ENGLAND.

APPEAL FROM THE HIGH COURT OF CHANCERY.

JACKSON . . . . *Appellant.*
INNES and others . . . . . *Respondents.*

WHERE lands are in settlement, and the husband and wife join in a mortgage of them, if the deed creating the security is no more in effect than a simple charge upon the lands, and does not alter the limitations further than is necessary to create the charge, the right of redemption, although it be reserved by the deed to the husband and wife, or either of them, *their or either of their heirs*, &c. belongs only to those who are intitled under the settlement, and not to the heirs of the husband, if he survive the wife.

But where the lands of A. upon her marriage were settled to the use of husband and wife successively for life, remainder in strict settlement, remainder to the wife and her heirs, with a power of revocation and appointment of new uses; and she joined with her husband in a mortgage, and by the deed to lead the uses of a fine which the husband and wife afterwards levied, according to covenant, the lands after the determination of the term, created to secure the repayment of the money borrowed, were limited to the husband and wife, and survivor for life, remainder in tail special; remainder, for default of such issue, to the right heirs of the survivor of husband and wife: The wife having died without issue, leaving the husband survivor, it was held, that this was more than a mere mortgage transaction—that there was evidence of an intention to effect a change of the beneficial interest; and that there was upon the face of the deed a clear manifestation of such intention, equivalent to a declaration; and consequently that the husband and his heirs, and not the heirs of the wife, were intitled to the equity of redemption.

1819.

JACKSON *v.* INNES AND OTHERS.

Lord Redesdale.—The facts* material to be stated in this case are as follows:—By a marriage settlement, executed in the year 1743, certain lands were settled to the use of Richard Jackson, the husband, for life; the remainder to Anne, his intended wife, for life; remainder to the children, male and female, of the marriage, in strict settlement; remainder to the use of Anne, the intended wife, her heirs and assigns; and the deed contained a proviso, enabling R. Jackson, and Anne, his intended wife, by any deed, &c. to revoke the uses, and to limit or appoint any other uses to any persons, and for any estates. In the year 1745, the husband and wife borrowed the sum of 200*l.*; to secure the re-payment of which, by indenture, dated the 25th of November, 1745, they demised the said lands to John Child, (as mortgagee) for the term of one thousand years, with a proviso for redemption, by *R. Jackson and Anne his wife, or either of them, their, or either of their heirs,* &c. and in case of such redemption, that the term and estate thereby granted should determine. This latter instrument, it is to be observed, could only have effect under the power of revocation contained in the settlement, and it oper-

* The facts, as they appeared upon the pleadings in the Court of Chancery, at the original hearing, are to be found stated at length in Mr. Vesey's Reports, vol. xvi. p. 35. Some omissions and some inaccuracies, owing probably to the state of the pleadings at the date of the decree, have been supplied and rectified in the following report. The observations made in moving judgment comprise a sufficient outline of the facts to make the case intelligible to the reader, and to supersede the necessity of giving a distinct and independent narrative of the case.

1819.
JACKSON v. INNES AND OTHERS.

ated merely to create a mortgage term, subject to redemption. It is clearly no more than a simple charge upon the estate, redeemable by Jackson, his wife, and their heirs, &c. and it did not alter the limitations of the settlement farther than was necessary to create the charge; it was, therefore, not redeemable by the heirs of the survivor of Jackson and his wife, but only by those who were entitled under the settlement, in the year 1746.

Jackson and his wife having afterwards borrowed of the mortgagee the further sum of 400*l.* by indenture, dated the 1st of January, 1746, they confirmed to the mortgagee, &c. the lands demised for the remainder of the term, discharged from all former provisoes, &c. but subject to a proviso for redemption, upon payment by Jackson and his wife, of the sum of 600*l.* with interest, whereupon the term and the respective indentures, whereby it was granted and confirmed, were respectively to cease and be void; and Jackson and his wife thereby covenanted to levy a fine of the lands, &c. and it was declared that the fine so levied of the premises should enure to the use of the mortgagee, his, &c. for the remainder of the term, subject to the proviso for redemption; and "from and after the expiration, or other "sooner determination of the said term, to the use "of Richard Jackson and Anne his wife, for their "lives, and the life of the survivor, and from the "decease of the survivor *to the use of the heirs* "*of their two bodies, &c. and for default of such* "*issue, to the use of the right heirs of the sur-*

1819.
JACKSON v. INNES AND OTHERS.

" *vivor of R. Jackson, and Anne his wife, for* " *ever*," &c. A fine was afterwards levied according to the covenant, and it is upon the construction and operation of the latter words of this deed that the whole question in this appeal arises.

Of the same date with the deed by way of further mortgage and limitation, R. Jackson executed a bond and warrant of attorney to C. the mortgagee, to secure the repayment of all the money borrowed. In the year 1755, R. Jackson paid the principal and interest then due to the mortgagee; whereupon the chirograph of the fine, and the deed of 1746, to lead the uses, were given up to him, and satisfaction acknowledged upon the judgment which had been entered up by the mortgagee. But I do not find that any assignment was made to him of the term.*

It is to be observed, that the proviso for redemption, which was contained in the first deed of mortgage, stipulating, that " if R. Jackson " and Anne his wife, or either of them, their " or either of their heirs, &c. should pay, &c." was by the second deed of mortgage and new limitation discharged; and in this latter instrument the proviso was simply, " if R. Jackson and " Anne his wife, should pay, &c. that the said

* In the report of this case, in 16 Vesey, 356, it is stated, that the term was assigned to Jackson, the husband. But that is a mistake. The provision of the deed is, that on payment, &c. the term shall cease; and there is no proviso for re-assignment. According to the substance and prayer of the cross bill, in the cause, it is supposed that the term is in the representative of Child, the mortgagee.

1819. JACKSON *v.* INNES AND OTHERS.

"indenture and the former indenture of mort-"gage, and every article, clause, and thing therein "contained, should cease, determine, and be "void." The effect, therefore, of the second deed is to confirm a term of years, which should be redeemable and cease on re-payment of the money borrowed, &c. and after such determination of the term, the lands are settled to specified uses.

Mrs. Jackson died in the year 1772, without issue, having made a will, which has no operation upon any matter in question in this case: because her power of disposal by will did not extend to any part of the property in question.

The fine and the indenture of 1746, which had been delivered up to the husband, were mislaid, and supposed by him to have been lost, but they were found after the mortgage transaction between him and Charles Cooth, the heir of Mrs. Jackson.

Post, p. 109.

In the argument of this case much stress was laid upon the expressions of the letter, written by Richard, (then Dr.) Jackson, to Cooth, dated the 8th of July, 1772, thirty-six years after the date of the deed creating the new limitations. In that letter, after mentioning a will, supposed to have been left by his wife, he adds, "It would not "hurt me in the least to find it good for nothing. "As you are HER HEIR AT LAW. Should I find the "fee of her estate in me, I might," &c. When he wrote that letter, he seems to have had an impression of some deed by which the fee vested in him. From this it has been argued, that the relief has been rightly given by a Court of Equity,

1819.

JACKSON v. INNES AND OTHERS.

upon the supposition that the deed of 1746 was a fraudulent transaction. But it appears clearly, from the frame of the decree* itself, that it was not made upon that ground; and from an investigation of the whole transaction, no facts can be collected to justify the imputation of fraud. To forget the particular terms of a marriage settlement, executed at a very distant period of time, is no uncommon failure of the memory; and from the letter, dated the 7th of August, 1772, in which Dr. Jackson inclosed a copy of his wife's will, and where he uses, respecting the freehold estate, the expression, "It is mine for life, as heir to my "children;" it is clear that he had forgotten the terms of the settlement, and was writing under evident mistake.

At various times after the date of these letters, Dr. Jackson, upon the application of Charles Cooth, had lent him sums of money, which in the year 1783 amounted to 600*l.*; and Dr. Jackson by a letter sent to Cooth but a short time before, having informed him that the chirograph of the fine and the deed to lead the uses were missing, and that he (Charles Cooth), as heir-at-law to Mrs. Jackson, was intitled to the estate after his (Dr. Jackson's) death; it was agreed between them that the 600*l.* advanced should be secured by a mortgage to be made by Cooth of his supposed reversionary interest. Upon this misapprehension of Dr. Jackson as to the

* Lord Redesdale, in moving judgment, read the whole decree. See p. 112, et seq.

1819.

JACKSON v. INNES AND OTHERS.

nature of his interest under the new settlement, it is to be observed (in addition to the length of time since the execution), that the ultimate limitation was not simply and absolutely to Dr. Jackson in fee. But after estates provided to him and his wife for their lives, and for their issue, upon the decease of the survivor; the fee in default of issue was limited to the survivor of the husband and wife. Under this misapprehension, however, a mortgage of the supposed reversion was prepared and executed in 1784, and by the decree upon the hearing in the Court below, it was declared that the Appellant, as representative of Dr. Jackson, was intitled to a charge upon the estate to that amount.

After all these transactions, Dr. Jackson having made farther advances to Cooth by way of loan, to the amount of 400*l*. the parties agreed that a farther charge should be made upon the supposed reversion by way of indorsement upon the mortgage deed already executed, which was accordingly prepared. But before it was carried into effect, the chirograph of the fine and the deed to lead the uses of the fine, dated in 1746, had been discovered by Dr. Jackson, who thereupon sent to Charles Cooth the deed, purporting to create a mortgage upon his supposed reversion as an useless instrument.

Charles Cooth, before he received information of the discovery of the fine and deed, had, by a will dated in 1782, given to one Hester Bower, his supposed reversionary interest in the Lye Farm, (part of the lands in question). The will adopting

the erroneous notion communicated to Cooth by Dr. Jackson himself, recites that "Dr. Jackson "is intitled to the premises *for life, as tenant by* "*the curtesy of England.*"

After the death of Charles Cooth, Dr. Jackson sued for and obtained from Mrs. Bower, part of the money advanced to Cooth; and Mrs. Bower died in 1794, without having made any claim to the reversion under the will of Charles Cooth, and without requiring any receipt for the monies paid by her to be indorsed upon the mortgage of the supposed reversion.

In 1797 Dr. Jackson died. He had made a will in 1775, when Charles Cooth was living, by which he had given the lands and farms in question to Charles Cooth and the Appellant. Afterwards, by a will dated in 1797, he devised the same lands, &c. to the Appellant, subject to the charge of certain annuities.

The Bill was filed in 1804 by J. B. Innes, claiming as heir at law to Hester Bower. It was afterwards amended by making Edmund, the heir at law of Charles Cooth a co-plaintiff, and adding other parties. After stating the original settlement, the several deeds of mortgage, and new limitation, &c. and that the equity of redemption was by mistake reserved to the survivor of Dr. Jackson and his wife; the bill prayed an account of arrears of the mortgage, of rents and profits, since the death of Dr. Jackson, &c. and a reconveyance, &c. The cross bill filed by the Appellant seems to have had no reasonable object or purpose, and was properly dismissed. The

1819.

JACKSON v. INNES AND OTHERS.

Decree. Dec. 18.

causes having been heard in 1809, before the Lord Chancellor, it was declared, in the original cause, that (the Appellant) was a trustee of the equity of redemption in the estates and premises called Lye Farm, for the said Plaintiff J. B. Innes, as the heir at law of Hester Bower, who was the devisee of Charles Cooth, the eldest son and heir at law of John Cooth, deceased, who was the heir at law of Anne Jackson; and of the equity of redemption in the estate and premises called Burnt House Farm, for the said Edmund Cooth, as the heir at law of the said Charles Cooth. And it was ordered, that the Master should take an account of the rents and profits of the said premises received by (the Appellant), &c. since the death of the said R. Jackson. And in case (the Appellant) had been in possession of all or any part of the said premises, it was ordered, that the said Master should set an annual value, by way of rent, wherewith he ought to be charged. And it was ordered, that (the Appellant) should be charged with the same accordingly; and in taking the said account the said Master was to apportion such rents, issues, and profits between the said premises called Lye Farm, and the said premises called Burnt House Farm. And it was ordered, that the said Master should take an account of what was due for principal and interest, upon and by virtue of the indentures of lease and release, or mortgage, bearing date the 15th and 16th days of January, 1784, and also what was due in respect of the sum of 80*l.* 2*s.* and interest advanced by the said Richard Jackson to the said

1819.

JACKSON *v.* INNES AND OTHERS.

Charles Cooth, since the date of the said indentures. And it was further ordered, "That in "case what should be found due in respect of "such principal, interest, and costs, should exceed what should be so found due for the said "rents, issues, and profits, then upon the said "John Blundell Innes and Edmund Cooth paying "the amount of such excess into the Bank, to "the credit of the said cause, within six months "after the said Master should have made his report; or in case the said rents and profits "should exceed what should be found due for "principal, interest and costs, as aforesaid, it "was ordered, that Gilbert Jackson (the Appellant,) and Jane Hamilton, should re-convey the "said farm, called Lye Farm, with the appurtenances, to the said John Blundell Innes, and "the said farm called Burnt House Farm, with "the appurtenances, to the said Edmund Cooth, "free from incumbrances; but in default of the "said John Blundell Innes and Edmund Cooth "paying the amount of the excess aforesaid by "the time and in the manner therein mentioned, "it was ordered, that the Plaintiff's bill in the "original cause should stand dismissed; but his "Lordship reserved the consideration of the "question, who was beneficially entitled to what "should be found due for principal, interest, and "costs, until after the Master should have made "his report." From this decree the appeal is presented upon the ground that the decision is not justified by the authority of the cases in which reservations of the equity of redemption to persons

1819.

JACKSON v. INNES AND OTHERS.

having no previous interest, have been considered as resulting trusts for the previous owners of the estates.

This is a case of great importance as a precedent, and as affecting the titles of persons who take under conveyances, supposing it not to be liable to impeachment upon the ground stated. It is highly important in all cases, that the principles of decision should be known and uniform—that professional persons may be able to advise with safety. In a case of this kind, a purchaser acting under a misconception of his legal adviser, found that his title was deficient. That was the case of *Ruscombe* v. *Hare*, in which the doctrine of resulting trust was held applicable. In this case it is alleged, that there is a distinct ground, *scil.* of fraud, to annul the limitation to the husband being the survivor. But no such ground is recognised by the decree, or established in evidence. The only question, therefore, which is now presented for the consideration of the House is, whether the decree is founded upon the principle which regulated former decisions, and was established by the judgment of this House upon the appeal in the case of *Ruscombe* v. *Hare*. The principle is this—That in a mortgage, the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such a case, (where fraud is out of the question), it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage. This is conformable to the principle upon

5 Dow, 1. (D. P. June 5, 1818.)

which other cases have been determined. If a lease be made by tenant for life, under a power created by a settlement, and a rent is reserved to the lessor and his heirs, (which is not an unusual blunder), those words are interpreted by the prior title, and applied to such person as, under the settlement, may be entitled to the estate in remainder, and not to the heir of the lessor, unless he happen to be such remainder man. In all such cases, the words used are to be interpreted according to the title when the instrument is executed. So where an estate belonging to the wife is mortgaged, and the equity of redemption is reserved to the heirs of the husband, there is a resulting trust for the wife and her heirs.

The case of *Broad* v. *Broad* * was the first in which the doctrine was applied. In Eq. Ca. Abr. 62, it is laid down as a general principle, that where money is borrowed by husband and wife, upon the security of the wife's estate, although the equity of redemption by the mortgage deed is reserved to the husband and his heirs; yet the wife shall redeem, and not the heir of the husband; and for authority, reference is made to the case of *Broad* v. *Broad*. According to the facts of that case, to be collected from the reports, T. B. the husband of the Plaintiff in the suit, settled certain houses in Bread-street, London, to the use of himself for life, remainder to the Plain-

* This case appears in Eq. Ca. Abr. 316, referring to 1 Vern. 213, under the name of *Brend* v. *Brend*. In 2 Chanc. Ca. 99, it is Brond v. Brond; and in 2 Chanc. Ca. 161, it is Broad v. Broad. See *post*. p. 117, note.

1819.

JACKSON *v.* INNES AND OTHERS.

tiff for life for her jointure. These houses were burnt down in the great fire in 1666. In order to rebuild them, the husband borrowed 600*l.*, and a fine was levied by husband and wife to the lender for 99 years, who re-demised the premises to the husband for 98 years, rendering 36*l.* per annum, and binding himself to repay the 600*l.* at a time, * &c. The husband had agreed with the wife that she should have the redemption paying the interest of the money borrowed. But when the houses were rebuilt, the husband settled them, among other lands, upon himself, in tail to the heirs male of his body—the remainder in tail to his brother, (who was Defendant in the suit) charged with portions of 3000*l.* to his daughters. He died, making his brother, the Defendant, his executor; and his personal estate was not sufficient to pay his debts. The Defendant had executed a bond, upon which he was liable as surety for his deceased brother to the amount of 1600*l.* which he satisfied, and also paid the interest of the 600*l.* borrowed, until 1681, when the Plaintiff filed her bill, by which she prayed that she might redeem, paying proportionably, and hold over until she was repaid with interest. The Defendant insisted that the premises, having been re-demised to his brother, were assets to pay his debts; and further, that the Plaintiff's title was but a parol agreement between husband and wife; and that he had no notice of the agreement until the filing of the bill.

* It was in such form that mortgages of this species were made at the date of the report.

1819.

JACKSON v. INNES AND OTHERS.

It was decreed, that the Plaintiff should have the redemption, paying a third part of the principal, but should have no profits received by the Defendant until the filing of the bill in 1681, when he first had notice of the agreement. The decree, therefore, which was made upon the original hearing, proceeded entirely upon the foundation of the agreement. A bill of review * having been afterwards filed, suggesting, that the decree was founded upon a trust arising out of an agreement by the husband, and that the agreement was not mentioned in the decree, nor stated to have been proved: Lord North, then Keeper, admitted the objection to the form of the decree, and said, that he took no notice of the agreement on that account, but affirmed the decree, because when the wife joined in the fine of her jointure, in order to a mortgage or security, it was not an absolute departing with her interest; but there resulted a trust for her when the mortgage was paid, to have her estate again, as if it had been a mortgage on condition, and the money paid at the day.

That was the first † case in which the principle was established. It has ever since been adopted

* 22 Feb. 1683, Broad v. Broad, 2 Chanc. Ca. 161. It appears singular that the Court in this case, at the original hearing, should have proceeded upon the ground of the agreement only, and have taken no notice of the doctrine of resulting trust. Because in the same Court three years before, a case seems to have been decided upon that principle. See the note, *infra*.

† There is an earlier case, decided in the time of Lord Nottingham, in which the same principle appears to have been applied. Cotton v. Cotton, 2 Chanc. Rep. p. 72. 30 Car. 2. The

1819.

JACKSON v. INNES AND OTHERS.

and referred to in all subsequent cases, up to the late decision in *Ruscombe* v. *Hare*. The rule fixed by those cases is no more than this,—where the equity of redemption is reserved to the husband, upon a mortgage of the wife's estate, and there is nothing more in the transaction, the Courts hold, that no alteration of the previous rights of the parties is effected. But it is an exception to that rule, where other circumstances occur, affording evidence of an intended alteration of rights.

In *Rowel* v. *Whalley*, 1 Chanc. Rep. 116, the wife joined with her husband in a mortgage of her lands, by a deed containing a proviso and declaration, that if the husband and wife, or either of them, or their heirs, executors, &c. paid to the mortgagee, his executors, &c. the sum borrowed, that the fine to be levied according to a covenant contained in the deed should enure to the husband and wife, and the longest liver of them; with remainder to the right heirs of the husband for ever. Here is a case of a distinct declaration, in no manner depending upon the

cause was heard by Mr. Justice Windham, and the application of the doctrine of resulting trust appears incidentally in the report of the decree, which contains the following declaration:—" And as to the mortgage made to Perkins by the said " Nicholas and the Defendant his relict, it appearing that part " of the mortgaged lands was, before that mortgage was made, " settled on the said Nicholas and Katherine in jointure, or " otherwise, so as the same came to her as survivor: This Court " is of opinion, that the equity of redemption belongs to her as " survivor, and not to the Plaintiff," who claimed it as heir to Nicholas her husband.

1819.

JACKSON v. INNES AND OTHERS.

proviso for redemption, but defining the course in which the property is to be carried after the satisfaction of the mortgage. A fine was afterwards levied, according to the agreement among the parties, and after the death of the husband, a bill to redeem was filed by the relict. The son and heir of the former husband being a party Defendant in the suit, was an infant. The Court decreed, that the Plaintiff and the infant, should proportionably pay what was due upon the mortgage, at the time of the death of the mortgagor, rating the estate for life of the Plaintiff in the premises at one third, and the reversion in fee of the infant at two thirds. In that case it was determined that the subsequent declaration and limitation having no connexion with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was held to be a distinct settlement, and that she had parted with her estate. In the case now pending before us for judgment, the distinction is stronger; for it is the mortgage term which is made redeemable by the husband and wife, and the fee is the subject of settlement.

In the case of the *Earl of Huntingdon* v. the *Countess of Huntingdon*, * 2 Vernon, 437, the

* See Tate v. Austin, 1 P. W. 264, where this case appears as cited by Cowper, Lord Chancellor; but the circumstances are not correctly given in the report.—The Lord Chancellor is supposed to state in Huntingdon v. Huntingdon, that the heir

1819.
JACKSON v. INNES AND OTHERS.

mortgage was made by the mother of the Plaintiff joining with her husband, of lands, being her inheritance; and the purpose was to raise money for the husband to pay for the place of captain of the Band of Pensioners. The mortgage was for a term of years, subject to which the estate was settled to the Countess, (the Plaintiff's mother), for life, remainder to the Plaintiff in tail; the proviso for redemption was, that on payment of the mortgage money, the term should cease. In 1683, the Countess joined with her husband in an assignment of the mortgage; and in the deed of assignment the proviso was, that on payment of the money borrowed by them, or either of them, the mortgage term was to be assigned as they, or either of them, should direct or appoint. The husband afterwards paid off the mortgage, and took an assignment of the term in trust for himself, and by will bequeathed his personal estate to the Defendant, his second wife, who claimed the term. The Plaintiff filed a bill in Chancery, praying that the term might be

of the wife brought his bill to exonerate the inheritance, and to have the mortgage paid off out of the husband's personal estate; which is repugnant to the facts of the case, and the previous statement in the report itself, that the husband had, in his lifetime, paid off the mortgage. The question in the cause was, Whether the executrix and devisee of the husband, (being his second wife), was entitled to hold the term under the will for her own benefit; or whether there was a resulting trust for the heir of the first wife; and if so, whether he was bound to repay to the estate of the deceased husband the principal and interest, which he had paid to discharge the mortgage, or was entitled to have an assignment of the term without such payment.

assigned to him. The Lord Keeper refused to make such decree, except upon the usual terms of a redemption, paying principal, interest, and costs; but upon appeal* to Parliament the decree was reversed, and the term directed to be assigned to the Appellant, with an account of profits from the death of the Appellant's mother, making to the Respondent just allowances for the maintenance of the Appellant, and management of the estate. In that case, the limitation, after the life-estate, was to the son in tail; and in the case now under discussion, it is to the husband and wife, and the heirs of their bodies; or, in default of issue, to the survivor of the husband and wife in fee; and that is the only difference in that respect between the cases. The proviso for redemption in the Earl of Huntingdon's case was, that on payment by either of them, the term should be assigned as they or either of them should direct. Under these circumstances, the executrix and devisee of the husband insisted that, as he had paid the mortgage, and taken the assignment, it belonged to her as his representative. The son of the former wife contended, that the estate was under settlement, and bound by the terms of the settlement; that the husband and wife could not deal with the estate beyond their own interest; and it was held, as to the term assigned to the husband, and possessed under his will by the Defendant, that there was a resulting trust for the son.

* 1 Bro. P. C. 1.—Jour. H. of Lords, 17 vol. p. 236.

1819.

JACKSON *v.* INNES AND OTHERS.

In the case of *Lewis* v. *Nangle*,* the property which belonged to the wife was mortgaged and settled upon the husband and wife, with remainder, not to the wife herself, but to the wife's sister: the wife died, and the sister brought a bill in order to compel the husband to pay off the mortgage. In that case it appeared, that the money raised upon the mortgage being 1100*l.* was in part borrowed for the use of the husband, and part of it for the purpose of paying a debt incurred by the wife previous to the marriage. In giving judgment upon that case, the Lord Chancellor said, "The general rule is, that when "the husband borrows a sum of money for his "own use, and the wife joins in a mortgage of "her jointure, for re-payment of it, that her estate "shall be a creditor upon the husband for that "sum. So it is where there is no settlement, and "the wife mortgages her estate of inheritance, to "raise money for the husband, but where, at the "time of executing such mortgage, or security, "a settlement is made, either before or after "marriage, there is no instance in which the "husband has been considered answerable to the "wife's estate for the money borrowed,"—and he there held, that under the circumstances of this case, there being a settlement of the estate, the husband was not liable for the money borrowed. The subsequent limitation was not impeached by the person who brought the bill, because that person was entitled to the estate under that limitation.

* Ambler's Rep. p. 150.

1819.

JACKSON *v.* INNES AND OTHERS.

In the case of *Jackson* v. *Parker*,* which was decided by Sir Thomas Sewell, a difficulty occurred of a different description. The husband had borrowed a sum of money, and in order to make a security, by mortgage of his own estate, his wife joined in a fine, which would have the effect of barring her of any claim of dower. The limitation of the equity of redemption was to the husband and the wife, and their heirs; and there was a declaration in the deed, that after payment of the money lent on the mortgage, the fine should enure to the husband and his heirs. Other charges were afterwards made upon the estate, and those subsequent charges were all made redeemable by the husband and wife, and their heirs. The husband by his will made a disposition of this property, in trust, to raise provisions for all his children. But the will was disputed by the eldest son and heir at law, upon the ground, that it was a devise of the equity of redemption, of which the husband was not sole seised; because the equity of redemption was reserved to the husband and wife, and their heirs. Sir Thomas Sewell had some difficulty upon the subject at first, in consequence of the words of the statute of wills, which does not admit of a devise of property, of which the devisor is not sole seised. But upon reflection, he decided, that the case was to be considered as in equity; it was not a legal estate, and as an estate to be governed by the rules of equity, it was the seisin of the husband, and not

* Ambler's Rep. p. 687

1819.

JACKSON *v.* INNES AND OTHERS.

of the wife. Upon a contest for redemption, the Court would regard the ownership of the estate, previous to the mortgage, and in that view the husband would be considered as the person entitled to redeem, the wife being entitled to redeem only in respect of her interest, which would have been only a right to dower, if she had survived her husband. In such case she would have been entitled to have had the estate redeemed, for the purpose of letting in her dower, but there her right ended, and that therefore the husband must be taken to be, in equity, sole seised of the estate, as if the mortgage had not been made. In that case it was argued, "That the Court "will put a true construction on the deed, by "taking into consideration the ownership of the "estate, and the purpose for which the deed was "made. That the husband was the owner of the "estate, and the intention of the deed was merely "to make a mortgage, and the wife was made "a party and joined in the fine, for the sake "of the mortgagee."—And this argument was adopted by the judgment.

In the case of *Corbett* v. *Barker*, according to the report,* the Court do not seem to have had the least notion that there existed a resulting trust, such as the House of Lords held to exist in the case of *Ruscombe* v. *Hare*, and they dismissed the bill. In that case, it appears probable that Baron Thomson doubted the correctness of the decision; for he says, "That a reservation of the

* 1 Anstr. p. 138.

1819.

JACKSON *v.* INNES AND OTHERS.

" kind now under discussion, in a fine levied, " completely *diverso intuitu*, shall not, without " an express declaration of such intention, carry " the estate in a new channel." The cause being afterwards re-heard, the Court seems to have been of opinion, that a trust resulted in favour of the original owner of the estate, and determined accordingly. The report of the case is so very imperfect in its language and statements, that it is difficult to discover what are the facts of the case, and the point decided; but as far as they can be collected, the case appears to have been of the same nature *

* The case upon the original hearing is reported 1 Anstr. 138. The only facts reported, so far as they regard the principle discussed in the text, are as follow:—The Plaintiff's father being seised in right of his wife, he and the wife mortgaged the estate for a term of years, and a fine was levied according to previous agreement and covenant; which fine was to enure to the use of the mortgagee, his heirs and assigns, subject to the proviso, and the equity of redemption was reserved to the husband and wife and their heirs. Afterwards, the mortgage having been assigned to the Defendants; the husband and wife, in consideration of 160l., by lease and release, conveyed their equity of redemption in fee, and covenanted, that all fines, conveyances, &c. should enure to the sole use of the Defendant in fee. After the death of the husband and wife, the Plaintiff their son filed the bill, claiming the estate by descent, as heir to his mother, subject to the mortgage. For the Plaintiff it was argued, that the mortgage deed being only for a term of years, though the fine is in fee, yet it is to the uses mentioned in the deed; and there is a proviso that on payment, &c. the term shall be void; then only the term was in the mortgage, and the fee was a resulting use in the wife, from whom it proceeded; and that being vested by the statute, she was immediately in of her old estate as to the fee.

Romilly for the Defendant, argued, that the bill could only reach one half of the estate. For as the fine saves the equity

1819.

JACKSON *v.* INNES AND OTHERS.

as *Broad* v. *Broad*, and the other cases which have been decided upon a similar principle.

It must now be admitted as an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower, out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where

of redemption to the husband and wife, and their heirs, one half was therefore vested in him, and passed to the Defendant: but Thomson, B. interposed, saying, "it had often been ruled, that a "reservation of this kind, in a fine, levied completely *diverso intuitu*, shall not, without an express declaration of such intention, carry the estate in a new channel; nor even if it had been to "the husband and his heirs only." After this interposition by the Court, the argument upon this point of the case appears to have been dropped, and the question was then argued and decided upon the fact of length of possession by the mortgagee. Eyre, Chief Baron, at the conclusion of his judgment saying,—As the Plaintiff fails upon this point, (*i. e.* possession by the mortgagee), it is unnecessary to consider the other, as to the operation of the fine upon the subsequent conveyance; although upon that point the Plaintiff's counsel seemed to be in the right. There is not to be found, either in this report, or in the further report of the case upon the re-hearing, (3 Anstr. p. 755), any other statement or allusion to the doctrine of resulting trust. The principle of decision is to be collected only from the extracts above inserted. It appears singular that it should not have been adverted to by the Court in giving judgment; yet it is possible, considering the decisive remark made by Thomson, Baron, upon the original hearing, that nothing further might have been said upon the subject at the re-hearing.

1819.

JACKSON v. INNES AMD OTHERS.

the words admit of any ambiguity; that there is a resulting trust for the benefit of the wife, or for the benefit of the husband, according to the circumstances of the case. But here, it seems to me, that the operation of the deed, as to the mortgage term, and the operation of the deed as to the limitation of the fee, are wholly distinct, and do not in any way depend on each other. The question does not arise upon the interpretation of the proviso for redemption, but it arises upon a distinct and subsequent clause of the deed. The term and the fee are kept distinct in the deed. The term is a security for the re-payment of the money lent, and when the mortgage should be discharged, the intention of the maker of the deed was, that the term should be completely at an end. The way in which they proposed to effect this was, by declaring, that upon payment of the money due, the term shall cease. If the money had been paid at the day, the term ceasing, there would have remained nothing of the mortgage operating upon the property. But there would then have remained the declaration in the deed, directing what should be done with the estate, subject to the term. The term being at an end, the operation of the deed, so far as it declared the limitations of the estate, subject to the term, remained perfectly distinct, and had no connexion whatsoever with the existence of a term, which then would have ceased to exist. A Court of Equity will so deal with a declaration, that, upon payment of a sum of money on a given day, the term shall cease; that, although the term becomes ab-

1819.
JACKSON v. INNES AND OTHERS.

solute by non-payment of the money at the day, it is still subject to redemption. By whom it may be redeemed, must be discovered from the title, which, by the deed itself, is declared to be in the husband and wife, for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. Upon the declarations, therefore, and the provisions of that deed, the redemption would arise by implication, in case the money was not paid at the day. The implication must be drawn from the deed itself, declaring who were the persons entitled to the estate.

In all the other cases decided upon the general principle, the grounds of the decision were, "that "the mode in which the redemption was limited, "was by mistake or improper contrivance intro-"duced into the deed." But in this case, there is no ground to raise such imputations. For the deed is clear and express in its declarations and provisions. The case is really in principle, if not in circumstances, the same as the case of *Rowell* v. *Whalley*.

Where the declaration of the uses of the fine refers simply to the operation of the deed as a mortgage: where it is simply a declaration, that the money being paid, the fine shall enure to the persons who make the mortgage, and there is nothing else which makes it subject to redemption, that would be considered as a mere clause of redemption, and construed in the same way. But where the form of the equity of redemption has nothing to do with the limitation of the estate; where the limitation of the estate is per-

1819.

JACKSON v. INNES AND OTHERS.

fectly distinct, it seems to me the rules which have been established in the cases of resulting trusts, do not in any degree apply.

Suppose that Dr. Jackson had died first, and that Mrs. Jackson had married again, and marrying again, had issue by a second marriage, there being also issue of the first,—what would have been the construction then put upon this deed? According to the deed, if she had only daughters by the first marriage, they would take the estate under the limitation to the heirs of the body of Dr. and Mrs. Jackson. But if the estate was to be considered as a fee in her, and if this subsequent declaration was to operate nothing, if she had a son by her second marriage, that son would be her heir at law. Yet if a contest had arisen between the daughters by the first marriage, and the son by the second, could any doubt have been entertained who would be entitled to the estate? Dr. Jackson had stipulated for his own children. Consider how the estate was limited before the mortgage. It was limited by the original settlement to the children. When that settlement was destroyed by the fine, and the revocation, which was the effect of the fine, and new uses declared, the resulting trust, if any could arise, must be to the old uses declared under the settlement. If otherwise, the estate must have gone according to the new uses; and then there might have been a contest between the persons entitled under the latter disposition, and those who were entitled under the former.

Suppose again, that Mrs. Jackson had survived,

1819.

JACKSON *v.* INNES AND OTHERS.

and there had been issue of the marriage, and the issue had thought fit to say to Mrs. Jackson, "you "are only tenant for life," would not she have had a right to answer, "I am tenant in tail under this "deed; I and my husband have levied a fine; "and having levied a fine, declared the estate to "ourselves and the heirs of our own bodies, which "gives me an estate tail, and enables me to dis-"pose of the estate in case I should think fit to "suffer a recovery or to bar the entail by a fine." It would have been extremely difficult in such a case to have decided that Mrs. Jackson was not entitled to the benefit of this estate.

The question of fraud must be put out of the case, as it appears to me. How can it be imagined that a prospective fraud was contemplated, the effect of which, according to the view in which the objection is made, must have depended upon the chance, whether the husband would survive the wife. That contingency happened six-and-twenty years after the deed was executed. The Court must interpret the deed. No Court has a power, in such a case, to set aside a deed. *Ruscombe v. Hare*, and all the prior cases, have been interpretations of the deed. The ownership, prior to the deed, and the purpose of the deed, must be considered, in giving the interpretation;—that is the language of Sir Thomas Sewell in *Jackson v. Parker*. In the case before us, we are required not to interpret the deed, but to determine that the part of the deed which, having no connection with the mortgage, disposes of the estate, subject to the mortgage term, is to be wholly set aside,

1819.

JACKSON *v.* INNES AND OTHERS.

either as a fraud, if a case of fraud can be made out, or as a mistake, if a case of mistake can be made out. If they proceed on the ground of mistake, there must be evidence. To support the allegation of fraud there must also be evidence. It must be shewn that this clear and explicit declaration was contrary to the intention of the wife, in consenting to the deed. If the wife had survived, and she had thought fit to insist upon the validity of this deed against her own children, could it then have been said that it was a fraud upon her intention in executing the deed; and yet, to support such a claim on behalf of the children, it would have been necessary to decide that a fraud was practised upon the wife, and that the deed was made contrary to her intention. Nothing short of that opinion would enable the Court to restore the original settlement, and give the children a claim, in contradiction to the rights of the mother, under this deed.

If the question had been put to me, after the death of Mrs. Jackson, whether Dr. Jackson, having survived her, had a good title to this estate, I should not have scrupled to give my opinion, that he had a good title to the estate. If a similar question had been put to me in *Ruscombe v. Hare*, I should have answered doubtfully; because, in the case of *Broad v. Broad*, and cases decided upon the principle which there prevailed, I should have found that Courts of Equity had applied the doctrine of resulting trust for the benefit of the wife. But, according to the mode in which

1819.
JACKSON v. INNES AND OTHERS.

this settlement has been made, there is no connection whatever, in legal operation, between the mortgage and the new limitations contained in the deed, which are distinct in form and substance, expressly providing for a subject which was not included in the mortgage. They limit the reversion in fee, while the mortgage is confined to the term of 1000 years.

Upon these grounds it appears to me that the part of this decree which declared, that the Appellant was a trustee of the equity of redemption for Blundell Innes, as the heir of Hester Bower, and for the heir of Cooth, is not according to law. The equity of redemption there intended is, I presume, the equity of redemption upon the original mortgage, which was made by Dr. Jackson and his wife, because the Appellant was not trustee of any equity of redemption upon the mortgage of 1784. Dr. Jackson was mortgagee in that mortgage. The mortgage of 1784 was a mortgage made by Charles Cooth to the late Dr. Jackson. It was a conveyance, under the supposition that Charles Cooth had a legal interest in the reversion of the estate. The supposed equity of redemption was in Charles Cooth, and in those claiming under him, and it was the supposed legal estate that was so far in Dr. Jackson. I apprehend therefore that the declaration that the Appellant was trustee of the equity of redemption, means the equity of redemption upon the mortgage term, which was created and confirmed by the mortgage deeds executed in 1745 and 1746, by Dr. and Mrs. Jackson. If that term of years was vested in Dr.

1819.

JACKSON v. INNES AND OTHERS.

Jackson, it was a term which, according to the spirit of the decree, he or his representative would have been bound to convey. But what is vested in the present Appellant, Mr. Jackson, under the will of the late Dr. Jackson, is not an equity of redemption, but a fee simple of the estate, subject to a term of years, which term of years was subject to an equity of redemption.

I apprehend that at the time when this decree was made, the circumstances of the case could not have been correctly stated to the Court; that there must have been some confusion, arising from the statement which was made to the Court, and owing to that confusion this declaration was contained in the original decree—that the Appellant was a trustee of the equity of redemption in the estates and premises, the Appellant not having in him any estate whatsoever which was in the nature of an equity of redemption. He had the fee simple of the estate, subject to a term of years;—but he had not in him, so far as I can find from the pleadings, the term of years, for I do not find that the term was assigned. He had also whatever interest Cooth conveyed by the mortgage which he executed; but that mortgage executed by Cooth could convey nothing, if Jackson had the fee in him which was vested by the settlement made in 1746. The language, therefore, of the decree is certainly in that respect incorrect, and I think that must have arisen from some misstatement with respect to the circumstances of the case. As they now appear before the House upon the pleadings, my humble opinion is, that this decree,

1819.
JACKSON v. INNES AND OTHERS.

so far as it directs a conveyance by Mr. Jackson to Innes and Edmund Cooth, is erroneous. For the uses limited by the deed of 1746 being to Dr. and Mrs. Jackson, and the survivor of them, and to the heirs of their bodies, with remainder to the survivor in fee, according to the terms of that deed, and as I conceive the intent of the parties, there is no foundation whatever for holding that the settlement made by that deed shall not have the operation which the words of the deed import. I do not find any thing in this case to constitute Dr. and Mrs. Jackson, to whom the estate is limited during their lives, and the natural life of the longest liver, or to constitute the heirs of their two bodies, to whom it was further limited, subject to their estates for life as tenants in tail, or the right heir of the survivor, trustees, or a trustee for any person. But if they were to be deemed trustees, then they must be deemed trustees for the benefit of the persons who would have been entitled under the original settlement. For if the case is to be considered as if the new limitations ought not to have been in the deed, that they ought to be totally expunged from the deed, and that after the declaration that the fine should enure for the purpose of supporting the term of a thousand years, the deed should have no further operation, which is the manner in which a decree of this description, founded on the cases which have been determined, must be framed, if it be maintainable, the consequence would be, that it must result to the trust in the original marriage settlement. In such case, if Mrs. Jackson

had survived, and there had been issue of the marriage, she would have had, under this deed, an interest different from that which she would have had under the marriage settlement, and she would then have been reduced to the simple condition of tenant for life, and her issue would have been entitled, the sons in tail male, and the daughters in tail general, and she could have had only an ultimate limitation in fee. If she had survived, and had issue of the marriage, could we have held that she would have taken no benefit under the deed of 1746, but must have been bound by the provisions of the marriage settlement of the year 1743. I confess I cannot find any ground for such a determination, and therefore I cannot find a ground for supporting the decree which has been pronounced.

I shall move simply to reverse this decree, and that the bill should be dismissed.

The Lord Chancellor.—The circumstances of this case are certainly, in point of fact, much better understood than they were, and much greater research has been made into cases, so as to bring before the consideration of the House, the true principle of decision. The Court below did not rightly apprehend the case, as it now appears. The judgment of this House will remove a difficulty, which I know is floating in the minds of many persons. I conceive it to have been the opinion of Lord Thurlow, that in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be in the recitals of the instrument,

1819.

JACKSON *v.* INNES AND OTHERS.

some expression that the parties meant it so: that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed to lead the wife to understand what those limitations were. It does however occur to me, on looking into the cases which have been referred to, that such a proposition cannot be supported, and therefore I am of opinion that the decree must be reversed.

10 July, 1819. Decree reversed.

*** After I had written the note which is to be found in pp. 125, 6, I was furnished with an extract of the decree upon rehearing in the case of Corbett *v.* Barker. The decree contains only directions for the ordinary accounts upon redemption, without any declaration upon the subject of resulting trust.