Evans a moiety of the *real estate* held by him *in trust* for her, or to make such other conveyances and diposition of the said real estate as to the court, might under the circumstances appear proper.

General Schuyler, in his answer to this bill, enters into a detailed narative and explanation of his connexion with General Bradstreet and his affairs during his life, and of his own proceedings relative to his estate after his death. He admits that he was employed by General Bradstreet as an assistant in the discharge of his public duties, aud that to some extent, he was also entrusted with the management of his private affairs: and after detailing some other particu-

lars, he proceeds to state as follows: "and this defendant further answering saith, *that some time in or about the month of July, in the year one thousand seven hundred and seventy-two, divers tracts of land having been advertised for sale, for the payment of quit rents, pursuant to an act of the late colony of New York, entitled &c..... ..... this defendant proposed to the said John* [*Bradstreet,*] *to become a partner with his defendant and others, in the purchase of the said land, to which the said John agreed; and this defendant for himself, and in behalf of the said John, together with the persons named in the schedule hereunto annexed,* marked D. [viz. so far as the tract in question is concerned, Rutger Bleecker, and John M. Scott.] (*which this defendant prays may also be taken as a part of his answer,*) *having purchased at public auction the several quantities of lands specified in the the schedule marked D.* [*one parcel of which is the tract now in question,*] *the said John paid by and through the hands of this defendant for his share of the lands so purchased, the sum af nine hundred and fifty-one pounds fourteen shillings and three pence of like current money aforesaid.* [viz. current money of New York;] ..... and this defendant admits that he doth hold or claim *in trust,* for the representatives of the said John, or for the purpose of the will of the said John, the proportions of the said purchases, specified in the said schedule marked D; and this defendant further answering saith, that the said John having declined being known in the transaction aforesaid, the interest of the said John therein, was covered under the name of this defendant, and this defendant understood from the said John, that his reason for declining to be known in the said purchase was, that he was apprehensive that the same might give offence to the Duke of Grafton, who or some of whose family, was, or were supposed to be interested in parcel of the said lands, in the manor of Cosby."

He further states the payment by him from time to time of considerable sums of money on account the estate of Bradstreet, to the complainant Evans, and to Messrs. Ludlow and Gould, attorneys of Sir Charles Gould, executor of Mary and Martha Bradstreet: He states also, that he had offered part of the real estate for sale at the written request of the Evan's, to the end that the moneys arising therefrom might be paid to him in right of his wife, and that *he had also, very lately, refered persons who had applied to him to purchase parts of the said real estate, to Evans and the said Ludlow and Gould, informing the said persons that he would confirm whatever agreement they should respectively enter into with them.* That being desirous of acquitting himself of the trust reposed in him by the will of B. he did, in Febuary, 1784, deliver a written statement of the case to Samuel Jones, Esquire, of the city of New York, counsellor at law, whom he then considered as counsel for the representatives of Brad-

street, for the purpose of obtaining his opinion about the means of acquitting himself of his said trust with safety to himself. One of the questions propounded to Mr. Jones, was as follows: "Mr. Schuyler earnestly wishes to put the several heirs in possession of the estate; how can this be done with safety to himself and in conformity to the said will?" To this question, Mr. Jones replied as follows: "Mr. Schuyler cannot put the heirs in possession of the estate; he must sell the real estate according to the will, and collect the personal estate; and after paying the debts and legacies, pay one half of the residue to Mr. Evans, in the right of his wife, and the other half to the executor of Martha Bradstreet." That in further pursuance of his desire to execute the said trust, he had since caused a division to be made of the lands purchased by him as above stated; previous to which division a map was made, copies whereof were, according to his best recollection, sometime in January or Febuary, 1787, delivered by him to the complainant Evans, or to Ludlow and Gould, whereby it would appear that the lots drawn for Bradstreet, were designated in his name.

That after various consultations about some safe mode of finally settling the estate of Bradstreet, and which always, from the opinion of counsel learned in the law, presented no small embarrassment and difficulty, he, in concert with Evans, the complainant, and the said Ludlow and Gould, as attorneys to the said Sir Charles Gould, put into the hands of the said Samuel Jones, and Richard Harrison, and Alexander Hamilton, of the city of New York, counsellors at law, some or one of them, the said will of John Bradstreet, together with copies of the wills of Martha and Mary Bradstreet, and a power of attorney from the said Sir Charles Gould, as executor to the said Mary and Martha, to the end that they might jointly consider and devise some proper mode for making a settlement of the said estate, and securing him, the defendant, as far as might be practicable, from all risk therein, by reason of his executorship; in consequence whereof, sometime in or about November, 1786, he received a letter from the said Alexander Hamilton, of which the following is an abstract: "I have considered, with Mr. Harrison, and Mr. Jones, a method of settling Bradstreet's affairs, in the safest mode for you—it is that you sell his interest in the lands which, by a late act of the Legislature, you are competent to. Mr. Ludlow may, and will become the purchaser; the price is not material; but for greater caution, it will be best to agree upon such a price, as land now sells for in market. The sale will convert the interest into personal estate—then Evans can represent his wife, and Sir Charles Gould, the rest of the parties, as executor of the two wills, and a settlement of course be easy. As to debts, Ludlow and Gould will engage to indemnify you as far as the shares paid to them, in behalf

of Sir Charles Gould, will go—and Evans, if you think it worth while, will give his bond. Considering the little probability, that debts to any extent exist, I think this kind of security may suffice, and as to a division of the lands, so as to separate your interest, it can be made by agreement between you and the purchasers, say Mr. Ludlow. This plan has been approved by Mr. Jones, and Mr. Harrisson, and seems to me free from any material objections." The answer states the willingness of Schuyler to carry this proposed arrangement into effect, but that it failed in consequence of difficulties, that arose relative to the securities which he thought proper to require against debts, and a disposition on the part of Evans, or Ludlow and Gould to require a discovery under oath from him, before coming to a final settlement. It did not appear that any decree had ever been made in the suit.

A voluntary partition of the tract in question was made between Schuyler and Rutger Bleecker, and a deed of partition between Schuyler of the one part, and Bleecker of the other part, was executed on the 19th of December, 1786, in which it was recited that Schuyler was seized in his demesne as of fee, of three undivided fourth parts of the said tract, and that Bleecker was seized in like manner of one undivided fourth part; that the parties being inclined to make partition so as to enable them, to hold their respective shares in severalty, the said tract had for that purpose been laid into lots, which are described by numbers and boundaries; that the parties had balloted therefor, that certain of them among which was lot number 97, (the lot now in question,) fell to the share of Schuyler, and the others to Bleecker, which they accordingly release, each to the other, in fee.

A map of the tract in question was also put in, bearing date August 31st, 1786, which was proved to have been found among the papers of Rutger Bleecker, and the writing on which was proved to be in the hand writing of John R. Bleecker deceased. Upon the spaces representing the several lots, were seperately written the names of Schuyler, Bleecker, Bradstreet, and Scott; the name of John Bradstreet being written on the space numbered 97.

The defendant having here rested, the counsel for the tenant, in order, (as the case states,) "to show that if there was a partition in August, 1786, it was not the title that the demandant pretended to claim," gave, in evidence, a deed bearing date May 16, 1794, from Philip Schuyler, described as executor of the last will and testament of John Bradstreet, deceased—to Agatha Evans, described as of the city of New-York, widow, one of the daughters of the said John Bradstreet, deceased; and Edward Gould, described as 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.

This deed recites the will of General Bradstreet, and that Schuyler, at the time of the making thereof, and from thence to the decease of the testator, was seized in fee, as tenant in common in trust for the said John Bradstreet, of one undivided fourth part of the tract of land now in question, (as also of certain undivided portions of two other tracts of land:) the death of William Smith, named in the will as co-executor; and that the grantee, Mrs. Evans, is one of the daughters of John Bradstreet. It also recites the will of Martha Bradstreet, the other daughter; and the devise therein to the demandant and her brother Samuel, to Mrs. Evans, and to Mrs. Livius; and that partition had been made among the proprietors of the said tracts of land, describing the lots which fell to Schuyler, as trustee of Bradstreet, and among others, lot No. 97 in Cosby's manor; and that the same had with other lots which fell to Schuyler in his own right, been conveyed to him by deed of partition. The deed then proceeds to state, 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 Gould, 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, and by virtue, also, of the power and authority with which he is as aforesaid invested, and of all other powers which he may lawfully claim as executor, hath "granted, bargained, sold, alienated, released, and confirmed; and by these presents doth grant," &c. unto the grantees above named, and their heirs and assigns, the said lands which so fell to the charge of the said Philip Schuyler, as trustee as aforesaid, (describing them at length, and including lot No. 97 in Cosby's manor,) with all, &c. to have and to hold, &c. to the said Agatha Evans and Edward Gould, their heirs and assigns, in manner following, viz: two equal undivided third parts to Mrs. Evans, and the remaining one undivided third part to Edward Gould, 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 and any parcel thereof; and after deducting the charges of sale, and other contingent expences attending the said trust, to divide the residue of the money to arise from such sale, to and among the said devisees, Samuel Bradstreet and Martha Bradstreet, and the said Elizabeth Livius," &c. One of the witnesses to this deed, was Richard Harrison, who was also the solicitor, and of counsel for Evans' wife, in the suit in chancery against Schuyler.

The counsel for the tenant further gave in evidence, a deed executed on the 22d of October, 1804, by Edward Gould to the demandant, described as Martha Codd, late Martha Bradstreet, wife of Mathew Codd, of Utica, New-York. It recites the above mentioned convey-

ance from Schuyler, on the 16th of May, 1794; and that the said Martha Codd, by the will of Elizabeth Livius, has, since the execution of the said conveyance from Schuyler, become entitled to all the estate of Elizabeth Livius conveyed thereby to Edward Gould, in trust, &c. *not sold and converted into money*, according to the trust; that Edward Gould had become a bankrupt, and obtained a certificate of discharge as such; and that he had been ordered by the court of chancery, "to transfer and convey to the said Martha Codd, all the real estate vested in him as aforesaid, as trustee as aforesaid, of Elizabeth Livius; *but that nothing in the said decree contained, should make him, the said Edward Gould, personally responsible for any of the said trust property which may have been converted into money, and for which he would have been liable if he had not become a bankrupt, and obtained a certificate of discharge.*" It further recites, that the said Edward Gould is willing also to convey to the said Martha Codd, such portion of the real estate mentioned in Schuyler's conveyance, as she may in virtue thereof be entitled to under the will of Martha Bradstreet, and all the real estate vested in him as her trustee.

The deed then proceeds, in consideration of the premises, and in pursuance of the decree, and also in consideration of the sum of one dollar, to convey to Martha Codd, her heirs and assigns, "all the real estate *held by him*," [Edward Gould,] "*at the time of his becoming a bankrupt*," [viz. in 1800.]

The deed also contains a covenant against the acts of the grantor, and for further assurances, "Provided, however, that such assurances shall not contain any covenants on the part of the said Edward Gould or his heirs, *by which he or they may be made answerable or liable for any act or acts in respect to the premises* herein before released, or any part or parts thereof *other than those by him or them done or suffered since his bankruptcy.*"

The counsel for the tenant also gave in evidence the decree in chancery refered to in the deed last above mentioned, together with the bill and the answer of Edward Gould. The complainants were the demandant and her husband, Mathew Codd. The defendants were Edward Gould and the demandant's brother, Samuel Bradstreet. The object of the suit was to obtain a judicial decision in favor of the demandant's claims under the instrument purporting to be the last will of Mrs. Livius, as against her brother, notwithstanding her marriage without the consent of Sir Charles Gould; and to require Edward Gould to account to her accordingly. Gould, in his answer, (which was sworn to on the 9th of July, 1802,) admits the facts set forth in the bill, avers his willingness at all times to account to the true claimant, and submits to the direction of the court. The substance of the decree, (which is very short,) is recited in the deed, as already set forth, except that it further orders that it be referred to one of the masters of the court,

"to take an account of the real and personal property in the possession of the defendant, Edward Gould, as a trustee as aforesaid, and *not converted into money before his bankruptcy, and to direct a proper transfer and conveyance* to the complainants as aforesaid."

Under this state of the evidence, it was insisted by the demandant's counsel that the tenant had failed to show any title to the share of the land claimed by the demandant; but that, on the contrary, that the legal title and seisin were shown to be in her, in virtue of the deed from Ten Eyck to Philip Schuyler, and, of either, first the several wills upon which she relied, or second, of the conveyance given in evidence by the counsel for the tenant, from Schuyler to Edward Gould, in 1794, and of the conveyance of Gould to the demandant, in 1804.

On the part of the tenant these positions were denied, and it was further insisted that even admitting them to be well founded, still the demandant's right of action was barred by the statute of limitations.

It is obvious from this statement of the claims of the demandant, and of the evidence relied upon by her in support of them, that the question whether or not those claims were well founded, (except so far as the point of adverse possession might be material,) was one in its nature purely *legal*. They depended chiefly upon legal instruments, and in no degree upon any disputed fact. They therefore presented absolutely nothing for the independent consideration and decision of the grand assize; for there is no principle of our jurisprudence more unquestionable than that unmixed questions of law are to be decided by the court. Had the opinion of the court been favorable to the demandant, upon the question which it was its province to decide, then indeed the appropriate functions of the grand assize would have been called into exercise in assisting to decide the mixed question of adverse possession. But so far from this having been the case, the court instructed the assize in express terms that the demandant had entirely failed, in point of law, to establish her claims: that neither through the wills produced by herself, nor by the deeds introduced on the part of the tenant, had she shown any legal title to and seisin of the land in question; and that she was not therefore in law entitled to recover, independently of the question of adverse possession. The court also further charged the grand assize, that even had the demandant been successful in showing a documentary title, the right of action would have been barred by the statute of limitations; provided the possession of Potter, taken in 1790, and that of those who succeeded him, had in fact been adverse.

In the face of these instructions, and in obviously intentional disregard of them, the assize thought proper to find a verdict in favor of the demandant.

The question now is whether this verdict ought not to be set aside and a new trial awarded.

Among the novel doctrines which this controversy has elicited, was the position advanced by the counsel for the demandant, upon the argument of this motion, that in this particular form of action, the power of the court to grant new trials, is limited to cases where the verdict was the result of "corruption, partiality, or prejudice." Now, as no direct evidence of such motives can ever be afforded by a special case, the tenor of the counsel's argument seemed to concede that these motives may be inferred from presumptive evidence; that there may be cases in which the verdict is so palpably irreconcilable with an honest, impartial, and enlightened view of the law and evidence, as to authorise the court to presume that it emanated from corruption, partiality, or prejudice; and to set it aside upon that ground.

If, then, the position, insisted upon by the demandant's counsel, were sound, it would be my duty to inquire whether, in reality this is not precisely such a verdict as that to which it is conceded the power of the court extends.

Looking at the case with this view, what are the characteristic features which it would present? The general question for decision, was, whether the demandant had shown a legal title in fee, and had within the period of limitation been in fact seized, or possessed of the tenements in question. This question, as we have seen, depneded primarily on a series of pure questions of law. Upon these questions, in direct opposition to the decision of the court, the grand assize took it upon themselves to pronounce in favor of the demandant. Why did they do so? If the case had been one of mercantile law, and the assize had consisted of eminent merchants; or if, in this case, the assize had been composed of learned lawyers, there would have been room for the charitable presumption that they were governed by their own independent, and in their opinion, superior knowledge of the law. But is there any room for such a presumption here? Such was the nature of the questions involved in this case that many of the very terms, without the use of which it is impossible to speak intelligibly concerning them, must have been to the members of the grand assize, (not being lawyers,) an unknown tongue. That they did not, in fact, understand them, is certain; and after making all reasonable allowances for the weakness of our imperfect natures, it would seem scarcely possible that they can have been flattered into the belief that they did. They were distinctly told, moreover, that it was the exclusive province of the court to decide upon questions of a purely legal character; that these were questions of this nature; and that the judgment of the court upon them was adverse to the demandant's claims. This, then, is a verdict rendered

not merely without, but against knowledge. The question then returns, to what is this verdict to be ascribed?

Is it such a verdict as would naturally have emanated from upright, impartial and unbiassed minds? In short, is it to be denied that it smells rank of prejudice, to say the very least of it? But I forbear to pursue this inquiry, as being both disagreeable and unnecessary; and the rather because there were a few individuals upon the grand assize whom I have the pleasure to know in private life, and who, however they may have been on this occasion deluded by unworthy artifices, to which I shall not now more particularly allude, or coerced by their less conscientious associates, I should be most unwilling to believe would voluntarily do what they knew at the time to be wrong.

After a careful examination of the doctrine urged by the demandants counsel which denies to courts the same general authority over verdicts in writs of right, as they possess in other forms of action, I am satisfied that it is alike unfounded in authority and reason. The only adjudicated case referred to in support of this doctrine, is the case of Tysen *v.* Clarke, 2 W. Bl. 941. There had in that case been an elaborate trial at bar; as may be seen by a full report of the proceedings in 3 Wills, 541. The case turned exclusively upon the *question in fact* whether there had been, about year 1706, a conveyance of the land in question, in fee, or only a lease for 41 years, executed to one Thomas Flanders by the ancestor of the demandant. The question rested altogether upon presumptive evidence. "One of these two facts," said the Chief Justice to the grand assize, in summing up the evidence, "you are to presume, for there is nothing more than presumptive evidence on either side." The verdict was for the demandant. A motion was afterwards made in behalf of the tenant for a new trial, "because, 1st, It [the verdict] was against the weight of evidence. 2d, It was conclusive between the parties; and the right of thet enant ought not to be concluded by a single trial." The decision of the court upon this motion is stated by the reporter in the following terms. "But the court unanimously denied a rule to show cause; because 1st, they were satisfied with the verdict in point of evidence. 2dly, The law has purposely made this trial by the grand assize conclusive, ut sit finis litium; and the court is not to be wiser than the law. 3dly, It may be doubted how far a new trial ought ever to be granted on a trial at bar in a writ of right, where the issue is joined upon the mere right. For it is pretty clear that no attaint lay in such a case. And the practice of granting new trials has been chiefly taken up since the disuse of attaints. But as to to this the court gave no positive opinion; for cases of fraud, &c. may happen wherein a new trial would perhaps be necessary, or else manifest injustice would be done."

This quallified doubt, upon a point relative to which however the court did not choose to express any opinion, affords but a slender foundation for the confident tone assumed by the demandant's counsel in denying the power of this court to interfere upon ordinary grounds with a verdict in a writ of right. I see nothing in the language of the court from which I can infer that they would have hesitated a moment about either the power, or the propriety, of setting aside the verdict, if the case before them had turned upon pure questions of law, and the verdict had been in direct conflict with the opinion and instructions of the court upon them.

But it was asserted by the counsel that after the most diligent research, he had found no instance of a new trial granted in this form of action either in England or in this state. He must therefore have overlooked the case of Nase *v.* Peck 3 Johns. Cas. 128, cited by the counsel for the tenant in reply; in which a new trial was granted upon ordinary grounds without the intimation of a doubt concerning the power. Vide also, 5 Taunt. 326 S. C. 1 Com. Law Rep. 121. 9 Peck 259. An attempt was however made upon the argument to show that there are certain peculiarities affecting this form of actiou which forbid the application to it of the ordinary rules relative to new trials. The tenant, it was said, "put himself upon the grand assise," and that the proceeding was therefore to be regarded as a species of "arbitration." But in what sense, in what respect peculiar to this form of action, can the tenant be said to put himself upon the decision of the grand assize?

The phrase was doubtless intended to import, (for in any other sense it has no pertinency,) that the joining of the mise and the reference of the issue for decision to the grand assize, is optional with the tenant. But every lawyer knows this not to be so, and that in this respect there is no difference between a writ of right and any other action. Formerly, in England, it is true, the tenant in this action enjoyed the privilege of demanding a trial by battel; and for this reason, however unsound it may now appear, it is said that (except upon some collateral issue which could not be tried by battel,) an attaint would not lie on a false verdict in this action. It is true also that the setting aside of verdicts, and granting of new trials has in modern times become the substitue for attaint. But the inference that because attaint would not lie in this action, no new trial could be granted, whatever slight appearance of plausibility it might otherwise have, is wholly repelled by the fact that the trial by battel is unknown to our laws.

Much was also said by the demandant's counsel about the solemnity and dignity of the trial by the grand assize, and the respect due to the verdict. The law at this day, recognizes no magical influence in mere names or forms. The proceeding by writ of right is tedious, cumberous, inconvenient, and expensive; and for these very

reasons has at length been wisely abolished by the legislature of this state. It is true however that it is a solemn proceeding; for it commences with an implied abjuration by each recognitior of all prejudice and partiality, and an invocation of divine punishment upon his head if he shall knowingly fail to find a true verdict according to the sworn evidence in the case and the laws of the land. It is also a dignified proceeding; for it is one of the means ordained by law for the enforcement of legal rights. But all this is equally true of the ordinary trial by jury. Indeed, with whatever success this topic might be, or may have been addressed to the grand assize by counsel who have so little respect for themselves, and so little regard for what is due to the character of the honorable profession to which they belong, as to resort to it, it is too obviously unfounded, to require serious notice. In short I can find no warrant either in authority or reason for regarding the verdict of a grand assize, upon a motion for a new trial in any light essentially different from the verdict of an ordinary jury. Neither is to be lightly disturbed; neither, when contrary to law, or palpably against evidence, is to be permitted to stand.

A contrary rule, in the one case as well as in the other, would defeat the law, and deprive its administration of that uniformity, and that certainty, so essential to the peace of society. The law has ordained the trial by jury, whether the jury consist of twelve, or of sixteen men, as one of the instruments for the enforcement of its own rules; but it has also taken care to guard against the abuse of this instrument.

Every legal controversy involves these two questions; 1st. What are the facts of the case; 2nd. What is the rule of law applicable to these facts? The particular function assigned to the jury, under our system of jurisprudence, is that of ascertaining the disputed facts. But the duty of determining the law is thrown upo nthe judge. The legal maxim is, de jure respondent judices, de facto jurati.

The law more over has prescribed the particular means by which the truth is to be sought out. It is by evidence adduced in court, and verified by oath. To such evidence uncontradicted, and free from any reasonable ground of suspicion, the jury are bound to give credit; and by the light of such evidence alone, are they to be guided. These are fundamental principles; and it is the solemn and indispensible duty of courts to see that they are not violated.

Neither can there be a greater error of opinion than to suppose that jurors may rightfully be influenced by their own independent speculative notions of what would be just, in the particular case. This is as true of a grand assize, as of an ordinary jury: a remark, which, but for the insinuations to the contrary, so industriously thrown out in several recent trials in this court, I should have considered quite superfluous. The law, in this action, as in every other. aims at *legal*

justice. The law consists of general principles, and rules. These in the eye of the law, furnish the only criteria of right; and however desirous individual litigants may sometimes feel, of seeing them trampled under foot in their own particular cases, it requires but a very moderate share of intelligence to foresee the insecurity, confusion, and intolerable oppression which would result from leaving it optional with juries, whether or not they should be enforced. Misera est servitus, ubi jus est vagum aut incertum. Among highly enlightened men, there has never been any diversity of opinion upon this subject, and I had until recently, supposed, that among reflecting men of but ordinary intelligence, there could be none. Legum interpretes judices: legum denique idcirco omnes nos servi, ut liberi esse possumus, is the emphatic declaration of Cicero: and an eminent and sagacious modern statesman has defined liberty to consist in "the despotism of the law." It would indeed be a most singular anomaly if courts were bound to pronounce definitive judgements in conformity with verdicts found against the established principles of law, when the very object of the institution of these tribunals is to uphold and enforce these principles.

Assuming then that the power to grant new trials extends to writs of right in like manner as to other forms of action, it remains to inquire whether this is a fit case for its exercise: for it must not be inferred from any thing that has yet been said, that I consider the fact of the verdict's being contrary to the instructions of the court to the grand assize, as of itself necessarily sufficient to require the granting of a new trial. The question now to be decided is, whether in reality the verdict in this case was, in the eye of the law and of reason, warranted by the evidence: and this question is to be tested, not so much by the impressions entertained and expressed by the court at the trial, as by the result of the more exact investigation, and more ample reflection for which an opportunity has since been afforded.

It has already been stated that the demandant claims title, either, first, as the devisee of Martha Bradstreet and Elizabeth Livius, or, secondly, as the grantee of Edward Gould. As the legal title only is in question here, it becomes necessary in the first place to determine what description of interest John Bradstreet, the original devisor, had, at the date of his will, and at the time of his decease, in the tenements demanded.

At the sale for quit rents, in 1772, Schuyler became ostensibly the sole purchaser, the deed being in terms, to him alone, as the highest bidder, affirming the consideration to have been paid by him alone, and being an absolute conveyance to him, his heirs and assigns, to his and their sole and only proper use, benefit and behoof for ever. But by the answer of Schuyler, sworn to on the 3d of March, 1789, to a bill in chancery filed in the preceding year, by Evans and

wife, it appears that three other persons, of whom Bradstreet was one, were beneficially interested in this purchase, and that Bradstreet, through Schuyler, paid one fourth part of the purchase money.

On the part of the demandant, it is insisted that the sale, and conveyance to Schuyler, as thus expressed, created a resulting trust as to one fourth of the land, in favor of Bradstreet, which the statute of uses instantly converted into a legal estate. In answer to this position, it is in the first place objected, by the counsel for the tenant, that Schuyler's answer was not admissable as evidence of the fact from which the alleged trust is supposed to have resulted. If a resulting trust in truth constitutes but an equitable title, available only in a court of equity, and not a legal title, susceptible of enforcement in a court of law, the evidence was inadmissible, without regard to its particular nature upon the ground of immateriality. So far, however, as the objection rests upon this ground, the tenant will have the full benefit of it, when I shall come to consider the effect of the evidence. In 1789, when Schuyler's answer was sworn to, he must, under any view of the case, be considered as the actual tenant; and I understand it to be a settled rule, that the declarations of a tenant in possession, adverse to his title, and relative to facts which may be proved by parol, are evidence, not only against himself, but also against those claiming by subsequent conveyances under him. I do not, however, understand the tenant in this action as standing in this relation to Schuyler. The deed from Evans and wife and Edward Gould to Potter, was executed four years before the conveyance of Schuyler to the grantors; and though at a late stage of the trial this latter conveyance was offered in evidence by the tenant's counsel, it was introduced not as evidence of title in himself, but, as the case expressly states, in order to show the true character of the title set up by the demandant. Nor am I able to perceive any other ground upon which it was admissable. But however this may be, I think it is now too late to object to it, because it does not appear by the case to have been objected to at the trial.

It was further insisted by the tenant's counsel, that the answer establishes not what the law denominates a resulting trust, but an express trust. A resulting trust is an interest arising by implication or construction of law; and is a pure trust of the beneficial ownership of the estate itself. It is never raised in opposition to what appears to have been the intentions of the parties; but arises only in the absence of any express agreement between them, defining their respective rights and obligations, and thus rendering such an interposition of the law unnecessary for the ends of justice. The fact that one fourth of the estate was purchased with the money of Bradstreet, and the deed taken in the name of Schuyler for the whole, created such a trust in favor of the former, unless it was superceded by some agreement between the parties. Does the answer disclose any such agreement?

I regret that the counsel did not express himself somewhat more explicitly upon this point, because I am not quite sure that I fully apprehend his views in relation to it. It is certainly very clear that it was understood by Schuyler and Bradstreet that the conveyance should be taken by the former; and that he should continue for an indefinite period, to be the ostensible owner of the land: but beyond this I cannot satisfactorily discover that the understanding extended. Bradstreet's motive for not appearing openly in the character of a purchaser, is stated to have been, the apprehension of giving offence to the duke of Grafton. But this motive is not inconsistent with an intention to acquire, potentially, the ownership of the land. It is clear that the money advanced by him was not intended as a loan; nor does it appear that he looked to any other source for reimbursement than the title of the estate itself. It may, however, have been intended, (and the supposition is by no means improbable,) that Schuyler should take and hold the legal title as well of Bradstreet's share as his own, for the purpose of enabling him to make sales and execute conveyances for their joint profit. If so, the legal implication insisted upon, would be in direct conflict with the intentions of the parties, and would therefore be inadmissable. Upon the whole, however, I shall, for the purpose of this motion, assume that here was in fact a resulting trust.

But it was also further objected, that as the tenant was a bona fide purchaser for a valuable consideration without notice of the trust, he cannot be affected by it. This position is certainly in accordance with the general rule affecting latent equities, nor have I been able to discover that resulting trusts have been considered as forming an exception to the rule. But it is to be remembered that according to the doctrines insisted upon by the demandant's counsel, a resulting trust is not an equitable, but a legal interest. Besides, Potter did not purchase of the trustee, but of one deriving whatever color of authority he had from the *cestui que* trust. It may therefore on this account be questionable whether the tenant, as the grantee of Potter, stands in an attitude which entitles him to protection under the rule of law in question. I shall therefore pass over this objection also, without further observation on the present occasion; and shall proceed to examine the main question, whether the interest acquired by Bradstreet was a legal estate recoverable in a court of law.

It is obvious from the answer of Schuyler, that not only he and the representatives of Bradstreet in this country, but the most eminent lawyers of that day, Harrison, Hamilton, and Jones, whom Schuyler formally and anxiously consulted, relative to his duties as trustee and executor, undoubtingly believed him to be seized of the legal estate in fee. His deed of 1794, to Evans and Gould, witnessed by Harrison, and probably drawn by him, was also clearly drawn under this

impression, and expressly recites the fact. This, if not evidence of what the law was, is at least evidence of the opinion then entertained of it by the learned jurists of the time, and should admonish us to be cautious in the application of principles which would lead to the opposite conclusion.

According to the argument of the demandant's counsel, this deed, from Ten Eyck to Schuyler, operates as to one fourth, exactly as a deed from Ten Eyck to Bradstreet would have done. But deeds are to operate according to the intention of the immediate parties to them; and this intention is to be inferred from the language of the instrument thereof. There is here no pretence of any mistake in the name of the grantee. Philip Schuyler was in fact the individual to whom Ten Eyck intended to convey, and to whom alone, as the highest bidder, he had any authority under the colonial act to convey. How, then, can another person be substituted as grantee in his place? That this conveyance should have created a new and important relation between Schuyler and Bradstreet, arising out of secret arrangements between themselves, and obligatory in a court of equity, involves no inconsistency. But that a sale and conveyance by Ten Eyck to Schuyler, "for his own use, benefit and behoof," should have had the direct effect, *proprio vigore*, to transfer the legal title to Bradstreet, who was ostensibly a stranger to the transaction, is not in accordance with common sense and common experience, however it may be with law.

Again, a bargain and sale of lands is defined to be "a kind of real contract; whereby the bargainor, for some pecuniary consideration, bargains and sells, that is, contracts to convey, the land to the bargainee; and he becomes by such bargain a trustee for, or seized to the use of, the bargainee; and then the statute completes the purchase." 2 Bl. com. 338. But *what* contract or purchase is it that the statute executes? Is it that one which was really entered into, or is it one which, so far at least as one of the parties to the deed is concerned, was never thought of, and which is contradicted by the deed itself?

This, however, I am fully aware, is a question, at this day, purely of authority. I proceed therefore to treat it as such: and I remark, in the first place, that although the doctrine contended for by the demandant's counsel has of late often been strenuously insisted upon in this court, I have never yet been referred to, or been able to find a single adjudicated case; (with an exception which I shall advert to in the sequel,) in which it has been even indirectly sanctioned, much less made the foundation of a judicial decision; nor have I been referred to, or been able to find a single passage, in any elementary writer, in which it is asserted. In the records of English jurisprudeuce, trusts of this nature are of frequent occurrence, and several instances of them are not

wanting in those of our own. But, as far as I have been able to discover, they have uniformly been treated, from the earliest traces of them to the present day, as exclusively of equity jurisdiction. The aid of chancery has often been invoked, to compel the trustee to yield up the possession and execute a conveyance; and in defence of the rights of the cestui que trust already in possession. But the present is, I apprehend, the very first action at law ever instituted for the recovery of this description of interest. This fact alone affords strong presumptive evidence against the right to maintain it. The evidence is but negative, however, and is not therefore entirely conclusive. If the right really exists, it is not the less valid for having been but recently discovered. Let us look, therefore, a little more closely into the matter.

I am aware that in the time of Lord Mansfield, the court of king's bench evinced a disposition to exercise a species of equitable jurisdiction, and to introduce and maintain the doctrine, that where the trust was plain and the title of the trustee merely formal, such formal title should not, in ejectment, be set up against the cestui que trust. Comp. 46. 3 Burr, 1901. Doug. 721. This doctrine, however, was never considered to be more applicable to cases of resulting trust than to those of express trust. But in truth it never gained any firm foothold and has long since been overruled; no other trace of it now remaining than the rule, that in particular cases the jury will be permitted to presume that regular surrender has been made by the trustees of their estate; thereby clothing the cestui que trust with the legal title, and thus enabling him to recover or maintain his possession at law. Roe *v.* Reade, 8, T. R. 118. Goodtitle *v.* Jones, 7 Ib. 50. Adams on Eq. (N. Y. ed. of 1821,) 32, 33, 86, 87.

As already intimated, the legal intendment from which a resulting trust arises, is admitted in order to give effect to the intentions of the parties, (supposing them to have been honest,) inferrible from the circumstances of the case. The intendment must therefore be in conformity with some form of language which it may be reasonably supposed the parties would have used had they thought proper to express their intentions. It may, I presume, be safely added, also, that the supposititious agreement, whatever may be its form, can have no greater force and effect than would attend an actual contract in the same form, had such an one been entered into between the same parties, under the same circumstances. Now, let these principles be applied to the present case; and let us see what sort of a contract the law will here imply, and what would be its legal effect. It is true, it is not easy to see how the grantor of Schuyler can reasonably be embraced within the scope of an implied contract of any form; he having on the face of the deed acknowledged the payment of the whole consideration by Schuyler;

and there being no evidence to show that he had any knowledge to the contrary. But supposing this difficulty surmounted, and assuming that he understood the whole transaction, and that he entered into the views of the other parties to it, it would then follow by legal intendment that he intended to convey to Schuyler for the benefit, as to one undivided fourth, of Bradstreet. Let us then suppose this intention to have been expressed on the face of the deed in appropriate legal language. The conveyance would then have been to Schuyler in fee; but as to one undivided fourth part of the premises, in trust for, or to the use of, Bradstreet and his heirs. If this form of words would not have effected the intention, I know of none that would. And yet there is no rule of law better settled in England and in this state, than that by such a conveyance, construed as a deed of bargain and sale, none but an equitable interest would have passed to Bradstreet. The statute would have executed the first use in Schuyler, the bargainee, but the use declared to Bradstreet would have been void as a *use*, and could have been enforced only as a *trust* in equity. 2 Bl. Com. 335. 4 Kent's Com. 296. Cas. Temp. Talb. 138. 6 Barn and Cres. 305. 3 Johns. Rep. 388. 16 Johns. Rep. 302, &c.

It is useless at this late day to inquire whether a different construction might not have been reasonably given to the statute of uses. Its construction in this respect has become definitely settled by a long train of judicial decisions in the courts of law and equity, and has long since been considered as beyond the scope of judicial revision. So far as the design of this statute was to abolish *uses*, as distinct from the legal estate, it is notorious that it has failed to effect its object. The ancient uses which were abolished, have been revived under the denomination of trusts. Trusts are therefore since the statute, what uses were before; and like them are cognizable, as fiduciary interests, only in equity. The interst here set up, is a trust—a resulting, in contradistinction to an expressly declared trust. It is however nevertheless a trust, and is uniformly so denominated; as the parties to it are, the trustee and cestui que trust. But if it is true, as contended in this case, that the entire estate as well at law, as in equity vests at once in one of the parties to the exclusion of the other, it is difficult to perceive the applicability of these terms. The interest created would then be, not a resulting *trust*, but a resulting *use*, which can never arise to any but the original owner of the estate. 1. Cruise's Dig. 450 Tit. use, §43. What is a trust? I will give the answer in the language of the writer just cited. A trust is a use not executed by the statute 27 Hen. VIII. A trust estate may be described to be, a right in equity to take the rents and profits of lands, whereof the legal estate is vested in some other person; and to compel the person thus seized of the legal estate, who is called the trustee, to execute such conveyances of the land as the person entitled to the profits,

who is called the cestui que trust, shall direct, and in the mean time, the cestui que trust, when in possession, *is tenant at will* to the trustee. Cruise's Dig. 456, Tit. Trust, §2, 3. But let us follow this writer a little further. If I mistake not, his exposition of the law is such as, if admitted, precludes all reasonable doubt upon the question under consideration.

After enumerating and illustrating three modes in which "direct" trusts may be created, he proceeds as follows: "Besides these direct modes of creating a trust estate, there are several other cases in which trust estates arise from the evident intention of the parties, and the nature of the transaction, *which are enforced by the court of chancery, and are usually called resulting trusts, or trusts by implication.* And in the statute of frauds and perjuries, which enacts that all declarations and creations of trusts of lands or hereditaments must be in writing, it is expressly mentioned, §20, that all conveyances where trusts and confidences shall arise or result by implication of law, shall be as if this act had never been made. And it has been determined, that this clause must relate *to trusts and aquitable interests, and cannot relate to a use, which is now a legal estate.*" Cruise's Dig. 470, Tit. Trust, §29. See also 1 Wills. 21, 2 Mad. Ch. 2d Am. ed. 112—119, and cases there cited.

No attempt was made by the counsel for the demandant, to distinguish, in respect to the present question, a resulting trust arising from the purchase of an estate in the name of one person and the payment of the consideration by another, from those arising in other modes. Nor is there any ground for such an attempt. Immediately after the passage above quoted from Cruise, follows a description of the various modes in which trusts of this nature arise, among which he enumerates that in which the one now under consideration was created; and adds, that the "payment of the money must be proved by clear and undoubted evidence; for otherwise *the court of chancery* will not interfere. Let us see then how the doctrine here contended for would apply to other descriptions of resulting trust. Where articles of agreement are entered into for the purchase of an estate, a trust immediately results to the purchaser. Ib. §30. So, in general, where lands are devised for a particular purpose, as to sell and pay debts and legacies, what remains after that purpose is satisfied, results to the heir. 3 Wheat. 563. Cruise's Dig. 475. In these cases a court of equity would, upon application, direct a conveyance to the cestui que trust; but he must be an intrepid lawyer who should assert, that the trust estate could be recovered in a court of law. The views of the other elementary writers on this subject, will be found to accord with those of Cruise. See, particularly, 2 Bl. Comm. 327 to 338. It is impossible to read the remarks of the learned commentator bearing upon this subject, (particularly his summary view at page 33, of the nature of trusts since the statute of uses, without clearly perceiving

that nothing could have been more remote from his thoughts and mind than any such doctrine as that now contended for by the demandant's counsel.

In one of the passages above cited from Cruise, it is stated as we have seen, that the exception in the statute of frauds, of trusts which result or arise by implication or construction of law, and which for that reason have been held to be proveable by parol, *relates ouly to equitable interests*. In support of this position he cites 1 P. Wms. 112, where it was so expressly adjudged. It is impossible I think carefully to read this act and enter fully into its design, without being forcibly struck with the propriety of this construction. A construction which would leave legal estates in lands still susceptible of being created and proved by parol, would violate the unquestionable spirit and intent of the act. Here then is a legislative description of resulting trusts designating them as equitable estates. The reasons, founded in the very nature of these trusts, for excepting them from the provisions of the act requiring other interests in land to be evidenced by writing, are too obvious to require comment. I cannot forbear here also to add, that there are in my judgment very sufficient reasons of sound policy, why courts of law should not have cognizance of resulting trusts. To say nothing of the superior means possessed by chancery to reach the truth, which in many cases of this description it would be impossible for a court of law to do, in many, perhaps in a majority of the cases that actually occur, the trustee himself has claims which could not be adjusted by a court of law, even by a separate suit for that purpose, and which he would be compelled to resort to a court of equity to enforce, while in the mean time the cestui que trust, having obtained uncontrolled possesion of the estate, the fund upon which his claims ought to have been, and in equity would virtually have been a lien, might be dissipated.

The foregoing views of this question are in conformity with my own uniform impressions upon the subject, since I first learned the distinction between an equitable and a legal interest in lands; and I never entertained a doubt of their soundness until my attention was called to the observations of the late Chancellor Jones, reported in the case of White *v.* Carpenter and others. 2 Paige's Ch. Rep. 217. One of the questions in that case, was whether the facts sufficiently shewed a resulting trust in the premises in controversy, in favor of one Willard, the original defendant in the suit, in consequence of the alledged payment by him of a portion of the purchase money. His honor, (at page 238,) prefaces his examination of this question with the following remarks: "A resulting trust arises by implication of law, and the operation of it is to vest the estate itself in the party to whom the trust results. The principle is, that the estate belongs to the party who advances the money out of his own funds and on his own ac-

count, to pay for it: and the nominal grantee who receives the title without paying or incurring any liability to pay any part of the consideration money, is looked upon, and in truth is the mere conduit pipe, or channel through which the estate and the title and interest in it pass from the grantor to the real purchaser who pays the consideration for it..... .....So far has this principle been carried, that *courts of law have held* that such interests are saleable by execution against the cestui que trust, and that *the right of possession and legal estate may be recovered in an action of ejectment or writ of right against the trustee*, on the ground that the trust is executed by the statute of uses, and the estate itself vested in the cestui que trust." It is proved to add also, that in the course of the present examination I have met with another late case, that of North Hempstead *v.* Hempstead, 2 Wend. 109, which was an appeal from chancery, in which the present Chief Justice of New-York, in general terms expresses himself much to the same tenor. Neither of these learned judges enters into any argument in vindication of his positions, nor does either cite any authority in support of them.

But the mere dicta of learned and experienced jnrists are entitled to respect. This consideration, and the consequent distrust it was calculated to inspire of the soundness of my own preconceived opinions, have stimulated me to a patient examination of the subject. When it is asserted that courts of law have held that a cestui que trust may maintain an action at law to recover the right of possession and legal estate against his trustee, this is but the assertion of a supposed fact. I have, as already intimated, sought elsewhere in vain for the least trace of any such decision. My unhesitating conclusion therefore is, that their honors gave utterance to a mistaken impression. But this is not all. In the case of Jackson *v.* Van Slyck, 8 Johns. Rep. 487, the supreme court of this state decided the very reverse of this doctrine. In that case the defendant sought to maintain his possession upon the ground that the purchase in virtue of which the lessor claimed to recover, had been made for his [the defendant's] benefit; whereby a trust had resulted to him. This, it will be perceived, was in principle as strong a case in favor of the doctrine which I am combatting as can be imagined. The cestui que trust was in possession, and the action was brought by the trustee to dispossess him. But the defence set up was pronounced to be invalid. "Whether," say the court, "the lessor of the plaintiff purchased the premises with the money of the defendant, and so became seized for the defendant in consequence of the resulting trust, is not a material inquiry in this case. Admitting the fact,————the plaintiff was entitled to recover, because a court of law can look only to the legal estate. An equitable estate cannot be set up in ejectment, as a defence against the legal title." The court at that time consisted of

as able men as ever adorned a bench of justice. Such was its unanimous opinion; and such, I humbly apprehend, must be the deliberate judgment of every intelligent court of law upon this question, as often as it shall present itself directly for decision.

As it regards the remarks of Chancellor Jones, that the interest of the cestui que trust has been held to be saleable by execution; I have not met with any case, English or American, in which it has been so held, except that of Foot & Litchfield *v.* Colvin and others. 3 Johns. Rep. 216. In that case, which was an action of trespass quare clausum fregit, the trust was fraudulently created for the express purpose of evading the operation of an existing judgment, in virtue of a subsequent sale under which the defendant had entered. It does not expressly appear from the report, that this was the ground of the decision. The court say that the locus in quo having been purchased with the money of Litchfield, was liable to be sold on execution against him under the 4th section of the statute of uses. It has, however, since been settled that this section (which is a provision borrowed from the English statute of frauds, and not a part of the English statute of uses,) relates only to fraudulent and covinous trusts. It was so decided by Chancellor Kent in thecase of Bogart *v.* Perry, 1 Johns. Ch. Rep. 52; and in the same case on appeal, 17 Johns. Rep. 351. Chief Justice Spencer, in delivering the unanimous opinion of the court of errors affirming the decree of the chancellor, reiterates this construction, and expresses his entire concurrence with the chancellor upon this point. So far, therefore, as the case of Foot & Litchfield *v.* Colvin et al. depends upon the fourth section of the statute of uses, it is defensible only on the ground of the trust having been fraudulent and covinous. There is, however, another ground upon which that decision may be vindicated. James Litchfield, the cestui que trust, immediately after the purchase and fraudulent conveyance to Foot, entered into possession of the land, and continued to occupy it until a short time before the sale by execution, and then left his son, a minor, in possession virtually as his representative. He had therefore such an interest as is held to be saleable on execution, in virtue of the act concerning judgments and executions. Jackson *v.* Parker, 9 Cowen, 73, and the cases there cited.

But it is unnecessary to pursue this discussion. It is possible there may be English cases in which trust estates of this description have been held liable to be sold by execution. No such adjudication is however referred to in the case from 3 Johns. above cited, nor, as already stated, have I found any. But if there are such cases, their true explanation will be found to be such as does not at all impugn the doctrine I am insisting upon. The English statute of frauds from which the provision in question contained in the fourth section of our

statute of uses was taken, was enacted long after the English statute of uses; and this provision was aimed, not at *legal* estates, executed as such by the statute of uses, but at such *equitable* interests as it was believed ought in justice to be subjected to the power of the judgment creditor. But this did not render them legal estates. And it is accordingly provided that the purchaser under the execution should hold and enjoy the land free and discharged of all incumbrances of the trustee; or, in other words, that the effect of the sale should be to destroy the legal estate in the trustee and vest it, along with the equitable interest of the judgment debtor, in the purchaser. This is clearly the light in which the subject is viewed by Blackstone, 2 Comon. 337. I will only add, that whatever difficulty there may be in discriminating between those trusts which fall within this provision and those which are unaffeced by it, there is not the slightest ground or authority for any distinction in this respect, between trusts expressly declared, and trusts resulting by implication of law. 2 Bl. Comm. 337.

General Bradstreet then took nothing but an equitable interest in virtue of the sale, and conveyance by Ten Eyck to General Schuyler.

But suppose he took a legal estate. Was it not an estate in joint tenancy with his associates in the purchase? This, to say the least, is a grave question; nor can I well perceive how it can be answered favorably to the demandant. As the law stood at that period, if the several persons beneficially interested in the purchase had been named as grantees in the deed, without any words expressly constituting them tenants in common, they would unquestionably have been joint tenants. The creation of an estate in joint tenancy, says Blackstone, depends on the wording of the deed or devise, by which the tenants claim title; and "if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B, and their heirs, this makes them immediately joint tenants in the fee of the lands." 2 Bl. Com. 180. But if Bradstreet was a joint tenant with his associates, then upon his death, two years after the purchase, no partition having meantime been made, his interest became vested in the survivors.

This point was not however very fully discussed by the counsel, and I shall not pursue the examination of it, nor express any definite opinion upon it; but shall proceed in the next place, to examine the will of General Bradstreet.

It is contended by the counsel for the tenant that according to the true construction of this will the executors took in virtue of it a legal estate in fee in the lands of the testator.

The cardinal rule in the exposition of wills, and to which all other rules must bend, is, that the intention of the testator as expressed in his will, (if consistent with the rules of law,) shall prevail.

The difficulty of ascertaining the intentions of the testator in this instance, arises not so much from the use of terms in themselves of doubtful or ambiguous import, as from the repugnance existing between the two principal clauses of his will when construed literally. He first devises and bequeathes all the rest and residue of his estate, real and personal, to his two daughters, equally to be divided between them as tenants in common in fee; but charges the same with the payment of one hundred pounds sterling per annum to their mother during her life.

Nothing can be more clear than the import of this provision when separately construed; but it is immediately followed by another provision, in these words: "Notwithstanding the former devise for the benefit of my wife and daughters, I empower my exeutors 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 nett 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 anuity to my wife, as aforesaid."

Now this provision again construed independently of the other, would unquestionably transfer the legal estate in trust to the executors. Vide the authorities collected and reviewed by Chief Justice Savage in the case of Jackson *v.* Schauber. 8 Cowen 193. What then was the will of the testator? Did he intend to devise his real estate, as such, to his daughters and to confer only a naked power upon his executors? or, did he mean to devise the legal estate to his executors in trust, to sell and pay over the proceeds to his wife and daughters?

From the manner in which the second clause is introduced, I think it is fairly inferable that the testator was aware, that what he was about to say would appear to be inconsistent with the literal import of what he had already said; and, that so far as the two clauses in terms, conflict with each other, he intended that the latter should control the former.

It is true that where technical words are used by the testator, (as in the first of these clauses,) the fair presumption is, that he knew their artificial import, and meant to use them in that sense; but I apprehend it to be equally true, that if he at the same time declares, either expressly or by irresistible implication, that he does not intend to use these terms in this sense, but to dispose of his estate contrary to the construction usually put upon them, it is the duty of courts to effectuate his intention as thus explained. The phrase with which the second clause commences, "Notwithstanding the former devise for the benefit of my wife and daughters," does, I think, evince an intention in the mind of the testator to explain and control the former devise so far as what was to follow should be inconsistent with what

would otherwise have been its legal effect, and, taken in connexion with the express *devise* of his landed *estate* to his executors, and the direction to divide and pay over the proceeds, "*as aforesaid*," which immediately follow, fully warrants the conclusion that by the preceding devise in fee to his daughters, he meant nothing more than an absolute bequest to them, or in the event of their death, to their *heirs*, of the pecuniary proceeds of the estate.

But, independently of the inference of intention, to be drawn from the express reference contained in the second clause to the first, there is another reason, why the latter clause should prevail instead of the former. When a will contains two separate provisions, so totally repugnant to each other that they cannot be severally carried into effect, the latter is to stand in preference to the former.

Assuming then that a legal estate passed to the executors, the only remaining question upon this will, is, whether they took an estate in fee, as is contended by the counsel for the tenant, or only an estate for life, as is insisted by the counsel for the demandant. If this question is to be considered as depending exclusively upon the terms of the devise to the executors, it is in no degree doubtful. It is a familiar and well settled rule that the word *estate* is sufficient in a will to pass a fee. So too, where there is a devise for life in express terms, a power of disposal annexed, does not enlarge it to a fee; but when such power is annexed to a general devise, without any specification of the quantity of interest, the devisee takes a fee. 16 Johns. 537.

But in relation to devises to trustees, the rule is said to be, that the quautum of interest is to be determined by the nature and objects of the trust; and that the estate is to continue so long only as is necessary to effect the purposes of the trust. When the trust rests in the trustees by implication without express words of devise, this is unquestionably the true and only just rule. Thus in the case of Doe *vs.* Woodhouse, 4 D. and E. 89, where the testator after devising his real and personal estates, to his wife, for life, gave annuities *to be paid by his executors out of his whole estate*, to commence after his wife's death; and then devised *the remainder of the profits*, after his wife's death, and after the payment of the annuites, *out of his whole estate*, to certain other persons; it was held that the executors took a legal estate, and as no quantum of interest less than a fee would enable them to do what was required of them, it was held that they took a fee.

This rule is also applicable to the case of a devise to trustees in general terms, without any express designation of the quantum of interest intended to be devised. Thus in the case of Doe *vs.* Nichols, 2 Dow. and Ryl. 480, (S. C. 16 C. L. Rep. 103,) when the testator devised his lands to trustees, in trust for his infant son, and directed the same to be transferred to him as soon as he should attain the age of 21 years, with a devise over to another and his heirs, in the event of the death of his son while under age; it was held, that the

trustees did not take a fee, but only an estate for years determinable upon the son's attaining 21 years. So in the case of Doe *v.* White, 5 East, 162, where the devise was to trustees and the survivor of them, and the executors &c. of such survivor, in trust, out of the rents and profits, &c. to pay *certain annuities for lives, and a sum in gross;* and from and after the payment of such annuities and gross sum, the testator devised successive estates for lives, with remainder, &c. it was held that *the purposes of the trust being all answered by the death of the annuitants*, and raising of the money for legacies, the remainder man took the legal estate; for where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall pass to them *by implication.* And to the like effect is the case of Jenkins *v.* Jenkins, Willis's Rep. 650. But I have not met with any case in which the rule has been applied to an express devise in terms of themselves importing an intention to pass the entire estate, and I apprehend it does not admit of such an application. In such a case, where the objects of the trust were temporary, and did not (as in the present case,) require an actual disposition of the estate by the trustee, a trust would result to the heir or ultimate devisee, which a court of equity would enforce by compelling the trustee to convey; but a court of law could not interfere.

But suppose this to be otherwise, and that notwithstanding a devise in terms of the whole legal interest of the trustee, it was competent for courts of law by implication to limit the devise to an estate for life or for years, according to what should appear to have been the actual exigencies of the case; I do not see that the legal effect of the devise under consideration would be at all affected even by such a rule of construction.

The executors are not merely authorised but expressly required to sell the testator's landed estate, (which of course means the entire interest in the whole subject,) and to pay over the proceeds to the testator's wife and daughters. This was the purpose of the trust. Supposing then the interest of the trustee to have been exactly commensurate with it, what interest could remain to vest elsewhere, when by the very act of executing the trust the whole estate must necessarily be transferred to strangers?

In a word, the duty imposed upon the executors was to sell the lands; and, under any view of the case, the legal interest with which they were invested must be considered as having been intended to endure, subject only to the superintendance of chancery, until that object should be accomplished.

But there is another insurmountable obstacle to the demadant's recovery in this action in the character of devisee.

The writ of right is an ancient common law remedy, which, with two or three slight modifications in point of form, was retained by

the people of this state among the other remedies borrowed from the English system of jurisprudence. It is a proceeding of a highly artificial and arbitrary character, and characterised throughout by an extraordinary degree of strictness. In modern times it has, in comparison with other forms of action, been but rarely resorted to; but when it has been, the English courts have considered themselves bound to adhere with scrupulous exactness to its ancient rules.

No less an interest than an estate in fee can be recovered by it; and it can be maintained only against the immediate tenant of the freehold. It is not sufficient for the party bringing it to show a good title to the property in question; it must also appear either that he has been himself actually seized of the lands sought to be recovered, within the period of limitation, or that he is heir at law, immediate or remote, of one who has been so seized. It is accordingly laid down and has been repeatedly adjudged, that a purchaser [that is, one claiming title by conveyance or devise, in contradistinction to one claiming by descent,] cannot maintain this action upon the seizin of the person from whom he purchased, but must rely upon his own seizin. Indeed, so indispensible is it for the demandant to prove not only a good title to the lands demanded, but an actual seizin also, that when the tenant chose to exercise the privilege at the trial of requiring the demandant to begin, (which he might oblige him to do by the tender of the demi-mark,) the assize were sworn to inquire of the demandant's seizin. If they found the seizin, they were then again sworn, to try the truth, whether the tenant or demandant had the right; but if they found against the seizin there was an end of the case.

It was therefore correctly held by the supreme court of this state, in the case of Williams *v.* Woodward, 7 Wend. 250, that this action could not be sustained by a devisee upon the seizin of his testator. The leading English authorities, ancient and modern, are so well collected, and the just deduction from them is so clearly and satisfactorily stated by Mr. Jus ice Sutherland in that case, that I deem it unnecessary more particularly to refer to them. Precisely the same doctrine was also held by the supreme court of Massachusetts, in the case of Wells *v.* Prince, 4 Mass. Rep. 64.

The only innovation upon the general rule that a writ of right cannot be maintained by the purchaser before actual entry, or what is equivalent to it, originated in the case of Green *v.* Liter, 7 Cranch, 229; in which it was decided by the supreme court of the United States, that a patent from the state of Virginia, for wild, unoccupied lands, conferred upon the patentee such a seizin in deed as to enable him to maintain a writ of right. I shall not presume to question the propriety of this adjudication. Considering the source of title and the condition of the lands, its soundness may be conceded without at all im-

pairing the general rule. But if, as was supposed in argument, the reasoning of the learned judge who delivered the opinion of the court in that case, countenances the idea that the presumption of possession arising from proof of title alone is sufficient to maintain this action, I am bound to say that it is not only unsupported by authority, but is expressly contradicted by judicial decisions and by every English writer that treats upon the subject. Proof of title to real property shows a seizin in law. It shows, prima facie, *a right of possession*, which, (unless barred by lapse of time,) may be enforced by a possessory action; but not an actual seizin, a possession which will support a writ of right. It is useless at this day to speculate upon the reasonableness of this distinction. Those who choose to resort to this action must be content to abide by its rules. For certain cases it affords an efficacious remedy; but it is not a legal catholicon. It is adapted to the case of one who can show a right of property and actual seizin and possession at some former time within the period of limitation. Both the legal right and actual seizin are indispensible, and are accordingly always alledged in the demandant's count. But then to make the seizin available, it must have been the seizin either of the demandant himself or of his ancestors; "for" (says Lord Coke,) "the seizin of him of whom the demandant himself purchases the land, availeth nothing." Co. Lit. 293 a. The demandant is also bound to state the seizin according to the fact. If he rely upon his own seizin, he must count of his own seizin; if upon that of his ancestor, he must count upon it, and state how he is heir; and if he derive his title from the ancestor seized, through several intermediate ancestors, he must state the descent to and from each respectively. See Archbold's Pleading, N. Y. Ed. of 1824, p. 454, 455. These are the two and only established forms of counting; and they indicate, in a manner too clear to be mistaken, the nature of the proof requisite to the maintainance of the action. If the seizin of the grantor or devisor is sufficient, why are there no precedents of a count upon such seizin? And if constructive seizin deducible from proof of title be sufficient, why may not the heir, before entry, count upon his own seizin, instead of having, as he is required, to count upon that of his ancestors? The doctrine upon which I am commenting is of ancient date, and is probably coeval with this form of action itself. It was unequivocally laid down by Lyttleton about four centuries ago. Co. Lit. §514, p. 293 a. This was long before the statute of 32 Hen. VIII, limiting the writ of right upon the demandant's seizin to 30 years, and upon ancestral seizin to 60 years. Our own act makes no such distinction as it regards the period of limitation, but is, I believe, in other respects, substantially a transcript of the English statute; and it expressly recognises the rule in question by enacting, that no action for the recovery of any lands, tenements or hereditaments

shall hereafter be maintained, unless on a seizin or possession of the hereditaments, either of the plaintiff, or of the ancestor of the plaintiff, within twenty-five years next before such action brought; and declaring that if in any such action the plaintiff shall fail to prove *such* seizin or possession, such plaintiff and his heirs shall be for ever thereafter barred.

But it is unnecessary to enlarge further upon this point. Even admitting that a devisee can under any circumstances confer actual seizin, there is no shadow of authority, even in the discursive reasoning of the supreme court in the case of Green *v.* Litter, above referred to, for the pretence that this is the case except where the lands are vacant and unoccupied at the death of the testator; a fact, says Ch. J. Parsons, in the case of Wells *v.* Prince above cited, which cannot be presumed. In the present case it is expressly shown that the tenements demanded have been held in direct hostility to the demandant's title, from the year 1790 to the present time. What was the situation of the premises at Martha Bradstreet's decease, in 1782, does not expressly appear, though it is probable they were vacant. But the demandant claims only a small part of the alledged interest under the will of Martha Bradstreet, while Mrs. Livius, under whose will she claims and has obtained a verdict for the residue, did not die until 1795.

The foregoing objections, it will be seen, extend to the entire claim of the demandant in the character of devisee. The demand is of one undivided fourth part of the lands described in the count. One third of this one fourth is claimed in virtue of the will of Martha Bradstreet, and the remaining two thirds in virtue of what purports to be the will of Elizabeth Livius. But the reading of this latter instrument in evidence was objected to by the tenant's counsel at the trial, and the same objection is now insisted upon in support of this motion for a new trial, on the following grounds, viz.

1. Because of the alledged insufficiency of the proof of its execution.

2. Because of its alledged invalidity and consequent irrelevancy; it appearing on its face to have been made by a married woman.

It was admitted in evidence, as it had been on former trials, chiefly upon the ground of its antiquity; though certainly not without great doubts whether the collateral proof in support of it was sufficient to bring it within the rule entitling it to be read upon that ground. Preferring however to confine my decisions, as I have thus far done, to points affecting the substantial legal merits of the case, assuming the facts to be as alledged by the demandant, I have turned my attention chiefly to the second objection. I am satisfied that the writing in question, whatever might be its efficacy in a court of equity, is utterly inoperative in a court of law. It is unnecessary to say that

it can have no operation as a will. Every lawyer knows that a feme covert is incompetent to devise her lands. Courts of equity, it is true, recognize the independent power of the wife over her separate estate, when such a power is reserved or conferred in deeds of settlement or other ante nuptial contracts, or, as it seems now to be considered, where it is expressly given in a devise or conveyance of the estate to the wife after marriage. And it may now be said, in general, that a feme covert, with respect to her separate estate, is considered in equity as a feme sole. She may therefore make an independent disposition of her separate property, which will be carried into effect in equity. If she assumes to do this in the form of a will, though the instrument will be void as a devise, it will be enforced in equity as an appointment; and the heir at law, as the trustee of the legal estate, will be decreed to convey to the person named as devisee. But it is perfectly clear that no effect can be given to such an instrument in a court of law. It is unnecessary to enter into an analysis of the cases upon this subject. There is not the slightest ground for any pretence that the present case forms an exception to this general doctrine. This subject has been very elaborately discussed in this state, in the cases of the Methodist Episcopal Church *v.* Jaques, 3 Johns. Ch. Rep. 77. S. C. 17 Johns. Rep. 548, and Bradish *v.* Gibbs, 3 Johns. Ch. Rep. 523. In these cases, and particularly in the latter, the English cases are collected and minutely canvassed; and in all of them it is either expressly stated or indirectly conceded, that a testamentary disposition like the present can be enforced only in equity. The case of Barnes's Lessee *v.* Irvin et al. 2 Dallas, 199, is most explicit to the same effect. See also 2 Kent's Comm. 143, 144. 4 Ib. 493. 1 Madd. Ch. 371—377. Clancy, 262.

But it is further objected against the instrument in question, that even admitting it to be a valid will, the demandant could claim nothing under it by reason of her having married without the consent of Sir Charles Morgan. Having however shown this instrument to be in its nature inoperative at law, it is unnecessary to enter upon the investigation of the question raised by this objection; and I will merely add in reference to it, that the deed to the demandant from her brother Samuel Bradstreet, to whom the estate was given upon the failure of the conditions of the demise to the demandant, could not aid her; because the premises are clearly shown to have been held adversely at the date of its execution.

It is also objected, that admitting the demandant's right to recover in the character of devisee on the grounds insisted upon by her counsel, the right extends at most, (even upon the assumption that the will of Mrs. Livius as well as that of Martha Bradstreet is available in this action,) only to one sixteenth part of the premises in question, instead of one fourth for which a verdict has been given. The argument in

support of this objection is this. Supposing the legal estate, if any, which passed to Bradstreet by the conveyance to Schuyler, not to have been a joint estate, which upon the death of Bradstreet became vested by survivorship in his associates, then he became a tenant in common with them as to one undivided fourth part of the lands; and the voluntary partition which took place in 1786, deeds of partition having been executed only between Schuyler (as the representative of the interest of Bradstreet and Scott, as well as of his own interest,) and Bleecker, could not have had the effect to work a severance of the interest of Bradstreet's devisees, so as, at law, to invest them with a title in severalty to the lots which fell to the share of Bradstreet. This argument, I am constrained to say, appears to me to be unanswerable. A parol partition of lands, *carried into effect by possession taken* by each party of his respective share, according to the partition, has been held to be valid and binding *on the parties*. Jackson *v.* Harder, 4 Johns. Rep. 202. But this decision furnishes no warrant for adjudging a parol partition *not carried into effect by possession*, to be valid and binding as between one of the parties and a *stranger* possessing and claiming the whole interest. The principle, it is presumed, upon which voluntary partitions and actual severance of possessions without deed, are considered to be valid and binding upon the parties, is, that they ought to be mutually estopped from denying and contradicting their own voluntary acts. But this principle is clearly inapplicable to a case like the present. If therefore the demandant were entitled to recover any thing in the character of devisee, her claim under the will of Martha Bradstreet must be limited to one-forty-eighth, and under that of Mrs. Livius to two forty-eighth parts, making together one-sixteenth of the tenements described in the count.

It remains now to inquire whether the demandant can derive any aid from the deed of Edward Gould executed in 1804. Having heretofore repeatedly expressed the opinion that this deed does not embrace the premises in question, and having also repeatedly explained my opinion of the true construction of this deed, and entertaining no doubt of the soundness of that opinion, I shall content myself with now declaring my adherence to it, without again entering at large into the reasons upon which it is founded.

It is impossible, I think, considering the language of this deed and the nature of the transaction of which it forms a part, to suppose that it was intended to embrace lands previously sold by Gould, and for which he had executed conveyances. That such was not the intention is plainly inferrable from the face of the deed itself. That such could not have been the intention of the decree in pursuance of which, to the extent of two thirds of the interest intended to be conveyed, the deed was executed, is too plain to require argument. The prior grantees of Gould were not parties to the proceeding, nor was

it designed to affect, nor indeed could it affect, their rights. So far as Gould acted voluntarily in the transaction, to suppose that he intended to give a conveyance which should enable the demandant at once to deprive those prior grantees of possession, would be to impute to him the greatest fraud without the shadow of evidence to support the imputation. The obvious design of the conveyance was, to transfer to the demandant the large residuum of property remaining undisposed of, and still held by the grantor in trust for her. To give to it a construction which would overreach the previous conveyances, would be at once unlawful and unjust.

I have now completed the examination of the title set up and relied upon by the demandant. If I mistake not it has been shown,

1. That John Bradstreet acquired no legal estate in the tenements demanded;

2. That if he did, it passed by his will in trust to his executors in fee, unless indeed it vested absolutely in his associates by survivorship at his death;

3. That admitting he had the legal estate, and that it passed by his will to his daughters, still that the demandant, having failed to show a seizin in deed, cannot recover in this form of action;

4. That the writing purporting to be the will of Elizabeth Livius, and under which the demandant claims and has obtained a verdict for two thirds of the one undivided fourth demanded, is wholly void as a will, and ineffectual in a court of law as an appointment, and ought not to have been admitted in evidence; and,

5. That even if all these decisive objections were removed, still the demandant's title would be valid to the extent only of one undivided sixteenth, instead of one-fourth of the premises in question.

Such I understand to be the true legal features of this case. If I have not wholly mistaken its character, a more groundless and untenable action never was instituted.

But there is also a defence set up to the action, founded upon the statute of limitations.

To this defence I have heard no plausible answer except the allegation that Stephen Potter is to be considered as having purchased with constructive notice of the legal incompetency of Ludlow & Gould to convey the interest now claimed by the demandant, and that his possession cannot therefore be regarded as adverse to the demandant's. But the sufficiency of this defence, so far as it depends upon questions of law, has been expressly declared by the supreme court of the U. States, after elaborate argument and full consideration, in an action of ejectment between these same parties. 5 Peters, 402. Nor is there any thing even in the late decisions of the courts of this state, great as the lengths are to which they have gone, that impairs the validity of this defence. And as it regards *the fact* of possession, with-

out interruption, and accompanied by unequivocal acts of dominion for thirty-four years antecedent to the institution of this suit, it is expressly sworn to by a witness who stands wholly unimpeached, and whose testimony is moreover corroborated by the notorious fact, that the premises in question, though a forest less than half a century ago, now constitute a part of a city comprising a population of many thousand souls. It was said, to be sure, on the argument, that the assize might have disbelieved this witness. It is difficult to infer from their verdict what they did, or what they did not believe. They probably would themselves be not a little puzzled to give any rational account of the matter. On the one hand it is certain that their verdict is irreconcilable with this evidence; but it is equally certain that they had no right to reject it as unworthy of credit. If they did do so, they must have been influenced by something widely different from the dictates of an enlightened and impartial judgment. This then is a clear case of adverse possession. Any construction of the statute which would stamp it with a different character, would be equivalent in effect to a repeal of the statute. Nor is the demandant protected against the statute bar by her infancy or coverture. Even according to the argument of her counsel, long before her title accrued, (except as to the fraction of interest claimed under the will of Martha Bradstreet,) the adverse possession commenced and the statute began to run.

A new trial must accordingly be granted—the costs to abide the event of the suit.