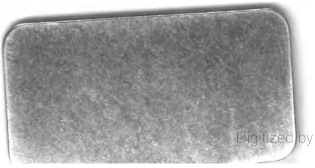

THE CONVEYANCER.

BY

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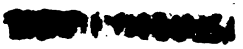

THE CONVEYANCER,

BEING

A SERIES OF ESSAYS

ON THE

Doctrinal and Practical Points

DAILY OCCURRING IN

CONVEYANCING.

To be published regularly on the SATURDAY in every Week, and possibly occasionally on WEDNESDAYS when the Subject requires it, or the Editor's Leisure permits.

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NUMBER I.

An Introductory Chapter on the Science and Practice of Conveyancing, explaining the Objects of this Work.

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INTRODUCTORY CHAPTER

ON THE

SCIENCE AND PRACTICE

OF

Conveyancing.

THE science of conveyancing comprises the law of real property, and the practice of conveyancing consists in the application of that Law to Practice. A work therefore entitled "The Conveyancer," will necessarily embrace the various points of doctrine and practice occurring in the law of real property, and should be particularly attentive to those which influence the daily practice of the profession. The mode to be adopted in

this and the succeeding chapters, will be to lay down the general rules or principles on the subject in question, and the reasons on which they are founded, and then to state the exceptions to these rules, and the reason of such exceptions, and from such several rules, reasons, and exceptions, to define the present operative doctrine on the point: upon this plan therefore the present work will be conducted.

The science of conveyancing is the law of real property. This law is founded on various principles, some of an inflexible nature, instituted for the general good of society, and therefore beyond the controul, and paramount to the intention of individuals; and others of a flexible nature, being subservient to the intention, and in short, mere rules of interpreting such intention.

tention. As therefore the first class of these rules controuls the intention, and is directly levelled at it, and intended to prevent its accomplishment, on the ground of its being generally injurious to Society, it is necessary in this introductory chapter to state and explain them in detail.

The first Rule is, that *a man shall not create a legal perpetuity*. It is for the benefit of society, and a strong stimulus to labour and industry, that property be quickly circulated; landed property in particular gives an influence and importance highly flattering to all men, and particularly to the new possessor. The great man of the parish derives no little gratification from his parochial sovereignty. Such is our nature; and hence the strong stimulus to labour and industry

in order to the purchase of landed property; and this labour and industry being beneficial to the state, it would be highly impolitic to lessen any cause or motive tending to produce it. The law has therefore jealously watched every mode and artifice which would restrain the alienation of property beyond a certain period, sufficient on the one hand to foster the stimulus to industry, by allowing time for the establishment of a family, and on the other to prevent by its general effects any injury to society. The period referred to and now subsisting is a life or lives in being, (for if many lives be named it can be only the life of the survivor, and they are all wearing out together,) and twenty-one years after the death of the single life, or the survivor of the several lives, and which may also eventually include a

double

double period of gestation, and indeed may likewise include in effect, though not in actual limitation, a second period of twenty-one years. Thus I may legally give by will my real estate *to my youngest male lineal descendant born, or in ventre sa mere at the expiration of twenty-one years from the death of my youngest grandson born, or in ventre sa mere at my death;* now here there may be a whole life, two periods of gestation, and two periods of twenty-one years; as, suppose the grandson and male descendant to be both in ventre sa mere at the times referred to, then there will be two periods of gestation, and, as to the second twenty-one years, that time must elapse before the male descendant will be adult and legally capable to convey. Surely this period must satisfy the most ambitious industry,

and indeed it is only by trusting to the uncertainty of human life that so extended a period can be permitted without its operating injuriously to society. Such is the rule and the reason of the rule of perpetuity, and there is not a single exception to it.

The second Rule is, that *a man shall not grant an estate on condition that the grantee shall commit a breach of the divine or municipal law, or on any condition wholly repugnant to the Estate: as that he shall not take the profits; or, with reference to an estate tail, that the donee in tail shall not marry.* The reason, as to the first class of conditions, is clear; and as to the second, such a gift is as tantalising as poor Sancho's supper—an abundance of good things, with a prohibition of eating. The law therefore

therefore, following the worthy governor's sensible example, annuls the repugnant prohibition, and fixes the gift absolutely and irrevocably in the donee. There are, however, cases, in the books, of partial restrictions being permitted: thus it has been held that a man may limit an estate in fee, on condition that the donee shall not marry, for this would not prevent the descent to the collateral heirs; but this is not the place for entering minutely into this doctrine. It will be sufficient to observe now, that the second rule exists as an inflexible imperative rule to the extent stated, and that every condition, even partially repugnant only, and though apparently supported by one or two of the old books, should yet be rigidly considered, and very cautiously admitted, for the law, (in the emphatical language of the books) strongly leans against them.

The

The third Rule is, *that a man shall not make his right heir a purchaser of the same Estate as such heir would have taken by descent.* This rule is not like the two former, existing for the general good and welfare of Society, for no practical benefit is now derived from it; but it arose from the feudal system, and before the abolition of that system by statute was essential to its preservation. I may be permitted, perhaps, in this place, to digress shortly, in order to shew the incorporation of the feudal system with our original common law, or that part of it which naturally sprung from the wants and necessities, and relative qualifications, of our first ancestors, and which indeed would naturally arise and grow in every country on the first formation of Society. These primeval rules constitute the first part of what

what is at present called The Common Law, or that body of traditionary rules and maxims which are not to be found in any Statute book, but manifestly originated from their necessity to the very existence of Society, and have descended to us in old Treatises and Reports. The introduction of the feudal system produced the other Part of this body of Common Law. This system being wholly of a military genius and tendency, required the most rigid rules of tenure to preserve its existence, and when it was annexed to our old common law, its rules became incorporated with our original rules of property, and the feudal rules principally applying to objects of tenure, soon formed the greater part of the law of real property. Hence the rigidity of many of our rules of tenure, and which

when

when the reason for their existence was done away by the abolition of the feudal system, had better perhaps have been also abolished. It may reasonably be supposed that but for the incorporation of the feudal system, our present rules of property would have been more congenial with the indelible feelings and tendencies of our nature, and not as in some instances they now are, absolutely repugnant to our nature; and this too perhaps would have prevented the necessity and rise of a separate Court of Jurisprudence to controul the rigour of the Common Law. But to return after a digression which seemed necessary to shew the reason of the third rule, this rule, viz. that a man shall not make his right heir a purchaser of the same estate as such heir could have taken by descent, was of extreme

treme importance while the feudal system prevailed; and strictly enforced, because the heir taking *as heir*, was liable to numerous charges in favour of the lord from which a purchaser was exempt. If therefore an ancestor could have made his heir a purchaser, he always would have done it to the speedy declension of the feudal system. Though the reason of the Rule has ceased, the Rule itself continues, and is, at this day, as effective in cases, where it applies, as if the feudal system were now in its meridian power.

The next Rule, or what is by many considered a rule, is nearly akin to the former, and one would have thought have been instantly recognized as strictly analogous to it. This fourth Rule is, *That no man shall make the right heir of a third person*

person a purchaser, so as to take the same estate by purchase as such heir would have taken by descent. This in truth was the rule, not originating from, but referred to, in the celebrated case called Shelley's case, and has been since generally called, The Rule in Shelley's case, though, in fact, the rule was coeval with the feudal system, and was almost as necessary and essential to the preservation of that system, as the third rule above-mentioned. This fourth Rule is the one in the discussion of which so much learning and labor have been consumed. The controversy seems to have arisen from supposing the rule to be a mere rule for the construction of words, and not as in fact it is, one of the inflexible imperative rules of the feudal system, levelled at the act and intention, and only looking to and regarding the words

words as shewing the intention. The reason of this rule, like the reason of the third rule, and the reason of all rules emanating from the feudal system, ceased with the abolition of that system, but the rule itself has continued, and is still continuing and operative.

The preceding rules are the fundamental constitutional rules of the law of real property, established for the general good and welfare of society, and intended to controul the intention and acts of individuals, and necessarily therefore of such inflexible force and operation that no artifice or ingenuity however involved, can evade them. The other rules of law are mere rules of interpretation, not levelled at any intention or act, and intended to destroy it, but arising from experience as the best mode of elucidating

dating the intention or of effecting the act. These last rules, with reference to the interpretation of wills, will be explained in a subsequent chapter, expressly on the construction of wills. Subject to the above fundamental rules, and others, if there be any, of the like fundamental nature, but which at present do not occur to me, an individual has the whole jus disponendi or disposition of his property as he pleases, either in a reasonable and judicious, or in any capricious or fantastic manner. Sic volo, sic jubeo, stet pro ratione voluntas, may be his true motto. The science of conveyancing, therefore, consists in the knowledge, first, of these several rules; and secondly, of their application hitherto to practice, as handed down in the numerous cases reported in the books, and the practice of conveyancing is the application

cation of those rules, in their present influence and operation, as extended, abridged, or modified, by the decisions on the subject, to the daily concerns of society relating to real property. A future chapter will be devoted to the best mode of education for a youth intended for the conveyancing department, either as a Conveyancer, strictly so called, or as an Attorney, practising in a part of the country where conveyancing abounds; and it may be just stated by the way, that this should be a principal object in the placing out of a legal youth, the department of conveyancing being evidently the most scientific and intellectual department of the law, and the study of it therefore, when traced to its source, more consonant to the glowing mind of youth than the dry technical practice of the courts. The

writer

writer remembering, and bitterly regretting the many many hours which he lost in the spring time of youth, from the want of an introductory hand into the best course of study, and from the disgust and depression which too often arise from the difficulties of commencing any study without some assistance, will be most anxious to devote many pages of these essays to the aid and introduction of students. One of his great objects is to increase the conveyancing knowledge of country practitioners, and to circulate in short and practical essays those rules, doctrines, and mode of practice which apply to cases daily occuring. It may be necessary to add, that no communications will be inserted. It would not consist with the writer's plan. He has not embarked in this work from any hope of lucre or personal reputation,

(a pe-

(a periodical work of this nature is not very likely to produce either,) but as he has much read and considered the principles, and been much engaged in the practice of conveyancing, he is now anxious, under the shadow of a name, to supply what he has often thought and felt to be a desideratum, namely, a series of short, plain, familiar essays, on the doctrinal and practical points of this interesting and preferable department of the law, and thus endeavour to redeem a debt which it has been well observed every man owes to his profession, and which ought to have been long since done.

The next chapter, to be published on Saturday next, will be the first of a series of practical essays on abstracts, shewing the best mode of preparing them, with reference

ference to the various circumstances of titles, and also shewing the principal points to be attended to in advising on them.

ON ABSTRACTS.

AN Abstract is an abridgement of the Title, and should contain a concise statement of such documents and facts as will shew a clear deduction of title to the premises sold, for a period of sixty years, being the time which the law requires for establishing a marketable title in fee.

It will pave the way for the more easy discussion of the form of an abstract, to premise a few general preliminary observations; some of these may probably be thought puerile, but any suggestion tending at once to correctness and dispatch, or good speed in legal business, cannot be really puerile however it may seem so.

1. First then, before the abstract is begun, it is advisable to sort the deeds, and to ascertain that they all relate to the same lands, and then on the outsides to number and date them in strict chronological order.

2. The next apparently puerile observation is, as to the mode of writing an abstract, but which to those who are called on to peruse and advise on abstracts is of greater tendency to the accuracy of perusal than is generally supposed. In writing an abstract there should be numerous margins, for however the idea may be ridiculed, practice will convince every one that facility and ease are gained, and indeed greater security to the client obtained by varying the mode of writing so as to arrest the attention. We all know that a man in the course of reading may pass over an observation currently stated, when an interrogation

terrogation to the same effect as the observation would challenge his enquiry, and this merely from the difference of mode in which the point occurred to his mind, the effect of which was, that his attention was arrested by the latter mode but not by the former. Any method therefore adapted to this end, that is, to arrest the attention, is strongly to be recommended. The best method of writing abstracts seems to be to have four several margins.

1. For parties, provisoes, and covenants.

2. Recitals—Habendum.

3. Operative part—Uses.

4. Parcels—Statement of execution and receit, livery of seisin, entry, registry, or inrolment, &c. when necessary.

This varying mode of writing will often refresh the attention, a matter of no little importance, when it is considered by what overloaded minds abstracts of titles are often perused; whereas a current style of writing without any break would, from its sameness, fatigue the mind; the varying mode also will greatly facilitate a recurrence to any part of the abstract, and render that part easy to be found. Upon sound consideration therefore, however trifling it may at first appear, it is of much importance in effect, to observe a due mode in writing the abstract.

3. The next observation is, as to the time from which a title should commence, with more particular reference to the circumstance of there being deeds or documents prior to that time, now it is clear that

that a purchaser may require a clear origination and deduction of a title in fee for sixty years: but supposing a case in which this can be evidently shewn by most of the title deeds, but yet there are others which shew a prior title; and ad-mitting, for the sake of illustration, some estate tail with remainders over which have not been effectually barred in law, but all of which in every probability have ceased by natural failure, or if not ceased, will never be raised as an objection; in such a case what is to be done? As a question of casuistry is it unjust to keep back these prior deeds and conceal the defect? or, as a question of law, would this concealment bar the vendor from a specific performance? or if the conveyance were executed nullify the sale on the ground of fraud? These are in every point of view questions

of extreme delicacy and difficulty, and I doubt whether my solution of them will satisfy every professional reader. To go for a moment into casuistry, I am certainly dissatisfied with Dr. Paley's principles of morality, viz. to refer every action to its consequences, that is, to determine the morality of every act according to the preponderance of its good or bad consequences; surely this is reviving the old system of the Jesuits, to resolve the quality of every act by its end, and not by its motive or means, whereas undoubtedly true morality would say, that the motive or spirit of the act constitutes the act, as we find in the familiar instances of distinction between murder and manslaughter, and other instances of the like nature; this mode of reasoning may perhaps be deemed too straightlaced, and it will be said that according

according to it, many titles now and for years uninterruptedly enjoyed would be open to doubt, and probably ultimately fail; what then is to be done? I can only repeat, according to the principles above laid down, that it is always better, and certainly more honourable, to state all the deeds in the vendor's custody relative to the title, and trust to the operation of law by presumption to extinguish those dormant claims which might arise from the prior deeds, and even if any such claim were so far existing and vital as to be capable of being urged with success against the title, still it is a fallacious argument, that because I have been defrauded I may defraud another; and therefore if I chuse to agree for the sale of an estate without having ascertained my title, and also having ascertained it and found it

it defective, to go on with the sale, I am bound to shew the whole title to the purchaser, and am not justified because I have a bad title in myself, or have been defrauded in taking a bad title, in defrauding the purchaser from me by concealing the defect of title; besides it is not clear but there may exist duplicates of these prior deeds evidencing the defect. There is also a difference between various defects, in their very nature, as whether the defect be vital and incurable by fine or other expedient, or by any reasonable lapse of time, or whether it be temporary only, and curable within a reasonable time? to the first defects the above observations apply with whole force; to the last defects they apply only with limited force.

4. The

4. The last observation however impresses strongly the expedience of the vendor's fully knowing and ascertaining his title before he hazards a sale, and particularly where the title is a family title, and has been long dormant and uninvestigated, and probably the deduction has been through an entailed descent, or under successive wills, but which in fact evidence no ownership except what is derivable from continuance of possession: whenever therefore a client of an attorney applies to him to mortgage or sell his estate, let him first call for and investigate the title deeds relating to it, and ascertain the accuracy and goodness of the title on the behalf of his client, before he tenders it to a mortgagee or purchaser, and when he is satisfied as to the goodness of the title, he may safely and openly proceed to a mortgage

a mortgage or sale, and fearlessly shew the whole title; but if he proceeds to such mortgage or sale without a certainty of the goodness of the title, the consequences may be fatal to the client. We all know of important consequences which have resulted from the discovery of defects of titles from the omission of vendors and proposed mortgagors to ascertain their titles before they offer them for sale or mortgage.

There are certainly numerous cases where great delicacy of acting is requisite on discovering defects in titles. Where the titles are investigated after a sale or proposed mortgage, on the part of the purchaser or mortgagee, perhaps the following rules should be pursued: If an attorney gains information of a defect in the

the title in the course of investigation on behalf of a particular client, he is bound to communicate the defect to his client, and if he should be also concerned for the party entitled to the benefit of the defect, yet he is not at liberty to communicate the defect to such party, without the concurrence of the client in whose service he acquires the information. Every attorney owes a particular confidence to each client, and he is not authorised to communicate any fact to one client in breach of his confidence to another. If information should come to his knowledge generally, and not while particularly concerned for any client, of a defect in a title, and he is both the attorney of the possessor of the estate, and of the party entitled to the benefit of the defect, he is bound to be silent and not communicate the fact to either, If however

however he is concerned for one party only, then he is bound to communicate the fact to such party, but where a fact comes to his knowledge during any particular transaction for any client, such client is entitled to the exclusive communication of all the facts which come to the attorney's knowledge during such transaction, and the attorney is not at liberty to disclose any of such facts without that client's express permission. It may not be useless to state shortly in this place, as the point occurs, what can be legally done to obviate in the safest manner that the case admits, any defect that may be discovered in a title. This must certainly in some degree depend on the nature of the defect. In all cases, only guarding against a forfeiture in those where it may take place, it is advisable immediately to levy a fine, and

and the fine will in most cases be a bar after five years non-claim. In every case a fine will aid the title. If too there be any outstanding term, the declaration of the uses of the fine should state that the fine was intended to bar all adverse estates, rights, titles, and interests whatsoever, as well for any term or terms of years, as in fee, or for any estate of freehold, to the intent that the conusor might under the fine acquire an immediate and absolute estate in fee simple, free from all adverse estates, charges, and incumbrances whatsoever; for otherwise by continuing the term you continue the old reversion expectant on the term, and no protection could be gained from an assignment of the term, for the purchaser would have notice of the adverse right. In most cases where the outstanding right is in fee, the first five years non-claim under the fine will bar it, though certainly

certainly it will be hazardous for the vendor to offer the lands for sale or mortgage, at the expiration of the first five years, without waiting a further time; but there may exist cases where there cannot be a perfect remedy to the defect without the concurrence of the adverse party, as in a case which sometimes occurs in practice, where a tenant in tail with various remainders over has mortgaged in fee, or otherwise aliened the legal estate, and afterwards suffered a recovery without the concurrence of the mortagee, or person having the legal estate; which recovery is of course bad for want of a good tenant to the præcipe, and probably the present owner claims under a deduction from this recovery: now here a fine levied by him, though it would greatly aid, yet would not perfect the title, because

cause though the fine would bar the issue after the death of the tenant in tail, yet each remainder man would come within the second saving of the statute of fines, and have an entire period of five years from the time of the remainder succeeding to the right to the possession, within which to make his entry or claim. In the last case, however, great advantage would be derived from levying the fine for the owner would save fifteen years liability of title; thus, the issue and each remainder man would have twenty years, within which to bring a formedon or ejectment, (according to the fact, whether there was or not a discontinuance of the estate tail, or their entry was or not tolled,) if no fine had been levied; but the fine would cut down the twenty years to five years, and consequently

quently greatly aid the title. Further, in the last case of the adverse title being intail with remainders over, the possessor should be silent till he has ascertained that the bar is complete, either under the fine if any has been levied, or by lapse of time; and then he may apply to the issue to be vouched in a recovery, and thus perfect the title, and as such issue will then in fact have no remedy to recover the lands, they will of course be disposed to listen to reasonable terms for their concurrence, and thus the lands would be saved. Further, in cases too where the title is defective, and the defect is discovered by a previous investigation, such defect may be remedied, or left to wear out by length of possession; whereas if the lands be offered for sale without any previous investigation,

tigation, such defect may naturally be expected to be discovered, on the perusal of the abstract by the purchaser's counsel, which would of course tend greatly against its being remedied or avoided, and also would from the failure of the contract for sale circulate the report of a bad title, and lessen the value at a future sale; and indeed, the very defect may come to the knowledge of the party having the right, and thus cause the loss of the lands.

4th. The next observation applies to the party by whose agent, and at whose expence the abstract is to be prepared. Mr. Booth, the late eminent conveyancer, has stated in an opinion, (see cases and opinion 303,) that the expence of making the abstract belongs to the purchaser, in order for him to employ his own solicitor,

that such an exposition of the title may be laid before counsel as he should deem best; but this point as well as many other practical points in the same opinion, are contrary to the established habits of the profession. Universally I believe the vendor's solicitor prepares the abstract, and the reason seems to be, that as the vendor is not bound to give up the deeds till he has received the money, and as the purchaser will of course not pay the money till he has ascertained the goodness of the title; it is a natural consequence, that the vendor's solicitor should prepare an abstract of the deeds, to enable the purchaser to ascertain the goodness of the title accordingly. As, however, the vendor's solicitor may be considered an interested party, anxious to set forth the title in its best light, and though without

without any dishonourable motive, yet leaning to give rather an ex parte statement of the title, it has grown into use in most parts of the kingdom, and generally assented to by solicitors of perfect honor, without the least idea of any reflection on their characters or intentions, that the purchaser's solicitor should examine the abstract with the deeds, and on such examination state any further part of the deeds omitted in the abstract, or otherwise alter and correct the abstract as he should think fit, it being an undeniable rule, that the purchaser shall have the benefit prior to his being obliged to pay the purchase money of laying before his own counsel such a statement of the title, being of course a correct statement, as he shall deem most likely to obtain a safe and satisfactory opinion.

opinion. This habit of the abstract being examined by the purchaser's solicitor, is not universally adopted in all parts of the kingdom, but unquestionably it would be very beneficial to introduce it where it is not the practice, and which on account of the general prevalence of the habit could be done without its raising any suspicion of the honor or integrity of the attornies practising where it may be introduced.

Some gentlemen of very cautious practice, frequently after acceptance of the vendor's abstract, draw their own abstract from an examination of the deeds, in order to be more certain as to the accuracy of the title to be laid before counsel; but the necessity of this, must depend upon the ability and correctness of

of the first abstract. Another reason for the vendor's solicitor originally preparing the abstract is, that the vendor is of course the party to know the facts and circumstances which connect the different documents of the title.

These preliminary observations to be completed in the next number.

ON ABSTRACTS.

Preliminary Observations continued.

5th, THE next observation applies to what deeds need not be abstracted, viz. Is it necessary to state expired leases? or, if A seised in fee, makes a mortgage in fee for a temporary purpose, and on the completion of that purpose the estate has been reconveyed, is it necessary to state the mortgage in fee, and reconveyance, the same being more an *excrescence* out of the title than a *continuance* of it? or, suppose A seised in fee to make a mortgage for years, and the term be surrendered, is it necessary to state these deeds? Upon a consideration however of this point, the conclusion seems to be, that it is necessary

to state all deeds and documents, which cease or are determined otherwise than by their own natural death or expiration; because where any other act is necessary to effect such cesser or determination, the purchaser should be satisfied that such act was competent for the purpose, and also he should have the act of determination, in order to prove the determination; but where the instrument has expired naturally by effluxion of time, he would not require any further act, for the instrument itself would prove its own expiry. The ultimate conclusion then upon this fifth general observation is, that in abstracts it is necessary to state all deeds and documents whatsoever in the vendor's possession or power, except such as have of themselves expired or naturally determined.

6th,

6th, The next observation applies to those cases where titles at first separate have ultimately become consolidated.

The rules upon this subject are these: 1st. To begin with the title to the most valuable parcel, that being the principal object of consideration, and proceed with that to the period when the other titles fall into it, then to take the titles of the inferior parcels; 1st, of that parcel which first becomes united with some other parcel, and then of that united title till it is further joined by some other parcel, then of this triple united title till it is further joined, and so on in this manner to the end; having regard only in the deduction of these subordinate titles, to the order and succession of time in which they join each other. By this mode, the title to the

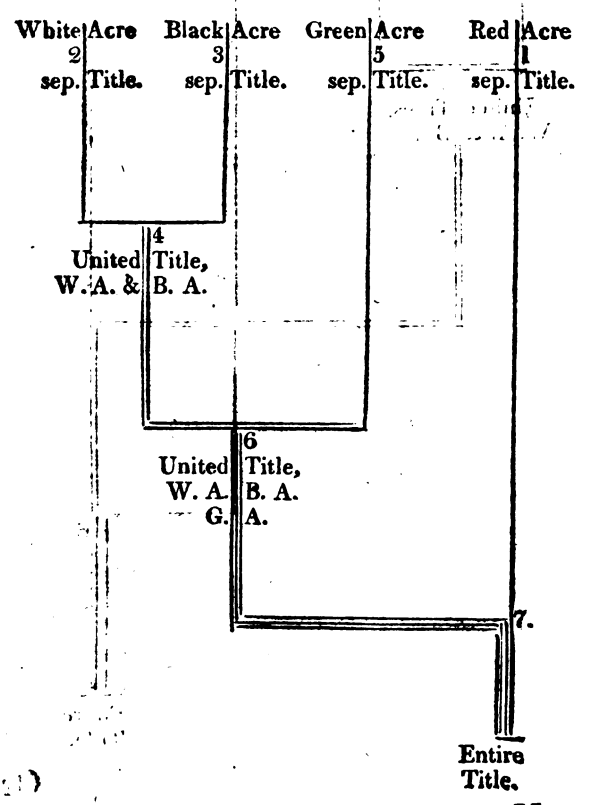
largest parcel will be the standard title, and the titles to the other parcels will be wholly a subject of distinct consideration. To illustrate the above rule by an example—Suppose an estate now intire, but formerly consisting of four separate parcels, called white acre, black acre, green acre, and red acre, and red acre to be the most valuable. In a case like this, first shew the title to red acre, as the most valuable, and most important to be considered, down to its being joined by the three other titles. If red acre should unite with the titles of one or two only of the other parcels, before its concurrence with the third, as for instance, with white acre and black acre, before their consolidation with green acre, still, notwithstanding this, go on with the deduction of red acre separately till its ultimate consolidation with green

green acre, without any reference to white acre, or black acre, and then in the subsequent deductions of white acre and black acre, shortly refer to that intermediate part of their united title abstracted in the deduction of red acre. This mode is advisable, because although it tends in some degree to a repetition, yet (and which is the great object) it tends more to accuracy and connection of deduction, particularly with reference to the principal or standard title. Having then abstracted the title to red acre till its point of junction with all the other titles, begin next the title of white acre, and go on with it till its union with black acre, then the title of black acre to the same union, then the united title of white acre and black acre till their union with green acre, shortly stating or referring if any part of

the intermediate title should have been joined by red acre before green acre, to those deeds and documents evidencing that part, and before abstracted in the title to red acre; then having brought the united title of white acre and black acre down to their junction with green acre, supposing green acre to join them before red acre, begin the separate title of green acre to such junction, and then the consolidated title of white, black, and green acre, till their ultimate confluence with red acre, as the standard title; but supposing red acre to join white acre and black acre before green acre, then trace white and black acre into the title of red acre, and afterwards the title of green acre separately throughout, till it joins the consolidated title. The following diagrams will shew these modes more distinctly,

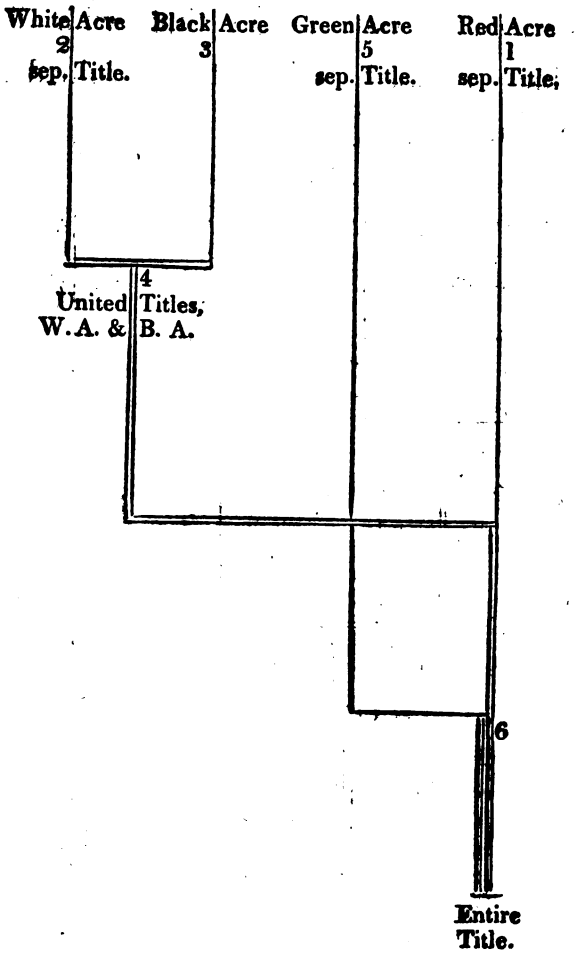
distinctly, viz. 1. Where the standard title is joined at one single time with the minor titles. 2. Where it is so joined at separate times.

No. 1.



No. 2.

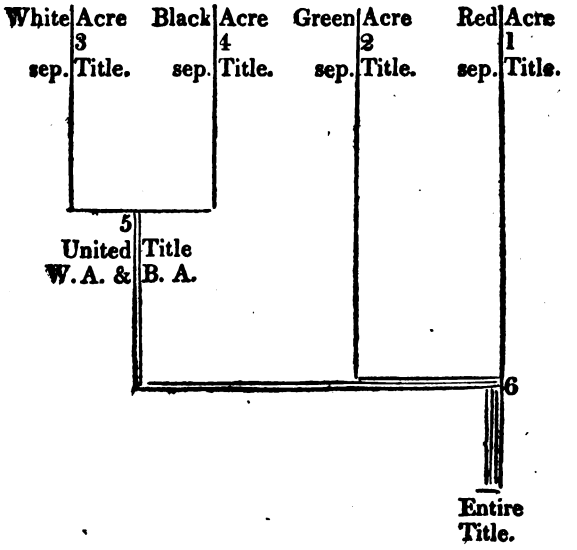
No. 2.



Or

Or the plan in No. 2, may possibly be simplified by taking the title to green acre as the second, and go on with it till it falls into red acre, and then to take the separate title of white acre as the third, the separate title of black acre as the fourth, and the united title of white acre and black acre as the fifth, according to this diagram.

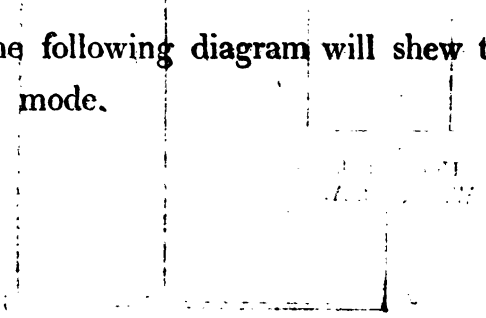
No. 3.



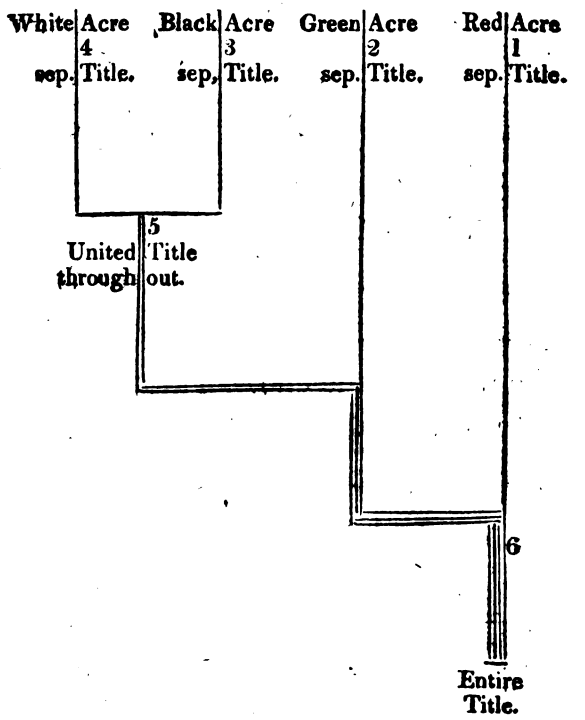
3, A

3. A third mode is, to take all the separate titles, first distinctly, and then the united title throughout, beginning at the earliest junction. This is as simple a way as any, but it may happen that by this mode one of the intermediate titles, in point of deduction, comprises the most valuable part of the purchase, and thus the principal object of consideration appears in a minor place in the abstract.

The following diagram will shew this third mode.



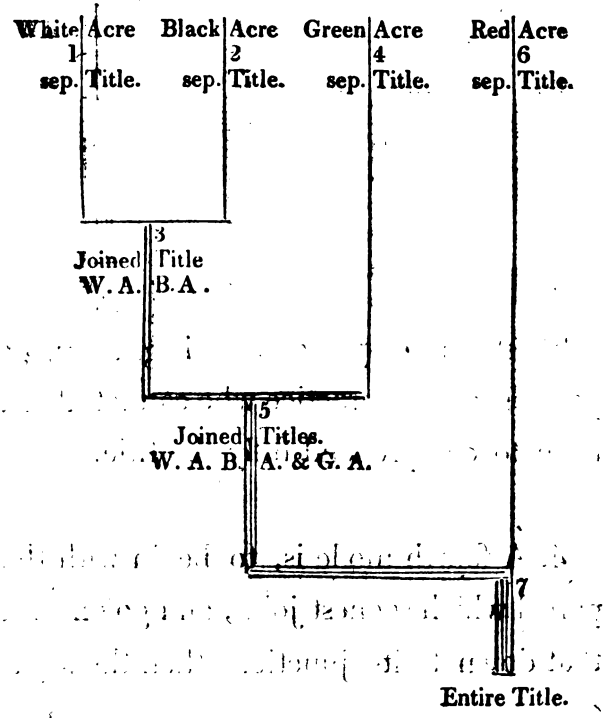
White



This is an easy mode for beginners, or persons in large practice who cannot afford time to comprehend fully the title.

4. A fourth mode is, to begin with the parcel which soonest joins, and go on with that down to its junction, then the separate

rate title of the second till such junction, then the joined title till the junction with the third, then the separate title of the third till such junction, then the three joined titles till the junction with the fourth, then the separate title of the fourth to such junction, and then the joined titles of the whole to the end. Thus,



This

This last mode perhaps is most regular in strict succession of deduction, but in framing an abstract it is not so much the object to produce symmetry of composition as utility of effect. It would be but a poor consolation for the oversight of a defect, that the abstract was logically framed. The object of the draftsman of an abstract should always be, to give such a prominent and perspicuous view of the title as will aid counsel in its perusal, and consequently to place in the first point of view the most valuable part of the property, as being the principal object of consideration. There is no doubt, but that an abstract of a title well framed, according to either of the diagrams, would enable counsel to peruse and advise on it with satisfaction and effect; but still, where different modes are open to our choice, though all may answer

swer the purpose, yet if there be any reasonable ground of preference, why not adopt such preferable mode? To advise then on the merits of the several modes pointed out, the third seems to me the most easy and simple for beginners, and also for persons greatly pressed in practice; the rule is simply this, take the title which is last joined, and deduce it separately, till the time of its being joined by the others, as the title of red acre for instance, according to the diagram; then the separate title of green acre, in like manner, as far as it goes on separately; then the separate title of black acre, in like manner, and also the separate title of white acre, making four separate branches; then having deduced each separate title as far as it goes on separately, begin the first united title of white acre and black acre,

acre, and go on to red acre, taking in green acre at the time of its junction. I have dwelt more minutely upon this mode, as being from its apparent facility and ease, more likely to be generally adopted. In point of actual perfectness of the instrument, however, I deem the first mode to be the superior one, inasmuch as it places at the first and principal view, that part of the title which calls for the most particular consideration. Thus I would always consider which part of the estate was most valuable, and begin with that, making it the standard title, and deducing it separately, till the time of its ultimate consolidation with every other title; and then deduce the other minor titles distinctly, in the plan pointed out in the first diagram. I shall conclude this head of separate titles, with stating the forms

forms of the heads of each title in the abstract. The forms then are these,

1st. As to the separate title of red acre being the standard title, till its conjunction with all the other titles.

2nd. As to the separate title of white acre till its junction with black acre.

3rd. As to the separate title of black acre, till its junction with white acre.

4th. As to the joint title of white acre and black acre, till its union with green acre.

5th. As to the separate title of green acre, till its union with white acre and black acre.

6th.

6th. As to the joint title of white acre, black acre, and green acre, till its consolidation with red acre the standard title.

7th. As to the entire title of the whole.

These heads, with such variations as will easily occur, will suit each of the preceding plans.

It may be added, that where the separate titles have been of equal undivided parts, and the values are equal, there the fourth mode, being the most easy and simple, is, I think, the preferable one, for in that case the variation of value, and consequently the variation of importance in the different parts of the title, and which causes the recommendation of the first mode, does not exist. It will be observed, that in these modes no regard is

given to the time of the origination of the several titles, for that seems a minor point of attention. I have often said (but which cannot be too strongly impressed on the mind of the draftsman) that the great object in framing an abstract through all its parts, both in its material and intellectual part, is to shew, as concisely and prominently as the nature of the instrument will admit, such a deduction of the title to the property sold, as will tend to the greatest accuracy of perusal.

Further, in the case of an estate being originally entire, and afterwards divided into parcels, and again subsequently consolidated, the plan of deducing the title would be, to state the joint title down to the time of separation, then the separate titles

titles, till their subsequent reunion, and afterwards the united title. In those cases where the separate titles shall not reunite in the vendors, but be throughout separately deduced to various persons, then, of course, each title is to be deduced separately, beginning with the most valuable, and proceeding with each title according to the degree of value.

I will now just state an extreme case, to shew the full extent of the practice advised on this part—Suppose an entire title divided into parcels, and separately deduced, afterwards uniting, and again reseparating, and a second time uniting, and ultimately sold as an entire estate:—In this case, you will first shew the original entire title, down to the period of separation, then the title to that separate part,

into which the titles to the other parts will ultimately run, then the title to such other separate part as is next previously joined by the other parts, and so on through each of the titles to the separate parts. When all these intermediate separate titles shall become re-united, then you go on with the entire title till the second separation, and then proceed with the separate titles in the same order as is mentioned with regard to the first separation till the subsequent and ultimate re-union, and then go on with the entire title to the end. Care should be taken in all these separate deductions of title to state the parcels in the first document of each separate deduction, in order that the certainty of the full reunion of all the parcels may be ascertained, and in order to this a statement of the parcels in the first deed

deed after each reunion should be given. It may be considered, whether separate abstracts of title to each part might not, in some of the circumstances before stated, be advisable? generally speaking, it does not seem that it would be advisable, but in some particular cases, as where a title to a separate part has many difficult points, and in fact comprizes most of the points arising on the abstract, then it would seem preferable to have a separate abstract as to this part, if it could be kept asunder from the general abstract. But however in most, nay in all cases, except in some extreme ones, the plan above recommended seems advisable.

The preceding observations do not strictly apply to those cases where the separate titles are of a different tenure, as freehold,

freehold, leasehold, and copyhold, as to which the rules are these:

1st. Where the freeholds and copyholds are sold together, and have been connected in title, the freehold abstract should contain the equitable title of the copyholds, and the legal title of the copyholds from the court rolls should accompany in a separate abstract.

2nd. Where the copyhold title has not been intimately connected with the freehold, it is better to have a separate abstract of title throughout to the copyholds.

3rd. Where freehold and leasehold lands are comprised in one sale, it is advisable to have separate abstracts, unless

unless in particular cases, where they have been uniformly connected, and one part bears a small proportion only to the other, and, generally speaking, in all cases where both freeholds and copyholds, and freeholds and leaseholds, are sold together, and the value will bear the expence, it is advisable to have separate abstracts, for the reason, that each tenure is subject to a different system of construction, and it therefore tends to greater certainty, to consider the parts relative to each tenure separately.

These are the principal preliminary observations which have occurred to me; of course there is a multitude of other points also of importance, but which seem most proper to be embodied with the

the particular observations on the several instruments abstracted when I commence the precedent of an abstract, which will be in the next number.

Stratford, Printer, Crown-Court, Temple-Bar.

ON ABSTRACTS.

I AM now come to consider the form of an abstract, interspersing such practical observations on the nature and operation of each deed and document abstracted, and on the usual or best mode of abstracting it, as the subject may require. This form will shew a plain general title of sixty years, as being the sort of title most commonly occurring in practice. The first point of consideration is the head of the abstract; and the question is, how should this head be framed? Is it better or not to state the parcels and the terms of the agreement at the head of the abstract? It is very far from my wish to urge unnecessary trouble or difficulty, or to quarrel with any established form, though not the most correct, where its alteration would be attended with danger; but I

am now discussing the form of an instrument, which can only prove dangerous in the degree it is incorrect, and I am advising the best mode of preparing this instrument; it is therefore necessary to state the most perfect form which can be adopted, and in this point of view I have no hesitation in advising the statement of the parcels, together with the incumbrances subject to which they are sold in the head of the abstract, for the strong reason that the parcels and incumbrances being stated in the head, are at once impressed upon the reader, and would assist him greatly in tracing the identity of the parcels through the subsequent deeds and documents, and also in ascertaining the liability of the lands sold to the incumbrances. Nor would this plan cause much additional pains in preparing the abstract, for I do not mean by stating the parcels to require

require a long description from the deeds to be set out, which would extend the head to an inconvenient length, but merely a short statement of the names and quantities of the purchased premises, or such other particulars as will enable the reader to ascertain and trace the identity of the parcels throughout the abstract.

I shall now begin the form.

AN ABSTRACT of the title of A. B. Esq. to the absolute fee simple and inheritance in possession of

All that freehold messuage, tenement, and farm, with the appurtenances, called Temple Farm, together with the several closes of land thereto belonging, and hereinafter set forth, to wit

	A.	R.	P.
One close of land, called Garden Court, containing - - -	10	0	0
One other close, called Elm Court, containing - - - - -	10	0	0
One other close, called Pump Court, containing - - - -	10	0	0
One other close, called Hare Court, containing - - - - -	10	0	0
One other close, called Brick Court, containing - - - - -	10	0	0
Making in the whole	50	0	0

Together with the right of common on Temple Garden common.

Subject

Subject to a fee farm rent of £20, payable thereout to Abraham Bencher, Esq. and his heirs, and subject to the land tax of £5.

And which said premises are contracted to be sold to Y. Z. Esq. for £2500 by the agreement for such sale hereinafter lastly abstracted, and under the terms and conditions expressed in such agreement. [Note 1.]

[*Note* (1.) The above form will serve as a precedent for most heads of abstracts. It will be seen that it states the parcels specifically, the names and measure of the several closes, and in short, a description of the lands purchased, according to the purchaser's intention at the time of the purchase. It also states every incumbrance

brance subject to which the purchaser has agreed to purchase; if too he shall have bought subject to any special condition or qualification, such condition or qualification should be stated in the head, for the reasons I have above given, that it at first impresses on the reader the whole nature and extent of the bargain which the purchaser has made, the precise lands he has agreed to buy, and the precise charges to which he has agreed they shall be subject; but if the terms of the agreement are the usual terms, it is not necessary to specify them in the head, but the agreement itself should be abstracted as the last document, and this, notwithstanding a copy of the agreement may accompany the abstract, because when stated on the abstract it is more likely to be well considered in connection

nection with the title, than when perused as a separate document: However this may originate, I appeal to the experience of every one accustomed to peruse abstracts whether the fact be not so.]

1st Jan. 1750. *Indenture of feoffment between A. B. of Lincoln's Inn, in the County of Middlesex, Esq. of the one part, and C. D. of the Inner Temple, London, Esq. of the other part.*

No recital.

It is witnessed, that in consideration of £100 to said B. paid by said D. said B. did grant and enfeoff unto said D.

All (state the parcels from the

the deed being the first deed, as thus:

All that messuage, tenement, and farm, called Temple Farm, with the several fields and closes of lands thereto belonging, or therewith usually held, and also with the right of common on Temple Garden Common.

And all ways, &c.

And the reversion and reversions, &c.

And all the estate, &c.

To

To hold unto, and to the use of said D. his heirs and assigns for ever.

Covenants by B. binding his heirs as against the acts of himself and his ancestors, and all persons rightfully claiming under him or them, except as after excepted.

1. *That he had good right to enfeoff.*

2. *For quiet enjoyment.*

3. *Freedom from incumbrances, except a perpetual fee farm rent of £20 payable to Abraham Bencher, Esq. and his heirs.*

4. *For*

			4. *For further assurance.*
			Executed by the said A. B. and duly attested.
			Not executed by the said C. D.
			Receipt for consideration money, indorsed, signed, and witnessed.
			Memorandum of livery of seizin duly made, indorsed, signed, and witnessed. [Note 2.]

[*Note* 2. This title commences with evidence of a seisin in fee, in the year 1750, being upwards of 60 years since. The following rules apply to the abstracting of the first document.

1st. Where

1st. Where the title commences with a will which contains only a general devise of all lands, then the vendor should if possible shew some evidence of ownership as some old leases, entries on the parish books, receipts for rent, registeries of marriages, christenings or burials, inscriptions on tomb stones, or rings, entries in family bibles or old books, old family letters or papers, evidence of old persons, or other proof whatever which can be obtained to substantiate such ownership.

2. Where the abstract sets forth a title to tithes, or to lands granted by the crown, then it is necessary to abstract in the first instance the grant from the crown, in order to shew that there is no unbarrable reversion or remainder in the crown, and also that there is no reservation of rent in the original grant.

3. Further

3. Further, it is never satisfactory to commence an abstract with a recovery deed, or a covenant to levy a fine or declaration of the uses of a fine, for these instruments always presume some prior estate tail with, possibly, remainders over necessary to be barred, and if these should not be effectually barred, the title will be defective, and therefore in order to shew an effectual bar, it is necessary to set forth the creation of the estate tail, and a purchaser may always require this, and if the vendor cannot shew such creation, the only answer he has is, presumption in favor of the title from time, but which is not conclusive, for I have known many instances of long continued possession in families where a dormant unbarred entail has subsequently appeared.

4. It

4. It is likewise also necessary to shew a clear deduction of sixty years, as any less deduction is not sufficient, inasmuch as a writ of right is not barred by a shorter possession than sixty years, but at the same time the title may in many instances be aided by the subsequent deduction, as where one or more fines have been levied, some one of which may have operated by nonclaim, but yet generally speaking, a shorter title than sixty years is not marketable.

This being the first abstracted deed, the following questions arise, what parts of a deed should be abstracted? and 2dly, how they should be abstracted? The answers to these questions are these:

1st. The date should be set forth in the margin.

2nd.

2nd. As to the parties, state their names, places of residence, and additions, together with any deduction of pedigree which may be annexed to their description in the deed. After you have once given the names of the parties you need not repeat their christian names, unless there are two of the same surname, and then you repeat the christian name of each to distinguish them, and also where two are both of the same christian and surname, then the place of residence is the best mode of distinction.

3rd. All recitals, or statements of facts, or references to deeds, or documents, not otherwise appearing in the abstract, should be fully given as to their effect, and whenever the draftsman has the least hesitation as to their effect, let him state them fully,

fully, but when these facts, deeds, or documents otherwise appear in the abstract, they may simply be referred to.

4th. The consideration should be stated, both as to the sum, and also the person by whom and to whom the same was paid, and in some particular cases, as in annuity deeds, where the consideration in a great measure constitutes the essence of the deed, the consideration should be stated fully, indeed even in the very words in annuity deeds.

5th. The operative part of the deed should be distinctly stated, and all the operative words given.

6th. As to the parcels;—in the first abstracted deed the parcels should be stated verbatim, but in the subsequent deeds, where

where the description is the same as in the first deed, there may be a reference to that, but where there is any variation of the several descriptions such variation should be shewn:—Examples of the different forms stating the variation will be given in the following parts of this work.

7th. It is not necessary to state fully the general words or the forms of reversions and deeds, unless they particularly vary from the usual forms.

8th. In stating the habendum it is not necessary to refer to the land, but only to state the seisin.

Also, where there is no limitation of use except to the grantee, you do not separate the limitation of use from the seisin,

seisin, but where the limitations of use are to other persons besides the grantee, you state the seisin, and then the limitations of use separately, and in the last case it is most important to state the uses correctly; the best mode of doing this is to state the words of the limitations, because by stating their effect, the draftsman presumes to ascertain the true constructions and effect of the limitations, whereas this construction should rest on the opinion of the counsel advising on the abstract, and when we consider how nice the distinctions upon many of these limitations are, particularly on the effect of the words "of" or "on," to give a separate intail to the husband or wife, or a joint intail to both; and also the necessity of construing and even spelling (as Lord Kenyon terms it) every word of a limitation over, after

a devise or use in fee, and generally the very difficult construction of all cases of this sort, the utility and even necessity of precisely and exactly stating these limitations becomes evident.

I do not however mean such strictness as to exclude the use of the term *remainder*, to express the determination of the prior estate, but merely to exclude a statement of the effect of limitations, such as, To the use of A. B. in tail male, or, To the use of the daughters in tail with cross remainders in tail, for these limitations are not long, and on their accuracy the title may often depend. To this, as to every rule, there are of course exceptions; thus, where a recovery has been suffered by the eldest son in tail, it is not so absolutely necessary to state the subsequent

quent limitations which have been barred by the recovery, and yet if the property is of magnitude, and the expence not material, it would be certainly better to state the whole limitations, for numerous cases occur in practice where recoveries are defective, and it then becomes necessary to trace the rightful title through the limitations. Instances where the tenant intail had mortgaged in fee, and afterwards suffered a recovery without the concurrence of the mortgagee, must have often occurred in practice, all this shews the necessity of stating the limitations. Further, it may be added, that the word *remainder* should not be used in those cases where the subsequent limitations are contingent, and such contingency depends on the introductory words to the limitations, or where the prior limitations are in fee, nor in

cases where the words are different from the usual words.

An observation may also be added here on the propriety of any opinion or judgement on the effect of the several deeds or documents, being stated by the draftsman in preparing the abstract; unquestionably the ultimate judgment and decision on the title must be left to the opinion of the counsel advising on the abstract, but yet observations by the draftsman, freshly occurring to him as he goes through the deduction of the deeds, and stated interspersedly through the abstract, may possibly arrest the counsel's attention, and induce his more particular consideration of the point; although therefore these observations are in some degree extraneous, yet one would not altogether

together check them, as they might prove beneficial, resting at the same time in a great degree on the prudence of the party ultimately settling the abstract, before it is submitted to counsel, not to retain any superfluous observations, or any not likely to produce practical benefit with reference to the title.

9th. The powers and provisions, if any, may be stated shortly as to their effect, unless any have been acted on so as to affect the title, and then each power so acted upon should be fully stated. Where the sale is under a power, such power must be given verbatim.

10th, The covenants should be also shortly stated as to their effect, particularly as to whose acts they extend, and in the covenant against incumbrances the exception

ception should be very fully set forth. Sometimes through the ignorance of the draftsman of a deed, the liability of the different covenants in it will vary: as possibly some one or more of the covenants may be general and the rest limited. Every such variation should be shewn, for it may tend to increase that degree of security for the title which covenants can give. In some particular cases, where any special covenant or power is of particular importance, it should be very fully stated, and nearly verbatim.

11th. The execution should be stated, and if the deed has been omitted to be executed by any party, then the omission of execution by that party should be mentioned, and this plan seems preferable and more apt to catch the attention, than to state

state only the parties who have executed by name, a plan sometimes I am afraid adopted to cloke some non-execution. It should also be mentioned in the presence of how many witnesses the deed has been executed, and in particular cases, as in annuity deeds, where the attestation is of particular importance, regard should be had to the stating of the mode of attestation, according to the requisite form; also in cases where the deed is made in pursuance of a power requiring a particular execution and attestation, it should be strictly and particularly seen and set forth, that all the requisites have been complied with. This is of the first importance, as it is well known that at this moment many titles are defective in consequence of the imperfect forms of attestations. The point is so important, that I will

I will go out of my way for a moment to lay down the distinctions on the subject, which are these: 1. If a power requires the instrument executing the power to be signed, sealed, and delivered in the presence of, and attested by two or more witnesses, and the attestation does not mention the word "signed," though in all probability the deed was signed in the presence of the witnesses, yet from the defect of the attestation, amounting in fact to a failure of one of the requisites of the power, because the power requires the instrument executing it not only to be signed, sealed, and delivered in the presence of two witnesses, but also such signing, sealing, and delivery to be attested by two witnesses, the execution is void, for the execution of a power is so strictly construed, that every iota of its requisitions must be complied

plied with; 2dly, Where the power only requires the instrument executing it to be signed, sealed, and delivered in the presence of two or more witnesses, and does not expressly require any attestation of such signing, sealing, and delivery by such witnesses, then if the attestation does not mention the word signed, but merely sealed and delivered, yet this will be a good execution, for notwithstanding the omission of the word "signed" in the attestation, the court will presume that the deed was signed in the presence of the witnesses, and the power does not require the act of signing to be attested. When therefore the draftsman in the framing of an abstract comes to a power, he should particularly attend to the requisitions of the power, and especially how the deed executing the power

is to be signed, sealed, delivered, and attested. As whether the power requires the deed to be signed, sealed, and delivered in the presence of *and attested by* two or more credible witnesses, or other words, so as to require the signing to be attested, or whether the power merely requires the act of signing without requiring also the attestation of the act, in the former case the decision of Wright v. Wakeford, 17 Ves. jun. 458, is an authority for the execution of the power being void, unless there is an express attestation of the fact of signing, but in the last case the fact of signing appearing in the deed, its being done in the presence of two witnesses would be presumed. See Macqueen v. Farquhar, 11 Ves. jun. 467. and see 17 Ves. jun. 458. So many titles are supposed to be

be defective on this point, that it is in contemplation to bring in a bill to remedy the defect, but yet the justice of such an act should be well considered, for property is the creature of law, and by confirming the apparent right of one party you divest the real actual right of another. Till however such a law, if it ever be enacted, is actually enacted, titles having the defect I have stated are radically bad, and an attorney discovering this defect, and having ascertained it, should be most cautious on the part of his client how he exposes the title.

After stating the execution and attestation, the receipt for the consideration money should be stated, and in cases where any subsequent or future act is necessary to give effect to the deed, as livery of

of seisin to a feoffment, or inrollment to a bargain, and sale, entry to a common law exchange, &c. such further act in every case should be mentioned in order to shew that the deed is perfect. This also applies to lands in register counties, and then the registering of the different deeds should be mentioned.

In the next Number the form will proceed rapidly, and the subject of Abstracts will be continued in the following numbers uninterruptedly to its completion.

Stratford, Printer, Crown-Court, Temple-Bar.

The Precedent of an Abstract continued.

1st Jan. 1753 } *SAID D. by his will of this date, after bequeathing a legacy of £1000 to his sister A. D. devised all his messuages, tenements, lands, and hereditaments whatsoever, subject to the payment of his debts, the aforesaid legacy, and his funeral, and testamentary expences, unto, and to the use of his son E. F. his heirs and assigns for ever, and appointed his said son sole executor of his said will.*

Executed by the testator in the presence of three witnesses, who (as stated in the attestation) respectively subscribed their names in his presence.

1754. *The testator died sometime in the month of January in this year, and on*

the 1st of February following, said will was proved in common form by the son and executor in the prerogative court of Canterbury.

1st Jan. 1755 } *Release by A. D. of the legacy of £1000 given to her by the said recited will.*

It may be now safely presumed that all the testator's debts have been fully discharged. [Note 3.]

[Note 3.] In abstracting a will you of course only state that part of it which refers to the purchased lands. If the purchased lands are included in a general devise, subject to debts and legacies, you should state shortly all the legacies given by the will, in order to shew that they have been released or barred by time, for it may so happen that some of these legacies

gacies have been continuing, and against which the presumption from time will not strictly hold, and therefore the purchaser should be satisfied as to this point by a short statement of the legacies. With regard to debts, they are not generally continuing, but in most instances they are immediately payable, and the possibility of there being future debts will not be presumed. What I mean by future debts, is a future contingent demand as under a bond of indemnity given by the testator, which is running at his death, and may or may not become a debt according to future events. So a liability under a bond by the testator for the due performing of an office by a third person. So a bond by the testator for the due accounting by an accountant to the crown; and in the present multitude of offices re-

quiring sureties these bonds are frequent. Whenever therefore the purchased lands have been recently devised subject to debts, and a sufficient time has elapsed to bar, generally speaking, all immediate debts, enquiry should be made whether there be any future contingent debts or demands, and although if the answer be in the negative, the possibility of such debts or demands will not be an objection, for no mere possibility, being only a suggestion, and not resting on any circumstance so as to amount to a near possibility, or to the next degree to a probability, is an objection to a title, yet a purchaser may require the best evidence to rebut even a mere possibility, and therefore in the present case he may require as the best evidence in this matter the production for his inspection, though not for his subsequent

subsequent custody, of a release of some legacy given by the will, because if there be such future possible debts or demands, the executors may require some covenant, or security, from the legatees, to abate their legacies received, in the event of these future possible demands becoming claimable; but if there be no such contingent demand in posse at the time of payment of the legacy, the legatee is not bound to bind himself expressly to an abatement, and the executors must, in that case, trust to an abatement by operation of law; and this being the rule as to the liability of legatees to covenant or bind themselves for the eventual abatement of their legacies, their release for such legacies will, according as it shall or shall not, contain a covenant for abatement, be evidence *pro tanto* of the existence or non-

non-existence of any future possible debts, and if there should be any such outstanding running liabilities, the purchaser should require some indemnity or security against them.

Where the purchased lands are charged with any legacy, a release of such legacy should be required.

It should also be stated after the abstract of each will when the testator died, and when and where the will was proved, that is, as to the times of the death and probate, as nearly as possible, without requiring the particular day, except as to the time of the death in peculiar instances, as where a term or other estate is to commence in interest or computation from such death, and then the day

day should be ascertained, and an extract of burial from the registry be stated. It may be added, that as to a freehold title, the proving of the will in the spiritual court gives it no authenticity, for the spiritual court has no jurisdiction as to real estate, but only as to personal estate, with reference to which the probate, with the will annexed, is the only admissible evidence of the will; but in any action respecting the real title, the original will must be produced, and from this nonjurisdiction of the spiritual court as to real estate arises the necessity of a clerk from Doctors Commons, or the register where the will is proved, attending the assizes, or other court, with the original will, or of such will being otherwise produced, and also the necessity of proving the execution of such will.

It

It is often a disputed point, whether a purchaser buying a title deduced through a recent will can require the will to be proved per testes, or the heir at law to concur in the conveyance? Formerly it was the frequent practice to require the concurrence of the heir, or the proving of the will per testes; but latterly this practice has ceased; and in the case of Bellamy *v.* Leversidge, stated in Mr. Sugden's excellent Treatise on Vendors and Purchasers, Lord Kenyon decided against the purchaser; but perhaps this distinction may be laid down as the rule by which the court would govern itself: 1st, Where the will states in the attestation, that it was signed, sealed, published, and declared, by the testator, in the presence of the three witnesses who signed their names in his presence, and there is

no

no counter-circumstance or evidence against the execution, there the Court will presume that the will was duly executed and attested, and will not permit the purchaser to require either the proving per testes of the will, or the concurrence of the heir; but where the attestation does not state in the will, that it was duly signed, sealed, published, and declared, by the testator in the presence of the witnesses, and that they subscribed in his presence, or there be any other irregularity in the attestation, there the purchaser might require the concurrence of the heir, or the proving of the will per testes, and this distinction seems founded on reason, for, in the first case, you are not to presume a defect contrary to an express statement, negativing the existence of such defect; but in the latter case

case there is nothing whereon to found such presumption, and the very omission of inserting these circumstances in the attestation, contrary to the usual form, of itself raises a presumption that there was some irregularity in the execution or attestation. I do not mean to say, that in every case of the latter instance the Court would require a proving per testes, or the concurrence of the heir, but the circumstances stated would weigh to incline the Court to decide so. Also there may be exceptions to these rules, founded on circumstances tending to raise a suspicion as to the sanity of the testator, or the character of the witnesses, or generally to throw a suspicion on the execution. In cases of this sort, the purchaser should of course require the will to be proved per testes, or the concurrence of the

the heir. It is always proper to state in the abstract where the will is proved, in order to know where to resort to for it when necessary.

1st Jan. 1756 } *Indenture of this date, Between said F. of the one part and G. H. of, &c. of the other part.*

Reciting said abstracted will, death, probate, and release, respectively, and agreement for advance of £100, after secured with interest.
No other recital.

It is witnessed that said F. in consideration of £100, to him paid by said H.
Did grant, bargain, sell, and demise, unto said H. his executors, administrators, and assigns,

All the premises referred to in the head of this abstract, by the

the like description as is stated in the first abstracted Indenture, except only the additions of the subsequent tenancies of the premises in these words, and which said premises were formerly in the occupation of C. D. Esq. and were by him devised to his son, the said E. F. and were afterwards in the possession of the said E. F. but had been since by him let to and were then in the occupation of Y. Z. or his tenant.

And all ways, &c.

And the reversions, &c.

And all deeds, &c. [but not attested copies.]

To hold unto said G. H. his executors, administrators, and assigns, for the term of 1000 *years thence next ensuing.*

Subject to a proviso for the lesser of said term, on payment by said F. his

his heirs, executors, or administrators, unto said H. his executors, administrators, and assigns, of £100 and lawful interest, on the first day of July then next.

Covenant by said F. for payment of mortgage money and interest.

Also general covenants by F.

1. *That he had good right to demise.*

2. *For quiet enjoyment.*

3. *Freedom from incumbrances, except the fee farm rent of £20.*

4. *For further assurance.*

Proviso that mortgagor might enjoy till default of payment.

Executed by said F. but not by said H. and duly attested.

Receït for consideration money, indorsed, signed, and witnessed.

Indenture

1st Jan. 1757 } *Indenture between said F. of the one part, and said H. of the other part.*

Reciting the last abstracted mortgage.

Said F. in consideration of the further sum of £200 to him paid by said H.

Did charge the said mortgaged premises with the said sum of £200, and lawful interest for the same, in addition to the said sum of £100 and interest.

Covenant by said F. for payment of further sum and interest.
That he had not incumbered.
For further assurance.
Executed by said F. but not by said H. Receipt for £200 endorsed, signed, and witnessed.

Indentures

1&2 Jan 1758 *Indentures of lease and release of these dates, Between said F. of the one part, and said J. of the other part.*

Reciting said abstracted will, death, probate, mortgage, and further charge respectively.

It is witnessed that in consideration of £500 to said F. paid by said J. said F.

Did grant, bargain, sell, and release unto said J. and his heirs,

All the premises stated in the above abstracted Indenture of demise by the same description as is therein contained.
And all houses, &c.
And the reversions, &c.
And all the estate, &c.
And all deeds, &c. [but not attested copies.]

To

To hold unto and to the use of said J. his heirs and assigns for ever. Subject to redemption on payment of said £500, and lawful interest, on the 1st day of July then next. Covenant by said F. binding his heirs for payment of the mortgage money and interest.

Also covenants by F. generally.

1st. That he had good right to convey.

2nd. For quiet enjoyment.

3rd. Freedom from incumbrances, except the fee farm rent of £20, and said first abstracted mortgage, and further charge for securing £400 and interest.

For further assurance.

Proviso and declaration by said J. that F. might enjoy till default of payment.

Executed

Executed by said F. but not by J.

Receipt for consideration money endorsed, signed and witnessed.

1st. Jan. 1759 } *Indenture tripartite of this date, Between said F. of the 1st part, K. L. of &c. of the 2nd part, and M. N. of, &c. of the 3rd part.*

Reciting that said F. was seised in fee of said messuage and farm, after described, subject to said abstracted mortgage by demise, further charge and mortgage in fee respectively, and the principal sums and interest thereby respectively secured.

And reciting that said F. had contracted with said L. to sell to him one annuity of £100 for 99 years, if A. B. and C. therein described, or either of them should so long live, at the price of £600.

And further reciting that for securing said annuity said F. had given a Warrant of Attorney for entering up judgment against him in the Court of Common Pleas, at the suit of said L. for £1200, and costs of suit. And that judgment was to be forthwith entered up accordingly.

It is witnessed that said F. in consideration of said £600, to him paid by said L. immediately, &c. the receipt, &c.

Did give and grant unto said L. his executors, administrators, and assigns,

One annuity or yearly rent charge of £100, of lawful money, &c. to be charged upon All the premises stated in the abstracted Indenture of the 1st January, 1757, by the like description as is therein contained.

And

And upon the reversion and reversions, &c.

To hold unto said L. his executors, administrators, and assigns, for 99 years, thenceforth ensuing, if said A. B. and C. or any or either of them should so long live, payable quarterly, on the 1st of April, the 1st of July, the 1st of October, and the 1st of January in every year, clear of all deductions whatsoever, except the property tax. And also with a proportionate part of said annuity in the event of the death of the survivor of said A. B. and C. in the interval of any two of the said quarterly days of payment.

Usual power of distress in case said annuity should be in arrear for the space of twenty-one days. Usual power of entry in case said annuity should be in arrear for the space of twenty-eight days.

And it is further witnessed, that said F. for the considerations thereinbefore expressed, and for the further nominal consideration of 5s. to him paid by said N. immediately, &c. The receipt, &c. and by direction of said L. testified by his execution of said Indenture,

Did demise unto said N. his executors, administrators, and assigns,

All said premises thereinbefore charged with said annuity, and being same premises as are comprised in said abstracted Indenture of the 1*st January,* 1756, *with their appurtenances.*

And the reversion and reversions, &c.

To hold unto said N. his executors, administrators, and assigns, for 200 *years,*

years, from thenceforth ensuing, sans waste. Upon trusts after declared.

Usual trusts for better securing said annuity.

Usual proviso for cesser of term, after the decease of survivor of said A. B. and C. and full payment of all arrears of said annuity, and all costs, and generally on full performance of the trusts of said term.

Proviso that trustee's receipts shall be sufficient discharges.

Covenant by said C. F. binding his heirs,

1st. For payment of said annuity.

2nd. Generally as against the acts of all persons except as after excepted, that he had good right to charge the premises with payment of said annuity.

3rd. That

3rd. That same premises were of sufficient value for such payment beyond all other charges and incumbrances.

4th. That he had good right to demise the premises to trustee.

5th. For quiet enjoyment.

6th. Freedom from incumbrances, except the fee farm rent of £20, and said abstracted mortgages, and further charge, and the principal monies, and interest thereby secured.

7th. For further assurance of annuity, and of the premises charged therewith.

Proviso enabling said F. at any time after the 1st day of January, 1760, to repurchase said annuity on giving 6 months notice to said L. and payment of £625, and all arrears of annuity.

Executed

Executed by said F. but not by said L. and N. Receipt for consideration money endorsed, signed, and witnessed.

1 & 2 Jan 1760 *Indentures of lease and release of these dates. The Indenture of release of six parts, and made between said E. F. of the 1st part, said G. H. of the 2nd part, said I. J. of the 3d part, said K. L. of the 4th part, said M. N. of the 5th part, and O. P. of, &c. and Q. R. of, &c. of the 6th part.*

Reciting said abstracted will, death, probate, mortgage by demise, further charge, mortgage in fee, and annuity deed respectively, and that said principal sums, interest, and annuity, respectively, were then due.

And reciting that said F. in order to the immediate discharge of said several incumbrances, and with the approbation of said several incumbrancers respectively, parties thereto, had

had determined to convey all said premises unto and to the use of said O. P. and Q. R. and their heirs, subject to said incumbrances. Upon trust forthwith for sale as after expressed.

It is witnessed that said F. in consideration of 5s. to him paid by said O. P. and Q. R. immediately, &c. The receipt, &c. and with the approbation of said parties thereto of 2d, 3d, 4th, and 5th parts respectively testified, &c.

Did grant, bargain, sell, release, and confirm unto said O. P. and Q. R. and their heirs,

All said premises referred to in the head of this abstract, and comprised in said abstracted Indenture of the 1st January, 1756, by the same description as is therein contained.

Together

Together with all houses, &c.
And the reversion and reversions, &c.
And all the estate, &c.

To hold unto and to the use of said O. P. and Q. R. and their heirs. Nevertheless upon the trusts after declared.

Usual trusts forthwith without the concurrence of said F. his heirs, and assigns, to sell said premises by public auction or private contract, and generally as said trustees should think proper.
And upon further trust out of monies to arise from such sale, and also out of the intermediate rents. In the first place to pay the costs attending the same, or otherwise, in the execution of trusts therein declared. And in the next place, to pay off, redeem, and repurchase the several principal sums, and interest,

interest, and annuity, respectively secured on said premises, according to their respective priorities. And upon further trust to pay the surplus (if any) of the said money unto said F. his executors, administrators, and assigns, and also reconvey all such part, if any, of said prsmises as should remain unsold unto said F. his heirs or assigns, or as he or they should appoint, discharged from all incumbrances by said trustees their heirs or assigns in the mean time. Usual proviso and declaration, that the persons who should become the purchasers of said premises, and pay his, her, or their purchase money to said trustees, should not be bound to see to application thereof. And that all receipts which should be given by said trustees for said purchase money should be sufficient discharges.

General

General covenants by said F. binding his heirs with said trustees.

1*st. That he had good right to convey.*

2*nd. For quiet enjoyment.*

3*rd. Freedom from incumbrances, except said fee farm rent of £20, and said abstracted mortgages, further charge and annuity deed, and several principal sums, interest, and annuity respectively thereby secured.*

4*th. For further assurance.*

Declaration and agreement by mortgagees and annuitant, that they will concur in any sale on receiving their principal monies and interest, and the consideration money for the annuity and all arrears.

Power for the change and new appointment of trustees.

Provision for the indemnity of trustees.

Executed by all parties except the trustees, and attested. [Note 4.]

[Note 4.

[Note 4. 1st. In abstracting a mortgage you state shortly the parties, recitals (if referring to any deed or document not before appearing,) consideration, operative words, parcels, general words, habendum, proviso for redemption, and covenants for the payment of the mortgage and for the title, and also the proviso, that the mortgagor may enjoy until default of payment. In mortgages, the covenants are always general, that is, the mortgagor covenants against the acts of all persons whomsoever, and the practice is so strict in this respect, that even if the mortgagee purchases and takes limited covenants, and immediately afterwards mortgages to the vendor, he is required to enter into general covenants, notwithstanding the instant before he took limited covenants from the vendor. The practice of taking general

general covenants on a mortgage is so uniform and invariable under all circumstances, that they are stiled mortgage covenants, in contradistinction to purchase covenants, which vary with the circumstances, and are general, or more or less limited according to the title. The effect of immediately mortgaging to the vendor after a purchase in fee, is in many cases extremely prejudicial, to the purchaser; thus, if A. sells and conveys to B. in fee with limited covenants, and B. immediately afterwards reconveys to A. in fee by way of mortgage, or demises to A. for a term by way of mortgage, in the former case, the covenants in the purchase deed are wholly extinguished, and in the last case are suspended during the term, and the only mode to obviate this difficulty in cases of this sort, is to make

make the mortgage to a trustee for the vendor, by which the extinguishment and suspension of the covenants in the cases above mentioned would be prevented. In cases of this sort too, much danger may arise from vesting the premises in the purchaser, as if he be an accountant to the crown, the lands will be subject to the crown debts paramount to the mortgage; to prevent this, it is adviseable to incorporate the mortgage with the purchase deed, and to convey the lands to a trustee, to the use of the vendor for a term for securing the money reserved by him and interest, and subject thereto to the use of the purchaser; and even in this case, though the vendor as vendor only covenants for the title to a limited extent, yet as mortgagee he receives general covenants; so universal is the practice of requiring general covenants on mortgages;

mortgages; from this it may be concluded, that in a very long abstract stating numerous mortgages, it is sufficient to say usual mortgage covenants, and state the incumbrances without stating specifically the several covenants, for the reason before stated, that mortgage covenants, from the universal practice of inserting general covenants in mortgages, necessarily mean general covenants.

2ndly, a deed of further charge is merely a covenant or agreement by the party that the lands shall remain in the hands of the mortgagee, subject to the additional sum and interest. It will be observed, that under the mortgage, the lands are already vested at law in the mortgagee for a term, and therefore the only further requisite is for the mortgagor to declare upon what further terms or security

curity the mortgagee shall hold the lands, and the declaration or agreement by the mortgagor, to this effect is amply sufficient in equity. In this instrument, the only covenants beside the principal covenant or further charge as to the additional security, are 1st. for payment of the additional sum and interest, 2nd. that the mortgagor has not incumbered since the mortgage, and 3rd. for further assurance. 3rd. The next abstracted deed is a second mortgage, and which last is in fee, in strictness a second security should not be a simple mortgage in fee, but a conveyance in fee in trust for sale, on account of the superior remedy under the latter, for under such a conveyance in fee, the trustee or mortgagee may sell and immediately raise his money, whereas in the former case of a simple mortgage in fee, he has no remedy against the lands, but to

To be continued.

to recover and take possession, subject to an account, or to file a bill for foreclosure, both of which are tedious remedies, and the former often ineffective. It has been doubted how far a title made under a trust deed of this nature is good; but by the present professional opinion such a title is clearly good, and upon the ground that no advantage is taken of the mortgagor; and no additional benefit can accrue to the mortgagee by the sale, for he can in no event acquire more than his principal money and interest, and the surplus will accrue to the mortgagor. The mortgagee also, being in the nature of a trustee, will be liable in equity for a breach of trust, in the event of any undue or collusive sale. The case of Croft v. Powell, Comyns Rep. 603, is sometimes urged against a good title under a trust

deed for sale of this nature, but in that case the mortgagee sold expressly subject to redemption, and the court said, that as the mortgagee had sold subject to redemption, it was not then to be considered what he might have done, but what he had done, inferring thereby that he might have sold absolutely: and with regard to the rule of once a mortgage and always a mortgage, that is answered by the preceding observation, that the mortgagee gains nothing by the sale beyond his principal and interest, and the mortgagor loses nothing except the conversion of land into money, but retains the equivalent or monies-worth of redemption. It may, however, be observed, that the security of a trust deed for sale instead of a mortgage is not universally adopted throughout the kingdom. In some counties,

ties, as Norfolk, I believe, for instance, it is not known as a security, except in cases where the security is very slender, and unable to bear any increase of debt beyond the principal money first advanced. Again, in the western counties, the adoption of a trust deed for sale instead of a mortgage is more frequent. I do not hesitate to express my own opinion, that a trust deed for sale is a much harder security than a mortgage, and ought not to be required in the first instance, or in any instance, where the property is an ample or fair security for the money lent. Where indeed the security is slender, or there are some prior incumbrances, then a trust deed for sale is by no means an unreasonable security, but, on the contrary, should always be insisted on. This deed being in the na-

ture of a mortgage, the covenants should be general as in mortgages. It may be added here, that if a sale should be made under a trust deed of this nature, no reference whatever should be made to any possible existing redemption in the grantor, but the lands should be conveyed absolutely to the purchaser, or as he may appoint. It may also be observed, that there is always inserted in these deeds a proviso, that the trustees's receipts shall be sufficient discharges to the purchaser, and that the receipt and conveyance by the trustee shall be competent and effectual, without the concurrence of the grantor; and clearly the receipt and conveyance of the trustee would be effectual without the concurrence of the grantor, but yet if the concurrence of the grantor could be easily obtained,

obtained, it had better be done, for this concurrence would entirely extinguish all lurking doubt whatever as to the perfectness of the title under the trust for sale. Also in a deed of this nature, the trusts always are, or should be, immediate, that is, that the trustees may sell at any time, without regard to the payment or non-payment of the loan at the time fixed; and as a check against a precipitate sale the trustee if he advances the money, or if he does not advance the money, then the party advancing the money enters into his covenant, binding his heirs, that no sale shall take place, or the lands be offered for sale, till the principal sum and interest shall be demanded to be paid within a given time, and default made in the payment thereof at such time. Now the reason and effect of the

trust

trust for sale being immediate, and of the consequent necessity of this covenant, are these: If the trust for sale depend on the happening, or not happening, of any prior event, as the non-payment of the money at a given time, this would be a condition precedent to the execution of the trust, and it would be incumbent on the purchaser to see, as the necessary ground-work of his title, that the event upon which the trust for sale was to take place, did actually happen, and that he can prove the actual happening of such event, but as a negative, such as the non-payment of a sum at a fixed time, can only be proved presumptively, though certainly, in some cases, to a very high degree of presumption, rising almost to demonstration, still this proof is difficult and expensive to be obtained, and it

is

is hard and injudicious to subject a purchaser to the obligation of it without strong necessity, and the necessity of this proof is avoided by making the trusts immediate.

If a case should occur in which it would not be advisable to make the trusts immediate, then the mode should be adopted of proving the fact or event on which the trusts are to commence by the statement or non-statement of such fact or event on the deed signed by the parties, so as to make the deed itself furnish evidence of the commencement and due execution of the trusts; thus, if the trusts for sale are to commence in the event of the non-payment of the money at a particular time, then the non-statement on the deed of such payment should be conclusive evidence

evidence of such non-payment. Further, where, however, the trusts are immediate, it is necessary to check the grantee against making an immediate sale, by inserting a covenant from him that he will not sell up to a given time, that is, until demand of payment within a given time, and default of payment at such time. Under this covenant the grantor will have a remedy against the grantee for any sale in breach of the covenant. Undoubtedly the covenant is personal only, and will not bind the lands, and therefore if the grantee chuses to sell, notwithstanding his liability under the covenant, he may effectually sell and make a good title, and a purchaser under him will be safe, even with knowledge that the money has not been paid, for the purchaser has no concern with the covenant, which rests solely between

between the grantee and grantor. It must be admitted, that if an extreme case be put, the remedy under the covenant may prove inadequate to the injury, as certainly a trustee under the deed may sell, and the lands be effectually conveyed to the purchaser free from all future lien, on account of the purchase money, and the grantor be driven to his remedy against the trustee, either to sue in equity under the trusts if the surplus purchased monies be not duly accounted for, or the sale be in any manner collusive or undue, or to sue at law for damages for breach of the covenant. Still, notwithstanding the possibility of an extreme case of this sort, experience proves that these trust deeds are seldom used to the unfair detriment of the borrower, and therefore in those cases which I have referred to, viz. where the security

security is not eligible or easily marketable, or the money advanced approaches to the value, or there has been a prior mortgage or incumbrance, and, in other cases of a like nature, the borrower should not object to a trust deed. In abstracting a mortgage in fee, you state the several parts in like manner as in abstracting a mortgage for years.

Further, whenever a second mortgage is made, you do not recite in it the first mortgage, but simply refer to the first mortgage in the covenant against incumbrances, and in the abstract a bare reference to the first mortgage in the covenants against incumbrances will be sufficient; also notice of a second mortgage should be immediately given to the first mortgagee, for then the first mortgagee will not be entitled to tack to his

his first mortgage any advance made after notice of the second mortgage. It is often a question asked in practice, whether it be preferable to have a mortgage for years or in fee. Generally speaking, a mortgage for years is the preferable mode, because it unites in the same person the right to the money, and the estate in the land; but then in the event of foreclosure, or the bar of redemption by time, there are many inconveniencies attendant on an estate for years. On the other hand, a mortgage in fee separates the right to the money from the estate in the lands, for the last of course descends or passes to the heir or devisee, while the former devolves on the executor, and it is often a nice question, whether the legal estate passes by the mortgagee's will, but yet as to this objection, it might be

be easily obviated by the form now generally inserted in wills, of devising trust and mortgaged lands to the trustees or executors, a form which should never be omitted where there are trust or mortgaged lands. With respect then to the point, whether a mortgage for years or in fee be the best? the answer is the same as to the difference between a mortgage and a trust deed for sale, though not applying so strongly in degree, viz. that on the part of the mortgagee, a mortgage in fee is the preferable security, but on the part of the mortgagor, a mortgage for years; consequently when the security is in any degree eligible, the mortgagee should be satisfied with a mortgage for years, and when the security is not perfectly eligible, the mortgagor should not object to a mortgage in fee.

We

We now come to the annuity deed, which is generally considered to be the last species of security that property becomes subject to, for the supposition is, that no one will grant an annuity at a high per centage if he can obtain money on mortgage at regular legal interest, but really I do not know whether the surplus per centage is not often compensated by the certain continuance of the security. In mortgages unless you agree for a fixed time, you are subject to frequent changes according to the necessities or caprices of the mortgagees, whereas, in annuities, you are wholly independent of the grantee, and by a giving a satisfactory security, say an estate in fee for securing an annuity for three lives, you save the expence of insurance, and can easily obtain money at eight per cent, with the privilege of redemption

redemption at any future time on re-payment of the principal money with some inconsiderable advance. Annuity transactions are now most frequent, and what with the risque and expences in consequence of the annuity act, and the charges of insurance, the annual interest paid by the grantor is most enormous, and this will necessarily be the case until the legislature does, (what it is rather surprising its wisdom has not long since seen the necessity of doing,) raise the rate of interest, or indeed leave it open to fluctuate with the value of money. This would furnish a relief both to the borrower and lender. It would relieve the former from the extra payments now unavoidable from the risque and charges occasioned by the annuity act, and the lender would gain a safer security. There are two sorts of annuity

annuity deeds, one within the act requiring registry according to its strict and almost inexplicable requisitions, and the other excepted out of the act, and consequently in no degree affected by it, but bearing only the same liability as any other common grant. The annuity deed abstracted is of the last nature, and does not require registry, and therefore not being within the annuity act, you abstract a deed of this kind as you would any common deed, and according to the rules laid down for abstracting deeds. Sometimes, however, even in cases of this last sort for greater (and it may really be added in many instances supererogatory) precaution the deeds are registered, and then when you go to the extent of registering a deed, and treat it as within the annuity act, you must of course frame the deed in all its

its parts according to the requisites of the act, and if a deed of this nature should occur in the documents of a title, you should abstract it accordingly. In abstracting an annuity deed within the act, particular attention should be given to the full statement of the consideration, the trusts, the mode of execution, the attestation, and all the other requisites which the act, or the decisions upon the act have made necessary to support the annuity. It should be also ascertained that all the collateral or auxiliary securities for the annuity, as well as the grant or principal security have been registered. It is difficult to say what auxiliary securities need be registered within the construction of the act, or rather what need not be registered, for the safe mode is to register all the securities, particularly since

since the courts have construed the word "*granted*," in the act to mean "*secured*," for it is scarcely possible to conceive an auxiliary instrument, that does not more or less tend to the security of the annuity. A question is now pending, whether a bond for the performance of covenants on an annuity deed be a security that requires to be registered. It is also a question, whether the memorial of a statutable annuity, should be set forth in the abstract. These questions will be discussed when we come to the abstract of a statutable annuity, which will be one of the instruments abstracted in the sequel of the precedent.

The next deed is a trust deed for sale, and in which all the incumbrancers should join and convey, or agree to the

conveyance of the estate in fee, to the trustees, upon trust for sale. Whenever there exist numerous incumbrances, it is always beneficial to have a general trust deed for sale, that is, to have all the parties interested join in a deed, not themselves conveying the lands to trustees, but assenting to such conveyance by the owner to the trustees, upon trust to sell and divide the money among the incumbrancers, according to their several priorities. This mode binds the parties to their own respective rights, and with notice of the rights of the other incumbrancers on the same lands; it is not advisable that these incumbrancers should actually convey, for that, except in very particular circumstances, would be requiring too much from them, viz. to vest their own rights in trustees, and divest themselves

themselves of their estates before the payment of their several incumbrances. But they should concur in the direction to the trustees to sell the lands discharged from these incumbrances, and that they would join in the conveyance of the lands according to their respective estates and interests to the purchaser. This mode of conveying lands to trustees upon trust for sale, must prove beneficial in all cases where property is much incumbered, and particularly where it is subject to intermixed and clashing liabilities. A deed therefore of this nature, being an executory instrument, should, like all executory instruments, contain many anticipatory clauses, providing for such events and contingencies as are not unlikely to occur during the execution of the trusts. A provision, which has been

found useful in cases of this nature, is, that no future mortgages or annuities made or granted by the owner shall be payable by the trustees, unless they are parties thereto. This may save the owner from the rapine of annuity brokers, and if any proper necessity should exist for raising money on annuities, there can be no doubt but that the trustees would readily concur. In cases of this nature too it is merciful to deliberate, whether the whole or a part of the estates might not be saved from a sale by some preventive arrangement, as by appropriating the rents for a given number of years, except a fixed allowance to the owners, and also by raising on mortgage, a certain sum to remain for some time to answer the debts immediately pressing. This mode has been acted upon in some cases with great success,

success, and after a number of years estates have been wholly relieved from debt, and the family have resumed their former property, with more economical habits. In abstracting a trust deed you state the parties, recitals, operative part, parcels, general words, reversions, estates, habendum, use, &c. down to the trusts in the usual way. The trusts being to be acted upon should be set forth fully, in order to shew that the sale intended to be made thereunder is duly made. As the incumbrancers and owners will join in the purchase deed, and convey, or direct the conveyance by the trustees, and the payment of the purchase money to them, it is not necessary to state fully the proviso that the trustees' receipts shall be sufficient discharges, but merely to refer to it. So the trust for the application of the money may be simply referred

ferred to for the same reason. The collateral provisions in the deed should be stated or not, according to the fact, whether they have been acted upon or not, so as to bear upon the title. You then state the covenants in the trust deed, which are by the several incumbrancers, that they have not incumbered, and general covenants for the title by the owner, with the exception of the fee farm rent, and the several incumbrances, according to their priorities, and then simply refer to the power for the change and appointment of new trustees, and to the provision for their indemnity.]

1 & 2 Jan. 1761 } *Indentures of lease and release of these dates. The release of eight parts, between said I. J. of the 1st part, said G. H. of the second part, said K. L. of the third part, said M. N. of the 4th*

4th part, said O. P. and Q. R. of the 5th part, said E. F. of the 6th part, S. T. Esq. of the 7th part, and V. U. Gent. of the 8th part,

Reciting seisin of C. D. the testator, and his will, death, and probate respectively herein before abstracted, and also the indenture of demise of 1st of January, 1756, the deed of further charge of 1st January, 1757, the indentures of lease and release, by way of mortgage in fee, 1st and 2d January, 1758, the annuity deed of 1st January, 1759, and the Indentures of lease and release of 1st and 2d January, 1760, respectively herein before abstracted,

And reciting that said O. P. and Q. R. as trustees under last abstracted indenture of release had caused a public auction to be holden at Garraway's coffee-house on the 12th day of December last, for sale of

of said premises, and that said S. T. was the purchaser thereof at said auction, free from all incumbrances, except as after-mentioned, at the price of 1800*l.*

And reciting, that there was then due to said G. H. for principal money and interest on security of said first abstracted mortgage, and further charge the aggregate sum of 315*l.*

And to said I. J. for principal money and interest on said secondly abstracted mortgage, the aggregate sum of 525*l.* *And to said K. L. for arrears of said annuity the sum of* 100*l. which together with the sum of* 625*l. as the consideration for the repurchase of said annuity made the aggregate sum of* 725*l.*

It is witnessed, that in consideration of said 315*l. of lawful money, &c. to said G. H. in full satisfaction of all principal money and*

and interest due to him on the security of said first abstracted mortgage, and further charge respectively, with consent of said parties thereto, of the 1st, 3d, 4th, 5th, *and* 6th *parts respectively testified, &c. paid by said S. T. immediately, &c. The receipt, &c.*

And also in consideration of said 525*l. of lawful money, &c. to said I. J. in full satisfaction of all principal money and interest due to him on security of said secondly abstracted mortgage of* 1st *January,* 1758, *with consent of said parties thereto, of the* 3d, 4th, 5th, *and* 6th *parts, respectively testified, &c. also paid by said S. T. immediately, &c. The receipt, &c.*

And further in consideration of said 725*l. of lawful money, &c. the said K. L. in full for the repurchase of said annuity of* 100*l. granted*

granted to him by said abstracted indenture of 1st of January, 1759, and payment of all arrears thereof, with consent of said several parties thereto, of the 4th, 5th, and 6th parts, respectively testified, &c. paid by said S. T. immediately, &c. The receipt, &c. And moreover, in consideration of 235*l.* of lawful money, &c. residue of said purchase money of 1800*l.* to said O. P. and Q. R. with consent of said E. F. testified, &c. paid by said T. V. immediately, &c. and making together with said sums of 315*l.* 525*l.* and 725*l.* respectively paid to the said G. H. I. J. and K. L. the aggregate amount of 1800*l.* in full for the absolute purchase of the fee simple and inheritance of said messuage, &c. after described, free from all incumbrances whatsoever, except as after excepted. The receipt, &c.

And

And lastly, in consideration of 5s. &c Said I. J. at request of said O. P. and Q. R. and E. F. and with consent of said G. H. and K. L. testified, &c. did bargain, sell, and release. And said G. H. at like request of said O. P. and Q. R. and E. F. and with consent of said I. J. and K. L. testified, &c. and to the intent to merge said term of five hundred years demised to him, did surrender and yield up. And said K. L. at like request of said O. P. and Q. R. and E. F. and with consent of said G. H. and I. J. testified, &c. and to the intent to extinguish said annuity of 100*l. granted to him, did remise, release, and for ever quit claim. And said M. N. at the like request of said O. P. and Q. R. and E. F. and with consent of said G. H. I. J. and K. L. testified, &c. and with intent to merge said term of two hundred years demised to him, did surrender*

render and yield up. And said O. P. and Q. R. with consent of said E. F. testified, &c. did, and each of them did, bargain, sell, and release. And said E. F. did grant, bargain, sell, alien, release, ratify, and confirm, unto said S. T. In his actual possession, &c. and to his heirs.

All said premises referred to in the head of this abstract by the description of All, &c. [Here will follow the description from the last purchase deed, viz. the conveyance to E. F. making such alteration as may be necessary with regard to the change of occupation, &c.]

Together with all houses, &c.

And the reversion and reversions, &c.

And all the estate, &c.

And all deeds, attested copies, &c.

To

To hold unto said S. T. and his heirs, and executors.

To such uses generally as said S. T. by any deed or writing, deeds or writings, duly executed and attested, should appoint. And in default thereof, and subject thereto. To the use of said S. T. and his assigns for life. Remainder To the use of said V. U. and his heirs, for the life of said S. T. in trust for him and his assigns, and to prevent dower. Remainder To the use of said S. T. his heirs, and assigns for ever.

Covenant by G. H. I. J. K. L. M. N. O. P. and Q. R. severally binding their several heirs, that they had not incumbered.

Covenant by said E. F. binding his heirs, as against the acts of himself, said G. H. I. J. K. L. M. N. O. P. and

and 2. R. and also of the said C. D. deceased.

1st. For the title.
2d. For quiet enjoyment.
3d. Freedom from incumbrances, except the fee farm rent of 20l.
4th. For further assurance.

Executed by all parties except S. T. and V. U. and duly attested, and several receipts for consideration money, endorsed, signed, and witnessed.
[Note 5.]

It will be seen that the mode of writing the abstract laid down in No. II. has not been strictly adhered to in this form of a precedent.

This has arisen from the impossibility of superintending the printing as to this point, but the Editor advises the above mode to be generally observed in practice.

[Note 5.] We now come to a purchase deed. Every purchase deed may be considered as a point or rest, to which the former part of the title is satisfactorily made up. On each purchase the title is fully and legally investigated, and the several outstanding incumbrances, charges, and terms, respectively got in, released, surrendered, or assigned, as the circumstances of the case may require.

It may be useful to add a few practical observations on the nature of such incumbrances as should be required to be released, and such as should be permitted to continue. Of course every outstanding estate or title which includes a liability or lien, should be strictly released and extinguished. Every mortagee, unsatisfied judgment creditor, and other

incumbrancer whatsoever, should therefore invariably concur and release; but where the outstanding estates or titles cannot be used against the lands, but are either expressly or impliedly protective, or are wholly passive, then it admits of consideration how far it is absolutely necessary to require their extinction, and which of them it is advisable to keep on foot. Thus, if there are several outstanding terms, all or some of which have been assigned, but under neither of which exists any charge on the lands, then it is to be considered whether it is absolutely necessary to get in all or any, and which of these terms. I am aware that it is the frequent practice to require an assignment of all the outstanding terms that have been heretofore assigned to attend, and that in some cases numerous terms are kept

kept attendant, but I cannot see the least utility to result from this plan, on the contrary great difficulty and expence often occur in tracing the title and representation to the different trustees. One well deduced legal term of sufficient duration to cover all probable liability of the lands, is surely sufficient to answer all the purposes of protection, and I would always advise such a term to be selected, the first if possible, if not one of the earliest, and one the creation, deduction, and present existence of which as a sound legal term can be clearly and satisfactorily proved. Such a term as this being established and assigned to attend, it is not possible to conceive any incumbrance or liability of the lands subject to the creation of the term, which it will not as fully protect against, as if there

had been any number of existing terms. This then is my advice as to the practice of continuing or surrendering outstanding terms, namely, on every purchase to consider and investigate the oldest term as to its creation and deduction, whether it be a good legal term, well created and deduced, and if it be, then to take an assignment of it, and merge and surrender all the subsequent terms, but if the first term be not a good legal well created and well deduced term, then to consider and enquire in like manner as to the creation and deduction of the second term, and if such second term be found to be a good legal well created and well deduced term, then to take an assigment of that and merge the first term, and so on in like manner if the second prove defective, till you come to a term

a term satisfactory both in its legal creation and deduction, and then take an assignment of that, and merge all the prior terms. Of course no term can be of any use as a protection unless it be a legal term, for the essence of protection is the priority of the legal title, and the passiveness of equity; that is, where there are two innocent parties, equity will not interfere for or against either, but be wholly passive; thus, if a person buys and takes a conveyance in fee of an estate without notice of any incumbrance, and also takes an assignment of an outstanding legal term created before any incumbrance, and consequently prior in legal title to the incumbrance, and after the purchase, an incumbrance should appear well created and well existing, and so circumstanced that no fraud or collusion can

can attach to the incumbrancer, yet both the purchaser and the incumbrancer are innocent parties, one of which must suffer to the amount of the incumbrance, but being both equally innocent, and there being nothing on the part of the purchaser to induce equity to act against him, and divest him of any benefit that may have accrued to him, equity will be wholly passive as between the parties, and then the purchaser will be entitled to take the benefit of the prior legal title which he has under the term, and this prior legal title will secure him against the subsequent incumbrance.

It may be useful to explain the distinction between a legal and an equitable term: a legal term is a term created by the party having the legal estate: an equitable term is

is a term created by a party having an equitable estate only. This distinction should be attended to, because a legal term in remainder is often confounded by students with an equitable term; but clearly if the party granting the term in remainder had the legal estate, such term though in remainder is yet a legal term: thus if A seized in fee mortgages to B for five hundred years, and afterwards mortgages to C. for one thousand years, this one thousand years term is as much a legal term as the five hundred years term, and if any rent were reserved under the five hundred years term, the remainderman might distrain in respect of his legal one thousand years term, and also the five hundred years term could be merged in the one thousand years term; but if A seized in fee mortgages to B in fee, and afterwards mortgages to C.

C. for one thousand years, here the term in C. is an equitable term, for A. at the time of granting it had not the legal estate, but only an equity of redemption. Now an equitable term can be of no use, for by the passiveness of equity in those cases to which the doctrine of protection practically applies, all the parties are reduced to their bare legal rights, and that alone will determine their respective priorities. In the deed abstracted in the precedent the term is merged, for it was of too recent a date to afford any protection.

On every purchase too the warranty or covenants for the title are brought up to the time of the purchase. These covenants do not in strictness form part of the title, but are auxiliary only, and to make

make the chain of warranty complete, the covenants should extend to the acts of all persons through whom the title has passed. In some cases however, from their particular circumstances, such warranty or covenants cannot be obtained, as where lands have been sold by trustees for sale under a deed or will, or by the assignees of a bankrupt, for no trustee or assignee, who is in fact a trustee, is bound to covenant for the title, but can only be required to enter into the single covenant that he has not incumbered.

A distinction was formerly attempted to be made between trustees, as to their different characters of active or passive trustees, considering trustees for sale, and all trustees who had any thing to act or do, as active trustees; and those who had merely a dry legal

legal estate without any discretion or power of acting, as passive trustees, and the object was to obtain a covenant for further assurance from the former; but this distinction has been long given up, and is never adopted in practice; and now no trustee in any case covenants but merely that he has not incumbered. The strictness is so great that if the party executing the trust is the representative only of the original trustee, yet he is not bound to covenant for the acts of his ancestor or testator, but merely that he himself has not incumbered, and thus there is no covenant against the acts of the original trustee. In all these cases the auxiliary guarantee and security for the title is incomplete, but this is not an objection by a purchaser, for that can only apply to the imperfectness of the title itself,

self, whereas if there was not a single covenant throughout the whole deduction, still the title might be good and marketable, and such as the purchaser could not refuse. No objection will therefore lie on account of the want of covenants in the title, though certainly if such deficiency should be great very particular caution should be shewn in investigating the deduction.

In the consideration also of the purchase deed being as it were a landing place in the title, it may not be deemed extraneous to introduce some observations on the different parts of a deed.

1st. As to the exordium. Deeds may begin in any form, but they generally begin with the form either of This Indenture made,

made, &c. or, To all to whom, &c. the first is called an Indenture, and the last a Deed Poll, and in truth, deeds as to this point are divided into two sorts only, indentures and deeds poll, and this not with reference to the form or words used in the beginning, but depending solely on there being or not being the act of cutting the deed instar dentium. It is by this act only that the deed is an indenture; the reason of this distinction has ceased, but still the operation of the deed as an indenture depends on the distinction. Formerly no deed was cut in this way unless there were two or more parts of it, and then the several parts were cut together, and of course there would be an identity in the cutting, and consequently the identity of each part might be determined by the cutting. This was the original reason, but the habit

habit now is to cut a deed if there be only one part of it, and even where there are two or more parts to cut each part separately, and often in a different manner from the others. There are however numerous acts of parliament which require the deeds made under them to be indented. See the Statute of Enrolments, 27 Henry VIII. cap. 16; 27 Henry VIII. Statute of Uses as to Jointures; 34 Ed. III. c. 15; 37 Henry VIII. c. 16; 32 Henry VIII. c. 28. enabling Statute to grant Leases; 7 Eliz. cap. 13. regulating the Sale of the Bankrupt's Estate; 43 Eliz. cap. 11. as to Contracts relating to draining and binding the crown; and 9 Geo. II. cap. 36. the Statute of Mortmain. Now no deed can be good under either of these acts, unless it has been actually cut, for the form only of the indenture, without

without actually cutting the deed will not be sufficient. So a deed beginning in the form of a deed poll will yet, if actually cut, be good as an indenture within either of the above statutes. It is the act of cutting alone which distinguishes an indenture from a deed poll. It is also most material to observe, that powers often require the deeds in execution of them to be by indentures; the power of leasing for instance generally requires it, and if a deed intended to operate in execution of a power be not indented it will be void, inasmuch as the indenting is one of the requisites of the power. This point as to the execution of powers is most important, and should be strictly attended to. The practical result is, that it is always the safest plan to prepare a deed by indenture, and to indent it.

2nd.

2nd. With regard to the date, and the insertion of the reign, and the dominical year. All this is not absolutely necessary to the operation of the deed, and when conciseness is greatly an object you may omit the reign. A deed takes effect from the delivery, and the date is only evidence of the time of the delivery. If the date be impossible, as if it be on the 30th of February, still the deed remains good, so if by accident the date be wrongly inserted, as if the false dominical year be mentioned, as if 1814 be inserted for 1813, still this would not avoid the deed, but the delivery would be the time of its operation. If any case of this sort, viz. if a mistake in the date should occur in practice, the time of the delivery should be mentioned in the attestation, with a reference to the mistake, if it be detected before the attestation is signed,

signed, but if not till afterwards, then a confirmatory attestation should be inserted, or some memorandum of the time of delivery indorsed on the deed, and signed by the parties and witnesses, or such of them as might be then living. In some particular cases perhaps, the date itself may be material. As in bargains and sales under the statute which requires inrolment within six months from the date. And as to recovery deeds, which must be executed during the term, suppose by accident the deed should bear date the day after the term, but should actually be executed the last day of the term, there could be no doubt, I should conceive, but that the deed would be good, the fact of the execution of the deed within the term being satisfactorily proved.

With

With regard to the parties to a deed, it is often a question in practice how parties should stand in a deed, whether according to the worthiness of their respective estates, or according to the order in which they act in the deed; thus, if there be a first mortgagee for years, and a second mortgagee in fee, and the mortgagor sells, then whether the first or second mortgagee should be the first party, viz. the first mortgagee as being the first acting party, or the second mortgagee as having the first estate of freehold, and consequently the first most worthy estate in the eye of the law; upon a due consideration of this question, the result seems to be, that the parties should stand according to the worthiness of their respective estates, and that in this case, the first mortgagee being for years only, should stand after the second mortgagee,

under such trustee, the third party, the trustee of the remainders over, and the fourth party the cestui que trusts under such last mentioned trustee; in order where there is a break in the legal fee by the division of an estate for life from the remainders over upon separate trusts, that the cestui que trusts of each estate, according to their respective priorities, may immediately follow their respective trustees. Another exception is, where there is an estate for years holden upon trusts, as well as an estate of freehold, in that case the cestui que trust for years should immediately follow the trustee of such estate. It will be observed, that in the above arrangement the vendor follows ultimately all the parties interested in, or whose concurrence is necessary to make out the title, but with reference to the purchaser and his trustees, the order of succession is reversed,

reversed, and the purchaser stands first, and each trustee in gradation, according to the degree of estates which they take; thus the trustee of the fee, or of any estate of freehold, before the trustee of a term, and where more than one term is assigned, of course the trustee of the first term before the second, and so in succession. It may be here observed, that through erroneous practice, several terms are often assigned to the same trustee. This should never be done, except where the terms are crossed; thus, suppose a party chooses to keep on foot four terms, he may safely assign the first and third to one, and the second and fourth to another, and in this way each intermediate term existing in a different party prevents a merger, but as is often found to be the case, several successive terms are assigned to the same trustee, the consequence of which

which is, that all these terms, except the last merge in the last, and thus the last term is the only operative protective term. I have already advised the preservation and continuance of one term only, and that to be the first and earliest of which the legal creation and deduction can be satisfactorily proved, and then all these inconveniences and difficulties will be obviated. Where however peculiar circumstances require the continuance of more than one term, no two terms immediately expectant on each other should be assigned to the same trustee, for by such conjunction a merger would be the certain consequence. So to go for a moment into marriage settlements where there are different trustees to take the seisin, and to preserve the contingent remainders, and also to take different terms for various purposes, the trustees of the fee should precede

precede the trustees of the terms, and also the trustees of the different terms should be arranged in succession, according to their several priorities.

In almost all cases, and indeed in every case except those hereinafter specified, the names and descriptions of the parties should be stated, but in the cases I have referred to, being such as where a person entitled to a particular estate cannot be ascertained, and yet it is necessary that such identical person should be a party, as where a term or other particular estate, right, title, or interest, is intended to be surrendered, merged, released, or extinguished, and this effect can only be produced by making the persons entitled to the next immediate estate in remainder parties, and when it is not perfectly clear in whom this next immediate estate is vested, there

there the parties should be by reference, thus, and the person or persons who at the time of the execution hereof shall be seised, or possessed of the next and immediate estate after or expectant on or subject to the estate, right, or interest, hereinafter intended to be merged, surrendered, released, or extinguished, as the case may be. This mode of making the surrenderee or releasee a party by reference, is certainly the safest plan, for then there can be no doubt but that the surrender or release is made to the right party, whereas if you make a particular person such party, you take upon you to determine his capacity of effectually accepting such surrender or release.

So also in a case which sometimes occurs in practice, where a purchaser, to whom the estate has been conveyed to uses

uses to bar dower, sells again a small part, and wishes to make the assurance by way of appointment only, to save the expence of a lease for a year, or where in any case the party sells, and conveys in execution of a power, not having at the same time the seisin, here it is advisable, and indeed necessary, to make the person having the seisin a party, in order that the covenants may be entered into with him, for otherwise the covenants will be in gross. To shew this necessity more clearly; a covenant is a common law liability giving a common law remedy, and can accrue only to a common law estate, so as to run with the estate. Now the only person having the common law estate is the person having the seisin, for the cestui que use is a stranger at common law, and only takes the legal estate, and becomes legal owner

owner by the operation of an express statute, viz. the statute of uses, and therefore can take no more at law than what the statute expressly gives him, and this is only to transfer to him what was in the common law owner; but if these covenants are not entered into with the common law owner, he of course has nothing which the statute can transfer. The difference between a covenant being in gross and running with the land, is, that in the former case it is a fixed right, accruing to the covenantee personally, and remaining in him and his representatives. No action can be brought under the covenant but by him or his representatives, and in his or their name or names, and this without regard to his continuing or not continuing owner of the lands to which the covenants refer; but covenants that run with the land accrue to the covenantee

nantee only while he is owner of the land, and if he parts with it are transmitted with the land to each successive owner, and are thus said to follow or run with the land, and it is only necessary to shew the legal ownership of the land, or in the law phrase the terre-tenancy, to found the right to the action of covenant. I repeat, therefore, that where a deed purports to be a purchase deed, and operates as an appointment only in execution of a power, so as merely to pass the use without transferring the seisin, and covenants for the title are inserted in such deed, it is necessary to make the person or persons, having the common law seisin, parties, in order to make the covenants run with the land, and the description should be by reference, thus: "And the person or persons for the time being, having the common law seisin of the hereditaments hereinafter appointed,

or

or intended so to be of the —— part." There can be no objection to the description by reference, for the law deems that certain which can be rendered certain.

I shall now add some instances of the order of the parties in a deed, according to the gradation above stated:

1st. Vendor 1——Purchaser 2.

2d. Trustee of legal estate, 1—Vendor 2.
Purchaser, 3.—Dower Trustee, 4.

3d. Trustee of legal estate, 1.—Vendor, 2.
Trustee of outstanding term, 3.—
Purchaser, 4.—Dower Trustee, 5.
Term Trustee, 6.

4th. Vendor,

4th. Vendor, 1.—Morgagee for years to the intent to merge the term, 2.—Purchaser, 3.—Dower Trustee, 4.

5th. Trustees for sale, 1.—Dowress, 2.—Consenting Party, 3. Purchaser, 4.

6th. Mortgagee in fee, 1.—Trustees for sale, 2.—Mortgagee for years, 3. Incumbrancer by lien claiming under the trust deed for sale, 4. Dowress, 5.—Annuitant, 6.—Vendor, 7.—Purchaser, 8.—Dower Trustee, 9.—Term Trustee, 10.

7th. Tenant for life, 1.—Remainder-man in tail, 2.—Intended tenant to the Præcipe, 3.—Demandant, 4, Purchaser, 5.

8th. Mortgagee

8th. Mortgagee in fee, 1.—Second Mortgagee in fee, 2.—Trustees for sale, 3.—Incumbrancer claiming by lien under the Trust Deed for sale, 4. Dowress, 5.—Judgment Creditor, 6.—Annuitant, 7.—Vendor and Mortgagor, 8.—Purchaser, 9.—Dower Trustee, 10.

9th. Trustee of an estate for life, 1.—Feme covert cestui que trust for life for her separate use, 2.—Trustee of the remainder in fee, 3. Cestui que trust of the remainder in fee, 4.—Purchaser, 5.

These instances will apply to almost all cases, and will follow the gradation which I have before stated, viz. the legal estate before the equitable estate; the

the freehold before the term or chattel interest; estates or interests in the lands before rights or interests issuing out of the lands; all estates, interests, liens, or rights, before mere consenting parties; the vendor to follow the whole order of his parties, but the purchaser to precede the parties on his behalf. The purchaser's trustees of the fee, or of any estate of freehold, to stand before the term trustees; and the term trustees to rank in succession, according to the priorities of their respective estates. These rules appear the most simple and correct for the position of parties in a deed; of course they are mere rules of convenience, and of no further importance than as their observance will add to the regular form of the draft; for it is clear

clear, that in what way soever parties are placed in a deed, it makes no difference in the operation of the deed if all the necessary parties concur.

Next as to the recitals in a deed. In the origin of the transfer of property no recitals were inserted in the conveyances or assurances then used, for they were unnecessary. The simplicity of those times did not admit or call for the complex limitations which the ingenuity, necessities, and conveniences of later times have introduced. There then existed no artificial mode of limitation. When a man purchased an estate it became his own absolutely, and

(To be continued.)

on his death went in due proportions to his wife and family. Hence the origin of dower, and also of the regulation of the law of descent, I say the regulation of this law, because its first formation rested on the primary principle of all property, namely, possession. That possession is property may be considered as an axiom in our laws of property, and if you trace this principle through all these laws you will find, that however involved it may be in some cases from the military rigidity of the feudal system, still it is the pervading cement of the whole, and links together its several parts; thus a title founded on possession alone, after sixty years is good. Also a title founded on a freehold seisin, subject to the party having the rightful title

being capable of claiming it, is after a fine, and five years non-claim, a good title. Likewise the whole body of conveyancing, (that is the nature and effect of the several kinds of assurances) rests on the principle of possession. All common law conveyances require actual possession, and all statutable conveyances, or conveyances under the Statute of Uses, require implied possession, and without this actual or implied possession applying respectively, the respective assurances would be inoperative. So also the doctrine and law of real rights and remedies are founded intirely on the principle of possession. Further, the common law as used in contradistinction to the doctrine of equity, acts so strongly upon this principle, that it neither recognizes any interest, nor consequently the

the passing or assurance of any interest, unless it is substantiated by possession; thus if a party is disseised of an estate the disseisor is during the disseisin the owner at law, and may pass the estate by any common law assurance, and the disseisee having only a right and no estate, and consequently no possession or future certainty of possession, cannot at law transfer his right to any person. He may indeed release or extinguish it, but then such release or extinguishment must be made to the disseisor as having the possession, and all actions at law touching the lands must also be brought against the disseisor. Possession also is of itself in some cases a title, as if the disseisee departs beyond seas, or omits to sue for the lands the disseisor has by the mere possession a title against every one else.

Upon the same principle too the doctrine of occupancy is founded, and which from its resorting to this principle in the case of a defective tenure, as the case of occupancy is, shews strongly the weight and influence of the principle on the original formation of our law of real property. This principle to which I have now but cursorily adverted, is so important, and its full consideration and investigation would so open the reasons and grounds of most of our laws of real property, that in a subsequent chapter it will be discussed at large.

The object of recitals is to give a statement or history of the several acts or events which have occurred relating to the title, since the last principal conveyance, in order to shew a general connection

tion throughout the title. The general plan in the recital of each purchase deed is to go back to the last purchase deed, and thence to deduce the title either by reference, or specifically to the present time, because the covenants in each purchase deed ought to be connected, as far as possible, with the covenants in the former purchase deed, so as to shew an entire chain of warranty. With regard to the language of recitals, it should be plain, simple, clear, and perspicuous, going immediately to the fact, without any ornament or circumlocution, and stating at once the deed or event intended to be recited in the most perspicuous manner. In some, and indeed many cases, it is not necessary to state specifically the several deeds, events, and documents occurring between the respective purchase deeds, but

but where the intermediate title, after having been vested in or accrued to divers persons, has again become united previously to the sale, or if it has not become wholly united, yet it has become so in a great measure, it will be sufficient to state by a reference in a general way, that under and by virtue of divers indentures and assurances in the law, and particularly, &c. (mentioning the principal ones and such as contain the recitals of the others, in order for no deed to exist relating to the title but what is referred to or is noticed in a deed referred to so as to put the purchaser upon his inquiry) the messuage, &c. became vested in, &c. or became settled and limited To the use of, &c. thus stating the effect of these several deeds and documents generally referred to, and shewing their ultimate operation.

There

There are certain recitals which may be called consequential, that is which follow naturally from preceding recitals, thus the recital of the death and probate of the will of a testator after the recital of his will. So the recital of the descent after the death of the intestate. So the recital of the fact of marriage after a marriage settlement. So the recital of non-payment of the mortgage money and interest after a mortgage ceasing the term "*in the event of*" payment at the time stated in the proviso. So the suffering of a recovery after the recital of a recovery deed. So the levying of a fine after the recital of a covenant to levy such fine.

These recitals always necessarily follow, and may be reduced to common forms. Indeed most of the recitals usually necessary

gessary to be inserted in deeds may be reduced to such forms as will generally serve every occasion. Some of these forms are here added, thus:

1st. The recital of a will.

And whereas the said A. B. by his will in writing, bearing date the day of and duly executed and attested for passing real estate, gave and devised All, &c. [state the words as to the parcels in the will] *unto and to the use of his son the said C. D. his heirs and assigns for ever.*

[If the devise be for life with remainders over, or subject to any condition, or in any respect a complex devise, then you state the several limitations or conditions

ditions shortly.] *And the said testator appointed the said C. D. sole executor of his said will.*

And, whereas the said testator departed this life shortly after the date and execution of his said will, without having in any manner altered or revoked the same. As by the said will proved by the said C. D. the executor aforesaid, in the court of some time in the year, and now remaining in the registry of the said court will appear.

Now this form will serve for all cases of this and a similar kind, and it should be an invariable rule for the recital of the death and probate to follow immediately the recital of the will. It is not necessary to state the precise day or even month in which

which the will is proved, but you should state the year, and you should also state the court, in order to know where it is deposited, if from any occasion it should be resorted to.

Again, the recital of a marriage should be in this form:

And, whereas the said intended marriage took effect, and was duly solemnized between the said A. B. and C. D. shortly after the date and execution of the last recited indenture, to wit, by licence in the parish church of on the day of

Here the time of the solemnization of the marriage, and its being solemnized by licence are expressly stated, and it is adviseable

advisable to state these particulars specifically where they are accurately known, or in cases of great importance, but yet as a general rule, it is not necessary, but merely to state that the marriage took effect, and was duly solemnized is sufficient.

So in the case of an intestacy and descent, the recital is in this form:

And, whereas the said A. B. departed this life intestate, some time in the year, and letters of administration of his estate and effects were shortly then after granted and committed to by the court of And, whereas the said A. B. left the said K. L. his heir at law, to wit, as the next brother to I. J. who was the eldest son, and heir at law of G. H. who was the eldest brother, and heir at

at law of E. F. who was the only son, and heir at law of C. D. who was the only sister, and heiress at law of the said A. B.

Again, the recital of the non-payment of money, pursuant to a proviso in a mortgage, and which should always follow the recital of such mortgage, is in this form:

And, whereas the said sum of £ and interest were not paid at the time appointed for such payment by the said recited proviso, by reason whereof, the said term became absolute.

It may be added, that a term can only be made to cease in a deed creating the term, but after a term has once become absolute, no proviso in a subsequent deed can determine it.

Such

Such proviso, however, in an assignment of a term, may determine such assignment, though it cannot the original term, and this observation is of practical use with reference to assignments or underleases, in consequence of the rigid doctrine laid down in Dumpor's Case, 4 Co. 119, and see Luxmore v. Saville, 16 East Rep. 87.

Again, the suffering of a recovery, or the levying of a fine is recited in this form, namely:

And, whereas a common recovery was duly suffered in term, in the year of the reign of, &c. pursuant to the last recited indenture, in which recovery, the said A. B. was demandant, the said C. D. tenant, and the said E. F. vouchee, and who vouched over.

So

So as to a fine:

And, whereas a fine was duly levied in, or as of term, in the year of the reign, &c. pursuant to the said recited covenant to that effect, contained in the said last recited indenture.

It will be seen, that in stating the suffering of a recovery, you mention the demandant, tenant, and vouchee, or at least, you mention the vouchee, and that he vouched over, the last alone is often adopted, and is perhaps sufficient, but in stating the levying of a fine, you do not mention the parties, but merely state the fact of the fine being levied in due performance of the covenant. It is important to state the vouching over, for that gives the recompence which causes the bar.

These

These, and all other recitals of this nature, necessarily following the preceding recitals, and being as I have before termed them, wholly consequential, may be drawn out, and kept as common forms, and would greatly facilitate the draftman in the preparing of any lengthened draft. They would also assist him too in a point of great importance in preparing a draft, namely, in regularly deducing the facts, deeds, and documents, to be recited in trucing the deduction in the deed. In truth, in order to frame a draft perfectly, the disposition and series of the several parts forming a skeleton of the deed should be drawn out previously to its commencement, and then the filling up of the different parts would be mere labor, without much mental exercise.

This

This mode of drawing out the skeleton or outline of the deed, would perhaps, more than almost any other mode, instruct the student in the system of drawing, and would also indeed, from the necessity that there is of stating the several recitals in strict succession, as the facts and events grow out of each other, tend greatly to bring his mind to a legal analytical habit, and certainly would particularly facilitate the labor and dispatch of preparing the draft. When the outline of the draft is framed and found to be correct, then by recurring to the common form book for the several recitals, taking it for granted, that it has been part of his previous study to have arranged the different parts of a deed, and among others the forms of recitals, from a comparison of the best drawn precedents, he will find that these forms will in fact supply the greater part of

of the draft. Now the form of the recital of an agreement for a purchase by private contract might be made a common form; thus, the student should compare the several recitals of such agreements which he can find either in printed or manuscript precedents, observe the variation that may exist between the several forms, and from them frame one for his own use. So also, the recital of a sale by auction. So also, the recital of an agreement for a loan. In all these cases, there will be unquestionably frequent necessity for alteration, to adapt them to the varying circumstances of each case, but still the principal part of the form will always remain. The mode of acquiring a knowledge of drawing, will be treated fully in a subsequent number on the best plan of education and instruction for the conveyancing department.

There is also a difference to be observed in recitals, according to the nature of the deed or instrument in which the recitals are inserted; thus, in a purchase deed you should go back to the last purchase deed, and recite or refer shortly to that, and then state the subsequent deduction. If such deduction be not long or multifarious, you may recite separately each document, thus: If the last purchaser afterwards made his will and devised the lands intail, and then the tenant intail suffered a recovery, and afterwards devised the lands to trustees upon trust for sale, and the sale is made by the trustees, here you recite that under and by virtue of the last purchase deed, stating the date and parties, all the lands, &c. were conveyed and assured unto, and to the use of the last purchaser,

purchaser, his heirs, and assigns for ever; and then you recite the will, death, probate, recovery deed, recovery and second will, death, and probate respectively; but, if the intermediate deduction between the last purchase deed, and the present sale be very multifarious, as if the last purchaser had made and created numerous mortgages and incumbrances to different persons, and which had been often transfered, but which had ultimately become vested in one person, who intended to join in the present purchase deed, then it is not necessary to recite separately these several mortgages, incumbrances, and transfers, but merely to refer to them, as by stating the fact, that the party had made and created several mortgages to divers persons for securing various sums of money,

and of which sundry transfers had been made, but all which said mortgages and incumbrances ultimately under and by virtue of certain indentures of lease and release, bearing date respectively, and made between respectively, (stating the date and parties,) and also under and by virtue of the several indentures, acts, deeds, events, and assurances in the law, therein recited or referred to, had become consolidated and wholly vested in (the party concurring.)

Again in some cases the mode of recital is uniform, as in the assignment of a term or other derivative interest, you always recite the creation of the term or interest, for the reason that you cannot assign more than is created, and in the recital of the deed of creation, you state the

the parcels at length, and also in other respects recite the deed fully, so as to shew the precise period and terms for and on which the derivative estate and interest is granted, and afterwards if this term or other derivative estate be often assigned, it is not necessary to state particularly every intermediate assignment, but merely the last deed in this way, namely, that under and by virtue of divers mesne acts, assignments, and assurances in the law, and ultimately under and by virtue of, &c. [stating the names and parties of the last assignment] all and singular, the said [premises] were assigned to the said for the residue of the said term.

Now it may sometimes happen, that the last assignee by deed, is not the present

sent assignor, but that the present assignor gains his title under some will or other act or event, subsequent to the last assignment. In this case, after stating by general words, as before explained, the title to the last assignment, you recite the subsequent will, act, or event, deducing the title from the last assignee to the present assignor specifically, and then in the usual way proceed to the recital of the agreement to assign.

Another consideration in the doctrine of recitals is, whether in the case of any known defect in the title it is advisable to set it forth in the recitals. The answer to this is clear, that it is not advisable to set forth any defect, unless it is certain that such defect is remedied by the deed in question, or some concomitant

comitant deed. When you can shew an effectual and complete remedy then state the defect, but without this never state it, because by stating it you admit the defect on the face of the deed; whereas though you may be sure that the defect exists, yet the onus probandi may be on the other side, and there may be great difficulty in proving it, and the want of proof will of course amount to the want of shewing the defect. No notice therefore should ever be taken of a defect in a title, unless you shew at the same time that such defect is clearly and satisfactorily remedied. Further, in reciting an estate tail which has been barred by recovery, it is not necessary to go beyond the limitation of the estate tail, but you may then safely say with remainders over, afterwards setting forth the recovery.

In

In the recitals of a marriage settlement you are not so particular as in those of a purchase deed, because a marriage settlement more resembles an ex parte instrument, and it is not usual to give that strictness to the investigation of the title which is indispensible in the case of a purchase, or in any transaction which wholly changes the ownership of the property. In marriage settlements therefore it is sufficient to state the simple fact, that the party is seised of the lands intended to be settled, without setting forth the title. So in annuity deeds and second rate securities where the parties do not deal upon strictly equitable terms, but where the borrower pays an exorbitant interest for his money. In these cases the increased interest must be considered as an equivalent for the hazardousness of the security,

curity, and therefore it is not the practice to set forth minutely the titles as in purchase deeds, and those instruments where the dealing of the parties is more equal.

In marriage settlements there are two modes of reciting the marriage treaty, one is the old mode of shortly stating the effect of the intended uses in the recital, but which is now generally disused, except in very particular and important cases, and the other is the present mode of referring to the uses and trusts. The last seems the best in every point of view, for if you state the effect of the uses in the recital, and it should vary from the uses actually limited, a difficulty would arise as to the true operation of the settlement.

It

It may also be useful to add a few words on the language of recitals where the deed embraces many objects, and it is necessary to state in the recital the agreement of the parties to these several objects, there the words *first*, *secondly*, *thirdly*, and *lastly*, applying to the several objects will tend to perspicuity. It may also be added, that all parentheses should be avoided as much as possible; generally speaking, the words *(to wit)* are more technical than *that is to say*. Where a statement is important, and you want to impress the fact strongly, this last expression "*to wit*" may be used with effect, as in the conveyance of an estate which commences from a marriage, after reciting the settlement, you recite the fact of marriage, and admitting that it is necessary to set forth the day of the marriage,

marriage, in order to shew the precise commencement of the estate conveyed, then you recite the fact of marriage, thus:

And, whereas the said intended marriage between the said and took effect, and was duly solemnized shortly after the date and execution of the last recited indenture, to wit, on the day of in the Parish Church of

Where you recite a circumstance that is probable, but cannot be ascertained, the technical words, are: "*And, whereas there is reason to believe that, &c.* [stating the circumstances.] So where you state a consequence of law from any prior fact, the technical words, are: "*by reason whereof,*" *&c.* as in stating the death of one

one of two joint tenants, by reason whereof the whole estate has survived to the other. So in stating the death of a tenant for life, by reason whereof the estate in remainder hath come into possession.

These short statements of the legal consequences from the facts in the title, are I think to be recommended, if not carried to too great a length, for they greatly elucidate the deduction, and assist the reader in his perusal of the draft.

This mode, indeed, of proceeding in the recitals link by link, through the whole series of deduction, and stating the legal conclusions from the fact is the great art of attaining perspicuity and accuracy in a draft. It also gives an air of science to the instrument, and raises it above

above a mere dry detail of facts. Unquestionably, a deed does not admit of ornament, and any attempt at fine language is ridiculous, and should be most cautiously avoided, but there is no reason why, without a particle of affected style, but on the contrary with the chastest and most simple language, a deed might not be made scientific as a model of legal deduction and analysis. Recitals are in fact the history of the title, and the perfection of all history is to contain a statement of facts in the most simple and appropriate language, with such conclusions as such facts evidently and certainly justify.

The above observations, however, as to the statement of legal conclusions from the facts of recitals, should not be so multiplied

multiplied as greatly to lengthen the deduction, but where these conclusions frequently occur, it is better to omit their separate statement, and in one general recital, either at the end of the deduction or in such part of it as the draftsman thinks it will best come in, to state generally, that under and by reason of the several events, acts, matters, and things hereinbefore stated, the said premises have become and are now vested in the said A. &c. according to the ultimate legal conclusion on the title.

In some cases it is proper for recitals to be very full, as where the operation of the deed itself is derivative or relative, as for instance an appointment in execution of a power, and particularly in a case which often occurs, a conveyance and

and sale under a power of sale. Here it is proper to recite the power, in pursuance of which the deed is made most fully, and indeed almost verbatim.

Again, in executory instruments or deeds of arrangement, it is often the practice, and indeed, generally speaking, proper to recite the object or basis of the agreement between the parties, and not to proceed at once to the operative part without shewing the intention. Indeed, in common conveyances, it is not unusual to insert immediately before the witnessing part a short introductory recital, that the parties had agreed, that the lands should be conveyed and assured to the uses, and in the manner hereinafter appearing, instead of going in an abrupt way to the witnessing part after an unconnected recital.

It

It is also often a question for consideration in framing certain deeds, such as purchase deeds when the purchase is by trustees under a will and the lands are to be settled to numerous uses stated in the will; and also in settlements made after marriage in performance of articles before marriage; whether it is better to state the uses fully in the recitals, or to refer generally to them, and afterwards to convey the lands to these uses specifically. The better opinion certainly seems to be, to state the uses in the recital, and then to convey the lands to the same uses, or such and so many of them as should be then existing undetermined and capable of taking effect. In recitals of this sort, you state fully the several uses, but you need in no respect state or refer to the powers.

The

The reason is this, the uses limited by the deed, or in execution of any of the powers, are actual limitations; but powers till executed are mere possibilities, under which in the end no estate may be created to affect the title, and therefore need not be stated, though in the conveyance of the deed to the uses by reference, the powers and all uses to be limited under them, would be equally included with the uses.

Where a will is the first recited instrument, it is proper to state the seisin of the testator, thus:

And whereas A. B. of &c. being, at the time of the date and execution of his will hereinafter recited, and so continuing without intermission till the time of his death,

death, seised in absolute fee simple of and in the messuages, &c. and hereditaments hereinafter described, and also released, or intended so to be, with their appurtenances, Did by his Will in writing, bearing date, &c.

Or you will sometimes find this form used:

And whereas A. B. of &c. being at the time of the date and execution of his will hereinafter recited, and also at the time of his death, seised, &c. for an intermediate disseisin, if the testator be afterwards remitted, is not a revocation, since by the remitter he is in of the former estate.

(To be continued.)

The next class of recitals embraces negative recitals, or those which state a direct denial of the existence of facts, in order to obviate all presumption of their existence, and save the necessity of future inquiry on the point; thus, if lands descend to a daughter, and she afterwards marries, and some years after makes her will by her married name, now in this case it will be a natural inquiry by a purchaser, whether there was any settlement on the marriage? and if there was not any, then in the purchase deed there should be an express negative statement to this effect, viz.

And, whereas the said daughter afterwards intermarried with A. B. of, &c. but no settlement or assurance of the

said lands and hereditaments was made before or after such marriage, or at any time during her life. And whereas the said daughter survived her said husband, and then after by her will, &c.

Without this negative recital the suspicion of a settlement would be apt to hang about the title; and certainly in numerous cases, negative recitals to the effect above stated greatly tend to the satisfaction and certainty of the title, and save much future trouble. Also, where general statements are made, it is advisable to add negative words, to limit and shew the precise extent of such statements; thus in reciting the issue of a marriage, if you state that there was issue, so many children, without limiting such statement, the mind is not perfectly

perfectly satisfied but there might have been more, for the statement does not positively exclude a greater number; but if you add an express negation that there were so many children and no more, the statement is bounded and certain, and all possibility of doubt is removed.

The above instances are adduced as illustrations only of the utility of negative statements, but these statements apply to numerous cases, and they certainly tend to produce that precision which is essential to legal instruments, and are therefore to be recommended: The rule upon the point under consideration may be thus laid down, that whenever there is a reasonable suspicion, or near possibility of a fact, but yet such

fact does not exist, a negative recital that such fact does not exist should be stated in the next purchase deed. Also, whenever there is a general recital, which by possibility may be extended beyond the fact, it is essential by negative words to reduce and confine it to the precise fact.

The next consideration in recitals is, whether it is necessary to recite any matter which may have led to the negociation for the purchase or subject matter of the deed, but not have formed any part of the consideration for such deed? my opinion is, that this is not necessary, and that it is quite sufficient to state the result of the negociation, viz. the agreement, without entering into the various inducements which may have led to such agreement; but where any collateral

collateral matter at all entered into and formed part of the consideration, there it is indispensible to state it. To illustrate this distinction, suppose A. to have land adjoining B's. lands, and to claim a right of way to his (A's.) land, through B's. land, and B. were to deny this right, and in consequence the parties were to enter into litigation, and during this litigation A. was to agree to sell his land to B. at a fair price, to be estimated by a surveyor: Now in this case it surely would not be necessary to recite the claim of the right of way, or the litigation, because the sole consideration for the lands would be the price fixed by the surveyor, and by the sale and conveyance from A. to B. the right of way would be extinct. So if A. had sold to a third person, it would not be advisable

to the deed: in practice one sometimes meets with deeds which detail the motives for the parties' acting with the most particular minuteness, but this is quite unnecessary, and may even be deemed in the language of equity impertinent; for a deed is not to be considered as a metaphysical disquisition, in which it is necessary to trace the gradations in the process of making up the mind. It is sufficient here to shew the result and actual determination, and the conclusion upon this point may be fairly drawn, that except in one or two particular cases hereafter referred to, it is unnecessary to set forth in recitals the private reasons or motives which led to the transaction, but that it is quite sufficient to state the dry and bare agreement to effect the transaction. The

cases

cases which I have alluded to as excepted are these; where the parties though not strictly incompetent to act with each other, yet act unequally, as where the transaction is between a parent and child, guardian and ward, or trustee and cestui que trust. In these and similar cases, from the greater influence which the parent, guardian, and trustee, has in his relative situation over his child, ward, or cestui que trust, equity scrutinizes with jealousy his conduct in acting, and investigates the motives of each transaction, because there is always abstractedly a primâ facie presumption of an undue influence by the one party over the other. This principle of construction is acted upon by equity in numerous instances, and is founded on due regard to the infirmity of our nature. In some cases

cases of trusts equity deems the temptation so strong, that it actually prohibits the agreement upon any terms, however favourable to the weaker party; thus a trustee for sale, while he remains such trustee, cannot purchase the trust estate, because, being the vendor, if he were permitted to become the purchaser, experience convinces us that in very few cases indeed the sale would be advantageous to the trust. In other instances, being the next class of cases, equity does not absolutely prohibit the agreement, but admits it to take effect under such strict scrutiny that the interests of the cestui que trust be not sacrificed. In these cases therefore which I have alluded to, of parent and child, guardian and ward, trustee and cestui que trust, it is necessary to state in the recital the motives and inducements

ments for the purchase, because they enter into the consideration for the deed, and particularly to rebut the *primâ facie* presumption which would otherwise exist against the transaction. In framing recitals of this latter sort you should go at once to the objection, and state plainly the motives and inducements to the transactions, and the reason of stating them: thus, suppose a son about to embark for India, to whom a distant relation had devised an estate, and who had agreed to sell it to his father. Now in a case of this sort the recitals should stand thus, 1st. State the purchase deed to the devisor. 2ndly, The will devising the lands to the son. 3rdly, The death and probate. 4thly, This recital. *And whereas the said A. B. the son, being about to depart for India, in the civil service of the*

the East India Company, is desirous of selling the said manor and hereditaments, so devised to him as aforesaid, in order to employ the purchase money arising therefrom for his promotion and benefit in India, and the said A. B. the elder, being desirous of retaining the same manor and hereditaments in his family, hath proposed to his said son to purchase the same, to which the said A. B. the younger hath willingly assented and agreed. And, whereas in order to rebut any presumption of an undue influence on the part of the said A. B. the elder, in the negociation and completion of the said purchase, he hath proposed to and agreed with his said son, that the said manor and hereditaments shall be valued by C. D. of, &c. land surveyor, a competent and indifferent person, between the parties, and that the amount of such valuation shall be the purchase

money

money for the said manor and hereditaments. And, whereas the said C. D. hath accordingly valued the said manor and hereditaments, pursuant to the said last recited agreement, and the amount of such valuation is the sum of as they the said A. B. the elder, and A. B. the younger do hereby respectively admit.

In cases therefore like the last mentioned, where the relative situation of the parties throws a primâ facie suspicion on the transaction, it is necessary to state the preliminary negociation, but where the parties are equally circumstanced, and there is no presumption or suspicion from their relative situation, and in general cases there surely is no necessity for detailing the motives to the agreement, but only to state the agreement itself.

An

An observation occurs by the way on the last form of recitals. It will be observed that it is direct, and goes at once to the object, without any circumlocution. This is a mode of framing recitals to be dwelt upon, and strongly recommended to the student. It forms one of the greatest perfections of a well drawn deed. Let the student first consider, and have a clear idea of the fact or deed to be recited, and of its operation and bearing on the title, and then state at once the fact or operation of the deed in the most direct way.

The preceding observations as to the detailing of the motives of a transaction effected by the deed, leads to the consideration of a distinction between the assurance of real and personal property.

I have

I have in a former Number stated it to be an axiom in law of extensive operation in conveyancing, that *possession is property*, and that in fact the law does not permit or recognize the assurance of any property that is not accompanied with the present possession, or the certainty of future possession. A kindred axiom equally operative as to assurances, is that *the law abhors litigation;* hence the doctrine of Maintenance and Champerty; hence too the above doctrine, that no property can be assured at law without the possession, because without that you would in fact only pass the *remedy* and not the *right,* and which would be to authorize a transfer of litigation. Upon these two axioms is built this important distinction in practice, viz. that as to property assurable at law, the purchaser has only

only to look to himself and his own acts, and if he is a purchaser bonâ fide for a valuable consideration, and without notice and a good legal title is assured to him he will be safe; but as to property not assurable at law, as choses in action for instance, notwithstanding the purchaser may be satisfied as to himself and his own acts, that he is a purchaser bonâ fide for a valuable consideration, and without notice, yet he will not be safe if there was any mala fides in the contract by which the chose in action originated; thus, suppose A. to convey a freehold estate to B. for an illegal consideration, and afterwards B. to sell to C. and C. after investigating the title, and ascertaining its accuracy to take a conveyance to himself in fee for a fair consideration, and without any notice of the arrangement between

tween A. and B.: In this case C would be safe, for being a purchaser bonâ fide for a valuable consideration, and without notice, and having a good legal title in himself, he would be protected at law, and equity would not interfere against an innocent party. But if under the circumstances above mentioned A. had given B. a bond for the like consideration, and B. had sold this bond to C. at the fair market price, and C. being a purchaser of the bond bonâ fide for a valuable consideration, and without notice, and having investigated and ascertained the title, had taken an assignment to himself, and afterwards the vicious consideration for the bond had been discovered, here C. would lose his money, for he would take subject to the original equity, as it is termed, that is, subject to

the validity of the original contract, or the contract originating the security, and which in this case would be the giving of the bond for the illegal consideration, and consequently a void consideration, and one upon which the bond could not be supported. The reason of the distinction is this, equity will not interfere against a bonâ fide purchaser for a valuable consideration without notice. Admiting then the passiveness of equity, the parties must stand upon their strict legal rights, and consequently, in the first instance above-mentioned, the purchaser having a legal title under a good consideration with his vendor will be safe, for the former transaction is closed as against him; but in the last case, viz. as to the bond, the original legal title still continues, and must be acted upon, for though

though the benefit or ultimate beneficial receipt of the money is assignable in equity, yet the legal right to receive it remains untouched at law between the original parties to the bond, and the only remedy for the recovery of the money secured by the bond is an action on the bond by the obligee, or his legal representative, against the obligor or his representatives. The assignment therefore of the bond only amounts in effect to a power of attorney to the assignee, to use the name of the obligee in suing on the bond; and as the action for the recovery of the money is between the original contracting parties, of course the law permits them to enter into the original contract, and consequently the vicious consideration may be proved, and being proved the contract will

be void altogether, and this notwithstanding any one or more assignments of the bond to any innocent purchaser or purchasers for a valuable consideration, for the law takes no notice of these assignments, a bond not being assignable at law, but considers the original contracting parties as the only parties interested. To apply these observations to the subject of recitals, it is important to consider whether it is possible to insert any recital in the equitable assignment of a chose in action, which will fortify the purchaser against any defect in the original consideration. It seems, however, that no recital can be of service in this case, and that acting upon the observation shortly since stated, viz. that the court will always presume in favour of the title, unless there be grounds for a con-

a contrary presumption, it is better not to insert any recital in this case, but to trust to the operation of law. This practical observation, however, is of prominent use, viz. never to purchase a bond or chose in action unless you well know the original parties, and have confidence in the soundness and validity of the original contract. If you have not this confidence, no apparent lowness of terms should tempt you to become a purchaser, for you must take subject to the original contract, and there is no possibility of guarding against any latent or concealed defect of that contract. The preceding observations also suggest some further advice. Whenever you are concerned for a purchaser be careful never to make inquiries as to any former transactions of the title,

title, or the incumbrances of the vendor. So also where you are concerned for the vendor never volunteer any observations, or enter into any unsolicited discussion respecting the incumbrances of your client. In these, as in many other affairs in life, it is wise to remain ignorant, and all that the mutual solicitors should do before the abstract is submitted to counsel is carefully to examine it with the deeds, and to ascertain that there is no fact or document recited or referred to in the deeds which does not also appear on the abstract, and that the abstract is correct in all respects. At this examination the parties should cautiously abstain from all discussion relating to the affairs of the vendor, lest the purchaser should be charged with notice, and thus lose the

the benefit of the protection which he would otherwise derive from the legal title. I am the more anxious in enforcing this prudent and necessary reserve, because young professional men, over anxious to act honourably, might be led into some unguarded information which would amount to notice to the purchaser, and subject him to all the inconveniencies of notice, for notice is communicative, and notice of one deed, event, or fact, is notice of every thing referred to or connected with it. Thus if you have notice of a deed, and another deed be referred to in it, you have also notice of such other deed. And again, if any further deed be referred to in such second deed, you have likewise notice of such further deed, and of every thing contained in that, and

and so on sometimes to considerable extent; whenever therefore the purchaser is likely to be charged with notice, or in the technical language, is put upon his inquiry, the solicitor must at once change his system of acting, and make every possible inquiry respecting such act, event and deed, of which he has notice, and require the production of the deed; but all this inquiry, and in fact every thing relating to the title, except the perfecting of the abstract, should be postponed till the counsel has advised on the title, who will of course point out what inquiries should be made. I repeat that no unguarded inquiries should be made till it is ascertained that the purchaser has no protection against any incumbrance, which on inquiry may be found to exist, for if he has a good legal

legal protection as a sound protective form, then being a bonâ fide purchaser for a valuable consideration without notice, he will be safe, but if notice be proved against him, the same will be no protection, for having notice and buying with notice, he is no longer an innocent party, and equity will not then remain passive, but interfere to enjoin his using the term against the incumbrance. The reserve which I have advised is not only prudent in law, but consistent with the strictest principles of honour, and ought to be observed in all transactions of sale and purchase. The doctrine of notice is so important, and also of such extent, that it will of itself supply ample matter for a future number.

The

The next observation applies to those cases where lands heretofore divided have ultimately become consolidated in one owner, and been sold by him as an entire estate; thus, suppose A. to have acquired by purchase, gift, and descent, or by purchases at different times, divers parts of a considerable estate, the entirety of which he has contracted to sell to B. and you have to prepare the purchase deed; now in this case, if you were to recite the several deeds and facts relating to the premises in chronological order, without reference to any connexion between these several deeds, the recitals would be a mass of confusion, quite unintelligible. In cases of this sort, therefore, the only mode is, to recite separately the several deeds, documents, and events, relating to each separate

rate parcel of the lands sold, taking the principal or most valuable parcel first, and going on with that to the end of its deduction, closing the deduction with some explanatory recital to the effect, *That under and by virtue of the several recited indentures, events, acts, matters, and things all and singular, the said messuage, &c. hereinafter first described, and also released or intended so to be, became well and effectually vested in the said C. D. in whom also the said other messuages, lands, tenements, and hereditaments hereinafter secondly, thirdly, &c. described, became afterwards also vested according to the deduction of such other parts hereinafter contained;* then begin the deduction of the next valuable part, and proceed with that till you vest it in the same person in whom you left the first part, and at the end

end of the deduction of the second part, another explanatory recital should be introduced, (viz.) *that under and by virtue of the said hereinbefore recited indentures of the and days of* (the indentures commencing the deduction of the second part,) *and also under and by virtue of the hereinbefore subsequently recited indentures, acts, events, matters, and things respectively, the said last mentioned lands and hereditaments became also vested in the said C. D. jointly with the said messuages, tenements, lands, and hereditaments hereinbefore first deduced;* and then go to the third and remaining parts, and deduce the separate titles to those parts in the same manner as is mentioned with reference to the second part. When all the parts are brought down to and

(To be continued.)

united in one person, then you go on with the recitals as to the united estate. The explanatory recitals that I have recommended, are of great utility in showing a clear deduction of the title on the face of the deed. In the above plan, the parcels in the recited deeds are referred to as being afterwards, in the description, first, secondly, and thirdly described, &c.; and this mode of reference will serve, even when, from the alteration of the lands since their union, it is not possible to mark out the precise lands in each separate deduction, because in those cases you first insert in the parcels the old descriptions from the last purchase deeds separately, taking them in the order they are referred to in the recitals, as first, secondly, thirdly, &c.; and then after these separate descriptions, you add

a new entire description according to the present state of the united property, introducing such new description with a clause to this effect, viz. *But which messuages, tenements, lands, and hereditaments comprised in the several separate descriptions hereinbefore contained, are, by reason of the various alterations and improvements since made therein, intended to be now and from time to time hereafter known and set forth by and under the general and united description next hereinafter contained, that is to say, All, &c.* (and here state the new description.) After this deed, containing the old and new descriptions, the old description ceases, and the new one becomes the only description to be inserted in all future deeds, because the object of stating both the old and new descriptions together,

ther, is to supply and perpetuate evidence, that the lands comprised in the old separate descriptions, and the lands comprised in the new united description, are the same lands; and this being once done, the object is abstractedly accomplished. But yet it may be prudent to repeat the old and new descriptions together in more than one deed, in order that the evidence of the identity of the lands may not depend on a single deed, which may be lost.

Sometimes, when parcels are separately deduced in the recitals in the way above directed, and it would too much lengthen the draft to insert the separate descriptions successively at length in the parcels, you can in the recitals refer to the parcels contained in each separate de-

 duction,

duction, as being then called by particular names (naming them), or in the occupation of particular tenants, also naming them, or generally referring to some distinctive mark in each old description, and then afterwards in the description of the parcels in the draft you are drawing, state at once the new description, without any previous reference to the old descriptions or any other preface, and after such new description, say, *And which said messuages, tenements, lands, and hereditaments were formerly divided into several separate parcels, and such parcels respectively were formerly called by the several names of* (stating the names), *or were in the several occupations of the aforesaid* (old tenants, naming them), or otherwise referring to the former distinctive marks, so as to show the identity of the lands

lands formerly described by the old descriptions, and now described by the new description. In the case of a reference to the names of the tenants, the parish books and assessments will afterwards aid the proof of the identity of the lands. The best distinctive marks in the description of lands are rivers, roads, or lanes; or if you refer to the ownership or occupation of neighbouring houses, to refer to any tavern if near, for signs are often of long duration. Further, when an estate now entire is yet deduced in numerous small parts, and these parts or any of them cannot be ascertained by any distinctive mark; then refer in the recitals of the old deeds to the parcels therein comprised, as being part of and comprehended in the parcels after described, under the general new description

tion thereof hereinfter contained; and then afterwards in the parcels take at once the new description, and at the end of it refer to the old descriptions generally as thus, viz. *And which said messuages, tenements, lands, and hereditaments hereinbefore newly and particularly described, are, and comprehend the same messuages, tenements, lands, and hereditaments as were comprised in and conveyed and assured by the several hereinbefore recited indentures of lease and release, bearing date respectively the, &c.* (taking the dates); or you may omit the dates, and say generally the hereinbefore recited indentures of lease and release respectively, by and under the several and separate descriptions contained in the same indentures respectively: indeed, a still more general way is practicable, as thus: to

to insert a general recital, *that under and by virtue of the several indentures, deeds, and assurances in the law hereinafter referred to*, the vendor is seised in absolute fee, or has an absolute general power of appointment over the messuages, tenements, lands, and hereditaments hereinafter particularly described, and also released, or intended so to be; and then recite the contract for sale, and in the description of the parcels take the united description, and afterwards refer to the several purchase deeds of the several parts in this manner, viz. "*And which said messuages, tenements, lands, and hereditaments, though now united and comprised under the entire description last hereinbefore contained, were formerly divided into several separate parcels, which were separately conveyed unto and to the use*

use of (the vendor) and his heirs, in and by the several indentures hereinafter mentioned, to wit, as to part thereof by indentures, &c." specifying them both as to dates and parties, except that where the parties run particularly long, then mentioning the dates only, as thus, *by indentures of lease and release, bearing date respectively the and days of* 1817, *the indenture of release being of ten parts, and made between A. B. of, &c. Esqs. of the first part, and the several other persons therein particularly named and described, of the several other parts;* thus mentioning the number of parties, and the first party by name, in order to identify the deeds; and as to other part of the said hereditaments and premises by indentures, &c. observing the same rules as before, and so on through all the several conveyances

veyances of the several parts to the vendor. If it should happen that all or any part of the lands shall not have been last conveyed to the vendor, but to some person who devised them to him, or from whom he took them by descent; then in the above reference, at the end of the parcels to the former deeds, refer to the last conveyance, viz. to the testator or intestate in the same manner as above, or, if possible, more concisely; and then add, "*and which said A. B. afterwards by his will in writing, bearing date the day of devised the said last mentioned parts of the hereinbefore generally described premises, unto the said vendor, his heirs and assigns for ever;*" or in case of intestacy, *and which said A. B. afterwards died intestate, leaving the said vendor his* (state relationship), *and heir at*

at law. This last mode of framing the recitals and parcels will be found useful, when the several deductions have been particularly numerous and minute, and it would be tedious to state each separate description. It also has the advantage of comprehending all that relates to the parcels in one particular part of the draft, so that the draftsman would know where particularly to direct his attention, as the other part would be a regular form.

It must be remembered, that the great object of all these modes is for the deed to contain competent evidence of the identity of the parcels; that is, that the lands now united and conveyed by one entire description, are and constitute the same lands as have been heretofore comprised under the several particular descriptions.

scriptions. This is the great object in all cases of this kind, in order to keep up the chain of evidence of identity between the former separate descriptions and the present united description.

As to the order in the recitals, in which the different parts should be deduced, I advise the most valuable part to be first deduced, and then the next valuable, and so on, as nearly as possible according to the degree of value; because, in stating the old descriptions, the part first described would be the most valuable part, and the other parts be secondly and thirdly described, and so on according to the relative degree of value. I do not mean you to stop in order to ascertain the precise degree of value of each part, where the several parts are pretty equal in

in value, but to follow this general rule where there is a manifest difference in the value of the several parts.

I am now to consider the cases in which recitals are not inserted, or, if inserted, are qualified. These refer principally to instruments where trustees convey; and in these cases, as a general rule, you should not go back beyond the instrument creating the trust, for the trustees have nothing to do with the previous title. Thus, if lands are given to trustees by will, upon trust to convey to certain uses or to settle in a particular manner, and they make the conveyance or settlement accordingly, in such conveyance or settlement you should not strictly insert any recitals prior to the will, but begin with the will, and then in

in the parcels you take the descriptions from the last conveyances to the testator, and you refer to such conveyances to show that the lands were vested in him and passed by his will. If, indeed, in particular cases it be beneficial to insert preparatory or collateral recitals, then it is not usual to object to them on the part of the trustees; or sometimes a very cautious draftsman will qualify any statement by the words (as is alleged), or other words to that effect, so as not to amount to a direct affirmation, according to the distinction between the operation by estoppel of a general and particular recital.

There is no point of practice of more delicacy or anxious consideration than to settle a draft on behalf of a trustee. These drafts

drafts sometimes run into multifarious matter not connected with the trustees, but yet forming part of the general arrangement between the cestui que trusts. One is of course anxious to aid the general transaction, and yet the paramount consideration is the perfect security of the trustee. Perhaps on this subject the following rules will afford some guidance. Wherever there is any contract between the cestui que trusts amounting to a transfer of the trust, there the whole of such contract must be stated, for the trustee must follow the trust according to the transfer. He becomes trustee for the new cestui que trust. This is a most pregnant rule, full of important practical consequences, and if attended to, will throw a steady light through many of the cases which arise in practice. Thus,

Thus, suppose lands are vested at law in A. in fee upon trust for B. B. contracts to sell to C.; now A. becomes trustee for C. and after notice of this contract could not safely convey to B. or in any way part with the legal estate without the concurrence of C. However, it is to be remembered that A. is trustee only for the ultimate cestui que trust, where the trust is effectually passed, and no longer remains in transitu. Thus, suppose in the above case B. contracts to sell to C. and C. pays the purchase-money; this contract, with the receipt for payment, being produced and proved to A. he might then convey to C. without the concurrence of B. The cestui que trust is changed from B. to C. Suppose a succession of such contracts from B. to C. and so on to Z. and B. and the other

other intermediate parties to Z. to be absent or refuse to answer, this would be no tenable objection. If they were present and willing, they might be made parties, but their concurrence is clearly not essential. By proving the successive contracts and payments of the purchase-monies, you prove the successive equitable conveyances and the consequent changes of the trust. A. becomes trustee for such one of them as for the time being has the trust or equitable interest. I take it to be now clear, that an intermediate trust or equitable estate or interest is, in real operation, nothing; and though in form it is usual to have the concurrence and conveyance of such intermediate holders, yet they neither pass nor extinguish any thing, for they have nothing. Thus, after B. had sold to C. and C. had entered

entered and taken possession, and paid the purchase-money, B. has nothing remaining. Suppose lands are conveyed to and to the use of A. and his heirs upon trust for B. and his heirs, upon trust for C. and his heirs, B. has nothing, and his concurrence is unnecessary. Again, suppose lands are conveyed to and to the use of A. and his heirs, upon trust for B. and his heirs, and B. sells to C. and C. pays the purchase-money, a purchaser from C. need not inquire about judgments against B. If indeed the purchase-money be not paid then, a judgment would be a lien on the unpaid money; but if the purchase-money be paid, then there can be no lien by judgments. Crown debts are different, and would continue liens even after a purchase for valuable consideration with-

out notice. Again, A. seised in fee, contracts to sell, the purchase-money is paid, A. becomes a bankrupt, his assignees need not concur in the conveyance; but if the whole purchase is not paid, then the assignees must concur, because the whole beneficial interest is not out of the bankrupt. It is established, that if an equitable tenant in tail conveys in fee by way of mortgage, he can afterwards suffer a recovery on his own freehold, without the concurrence of the mortgagee; or as a stronger case, let A. an equitable tenant in tail, convey to B. and his heirs upon trust for C. and his heirs, upon trust for himself, A. in fee, A. can still suffer a recovery on his own freehold, without the concurrence of B. or C. Whenever, therefore, in practice it is proved to the satisfaction of the trustees' counsel, that the trust

trust has been transferred, there is no absolute occasion for the concurrence of the former cestui que trust; he may be made a party, if present and willing to concur, but his non-concurrence is not an objection. This doctrine will apply to numerous cases in practice, where questions arise as to the necessity or expediency of the concurrence of particular parties: thus many questions arise in cases of portions, whether administration is necessary; as suppose a portion for a younger child who is a daughter, assigned on her marriage to trustees for her husband for life, remainder to herself for life, remainder to her children, and in default of children, to herself absolutely, and the wife to die without issue; the trustees also to be both dead, and the survivor to die intes-

tate: here the husband, in taking out administration to his wife, is alone competent to release the portion without the necessity of taking out administration to the surviving trustee: so in every case in equity, if you have the real beneficial interest, you are safe. The rule may be shortly laid down thus: that in no case is the concurrence of any party essential in respect of any equitable interest, unless he retains and has a real beneficial interest at the time of the execution of the deed, even if he has had such interest during the present trusteeship, still, if such interest no longer remains in him, he is become a stranger.

As I have just considered the nature and necessity of recitals in conveyances by trustees, and the subject altogether is

is practical and useful, I will state some recent cases where the doctrine was brought into action. Trustees of monies bequeathed by a will to be laid out in the purchase of lands, and those lands to be settled to various uses, contracted to purchase lands of which the legal estate was outstanding in a trustee for the vendor. The title was approved and the conveyance drawn by way of lease and release by the trustee of the legal estate and the vendor, to the trustees of the purchase-monies and their heirs, to the uses of the will by reference. The recitals stated the will and the uses specifically: the solicitor for the trustee of the legal estate objected that his client ought not to join in a deed containing so much matter irrelevant to his trust, and that he should simply convey the legal estate to the vendor, and the vendor might afterwards convey

convey to the purchasers; but certainly this would have been incorrect on the part of the trustee himself. Having notice of the sale and of the purchase-money being trust-money, he was not justified in conveying to his original cestui que trust alone: the trust was changed, or in a progress of change, and of which he had notice. It requires consideration whether he was even justified in conveying to the trustees themselves, the purchasers absolutely, without some reference to the uses of the will. His real cestui que trusts were the parties claiming under these uses, and his true and safe mode of discharging himself from his trust was to convey at once to these uses upon the principle already laid down, viz. that the ultimate equitable claimant is the real cestui que trust. Sometimes I think that counsel are unnecessarily strict

strict in advising on the part of a trustee. It is facetiously said, that the opinion of an equity counsel always ends in recommending a suit; but it really should be remembered what fatal consequences the long continuance and expense of a suit often entail on the parties. In one case lands were devised to three trustees, and their heirs, upon trust, that they and the survivors and survivor of them, and the heirs and assigns of such survivor, should stand seised of the premises, upon trust for A. for his life, and after his decease, for his first and other sons successively in tail: the tenant for life died, leaving a son who suffered a recovery and sold, and the surviving trustee was made a party to the conveyance to the purchaser. The draft was laid by the trustee before his counsel,

sel, who objected to his concurrence on the ground of its not being clear that the trustees were more than mere devisees to uses, and required that this point should be determined by a suit. Now certainly it might be said that a devise to A. and his heirs, upon trust for B. and his heirs, gives B. the legal estate, the same as a devise to A. and his heirs, to the use of B. and his heirs; and also that the word "*seised*" is the word in the statute of uses. But against this it was urged, that the testator, by using the words, that his trustees, and the survivors and survivor of them, should stand seised, did not mean by the word seised, a mere statutable seisure, but a surviving and continuing trust; and also that there existed an actual necessity for the trustees to take the legal estate, in order to preserve the contingent

contingent remainders to the first and other sons; so that the preponderance of argument was in favour of the trustees taking the legal estate: but the counsel recommended a suit to determine the point before he would advise the trustee to convey. Now surely this was acting with too much rigour on the part of the trustee; for, even if he had not the legal estate, still a qualified conveyance, so far as any estate passed to him, could cause no injury. I think that in every case where a trustee unnecessarily requires a suit, he should pay the costs; but after Taylor v. Glanville, 3 Madd. 176, it is difficult to speak so generally.

In another recent case a draft was to be settled, on behalf of the trustee of an outstanding term. There were several

veral terms to be assigned by different trustees in one deed. The draft had been prepared by a conveyancer on the plan recently suggested, of granting under-leases of the several terms to one trustee, and then assigning the reversions of these terms to another trustee. The solicitor for one of the trustees objected to this mode as novel and untried, and, moreover, as producing no benefit, since, as there must be two trustees, the old mode of assigning the first, third, and fifth, and so on, to one trustee, and the second, fourth, sixth, and so on, to another trustee, would completely answer the purpose, and rested on established practice. Unwilling however to object, if there was certainly no hazard to the old trustees, it became necessary to consider fully, whether

ther the plan adopted could be at all injurious and unsafe. I agreed, that as there would be still two trustees, the preference of this mode to the former one was not very apparent; and not to have two trustees, but to retain the reversionary interests in the old trustees, was objected to, as the old trustees wished to be entirely discharged from the trust. Seeing, however, no hazard or liability from executing the deed in this form, I advised him to waive his objection, taking care that he only entered into one covenant that he had not incumbered, and not two covenants, as the draft had been framed. The second covenant was an additional liability which he was not bound to incur. But during the consideration of this subject, it seemed to me that a plan might be struck

struck out of this new mode which would remove the present difficulty, either of there being two trustees, or leaving the reversionary interests in the old trustees, viz. *by surrendering the reversions of the original terms in the freehold.* By this mode you at once preserve the benefit of each term separately, and concentrate the protection of all the terms in one trustee. If the evidence of the first sub-term should fail, then the second sub-term will supply its place and avail, and so as to the others. But as this amended plan, if soundly established, cannot fail of becoming general in practice, by avoiding the extreme trouble and expense which so often attends the tracing out the representations to trustees of terms, I shall examine the principles on which it rests fully and particularly. The questions

questions then to be considered, in order to ascertain the perfect safety and efficacy of this mode, are two, viz.

1st. Whether these sub-terms will, to the extent of their respective durations, afford the same protection at law as the original terms.

2d. Whether the surrendering of the reversions of the original terms will not produce the merger of the sub-terms, seeing that if the sub-terms were in different persons, one might be surrendered to the other after the surrender of the reversions.

Now,

Now, as to the first question, it is clear that the sub-term, when perfected by entry, will pass the legal estate, to the extent of such sub-term, as fully and certainly as the legal estate passed by the original term. With respect to the entry, it can be made at any time by the sub-termor or his executors, administrators, or assigns, and indeed entry after a time would be presumed. How very seldom is an actual entry made under any mortgage term, afterwards assigned to attend! Also, in the case of a term in remainder, an entry would not be necessary, as the sub-term would pass by way of grant. Admitting, however, the necessity of an entry, and putting the point to its worst, still it is an objection that can always be obviated whenever a necessity shall exist of acquiring

quiring the possession at law under the sub-term. An entry can be made at any time, and such entry will give the full benefit of the sub-term, by passing the legal estate to the extent of its duration. This objection therefore, even if it exists, is little to be regarded when set against the great advantage of concentring all the terms in one trustee only.

2. With regard to the second point of inquiry, it seems, on consideration, to be a clear result from the doctrine of surrender, that the surrender of the reversions would not affect the relative situation of the sub-terms if vested in third persons. It is an established principle, that a surrender shall never affect the rights of third persons, and the law will even restrain the operation of

of certain legal incidents attached to estates, which have come into possession by surrender. Thus if a termor grants a derivative term, and afterwards surrenders to the reversioner, who is an infant, the infant shall not have his infancy against the sub-termor; and there are numerous other cases in Coke on Littleton, 338. (a.) In the present case, therefore, the reversions will, in notion of law, continue in order to preserve the sub-terms from successive mergers: this result would be quite certain, supposing the parties having the sub-terms to be clearly in the situation of third persons to the freeholder; the only doubt is, whether the sub-termors, being trustees for the freeholder, are to be considered as third persons entitled to the benefit of the notional continuance of the reversions:

sion. The primâ facie answer to this doubt is, that this doctrine is a legal doctrine, and the law takes no notice of trusts, and consequently at law the sub-termors would stand simply and solely in the character of third persons, without any evidence or notice which the court could entertain of their being trustees for the reversioner. The only reply that can be made to this answer is, that the present is a compound question, and that in compound questions the law will recognise trusts: thus, in a contract for sale, when the point is whether the vendor has shown a good title, this is a compound question, and the law will not merely look to the legal estate and deduction, but require the vendor to show that he or his trustees have also the beneficial title. So, before the sta-

tute of uses the law recognised a use as forming part of the property of the freeholder; and it is now a pending point, whether an outstanding trust term be bona notabilia in the trustee, so as to require a metropolitan administration; and the question in the present case is, whether the court would entertain this as a compound question, so as to take in the consideration of the trust. A surrender shall not affect the interest of a stranger; but is the trustee of the successive sub-terms a stranger to the parties surrendering, when the person, by whose direction and in whose favour the surrender is made, is the cestui que trust of the sub-terms? This is the point to be considered. But as any plan, suggesting an alteration in practice, requires to be again and again deliberated upon

upon before it can be safely adopted, I shall postpone the final discussion of this subject to a future number.

The subject just considered relating to outstanding terms, leads on to the consideration of another doctrine intimately connected with it, viz. the surrender of outstanding terms by presumption, a doctrine which is at present in a very unsatisfactory state; and any attempt to reduce it to some certain operation and application in practice will, it is hoped, be received with indulgence.

In order to give a proper view of the subject, it will be expedient to take into our consideration,

1. The

1. The nature of the protection of a term at law.

2. In equity.

3. The nature of presumption abstractedly.

4. Those cases where there are facts for the presumption.

5. Cases where there are no facts.

6. Cases where there are facts against the presumption.

7. Where there are facts both for and against the presumption.

8. The sound doctrine to be deduced from the several cases.

1. As to the first point, viz. the nature of an outstanding term at law, it is clear that when lands are demised, or bargained and sold, for a term of five hundred or one thousand years, by a party

party seised in fee at law, the person to whom the lands are so demised, bargained, or sold, is entitled to enter upon and hold and keep the possession of the lands for the term granted, in exclusion of all other persons whomsoever, as well the lessor, and his heirs and assigns, as every other person. The great point to be ascertained is, that the lessor granting the term had the legal estate, so that the term is a legal term, entitling the lessee to enter at law and to hold and retain the possession. Under such a term the lessee becomes sole owner at law of the lands during the term, and can recover and hold them against the lessor and all other persons whomsoever. All that the lessee should take care of is, that he can produce the deed creating the term, and, if he claims as assignee, each

each successive assignment. If he has this evidence, he must succeed in holding the lands during the term. I have mentioned the necessity of this evidence particularly, because it is not sufficiently regarded in practice. Terms are frequently assigned which could not be sustained by the necessary evidence in a court: now a term, unsupported by evidence, is of no use; the advantage of the term is to give the possession of the lands at law, and the right to such possession, so as to enable and entitle the owner of the term to recover such possession by ejectment; and to do this he must well show the granting of the term and the subsequent deduction to him. Whenever, therefore, a term is to be assigned as a protection, the great object is to ascertain, 1st, that the party creating

creating the term had the legal fee; and 2d, that the creation and deduction of the term can be proved, that is, that the deeds demising and assigning the lands for the term can be proved; and that those, which bear date thirty years back, appear to be regularly executed and attested, so as to prove themselves; and those of a later date can be proved by due witnesses, because this proof will be essential to obtain the full benefit and protection of the term in a court of law. And it is this power of recovering and holding the possession during the term, which, as already observed, constitutes the protection: any term, therefore, of which this proof is wanting, so that it could not be established in a court of law, is of no use by way of protection. The practical result then on this

this point, with reference to the subject under consideration, is, that a term to protect must be a legal term, carrying with it the right to the possession during the term. This then is the title at law, viz. the right to the possession of the lands during the term.

2dly. I now come to the second point, as to the attendancy of a term in equity; and I lay down at once the proposition which I hope to establish, though contrary certainly to some opinions, and *dicta* in the books, viz. That there never can be any attendancy of a term, unless the equitable interest of the term is absorbed in the equitable freehold. This proposition includes the assertion, that no declaration of intent alone will either cause or prevent the attendancy of

of a term. The result of attendancy is indispensable from the equitable absorption of the term; *there is no term in equity;* this is the principle, and which can be easily illustrated: thus, suppose a lessee for ninety-nine years makes his will, and bequeaths the term, and afterwards dies without any further act, the legatee would take the term; but suppose the lessee afterwards to contract to purchase the freehold, would any beneficial interest pass to the legatee? This is certainly one of the strongest of cases; but yet I put it, and hold that the subsequent contract would be, in effect, an ademption of the equitable interest of the term; because, after the contract, there would be no equitable interest of the term distinct from the equitable freehold; the termor would have

have the term at law; but in equity the heir would take the immediate and whole fee; the only ground upon which, in the case put, equity could favour the legatee, would be by being passive against him, so as to give him the benefit of the legatory bequest; but there is no equity between representatives, and the equitable title must prevail. In the case of creditors, indeed, equity will not act; as if a termor at law, with the equitable fee, died indebted, equity will not take the benefit of the term from the creditors. But this case is an exception. In order to understand perfectly this doctrine, which is of essential importance, it is necessary to establish the position, that every owner of lands has in him two estates, viz. the legal estate, or the ownership at law, that is, that estate or ownership which

which enables him to go into a court of law, and, by ejectment, to recover and hold, and retain the possession to the extent of the legal estate, if in fee, for ever; and if for life or a term, during the life or term. And, secondly, the equitable estate, that is, the right to go into a court of equity and compel a conveyance of the legal estate; and in the mean time giving the right to the rent, profits, and produce of the land, so that, in point of benefit, the equitable estate confers the true and real ownership; and the legal estate is merely nominal, and always subservient to the ownership of the equitable estate. This division of ownership into legal and equitable estates is peculiar to our legislation, and grew out of the state of this country during the civil wars, when (the idea

idea being borrowed from the Roman law) a mode was introduced of conveying lands to a third person as ostensible owner; but upon a secret trust for the party conveying. This novelty, increasing with the necessity of the times, at last became so frequent, that the then Chancellor took cognizance of it and recognised the right; and this recognition laid the foundation-stone of the present extensive jurisdiction of the court of equity which now so overshadows the law. The right recognised was, that the profits and beneficial interest in the land might be secured and appropriated distinctly from the legal ownership of such land; or, in other words, that A. might be owner at law, and be alone recognised at law as the owner; and acquire and hold, and

be

be subject to all the legal privileges and liabilities of the ownership at law, and yet be bound to answer and account for the profits and benefits to B. who is wholly unknown at law; but whose interest is within the jurisdiction and protection of the court of equity. In order to obtain such jurisdiction, this court claimed and adopted, perhaps by usurpation from the courts at law, the right to issue a writ of subpœna against the legal owner, compelling him to answer and account for the profits to the equitable owner; and, if required, to convey the legal estate to the equitable owner. It was the happy invention of this writ of subpœna, capable of being moulded to all cases, and unrestrained within any defined limits, which has enabled the court of equity to acquire an almost universal

versal jurisdiction over the conduct of individuals as connected with property. It now takes cognizance of all such cases, except those which are called, though strangely, duties of imperfect obligation, meaning, in truth, that our legislation is too imperfect to reach them. But, with this exception, the Court of Chancery comprehends the whole circle of human obligation with reference to property. The seminal principle is, that what a man is in conscience bound to do, he shall be compelled to do; and this principle, enforced by the subpœna and the necessary power which every court has of punishing the contempt of its decrees, brings within the reach of the court almost every situation and character of man with reference to property. All undefined

fined jurisdiction is more extensive than any definite system. Now, in the construction of equitable cognizance, there is no act of Parliament bounding its extent by express enactments, nor any fixed unbending rules, as the rules of tenure, which govern the doctrine of real property at law; but this equitable jurisdiction is capable of being extended to the full stretch of the original principle, that what a man ought in conscience to do, he shall do, with the exception only above stated of what are called duties of imperfect obligation; and these may be safely left to the legislation of Heaven. Conscience, the whispering of the pillow, in its ordinary actings, needs little aid from man; but when it puts forth its strength, when, in the sublime personification of Holy Writ, "the beam of

of the timbers cries out the crime, and the stone from the wall answers her;" when the eye of Omniscience is seen in every look, how impotent becomes all human infliction!

It might at first seem that the statute law, or numerous acts of Parliament in our statute book, would operate as a check to the extent of this equitable jurisdiction; but the Court of Chancery does not always feel itself inclined to obey either the words, or what one would consider to be the natural meaning of an act of Parliament; but either refining upon the supposed spirit of the act, or upon some collateral principle connected with the original maxim, that what ought in conscience to be done, shall be done, the decisions of equity often contravene

travene the strongest words of acts of Parliament. This mode of operation is evident in many instances: take the statute of frauds, which declares expressly that no agreement shall be valid as to land but in writing, and observe how the court has refined upon this simple and clear enactment: thus, if there has been no writing, but a palpable part performance, the court will execute the agreement; and hence arises a multitude of cases and questions as to what shall constitute a sufficient part performance, to take the case, as it is termed, out of the statute. Again, on another principle, with reference to the same statute, parol evidence is not admissible to prove or alter the agreement; but yet is admissible to rebut the equity, that is, to prevent the relief of the court for the

execution of the agreement. So again, with reference to the registry acts, the decision of Chancery entirely contradicts the words of the act, and even contradicts the decisions of the courts of law upon the same act. There are, indeed, some acts of Parliament of that imperative nature which the Court of Chancery will adhere to, as the annuity acts; but even here there is a degree of coyness in acting; for, though the annuity act wholly annuls all the securities not duly registered, and makes them mere waste paper, yet the court will not decree them to be delivered up, but upon terms, viz. the plaintiff paying the consideration-money into court. In some cases too, Chancery supplies, in effect, the imperfect wording of acts of Parliament, or at least construes them in

in that manner, as to give them the requisite operation to produce the effect intended: thus the statute of fraudulent devises, which has the exception of devises for the payment of debts, has been construed to except only practicable devises for the payment of debts. In taking this view of the various principles on which the doctrines of equity are founded, my object is not to condemn the course which this court has taken in its progress of (what may be called) juridical legislation. On the contrary, I admit the utility of that gradual expansion of doctrine which meets the varying cases of new impression as they arise, so that the doctrine may be from time to time moulded in exact proportion to the emergency of its operation. This system, however, encroach-

ing, as it must be admitted to do, on legislation, must be indeed most strictly and narrowly watched; but under the check of publicity, it is perhaps the only system which can keep regular pace with the ever changing modifications of property. How essential then is it, that all judicial decisions should be public, and publicly reported! Private judicial hearings must cease, or courts of equity will become engines of dreadful injustice. Certainly in particular cases, public hearings sometimes disclose the domestic circumstances of families, which is an evil; but it is only a partial evil yielding to the greater good. With respect to new occasional acts of Parliament to remedy the doctrine, no act of Parliament, or set form of words, can be framed so as to meet the ever shifting variety

variety of human transactions. Such an anticipatory act is beyond our foresight; temerity may attempt it, but no human talent can execute it. Take any one of the late acts of Parliament, which are prospective in their operation, and it will be found to come short of its object; and, in many instances, to increase instead of remedying the evil. As to any retrospective act, it ought never to have passed; no past evil or mischief, to be relieved, can equal that which is produced by the precedent of an ex post facto law. A sound seminal principle of doctrine is the best act of Parliament. It has indeed sometimes occurred to me, that periodical acts of Parliament, declaring the doctrines of the courts, similar to the ecclesiastical canons

canons or the French code, might be beneficial.

There is not, perhaps, a more difficult, though at the same time a more pleasing study (for the difficulty of any study is always rewarded with a proportionate delight), than to trace the doctrines of equity, and ascertain how far the court follows the law, and how far acts upon abstract principles of equity; and it will be sometimes difficult to discover any rational principle in the doctrine of the court. For instance, on what rational principle should equity follow the law in the absurd doctrine of revocation, resting as it does on a mere criticism of the statute of devises, when, by holding that a will was a conveyance at death, and not at the time of making it, the absurdity,

absurdity, and, what is more material, fatal consequences of this doctrine could have been avoided. There are, also, some cases of hardship where the court does not relieve for want, it is said, of sufficient machinery to ascertain the quantum of relief; but it would seem no great additional stretch of jurisdiction to frame an issue to a jury in these cases. In other instances too, the court does not seem to give sufficient weight to the original principles upon which the court itself is founded: thus, in many cases of mistake there is no relief if not supported by contract; but surely mistake itself should be a sufficient ground for relief as an original principle. Upon the whole, therefore, of this rapid view of the origin, foundation, and growth of the doctrines of equity, some anomaly appears to exist; and there seems, also,

room

room for rendering more effective the operation of the court. A jurisdiction so comprehensive in its extent and refined in its doctrines, requires, for its administration, a mind of strong original talent, well imbued with the study of former decisions; sufficiently mathematical in its arrangement to adhere to system, and yet not so stern as to be unable to bend to the shifting nature of equity, in an equal degree metaphysical and mathematical. A mind strictly mathematical makes a good common lawyer, but is too rigid to vibrate with the multiform cases of equity; and a mind wholly metaphysical is fit for nothing but to distract the hapless possessor.

Few authors, also, have traced and developed the doctrines of equity, so as

as to show their origin and progress. The Treatise of Equity, by Ballow, is the most scientific book on the subject; but a new scholastic work is now wanting. It should contain three parts: 1st, An inquiry into the true principles of equity abstractedly: 2d, An inquiry into the doctrines of equity adopted and acted upon in the courts: 3rd, The summary comparison and result. Amid the multitude of law compilations which load our shelves, a work of this kind would be a treasure.

I might well stop here; but there exists one view in which the jurisdiction of Chancery appears in so interesting and benign a form, that I am unable to pass it by. I mean when it throws its protection over individuals in situations exposed

posed to imposition or oppression. All men, every one of us, are more or less governed by self-interest; some more glaringly, and others less ostensibly, but not less surely. When, however, there exists a fair combat of these interests in the ordinary transactions of life, any great predominance on either side is prevented, and the result is beneficial; and even the existence of this universal selfishness is advantageous, as giving a spirit and stimulus to our conduct, which would otherwise become dead and languid. This fairness of transaction, however, is always regulated by the degree of counteraction to the selfish principle. Where there is no such counteraction, little fairness can be expected; and the good faith and honesty of every transaction may be pretty well ascertained from

from the restraint which exists on the acting of each individual. Now, there are many situations in life in which men are called upon to act as trustees or agents for others; and in all these cases, to authorize such persons to deal with themselves for their own benefit, would be to sanction the sacrifice of the trust. According, then, as this counteraction fails, equity restricts the capacity of acting: where it fails altogether, as in the case of trustees for sale, and persons acting in the character of trustees for sale, and all persons employed by them; and, also, of solicitors while concerned for their clients in negotiating a sale, all these persons are prohibited from selling to, or dealing with themselves; the court will not admit a sale to take place under any circumstances. In other

other relative situations, where the counteraction does not altogether fail, but fails in part only, there the court does not prohibit the act; but scrutinizes it with the most jealous anxiety; and if not founded on perfect fairness, will at once annul it: thus, in transactions between the trustee and cestui que trust, or guardian and ward, or mortgagor and mortgagee, where there are two separate parties dealing together, and consequently some degree of mutual control, and yet, from the paramount influence of the one party, not a due equality of control, the court does not altogether prohibit the dealing between the parties; but exerts its influence to secure it from undue imposition or oppression: thus, a transaction between a trustee and cestui que trust must be scrupulously fair,

or

it will be set aside. So in the common case of a mortgagor and mortgagee, though a mortgage transaction is perfectly lawful, yet there are many arrangements which even the mortgagee himself cannot assent to, because the court supposes the mortgagor, borrowing money of the mortgagee, to labour under a degree of necessity, and consequently a mental pressure, which restrains the fair course of acting, and weakens the necessary counteraction to the conduct of the mortgagee, which equity requires to constitute fair dealing: thus, no arrangement between the mortgagor and mortgagee, to make future interest become principal, will be good, except in the case of advances by bankers, where the practice of making periodical rests in their accounts is according

cording to their regular mode of dealing. So as to expectant heirs, they are unable to bind their reversionary interests except on the fairest terms. It is not every offer which one man makes that another can legally accept; even though at the time both parties may be willing, yet if there is an undue pressure on the mind of either, the court will restrain the transaction. It is this universal controlling power of the court which acts so beneficially in regulating the various transactions of men. I can speak from experience, that this general control of equity is most necessary. It would be impossible to measure the length to which the avarice and rapacity of men would extend transactions where there is no check opposed to their conduct, if it were not for this judicial

judicial control. It may be laid down as a general rule, that there is no case in which any party to a transaction labours under an undue influence or mental pressure, but the transaction will be avoided as to him. In a recent case this principle was acted upon to its full extent, viz. where money was to be laid out with the consent of a married woman; the money was laid out, but without her consent at the time; but she consented afterwards, and the money was lost; and the court held the subsequent consent to be insufficient, on the ground, that there was a different pressure on the mind, in not wishing to retract what was done, than in assenting originally to its being done. Numerous cases, also, are constantly occurring, of acts and conveyances done and executed by

by persons under undue influence being set aside; but at law this extensive jurisdiction is not known. Certainly the act of a man lies in the assent of his mind, and where there is no mind there can be no act either at law or in equity: thus, any act by an idiot, or lunatic during his lunacy, is equally void both at law and in equity; but there is a distinction between the acts of idiots and lunatics. An idiot is a being to whom the Deity has not imparted any mind. The Almighty could, indeed, by a flash of omnipotence instantaneously illumine the intellect; but this is not the course of his providence. An idiot, therefore, can never do any legal act; any act by him is conclusively bad: but a lunatic is a being to whom a mind was originally given; but which is for the time

diseased and suspended; an act, therefore, by a lunatic cannot be pronounced void à priori. It may have been done during a lucid interval; in which case it would be good. In a modern instance, a deed, executed by a lunatic in a mad-house, was sustained, having been proved to have been done during a lucid interval. But these cases require great caution, and the strongest proof of sanity, or a lucid interval, when the act was done. Also in some strong cases of duress, where there can be no exertion of mind, the act is null at law; but still the law is of too stern a nature to enter into those shades or degrees of influence which, though not amounting to actual duress, yet too strongly impress the mind to leave the party a perfectly free

 agent:

agent: these are only cognizable in equity.

I shall now return to the immediate subject which led to the above general view and sketch of the jurisdiction of Chancery, and endeavour to bring the principles there laid down to bear upon the particular subject under consideration. I have, indeed, extended this view beyond my original intent; but it is hoped that the discussion will assist the reader in his examination of the immediate subject, viz. how the attendancy of outstanding terms operates in equity.

A term is attending in equity when it is held upon trust for the equitable owner of the inheritance. It then attends and follows the equitable ownership through all

all its modifications. In truth, in equity there is no term; it is only the inheritance that exists. The equitable term is merged in the inheritance. My use of the word "merger" will be explained hereafter. This is the true principle of attendancy, viz. the merger of the equitable term. When this merger takes place, the legal term attends. When this merger does not take place, the legal term does not attend; nay, further, cannot attend. Without a merger of the equitable term there can be no attendancy of the legal term: no declaration of the parties can effect it any more than a declaration can effect the merger itself. Both merger and attendancy are the inevitable legal consequences of certain premises: let these premises exist, and merger and attendancy are unavoidable; let them

not exist, and merger and attendancy are impossible. No man can cause a merger by mere declaration. In this, as in numerous other cases, the rule is not to be controlled by the intent. In Scott v. Fenhouillet, indeed, as reported in Brown, there are some dicta leaning to the contrary; but the whole report of that case is too vague to deserve any reliance. But let us try the doctrine by cases. If lands be limited to A. for five hundred years, upon trust for C.—with remainder to B. for five hundred years, for his own use—with remainder to C. his heirs and assigns; and there is an express declaration, that the term in A. shall attend the inheritance in C.: here, notwithstanding such declaration, the term will not attend; but will devolve on C.'s executors, and be personal assets, because there is not and cannot be any merger

merger of this term in C.'s inheritance, on account of the intermediate term in B. The equitable term then is subsisting as a term and chattel interest, and consequently is subject to all the incidents of a term; and, therefore, inevitably passes to the executors and is personal assets, and no declaration of C. can alter its nature or make it part of the freehold. Nothing can do this but the operation of merger: but let this operation take place; let C. buy B.'s term, and then it will be as impossible for C. to pass his first equitable term by his will, attested by two witnesses only, as before such purchase it was impossible for him to prevent its passing; because, by such purchase, both terms are gone in equity, and C. has only one immediate equitable inheritance in possession, devisable

devisable only by a will with three witnesses. This principle of the agency of merger in equity, and of its certain effect of attendancy, will at once open the numerous cases on the nature, incidents, and liabilities of the equitable estate after the attendancy. When there is an attendancy, the equitable ownership is a freehold with all the qualities and incidents of a freehold, requiring a will with three witnesses, and is in all respects real estate. When there is not an attendancy, the equitable ownership is a term, with all the qualities and incidents of a term, and in all respects personal estate. To put one of the strongest cases of each kind. Lands are limited to A. for five hundred years for his own use; remainder to B. in fee. A. makes his will and gives the term, and then contracts

contracts to buy the fee, and dies. Here no equitable estate will pass by the will, because by the contract the term merged in equity, and A. had in equity no term, but only the inheritance in possession; and though the term passes at law, yet A.'s legatee will be a trustee for his heirs. But, suppose lands limited to A. for five hundred years, for his own use; remainder to B. for five hundred years, for B.'s own use; remainder to C. in fee; and A. to make his will, and afterwards contract to buy C.'s inheritance, and to die, A.'s will passes the term both at law and in equity, because the contract did not merge it, on account of the intermediate term in B. But let A. in the last instance, contract of purchase also B.'s term, and his will then would not pass his original term in equity, because by

by the purchase of B.'s term the obstacle to the merger of the first term was removed, and both terms merged, and C. became equitably seised in fee. And this result of A.'s original term not passing in the first instance, and passing in the second, is beyond any control of the intent. The strongest declaration in either case will do nothing.

But it will be said, You suppose, as indeed you have already stated, that the legal and equitable estates subsist distinctly at the same time in the same person. Certainly I do; and I apprehend that the decisions in equity cannot be supported or reconciled on any other doctrine. I am aware of the case of Selby v. Alston, 3 Vesey, junr. and the broad universal proposition there laid

laid down by Lord Alvanley; but though I think such proposition not warranted by the case; and indeed that the case in itself involves an express contradiction of it, as I shall presently show; yet the conclusion hereafter drawn by me, in summing up the present practical doctrine of surrenders by presumption, will not in the least contradict or interfere with that case, or with Lord Alvanley's proposition. It is, however, important to go more fully into this part of the doctrine. Now the true and genuine doctrine which I contend may be legitimately extracted, cold drawn, from the various decisions in equity bearing on this point, and considered with reference and analogy to each other, is, that in all cases the owner has in him, in contemplation of equity, the legal and equitable

equitable estates distinctly; and that even Selby v. Alston, while it expressly determined that the equitable estate was extinguished in the legal estate with reference to the descent, yet admitted that the devise of the equitable estate continued, notwithstanding its extinction, and consequently that the equitable estate was not extinguished with reference to the devise. How it is possible to reconcile these two results I am unable to determine. Selby and Alston was this: There were father, mother, and son; the father contracted to purchase lands in fee, and died intestate before a conveyance. The equitable fee came to the son, descendible ex parte paternâ. The lands were, after the father's death, conveyed to the mother in fee upon trust for the son. The son made his will in the

the lifetime of the mother, having then the equitable estate only, and devised the lands to a charity. The mother died intestate, and the legal fee descended to the son from her, and was in him descendible ex parte maternâ. Held that the descent of the legal fee extinguished the equitable fee; and the will being void under the mortmain act, the lands descended to the maternal heir. Now it will be observed in this case, that the very annulling of the devise under the mortmain act, shows that it was not revoked by the descent; and, as a necessary consequence, that the equitable estate continued for the purpose of the devise. I am aware that Lord Alvanley lays down the broad direct proposition, that in all cases where the legal and equitable estates are commensurate, and unite

unite in the same person, the equitable estate merges in the legal; but it is manifest, from the operation of the very decision itself on its own facts, that he had not circumspected all the consequences of such a doctrine. His own decision, in truth, destroyed his proposition; for the decision recognised the devise, and the devise being of the equitable estate before the descent, and continuing good after the descent, the equitable estate was, at least for this purpose, continuing after the descent; and, therefore, this case itself establishes the proposition, that for one purpose at least, viz. for a devise, the equitable estate continues. But to put the common case, occurring daily, and supported by all the authorities; viz. A. contracts to buy land to be conveyed to him in fee. He makes his

his will, and devises the equitable fee. Afterwards the legal fee is conveyed to him in fee strictly according to, and precisely commensurate with, the limitation of the equitable fee. This is not a revocation; but the will passes the equitable fee, which shows that the equitable fee was not wholly extinguished by its junction with the legal fee; for it is not possible in equity, any more than in law, to devise an after-acquired estate. The will then, not being revoked, must pass the equitable fee in the devisor at the time of making the will, that being the only estate which the will could pass; and, consequently, such equitable estate was not wholly extinguished by the legal fee. The legal fee is a superaddition to, and not an extinction of, the equitable fee. The conclusion then, when the legal

legal and equitable estates are commensurate, is, that though (if Selby v. Alston can be sustained) the equitable estate is extinguished for the purpose of descent, it is yet continuing for the purpose of devise. And lastly, the whole doctrine of revocation of devises in equity is founded on the separate existence of the equitable estate: as the doctrine of the non-revocation in equity by a mortgage in fee, but of the revocation by a contract, nay an absolute revocation, notwithstanding the subsequent abandonment of the contract, and the strongest intent against a revocation; and above all, of the non-revocation of the devise of the equitable estate by the subsequent conveyance of the legal estate. It is not then too much to say, that the whole analogy of equity bears against the decision

cision of Selby and Alston, or rather against the broad proposition laid down by Lord Alvanley, that when the legal and equitable estates are commensurate and rest in the same person, the equitable estate is extinguished.

But in every case of a partial union of the legal and equitable estates, viz. where they are not commensurate, I am supported by all the authorities in saying, that the two estates subsist distinctly at the same time in the same person. Thus, if lands are limited to the use of A. and his heirs, upon trust for A. for life, remainder for B. and the heirs of his body; A. has the equitable freehold distinctly in equity, and a recovery suffered by B. on the freehold of A. would be effectual; but if lands are limited to the use of A. and his heirs,

upon trust for B. for life, remainder upon trust for C. and the heirs of his body; a recovery suffered on the freehold of A. would not bar C.'s entail, though a recovery suffered on B.'s freehold would. This shows, that in the first case, A. had the equitable freehold so far distinctly from the legal, that it was sufficient to support an equitable recovery in analogy to a legal recovery. Again: if lands are limited to the use of A. and his heirs, upon trust for B. for life, remainder upon trust for A. and the heirs of his body; a recovery suffered on the freehold of B. will bar A.'s entail. So if lands are limited to the use of A. and his heirs, upon trust for B. for life, remainder for C. and the heirs of his body, remainder for A. and his heirs; a recovery by B. and C. will bar A.'s remainder

remainder in fee. In each of these cases the legal and equitable estates subsist distinctly in the same person. The equitable estate is clothed with the legal estate, and protected, not extinguished, by it. These cases, too, bear against the proposition, that a man cannot be a trustee for himself; for, in all these cases of a partial ownership of the equitable estate, he is trustee to that extent for himself. But, in truth, in many cases a man is trustee for himself. If lands be limited to A. for one thousand years, with remainder to B. his heirs and assigns upon trust for A. his heirs and assigns; here A. is trustee for himself; he has the term at law and the inheritance in equity. If he makes his will with two witnesses, the term only passes at law; but nothing in equity. If he

dies intestate, his executors are trustees of the term for his heirs; one set of representatives trustees for the other. I see no greater difficulty in making the maternal heirs trustees for the paternal; certainly not so much as the breach in the consistency of the doctrine, which the present decision of Selby and Alston occasions.

I may here stop to advert to the operation of an outstanding term in preventing dower or curtesy. It has caused much wonder why an outstanding term, as it protects a purchaser from dower when the term is assigned to his trustee, should not equally protect him when not assigned. Undoubtedly it would seem that the mere assignment can effect nothing, except so far as the form of an assignment

assignment has been hastily decided to be necessary; and our ultra reverence to the result of a case and not to its principle, to the rind and not the kernel, makes us succumb to any absurd result. Every case contains two properties—the principle of the decision, and the application of the principle. The application may be good or bad, fruit or leaves; but the principle is the sap from which we graft. "Every principle," says Lord Bacon, "contains an endless power of semination." In following cases, then, we should follow the principle of the case and not its mere result. Now, with reference to this doctrine of an outstanding term protecting from dower, the true wonder is, not why an unassigned term should not protect as well as an assigned term; but, why any term should

protect at all. It is too late now to contend, that dower attaches on an equitable estate; multiplied cases have determined that it does not, and this is certainly the settled doctrine. As, then, this is the settled doctrine, how can dower at all attach, except subject to the term? Dower can only attach at law, and at law the term is precedent. In equity there is no dower; an equitable inheritance in possession is not subject to dower. Upon true principle, then, according to the settled doctrine of dower not attaching on an equitable estate, every term assigned, or not assigned, ought to protect, for every term is precedent to the estate, upon which alone dower attaches. But it is not so with curtesy. No term ought to protect from curtesy, because curtesy attaches

attaches on an equitable estate; and assign or not assign the term at law, the equitable inheritance still remains entire, subject to curtesy. Upon principle, then, it is apprehended that there ought to be this distinction between dower and curtesy.

But it will be asked whether I mean to state, that the principle of merger is adopted in equity through all its consequences? I answer, No. It is the peculiar quality of equity, as contradistinguished from law, to act within a circle, and stop short in the adoption of any principle when it reaches the equitable horizon. The law, on the contrary, pushes on the principle unrelentingly, without any regard to the consequences. Thus A. absolute owner in

in fee, sells to B. for a very inferior price, but not amounting to fraud, A. refuses to convey, and B. files a bill; the court would enforce a specific performance: But suppose A. a trustee for sale, makes such a contract, the court would not enforce a sale, for it would be a breach of trust by B. and therefore against equity. So in the case of merger, when it would operate against equity, the court would relieve. This is sufficient for my present purpose. I shall hereafter, in another place, consider more fully how far relief can be obtained in equity in cases of merger.

Before, however, I close this second head, though already long continued, it is necessary to advert to the expression often occurring in the books, of disannexing

annexing the term after its appendancy; but I apprehend, that a term once appendant, and consequently merged in equity, can never be revived, and, therefore, that the old term can never be disannexed. The owner may create a new term in equity; but he cannot revive the old one. Thus, if the termor assigns the term by the direction of B. this direction will be the creation of a new term; the direction is an equitable demise upon the same principle as a contract is an equitable conveyance; but the old equitable term is not revived. Hence, when the books speak of the disannexing of the term, they mean the creation of a new term in equity, or the alienation of the equitable ownership, to the extent of the residue of the old term; but not the revival of the old equitable term.

term in specie. I am now come to the close of this second head, and the conclusions which I submit are legitimately deducible from the above discussion are these: 1st, That the doctrine of merger is adopted in equity in cases where the equitable owner has the whole beneficial estate: 2d, That wherever the equitable estate of the term merges, the term at law is necessarily attending in equity: 3d, That the intent operates nothing; but, independently of all intent, there can be no attendancy without merger, and there must be attendancy with merger: 4th, That the legal and equitable estates subsist distinctly in the same person at the same time, when the two estates are not commensurate: 5th, That where they are commensurate, yet the equitable estate, if devised before

fore the incorporation, will continue thenafter for the purpose of the devise: 6th, That an equitable term, once merged in equity, cannot be specifically revived, though a new term may be created out of the equitable ownership to the extent of the residue of the old term.

3d. As to the doctrine of presumption in itself.

Presumption is the inference of the effect of various collateral causes, in the absence of direct proof of such effect. You cannot prove the effect itself; but you can prove certain concurrent causes which you infer must produce that effect. Thus you cannot see the focus; but you see the converging rays, and from them you infer the focus. In many cases this presumption raises

raises or produces a higher degree of moral certainty than positive evidence; for all evidence is only probability, varying from its degree according to the clearness of the deposition, the nature of the fact deposed, and the character of the deponent: but still, let the deposition be most clear, the fact tangible and evident to the senses, and the deponent Cato himself, yet the result would be only high probability. Thus, then, positive as well as presumptive evidence, concurring in the transactions of life, present only balances of probabilities; and from the imperfect nature of positive evidence, presumption frequently affords greater moral certainty of the fact, because it affords greater proof of the surrounding concurrent facts upon which the presumption of the fact

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is founded. Positive evidence may be sometimes fabricated; but presumptive evidence, presenting a circle of minute independent circumstances, unconnected between each other, but concurring in raising the presumption, is scarcely possible to be fabricated. Such then is the nature of presumption, in itself. Further: presumption is the result of evidence, and a question for the consideration of a jury: certainly, in some cases, the evidence is simply negative, and then the result would seem rather a legal construction; but it is difficult to mark the precise line of distinction, and in most cases some law and fact are mixed, and therefore all questions of presumption are left to a jury. But it is apprehended (and this is a point of importance in our present inquiry), that a fact

fact proved by presumptive evidence, is as much established as a fact proved by positive evidence. If the actual surrender by deed of a term be shown, the term has undoubtedly ceased: now suppose the deed of surrender to be lost, and its existence to be proved by collateral evidence, still, when proved, and the fact found by a jury, the term must be equally ceased. Again: suppose no deed of surrender can be proved; but such a period has elapsed since the dormancy of the term, without any recognition of it, as the law says, shall amount to a surrender; and the jury, on the evidence of such lapse of time, without any recognition of the term, find the term surrendered; is not the term equally defunct as if it had been surrendered by deed? If, then, the law says, that a dormancy

dormancy of twenty years shall constitute a legal surrender, you have only to prove this dormancy, and the jury are warranted, on that evidence, to find the legal surrender accordingly. Now, whenever the evidence is complete, the surrender is effected, and the verdict of a jury is not necessary. A jury only find, that the evidence is complete. If the facts exist, the legal result equally exists, whether there be a verdict or not, as any fact equally exists the moment before, as after, the verdict. The jury do not make, but find, the fact. It is the evidence that sustains the fact; and if this evidence is perfect, the fact equally exists, whether it be afterwards before a jury or not. The verdict of a jury is only a formal authentication of a fact proved by evidence, and existing the moment such

such evidence existed. Then, as to the presumptive surrender of an outstanding term—as soon as the evidence which raises the presumption exists, the presumption is raised—as soon as the time of dormancy which the law says amounts to a surrender, has elapsed, the surrender is effected, and the term ceases. I take it to be indisputable, that if a term be surrendered, it has ceased; and that whether the surrender be by deed, or in law, makes no difference: if there be a surrender, the term is gone. Whenever, therefore, a term has been dormant for a period which the law says shall amount to a surrender, that term is surrendered, ipso facto, by such lapse, and being surrendered, is gone and cannot be revived; and no subsequent assignment in words of that term can constitute an operative assignment

assignment in effect. If the jury find a term surrendered by presumption, can it be assigned afterwards? If not, what prevents the assignment? Not the verdict of the jury finding the presumption, but the facts on which it is found. If there had been no verdict, the presumption would have equally existed. The verdict of a jury authenticates the result, but does not produce it. Suppose in the case where the jury found the presumed surrender, there had been no trial, could there have been an effectual assignment of the term? If not, and I conceive not (for, if it were so, there could be no presumption without a verdict), then an assignment will be equally ineffectual where the facts raise the presumption of a surrender, whether there has been a verdict or not. This argument will be brought to

to bear on Doe v. Scott, hereafter considered.

The conclusions, then, from this third head, are,—1st, That a surrender by presumption, is a question for a jury: 2d, That the jury do not raise the presumption, but only find it; but the evidence raises the presumption: 3d, That when the evidence sufficient to raise the presumption exists, the presumption is equally raised, whether found by a jury or not: 4th, That the moment the presumption is raised, the term ceases: 5th, That after a term has ceased, by the presumption arising, such term is not capable of being afterwards assigned; but is, in legal effect, as much gone, as if actually surrendered by deed.

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4th, As to the doctrine of presumption, with reference to the first class of cases, viz. where the facts are for the presumption.

Now in these cases, the presumption takes effect without regard to time, and may arise as well within one year, or five years, as within fifty years: indeed the recency of the facts strengthens the presumption, because the proof of them is fresher. These cases are, where an actual surrender has been made, but has been lost, or is destroyed; but you can produce evidence to prove its having been made, as—an entry in the attorney's book,—of charges for making the surrender,—evidence of a person that he was witness to the execution of the deed, —and other collateral facts; and, indeed,

this class includes generally all cases where, though you cannot prove the positive fact of surrender, yet you prove other facts which produce the same degree of certainty. Such and similar cases are cases where there is evidence to presume an actual surrender, and upon which the jury would find the actual surrender accordingly.

2d, As to the second class of cases, viz. where there are no facts, either for or against the probability of the actual surrender.

This is a class of a different nature from the preceding: these are cases of pure operation of time, and the question is principally legal; for the only facts to be proved, are the lapse of time,

time, and the entire dormancy of the term: upon these facts the legal construction raises the presumption of a surrender of the term. The cases, then, within this class, are exclusively such as where the term has never been assigned to attend, never been used, or recognised at all with relation to the inheritance, but was created for some particular collateral purpose, and has remained dormant from the completion of such purpose, since which, a certain number of years has elapsed; and the sole practical question is, what is the number of years, or period which the law fixes to constitute a legal surrender. Now the period fixed is twenty years, by analogy to the statute of James: and in all cases where the original purpose or trust of a term has been fully satisfied, or discharged, and such event can be distinctly proved, then on such

event, the term will become dormantly attendant; and if twenty years elapse during such dormancy, such term will by such lapse of dormancy, ipso facto, cease, as effectually as if it had been expressly surrendered on the expiration of such twenty years; and that equally, whether such presumptive surrender be found by a jury or not, for it is the evidence that founds the presumption, and the evidence equally exists, whether brought before a jury or not. This class, as already explained, comprises only cases of pure and single operation of time, and therefore will apply only to the following probable instances in practice; as, 1st, where a mortgage for years has been paid off, and the express time of payment can be proved, and there has been no recognition whatever of the term, and no disability in the termor, and twenty years have

have elapsed, surely such term ought as certainly to cease, on the expiry of the twenty years, as if it had on the day of such expiry been expressly surrendered by deed; and any subsequent assignment in words of such term, should be merely in words, without any operation in law. It would be making the law a strange fickle doctrine to hold that a term could be presumed to be surrendered to-day, and revive, and be assigned, and operative to attend to-morrow. 2dly, So as to terms created by settlements, or wills, where there is no proviso of cesser, but where the purposes of their creation are satisfied, twenty years' dormancy will amount to a surrender. 3dly, In truth, in all cases where the purpose of creating the term is satisfied or discharged, and the term has never been declared or assigned to attend, but has remained entirely

tirely dormant for twenty years thereafter, such dormancy will constitute a legal surrender. 4thly, A fortiori, this construction applies to cases where, though there is no proviso of cesser, yet the trust is, that when the purposes of the terms are answered, the term shall be surrendered.

But it will be urged, that this presumption by time, will be made, only for, and not against, the owner of the inheritance. It is difficult to discover any sound principle on which this distinction can rest, because less than twenty years will not in any case warrant a presumption in favour of the owner of the inheritance. It cannot be, therefore, merely for the purpose of justice, that the presumption holds, for that reason would apply as strongly to nineteen

teen years, as to twenty years; nor can it be on account of the owner of the inheritance being the cestui que trust of the term, and therefore in the nature of a tenant at will to the termor, so as to construe the possession to be under the term; for this would exclude all presumption whatever, since it is contrary to every principle, to presume that to have ceased, which the parties' own possession has been continually supporting; besides, it is difficult to understand how a term can in a court of justice be presumed to have been surrendered to-day, and to-morrow be set up to recover the possession. I am unable, therefore, to lay down any distinction in this presumption of surrenders between cases for and against the owner of the inheritance. The true ground is, that after a lapse of twenty

twenty years without any recognition of the term, it shall be presumed that the reversioner did not mean the term to continue, but left it to cease by presumption, and that twenty years have been fixed as the period for the completion of such presumption, by analogy to the statute of limitations, barring outstanding rights as to leaseholds after twenty years. To admit that the possession of the reversioner is in the nature of a tenancy at will under the term, is to exclude presumption altogether in every case, whether for or against the inheritance, and whether after twenty years, or a hundred years, for such possession would carry with it a necessary continuation of the term. It must be strictly remembered that the cases which I speak of are those where the term has never been

been assigned or declared to attend; but left to itself after the purposes of its creation have been determined, and without any evidence of intent to preserve it as an attendant term. The short result then is, that there seems no real distinction in principle between the presumption of a surrender for or against the inheritance, because the same reasons of the possession being consistent with the term, which would exclude the presumption in the one case, would equally exclude it in the other; and the reason assigned by Lord Ellenborough for the presumption in favour of the owner of the inheritance, viz. the effecting the purpose of justice, equally applies to the period of nineteen years as twenty-one years, and therefore cannot be the true reason. But there will be urged the case of

of Doe v. Scott, 11 East, in which Lord Ellenborough lays down the distinction, saying, "There was no purpose of justice to be answered by presuming a surrender in this case, nor was it for the interest of the owner of the inheritance to have such a presumption made: it might have been his intention to keep alive the term, and to have it assigned to a trustee to attend the inheritance." Now, in the first place, I do not apprehend that presumption is raised for effecting an abstracted purpose of justice; but is a probability, actual or legal, of the fact itself: this is evident, from the presumption not arising till the full period of twenty years. If the purpose of justice alone was the cause of the presumption, then it would be raisable by ten or fifteen,

fifteen, as by twenty years; but twenty years alone constitute the unalterable period for raising the presumption. In Doe v. Calvert, 5 Taunt. 171, Sir J. Mansfield expressly says, "I have never "known a case in which a shorter time "than twenty years has been held suffi- "cient to ground the presumption of a "surrender; and that is often too short "a time, for many times receipts and "documents may be lost. But it is "enough to say, that twenty years is "the time prescribed by act of Parlia- "ment as a bar to an ejectment, by an "analogy to which the doctrine of pre- "sumption has gone; and we might as "well say, presumption might be raised "by five years in assumpsit and three "years in trespass, as eighteen years "in ejectment." But in the very case of Doe

Doe v. Scott, Thompson, Baron, states, "that though no notice had been taken "of the term from 1751 to 1802 (51 "years), yet the owner of the inherit- "ance having then joined with the re- "presentatives of the termors in ex- "ecuting a deed, in which it was re- "cited, that the term had not been sur- "rendered, he thought that was sufficient "to warrant him in the opinion which "he had delivered at the trial." This is a new view of the doctrine in the case, different from Lord Ellenborough's reasoning, and comes nearer to what is apprehended to be the true doctrine of presumption. Baron Thompson rested the law on the posterior declaration of the parties, operating to annul the implied presumption by time, and to continue the term. It will be seen hereafter, that an assignment

assignment to attend, or any trust or declaration to attend, will exclude the presumption of a surrender by time, because such trust or declaration necessarily implies the continuance of the term; and it is clear, that such a trust, or declaration, made during the twenty years will prevent the presumption by time; but the true question here is, whether a posterior declaration, after the twenty years have elapsed, and the presumption apparently taken place, will retrospectively annul the presumption? Certainly if an actual assignment, or declaration to attend, was made during the twenty years, though not produced till afterwards, still it would prevent the presumption; can, therefore, the intent of continuing the term be raised by a subsequent declaration, so as to rebut the presumption?

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In some cases, posterior acts will be proof of prior events; as the receipt of rent after a fine, but for the period before the fine was levied, will prove a freehold to support the fine; but the general principle is, that posterior acts will not operate retrospectively: thus, a purchase by a father in the name of a son will operate as an advancement, unless rebutted by some contemporaneous declaration: no subsequent declaration will avail. So where consent by a married woman to the laying out of trust-money is necessary, no subsequent consent will avail. And in other cases it cannot, therefore, be admitted, that a subsequent declaration, without some contemporaneous overt act, can annul a presumption actually completed; for it would destroy all confidence in legal results, if they were open to be varied

varied by subsequent declarations. Admitting, therefore, that Baron Thompson put the case of Doe v. Scott upon its right principle, differently from what Lord Ellenborough considered it, yet I submit that the principle did not warrant the decision, and that this case cannot be sustained at law against the many authorities which have held, that a term, after twenty years' dormancy, that is, without any continuing trust or declaration of attendancy, shall be surrendered by presumption; and one would think it should be clear, that when a term is once surrendered, and consequently ceased, it cannot be revived by any posthumous declaration. I would add a few words as to the expression, "owners of "the inheritance." This expression seems extremely incorrect, and its incorrectness appears

appears to have led Chief Justice Abbott into an error in his judgment in Doe v. Hilder. The expression "owners of inheritance" means all the reversioners after the term, that is, all persons seised of or interested in the reversion: thus, if a term is assigned to A. his executors, administrators, or assigns, upon trust for B. his heirs and assigns, and to attend the inheritance; and B. afterwards demises to C. for a term, C. the second termor becomes a reversioner, or one of those who are meant by the expression "owners of the inheritance," that is, in fact, cestui que trusts of the term. Now, in Doe and Hilder, where such a case occurred, and the presumption was made in favour of the second termor, Abbott, Chief Justice, urged it as a case where the presumption was against the

the owner of the inheritance, supposing that the words meant, the freeholders for the time being; but the real meaning is, the cestui que trusts of the term, or whoever claims any estate or interest in the reversion after the term.

I would wish, therefore, to fix the doctrine on what appears to be the right principle, viz. that, notwithstanding Doe v. Scott, there is no sound distinction in the application of surrender by presumption, between cases for or against the inheritance, because every reason which has been urged for its applying when for, but not when against, the inheritance fails. With respect, however, to the safe acting in practice in cases of this class, till the doctrine is finally settled by a sound decision after due consideration and ar-

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gument; and also indeed in all other cases considered in this discussion; *this* I shall endeavour to point out fully and clearly in the summary of the whole doctrine.

3d. As to the third class of cases where there are facts against the presumption.

This class includes those cases where the term has been expressly declared, or assigned upon trust to attend, or on its original creation, if created for a particular purpose, is directed, on such purpose being satisfied or discharged, to attend. Now I take such trust, or direction of attendancy, to amount to an express prohibition of a surrender, till the trust or direction be afterwards rebutted by any counter declaration or circumstances. If the trust had

had been in so many words, that the term should not cease or be surrendered, but attend and protect, then it will be admitted that a surrender would have been prohibited; but is not the very trust, to attend and protect, of itself equally prohibitive? for how can the term attend and protect unless it be continuing, and not surrendered? and therefore the declaring, that it shall attend and protect, is tantamount to declaring that it shall not be surrendered, because, if surrendered, it cannot attend and protect. I submit, therefore, that every express trust of attendancy is a direct prohibition of a surrender by presumption, till such trust is rebutted by counter facts; and what these counter facts are, and the weight and influence to be allowed to them, will be considered in the 4th class of cases infra, when

circumstances both for and against the presumption exist. The present class of cases, viz. those only where there are circumstances against the presumption, are, in practice, generally the following: 1st, When in a family title of regular descent, or devise, without any sale or mortgage, or other alienation inter vivos, a term has been once assigned, or declared upon trust, to attend however far back, whether for twenty or one hundred years, yet such trust, amounting to a continuing intent against the presumption, and there being no counter-intent rebutting it, will effectually resist the presumption, and the term will continue: 2dly, When, in either of the two instances mentioned in the last class of cases, the term, though never assigned nor declared upon trust to attend, is yet excepted or recognised in any conveyance,

veyance, as continuing within twenty years after the commencement and dormancy, this recognition will rebut the continuance of dormancy, and bring down the existence of the term to the time of the recognition: 3dly, So in all cases where the course of presumption before the twenty years are expired, is stopped by any act, declaration, or evidence whatever rebutting such presumption.

4th. As to the fourth class of cases, viz. where there are facts both for and against the presumption. This is the important class, and involves the cases which generally arise in practice. I shall first shortly recapitulate those cases which are not included in this class, and then come to those which are included. Now, first, those cases are not included where an actual surrender has been made, but

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is lost, and the evidence goes to prove the actual surrender: 2d, Nor those cases of pure operation of time, without any collateral circumstance bearing on the presumption: 3dly, Nor those cases where the facts rebut the presumption without any counter-evidence; but, 4thly, those cases only where there exist facts and circumstances both for and against the surrender. Now such facts as may be considered for the surrender are, 1st, Lapse of twenty years or upwards without the term being acted upon or recognised: 2dly, A subsequent term acted and relied upon for attendancy and protection, without any notice of the prior term: 3dly, Alienations of the inheritance without recognition of the term. On the other hand, such facts as may be considered against the surrender are, 1st, An express trust to attend: 2dly, Recognition of the term in the convey-

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ance of the inheritance: 3dly, No subsequent term to protect. These form the principal circumstances, both for and against the surrender, which occur in this class of cases; and it is in the balancing of these conflicting circumstances, and in determining the scale of greater weight, that the difficulty lies. But it will be objected at the outset, that an express trust of attendancy cannot be rebutted by any presumption, because, after a term has been once assigned to attend, nothing will cease it, but an actual surrender. It is necessary, therefore, to fix this point before the distinctions are stated. Now, first it is clear, that every term upon trust to attend is holden upon trust for the owners of the reversion expectant on the term. Such owners are the cestui que trusts of the term, and are as competent to call for

for an assignment of the term from the trustee, as the cestui que trusts of the fee are competent to call for a conveyance of the fee. Such owners may, if they please, the day after the assignment, or at any time, require the term to be surrendered. The attendancy of the term, then, is not of that indelible nature as to be unalterable. An actual surrender would of course cease the term. 2dly, As, then, the term may be actually surrendered by the direction of the owners of the reversion, notwithstanding the prior trust to attend, so also it becomes capable of being surrendered by time if, and when, the continuing nature of the trust is stopped: thus, if the owners of the reversion were, by some deed, to declare their intent to obtain a surrender of the term; then the

the lapse of twenty years from this time would amount to a presumption of a surrender; because these twenty years would run from the period when the continuing nature of the trust stopped, and then the term would be open to presumption. 3dly, Whenever, though there is no express declaration of intent by the owners of the reversion, to obtain a surrender of the term, yet other circumstances exist which demonstrate the intent tantamount to a declaration; the term, notwithstanding the trust of attendancy, will be open to surrender by presumption. The inquiry then is,—and here we come up to the difficulty,—what are the circumstances which will be sufficient to demonstrate the intent? This inquiry brings me at once to the discussion of the case of Doe v. Hilder, which has

has caused such a tumult among conveyancers, and of the animadversions which have been made by various judges on the decision in that case. And in order to go through this discussion satisfactorily, it will be necessary to state the case of Doe v. Hilder, from the report, so far as it regards this point, and also the animadversions on it, verbatim. The case of Doe v. Hilder as to this point was thus.

Doe, on the demise of Putland, against Hilder.
2 Barn. and Ald.

EJECTMENT for a certain piece of marsh land, situate at the parish of Hurstmonceux, in the county of Sussex. At the trial before Park J., at the last Spring Assizes for that county, the following facts appeared in evidence. In 1808, Richard Newman, being indebted to the lessor of the plaintiff, executed a warrant of attorney to confess a judgment to the amount of 4000*l*. The judgment having been accordingly entered up, was revived in 1818 by *scire facias*, and a writ of *elegit* issued thereon. An inquisition was taken under this writ on the 13th March 1818, by which

which the premises in question were extended as one moiety of the hereditaments of Richard Newman, in the possession of the defendant. The defendant, in 1816, became tenant to Mrs. Sarah Newman, to whom, in that year, her son, Richard Newman, had conveyed his life-interest and his reversion in the premises as a security for a debt, without any notice of the judgment signed in 1808. No notice to quit had been given to the defendant. In 1762, a regular mortgage term of one thousand years was created by Francis Hare Naylor, then the owner of the fee in these and other premises of greater value, and several further charges were made previously to, and in the year 1770. In 1771, Naylor devised the estate to trustees to sell. In 1779, they sold and conveyed these premises to John Newman in fee, and the term was assigned to William Denman, his executors, administrators, and assigns, in trust for John Newman, his heirs and assigns; and to be assigned, conveyed, and disposed of, as he or they should direct and appoint; *and in the mean time and until such appointment to attend and wait upon the freehold and inheritance of the same premises.* The estate descended from John Newman to his nephew, Richard Newman, who, in October 1814, on his marriage, settled the estate to the use of himself for life, with remainder over in strict settlement. On the 17th March 1819 (after the commencement of this action), John Denman, as the son and next of kin of William Denman, who died intestate in 1810, took out letters of administration, and by a deed, dated 19th March 1819, by the direction of the devisees of Mrs. Sarah Newman, who had died in 1816, assigned the term in the usual and regular way to a trustee for them,

them, and to attend the inheritance. The deed creating the term in 1762, was produced by a purchaser of the larger part in value of the estate comprised in it. The deeds of 1779 and 1819 were produced by the defendant. Two questions were made. First, that the defendant, under these circumstances, was entitled to a notice to quit. Secondly, that the outstanding term put an end to the plaintiff's case, the legal estate being thereby out of him. The learned judge was of opinion against the defendant, on the first point; and as to the second, he directed the jury to presume a surrender of the term. The jury having accordingly found a verdict for the plaintiff, Gurney, in last Easter term, obtained a rule nisi, for setting aside the verdict, against which rule cause was now shown by

Marryatt and Abraham for the lessors of the plaintiff. They contended, first, that the jury were warranted in presuming a surrender, where the purposes of justice required it. Here the term had been taken no notice of from 1779 till 1819, just previously to this trial. And yet there were many intermediate conveyances, and one marriage settlement executed. In support of this they cited Doe v. Pegge*, Lade v. Holford†, Doe v. Staple‡, Doe v. Scott§, and Doe v. Wright‖.

Gurney, Comyn, and Sugden, contrà.

As to the second point, this differs from any of the cases cited: for there the presumption of the surrender of the term was made in favour of the owner of the inherit-

* 1 T. R. 760. † Bull. N. P. 110. ‡ 2 T. R. 684.
§ 11 East, 478. ‖ 2 Barn. and Ald. p. 710.

ance,

ance, but here it is to be made against his interest. Any thing which clogs the free alienation of property is detrimental, and therefore the court ought as far as possible to protect the interests of purchasers. It was for this purpose that these terms were introduced, viz. to protect the estate in the hands of a purchaser from the effect of mesne incumbrances, Evans v. Bicknell *. It is said that no notice is taken of this term in the marriage settlement of 1814. But it is not usual to do so. A term is not usually assigned either on a devolution of the estate from ancestor to heir, or on a marriage settlement; when once assigned to attend the inheritance, it is considered as always assigned for that purpose. The case of dower has always been considered as the excepted case, and was so stated by Lord Eldon in Maundrell v. Maundrell †. As to the possession, the question is, whether that has been inconsistent with the existence of the term, Keene v. Deardon ‡. Possession is indeed evidence of title, but not whether that be a legal or an equitable title. And the owner of the inheritance being considered as tenant at will to his trustees, his possession is the possession of the trustees. Freeman v. Barnes §, Dighton v. Greenvil ‖. Here there has been nothing inconsistent with the subsistence of the term. And if the mere lapse of time be sufficient, it will become a difficult question hereafter to ascertain how often a term must be assigned in order to rebut the presumption of its being surrendered. This doctrine will in practice be found extremely inconvenient,

* 6 Ves. 184. † 10 Ves. J. 246. ‡ 8 East, 248.
§ 1 Ventr. 82. 1 Sid. 460. S. C. ‖ 2 Ventr. 329.

and

and may prejudice many titles which are at present considered as good. Here too the circumstances relied on in Doe v. Wright *, of the deeds being in the possession of the owner of the inheritance, do not occur. They also cited upon this point Doe v. Sybourn †, Goodtitle v. Morgan ‡, and Willoughby v. Willoughby §.

Abbott C. J. now delivered the opinion of the court. This was an action of ejectment tried before my brother Park at the last assizes for the county of Sussex. The title of the lessor of the plaintiff was upon a judgment recovered in the year 1808, against Richard Newman for 8000*l.* and a writ of elegit and inquisition thereupon in the year 1818, finding Richard Newman seised in fee of the premises in question. It was further proved that the defendant occupied the land as a tenant, and had declared that he considered it to belong to Richard Newman, and had delivered to him a notice of the judgment received in June 1818 from the lessee of the plaintiff. On the part of the defendant, it was proved that on the 23d June 1762, Francis Hare Naylor had conveyed the premises in question, *inter alia*, to Thomas Carter, for a term of one thousand years, by way of mortgage for securing the sum of 6000*l.* That in the year 1779, the mortgage was paid off, and deeds were then executed, whereby, in effect, the term was assigned to William Denman in trust for John Newman, a purchaser of the premises, and to attend the inheritance. That in the month of October 1814, the

* 2 Barn. and Ald. p. 710. † 7 T. R. 2.
‡ 1 T. R. 755. § 1 T. R. 772.

said

said Richard Newman, to whom the premises had descended from the purchaser John Newman, made a settlement upon his intended marriage, whereby he conveyed the premises to trustees and their heirs to the use of himself for life, with a remainder to his intended wife for life, remainder to the issue of the marriage, and reversion to himself in fee. That in the year 1816, the said Richard Newman and his wife conveyed their life estates, and his reversion in fee, to Sarah Newman, the mother of Richard, as a security for 1162*l.*; which appears to have been money then due from him to her. That Mrs. Newman, the mother, died in the year 1817, having previously devised her interest to some other relations. That William Denman, to whom the term had been assigned in trust, to attend the inheritance as aforesaid, died about four years ago; and that on the 19th March last, his son took out administration to him, and executed a deed, purporting to be an assignment of the term to a person therein named, in trust for the devisees of Mrs. Newman, the mother. Upon this evidence, two questions were made at the trial; whether the term might be presumed to have been surrendered and merged in the inheritance; and if it might not, then whether it was a trust within the 10th section of the statute of frauds, so as not to stand in the way of the execution on the judgment. The learned judge thought this a case in which a jury might presume a surrender of the term; and the matter being accordingly left to them, they found that the term had been surrendered. A motion was afterwards made for a non-suit, according to leave given by the learned judge; a rule to show cause was granted, and the matter argued before us very

very fully and ably. The same two points were made. And with respect to the statute of frauds, a further point also: it being contended, first, that the trust of a term of years is not within the 10th section of the statute; and, secondly, that if it be, yet in this particular case, the statute would not help the plaintiff, because the termor must be considered as a trustee, not for the debtor, but for the devisees of Mrs. Newman, at the time of issuing the execution. Upon these points, however, it is not necessary for us to pronounce any judgment, because we are of opinion, that in this case, a surrender of the term might lawfully and reasonably be presumed. It is obvious, that if such a surrender had been made, it would probably not be in the power of the plaintiff to produce it, he being a stranger to the particulars of the title which his debtor had in the land. The principal ground of objection to the presumption was, that such a presumption had, in no instance hitherto, been made against the owner of the inheritance; the former instances being, as it was said, all cases of presumption in favour of such owner. But this proposition appears to be too extensively laid down. One of the instances in which it has been said that a surrender shall be presumed, is the case of a mortgagor setting up a term against his own mortgagee, and this is said generally, and without distinction, between a mortgagee in fee or for years. But if such a term be set up against a mortgagee for years, and a surrender presumed, the presumption is made against, and not in favour of the owner of the inheritance. It is made against his interest at the time of the trial, but in favour of his honesty at the time of the mortgage; for if the term existed at the time of the mortgage, he

he ought in honesty to have secured the benefit of it to the mortgagee at that time, and not to have reserved it in his own power, as an instrument to defeat his mortgage. And upon the same principle on which a surrender is presumed in the case of mortgagor and mortgagee, we think it may reasonably be presumed in the present case; though the principle is applicable not to the judgment creditor, but to other persons. One of the general grounds of a presumption is, the existence of a state of things, which may most reasonably be accounted for, by supposing the matter presumed. Thus the long enjoyment of a right of way by A. to his house or close, over the land of B., which is a prejudice to the land, may most reasonably be accounted for, by supposing a grant of such right by the owner of the land: and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for, by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed. Where a term of years becomes attendant upon the reversion and inheritance, either by operation of law, or by special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor, and without supposing any surrender of the term; and therefore in general such enjoyment, though it may be of very long continuance, may possibly furnish no ground to presume a surrender of the term. But

 where

where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made; in such cases the things done or omitted may most reasonably be accounted for, by supposing a surrender of the term; and therefore a surrender may be presumed. We think there are such things in the present case. In the year 1814, Richard Newman the debtor, and then owner of the inheritance, made a settlement upon his intended marriage, which took place immediately. Upon such an occasion the title and title-deeds of the husband would probably be looked into by professional men, on the part of the husband at least, if not on the part of the wife also; and notwithstanding the assertion of one of the learned gentlemen, who argued this case on the part of the defendant, and by whom we were informed that it is not usual, on such occasions, to take any notice of an outstanding satisfied term; we cannot forbear thinking that such a term always ought to be, and frequently is, in some way noticed, either by the deed of settlement, or by some separate instrument; because, if it be not noticed, and the termor be not called upon to assign the term to the uses of the settlement, nor any declaration of trust made of it to those uses, it may afterwards be made an instrument of defeating the settlement. The title-deeds usually remain with the husband; and if he be driven by necessity to borrow money, he may meet with a lender who has no notice of the settlement, and may by handing over his deeds, and obtaining an assignment of the

the term to him, and other conveyances, give to him a title that must prevail both at law, and in courts of equity, against the settlement. The supposed practice of taking no notice of outstanding terms on such an occasion, appears to have been insisted upon before Lord Hardwicke, in the case of Willoughby v. Willoughby, as applied to marriage settlements and purchases. But that very learned judge, in giving his judgment in that case, says, he had inquired of a very learned and eminent conveyancer, and could not find that there had been any such general rule. And he afterwards proceeds to say, "Where the assignment has been generally in trust to attend the inheritance, and the parties approve of the old trustees, they may safely rely upon it, especially in the case of a purchase or mortgage, where the title-deeds always are, or ought to be, taken in; for if he has the creation and assignment of the term in his own hands, no use can be made of it against him. Such instances as these may account for the practice in many cases, but cannot constitute a general rule." If in the present case it had appeared, that the deeds relating to the term were delivered to the trustees of the marriage settlement, as one of the securities for the settlement, the case would have stood on a very different ground. The marriage settlement, however, is not the only occasion on which we think it may most reasonably be supposed, that this term, if existing, would have been brought forward. It appears that in 1816, the same Richard Newman, being then indebted to his mother, and desirous of giving her security for the debt, prevailed upon his wife to join with him in conveying to her the interests they derived under the settlement. Upon this occasion,

an assignment of the term, or a delivery of the deeds relating to it, would undoubtedly have been most important acts in favour of the mortgagee, because they would have protected the mortgagee against any subsequent use of the term to defeat her mortgage. On both these occasions, therefore, the term, if existing, could not have been wholly disregarded, without either want of integrity on the part of Richard Newman, or want of care and caution on the part of the professional men engaged in those transactions. We think it more reasonable to presume a prior surrender of the term, than to presume such deficiencies. It certainly might not unreasonably be left to a jury to consider to what cause they would attribute these omissions; and this was done at the trial. It is true that an assignment of the term was taken a few days before the trial for the alleged benefit of the legatees of the mortgagee, Mrs. Newman, on whose behalf we were informed the present cause was defended. But this tardy act cannot be of any avail, and leads not to any presumption. The assignment was made by the administrator of the person in whom the term had been vested; and the administrator would probably be ignorant of any previous surrender made by the intestate. The time for dealing with the term, on behalf of the mortgagee, was the date of the mortgage. An actual assignment of the term is more regarded than its mere quiescent existence. It will defeat the title to dower, which its existence only will not, according to the case of Maundrell v. Maundrell, 7 Ves. jun. 567, and 10 Ves. jun. 246, and the cases there cited. These observations respecting the settlement and the mortgage, receive additional force from the consideration of

of their dates. They were both long subsequent to the judgment, and they are the acts of a person materially interested in protecting the land from the judgment, and excluding all questions on the subject of priority or otherwise in the case of the settlement, for the sake of his intended wife, and the issue that he might expect by her, and in the case of the mortgage, for the sake of the mortgagee, to whom he was so nearly related, and who was evidently a favoured creditor. And it cannot be denied that an actual assignment of the term would have been in many respects more operative against the judgment, than its mere existence. In the case of the mortgage, it would have put an end to all question on the Statute of Frauds, by making the termor specifically a trustee for the mortgagee before execution issued, according to the case of Hunt v. Coles, 1 Com. Rep. 226. For these reasons we think the verdict ought not to be disturbed, and the rule must therefore be discharged.—Rule discharged.

The animadversions by Mr. Sugden on this case now follow *.

"It will at once be observed, that this is a stronger case in favour of the existence of the term than that which we have been considering. There was no circumstance which pointedly called for an assignment of the term before the period when one was made; for an assignment is never made by reason of descents, or of a marriage settlement. Previously to the sale, therefore, the presumption could not on any reasonable ground be let in; and if not, such

* Sugden on Vendors and Purchasers, 6th edition, p. 420.

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a presumption ought not to have been made at all. There could be no doubt which ought to be preferred, the purchaser, or the judgment-creditor. The latter obtained his judgment on a warrant of attorney, and slept on his security for ten years, and never had a specific lien on the estate, but a general security riding over the whole of the seller's property; whereas the purchaser not only bought the estate itself without notice of the incumbrance, but had possession of all the deeds relating to the term, to the possession of which he was entitled as a purchaser. That circumstance alone, even as between two mortgagees of the estate itself, both of them equally innocent, would give the better right to the one holding the deeds *. As between a purchaser of the estate and a mere judgment-creditor, the rule applies with irresistible force. The purchaser, therefore, clearly had *the better equity;* and the presumption of the surrender, without any evidence upon which to ground it, let in the judgment-creditor on the estate in the hands of the purchaser, although, according to equity and good conscience, the creditor had no title to rank as such. *The presumption too let in the judgment-creditor on the estates provided for the wife and children by the marriage settlement; for the term could not be presumed to be surrendered against the purchaser, and in existence for the benefit of the wife and children.* And yet gentlemen in very great practice never knew an instance of an attendant term being re-assigned on a marriage, and have suffered hundreds of settlements to be executed without requiring such an assignment; so that the provisions made for very many families may be deeply incumbered

* Stanhope v. Earl Verney, 2 Eden, 81.

if

if this new rule is to be followed. It will not be contended that the subsequent conduct of the purchaser of the life-estate ought to affect the wife and children of the seller; and yet it is undeniable that the circumstance of the purchaser not taking an assignment of the term was relied upon as a strong ground in favour of the presumption. The assignment was made by Denman's administrator, who was regularly such as next of kin, and not a mere stranger, procuring a limited administration *de bonis non*, for the purpose of assigning the term.

"The above decision powerfully attracted the attention of the profession. An ejectment was afterwards brought by the Newmans and Denman, against Putland, who recovered in the former ejectment, to recover back the estate *. It came on at the assizes for Sussex, before Mr. Baron Garrow. Upon this ejectment the lessors of the plaintiff proved a mortgage in fee of the estate to Thomas Markwick, in August 1814, by Richard Newman the son, who afterwards made the marriage settlement. By this mortgage, which it had not been considered necessary to produce upon the former ejectment, all deeds were granted; and it contained a *general* declaration of the trust of all terms of years for the mortgagee. The assignment of the term from Carter of the 7th of October 1779, was delivered over to Markwick, and was contained in a schedule of title-deeds made at the time of the mortgage, and signed by Markwick. By a deed dated the 9th of September 1819, Newman, the trustee

* Doe v. Putland.

of

of the one thousand years' term, declared that he would stand possessed of it in trust for Markwick, and to secure the mortgage-money due to him. It was argued on the part of the defendant, that it would be inconvenient that one judge should direct a jury to presume a surrender of the term, and another direct the contrary. In the mortgage to Markwick there was no notice of any particular term, and no assignment was taken of the one thousand years' term; Newman might therefore have parted with the term upon a new loan. The assignment in March 1819, was not at all for the benefit of Markwick; there was no acting upon the term from 1779 till 1819. No notice was taken of it in the marriage settlement. The learned judge said, in charging the jury, that the facts were very different now to those proved on the former trial; and his present view was sanctioned by the suggestion in that very case. Here the deeds were handed over to the morgagee before the settlement and conveyance, which accounts for the term not having been mentioned in those securities. The circumstance of the deed having been scheduled and handed over to Markwick shows that the term had not been surrendered. The learned judge directed the jury to find a verdict for the plaintiff. The jury found that the term was subsisting, and reserved any question of law.

"In Trinity term 1820, the defendant moved for a new trial; the learned judge who tried the cause restated the point upon which he directed the jury, and observed, that the case had excited a great deal of attention, and had occasioned the observations which have already been submitted

submitted to the learned reader *. The Chief Baron said, that he should like to have the point argued on the presumption of surrender. From his habits in Westminster Hall, his lordship added, he had travelled more than most men through the law relating to this case, and he did not think the doctrine of presumption a correct doctrine. It is a very serious point; and of late the doctrine has been carried to a very frightful extent. Mr. Baron Graham observed, that he had never suffered these presumptions, except in cases very strongly warranted, and where nothing was shown to the contrary. The Chief Baron added, that he never desired a jury to presume where he did not believe himself. The Court gave the defendant leave to argue the point upon the statute of frauds, upon a case to be stated †. The point, therefore, as to the surrender of the term, was put at rest. The case upon the other point was prepared, but the suit has since been compromised, highly to the advantage of the Newmans.

"The attention of the Lord Chancellor was quickly drawn to the doctrine of the Court of King's Bench. In the Marquis of Townshend v. Bishop of Norwich, on the 27th January 1820, his lordship observed:—

* They appeared at the time in the shape of a letter from the author to Mr. Butler.

† It appears, therefore, that the presumption was made on the first ejectment against the real facts and merits of the case as they ultimately appeared. This powerfully shows that such a presumption ought not to be made on light grounds.

The

"'The legal interest in the advowson is unquestionably in Mr. Ainge for a term of years, which, as I understand, has been expressly assigned to attend the inheritance. I do not inquire whether there may have been intermediate transactions since the creation of the term, which might induce some people to think a surrender of it should be presumed, further than to remark, that having in days, which perhaps may be thought days of yore, passed about two years, by no means unprofitably, in the office of Mr. Duane, and during which I had frequent opportunities of knowing the opinions entertained by Mr. Booth, Mr. Fearne, and other eminent conveyancers of that day, I well know that they were in the habit of proceeding on notions relative to satisfied terms, which, notwithstanding some modern decisions, I would not advise conveyancers to depart from *.'

"Upon another occasion his lordship observed: 'Formerly, assignments were not considered necessary, because the old trustee would be a trustee for you, although you might not like him. It was never considered that the presumption of a surrender was to be made because some particular act had not been done. Lord Kenyon thought that some act must be done to presume a surrender; but now it is said, that if no act is done, you may presume a surrender: I cannot go the length which I see some late cases go, where there is no proviso. They have raised the presumption from a transaction where they say the term would have been assigned

* From Mr. Wilson's note.

if

if not surrendered. I say that the circumstance does not let in that presumption; because the purchaser must know that the term will be held in trust for him, and he may leave it where it is, to save the expense of taking out administration*.'

"His lordship again took occasion to observe, in Hayes v. Bailey, 15th March 1820: 'There is now a modern doctrine of presuming surrenders. When I first came here, every old lawyer thought assignments of terms unnecessary; and as to the principle, that the term would be presumed to be surrendered if it had not been assigned on marriages, &c.; it was then thought that there was no occasion to assign, for if it had once been assigned to attend, the assignee will be a trustee for you. They then never thought it necessary to have it assigned on such occasions. I remember Mr. Lloyd used to say, that an old term was worth two inheritances. You see Lord Kenyon got as far as this before he would presume a surrender; you must show that there had been some dealing with it; but it seems to be the law now, that if you show that there has been no dealing with it, you are to presume it surrendered †.'

"In the late case in the Exchequer, of Deardon v. Lord Byron, the Chief Baron again expressed his disapprobation of this doctrine of presumption ‡.

"Upon the appeal in the House of Lords, in Cholmond-

* From the author's note. † From Mr. Jacob's note.

‡ MS.

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ley v. Clinton *, the Lord Chancellor, with reference to a deed of the year 1704, by which a term of two hundred years was created, with a proviso for the cesser of the term; but which, as the circumstances upon which that term was to determine had not taken effect, remained a subsisting term, and was assigned in 1811, observed:— 'I would wish to call your Lordships' most particular attention to this part of the case, because, unless I now misunderstand, and unless I have misunderstood for a good many years, in which I have been laboriously, in different situations, discharging the duties which belong to the profession, of which I have the honour to be a member, the doctrine upon this subject, there arise out of the circumstances which I am about to mention many important observations bearing upon this case, with a great degree of importance, because bearing, unless I misunderstand the case very much, upon the titles to property in this kingdom. My Lords, this deed of 1704 provides, as I before stated, for the cesser of the term, that is, of the interest which the term creates. Let me suppose for a moment, that there had been no such declaration with respect to the cesser of the term, or what comes to the same thing, that the state of things has not yet arisen in which the term is to cease, that term created in 1704, would, according to all the ideas that I ever had of the law of this country (I am speaking now of what would have been done twenty-five years ago, instead of speaking particularly of the present time), be considered as a term which, whether the instrument that created it or

* MS.

not

not did so declare, would be attendant upon the inheritance when the ends and trusts of it were satisfied; that is, it would be considered as a term, where neither presumption that it was satisfied, nor presumption that it was surrendered, would at that period have been entertained, unless there had been some dealing with the term which would authorize a presumption either of the one nature or of the other; but it would be taken to be, what, in the language of those who are now no more, I have often heard it stated to be, the best part of a title, namely, that old term that could be got in to protect the inheritance. And I conceive that such a term, whether there was any intention that it should or should not attend the inheritance, would be a term held in trust to attend the inheritance, protecting the equities of all who had equities during the existence of that term; all the estates, to a certain extent, that is, during the duration of the term, would be equitable estates, but protecting them all according to the due course, and order, and priority in which they existed, and according to their equities.'

"In giving judgment in the same case upon the hearing at the Rolls, the present Master of the Rolls appeared also to be of opinion against the presumption in such cases*.

"Since the decision in Doe v. Hilder the point has been repeatedly debated before the different Masters in Chancery, upon objections taken by sellers to procure repre-

* 2 Jac. and Walk. 158.

sentations

sentations to terms of years, which, they insisted, ought to be presumed to have been surrendered; but the general and prevailing opinion has been, that the doctrine cannot be maintained; and the Masters have acted upon that principle.

And finally, in Aspinall v. Kempson, upon a motion before the Lord Chancellor for a new trial, in which some gentleman at the common-law bar cited Doe v. Hilder, his lordship observed, 'It is not necessary to consider much the doctrine of presumption with reference to the present case; but the case of Doe v. Hilder having been alluded to, and having paid considerable attention to it, I have no hesitation in declaring that I would not have directed a jury to presume a surrender of the term in that case; and for the safety of the titles to the landed estates in this country, I think it right to declare that I do not concur in the doctrine laid down in that case *.'

"We may, therefore, be justified in considering the law to stand as it did before the decision in Doe v. Hilder; and conveyancers of course will follow the advice of the Lord Chancellor, and not depart from the practice which they have hitherto followed.

"The Vice-Chancellor has in two late cases upon specific performance, as between a seller and a purchaser, presumed a term to be surrendered, which had *not* been assigned to attend the inheritance, and which for a long

* L. I. Hall, 5 Dec. 1821, from Mr. Walker's note.

period

period had not been disturbed. The first case was Emery v. Growcock *, which will I believe be reported. The other case was *ex parte* Holman †, where it appeared, by the abstract of title delivered to the purchaser, that, by indenture bearing date the 24th of December 1735, and made between Thomas Baker of the one part, and John Marsh of the other part, the said Thomas Baker did grant and demise, amongst other hereditaments, the messuage and premises in question unto the said John Marsh, his executors, administrators, and assigns, for the term of five hundred years, subject to redemption on payment by the said Thomas Baker, his heirs, executors, administrators, and assigns, unto the said John Marsh, his executors, administrators, or assigns, of the sum of 205*l.* on a certain day therein mentioned; that the said sum was not paid accordingly; but that the same, with all interest, was paid to the executor of the said John Marsh on the 6th day of October 1750, as appeared by a receipt indorsed on the said indenture; but no assignment or surrender of the said premises comprised in the said term was ever made and executed, and therefore the purchaser insisted, that the sellers should, at their own expense, discover the personal representatives of the said John Marsh, and procure an assignment from them of the said term to a trustee for the purchaser to attend the inheritance.

"The Master, to whom the title was referred, was of opinion that the term of five hundred years was outstanding, and was then vested in the personal representative

* March 1821, MS.

† 24 July 1821, MS.

or

or representatives of John Marsh the termor, but it did not appear by any evidence before him who was or were such personal representative or representatives; and the Master was of opinion that it was expedient and necessary that the said term should be assigned to a trustee for the purchaser, and that the expense of deducing the title thereto, and of procuring the said term to be so assigned, should be borne and paid by the vendors.

"In an intermediate deed, dated in July 1749, the term was noticed, but in no other deed was it mentioned; and there were three conveyances of the fee upon sales, one in 1784, another in 1791, and the other in 1792. The Vice-Chancellor was of opinion that a surrender of the term must be presumed."

But before I advance to the consideration of Doe v. Hilder, it will be expedient to bring back to our view some of the propositions already laid down, viz. 1st, That the trust of attendancy is not of that indelible nature as to be incapable of being revoked or changed; but that the cestui que trusts of the term may immediately, or at any time after the

the attendancy, direct an actual surrender: 2dly, That such cestui que trusts may immediately, or at any time thenafter, declare their intent to have the term surrendered, and that such intent will stop the continuing nature of the trust of attendancy, and subject the term to the operation of presumption; and that the lapse of twenty years after such intent declared, and without any dealing whatever with, or any recognition of, the term, will raise the surrender by presumption. The above two propositions have been before laid down—I now come, 3dly, to the third and further position, viz. that though there is no express declaration of intent, yet facts and circumstances may exist of that degree and nature as to demonstrate an intent to have the term surrendered, and then the intent being established by

these facts and circumstances, the like result will follow, as in the case of an express declaration of intent, viz. that after a subsequent dormancy of twenty years, without any notice whatever of the term, the presumption will be concluded and the term be legally surrendered. The requisite point is, to ascertain that the facts are of sufficient force, that they are what the ecclesiastical courts call *proximate* facts, such as necessarily and unavoidably raise the inference. It is clear also, that unless some certain rule can be laid down, which may be applied to all cases, the doctrine will not be practical: but I submit, that a sure and certain rule can be established, always applicable and easily applied. Thus, suppose A. to be seised in fee, married, and his wife dowable, with two outstanding terms

terms vested in separate trustees upon trust to attend; A. sells and conveys in fee to B. and B. takes an assignment of the second term to a trustee upon trust, expressly to attend and protect against the dower of A.'s wife; but no notice is taken of the first term. After this, twenty years elapse. Now, would not these facts be proximate facts; that is, be of such force as irresistibly to raise the inference of an intent by B. when he purchased, to have the first term surrendered? For consider the case: when B. purchased there were two terms, and he took an assignment of the second term only, upon trust to protect against the dower of A.'s wife. Now, by taking this assignment upon trust to protect, he meant that the term should so operate to protect; but the second term would not

protect while the first term was continuing. The dowress would retain her prior equity of the first term. Is not this then demonstrative, that he intended to have the first term surrendered? He has the second term expressly assigned to effect an object which cannot be effected while the first term continues. I repeat, is not this demonstrative that he meant the first term not to continue? The trust of protection declares, that the second term shall protect, and, as it cannot protect unless the first term is surrendered, does it not also necessarily declare, that the first term should be surrendered? I take it that the intent is as convincingly shown, as if it had been expressed in so many words; then the intent of having the first term surrendered being proved, the continuing nature

ture of the trust stops, and the term becomes subject to presumption; and a subsequent dormancy of twenty years, without any dealing with, or recognition or notice of the term, will raise and conclude the presumption; and the first term must be considered as legally surrendered at the expiration of twenty years from the stopping of the continuing nature of the trust to attend.

I now advance with greater confidence to the discussion of Doe v. Hilder. Now, first, I submit that the principle laid down in the judgment of Doe v. Hilder was right, though the application of the principle to that case was not warranted by the circumstances. The circumstances were meagre. There was only one alienation by a marriage settlement, and

and a mortgage by a son to his mother of his life interest and reversion. There was no second term, nor, in truth, any act or circumstance that could at all incline to be deemed a proximate act. As to the observations by Chief Justice Abbott, that outstanding terms are got in and assigned on marriages, it is well known to all conveyancers, that it is never the practice to call in an outstanding term on a marriage. I do not recollect a single instance of its being done; and I will venture to predict, that it never will be done; the nature of the transaction forbids it. The parties are in too much haste, and will not wait. How would the lovers stand aghast at being told, that the happy day could not be fixed, till a certain grave personage, denominated "An outstanding Term,"

Term," could be got in and assigned to attend? The perpetual result would be, that they would marry and leave the term to its fate. The fact, therefore, of a settlement being made without an assignment of the term, tended in no degree to raise the presumption of a surrender. Besides, a settlement is an ex parte alienation, not a parting with the lands; but the lands are settled or made more sure and fixed in the family. Even on a mortgage it was not, till of late, the practice to take an assignment of outstanding terms, though now, and in future, from the recent fluctuation in the value of land, and also from the more extended use and application of attendant terms, mortgagees do and will require their assignment. It appears then, that in Doe v. Hilder there was not a single

single proximate fact. The settlement was not one; and beside that, there was only a mortgage of a life estate and reversion by a son to his mother, which could weigh nothing; for, first, it was a family arrangement, where strictness was not regarded; and, secondly, the son, as a partial cestui que trust only to the extent of the life estate and reversion, was not entitled alone to call for an assignment of the term.

I now proceed on to consider the animadversions by the various judges on the decision in Doe v. Hilder as stated in the above citation from Mr. Sugden's Treatise. These animadversions appear to resolve themselves into two objections, viz. 1st, that the term, having been assigned expressly upon trust to attend,

attend, was not liable to be surrendered by presumption; and, 2dly, that, according to the ancient practice, it was not deemed necessary to have repeated assignments of outstanding terms, or ever to assign a term after it had been once assigned expressly upon trust to attend. Now, as to the first objection, I admit that a term once assigned upon an express trust to attend, cannot be liable to surrender by presumption, while the continuing nature of the trust continues; but I submit, that the continuing nature of the trust may be stopped, and that this continuing nature will be stopped by the declaration of an intent to surrender the term. Suppose the party who had the term assigned upon trust to attend, were immediately afterwards to declare, in so many

many words, that it was not his intent to continue the term, but to have it surrendered; would not twenty years' dormancy, after such a declaration, raise the presumption? Suppose then, instead of a direct declaration, he was to deal with a subsequent term in a manner which would not be effectual according to his intent, if the first term were to continue, would not this act amount to a declaration, that the first term should not continue; but that he meant to have it surrendered? Acts can speak as strongly as words, witness the well-known illustration of the countryman and the stag, where the man, who had promised not to tell the place of concealment, did not speak, but pointed. So here, if the party does an act, which act cannot be effectual if the first term continues, is it not

not in effect a declaration by him of his intent, that the first term shall not continue? He may omit afterwards to execute his intent of obtaining an actual surrender; but all that we want is to prove the intent, so as to negative the continuing nature of the trust to attend; that is, the inference arising from it of itself, that the party could not mean the term to be surrendered, when he declared that he meant it to attend, which it could only do by continuing. Rebut this inference; show a different intent; and the term becomes free from the inference, and as it stood before the express trust, viz. open to presumption by surrender. I repeat, that the pressure of the trust to attend against the presumption is in the inference to be drawn from the continuing nature of the trust,

of

of the intent not to have the term surrendered; but let this inference be rebutted, let there be a subsequent direct declaration of intent to the contrary, or let there be such subsequent acts as amount to a necessary inference or demonstration of a contrary intent, then the inference from the trust of attendancy is rebutted, and the term becomes exposed to surrender by presumption, and twenty years' subsequent dormancy will conclude the presumption and establish the surrender. But it will be said, how can you lay down a rule of that certain discoverable operation which can be applied to cases in practice? I answer, that I apprehend such a rule may be laid down. The rule is, that the mere neglect or omission of taking an assignment of an outstanding term, to attend upon any purchase,

purchase, mortgage, or other alienation, shall not of itself raise an intent in the party to have the term surrendered, but that there must be some direct or overt act by him to raise such intent. Thus, if there are two outstanding terms, held upon trust to attend, and sale after sale takes place, without any assignment or notice of the terms, no intent of having them surrendered will arise; but the terms will be protected from presumptive surrenders, by the continuing nature of the trust to attend. But if, on any sale, the second term is assigned upon trust to attend and protect against dower, or even to attend generally, which, however, carries with it a general protection against dower; here the act of taking an assignment of the second term, and not of the first term, and yet for effecting a trust or purpose, which the first term,

term, if left continuing, might be applied to defeat, and which could be certainly effected by the second, if the first was not left continuing, but which result could not be predicated, if the first was left continuing, surely demonstrates an intent to have the first term surrendered. This is all that is wanted; viz. to raise a counter-intent to the inference arising from the trust of attendancy: and I submit that this counter-intent can be as certainly raised by acts as words; viz. as certainly by such overt acts as dealing with the second term to effect an object, which it could not effect if the first term was left to continue, as by an express declaration that the first term should be surrendered. It is upon this ground, and for these reasons, that I submit the principle in Doe v. Hilder to be the right principle, though

though the circumstances of that case did not warrant its application. But, further, it is so essential to lay down and establish a rule of that certain tangible nature, as to be always applicable to cases in practice, that I shall proceed further in such observations as will show clearly the force and operation of the rule. Now the rule is, that all passive or negative acting operates nothing. Any length of omission or neglect to take an assignment of an outstanding term once assigned upon an express trust to attend, will not be sufficient to raise an intent of a surrender by presumption. The continuing nature of the express trust to attend, exists and protects the term; but some direct act against the continuance of the term, is necessary to rebut the continuing nature of

of the trust; some demonstration arising from words or deeds of an intent to have the term surrendered, and not to continue it as attendant. It cannot be denied but a declaration of such intent, in so many words, will be sufficient. My argument is, that the intent may be as clearly manifested by acts as words, by such acts being done by the reversioner, as would not be effectual according to his intent, if the first term were left continuing; but would be effectual, if the first term were to be surrendered. I conclude, therefore, with submitting the following rule as the true and sound doctrine, viz. that whenever there is any express declaration of intent to have a term, once assigned upon trust to attend, surrendered, such intent will rebut the continuing nature of the trust to attend; and

and immediately subject the term to surrender by time. Also, that although there be no express declaration to have the term surrendered, yet if the reversioner has done any acts which raise a necessary or strong implication that he intended to have the term surrendered (because if continuing it might prejudice such acts), then these acts by the reversioner are tantamount to a declaration, and will equally stop the continuing nature of the trust to attend, and subject the term to be surrendered by time. Since the former number was published this subject of the surrender of terms by presumption has undergone much discussion, and may be considered as at this moment in progress to a sound system of doctrine. The old opinion was, that no term once assigned to attend

could be surrendered by presumption, unless there was a counter-declaration that such term was not intended to continue; but now the courts admit such presumption to be raised by the acts of the reversioner without the necessity of an express declaration. The latest case is Townsend v. Champernown (Mac Leland and Young's Reports), where this principle, first acted on in Doe v. Hilder, is recognized and sustained.

I now return to the subject of the attendancy of terms, from which the above discussion of the surrender of terms by presumption is a digression. There are some peculiarities in this doctrine of attendancy which it will be useful to consider. The foundation of the protection derived from a term is founded

founded on the rule of equity, never to act against a bonâ fide purchaser for a valuable consideration without notice, because the object of equity is to do equity, and there cannot be a higher claimant upon equity than a purchaser so circumstanced; to act against him, therefore, however it may tend to relieve another, must yet injure an innocent party; equity therefore lays it down as a rule, never to act adversely against such purchaser. The court of equity then being passive, the law takes its course, and thus the term giving the possession at law during its continuance secures such possession to the purchaser. The title of the inheritance may altogether fail, and yet the possession be safely held under the term, although he has no real right except the mere term. Thus suppose

pose A, seised in fee of lands with a term in B upon trust to attend, and A to sell in fee to C for value and without fraud or notice; but C not to require an assignment of the term; and afterwards A to sell in fee to D, also for value and without fraud or notice; and D to take an assignment of the term upon trust for himself, this term will protect D against C. It is not necessary for the party claiming the term, to have any real estate or title independantly of the term for the term to protect, (as we see in the case of D, who had no real estate or title, that having previously passed to C); but such party having paid his money and taken a conveyance, which he believes to be effectual though in reality inoperative, and having also obtained an assignment of

of the term, equity will not act against him to take away the benefit of such assignment. The single case, not of exception to this doctrine, as is laid down in some books, but, rather, in which it does not work in practice, is the case of the King, according to the decision of the King v. Smith, best reported in the Appendix to Sugden's Vendors and Purchasers. The grounds of this difference will be considered in the next number.

I have said in a former part, that in order to make a term attendant, the equitable estate or interest of the term must be merged or absorbed in or conjoined with the equitable inheritance; for without such union with the inheritance there can be no attendancy.

tance

In a late case in practice, a large estate was leased nearly two centuries back, to A for 1000 years; A afterwards underleased for 980 years; the subsequent owners of the underlease purchased the reversion in fee, and wished to have the underlease assigned upon trust to attend, but it appeared to me impossible, the term was and must continue a chattel; whereas, if it were to attend, it would become in equity freehold, and it is not possible by mere declaration to change the tenure of land. With respect to the report of Scott v. Fenhoulett, (Brown's Report,) evidently that report is not correct.

It is a curious point, whether after a term has once attended, (i. e.), become in

in equity absorbed in or conjoined with the inheritance, it can be dealt with in equity as a chattel. Suppose A. seised in fee of lands with an outstanding term in B upon trust to attend, can A, by his will with two witnesses only, declare that B. shall stand possessed of the term upon trust for C, so as to sever the term? I consider not; because A has not a chattel in equity but the inheritance, and when the will acts it is on the inheritance, and therefore void not having three witnesses; but, suppose C's inheritance to be defeated by some prior claim, and him to have only the term by way of protection; then the term will be altogether a chattel in equity as well as at law, but this last effect is produced not by the transfer of a portion of the equitable inheritance, but by a general estoppel in

in equity; that is, the trustee has the term upon trust for A, and A by necessity retains the beneficial interest under the term, because equity being passive, every one is estopped from claiming against him. He has no real interest transferred to him, but acquires an interest by necessity from every other person being estopped to claim; and, therefore, there is no contradiction or incongruity in considering such newly raised equitable interest as a chattel. The same result sometimes arises where there is a disseisin of lands in which there exist two owners, a termor, and the reversioner in fee, twenty years pass, and the termor is barred; but afterwards the reversioner recovers the lands, here the disseisor retains the lands for the term as a chattel, but this is also a newly acquired interest. Again, where the termor

is

is also the beneficial owner in fee, and the legal fee is outstanding upon trust to attend, and the termor dies indebted; the creditors attach the term and equity will not interfere against them. Here the term becomes a chattel, both at law and in equity in the creditors, and the purchaser under them; but that is also by the effect of the estoppel in equity. Neither of these cases, therefore, affects the general principle, that after a term attends it is in equity part of the inheritance, and can only be passed accordingly: but to proceed with the abstract.

January 1, 2, 1762. *Indentures of lease and release of these dates. The release of three parts, and made between the said S. T. of the first part, W. X. of the second part, and Y. Z. of the third part.*

Reciting

Reciting contract for sale from S. T. to W. X. for £1000, and agreement to appoint and convey to the uses after limited.

It is witnessed that in consideration of £1000 to S. T. paid by W. X. The receipt to and of 5s. paid by Y. Z. The receipt, &c. S. T. did in execution of the power of appointment, reserved by last abstracted indenture appoint; and also by way of further assurance grant and release unto the said X. and Z. (in their actual possession, &c.) and to their heirs.

All (parcels, as in the last abstracted deed), general words, reversions, all the estate, &c. and all deeds, &c.

To hold unto and to the use of the said X. and Z. and their heirs, nevertheless as to

to the estate of Z, and his heirs upon trust for X, and his heirs for ever.

Executed by the said S. T. and attested by two witnesses, receipts for consideration, money signed and witnessed.

(Note 7.) The limitations in the above abstracted deed lead me again to consider the doctrine as to legal and equitable estates in the same land, co-existing in the same person. Cases of this sort occur constantly in practice; and in numerous abstracts you will find the above and other similar limitations for barring dower, viz. to the use of the purchaser and trustee and their heirs; but as to the estate of the trustee and his heirs upon trust for the purchaser, and his heirs; Also to the use of the trustee and purchaser,

purchaser during the life of the purchaser, with remainder to the heirs of the purchaser: also to the use of the trustee and purchaser, and the heirs of the purchaser, but as to the estate of the trustee in each of the two last instances upon trust for the purchaser and his heirs. Now in these cases, what is the operation of the limitations with reference to the absorption of the equitable estate in the legal estate? The doctrine in the books is, that where the legal and equitable estates in the same lands co-existing in the same person, are precisely commensurate, the equitable estate is absorbed in the legal estate, and the party has only one entire estate, and not two separate estates. Now, in the limitation, in the abstracted deed to the use of the purchaser and trustee and their heirs; but as to the estate of the trustee upon trust for the purchaser and his heirs, it is clear

clear that they both take at law as joint tenants in fee, and that the purchaser could not devise the lands at law. It is also clear that if there has been no trust, but the two parties had been equally joint purchasers, the equitable estate in each moiety would have absorbed in the legal; and they two would have been joint tenants both at law and in equity; so that neither could have devised his moiety without severance of the jointenancy; but the addition of the trust of the other moiety for the purchaser gives the whole equitable fee as an entirety to the purchaser, so that he may devise the intire fee in equity; and thus, although the purchaser, as to one moiety, is seised both at law and in equity, yet being also seised in equity of the other moiety, such equitable estate

ceases

ceases to be held in jointenancy, but is held as an entirety; for though the purchaser had the same estates in quantity, both at law and in equity, in his own moiety, yet they differed in quality, the legal estate being held in jointenancy, and the equitable either in common or as an entirety. So as to the other limitation to the use of the purchaser and trustee for the life of the purchaser, with remainder to the purchaser in fee, but as to the estate of the trustee upon trust for the purchaser, here the purchaser has at law several estates, but in equity only one estate in the entirety in fee simple, and which estate he can devise, but it is a difficult question whether in the last mentioned limitation, the purchaser could devise at law the remainder in fee, on the ground that it was so conjoined to the particular estate as

as to be inseparable from it. This applies also strongly to the limitation to the use of the purchaser and trustee and the heirs of the purchaser, but the point as to the power of devising will be considered fully hereafter. Upon all these points, with reference to the union of the legal and equitable estates, I consider the sound doctrine to be, that where the legal and equitable estates are commensurate both in quantity and quality, there the equitable estate is absorbed; but when they are not so commensurate they continue separately in the same person, and his acts affect the estates accordingly. Many errors arise from not applying this doctrine more strictly. Thus I submit, that the recent case of Ireson v. Pearman, (Barnwell and Creswell, 799,) was wrongly decided on this

this ground. The case was shortly this: By indentures of lease and release, dated 9th and 10th October, 1796, lands were conveyed unto Malin and Caldecott, and their heirs, to the use of Malin and Caldecott, and the heirs of Malin for ever; but as to the estate of Caldecott in trust for Malin and his heirs: afterwards Malin by his will, dated 11th April, 1807, devised the lands to his daughter, and the heirs of her body; but in case she died without having any issue of her body lawfully begotten, living at her decease, then he devised the lands to his nephew, and his heirs for ever. The daughter afterwards conveyed the lands to a tenant to the præcipe for suffering a recovery, but to this deed Caldecott (who was then living) was not a party. A recovery was accordingly

accordingly suffered to the use of the daughter in fee. Afterwards the lands were contracted to be sold, and the purchaser's solicitor contended, that the recovery was defective, for want of the concurrence of Caldecott in the recovery deed for making the tenant to the præcipe. The court decided, that the recovery was defective on this ground. There were other circumstances but this was the gist of the case. Now I submit, that the recovery was effectual to bar the intail and remainders over in the equitable estate. The rule already adverted to is, that the equitable estate is only absorbed in the legal estate, where the two estates are commensurate in quantity and quality; for in every other case (as may be seen from the several instances of dower limitations above stated),

the two estates are separate. If lands are devised to the use of A for the life of B, with remainder to the use of A and his heirs absolutely, or with remainder to the use of C and his heirs absolutely, nevertheless in each instance upon trust for B in tail; in either case B alone is competent to suffer a recovery, and bar not only his own equitable intail, but the equitable remainder in fee. So, if lands be limited to the use of A for life, with remainder to the use of B in fee; but as to the estates of A and B upon trust for B in tail with remainder upon trust for C in fee, here B alone may bar the equitable remainder in fee in C. In Pearman's case, therefore, the tenant to the præcipe during the life of Caldecott was sufficient to bar the equitable estates; because during his life there were two sets of separate estates throughout, viz. the one equitable

equitable, to wit, vested in the daughter in tail with the remainder to the nephew in fee: and the other legal, viz. vested in Caldecott for life with remainder to the daughter in tail, with remainder to the nephew in fee. In Caldecott's life, therefore, she alone was competent to make a good equitable tenant to the præcipe for suffering a recovery to bar the equitable estate, tail, and remainders over. In Pearman's case, Mr. Justice Bayley observed, "The daughter had an equitable estate pur autre vie so long as Caldecott lived, and a legal remainder in tail;" but this was not so. She had the immediate equitable in tail, and the nephew had the equitable remainder in fee. This is strongly proved by the father being able to devise the whole fee; which shows, that during his life he had the whole entire

tire equitable fee: The father's will passed the whole equitable estate, and the first disposition was to the daughter in tail. If it be said, that the rule applies only to any particular estate or remainder individually, if the legal and equitable estates are commensurate in quantity and quality, the following case may be put to the contrary: suppose a recovery suffered and the demandant to stand seised, to the use of A and his heirs upon trust for B in tail; but if B should die without issue living at his death then the demandant to stand seised to the use of C and his heirs absolutely. I apprehend that a recovery by B would bar this limitation to C and his heirs in equity. If in Pearman's case Caldecott had indeed died before the recovery was suffered, then the estate both legal and equitable would

would have become commensurate, and the intail and remainder wholly legal; but during his life, the legal and equitable estates being unequal did not conjoin. Upon this ground I submit that this case of Ireson v. Pearman was wrongly decided so far as regards the operation of the recovery to bar the equitable estate tail and remainder over; and that Pearman, the attorney against whom the action was brought for negligence, ought not to have been liable beyond the mere expense of getting in the legal estate in fee from the nephew, the daughter having died without issue.

I may add, that, in the case of Ireson v. Pearman, Mr. Justice Bayley cites the authority of Salvin v. Thornton, Brown's Chancery Cases, 74, as being in point, but which

which really was quite different. In that case the lands were limited to A for life, remainder to B in tail, remainder to C in tail. A forfeited his life estate by rebellion, which was sold and purchased by B, who, however, took a conveyance of the life estate to the use of a trustee, upon trust for himself; and then he, without the concurrence of the trustee, conveyed to the tenant to the præcipe and suffered a recovery; and it was held that the recovery was void to bar the legal intail and remainder, and clearly this case was rightly decided; but the great distinction between that case and Pearman's case is, that in Salvin's case the intail was originally legal and one estate; all the limitations in their creation having the legal and equitable estates commensurate; but in Pearman's case the estates were

were separate at the time of the creation of the intail. The legal estate was in Caldecott for life, with remainder to the daughter in tail with remainder to the nephew in fee; but the equitable estate was immediately in the daughter in tail, with remainder to the nephew in fee—at law the daughter had a remainder in tail—in equity an immediate intail. This circumstance then of the daughter having different and separate estates at law and in equity in the lands, makes the distinction between Ireson v. Pearman, and Salvin v. Thornton; for in the last case the tenant in tail never had but one, and the same entire legal intail in which the equitable in tail was absorbed. Further: The doctrine by which the case of Ireson v. Pearman is shewn to be wrongly decided, is confirmed by the case of Boteler v. Allington,

ton, (Brown's Chancery Cases, 72), where the case was in effect this—lands were devised to A for life, with remainder to a trustee and his heirs (without being confined to A's life), upon trust to preserve contingent remainders with remainder to A's first and other sons in tail, with remainder to the testator's right heirs. The testator left a sister, his heiress, who devised the reversion to the trustee. A died, leaving a son, the son suffered a recovery without the concurrence of the trustee. The question was, whether the recovery was effectual to bar the reversion in fee which had been devised to the trustee. It was urged that for want of the restrictive words during the life of A, the trustee took the legal fee (which seems to have been admitted), and the estate tail and ultimate reversion

devised

devised to the trustee were equitable; but that such reversion, when so devised to the trustee became absorbed in the legal fee in him, and therefore was not barred by the equitable recovery. The Lord Chancellor Thurlow however held otherwise, and it is clear that the mere circumstance of the equitable remainder in fee being in the same party who had the whole legal fee, did not extinguish the equitable estate, because the several estates were not commensurate, but separately co-existed in the same person. In one case indeed, even where the two estates are commensurate, it is held that for some purposes the equitable estate is not absorbed, but merely clothed with the legal estate; that is, that the equitable estate subsists with the addition of the legal estate: thus, if

A contracts to purchase land in fee, and makes his will and takes a conveyance of the legal estate in fee, the will is not revoked; for the conveyance of the legal estate does not alter or change the equitable estate, but only adds to it.

A singular case occured lately in practice: viz. of limitations to prevent curtesy in a conveyance to a single lady, framed in the same way as to prevent dower; but I considered the mode wholly ineffectual, because however you might limit or break the legal estate, yet, after all, there would be one entire beneficial estate which would be subject to curtesy, and this could not be prevented, except by actually giving away some part of the beneficial estate: thus, if you made the limitation to the trustee to prevent

vent curtesy to be for his own use beneficially, and not upon trust for the lady, that would have been effectual, but not otherwise, for with reference to the principal point, it may be laid down that however the legal estate be broken or divided, still if the several estates be all upon trust for one party, that party has one entire equitable estate. Again: It has been decided that if A contracts to purchase in fee and devises the land, and then takes a simple conveyance in fee, the will is not revoked, but if he takes a conveyance to dower uses, then the will is revoked. See the case of Rawlins v. Burgis, 2 Ves. and B. 282, which was so decided, but I very much doubt the soundness of this decision, for however the legal estate might be limited by the conveyance, yet the equitable

equitable estate was not changed, but the devisor had the same one entire equitable estate, after the conveyance, as he had before, only clothed with the legal estate; but it matters not whether the legal estate was vested in one person or in several persons. If it be said that the power of appointment might give a greater facility of alienation or create a new modification of ownership, I am not at this moment aware that that could be given or created by a power beyond what the party would have in equity. Shew any equitable change or modification of ownership, and then there is a revocation.

(Note 8.) It will be observed that in the deed abstracted I have not made the dower trustee a party, nor

nor do I consider it at all necessary; and there is really nothing so destructive of all order and safety in conveyancing as to require from time to time the concurrence of parties, which former practice has not warranted, and which is not essential. Where there is a power of appointment, the appointment under such power will pass the whole estate, and there will be nothing for the trustee to convey. If it be said that a power may be destroyed or suspended by secret acts of which purchasers may be ignorant, and that an appointment in execution of a power is not so substantial an assurance as a conveyance at common law; it is certain that there has been such an impression, but does experience confirm it? I never remember a case where an appointment in execution

tion of a power failed from any secret destruction or suspension of the power, and numerous and most important purchases are constantly settled depending entirely on powers of sale and exchange in settlements. No objection is ever made, or would be listened to, that the title depended on a power, but the purchase would go on as a matter of course without the least idea on the point. So numerous titles are constantly passed, and cannot be objected to, of appointments under executions of powers without the concurrence of the dower trustee. Whether indeed a vender could successfully refuse to obtain the concurrence of the trustee in the purchase deed is not quite certain, for it is a strong argument that the vendor is certain of recovering his purchase money, and the purchaser ought to

to be made equally sure of having the enjoyment of the lands, and therefore should be entitled to take such assurance as he should deem most effectual; but yet as it is clear that the conveyance will be very good without the trustee, and his non-concurrence is sanctioned by practice, I doubt if the court would enforce his concurrence. It is said that some of the masters require it in their offices, but if so it is contrary to all precedent; and this innovation should be at once set at rest by being brought before the court.

There is a singular instance of laxity in practice, in not taking the conveyance of trustees to preserve, on a sale by the tenant for life, and tenant in tail, because clearly the trustees have a vested remainder. But I remember only one case

case where the concurrence of the trustees was required, and in that case the remainder came into possession after the recovery, viz. by the tenant for life, who lent his freehold for suffering the recovery, and was bound, on pain of forfeiture to take a particular name, resuming his original name after the recovery; thinking the recovery was a dispensation, but which it was not, so that his life estate became forfeited, and the trustees acquired the possession.

It is certainly unusual in practice, after a father and son tenants for life and in tail, entitled under the limitations in a settlement suffer a recovery to such uses as they shall appoint which is the usual mode, and they execute the power to make any inquiry about the remainder in the

THIS work will certainly be continued. It has been delayed for the last few weeks owing to various causes, one of which was, that the Editor had hoped to have commenced the ensuing term with his promised number "*on the best mode of education and instruction for the conveyancing department;*" but this number is not sufficiently matured. The high importance of the subject renders its due and repeated consideration particularly necessary. Some delay in the future progress of the work will possibly occur; indeed he has abandoned all hope that consistently with his other avocations its publication can be regular, yet he has never entertained a moment's idea of relinquishing it. Wide as is the field of practical conveyancing, he yet hopes that time and opportunity will be permitted to him to glean in every part of it before he terminates the Conveyancer. This may be the labour of some years, but he adopted the present mode of publication (abstractedly not the most preferable) because it would be occasional and continuing. This and the next number will complete the doctrine of recitals; the form of the abstract will be then resumed, and continued with notes down to the second purchase deed, when the Editor will again return to the practical

practical consideration of the further parts of a deed, considering each purchase as a point or rest on the title from which these digressions may be made; and also considering these digressions themselves, from their varied nature, to relieve the tediousness of a long regular subject, and indeed exactly to suit and shew the intended miscellaneous character of the work.

He would wish in a future number to consider the conveyancing part of the stamp act, and every communication on this subject would be thankfully received. The Editor is aware that these requests seldom produce any return; but he trusts in the present instance, as he has embarked in this work solely from the hope of circulating practical knowledge among the provincial profession, without any personal motive, that they will themselves, to the sacrifice of a little time, contribute their aid to this number, and communicate every point on the conveyancing part of the stamp act which may have occurred to them in practice. There can be no doubt but a well digested number on this subject would be particularly useful among the country profession, unable at every necessity to resort to counsel;

sel; but yet, unless the Editor receives ample communications, he will be obliged to pass it over, for it is not of a nature to be discussed without a copious supply of cases which have actually occurred.—Communications to be addressed to Mr. BICKERSTAFF, *Law-Bookseller, Essex Street, Strand,* marked (for the Conveyancer.)

The letter of "a Subscriber" has been received, but his suggestion would render the work puerile. The style is perhaps too familiar at present, and yet it seems best adapted to the frank nature of the work. Some occasional future numbers will of course require a more elevated manner.