The Family Tree is page 3

and the first page of text is page 5

Those were the first pages in the pamphlet

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Colonel John Bradstreet.——Mary Aldridge,——General John Bradstreet.
(d. 31 Mar., 1782.) (d. 26 Sep., 1774.)

Martha, d: unm: 22d March, 1782

Agatha,——Charles du Bellamy, or Evans, d. 9 Aug. 1793
(d. Feb. 9, 1795) s. p.

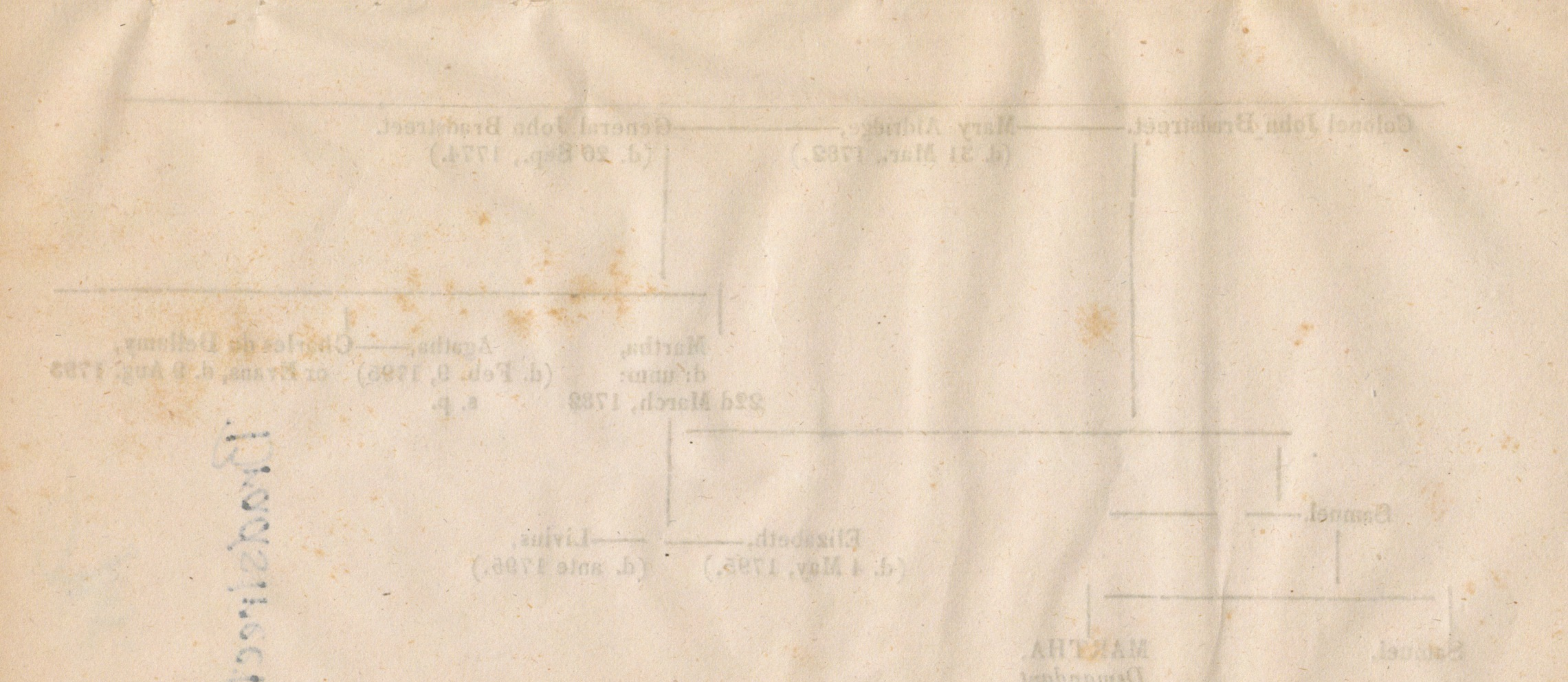
Samuel.

Elizabeth,—— ——Livius,
(d. 4 May, 1795.) (d. ante 1795.)

Samuel.

MARTHA,
Demandant

Pltf's Exh. No. 2
Bradstreet v. Cooper.



MARTHA BRADSTREET vs. APOLLOS COOPER.

The Court having been opened, the following Recognitors were impannelled as forming the Grand Assize :

Sybrant Kettle,	Abraham F. Lansing,
Gerrit Gates,	Anthony Van Sandford,
John Gates, Jr.	Jacob Lansing, Jr.
Stephen P. Schuyler,	Peter Van Loon,
Evert Van Allen,	John De Freest, Jr.
Dow A. Fonda,	Evert Lansing,
Peter G. Vandenberg,	Francis Lansing,
John Geddes,	Cornelius E. Tymeson.

The fair demandant appeared in person, attended by John Van Ness Yates and Samuel Stevens, Esqrs. as her Counsel.

The tenant appeared by Abraham Van Vechten, Daniel Cady, Joseph Kirkland, and Benjamin F. Cooper, Esqrs.

Mr. Cady opened the case on the behalf of the tenant, and having detailed to the Grand Assize the nature of the proceedings in relation to writs of right, proceeded to state that his client was a citizen of the United States, but that the demandant, who sought to obtain possession of the property in question, was a subject of the King of Great Britain ; that it was a general principle of common law that an alien could not support a writ of right, and unless she could show some treaty or statute in her favor, she could not recover in this form of action. Admitting, however, that she might be enabled to support her claim on that ground, she still must show an absolute indefeasible title, and in addition, an actual seizin or possession by herself; or produce to the Court such evidence that the law will presume she had been in possesion. On behalf of his client he should show a clear paper title from the year 1794, and that they have been in possession of the property, which is a tract of land situate in the village of Utica, and county of Oneida, in

the Northern District of New-York, and composed part of what was formerly called Cosby's Manor, from thence to the present time : the bare fact for them to decide was, which has the greatest mere right to the premises in question.

We shall shew you that the grantee of the deed of 1794 entered into possession of the lot No. 96 of Cosby's Manor under that deed, upon the execution thereof; that he claimed the sole and exclusive ownership of that lot; and that he continued thereon up to the period of his conveyance to the tenant; and that during the tenancy of the grantor and the present possessor very large and and extensive improvements, &c. had been made by them, and that they had done other acts in their capacity as owners.

Mr. Cady.---We put in a deed dated 19th, July 1794 from Agatha Evans, one of the daughters of General John Bradstreet, and Sir Charles Gould, by his attorney Edward Gould, to James S. Kip for lot No. 96 on which the premises in question are included with covenants for quiet enjoyment, clause of warranty &c. the consideration is £627. 4.

Mr. Yates.—We object to the production of this deed upon two grounds, 1st, the interest of the grantors is not shewn, and 2d, the deed purports to have been executed by Edward Gould, as the attorney of Sir Charles Gould, but no power of attorney is produced.

Conkling J.— These objections have been argued before in former trials and overruled, I will however note the objection.

Mr. Cady.—I would mention to the grand assize that the premises as described in the deed to Kip are part of the lot No. 96 in Cosby's Manor, the count of the demandant is for part of lot 96 in the same Manor: we now produce a deed from James S. Kip to the tenant, Apollos Cooper, dated 11th April 1795, describing by metes and bounds 115 acres of the aforesaid lot (including the premises in question) with the usual covenants for quiet enjoyment, warranty &c. in consideration of £600.

Mr. Yates.—We have the same objections to this deed, with the further one of the want of proof of possession by Kip under the deed of 1794, which we do not admit—your Honor will be pleased to note our objections.

John Fish examined by Mr. Cady.—A surveyor residing at Utica. Knows the boundaries of lot No. 96 of Cosby's Manor.

(Mr. Cady reads from the deed of 1795 as to the boundaries which witness points out to the grand-assize upon a map of Cosby's Manor which he produces: the deed states the quantity of land to be 115 acres; witness identifies the land described in the count as the same mentioned in the deed). The tenant has the western half of the lot which lies between the canal and the river; it extends about 32 or 34 chains south of the Erie canal; that comprises the whole extent of his lot; knows Mr. Cooper has been in possession ten years.

William Alverson.—Sworn upon his *voire dire.* Witness held part of what was Cosby's manor in the year 1797, which he has since sold; gave a conveyance with warranty; knows the demandant's claim extends to the lot 97 as well as lot 96; my part was formerly a portion of lot 97; witness is a relation of Potter to whom he sold his portion of the lot, who has since sold it to Mr. Huntington, against whom the demandant he understands is proceeding.

Cross-examined by Mr. Cady.—He has no interest in any part of lot No. 96 and never had.

Mr. Yates.—Objected to his being sworn in chief: the objection was overruled by the court, to which decision the demandant excepted.

Sworn in chief.—Has resided in Utica since 1789; Edward Gould sold the land to Kip, who had made improvements on it by building a barn. Cooper took possession in 1795; has resided there since then; a person named Sanger was agent for selling the land; he had agency of other land; the land has been cleared and improved by Cooper; it is now sold out into lots or at least a considerable part of it; when Cooper took possession there was a piece cleared on the flats near the river; the first lot was sold to Abram Cooper in 1796 or 1797; there were about twelve or fifteen houses on the land between the river and canal in 1826; lot 95 is the most easterly lot; the tree mentioned in the count stands on the line between lots 96 and 97; Greenman, Pond, Harnard, Walker Terry and Kingsley lived in separate houses on the land in 1826, except Harnard and Terry, who lived in a double house; John Shaw also lived there; Mr. Cooper's possession did not extend the whole width of the lot in 1796 between the canal and river; the houses I have mentioned are all on that part which was formerly in the possession of Mr. Cooper.

Cross-examined by Mr. Yates.—The Cooper lot was occupied in 1788 by Francis Foster as a squatter; Timothy Russel and Norman Merry purchased of Foster for £ ; Foster had made only trifling improvements, such as building a log house; he sold out in 1789 to Russel and Merry; they sold to James Sole in 1790 or 1791; Kip followed Sole in 1793 or 1794; when Kip took possession there were about twelve or fifteen acres cleared; Cooper took possession in 1795; Cooper did not take possession of the whole width between the canal and the river; witness lives on lot No. 96 now under Mr. Harnard; I rent my property of him; Harnard claims under Cooper; does not know that the lots No. 95, 96, 97, 99 were called the Bradstreet property; did not hear who Sanger was agent for; knew he was agent for that land; did not swear on a former trial that he had heard this property called the Bradstreet property in 1792, 1793 or in 1794; lives on part of the property described in the count; lived there a little over a year; has been examined repeatedly on these trials.

Re-examined, by Mr. Cady.—I reside on the eastern part of the lot No. 96, on a part sold by Cooper in 1795, 1796 or 1797. The house in which I live has been built between thirty and forty years; it was built by John Fordham; has been occupied by him, or those claiming under him, ever since; I entered under Harnard, in 1825 or 1826, when a man of the name of Locke was in possession; I succeeded Harnard in the possession of the house; he moved out and I entered; thinks Locke was in before Harnard; there have been a good many in possession there. (Mr. Cady then read the description of the premises from the count, in order that the witness might determine whether the house was situated thereon as therein described.) Witness then said that the house was on Cooper's purchase, but *not* within the boundaries, as described in the count.*

Re-Cross-examined, by Mr. Yates.—My house is between King's house and the east line of lot 96; I live east from Cooper's.

Solomon Wells—Examined by Mr. Kirkland.—Knows where Mr. Cooper lives; has known the property since 1791; became acquainted with Sole about that time; resided then at Deerfield, where he has remained ever since; James Sole was then in pos-

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* See page 9.

session of lot 96 ; about four or five years after Cooper came into possession ; lives opposite to the lot No. 96, on the other side of the river ; Cooper has lived there ever since ; thinks part of the lot was cleared during the time Sole was in possession ; a great many houses besides Cooper's on the land ; soon after Cooper's house was built others were erected.

Cross-examined, by Mr. Yates.—Lives on lot 13, at Deerfield ; did not know Merry and Russell ; knew Kip ; understood that he purchased from Sanger, as the agent of Gould and Evans ; he was agent for what some people called the Gould and Evans property ; did not hear for several years that they were called the Bradstreet lots ; has heard of the Schuyler and Bleecker lots ; my father's was one of the Scott lots, which is the one I live on ; a person named Lansing was the agent for that lot ; did not know Foster ; thinks it likely he was gone out of the country before he (witness) arrived; Sole sold to Kip, who sold to Cooper ; has seen Kip on the lot ; he built a house there, but not on the part sold to Cooper ; has seen him occupying the premises sold to Cooper : cannot say whether there was any fence erected.

Question by the Court.—It was already cleared where Cooper built his house, in which he has resided ever since.

By Mr. Yates.—Does not know whether Kip was in possession when he sold to Cooper ; Kip settled at first on the Bleecker lots; not far from where Mr. Miller lived.

John Fish—Re-called by Mr. Stevens.—(The witness proceeded to mark out with a pencil on the map the boundaries, as described in the count.) The line, as now drawn, would include a portion of Alverson's and King's lots.

Cross-examined, by Mr. Cady.—If the line were drawn to the westerly side of King's lot it would not touch the house ; but as drawn by the boundaries laid down in the count, it would go through it ; part of Alverson's property, no doubt, is included in the count.

Mr. Stevens.—We contend that the witness, Alverson, is now shown to be interested ; from the evidence just given, it is shown that the line, as drawn from the count, runs through a portion of the property of which he is now in possession; he therefore has an immediate interest in preventing a recovery, for the purpose of protecting his own possession. He has not only an interest in the question in dispute, but an interest in the event ; it is one of those

cases in which reason and sound policy dictate an exclusion of such evidence. He is doubtless interested in the event; for should a verdict be rendered in favor of the demandant, he must be turned out.

Conkling, J.—You had better proceed with the testimony, and let this question be reserved for fuller discussion hereafter, before the case goes to the Grand Assize.

Mr. Cady,—We rest for the present.

Mr. Yates then proceeded to open the demandant's case, stating the facts which were subsequently proved in evidence, and contending that by the purchase of General Schuyler, in 1772, a resulting trust in one undivided fourth was created in General Bradstreet, which, through his will, and the wills of Martha Bradstreet and Elizabeth Livius, became vested in the demandant. That, if the demandant could not claim under that resulting trust, yet she became seized in fee, under the decretal order of the Court of Chancery in 1804, and the deed, in pursuance thereof, from Edward Gould to demandant. That the statute of limitations was no bar to the claim of demandant, she being protected by infancy and coverture; and that her title, as an alien, is secured by the treaties of 1783 and 1794; from the latter treaty it clearly appears that the rights of aliens were protected; if he should prove that a resulting trust in the premises in question was created in General Bradstreet, there did not then appear to him any doubt but that the treaty did apply, and the constitution of the United States vested this Court with jurisdiction. He would read from the ninth article of the treaty so well known as the "Jay Treaty"—"It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and the legal remedies incident thereto, be regarded as aliens." This article applies to the title of the parties, whatever it is, and gives it the same legal validity as if they were citizens. It is not necessary that we should show an actual seizin, but

only that the title was in us, or our ancestors, before the treaty was made.

Produces Exemplification of the patent for Cosby's Manor dated 2d January, 1734, in which certain quit rents were reserved to the crown.

Produces warrant of Daniel Horsmanden Esq. chief justice of the colony of New-York, dated 7th May 1772, to the Sheriff of the County of Albany, directing the sale of Cosby's manor for arrearages of quit rent: the return of Mr. Sheriff Ten Eyck was indorsed thereon, which stated that a sale had been had on the 4th of July 1772, and that the purchase had been made by General Schuyler of the whole Patent, with the exception of one hundred acres, for the sum of £ .

Produces the deed of conveyance from the sheriff to General Schuyler under the quit rent sale, dated 20th July 1772.

Produces a deed of release, by way of partition, between General Schuyler and Rutger Bleecker, dated 19th day of December 1786, in which General Schuyler is stated to be seized of three undivided fourths of lot No. 96 and Rutger Bleecker of one undivided fourth, and by which Rutger Bleecker releases his interest therein to Schuyler. (Also produces a map in which lots 95, 96, 97 were allotted to, and marked with the name of General Bradstreet; it was objected to as admissible evidence on the ground, that it did not appear to be in any way connected with the deed; that it was made by a party who was a perfect stranger to the transaction; and it did not appear to be recognized by the parties to the deed of partition: it was withdrawn.)

Produces the will of General John Bradstreet dated 23d Sep. 1734: "all the rest of my estate, real and personal, I devise and bequeath to my two daughters equally to be divided between them, as tenants in common, in fee. But I charge the same with the payment of one hundred pounds sterling per annum, to their mother during her life. Notwithstanding the former devise for the benefit of my wife and daughters, I empower my executors to do all acts and execute all instruments, which they may conceive to be requisite to the partition of my landed estate, and I devise the same to them as joint tenants, to be by them sold at such time and in such manner, as they shall think most for the interest of my daughters, to whom the nett produce shall be paid in equal shares.

I appoint for the execution of this my will the said Colonel Philip Schuyler and William Smith Esq. New York:" the will was proved by General Schuyler alone.

Produces the will of Martha Bradstreet *the elder*, one of the daughters of General John Bradstreet, dated 15th May, 1781, whereby she devised to her mother Mrs. Mary Bradstreet, the produce and interest of her real and personal estate, during her life; and after her decease, she devised one equal third of her estate, real and personal, to her sister Elizabeth Livius, her heirs and assigns, to be at her disposal, independent of her husband; one third part to Samuel Bradstreet and Martha Bradstreet, children of her late brother Samuel Bradstreet, and to their heirs, with benefit of survivorship. The remaining one third thereof she gave to her sister Agatha, wife of Charles Du Belamy, during her life, independent of her husband, after his death, she surviving, to her in fee: but if she died before her husband, to her children; but if she survived her husband; and had no children, and should not dispose of the same by will, the same should go to Elizabeth Livius and her heirs. A like devise of the share given to Elizabeth Livius was made in favour of her sister Agatha, if she should die without disposing of her share, and without issue.

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

Produces the will of Mrs. Mary Bradstreet, the widow of General John Bradstreet, dated 23d March, 1782.

Produces Exemplification of a bill in Chancery, filed 3d May, 1788, by Charles John Evans and Agatha his wife, against General Schuyler.

Produces Exemplification of the answer to the bill, filed 3d March, 1789. [The copies of the bill and answer, and extracts therefrom would have been given, had they been within the reach of the Re-

porter ; he hopes, that from the argument of counsel, as set out in the report, sufficient may be gathered to render the case fully clear and comprehensive.]

Archibald Campbell—Examined by Mr. Stevens.—Is Deputy Secretary of State. Produces book of record from the Secretary's office ; it contains a deed of partition between the devisees of General Schuyler, dated 11th May, 1805, it was recorded on the 2d of September, 1809, to which there is annexed a map of Cosby's Manor, on which lots 95, 96 and 97 are marked to General Bradstreet : there are several other lots, some marked to John Marine Scott, and some to Mr. Bleecker.

Mr. Cady contended that this evidence was inadmissible ; the deed ought to have been recorded in the office of the County Clerk : he also contended that it was not any evidence against the tenant, because the map was not made until after the conveyances under which the tenant claims,

Mr. Stevens.—By the Revised Laws of 1802, chapter 155, § 4, 5, the deed is properly enrolled in the Secretary's office; the Revised Laws of 1813 directed the enrollment in the County Clerk's office.

The evidence was admitted ; decision excepted to by the tenant.

Produces will of Mrs. Livius, dated 25th May, 1794, by which she constitutes the demandant her sole heiress, when she attains the age of twenty-one years, or marries, provided she marries with the consent of Sir Charles Morgan (Gould); with a proviso that in case of demandant's death before she should attain the age of twenty-one, or be so married, the same should go to her brother, Samuel Bradstreet.

Mr. Cady objected to the introduction of the will, on the ground that Mrs. Livius, at the date thereof, was a *feme covert;* and also for want of proof of its execution.

Mr. Yates.—Martha Bradstreet, by her will, devised one third of her share which she took under the will of General Bradstreet to Mrs. Livius, her heirs and assigns, to be at her disposal, independent of her husband. The devise is therefore good, as the execution of a power of appointment. It is no objection to a will, more than thirty years old, being *read* in evidence, that possession has not followed it, because the court cannot know how the will directs the possession to go, till it be made acquainted with the contents of the will, by its being read. 2 *Car. & Payne*, 440, *and see Doe dem Oldham and wife v. Woolley*, 2 *B. & C.* 22.

Admitted, but excepted to by tenant.

Produces release from Samuel Bradstreet to Matthew Codd and Martha, his wife, (the demandant,) dated 26th July, 1802, of his share under the will of Mrs. Livius.

Mr. Yates.—We offer this to confirm the existence of the will of Mrs. Livius: it may also be as well to mention, that Elizabeth Livius was the step-daughter of General John Bradstreet.

Produces exemplification of divorce of the demandant from her husband, Mattthew Codd: the date of the decree pronouncing the divorce, was the 16th of June, 1817: the divorce was obtained on a bill filed by the demandant.

Mary Bradstreet, examined by Mr. Yates.—Is the widow of Samuel Bradstreet, the brother of the demandant; the demandant was married in Ireland in the year 1799, and came to this country in the fall of the same year. She was under twenty-one when she was married; she was twenty-one on the 10th August, 1801. Agatha and Martha were the names of the two daughters of General John Bradstreet. Agatha married Charles John Evans. Mr. Evans formerly went by the name of Du Bellamy, his real name, however, was Evans. Martha Bradstreet died unmarried; she died before Elizabeth Livius, the step-daughter of General Bradstreet; Elizabeth Livius had no children; she was the second wife of Mr. Livius; Mr. Livius had children by a former marriage; the demandant is a niece of Elizabeth Livius; my husband was a son of Major Bradstreet, and the brother of demandant; there were not any nearer of kin to Mrs. Livius, than my husband and the demandant; the demandant has left this state, on a visit, but with that exception, remained here ever since; she left her family here when she went; she was absent but a short period at a time.

Cross-examined by Mr. Cady.—Witness left England in 1796 or 1797. Until her marriage with Samuel Bradstreet, she was not acquainted with the family. Had not any personal acquaintance with Mrs. Livius; she resided in London; she was, she understands, a native of Boston; does not know how long she resided in London; believes she died about a year or two before my marriage; did not know Martha, the daughter of General John Bradstreet; she resided in London. Mrs. Evans resided in New York at the time of her death; does not know where she resided at the

'time of her marriage; the demandant has resided in Utica, Frank fort, New York, and Albany.

Re-examined by Mr. Yates.—As far as she knows, Martha Bradstret, *the elder*, and Mrs. Livius resided in England or Canada, during the revolutionary war.

John R. Bleecker, examined by Mr. Yates.—(Mr. Yates produces the map mentioned in page 11.) The map was found among my father's papers; it is a map of the division of Cosby's Manor, containing the whole tract conveyed to General Schuyler, by the Sheriff of the county of Albany in 1772; it was made by my grandfather; he was a surveyor; it is dated 31st August, 1786; saw it first about thirty years ago, before the death of General Schuyler; the lots marked to my father upon the map, correspond with those mentioned in the deed; with regard to the other lots, cannot say whether the map and the deed correspond, as he has not compared them; General Schuyler, John M. Scott and General John Bradstreet were the purchasers of the other lots; General Bradstreet's lots were purchased in the name of General Schuyler, as trustee for General Bradstreet; General Schuyler died 18th November, 1804.

Mr. Yates.—We now contend that the map is admissible evidence, and may be taken as part of the deed of 19th December, 1786: in addition to which, there is a charge made by Bleecker against General Schuyler. as appears by the answer of General Schuyler, for preparing this very map, dated on the same day that the map is. The court also are aware, that in some cases of *boundary*, that full proof is not necessary, which is required to establish a private fact. *Mima et al. v. Hepburn*, 7 *Cranch*, 295–6. Rejected by the court; Demandant excepted.

Admitted that the undivided fourth (the amount claimed to be recovered) is worth more than $2,000.

Produces exemplified copy of record of partition filed 11th September, 1806, in the Supreme Court of the state of New York, between Matthew Codd and Martha his wife; and Richard Harrison, Charles Wilks, Edward Gould, Benjamin Walker, Nathan Williams, Jonas Platt and others, (for part of Cosby's Manor) in favor of the demandant; it did not include the Utica property. Richard Harrison, Charles Wilks and Edward Gould were trustees under the will of Mrs. Evans; Nathan Williams and Jonas Platt

were the trustees of Mrs. Bainbridge, the legal representative of Mrs. Evans.

Produces exemplified copy of the will of Agatha Evans, dated 29th November, 1794.

Mary Bradstreet re-called.—Mrs. Bainbridge was a daughter of Mrs. Evans, formerly Mrs. Symington.

Mr. Van Vechten then read the following extract from the will of Mrs. Evans, "directing her executors to confirm certain conveyances of property she had made, previous to the execution of the conveyance of the 16th May, 1794, by General Schuyler to herself and Edward Gould."

Produces consent of Sir Charles Morgan, late Sir Charles Gould, to the marriage of Mrs. Bradstreet, the demandant, dated in June, 1800, a few months after the marriage.

Mr. Yates.—That subsequent consent is sufficient. *See Jackson v. Miller*, 6 *Wendell*, 232. *Clark's ex'ors. v. Van Riemsdyk*, 9 *Cranch*, 159, 161.

Admitted—That General John Bradstreet died 26th September, 1774.

That Martha Bradstreet the elder, died 22d March, 1782.

That Mary Bradstreet, the widow of General John Bradstreet, died 31st March, 1782.

That Charles John Evans died 9th August, 1793.

That Agatha Evans died 9th February, 1795.

That Elizabeth Livius died 4th May, 1795.

Demandant rests.

Mr. Cady.—Produces the following deed, dated 16th May, 1794, from Philip Schuyler, executor of the last will and testament of John Bradstreet, deceased, of the one part; to Agatha Evans, (for her share under the will of General Bradstreet) and Edward Gould, of the city of New York, (describing him as the attorney of Sir Charles Gould, sole executor of the last will and testament of General John Bradstreet, deceased). It recites the purchase by General Schuyler; the will of General John Bradstreet; and that Philip Schuyler, at the time of the making thereof, was seized in trust for the said John Bradstreet of one undivided fourth part of the tract of land described in the partition deed, executed by himself and Rutger Bleecker (together with other lands): the death of William Smith his co-executor; and that Agatha Evans, formerly

Agatha Du Bellamy, is one of the daughters of John Bradstreet. It also recites the will of Martha Bradstreet, the daughter of John Bradstreet, and the devises in the same of one third to Samuel and Martha Bradstreet, children of her brother Samuel Bradstreet, deceased; one third to her sister Agatha, then the wife of Charles Du Bellamy, afterwards Agatha Evans, the wife of Charles John Evans; and the remaining one third to her sister Elizabeth Livius; and that partition had been made among the proprietors of the Manor of Cosby, describing the lots which fell to Schuyler, as trustee of John Bradstreet, and among them lot No. 96; and that the same had, with other lots which fell to Schuyler in his own right, been conveyed to him by the deed of partition. The deed states, that the said Philip Schuyler, as well to invest the said Agatha Evans with a legal title to her proportion of the said lands and tenements, devised to her by virtue of the wills 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," &c. hath, "by virtue, also, of the power and authority with which he is so as aforesaid invested, and of all other powers which he may lawfully claim as executor," and doth "grant, bargain, sell, alien, release, and confirm," to Mrs. Evans and Edward Gould, and their heirs and assigns, the said lands which fell to the share of the said Philip Schuyler, as a trustee for the said John Bradstreet, (describing them at length, and including lot No. 96,) with the reversion and reversions, &c. and all the right, title, &c. in law or equity, &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 to the said 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 or any parcel thereof; and, after deducting the charges of sale, and other contingent expenses attending the said trust, to divide the residue of the money to arise from such sale, to and among the said devisees, Samuel Bradstreet and Martha Bradstreet, and the said Elizabeth Livius, and their heirs, executors and administrators, according to their several interests in the estate of the said Martha Bradstreet,

by virtue of her will, or to such persons as would be entitled thereto, upon the happening of any of the said contingencies, in the said will mentioned," &c. The deed further contains covenants against Schuyler's own acts or incumbrances, and for further assurance.

Abel French, examined by Mr. Cady.—Went to Oneida County in the year 1792, and remained there till about 1805; knows the tenant Mr. Cooper; he came there about two years after me; he made a purchase of some property at what is now called Utica; witness recommended him to purchase; as far as he knows Cooper has resided there ever since; Cooper has frequently pointed out to me the tract of land he purchased; witness was in Utica about three years ago; Cooper was still in possession; about the time Cooper purchased there were about ten acres improved; where Cooper lives there are many settlements; the place is thickly settled.

Solomon Wells recalled by Mr. Kirkland—David P. Hoyt lived on the eastern part of the lot; he resided there rising thirty years; perhaps thirty five.

Mr. Stevens.—We object to their establishing an adverse possession by means of the title of a third person.

Mr Cady contra cited Stearns on real actions, 339.

Mr. Yates contended that this was a departure from the true question as to which of the parties had the better right: 3 *Johnson's cases*, 128.

The Court ruled in favor of admmitting the evidence, to which the demandant excepted.

Examination continued.—Went to Utica in April 1791; saw Sole a few days after his arrival; he was in possession of the eastern part ot the lot; Kip went into possession afterwards; he built a house a number of years afterwards along the side of the canal; David P. Hoyt was in possession as soon as Cooper; he lived there until his death, which took place about five years ago; Hoyt exercised acts of ownership upon it to the day of his death; the part claimed by Hoyt was in fence when witness came into the country; the widow and children of Hoyt are now in possession; there are a number of houses on that part; to the best of his recollection Hoyt was there from 1796 or 1797.

Cross-exemined by Mr. Stevens.—Hoyt was a tanner and currier; his tanyard was west of his house; has seen him at his tanyard; that is not on the lot No. 96; between where the wind-

mill stands, and on the river on the easterly side, does not know whether there are any houses; cannot say whether he has ever seen Hoyt exercise any act of ownership upon any part of lot No 96.

Tenant rests again.

Mr. Yates. Produces decree of the court of chancery; also the bill and answer in *Codd and wife, against Gould and Bradstreet.*

The bill stated that Gould had become possessed of considerable personal property in trust for Mrs. Livius; and also that certain real estate had become vested in him, in trust as aforesaid, and praying an account; that Edward Gould should state how he held and had acquired the aforesaid property in trust; and, that he might transfer the said property to the demandant, and deliver over all vouchers ,papers, and muniments relating thereto, and make a full answer to the bill.

The answer of Edward Gould filed in 1802, admitted that he held the property as mentioned in the bill, both real and personal, by virtue of a power from Mrs. Livius, and also a power from Sir Charles Gould, the executior of Martha Bradstreet; which he was ready to account for and transfer; but, that by reason of the dispute between Samuel Bradstreet, and the demandant, relative to the property left by Mrs. Livius, and the marriage of the demandant, without the previous assent of Sir Charles Morgan, (Gould) he (the defendant Edward Gould,) was informed by counsel, that he could not securely make the transfer, without the sanction of the court of Chancery.

The decree which was made in 1803, directed the real estate, which Edward Gould held in trust as aforesaid, to be conveyed, under the direction of a Master, to the demandant; and also, that it be referred to a Master to take an account, &c. and report touching the property, so as aforesaid held in trust by Edward Gould; but that Gould should not be liable for any of the trust property, which had been converted into money before his bankruptcy.

Produces the following deed, dated at the city of New York, on the 22d October, 1804, made between Edward Gould and the demandant, by the name of Martha Codd; it recited the conveyance executed by Philip Schuyler, on 16th May, 1794, as executor of General Bradstreet, to Agatha Evans and Edward Gould, and the different wills hereinbefore set forth, and the trusts thereby created: that Martha Codd, late Martha Bradstreet, by the will of Elizabeth

Livius, has, since the execution of the deed from Philip Schuyler, become entitled to all the estate of Elizabeth Livius, conveyed by the deed of Philip Schuyler to Edward Gould, in trust for Sir Charles Gould, as executor of the will of Martha Bradstreet, not sold or conveyed according to the trust; and that Edward Gould, having become a bankrupt, has been ordered by the Court of Chancery to transfer and convey to Martha Codd, all the estate vested in him as trustee; and that he is willing to convey to the said Martha Codd all the estate vested in him as aforesaid, as her trustee, to which she may be entitled to, under the will of Martha Bradstreet. The deed then proceeds to convey to Martha Codd, her heirs and assigns, all the real estate held by Edward Gould at the time of his becoming bankrupt, as aforesaid, as trustee as aforesaid, for the said Elizabeth Livius, by virtue of the several indentures of release, executed by the said Philip Schuyler, as aforesaid, and the several wills therein referred to; and, also, all the real estate held by him, the said Edward Gould, at the time of his becoming bankrupt, as aforesaid, as trustee for the said Martha Codd, by virtue of the said several indentures and wills above referred to; to have and to hold unto her, the said Martha Codd, her heirs and assigns, to the only proper use, benefit and behoof of her, the said Martha Codd, her heirs and assigns, for ever.

Produces Exemplification of the proceedings by which Edward Gould was declared a bankrupt; the act of bankruptcy was stated to have been committed in June, 1800; the commission of bankruptcy was dated on 13th October, 1802.

This closed the evidence on both sides.

Mr. Yates.—Before I commence my address to the grand assize, I will thank my learned opponents to mention the authorities on which they intend to rely, so that the gentleman who is to follow me, may have an opportunity of looking into them.

Mr. Van Vechten.—We refer to 1 *Sch. and Lef.* 104; *Co. Litt.* 293, *a.* 1; *Henry, Bl.* 1; 5 *Taunt.* 326; 19 *Viner*, 312, *n.* 2. As to recitals in deeds under which parties claim, see 4 *Peters*, 1; 5 *Peters*, 402.

Mr. Cady.—As to adverse possession, we cite *Jackson dem Young et al. v. Ellis and White*, 13 *Johns.* 118; *Jackson dem Pres-*

ton et al. v. Smith, 13 *Johns.* 412; *Jackson dem Vanderlyn and Betts v. Newton*, 18 *Johns.* 360.

When the property is directed to be converted into money, *Craig v. Leslie et al.* 3 *Wheat.* 578. As to resulting trusts being of equitable interest, 1 *Cruise* 464, 465. That a *feme covert* cannot make a will so as to devise real estate, 6 *Cruise, page* 15, § 10; 2 *Day's Connect. Rep.* 163. We also refer to 2 *Cruise, Title* 12, *c.* 1, *s.* 20; *9th Article of Jay's Treaty; Harden v. Fisher*, 1 *Wheat.* 301; *Stearns on real actions*, 19, 35; *Co. Litt.* 296, *b.* In relation to trusts, 2 *Johns. C. C.* 397; 2 *Peere Wms.* 548; to shew they are mere equities.

Mr. Yates, then commenced his address to the grand assize, in which he forcibly and eloquently contended for the claims of his client; commenting upon the evidence as he proceeded, and evidently by the suavity of his manner, paving his way to the kindness and good will of the grand assize, whose careful and impartial attention he was aware he so much needed while he led them through the enormous mass of authorities, he deemed it his duty to submit to them. With all the zeal of an advocate, deeply interested in the cause of his client, he addressed the feelings of the grand assize, hoping that by their verdict, they "would cause the rosebud which the demandant had planted in Europe, to blossom and flourish in America"; he was well assured that the objection raised by his opponents, that the demandant was a foreigner, would have no weight with them; but that they would fairly, fearlessly, and impartially deal out justice to the parties.

The deed to James S. Kip, is from Agatha Evans and Edward Gould, as the attorney of Sir Charles Gould, but there is not any evidence of any power of attorney having been given by Sir Charles: when a party executes a deed under a power of attorney, the power of attorney ought to be produced, *Johnson v. Mason*; 1 *Esp.* 90; *Yarborough v. Beard, Taylor's N. C. Rep.* 25. The power must be produced, because there is, in the nature of things, no *prima facie* evidence that one man is, in fact, the attorney of another; *Osborn v. U. S. Bank*, 9, *Wheaton*, 829. Admitting that the power of attorney was sufficient for the purpose of conveying the property, it ought to have been recorded in the office where the deed is required to be recorded; otherwise the deed made by the attorney is not effectual as a recorded deed: *Taylor v.*

McDonald; 2 Bibb, 420. Presuming, however, that the power was given; it was not such an one, as could authorize Edward Gould to make a valid conveyance of this property: in any event, whatever might be the powers conferred on Edward Gould by that deed, it could not be received here as evidence; as Sir Charles Gould could not delegate his powers of executor. The authority to execute a deed must be by deed. An agent cannot bind his principal by *deed* unless he has authority by *deed* so to do: see *Hanford v. McNair*, 9 *Wend.* 54. As to the construction of powers, see 2 *Ventris*, 350: it is a general rule that a purchaser under a power purchases at his peril. *If there was no subsisting power or authority to sell, no title is acquired*; *Swan v. Saddlemire and Wood*, 8 *Wendell*, 681; *Jackson dem Anderson v. Anderson*, 4 *Wendell*, 474; *Sinclair v. Jackson*, 8 *Cowen*, 581; *Doe dem Biggs v. White et al.* 2 *Dowling & Ryland*, 717. Where real estate is devised to executors with power to sell the same, and the executors die without conveying, the estate descends to the heirs at law, *Jackson dem Miller et al. v. Potter*, 4 *Wend.* 672. Every execution of a power must have reference to the original deed creating that power; and whoever claims under the execution, must make title under the power itself; *Robinson v. Hardcastle*, 2 *Term Rep.* 241; had this course been pursued, as it ought to have been, Kip would then have learnt that there had been such persons as General Schuyler; as General Bradstreet; that he had left two daughters, to whom his property was devised; but he would not there have learnt any thing, or found any thing, about the grantor of his deed, Edward Gould. It is general rule of law, that a delegated authority cannot be delegated; see *Shankland v. The Mayor, &c. of Washington*, 5 *Peters*, 395; So, wherever a power is given, whether over real or personal estate, and whether the execution of it will confer the legal, or only the equitable right on the appointee, if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegari*. Therefore, where a power of sale is given to trustees, or executors, they cannot sell by attorney; *Sugden on Pow. page* 175, *First American Edition*. The executors cannot sell by attorney. The power given to them, by the will, was a personal trust and confidence, to be exercised by them jointly,

according to their best judgment, under the circumstances contemplated by the will. One executor in this case, cannot commit his judgment and discretion to the other, any more than to a stranger; *Berger and Icard Ex'ors, &c. v. Duff*, 4 *Johns. C. C.* 368.

Mr. Cady.—We shall contend that after a lapse of thirty or forty years, the existence of this power is to be presumed.

Mr. Yates.—We contend also, that this deed to Kip is improperly executed: the power of attorney was a joint power to Ludlow and Gould, and the deed to Kip is executed in the name of Edward Gould, alone. If one of several partners execute a deed, or covenant, in the name of the firm, it is his own deed; for, though one partner might bind another by written instruments, he could not do so by deed, without a special power under seal for that purpose; *Harrison v. Jackson et al.* 7 *Durnford & East*, 203; *Steinbeck v. Rhinelander et al.* 3 *Johns. Cases*, 280; *Green & Mosher v. Beals*, 2 *Caine's Rep.* 254; *Appleton v. Binks*, 5 *East.* 148; "if one of several partners execute a deed, or covenant in the name of the firm, *it is his own deed.* It is not denied that the defendant was an agent of the *Granville Cotton Manufactory.* But there is a distinction between an attorney in fact, and an agent. The former can be constituted *only by deed.* The authority of the latter may be by parol or implied. An attorney *must always* use the name of his principal; an agent or factor, may do the business in his own name. If the defendant had been an attorney in fact, and had executed the deed in his own name, *it would have been void.* The deed is the act *only* of the person who affixes the seal;" *White et al. v. Skinner*, 13 *Johns. Rep.* 307. The deed here is executed by Edward Gould *alone*, and although he describes himself as the attorney of Sir Charles Gould, he only is personally liable, and not Sir Charles Gould; *Stone v. Wood*, 7 *Cowen*, 453; see also, *Mackay et al. v. Bloodgood*, 9 *Johns.* 285. The declarations and admissions of Edward Gould, that he held the power from Sir Charles Gould, cannot be received in evidence of the fact of his authority; *Lessee of James v. Stookey et al.* 1 *Wash. C. C.* 330.

It is contended by the tenant that his possession is adverse: for such argument there can be no ground. Before he can set up any claim to an adverse possession, he must prove the validity of his own title. The rule of *caveat emptor*, applies only to purchasers of defective *legal* titles: it is true he is not to be affected

by any latent equity, whether founded on trust, fraud, or otherwise, of which he had not actual notice, or which does not appear *in some deed necessary in the deduction of the title*, so as to amount to *constructive* notice; *Wilcox v. Calloway.* 1 *Wash. Virg. Rep.* 41; *Hooe et al. v. Pierce*, 1 *Wash. Vir. Rep.* 217. It will be contended that Kip ought to have had *actual* notice of this fraud; we contend that *constructive* notice of all, that is apparent upon the face of the deed, under which they claim; and such other facts as those which necessarily would put him (Kip) on enquiry, if pursued with ordinary diligence and prudence, is sufficient; *Dexter v. Harris*, 2 *Mason*, 536; *Dunch v. Kent*, 1 *Vernon*, 319; *Wormley v. Wormley*, 8 *Wheat.* 445; *Hamilton v. Royse*, 2 *Sch. & Lef.* 315. We contend that the tenant entered and was a purchaser with notice of our interest; he therefore entered in subordination to our rights, and such entry would not constitute an adverse possession. Again, the tenant has shewn no adverse possession of the premises in question, under the deed to Kip; because, though the deed was void, as to what Edward Gould professed to convey, it was valid for Mrs. Evans' share, and as to that, it made Kip a tenant in common with the demandant, *pro tanto:* therefore his possession is not adverse; *Barr v. Gratz*, 4 *Wheat.* 213; see also, *Den dem. Walker v. Turner*, 9 *Wheat.* 551.

How does the title of the demandant stand? The first objection urged against it, is, that she is an alien, and therefore, cannot maintain a writ of right; see *Hughes v. Edwards*, 9 *Wheat.* 496; *Orr v. Hodgson*, 4 *Wheat.* 463; *Blight's Lessee v. Rochester*, 7 *Wheat.* 535; *Jackson v. Beach*, 1 *Johns. Cases*, 399; *Jackson v. Lunn*, 3 *Johns. Cases*, 109; *Act of April 2d*, 1798; *March* 26, 1802; *April* 4, 1807. The title became vested in General S., in 1772, by a conveyance in fee from the Sheriff of Albany county, and lot No. 96, (which includes the premises in question,) in the release made by Schuyler to Gould & Evans, in May, 1794, pursuant to a division, is stated to have been drawn to Schuyler, in trust, for General Bradstreet. Schuyler, in his answer, admits that the money was advanced him by General Bradstreet, at the time of the purchase; (who for various reasons, did not wish his name to appear in the purchase deed;) that the purchase was made for General Bradstreet; and that he held the property in trust for him. Where land is purchased in the name of one person, and the con-

sideration is advanced by another, a trust results in favor of the person who advanced the consideration; *Jackson dem Seleye v. Morse*, 16 *Johns.* 199; in the case of *Jackson v. Mills*, 13 *Johns.* 463, *Spencer C. J.* says it was proved that Whitlocke was the mere trustee of Harder, in taking the Sheriff's deed, under the sale on the junior judgment; and the deed from Whitlocke to Harder was the mere execution of his trust. Harder *only* was beneficially interested in that purchase as it was made for him, and he paid the consideration money. Whitlocke never had any interest under that deed; and, therefore, his execution of the trust, could not operate as an estoppel to any title he might thereafter acquire, in his own right to the same lands. The interest obtained by General Schuyler under the deed from the Sheriff, so far as our fourth is concerned, was not even a mere equity; if the vendee (General Schuyler) had only a mere equitable interest; a judgment at law is not a lein; *Bogert v. Perry et al.* 17 *Johns.* 351; the proof in this case clearly shews, that General Bradstreet had the whole beneficial interest in the premises in question; and that General Schuyler was a nominal grantee, without title:— the remedy of the demandant, then, is in this Court, and she should not be sent from a court of Law to a court of Equity, for the recovery of her rights; *Jackson dem Livingston v. Bateman*, 2 *Wendell*, 574; in the case of *White v. Carpenter*, 2 *Paige.* 238; *Chancellor Jones* says, "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 account, 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. It follows, as a necessary consequence, that the trust must arise, if at all, at the time of the conveyance; and that the money or other consideration for the deed, which is the foundation of the trust, must be then paid, or secured to be paid. 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, on the ground, that the trust is executed by the statute of uses, and the estate itself vested in the *cestui que trust.*" Again, to make out a resulting trust, by the payment of the consideration money by one, the deed being taken in the name of another, the money must be paid *at*, or *before the execution of the deed*; *Jackson dem Erwin et al. v. Moore*, 6 *Cowen*, 706. General Schuyler admits in his answer to the bill filed by Charles John Evans and wife, that the consideration money *was paid* by Bradstreet, before the execution of the deed: his declarations are competent evidence, for the purpose of establishing a resulting trust. Such trust is not within the statute of frauds, and may be proved by parol, and the payment of the money, by the *cestui que trust*, ought to be clearly and satisfactorily established; *Foote et al. v. Colvin et al.* 3 *Johns. Rep.* 216; *Malin et al. v. Malin et al.* 1 *Wend.* 625, 648. As to the doctrine of seizin, and that an actual entry ought to have been made; 5 *Cowen*, 375; 1 *Peters*, 506, 7, 8; 1 *Munford*, 162, 163; 8 *Cranch*, 245.

Mr. Stevens.—There is nothing in this case that would justify counsel to interest the feelings of the Grand Assize; they have a more important duty to perform, to listen and adjudicate upon dry matters of law and fact. It is a novel action; it is an important one, and invites a sober examination of the law and facts. The law and facts are so inseparably blended that the jury must necessarily pass upon both.

The first objection raised against the right of the demandant to recover is, that she is not a citizen of the United States: this does not preclude her right of recovery. The demandant has the legal title vested in her, and is entitled to recover under the wills, or under the deed given by General Schuyler to Evans and his wife and Edward Gould, as the attorney of Sir Charles Gould.

Another objection is raised, that at the time of Jay's treaty, there was not any seisin in General Bradstreet: the case of *Hughes v Edwards*, 9 *Wheat.* 496, is directly in point, which states: "That the next objection relied upon is the alienage of the respondents. The objection would not, we think, avail the appellants, even if the object of this suit was the recovery of land itself, since the remedies, as well as the rights, of these aliens, are completely pro-

tected by the treaty of 1794, which declares 'that British subjects who now hold lands in the territories of the United States, &c. shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so for as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens:'" there is no doubt but that the treaty gives him the same rights he would have had, had he been a citizen of the United States.

The objection on the ground of the demandant's being an alien was subsequently waived.

The next question for your consideration is, who has the best paper title to the premises in dispute? General Bradstreet, by his will, devised all his estate, real and personal, to his two daughters, equally to be divided between them, as tenants in common, in fee: there can be no doubt but that the two daughters were Martha Bradstreet, *the elder*, and Agatha, the wife of Charles John Evans; although they are not named in the will: Martha Bradstreet, *the elder*, (under whose will we claim) by her will, devised to her mother, Mrs. Mary Bradstreet, the produce and interest of her estate, real and personal, during her life; after her decease, she devised one third thereof to Mrs. Livius, *to be at her absolute disposal, free from the controul of her husband:* one third to the *demandant* and her brother, Bradstreet: and the remaining one third to Mrs. Evans: so that under the will of Martha Bradstreet, *the elder*, the demandant obtained *one twefth* of the premises in question: Mrs. Livius had *two twelfths* of the premises devised to her under the will of Martha Bradstreet, *the elder*, and she (Mrs. Livius) having devised her whole interest, under that will, of the premises in question to the demandant, she (the demandant) obtained *three twelfths, equal to one fourth of the premises.*

It is contended that General Schuyler had a legal title, by virtue of the Sheriff's deed, to Cosby Manor; and we are met with the objection that the purchase was made by him on his account absolutely; and although it is in evidence that the fourth part *was purchased with General Bradstreet's money*, still he, General Bradstreet, had not the legal title: we insist that he had the legal, as well as the equitable title, and this is clearly admitted by the an

swer of General Schuyler, upon oath, *made subsequently* to the conveyance by General Schuyler to Mrs. Evans and Edward Gould: so that any one claiming under General Bradstreet, can set up the legal title of Gen. Bradstreet, and thereby make to himself a good, valid and legal title to the premises in question.

The learned counsel then proceeded to explain to the *grand-assize* the meaning of the words *cestui que trust; cestui que use: trustee, &c.*

It is contended by the demandant that a trust results by implication of law to him who advances the consideration money out of his own funds, and, on his own account, to pay for the property although the deed is taken in the name of the third person: the counsel for the tenant will tell you that our remedy is in a court of equity and that we have no remedy here: the statute upon this point is conclusive, for it vested the legal estate in General Bradstreet immediately on the execution of the deed to Geueral Schuyler: it does not apply to declared trusts, but to *implied* trusts; *White v Carpenter, 2 Paige*, 238. It is essential from the very words of the the statute to a resulting trust, that it should arise from some conveyance or deed; and it happens, when an estate is purchased in the name of *one person*, and the price, or consideration money is paid by *another person*. In such a case there is a *resulting trust, in favor of the person who paid the consideration; Jackson v. Seelye*, 16 *Johns.* 199. The Court of Errors in this state, say " it is fairly inferrible, that if any consideration was paid in the first instance, all the inhabitants contributed to it. The grant is to the patentees and their associates, heirs, successors, and assigns. If the patentees were trustees, and the *cestui que trusts* paid the consideration, there was then a *resulting trust in their favor;* and such *cestui que trusts* have been considered as possessing the equitable estate, and the *legal* also, so far as to enable them to defend or maintain an action of ejectment for lands thus held by them; *North Hempstead v. Hempstead*, 2 *Wendell*, 134.

There is also, a particular statute which makes this description of property subject to execution; *Revised Laws of* 1802, *page* 68, *sec.* 4; *Foote v. Calvin*, 3 *Johns. Rep.* 221; *Jackson dem Walton v. Leggett*, 7 *Wend.* 379; we therefore insist, that General Bradstreet had the legal, as well ass the equitable title:—in the schedule to the answer, filed in 1786, there is a charge against General

Bradstreet, for surveying the property and making the map; which is further evidence, that General Bradstreet was considered to have had some interest in the property, and what could he have had *short of actual ownership.*

General Bradstreet is the common source of property to both the demandant and tenant: the deed to Kip states that Agatha Evans is one of the daughters of General Bradstreet: he is the common ancestor of both.

It will be contended to you, that under the will of General Bradstreet, the executors were bound to sell: such, we say, was not the meaning of the testator; they (the executors) were to sell the property if they should consider it advantageous; but if not, it was to go to his daughters in fee: the case of *Jackson on the demise of Miller and others v. Potter*, 4 *Wendell*, 672, says, "where real estate is devised to executors, with power to sell the same and distribute the proceeds, if the executors die without conveying, the estate descends to the heirs at law, and a conveyance from them is good to pass the estate." The executors did not sell: we therefore, say, that the demandant under Martha Bradstreet's will, took a vested remainder, subject to be divested on the executors acting in accordance with the directions of the will: they did not sell, therefore, the legal estate has become vested absolutely in the demandant.

It is contended that Mrs. Livius had no power to make any devise of the real estate bequeathed to her by Martha Bradstreet: in the case of *West v. West, Ex'ors*, 3 *Randolph*, 373, 392, the court, after remarking upon the different powers of *feme coverts* to make wills, says "these remarks do not apply to cases, where a right to dispose of real estate by will, is expressly given to the wife, by the instrument creating the trust estate; for the *power that creates the estate*, may prescribe, at pleasure, *the rights to be enjoyed with it.*" See also, *Bradish v. Gibbs and others*, 3 *Johns. Chan. Rep.* 523; *Stevens v. Savage*, 1 *Vcs. jr.* 154. Should they, however, contend that this is not law, why then we claim as heir at law of Mrs. Livius. In addition to this, the judgment in partition in 1806, confirms the demandant's title to one fourth of General Bradstreet's real estate.

It is also contended, that the devises are void, on account of adverse possession. A right of entry is devisable, within the sta-

tute of wills, (1 *R. L.* 334.) though at the time of the devise, and the devisor's death, the land be in the adverse possession of another; *Jackson dem Eden and Wood v. Varick and Bacon*, 7 *Cowen*, 238, 243, 245; *S. C.* 2 *Wendell*, 166. Adverse possession taken and held under a sheriff's sale, will not, according to the decisions of the courts of New York, prevent the operation of a devise, by another, in whom the title to the estate was vested; *Waring v. Jackson dem Eden et al.* 1 *Peters*, 570. It has been the uniform course of the Supreme Court of the United States, with respect to titles to real property, to apply the same rule that is applied by the State tribunals, in like cases. *Ibid.* See also, *Doe dem Souter et al. v. Hall et al.* 2 *D. & R.* 41.

As to our one fourth, there never could have been any adverse possession: the deed from Schuyler to Evans and Edward Gould is their evidence, and cannot be repudiated by them, and they are estopped from setting up any thing inconsistent with that deed; *Jackson dem Bird v. Ireland*, 3 *Wendell*, 99; the deed was given to Edward Gould, in trust, that he should convey to the demandant her share of the premises, according to the wills of Martha Bradstreet and Mrs Livins.

The deed from Edward Gould to the demandant is not void on the ground of adverse possession: here is no conveyance of any beneficial interest, but only the passing a trust estate from one to another; the beneficial interest still remaining in the same persons. It is doing that *voluntarily*, which a Court of Chancery would *compel*, if refused: *Mitchell et al. v. Stevens*, 1 *Aikens*, 24; 1 *Vol. Laws of Vermont*, 196; *Tuttle v. Jackson dem Hills*, 6 *Wendell*, 224.

If we have not a legal title by virtue of the wills, we have it by conveyance: one ground is not inconsistent with the other; and the judgment of the Supreme Court is corroborative of our rights. What title has the tenant shown: Kip must have known that Edward Gould had no authority; his very deed must have shewn him sufficient to have put him upon inquiry; at all events, he is presumed to have purchased, with notice of our rights. We contend that the possession of the tenant, is not sufficient to bar us, for we are protected by the statute of limitations, by infancy, and coverture; see *Jackson dem Hardenburgh et al. v. Schoonmaker*, 4 *Johns. Rep.* 389; *Jackson dem Beekman v. Sellick*, 8 *Johns.*

262, 269: *Jackson dem Swartwout et ux. v. Johnson*, 5 *Cowen*, 74, 96, 102, 3: *Jackson dem McCrea v. Mancius et al.* 2 *Wend.* 357, 368: if, however, it should be contended that the statute does not allow *cumulative* disabilities, still, infancy *alone* will protect us; for the demandant was not of age until the year 1801, and the present suit was commenced in 1824, within the *twenty-five* years allowed by the statute.

Supposing the Court should be inclined to admit the evidence of Hoyt, being in possession of part of the premises in question, yet we contend, that a better subsisting adverse title in a third person, is no defence in a writ of right. That writ brings into controversy only the mere rights of the parties to the suit; *Green v. Liter et al.* 8 *Cranch*, 229, 25); it cannot be admitted: because a writ of right does not bring into controversy the right of the demandant as against all the world, but the mere right of the parties to the suit; *Green v. Watkins*, 7 *Wheat.* 23; see also, *Boiling v. The Mayor, &c. of Petersburg*, 3 *Randolph*, 563.

The tenant has shown no adverse possession of the premises in question under the deed to Kip, because, though the deed was void as to what Gould professed to convey, it was valid for Mrs. Evans's share; and, as to that, it made Kip a tenant in common with the demandant *pro tanto;* and the tenancy in common is the tenancy of both.

We also claim our possession under the tenancy, if so it may be considered of Foster, who came on the land as a squatter, in 1788; for his possession being without title, is to be deemed our possession; and therefore their subsequent possession cannot be adverse. The doctrine of adverse possession must be made out by clear and positive proof, and not by inference. Every presumption is in favor of a possession in subordination to the title of the true owner; *Jackson dem Bonnell and others v. Sharp*, 9 *Johns.* 183. Is their possession adverse? We contend not; it is not only wanting in positive proof to sustain it, but it is clearly founded in fraud; and if so founded, cannot be sustained, *Livingston v. Peru Iron Company*, 9 *Wendell*, 511.

But supposing the possession is adverse, the demandant was an infant when the adverse possession began; and when that disability ceased, she would have been bound to have brought her action within the time limited by the statute; but she was a *feme covert*

before that disability did cease; and was even then protected by the statute of limitations, by the proviso in favor of the disability of coverture (Laws, vol. 1, 563). This is not a case of cumulative or successive disabilities; *Jackson dem McCrea v. Bartlett*, 8 *John's.* 262.

If the possession of the tenant is not adverse, it is then in subserviency to our claims: that establishes an actual possession in us—the debateable point is that of adverse possession: the question of an adverse possession is a question for the Jury—*Jackson dem Jadwin v. Joy*, 9 *Johns.* 102.

Van Vechten, Cady, and Cooper, for the tenant.—The issue which the grand assize are sworn to try, is, whether the tenant has greater right to hold the premises which the demandant claims, or she to have them, as she demands.

It is an action at law to recover of the tenant the premises in question, of which, by the nature and form of the action, the demandant admits, tnat he is, and has been, in the actual possession adverse to her more than twenty years; for otherwise there would be no necessity for her resorting to a writ of right; inasmuch as twenty years' possession, unless adverse, would have created no bar to the usual common law remedy by ejectment: hence it follows, that the issue of the trial must depend upon a legal title in the demandant, accompanied with an actual seisin in herself, within twenty-five years, before suit: for she counts upon her own seisin within twenty-five years, and, of course, if there has been an adverse possession for a longer time, she has been disseised above twenty-five years.

What are the grand assize to try, and what is the duty which they have been sworn to perform? They are to decide, by legal evidence, under the the direction of the Court, whether the demandant has a right at law to recover the premises. They have been sworn to determine the point in issue between the parties, so far as relates to disputed and disputable facts, according to the evidence which the Court has adjudged to be legal and pertinent to the issue: for it is an indisputable principle of law, that upon the evidence as to the facts the jury are to decide; and upon the questions of law arising from the facts, when ascertained, it is the exclusive province of the Court to decide: it must therefore be obvious that,

in order to the security of legal rights, the direction of Courts, upon questions of law, as well relative to the title in controversy, as to the competency and sufficiency of the testimony to establish the points in dispute, the grand-assize are bound by the tenor of their oaths, and the nature of their duty to consider the law to be, as it shall be laid down to them by the Court: but as to the weight of testimony, and the credit of the witnesses, it is the province of of the grand-asize to determine, with the aid and advice of the Court. The wisdom of this distinction between the province of the Court and jury all must concede; because, the decision of legal questions, involving legal rights, require legal information, and a correct knowledge of the established rules relative to the rights of property, &c.: it is for this reason that profound and experienced jurists are selected for judges: in order the better to secure the legal rights of parties, every wise government has instituted revising tribunals, to supervise the judgments of subordinate courts, to correct errors in law, which those courts may commit. The determination of questions of fact according to the evidence, is left to the jury; inasmuch, as the performance of that duty does not require legal knowledge, but sound common sense, impartiality, and upright intentions. But the framers of our judicial system, aware of the infirmities of human nature, and that it is necessary, for that reason, that there should be a supervising power to correct the errors which jurors may commit, through mistake, prejudice, or assuming to interfere with the province of the Court, in disregarding its directions upon points of law, have wisely invested the courts with power of setting aside a verdict, which in the judgment of the court, is contrary to the law, or the weight of evidence. These provisions for correcting the errors, both of courts and juries, shew conclusively, that every precaution has been taken in the organization of our judicial system, which human wisdom has hitherto been able to devise, to render the rights of property uniform, stable and secure. Another obvious result from the established rules above stated is, that when a juror is sworn to try a cause, he binds himself in the most solemn manner, to try it according to the evidence which shall be offered, and admitted by the court, as if he had never heard any thing of the case before, and of course to divest himself of every prepossession or impression, which he may have before received respecting its merits.

It has been thrown out on the part of the demandant, that she has undertaken the controversy by the legal advice and decisive opinions of eminent counsel; and that she is contending for her just rights, against a numerous and powerful body of citizens: what weight will a grand assize give to the opinions of counsel, made on an *ex parte* statement? and is the title of the tenant in any way injured, because many of his neighbors have a similar title for their land?

The titles of both parties have been so fully commented upon, by the demandant's counsel, that the grand-assize must now be fully acquainted with every circumstance relating to them.

Has the demandant proved such a title to the premises in dispute as the law requires, in this action, to entitle her to oust the tenant of his possession? This is *per se* clearly a question of law for the Court; inasmuch, as it involves no question of fact for the grand-assize to pass upon; for it is a matter of no consequence whether the tenant has or has not shown a perfect title in himself, by adverse possession, or otherwise: unless the demandant has made out a legal title in herself, she cannot be permitted to oust him of his possession. It would be a novel and alarming position, that a party who assumes to prosecute a writ of right, without any legal title, can dispossess a tenant because he may have no complete title,

It then becomes important here to advert to the title set up by the demandant, on which she claims to recover. She counts, as before stated, on her own seisin of the premises within twenty-five years before suit; to maintain a writ of right, actual seisin is necessary, 19 *Viner* 312, *note* 2; 4 *Reports*, 9 *Bovil's Case*. How has she attempted to prove her seisin? The title became vested in Philip Schuyler in 1772, by a conveyance in fee from the Sheriff of the county of Albany; and lot No. 96 (which includes the premises in question) in the release, made by Schuyler to Bleecker, in December, 1786, pursuant to a division, is stated to have been released by Bleecker to Schuyler, and that Schuyler subsequently admitted in his answer that that lot was drawn to Schuyler in trust for Bradstreet; but this does not prove a seisin in demandant according to her count; it is however said that Schuyler has admitted he purchased one quarter of Cosby's Manor for, and with General Bradstreet's money; therefore a trust resulted in favor of General Bradstreet, which the statute of uses executed. Admit

this, for argument sake; it does not prove demandant's seisin, by her taking the *esplees* or profits, within twenty-five years before suit; and therefore does not sustain her count.

It is further urged that General Bradstreet, by his will in 1774, devised his real estate to his daughters, Martha and Agatha, and the former, in 1781, devised a portion of her share to Mrs. Livius, and another portion to the demandant and her brother; and Mrs. Livius, in November, 1794, devised to the demandant her share. How did the demandant acquire seisin under either of the above wills? General Bradstreet devised the land in joint tenancy to his executors, General Schuyler and William Smith, to make partition, and sell and pay over the proceeds to his daughters; then no legal estate passed by the devise to his daughters, and of course they acquired no seisin. What then follows? His daughter Martha could devise no more than she had, either to Mrs. Livius or the demandant; how then, and when, did the demandant acquire a legal title to, and seisin of the premises? For, if the legal estate passed by General Bradstreet's will to Schuyler, as surviving executor in trust, it could not at the same time pass to the daughters of General Bradstreet, who, by the will, were entitled only to the avails of the sales, at the hands of his executors, &c.

It is said that documentary proof of title to real property is *primâ facie* evidence of seisin in fact. Admitted: but what becomes of this *primâ facie* evidence when the possession and seisin are proved to be in another, holding adversely? It has also been said, that the Chancery proceedings and decree against Edward Gould, were instituted to unite actual seisin with the demandant's title: this concedes that the title may be in one party, and the actual seisin in another; but what legal title had the demandant before the release from Edward Gould to her; and what seisin could Edward Gould's release transfer to her, of lands which another was then actually seised of?

It is further said that an actual seisin is not necessary to be proved in a writ of right by a demandant, if he shows a clear title to the premises; for, in that case, seisin follows as a legal consequence to the title: but how does this position apply when the actual seisin is in another person, holding adverse to him? Such an adverse holding for twenty years bars the owner's right of entry. In a writ of right the demandant must count, according to our statutes, upon

a seisin or possession in himself, or his ancestor, within twenty-five years; and, if upon the trial he does not prove such seisin or possession, he and his heirs shall be forever barred, 1 *Revised Laws* 1801, *page* 185, *sec.* 2. Hence it would seem, that the Legislature, in the case of an adverse possession, meant to require proof of an actual possession in the demandant, within twenty-five years to sustain a writ of right; and that for want of such proof he should be barred: this being the law of our own state, must (according to the doctrine of the opposing counsel) govern this case: and it will not be denied, that the legal construction of the act is the province of the Court to determine, and so far the interposition of the grand assize must be controlled by the judgment of the Court.

It is said, that by the will of General Bradstreet, Schuyler, as executor, took only a life estate; and until his death, in 1804, the daughters of the testator could not enter. The will gives the estate in joint tenancy to the two executors, in trust to sell, &c. Schuyler took it by survivorship: the rule of law is well settled, that a devise of real estate to executors in trust to sell, &c. vests a fee in order to the fulfillment of the trust; and another rule equally well settled is, that in such a case, the legal estate descends to the heirs of the trustee, charged with the trust: these are pure questions of law, with which the grand assize have nothing to do: the law being as we have stated, how and when did the demandant acquire her seisin of the premises, to enable her to recover in this action? Admit the character of devisee which the demandant sets up; of what was she devisee? Not of the land, for that, the executors were directed to sell; but of her share of the avails of the sales, as prescribed by the will:—This did not give her a legal estate in, and seizin of the lands: how then is the seisin, on which she has counted, proven? Again, a writ of right does not lie for a devisee; 1 *Sch. and Lef.* 104, 622; these are questions solely for the Court, unconnected with any facts which the grand assize are to pass upon. Again, suppose for the sake of argument, it should be conceded, that upon the death of Schuyler, the legal estate passed to demandant as devisee, then the question of law arises, whether the devise gave her a seisin to warrant a recovery in this action? It is an established rule of law, that a devisee counting upon his own seisin, cannot recover by a writ of right, without showing actual seisin in himself—How? by taking the *es-*

plees or profits, &c.; which proof may be rebutted by showing a subsequent adverse possession; *Co. Litt.* 293, *a*; 1 *H. Black.* 1; 1 *Sch. and Lef.* 104; 5 *Taunt.* 326. Here an actual adverse possession is proved, under a conveyance in fee from the grantees of Schuyler, with covenants for quiet enjoyment, from 1794. Schuyler did not die until 1804. Where, then, is the evidence of demandant's seisin, as devisee or otherwise? But these are questions exclusively for the Court.

It is said, that the demandant has acquired the legal estate (by the release from Edward Gould to her, in 1804, pursuant to the decree,) of Gould's title, under the deed from Schuyler to him and Mrs. Evans, in 1794. The effect of the release from Edward Gould to the demandant, depends upon the following questions of law:—1st. Does it include the premises in question? 2d. If it does, is it operative? These are clearly questions for the Court, and not for the grand assize, to pass upon. To determine what the release was intended to embrace, and does embrace, we must look to the decree to which it refers, and the terms of the deed. The decree orders Edward Gould to convey, under the direction of a master, the trust property, referred to in the pleadings, except what had been converted into money before he became a bankrupt, and exonerates him from responsibility for the avails of the land so converted, &c. And the deed released to demandant all the trust property, which remained in Edward Gould's hands unconverted, and contains a proviso for his exoneration, as prescribed by the decree. All Edward Gould's saleable interest in the premises had been sold and conveyed to Kip in 1794, for a full consideration, and the same has since been held exclusively by him or the tenant, as a *bonâ fide* purchaser under him. It is evident, from the proceedings in Chancery, and Edward Gould's release to the demandant that he was seised in fee as trustee, and had made sales of parts of the trust property; and the decree exonerated him from responsibility for the proceeds of the sales, &c.; that the deed from Edward Gould to the demandant, neither embraces or was intended to embrace the premises, &c., sold and conveyed to Kip in 1794, and actually possessed under that conveyance. This construction gives to the Chancery proceedings, and the release of Edward Gould to the demandant, a fair, legal, and honest operation; but that set up by the demandant is repugnant to her

own admissions and acts, and cannot avail her; because the adverse possession of Kip, when the release was made, would render it inoperative, as to the premises in question: the release could not divest the seisin of Kip, and of course does not prove a seisin in the demandant, without which she cannot recover; and the decree gave no seisin to the demandant of what the tenant then held adversely, and could not prejudice the tenant's title, as he was no party to the decree: if these views are correct, they are decisive against the demandant's rights.

Has the tenant shown a legal title to the premises in question, and what is the nature of that title? he has shown himself a *bonâ fide* purchaser, for a valuable consideration, of the premises under the title of Kip, which accrued in 1794; and has been followed by actual and exclusive possession ever since, which makes a perfect title. The deed to Kip is in fee, for a full consideration, and contains a covenant for quiet enjoyment; so also, is the deed from Kip to the tenant. This suit was commenced in Nov. 1824—what follows? in judgment of law here has been an adverse possession in the tenant, for *thirty* years before suit. There is no evidence in the case to shew a doubt as to the adverse character of the possession; unless a *bonâ fide* purchaser in fee, for a valuable consideration; a conveyance with covenants for quiet enjoyment; taking possession, and exercising exclusive ownership; making valuable improvements; selling and conveying in fee, and warranting the title, afford evidence that the possessor entered, held, and did all the above acts, meaning to recognize the demandant as the true owner, and that he held in subordination to her rights: the supposition that such a conclusion can be drawn by a grand assize is not to be credited.

It is said, that the demandant was an infant till 1801; was married in 1799; and remained *covert* till 1817, and therefore, the tenant's possession cannot avail him against her. The adverse possession commenced while the legal estate, according to her own showing, was in Edward Gould; and the law is well settled, that the possession runs against the legal estate; 2 *Sch. and Lef.* 528; so also, in the case of a tenant in tail, when an adverse possession has begun to run against him, it is a complete bar to his successor; *C. C. U. S. New Jersey*, 1821; *Inman v. Barnes*, 2 *Gullison*, 315.

It is said that the statute of limitations allows to a party under legal disabilities, twenty-five complete years, after the disabilities are removed, to bring a writ of right. The second section of the laws of 1813, *Vol.* 1, *page* 185, provides "that no avowry, &c., shall be made unless upon a seizin of his own, or his ancestor, within twenty-five years before suit; and if such avowry is made, and such seisin or possession be not proven, the demandant and his heirs shall be forever barred." What evidence is there in this case, that the demandant has ever been seized or possessd, of the premises in question? Is it proved by the tenant's entry under an absolute title with covenants, claiming the fee as his own, and exercising exclusive ownership? The general doctrine laid down in the books, relative to the statute of limitations, is, that no cumulative disabilities are allowed; the second section of the act has not altered this construction, nor was it intended, by grouping the various disabilities in one proviso; inasmuch, as that was obviously done by way of specification merely, of the different kinds of disabilities. The terms of the proviso in the statute run thus: "that no part of the time during which the demandant was an infant, *feme covert*, insane *or* imprisoned, shall be taken as part of the twenty-five years": hence the obvious intent of the statute according to its sound construction by the word "*or*," before the last disability clearly implies, the intent of the Legislature to have been, that either of the disabilities expressed, might be relied on separately, but not conjunctively. It has been urged, that the proviso in the fifth section, relative to the limitation of personal and mixed actions, manifests a different interest, because that relates to the existing disability, at the time the cause of action accrued. Is this reasoning sound? The provisoes, in both cases, must be deemed to refer to the time when the right of action accrued. If the demandant was then under either of the disabilities specified, the extension of time to sue, or the commencement of the period within which the suit was to be brought, must be calculated from the time the disability is removed; inasmuch, as the limitation is intended to quiet *bonâ fide* purchasers. How will superadding accumulative disability, arising from the demandant's own voluntary act by marriage, consist with the intent of protecting purchasers against stale claims? Statutes of limitation, are emphatically considered statutes of peace against dormant

claims, to be construed beneficially to promote their object; 2 *Paine*, 55; but, according to the demandant's doctrine, it would seem, that the older the claim is, the more it is to be favored, contrary to the declared objects and policy of statutes of peace. The reason urged by the demandant's counsel for such favor, that a recovery or defeat in a writ of right is final, is equally repugnant to the policy of the law, and all its provisions relative to stale claims to land, and the proceedings by writ of right, inasmuch, as it would be extending greater indulgence to antiquated, than to modern claims; and invite to the antiquated remedy of a writ of right, which, the policy of the law and the peace of the community requires should be discountenanced. Why does the law require a demandant in a writ of right, to prove an actual seisin in himself or his ancestor, within twenty-five years; when it only requires proof of a right of entry in a possessory action, within twenty years? Does not this show that a naked title in the demandant, within the period limited, when she has not had actual seisin, was not intended to be sufficient to sustain a writ of right? It is true, the verdict and judgment in a writ of right are conclusive;—Why? The law makes them so in furtherance of the policy of the statute of limitations, to put an end to litigation about stale titles.

It is said, that the tenant is a purchaser with notice of the demandant's interest—therefore, he entered in subordination to her rights, and not as an adverse possessor. What notice had he? None is proved. But if he had, the notice conveyed by Schuyler's deed, 1794, was, that Edward Gould, one of the grantors of Kip, was the attorney of Sir Charles Gould, the sole executor of Martha Bradstreet, and trustee of her real estate, to sell the same, &c.; that Schuyler conveyed to Edward Gould, the attorney of Sir Charles Gould, the legal estate, subject to the trusts created by the will of Martha Bradstreet; and to enable Edward Gould to execute these trusts, by selling, &c. Was this a notice which could impeach Kip's purchase? Was not the sale to him in conformity with the trust? Can the demandant be allowed to deny it, after the admissions contained in her decree against Edward Gould, and his release to her in 1804? Again, if the recitals in the release from Schuyler to Edward Gould, are evidence against the tenant as grantee of Edward Gould, they are also evidence against the demandant, who claims her legal title under the release.

It is further said, that the deed to Kip is from Edward Gould, as attorney of Sir Charles Gould, and no power of attorney is shown. The existence of such a power is proved by the demandant's own evidence. In her bill in Chancery, she alleges that Edward Gould had obtained the management of the real property of Mrs. Livius, in trust for her; and the demandant calls on Edward Gould to set forth how he obtained the trusteeship His answer says by powers of attorney from Mrs. Livius and Sir Charles Gould. This answer was not replied to; but the cause went to a hearing on bill and answer: the allegation in the answer, therefore, stands as true, and of course the existence of both powers is admitted as proved. But the tenant cannot be required to produce the powers especially after so great a lapse of time; because, first, they are not deemed to be under his control; secondly, the admission of Edward Gould's trusteeship by the demandant's bill, &c. in the absence of other proof, must be referred to the powers; and thirdly, the bill, &c. called for giving over papers, &c. by Edward Gould to the demandant, and the former having conveyed as required, the powers may be presumed to have passed into her hands; especially as the decree expressly exonerated Edward Gould from responsibility for former sales. The bill also called for an account, and the decree ordered one before a master, but it was not taken; which proves conclusively, that he was not proceeded againinst; or dealt with as a delinquent in duty; and as Edward Gould executed the release to the demandant, including as well her interest under the will of Martha Bradstreet, as of Mrs. Livius; and the demandant did not prosecute an account before a master according to the decree, it is a just inference, that Edward Gould rendered to her and her husband, a satisfactory account; and paid her whatever balance remained in his hands, if any, of all sales made by him prior to his bankruptcy. The sale to Kip was made in 1734 for a large consideration; viz. £ 627. 4. what follows, (which may be reasonably presumed;) that this sale was included in the account, and the demandant obtained her share of it, or was satisfied with the decree exonerating Edward Gould from responsibility therefor. It also appears from the answer of Edw. Gould, that he had authority from Mrs. Livius by which his transactions were sanctioned: this answer being her own evidence, and the truth of it not having been put at issue in the Court of Chancery goes strongly

to show, in additon to General Schuyler's answer, that Edward Gould was the authorized and acknowledged agent of the demandant, under the direction of Sir Charles Gould, the executor of Martha Bradstreet and Mrs. Livius, to aid in the sale of real property and receive the proceeds for them. Is it asked where is the evidence of his authority ? First, the answer of General Schuyler states, that the authority from Sir Charles Gould was produced to them ; Secondly, Edward Gould's answer states his authority from Mrs. Livius ; and Thirdly, the demandant's bill against Edward Gould calls upon him for the papers under which he had acted. What follows? When Edward Gould had rendered his account and given the release, &c. to the demandant and was exonerated by the decree from further responsibility, it is to be presumed that he delivered up all those papers for the demandant's use, and now, after a lapse of more than thirty years, the tenant is modestly asked to produce them, at the peril of loosing his property.

It is said, that the deed from Edward Gould to Kip was executed by him, as the attorney for Sir Charles Gould, and not as trustee under Schuyler's deed ; *ergo*, the conveyance is void. The form of of the conveyance cannot impair its legal effect, after a lapse of thirty years before the commencement of this suit, when it has been accompanied by actual possession and exclusive ownership ever since. The probable reason for the form of conveyance adopted by Edward Gould is explained by General Schuyler's conveyance to him, as the attorney of Sir Charles Gould, executor as before stated; and having been followed up by the demandant's bill and decree against him, and the proceedings had thereon, it does not lie on the part of the demandant to make this objection ; on the contrary at this late period, and in favor of *bonâ fide* purchasers, the law will presume a release from Edward Gould to Sir Charles Gould after General Schuyler's conveyance to him, and a power subsequent from Sir Charles to Edward Gould to sell and convey, should that be necessary to support the conveyance. This presumption is confirmed by the record of partition between the demandant and her husband, in her right, and Richard Harrison, Charles Wilks and Edward Gould, trustees under the will of Mrs. Evans, and Nathan Williams and Jonas Platt, trustees of Mrs. Bainbridge,

the legal representative of Mrs. Evans, of the lands in Cosby's Manor on the north side of the Mohawk; Mr. Harrison filed the bill for Evans against Schuyler; is one of the counsel stated in Schuyler's answer, to whom the whole case was submitted for advice; and witnessed the conveyance from Schuyler to Evans and Gould. It would seem extraordinary that when instituting proceedings in the Supreme Court for a partition of the lands which demandant held in common with Mrs Evans, under the Bradstreet title, she should have omitted to include so valuable a part of the property as the lands situated in the growing settlement of Utica if, at that time, her counsel who conducted those proceedings, or she herself, had any idea of her subsisting interest in the Utica property. This probably explains why the suit against Schuyler was not pursued; and shows that Schuyler's conveyance was deemed by the counsel a proper mode of transferring his trusts: and Edward Gould being described as the attorney of Sir Charles Gould, was to designate him as the selected agent to perform Sir Charles Goulds' duties; and to enable him to do so, the conveyance was made to him in that character, and this is the more extraordinary, as she and her husband had a mutual interest to have their common interest severed, to enable them to manage it with greater facility. This proceeding took place only two years after Edward Gould's release, to her upon which she now seeks to bottom her legal title to the Utica land: but our surprise at the omission will naturally cease, when we consider that Edward Gould was a party to that partition, and would probably have interposed a decisive objection to her claim, as a tenant in common, in the Utica land.

The demandant came to this country in 1799, in quest of the property here; General Schuyler filed his answer to Evans' bill, giving a full account of the property. The bill and answer were filed in New York, where the demandant and her husband landed: hence it is presumable that the demandant obtained full information through the agents of her joint owner, Mrs. Evans, of the situation of the property and that she and her husband proceeded to view it, and therefore must have known of Kip's purchase, and the tenant's possession under it, at least five or six years before filing her bill against Edward Gould; yet in that bill there is no pretence of complaint against Edward Gould for the sale to Kip. Again: the demandant and her husband, in 1806, commenced proceedings in par-

tition for the division of the lands in Cosby's Manor, opposite to Utica, to which Edward Gould was made a party as one of the trustees of Mrs. Evans, but the Utica property was not included in that partition: why? Demandant's husband was more interested if they then claimed a subsisting interest in the Utica property, to have that severed, as being the most valuable; may not the following be presumed a good reason for not including the Utica property: Edward Gould knew that such a claim had been extinguished by the decree in Chancery against him and his account.

But it is said, that the lands in Utica were then held adversely to the demandant, and therefore were not the subject of a partition: yet it is contended, on the part of the demandant, that the tenant has no adverse possession. It is conceded, that as to three-fourths of the premises purchased by Kip, he acquired a valid title through Mrs. Evans; why then could not the demandant and her husband have enforced the partition with Kip as their co-tenant in common.

It is said, that Kip could not believe that he obtained a good title; therefore his possession is not adverse: yet we are told that the Utica property was not included in the partition of 1806 because it was held adversely: has there been any change of tenancy from that time to the present? Is not the tenancy as adverse now as it was then? And yet the learned gentlemen say it is not adverse. The case of the *Peru Iron Company and Livingston*. 9 *Wendell*, 511, affords no countenance to the arguments of the learned gentlemen on the ground of adverse possession: admit that there was fraud in Kip in obtaining the deed from Mrs. Evans and Edward Gould, and then, perhaps, it may be cited with reason: in the case above cited the question was, whether a conveyance, obtained by fraud and false representations, could be the foundation of an adverse possession, and available by purchasers from the fraudulent grantee, who had full notice of the fraud at the time of the purchase, and that fact admitted by the demurrer; is the fraud admitted here? No! is it proved? No! It was in that case contended, (by Mr. Van Vechten) and so the Court decided, that the doctrine of adverse possession was not available to such fraudulent purchasers: but the whole argument of the learned gentlemen on the doctrine of adverse possession is quite gratuitous, and has no bearing on this case, unless they previously establish their own title.

It is said, that "this is a novel action. The case is an important one, and invites to a sober examination of the law and facts; therefore, an explanation of the law to the jury is necessary." The form of action is ancient, but its use is somewhat novel, being applicable only to cases where the demandant's claim is become stale, by allowing the tenant to hold the premises so long that no other form of action is allowable; and this affords an obvious reason why strict and satisfactory proof on her part, should be required; inasmuch as the delay in commencing the action for so long a time, as that every other form of action is barred, of itself, carries a presumption against the fairness of her claim: hence a deliberate and close examination of the title she sets up, is required at the hands of the Court and the grand assize. The law to be examined by the Court, and the facts by the grand assize, under the advice of the Court, according to the legal rules of evidence. It has been correctly stated by the learned counsel, that the grand assize are not presumed to understand the law, and it should have been added, that so far as any question of law arises, it is the province of the Court to decide such question, and inform the grand assize upon the law relating to it: why then was it necessary for the counsel to entertain the grand assize with a citation of legal authorities, and a labored discussion before them, of the questions of law? Was it not incongruous to tell the grand assize that they are not judges of law, and at the same time to appeal to them upon questions of law? Was this course calculated to aid them in their decision upon the questions of fact? Suppose the Court should conceive the law to be otherwise than the learned counsel have stated; from whence are the grand assize to take the law, from the Court or from the counsel?

It is said, "that it is admitted, that the demandant has a clear, equitable title, to one fourth of the premises in question": the extent of the admission is, that if she has any title, it is to a portion of the money arising from the sales of the land in question; but this is a very distinct thing from a legal title to the land itself.

It is said, "that putting Mrs. Livius's will out of the case, as being void, the demandant acquired her title, as heir at law." But, in order to acquire a title to the land by descent from Mrs. Livius, it should have been shown that she had a legal title to the land: this brings us back to the question, whether she had such

title under the will of Martha Bradstreet? If not, the demandant could inherit none from Mrs. Livius. The demandant has not counted upon a title by descent from Mrs. Livius, if she meant to avail herself of her heirship: but if she had so counted, the evidence which she has adduced would not support the count. To enable her to recover in this action, it was necessary for her to prove a title, in conformity with that which she has set up in her count. From the evidence in this case it appears that her brother, Samuel Bradstreet, stood in the same relation with her to Mrs. Livius, and of course, was a co-heir. How, then, could she claim the whole of Mrs. Livius's interest? Will it be said, that she acquired Samuel's interest by his release in 1802? The release of Samuel Bradstreet, bears date about eight years after the premises had been held adversely by the tenant, and his grantor Kip; therefore, that release was utterly void, as being against the statute of champerty.

It is said, "that the law and facts are inseparably blended in this case, and therefore, the grand-assize must pass upon both." The will of General Bradstreet is admitted, but the construction to be given to it, in order to make out the demandant's legal estate in the land, is controverted. Is the legal construction of this will a question of law or fact? If the former, its construction is the peculiar province of the Court: and if the Court shall decide that it passed no title in the land to the testator's daughter, Martha, how could the demandant obtain such a title from Mrs. Livius, the devisee of Martha? If Mrs. Livius had no title by the will of Martha, to the land, the demandant can have acquired none through her, either by will or by descent: and without a legal title and actual seisin, she cannot maintain her writ of right. This view of the case presents an unmixed question of law, for the decision of the Court, and should that decision be against her, it disposes of this cause, unless she has shown such a title and seisin in herself from some other source.

It is said, "that the tenant has shown no adverse possession of the premises in question, under the deed of Kip; because, though the deed was void as to what Edward Gould professed to convey, it was valid for Mrs. Evans's share, and as to that, it made Kip a tenant in common with the demandant *pro tanto;* therefore, his possession was not adverse." What was the belief of Kip and his

grantor, upon this point? Would he (Kip) have paid a valuable and fair consideration; have taken an absolute conveyance in fee; have entered into possession, claiming and exercising exclusive ownership over it, as the owner of the fee under a covenant of warranty; have sold a part of the premises to the tenant for a valuable consideration, who entered in 1795, and who has since held and disposed of parcels of land, and made large, permanent, and expensive improvements thereon; unless they both believed in the goodness of their title, and entered into possession, considering themselves the absolute owners thereof: does not the evidence prove these facts, that in the absence of proof to the contrary, such was their belief. It should also be borne in mind that there is not any evidence to question the honesty of Kip or his grantor. Does not this evidence rebut decisively, any pretence of their holding in subordination to any subsisting title in the demandant or any one else?

Now let us see what are the questions of fact for the grand assize to decide in this case:

Whether Kip entered, meaning and believing that he had a good title. Upon this point, the evidence before referred to, would seem to be conclusive, in favor of the tenant; and is confirmed by the exclusion of these premises out of the partition of 1806, and the demandant's acquiescence in the possession and improvements of the tenant and his grantor, during seven years after her divorce, before this action was commenced; and for the period of thirty years prior to its commencement.

But it is said, that Kip was bound to know that he did not acquire a good title, because, Edward Gould conveyed, as attorney for Sir Charles Gould, and no power of attorney is shown. After a lapse of thirty years, and constant possession and ownership under the deed, the law will presume a competent power of attorney. From the evidence in the case, it may also be presumed that the power of attorney was given up by Edward Gould to the demandant when he released his trust interest to her in 1804, and rendered an account of his trusteeship. It is further said, "that Sir Charles Gould, as executor, could not give a competent power to convey." Kip, not having been a lawyer, may have been ignorant of the law on the subject; and, though ignorance of the law will not excuse a man from responsibility for a violation of an ex-

press law, yet it will excuse him from the imputation of taking a title, and acting under it as he (Kip) has done in this case, when he verily believed that the title he purchased and paid for, was good: for otherwise, a man who takes an invalid title, believing it to be good, enters upon the property, and improves, and uses it as his own, at a great expense, for ever so long a time, would derive no protection from the statute of limitations, which is repugnant to the policy and intent of the statute.

The deed from General Schuyler to Mrs. Evans and Edward Gould, conveys to the latter, as the attorney of Sir Charles Gould; hence it is a fair inference that both Edward Gould and Kip, as well as Mrs. Evans, who was a party to the conveyance, acted under the belief that the conveyance from Schuyler to Edward Gould, being as the attorney of Sir Charles Gould, it was proper for Edward Gould, when he sold to Kip, to convey by the description and in the character which Schuyler's deed described, intending to convey the title which he had acquired from Schuyler.

What other questions does this case present? Whether the demandant has shown a legal title and seisin to maintain her writ of right? This is a pure question of law arising, as before stated, upon the wills of General Bradstreet and Martha Bradstreet, his devisee, and the deed from Schuyler to Edward Gould, and presents the following points:

First—Whether Martha Bradstreet took an estate in fee, by the will of her father? If she did,

Second—Whether the demandant can maintain a writ of right, as devisee under the title of Martha Bradstreet, upon her count in this action? And

Whether she can maintain it upon the release of Edward Gould to her, in the absence of any proof of an entry or actual seisin under either of the above instruments?

As to the last question, it should be remarked that Edward Gould's release to her was ten years after the conveyance to Kip; and it, as well as the decree, clearly excludes the property which he had converted into money. If so, she acquired no title by that conveyance to the premises sold to Kip; for by her bill and the decree, she admits the legal estate to have been in Edward Gould. These are all pure questions of law which, if decided against her, are decisive of the merits of this cause. It is, therefore, not true that

here is such a blending of law and facts, that the grand assize must necessarily decide upon the whole merits of this case. Nor has the demandant any just cause of complaint for being held to the strict rules of law which govern the proceedings which she has voluntarily commenced against the tenant. Why she and her counsel appear so strenuous to cast upon the grand assize the burden of determining questions of law, upon which her title must depend, can only be accounted for by the supposition that they can convince them that the positions which they advance as law, are founded in law, and that they despair of convincing the Court of the soundness of their law: and this supposition is rendered the more reasonable from the fact that the counsel well know that the decision of this Court cannot conclude her as to the law, if she and her counsel feel a real confidence in the legal positions which they have advanced, and this Court may overrule.

Mr. Livingston, (District Attorney,) on behalf of the demandant, then submitted to the Court a series of propositions, as instructions for the Court to the grand aesize: they consisted of a digest of the arguments made by her counsel in their address to the grand assize.

The Court refused to receive them, to which the demandant excepted.

Conkling, J.—In summing up the case, after fully stating and explaining the evidence on both sides, directed the grand-assize as follows:—It was one of the peculiarities of this action that the tenant, or defendant, was required at the trial to begin. It was not, however, to be inferred from this that the demandant, or plaintiff, in a writ of right, more than in any other action, could recover without proving title in himself. No interest other than that of a legal estate in fee could be recovered in this form of action; and the demandant in this case having counted on her own seisin, it was incumbent on her also to prove that she had, at some period, been actually seised or possessed of the land in controversy; although, upon the question, what, in law, is sufficient to constitute such actual seisin, there was, perhaps, some room for dispute. As to two undivided third parts of the premises, the validity of the tenant's title thereto was indisputable, and indeed, was not disputed. Mrs Evans being beneficially interested to that extent in the property, General Schuyler might lawfully, (at least as it regarded her share,)

convey to her the legal estate, if she and her husband chose to take a conveyance. But as to the remaining third part, the title of the tenant was obnoxious to the objection that General Schuyler, having taken upon himself the execution of the will of General Bradstreet, could not legally delegate the trust to another; but was bound to execute it himself by an actual sale of the testator's property, and by paying over the proceeds according to the directions of the will. Such, undoubtedly, was the general rule of law. But admitting its applicability to this case, it was necessary next to inquire whether the demandant had shown such a title and seisin in herself as to entitle her to recover. The evidence on the behalf of the demandant, consisting almost exclusively of written documents, and her title depending upon no disputed fact, it became purely a legal question whether she had proved such title and seisin. In his opinion she had failed to do so, either by virtue of the wills under which she claimed, or of the deed from Edward Gould. It was his opinion that by the conveyance from Mr. Sheriff Ten Eyck, in 1772, the legal estate vested wholly in General Schuyler. If so, no legal estate passed by the will of General Bradstreet to his daughter Martha, and, of course, none passed to the demandant in virtue of the subsequent devises. But even admitting the trust which resulted in favor of General Bradstreet, from the fact of his having furnished one-fourth of the purchase money, to have been, as was contended, converted into a legal estate in him by force of the statute of uses, still the estate passed to his executors and vested in Gen. Schuyler, as surviving executor, at least for life, and probably, according to the usual construction of the will, in fee. In addition, moreover, to the insuperable obstacles to the demandant's recovery as devisee, according to what appeared to be the settled law of England, a devisee could not, in that character, maintain this action before actual entry; and such he understood to be also the law of this state. As the devisees of Martha Bradstreet, and of Elizabeth Livius, therefore, the demandant was not, in law, entitled to a verdict.

It was, however, contended by her counsel that if she did not obtain a legal estate as such devisee, she did so by virtue of the deed from Edward Gould, executed in 1804. In order to sustain herself upon this ground, she was, of course, under the necessity of admitting that the legal estate was originally in General Schuyler,

and that her share of the interest passed to Edward Gould by the conveyance from General Schuyler to him in 1794; which, however, was strenuously denied by the counsel. But assuming this to have been so, still, independently of the question whether, in that case, the conveyance from Edward Gould to Kip, made a few months after that from General Schuyler to Edward Gould, did not also convey a good legal title to Kip; it was clear from the language of the pleadings and decree in Chancery and from the terms of the deed itself, that this conveyance was not intended to embrace any of the trust property previously sold and conveyed by Edward Gould. Such, it was obvious was not the intention of either party, and the deed would not therefore admit of a construction which would overreach the previous conveyance by Edward Gould to Kip. In fact, the lands previously sold were virtually, in terms, excepted.

The tenant, moreover, for greater security, also relied upon possession of the premises, first by Kip and ever since by himself, which he contended was adverse from the date of the conveyance by Edward Gould to Kip, in 1794, to the present time. If it were important to determine the fact and character of such possession, which however it was not, it would be a question for the grand-assize. As to the fact of such possession, it was expressly sworn to by the witnesses, and, indeed, did not appear to be controverted. It was, however, denied to have been adverse, because, as was alleged, both Kip and Cooper, the tenant, were chargeable with constructive notice, that General Schuyler could not legally convey to Edward Gould in the manner he had done. But it was a sufficient answer to this objection to say, that the doctrine of constructive notice was inapplicable to the question of adverse possession. According even to the recent decisions of the Courts of this State, which were relied upon by the demandant's counsel, nothing but actual fraud, or actual notice of what, in law, would render a conveyance void, was sufficient to invalidate a possession, taken and held under such conveyance, as a statute bar.

The Counsel for the demandant excepted to the several instructions given by the Court to the grand-assize.

The cause was committed to the grand-assize, at about 2 o'clock, P. M. of Tuesday, the 23th day of January last. Soon after the

opening of the Court, on the following morning, they came into Court, and declared their inability ever to agree upon a verdict in this case: such, they stated, was their unanimous conviction; and one of them remarked that they then stood precisely as they did when they went out: by consent of counsel on both sides, the Court directed them to be DISCHARGED.

It was understood that *fourteen* were in favor of a verdict for the demandant: *two* for a verdict for the tenant.