REPORTS

OF

APPEAL CASES

IN THE

HOUSE OF LORDS,

During the Session, 1818.

58 GEO. III.

ENGLAND.

APPEAL FROM THE COURT OF EXCHEQUER.

RUSCOMBE and another—*Appellants.*
HARE—*Respondent.*

June 23, 1817; Feb. 6, June, 5, 1818.

MORTGAGE.—HUSBAND AND WIFE.

HUSBAND, having two mortgages on his estate, devises it to his wife, and dies. Wife, having married again, joins her second husband in another mortgage of the estate, consolidating the two former mortgages into one, at a different rate of interest, reserving the equity of redemption to the husband and his heirs, without any recital or special circumstance to show that it was the intention of the parties to make a new settlement of the estate. Husband, after death of the wife, deals with the property as his own, disposes of part for val. con. and dies. Bill by heir at law of the wife, against the purchaser, representatives of the husband, and mortgagee, to redeem; and decreed accordingly; and the decree affirmed in Dom. Proc., with alterations as to the manner of taking the accounts:—

The rule being that, where husband and wife mortgage

June 23, 1817; Feb. 6, June 5, 1818

MORTGAGE. —HUSBAND AND WIFE.

the wife's estate, and the equity of redemption is reserved to the husband and his heirs, without recital or special circumstance to show the intention to make a new settlement of the estate; the husband has the equity of redemption, as he before had the legal estate, only *jure uxoris*.

Bill filed, 1800.

THE bill filed in T. T. 1800 in the Exchequer, against William House, Richard Ruscombe, Alexander Bruford, the younger, Francis Bruford, and William Long, stated, that Nicholas Hare, seized in fee of certain lands and other hereditaments, in the parish of Lyng, in Somersetshire, in 1749, by lease and release mortgaged the premises to William House for 800*l*., with interest at four and a half *per cent*. and covenanted to levy a fine, *sur conuzance de droit come ceo*, &c. the uses of which were to enure to House, his heirs and assigns, subject to the proviso for redemption; and the fine was duly levied. In 1762, Hare mortgaged the premises for a further sum of 450*l*. and interest at four and a quarter *per cent*. to the same House.

Mortgages, 1749, 1762.

Hare, afterwards, by his will, dated 21st June, 1757, devised all his freehold estates and lands of inheritance whatsoever, to his wife Mary Hare, her heirs and assigns; and made her sole executrix and residuary legatee. He died in 1764, leaving the said Mary Hare, the Respondent's mother, his widow, and the Respondent, then an infant of two years of age, his son and heir at law, him surviving. Mary Hare proved the will, and took upon herself the execution.

In 1765 Mary Hare intermarried with Alexander Bruford.

June 23, 1817; Feb. 6, June 5, 1818.

In 1766, by indentures of lease and release, made between Bruford and Mary his wife of the one part, and House of the other, reciting the indentures of 1749, and deed poll of 1762; and that the principal sums of 800*l.* and 450*l.* were not paid; the will and death of Nicholas Hare, the mortgagor; the marriage of Mary Hare with Bruford; and that the sums of 800*l.* and 450*l.* were then due from Bruford and his wife; but that all the interest had been paid up to that time by Bruford: it was witnessed, that for the better securing the said sums of 800*l.* and 450*l.* with such interest for the same as thereinafter mentioned; that is, interest at the rate of 5*l. per cent.* Bruford and Mary his wife granted, bargained, sold, &c. the premises to House, discharged of the former proviso for redemption, but subject to another proviso, that in case Bruford should pay the two sums, amounting together to 1250*l.* and interest at 5*l. per cent.* at a time therein specified, House should reconvey the premises to the husband Bruford, his heirs and assigns for ever; and Bruford and Mary his wife, jointly and separately, declared and agreed, that all fines and recoveries, &c. theretofore levied and suffered of the said premises, and a fine then intended to be levied, and which Bruford covenanted for himself and his wife, to levy to House, should be and enure to the use of House, his heirs and assigns, subject to the condition of redemption.—This last-mentioned fine was afterwards levied.

MORTGAGE.—HUSBAND AND WIFE.

1766, husband and wife mortgage the wife's estate, consolidating into one the two former mortgages.

Equity of redemption reserved to the husband and his heirs.

House died in May, 1791, having made a will,

June 28, 1817; Feb 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE.

1794, wife dies, leaving Respondent, her son by her former husband, her heir at law, who files his bill for redemption.

by which he appointed sole executor his son and heir at law, the Defendant William House, who duly proved the will, and became his personal representative.

Mary, the Respondent's mother, died in 1794, leaving him, her only child by Nicholas Hare, her heir at law. Alexander Bruford died in 1799, having previously made a will, appointing his sons, Alexander and Francis, his executors, and devising to them the premises before-mentioned, or part of them; and that they, and Ruscombe, and House, entered on and took possession, &c. And the bill prayed an account and redemption.

Answer. Ruscombe purchaser for val. con.

Ruscombe put in a plea and answer, and pleaded that he was a purchaser for val. con. without notice; and this being over-ruled, he further answered, that he agreed with Bruford for the absolute purchase of a part of the mortgaged premises; and that in 1797, in consideration of 2,000*l.* paid to House, and 600*l.* to Bruford, House, at Bruford's request, by lease and release, released and conveyed, and Bruford granted, ratified, and confirmed, to Ruscombe and to Long, his trustee, the premises therein described to hold to Ruscombe and Long, to the use of such person, and for such purposes as Ruscombe should, by deed or will, appoint; and in default thereof to the use of Long, his heirs and assigns, during the life of Ruscombe, in trust for Ruscombe; and after the determination of that estate to the use of the right heirs of Ruscombe. The answer then stated that Ruscombe paid the money, was let into possession, and ever since held the property as his absolute estate of inheritance.

House answered that the mortgage money had been paid, and that he claimed no interest in the estates. Long referred to the answer of Ruscombe, and stated that he was only a trustee for him. June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE. Answers. House and Long. Answer. Brufords, representatives of husband.

Alexander and Francis Bruford submitted that, by the transactions of 1766, the estates vested absolutely in Alexander Bruford the elder; and that he alone, in 1789, mortgaged the premises to House for a further sum of 300*l.* being the arrear of interest accrued, due on the said sum of 1,250*l.*; and that in 1797, part of the estate had been conveyed to Ruscombe, as stated in Ruscombe's answer; and that by will, dated 1798, Bruford the elder had devised the rest of the estate to them.

It was ordered by consent that the Respondent should admit at the hearing the several deeds and will mentioned; and no witnesses were examined on either side. Dec. 19, 1810.

The Court, on the 17th December, 1813, declared that the Plaintiff (Respondent) was entitled to redeem; and decreed an account of what was due for principal and interest on the two mortgages of 1749 and 1762, such interest to be computed from the death of Alexander Bruford, and that, on payment thereof, the Defendants, Rusbombe, Bruford, &c. should reconvey the estate, free from all incumbrances, &c.

Decree, Dec. 17, 1813, that wife's heir at law was entitled to redeem. Account on the first two mortgages. Interest from death of husband.

From this decree Ruscombe and A. Bruford appealed.

Mr. Martin (for Appellants). This case is distinguishable from that of *Jackson v. Innes.* The husband was bound only to keep down the interest June 23, 1817.

June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE.—HUSBAND AND WIFE.

Jackson v. Innes, heard in Dom. Proc. March 3, 6, 1815, but not decided.—*Vid.* Innes v. Jackson, 16 Ves. 356.

of the debt. He did not represent Hare; and yet, in 1766, he made himself liable to pay the debt, which it was not reasonable he should do without some benefit. This was not like the case of pledging the wife's estate for the husband's debt; but it was the case of a husband binding himself to pay the debt of a wife: and it may be presumed that the wife, in consideration of his making himself so liable, intended to transfer to him the equity of redemption. Unless this was the intention, one cannot well tell why the deed of 1766 was executed, as there were no arrears of interest, and it was not therefore likely that the mortgagee would have called for this deed. Unless then *a recital* of the intention to re-limit to the husband is absolutely necessary, this is as favourable a case as can well be. The ground of the decree in *Jackson v. Innes* was, that the intention of the parties was merely to render the wife's estate a security; and that no benefit was intended for the husband beyond the pledge of the wife's estate for his debt. But here, unless he was to have the benefit of the equity of redemption, he made himself liable for the wife's debt for no consideration at all. (*Lord Eldon*, C. The deed recites that the wife was not only devisee, but executrix and residuary legatee of Hare, her former husband; and then it states that the wife and her husband, Bruford, were indebted to House, which he could not be unless he had, along with his wife, personal assets of Hare.) The only reason for making him liable, unless he was to have this benefit, would be that the estate was not sufficient security, but it was sufficient; and the presump-

Cooth v. Jackson, 6 Ves. 12. Innes v. Jackson, 16 Ves. 356.

Mortgage deed, 1766.

tion is, that he was made liable, because it was intended that he should have the equity of redemption. June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE.

The decree was, at any rate, erroneous in the directions respecting the computation of interest: Ruscombe had a right to say that he should be in as good a situation as House: and what would be the amount of the argument as against House? True, Bruford ought to have paid the interest up to the time of his death. But was House bound to call for the interest? It would be a good answer for House, that he was not bound to call for it from year to year; and if so it was a good answer for Ruscombe. We are therefore entitled to the whole of our interest, and not merely to interest from the time of Bruford's death—even if the House should be against us on the principal point.

Mr. Heald. In *Innes (Cooth) v. Jackson* it was stated to be a rule, that where the wife's estate is mortgaged without a recital of any other purpose, and the equity of redemption is reserved to the husband, he shall be considered as a trustee for the wife, and her heirs. (*Lord Eldon*, C. I think there is some case in which it is laid down as a rule that when the wife's estate is mortgaged, and nothing is recited except the purpose of securing the repayment of the money, and the other covenants are conformable, and the equity of redemption is reserved to the husband, the Court considers him as entitled to the equity of redemption as he was before seized of the legal estate, *jure uxoris.* But there is some speciality in *Jackson v. Innes.*) In *Broad v. Broad* such a rule is presumed; but there

Broad v. Broad, 2 Ch. Ca. 98. 161.

June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE.

was a positive agreement in that case, and the decision would be the same whether there was such a rule or not. But, suppose that such a rule does exist, the question is, whether it does not rest on the principle mentioned by Lord Thurlow in *Clinton v. Hooper*, 3 Bro. Ch. Ca. 201. On referring to all the cases, he laid down this rule, that where there is a mortgage of the wife's estate by husband and wife for the husband's debt, she is a surety for her husband. That is the principle; and her estate shall be exonerated out of the husband's assets. So that on that ground it is rather probable that equity would lay down such a rule as is stated in *Innes (Cooth) v. Jackson*. But is that to extend to cases where the debt is that of the wife? It must be so held if this decree should be affirmed, as in this case the debt is that of the wife, not that of the husband. In *Lewis v. Nangle*, Amb. 150, the facts are shortly stated; but it is to be collected from that case that the rule depends on the application of the money; so that the rule is to be governed by the equities of the case. Then how would it be if she clearly meant to give the equity of redemption to her husband? (*Lord Eldon*, C. Lord Thurlow's notion was, that the intention must be recited.) The question is whether, if there is such a rule, it must not bend to circumstances. In *Clinton v. Hooper*, where the wife's estate was mortgaged, and the husband received the money; and she, having agreed during coverture, and confirmed the agreement when a widow, that her estate should continue liable; it was held that the estate was not to be exonerated out of the husband's

assets. (*Lord Eldon*, C. It is very important that it should be settled by this House, whether there is such a rule. Lord Thurlow said that the wife's intention, as recited, should govern. But suppose the rule to exist, yet there may be a doubt whether it applies in *Innes* (*Cooth*) *v. Jackson*.) That is what I have been endeavouring to get at: that the rule is not inflexible. Then what are the circumstances that may alter and vary it? Suppose the equity of redemption reserved to a stranger; or is the rule confined to husband and wife? But here the great ingredient is, that it was the wife's debt. The husband might say, "I am a purchaser for "valuable consideration of this equity of redemp-"tion; for although I possessed assets of the former "husband, at the time I married Mrs. Hare, it "does not follow that I possessed assets of his to "pay this interest for ever, and yet I covenant to "pay the interest." The rule therefore does not apply to this case. (*Lord Eldon*, C. It is proper that the Register's Book should be searched for *Broad v. Broad*, and *Clinton v. Hooper*. *Lord Redesdale*. Yes; for the Chancery cases are very incorrect. *Lord Eldon*, C. This is the debt neither of husband nor wife, but that of the estate: and neither the husband nor wife, in respect of the estate, were liable, unless in as far as she possessed assets of Hare; and some inquiry ought, perhaps, to have been directed as to that fact.) Probably Hare, the former husband, did not leave assets sufficient to pay the debt, otherwise he would not have borrowed money on mortgage: and the wife, if she had received assets, would probably have re-

June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE.

June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE.

deemed soon after Hare's death. Then comes the covenant by him, for himself and his wife, for further assurance, which is quite consistent, every thing showing that he gave a valuable consideration for this equity of redemption. It might be said that all this was not for the benefit of the wife. But still he gave that consideration; and some part of the benefit accrued to the wife; for House might say, "Pay me the money, otherwise I will foreclose:" so that the estate might have been preserved by his becoming liable to pay the debt, which was a benefit to the wife. (*Lord Eldon*, C. Did the Court, without difficulty, apply the same rule to the case of a purchaser as to that of a representative?) It was said by the present Ch. J. C. B., then Ch. B., that this was a mortgage of the wife's estate, and, on that ground, within the rule.

Gibbs, Ch. J.

Then, with respect to interest, Ruscombe was a purchaser for val. con. and stands in the same situation as that in which House would have stood: and is entitled to interest from the time it was last paid: and the decree is, at least in that respect, erroneous.

Mr. Agar. This case was different from that of *Innes (Cooth) v. Jackson.* (*Lord Eldon*, C. It was a question there whether it was merely a mortgage, or also a new settlement.) Then here, it is clear, there was not the least intention that this should be new settlement of the property. It appears from the deed of 1766, that the interest on the previous mortgage was four and a half per cent.; and that the object of the deed was to raise the interest to five per cent. It was "for better securing

" the repayment of the money, and such interest June 23, 1817; Feb. 6, June 5, 1818.
" as hereinafter is mentioned," *i. e.* at the rate of five per cent; and can it be said that the mere reservation of the equity of redemption to the husband, particularly to him, his heirs, and assigns, without any thing more, gives to him alone the wife's estate? But had the estate become his at law? The proviso is, that " in case Bruford, his ex-
" ecutors, administrators, or assigns, should pay
" the said two several sums of 800*l.*, and 450*l.*,
" making together the sum of 1250*l.*, and all in-
" terest thereon, at the time therein mentioned, to
" the said William House, his heirs, executors, ad-
" ministrators, or assigns, the said William House,
" his heirs and assigns, should at any time or times
" thereafter, &c. release and convey the said mes-
" suages or tenements, lands and premises, &c. unto
" the said A. Bruford, his heirs and assigns, for
" ever." It was only on condition of his payment at the time mentioned, that the estate was to be conveyed to him, and to become his at law. But he had not paid at the time. He did not perform the condition, and had no estate. And yet this deed was to deprive her and her heirs of the estate! In the words of a decision in another Court, it was only by declaration manifestly plain, or by necessary implication, that she could disinherit her heir at law. If there is a doubt, the heir takes; and a fine levied with a different intent could not pass the estate to the husband. The case of *Lewis v. Nangle* had nothing to do with this, as the question there does not arise here. We do not ask him here to exonerate. The simple point is, did she mean to give

MORTGAGE.—HUSBAND AND WIFE.

June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE.

up her whole interest in the estate to him? In *Corbet v. Barber*, 1 Anst. 138. 141. the late Ch. B. (Thomson) says, that where a fine is levied with a different intent, it had never been permitted to pass the estate from the wife to the husband; and he was fully borne out in this statement by the authorities; *Jackson v. Parker*, Amb. 697—*Astley v. Lord Tankerville*, 3 Bro. C. C. 545. And there is no case impugning that doctrine. Can this reservation, then, of the equity of redemption, with a proviso, give the estate to the husband, especially when, as here, he has not paid according to the proviso? In *Clinton v. Hooper*, 13 Bro. Ch. Ca. 201; and 1 Ves. jun., 173; the question was merely whether the wife's estate should be exonerated, which does not arise here. Then as to *Lewis v. Nangle*, reported in Ambler, 150; and in a note to the case of *Evelyn v. Evelyn*, in Cox 2 P. Wms. 665; and in Cox Ch. Ca., it appeared from the Register's Book that the husband had laid out 800*l.* in improving the estate. The question was, whether the wife's estate should be exonerated. But we ask no exoneration here, but to be permitted to redeem.

They ask why the mortgage of 1766 was granted, and the fine levied; I answer, to give a higher rate of interest. It fell from one of your Lordships that the covenant for further assurance was by Bruford and the wife, and that if he alone obtained the fee simple she could make no farther assurance, and the covenant would so far be absurd. The effect of their argument would be to make this a deed without consideration, which could not stand from the

wife to the husband. The Appellant had notice of all these circumstances, and could not be in a better situation than the person from whom he derived his title.

June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE.

Mr. Martin (in reply). The question is, whether the husband intended to give the wife a beneficial interest; for it is settled that a wife, if she pursues the proper forms, may pass her estate from herself and her issue, if it is clear that she so intended; and a large proportion of the estates in the whole country have been acquired by such titles. I know of no case exactly like this; and none of the cases cited on the other side will bear them out. It is stated in the deed of 1766 that all arrears of interest on the original mortgages were paid; so that there was no reason for any further security, unless it was intended to new model the estate by giving the equity of redemption to the husband. House had the mortgaged estate in fee, and as far as he was concerned, this fine was not at all necessary; and if the object had been merely to increase the rate of interest, it would have appeared by a recital in the deed that he had called for it, and threatened to call in the mortgage money. There is, however, no such thing. But suppose the object had been to increase the rate of interest, Bruford binds himself to pay it, and assumes the liability to discharge the principal. If these facts had been recited on the face of the deed, they would have shown a sufficient consideration. But a consideration was not necessary. The question is, what was her intention; and there is no instance where a woman has been relieved against a fine except where improper means

June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE.

have been used to compel her to levy it. The principle is, the wife's intention; and all the cases on the other side are cases where the wife's estate had been pledged for the debt of the husband; and the *dictum* of Thomson, Ch. B. might be dismissed with that observation. The mortgage of 1766 could have had no object unless the intention was that the equity of redemption should go in a different way. The mortgagee got no new remedy; but, without this, the husband could not have the interest: and to give him that interest must have been the purpose. The only new operation is the giving him the equity of redemption. There was a farther mortgage of the estate by the husband alone twenty-eight years after; and that, if she was apprized of it, was an acknowledgment on her part that the husband had the equity of redemption. (*Lord Eldon*, C. Was she a party to that deed?) No, it was not necessary, if she had before given the equity of redemption to her husband. The case of *Jackson v. Parker* is rather in our favour, than against us, as it seems to have been decided on the intention. The case in 1 Vern. 213. was one in which the husband got the money. Here he had nothing, and was a loser unless he got the equity of redemption: and the fact was, although it could not be now brought before the House, that the wife had no assets of her former husband. In the case of Lord and Lady Huntington, the estates were originally the wife's, and it appeared that for his own purposes he had prevailed on her to join in a revocation of the old, and limiting new uses. That there was the case of a woman pledging her

Huntington v. Huntington, 1 Bro. P. C. 12 Vern. 437.

estate for the debt of her husband, and *ultra* that purpose no interest was conveyed to the husband. But here there was no necessity, no object for the mortgage of 1766, except to give the husband this interest. It seems to have been a postnuptial settlement proceeding on a previous arrangement; and the subsequent mortgage shows the understanding of the family that the husband had the equity of redemption.

June 23, 1817; Feb. 6, June 5, 1818.

MORTGAGE. —HUSBAND AND WIFE.

Lord Eldon, (C.) The leading question here is, whether the husband had a title to convey; 2d, whether, if he had no title, the persons claiming under him can, as against the heir at law of the wife, stand in a situation better than that in which the husband would have stood.

Judgment. Feb. 6, 1818.

I do not mean, at present, to call upon your Lordships for any opinion upon these points; as much of the argument was addressed to the House, in the presence of a noble Lord who, I have some reason to believe, had formed an opinion upon the case; and I am anxious that the opinion should be known, not so much with reference to the present case, as with regard to another case, that of *Cooth v. Jackson*, decided by myself; a case, however, which appears to me very different from the present case; and I ought in justice to say that, although on the best consideration I could give to the case, I thought the decision right, yet there are many important considerations to be attended to before that judgment can be either affirmed or reversed.

Innes (Cooth) v. Jackson, 16 Ves. 356.

Now what are the facts of this case? Nicholas Hare, being seized in fee simple of the premises in

Feb. 6, 1818.

MORTGAGE. —HUSBAND AND WIFE.

question, in 1749 mortgaged the same by lease and release to William House for 800*l.*, and there was a covenant to leavy a fine, the uses of which were to ensure to House, his heirs and assigns, subject to the proviso for redemption, and the fine was accordingly levied. In 1762, Hare by a deed poll mortgaged the estate to House for a further sum of 450*l.*

Under these circumstances he made his will in 1757, and devised all his lands to his wife, describing her as his dear and beloved wife, and made her his executrix as well as devisee; and, what both the printed cases have omitted to mention, she was his residuary legatee. They have also omitted to mention the rates of interest for the 800*l.* and the 450*l.*, which were different from the rate of interest in the subsequent mortgage of 1766. And it will be consolation to me during my remaining life, knowing that it has been said that I have been dilatory in decision, that I have, by looking at the original instruments, saved to the right owner many a landed estate which would otherwise, probably, have been given to his adversary.

Hare died in 1764, and in 1766 it appeared that his dear and beloved wife had married in the interval between these two periods. She being residuary legatee, was liable for the debts of the testator to the amount of the assets. If there was no personal estate, then she could not be personally liable; and the real estate was the only debtor. She could be personally liable only in respect of the personal assets or rents and profits of the real estate. And if up to the 1766 she continued liable in respect of the assets received by her,

Bruford, by marrying her, also became liable to the amount of the assets. I would here state, that we cannot attend to a suggestion made at the bar, that there were no assets; for where it appears on the face of the instrument that he is a debtor, and acknowledges himself as such, it must be so taken, unless there is the clearest evidence to the contrary.

Feb. 6, 1818.

MORTGAGE. —HUSBAND AND WIFE.

And now see the importance of examining the original instruments. The deed of 1766 recites the mortgage for the 800*l.*, and then the second mortgage for 450*l.* with interest at 4*l.* 5*s.* *per cent*: and then it states that all interest was paid up by Bruford, but that the principal sums were due: and then the motives for executing this deed of 1766 were stated; and these were for the better securing the principal sums, "and *such* interest as herein-"after is mentioned," and that was the increased interest of five *per cent*.

Now if it clearly appears to have been the intention of the wife, that he should have the equity of redemption, he must have it. But still the question is, what Courts of Equity have agreed to consider as evidence of that intention manifested on the face of the instrument from which you are to draw your conclusion. I perfectly recollect what fell from the lips of Lord Thurlow, though it is a quarter of a century ago, upon that point: that where the equity of redemption is, in these cases, reserved to the husband, if there is no other evidence of the intention, and if the recital shows that the instrument is framed for other purposes, the husband is seized of the estate which he before had;

Opinion of Lord Thurlow that, although the equity of redemption is reserved to the husband alone, he has it only *jure uxoris*,

Feb. 6, 1818.

MORTGAGE. —HUSBAND AND WIFE.

unless the intention to give it to him alone is recited.

with this difference, that if he before had the legal estate *jure uxoris*, he afterwards had the equity of redemption, but still *jure uxoris*: or if the estate which he before had *jure uxoris* was equitable, so it remained equitable, but still *jure uxoris*: and that equity throws this protection round the wife, that the deed shall operate no further than its particular purpose, unless there is some recital of intention that the husband should take the benefit. But there may be complex cases, such as some of those which have been cited, very different from the case of a simple reservation of the equity of redemption to the husband, where the estate belonged to the wife. And yet it appears that, even in these complicated cases, the rule of law prevailed.

In this case the debt is that of the estate, unless the wife had personal assets of her former husband.

A good deal has been said, about whether the debt is that of the husband, or the wife, or of both. Now this is a case where, if there were no assets, it was not the debt of either. If there were no personal assets, the debt was charged only on the real estate; and if the testator had other real estates, his covenant would have bound the other real estates; but the wife would not be the debtor. Then it will result to this. A person mortgages his estate for sums at a certain rate of interest and dies, leaving his wife, his devisee, executrix, and residuary legatee. The wife marries again, and along with her husband makes another mortgage of the premises for the same sums; the instrument reciting that the interest was paid up to that time, but that the principal sums were due; and that the purpose was for better securing the payment of the

principal sums and a higher rate of interest; and for what? for any other purpose? no other purpose. And then it is asked what was the object of the mortgage. The answer is, that it was the better securing the payment of the principal, and varying the rate of interest. You may say, that it was for the further purpose of reserving the equity of redemption to the husband. But the question comes back again to this; whether there are any special circumstances to show that the intention was to go beyond the purpose recited in the deed.

Feb. 6, 1818.

MORTGAGE. —HUSBAND AND WIFE.

Then we have to consider what was the effect of the fine, and with respect to that the same answer may be given. The fine is levied only for the same purpose for which the mortgage was made. If a fine by him alone could answer the recited purpose, the circumstance of her joining with him to levy the fine, might be evidence of her intention to waive her right. But that is not the case; for, the estate being that of the wife, whether the purpose was to vary the rate of interest or to entitle him, if a fine was necessary, the purpose could not be effected unless she joins him in the assurance on record.

Then it is said that he made this his debt. But we know that it often happens that, although a man covenants for payment to a creditor, and makes it his debt as to the creditor; yet, as between him and the estate, it is not his debt, but that of the estate. Hare mortgaged the estate. You now demand your money; but I will be security to you the mortgagee, and have my demand over against the estate.

Feb. 6, 1818.

MORTGAGE. —HUSBAND AND WIFE.

So it will come to this: an estate mortgaged for two sums is devised to the wife: she marries Bruford; and they acknowledge that they are indebted, which they could not be unless they had assets of the former husband, and make another mortgage deed, consolidating the two former mortgages, and reciting that the purpose is to give a higher rate of interest: and there is nothing to show that she meant to give her husband the benefit of her estate, except the equity of redemption reserved in this way. Whether that is sufficient to give the equity of redemption to the husband is now to be determined. I do not press for your decision on that point at present; but merely throw out these considerations generally.

On the 16th Feb. 1818, the Lord Chancellor stated the concurrence of Lord Redesdale in the opinion that the decree ought to be affirmed.

June 5, 1818.

Lord Eldon (C.) The decree in this case was right, in so far as it declared that the heir at law of the wife, whose estate had been mortgaged, was entitled to redeem, although the equity of redemption had been reserved to the husband and his heirs. Here there is no recital, no special circumstance from which it can be concluded that the real intention was to make a new settlement of the estate—nothing to take it out of the rule that where the husband is seized of the legal estate

Rule of law.

jure uxoris, and husband and wife join in a mortgage of the estate—reserving the equity of redemption to the husband and his heirs, the husband

has the equity of redemption, as he before had the legal estate, *jure uxoris*; nor any such special circumstances as those in the case of *Jackson v. Innes*, the name of which in the Court of Chancery is *Cooth v. Jackson*.

June 5, 1818.

MORTGAGE.—HUSBAND AND WIFE.

Innes (Cooth) v. Jackson, 16 Ves. 356.

But on looking at the record it appears that there are some errors in the terms of the decree which ought to be corrected. There was one mortgage for 800*l.*, and another for 450*l.* by the former husband; and these were, in 1766, consolidated into one by the wife and her second husband, at a different rate of interest. The decree has directed the account to be taken on both the mortgages, as if existing separately, instead of being consolidated into one at a different rate of interest. This is a mistake; the account ought clearly to be taken on the consolidated mortgage. The wife died in 1794, and the husband in 1799; and the decree directed that the interest should be computed from the death of the husband. While both the wife and husband lived they were not bound to keep down the interest: but when the wife died the husband became tenant for life by the courtesy; and, as tenant for life, was bound to keep down the interest from that time. But the decree directs no account of the interest till the death of the husband.

Errors in the terms of the decree.

Another consideration is, that as they were not bound to keep down the interest on the mortgage of 1766, how is that to be provided for? The arrear of interest at the death of the wife must be converted into principal, and considered as a charge on the estate, and the estate must answer it. So that the arrear of interest is to be converted into

June 5, 1818.

MORTGAGE.—HUSBAND AND WIFE.

principal at the death of the wife, and to be considered as a charge on the estate; and from that time the husband was bound to keep down the interest.

Another mistake is that Ruscombe is ordered to reconvey the estate free from all incumbrances. It ought to be free from all incumbrances created by himself.

Decree *affirmed*, with alterations as above.

IRELAND.

ERROR FROM THE COURT OF EXCHEQUER CHAMBER.

SHULDHAM—*Plaintiff in Error.*
SMITH (Lessee of Mathews)—*Defendant in Error.*

AND

SMITH—*Plaintiff in Error.*
SHULDHAM—*Defendant in Error.*

April 25, 28, July 8, 1817; June 3, 5, 1818.

DEVISE.

DEVISE of real estate in trust to pay the clear rents, issues, and profits, and in certain proportions, to certain persons in the will mentioned, for life: and then testator proceeds to devise as follows:—"And from and after the death of "the survivor of them the said L. S." &c. (naming the several persons to whom the above life interests were given) "then I give and devise all and singular the "said manor, messuages, lands, &c. unto all and every "the children of my late sister E. C. by her three se-"veral husbands" (naming them), "that shall be then "living, and their heirs and assigns for ever, equally to