ENGLAND.

(EXCHEQUER CHAMBER.)

HENRY SMITH - - - *Plaintiff in Error.*

The EARL OF JERSEY and others - - - - - - } *Defendants in Error.*

A POWER reserved upon a marriage settlement to Tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by a lease for lives providing a re-entry in case the rent remains in arrears fifteen days, and there is no sufficient distresses on the premises.

B. M. being seised, &c. in fee of lands, &c. devised the lands, &c. to his daughter, *L. B.* for life, with remainders over; with a power to her in consideration of marriage, either before or after marriage, of revocation and appointment. *B. M.* died seised, without altering his will, leaving his daughter, *L. B.* seised of the lands, &c. for life, with power, &c.

L. B. intermarried with *G. V. V.*

Before the marriage, *L. B.* being seised as aforesaid, by deed, in conformity with the power in the will of *B. M.* and in consideration of the marriage, revoked the uses and devises contained in the will, and appointed and limited the lands, &c. to *F.* Earl of *G.* and *C. M.* and their heirs, in trust, to hold the same to the uses before limited, until after the marriage, and then to the use of *G. V. V.* for life, remainder to *L. B.* (the grantor) for life, remainder to preserve, &c.; and after the decease of the survivor of them to divers other uses for the benefit of their issue; and in default of issue to the use of the will of *L. B.*; and in the mean time to the use of *L. B.* her heirs and assigns.

In the deed was contained a leasing power to and for

G. V. V. and *L. B.* from time to time during their respective lives, when and as they should respectively be in possession of the lands, &c. by indenture or indentures, under their respective hands and seals, attested by two or more credible witnesses, to demise such parts of the lands, &c. as now are leased for lives, or for years determinable on lives, in possession or reversion for lives, or for any number of years determinable on lives, so as there be not any greater estate or interest subsisting at any one time than what will wear out or be determinable on the dropping of three lives, and *so as* on every such lease there be reserved and made payable, during the continuance of the estates and interests thereby to be demised, leased, or granted respectively, *the ancient and accustomed duties and services, or more, or as great or beneficial rents, duties and services, or more, as now are, or at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable* for the same premises respectively, or a just proportion, &c. (except heriots, &c.) all such rents, duties, and services respectively, to be incident to and go along with the reversion and remainder of the same premises expectant on the determination of the respective demises, &c. and *so as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved,* and so as, &c. &c.: and also by indenture under hand and seal, attested as aforesaid, to demise all or any of the lands, &c. for any term absolute, not exceeding twenty-one years, to take effect in possession, &c. so as upon every such lease there be reserved, during the continuance of such lease, so much or as great and beneficial yearly and other rent, and services proportionably, as now is paid, or the best and most improved yearly rent, &c. without taking any fine, premium, or foregift, &c.; and so as in every such lease for any term of years absolute respectively, *there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof:* and also by indenture under hand and seal, attested as aforesaid, to demise the lands, &c. wherein any mine, &c.

On the 5th September 1803, *G. V. V.* being seised of the lands for life, by an indenture of lease, in consideration of, &c. let premises, part of the lands, in settlement, which had been and were then under a lease for years determinable on lives, to *C. S.* and *H. S.*, their executors and administrators, for ninety-nine years, if *C. S.*, *H. S.* and *J. S.*, or either of them, should so long live, yielding, &c. the yearly rent of 2 *l.* at Michaelmas and Lady Day, and one couple of fat capons on, &c.

The indenture contained a covenant by the lessees for the payment of a proportion, &c.; and a covenant for the payment of the yearly rent of 2 *l.*, and for the performance of the duties, &c. And also a proviso: "that if it should happen at any time during the estate thereby granted that *the said yearly rent or sum of* 2 *l.*, *and every or any of the duties, services, reservations and payments thereby reserved, or any* part thereof, *should be behind, unpaid, or undone, in part or in all, by the space of fifteen days* next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid, *and no sufficient distress or distresses can or may be had and taken upon the said premises,* whereby the same and all arrearages thereof, if any be, may be fully raised, levied and paid, &c.; or if any default should be made in the payment or performance of all or any of the reservations, covenants and agreements therein-before contained, that then and from thenceforth, in all or any or either of the said cases, it should be lawful to and for the said *G. V. V.*, his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises should belong, into the premises, &c. to re-enter, and the same to have, hold, retain, possess and enjoy, as in his and their former estate, &c."

After the death of the tenants for life, upon a trial in ejectment by the grantees of the devisee under the will of *L. M.*, against the parties holding under this demise, it was found by special verdict, that the rents, duties, reservations, and payments reserved by the indenture, and secured by the render, covenants, and power of re-entry therein contained, at the time of making the indenture, were ancient and accustomed,

and then were as great and beneficial as any which at the time of making the deed, or at any time thereafter, were or had been reserved in respect of the premises demised.

And that the usual and accustomed form of leases of the estate, contained in the settlement for lives or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the indenture of demise in question.

Held, affirming a judgment of the King's Bench, and reversing a judgment of the Exchequer Chamber, that the evidence from the former leases was properly admitted and introduced into the special verdict; and that the lease in question, according to the practice of conveyancers, was by implication within the terms of the power, and valid.

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GEORGE, Earl of Jersey, Edward Ellice, and Alexander Murray, brought an ejectment in the Court of King's Bench in Michaelmas Term 1813, against Henry Smith, for the recovery of a tenement, with the appurtenances, called Tal-y-Coba-Uchaf, in the parish of Lansamlet in the county of Glamorgan, then in the possession of Henry Smith. There were two demises laid in the declaration; the first on the 11th July 1813, and the second on the 11th January 1814. Henry Smith defended and pleaded the general issue.

At the Summer Assizes in the year 1815, the cause was tried before Baron Wood, at Hereford, when a special verdict was found, stating in substance as follows:—

That the Honourable Bussey Mansel, afterwards the Right honourable Bussey Lord Mansel, Baron Mansel, of Margam, in the county of Glamorgan, being seised in fee of the premises in the declaration

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mentioned, being a tenement called Tal-y-Coba-Uchaf, made his will, dated the 11th December 1749, by which he devised the said tenement, amongst other things, in remainder, after certain limitations which never took effect, to his daughter, Louisa Barbara, for life, with remainders over; and a power to her in consideration of marriage, either before or after marriage, of revocation and appointment, as afterwards pursued by her in the deed of settlement hereafter mentioned.

That Lord Mansel died on the 29th of November 1750, seised as aforesaid, without altering his will as to the said premises, leaving his daughter, Louisa Barbara, his only child him surviving, seised for life of the said premises.

That the said Louisa Barbara, on the 20th July 1757, intermarried with George Venables Vernon, the younger, afterwards the Right honourable George Venables Vernon, Lord Vernon, Baron of Kinderton, in the county of Chester.

That before the said marriage, the said Louisa Barbara, being seised as aforesaid, by deed dated the 2d July 1757, in conformity with the said power in the said will of the said Lord Mansel, and in consideration of the said marriage, revoked the uses and devises contained in the said will concerning the said premises, and appointed and limited the same to Francis Earl of Guildford and Charles Montague, and their heirs, in trust, to hold the same to the same uses as before limited until after the said marriage, and then to the uses of the said George Venables Vernon for life, without impeach-

ment of waste, remainder to the said Louisa Barbara for life, without impeachment of waste, and in the mean time to the said Francis Earl of Guildford and Charles Montague, and their heirs, to preserve contingent remainders; and to permit the said George during his life, and afterwards the said Louisa Barbara during her life, to take the rents, &c.; and after the decease of the survivor of them, to divers other uses for the benefit of their issue; and in default of issue, to the use of the will of the said Louisa Barbara, and subject to the powers and limitations to be thereby directed and appointed; and in the mean time to the use of the said Louisa Barbara, her heirs and assigns, for ever.

In the said deed was contained a leasing power in these words: "Provided always, and it is hereby "further declared and agreed, by and between the "said parties to these presents, that it shall and may "be lawful to and for the said George Venables "Vernon the younger, and Louisa Barbara Mansel, "his intended wife, from time to time, during their "respective lives, when and as they shall respec-"tively be in possession of or entitled to the per-"ception of the rents and profits of the manors, "messuages, lands, hereditaments and premises, so "limited to them for their respective lives as afore-"said, by indenture or indentures, under their re-"spective hands and seals, attested by two or more "credible witnesses, to demise, lease, or grant such "part or parts of the said manors, messuages, lands, "tenements and hereditaments, or parts or shares "of manors, messuages, lands, tenements, heredita-

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" ments and premises, whereof they shall be so " respectively in possession or entitled to the per- " ception of the rents and profits as aforesaid, as " now are leased for life or lives, or for years deter- " minable on the dropping of a life or lives, to any " person or persons, in possession or reversion, for " one, two, or three lives, or for any number of " years determinable on the dropping of one, two, " or three lives, so as there be not on any part or " parcel of the same premises to be demised, leased, " or granted respectively, for a life or lives, or for " years determinable on the dropping of a life or " lives as before mentioned, any greater estate or " interest subsisting at any one time than what will " wear out or be determinable on the dropping of " three lives, and so as on every such respective " lease, demise, or grant for a life or lives, or for " years determinable on the dropping of a life or " lives, there be reserved and made payable during " the continuance of the estates and interests there- " by to be demised, leased, or granted respectively, " the ancient and accustomed yearly rents, duties, " and services, or more, or as great or beneficial " rents, duties and services, or more, as now are, or " at the time of demising or granting the premises " so to be demised, leased, or granted respectively, " were reserved or made payable for or in respect of " the same premises respectively, or a just propor- " tion of such ancient or the present reserved rents, " duties, and services, or more, according to the " value of the premises so to be demised, leased or " granted respectively (except heriots, which shall

" or may be varied, or altered or compounded for,
" according to the will and pleasure of the said
" George Venables Vernon the younger, and Louisa
" Barbara Mansel), all such rents, duties, and ser-
" vices respectively, to be incident to and go along
" with the reversion and remainder of the same pre-
" mises, expectant on the determination of the said
" respective demises, leases, and grants thereof, and
" so as there be contained in every such lease *a*
" *power of re-entry for nonpayment of the rent*
" thereby to be reserved; and so as the respective
" lessees to whom such lease or leases shall be made
" as aforesaid be not, by any express clause to be
" contained in any such leases respectively, freed
" from impeachment of waste; and so as the said
" respective lessee or lessees, to whom any such
" lease or leases shall be made respectively as afore-
" said, doth and do seal and deliver a counterpart
" or counterparts of such lease or leases respec-
" tively: and also by indenture or indentures under
" their respective hands and seals, attested as afore-
" said, to demise, lease, or grant all or any of the
" said manors, messuages, lands, hereditaments and
" premises, and parts and shares of manors, mes-
" suages, lands, hereditaments and premises, or any
" of them, so limited to them the said George
" Venables Vernon the younger and Louisa Bar-
" bara Mansel, his intended wife, for their respec-
" tive lives as aforesaid, for any term or number of
" years absolute, not exceeding twenty-one years,
" to take effect in possession, and not in reversion, or
" by way of future interest, so as upon every such

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" lease for an absolute term not exceeding twenty-
" one years there be reserved and made payable,
" during the continuance of such lease or leases, so
" much or as great and beneficial yearly and other
" rent and rents, and other services proportionably,
" as now is and are therefore paid and yielded, or
" the best and most improved yearly rent and rents
" that can be reasonably had or obtained for the
" same, without taking any fine, premium, or fore-
" gift, or any thing in the nature or in lieu thereof,
" to be incident to and go along with the reversion
" and remainder of the same premises expectant on
" the determination of the said respective leases; and
" so as the respective lessees, to whom such lease or
" leases shall be made, be not, by any express clause
" to be contained in any of such leases respectively,
" freed from impeachment of waste; and so as the
" said respective lessee and lessees, to whom any
" lease or leases shall be made respectively as afore-
" said, doth and do seal and deliver a counterpart or
" counterparts of such lease or leases respectively;
" and so as in every such lease for any term of years
" absolute respectively there be contained a clause
" of re-entry, in case the rent or rents thereupon to
" be reserved, be behind or unpaid by the space of
" twenty-eight days after the times thereby respec-
" tively appointed for payment thereof: And also
" by indenture or indentures under their respective
" hands and seals, attested as aforesaid, to demise,
" lease, and grant all or any part of the lands, here-
" ditaments and premises so limited to them the
" said George Venables Vernon the younger, and

" Louisa Barbara Mansel, his intended wife, for " their respective lives as aforesaid, wherein or " whereupon any mine or mines now is or are open; " or wherein or whereon any person or persons shall " be willing to open any mine or mines, sough or " soughs, or other thing or things whatsoever, which " may be requisite and necessary for the digging " and getting of lead or copper ore, or any metal or " mineral whatsoever, unto any person or persons, " for any term or number of years not exceeding " thirty-one years, to take effect in possession and " not in reversion, or by way of future interest; and " so as upon every such lease for an absolute term, " not exceeding thirty-one years, there be reserved " and made payable, during the continuance of such " lease or leases, such part or share of the lead, cop- " per ore, coal, and other produce to be gotten from " the said mines, or such yearly rent or income in " respect thereof, as can reasonably be had or obtain- " for the same, without taking any fine, premium or " foregift, or any thing in the nature or in lieu thereof, " to be incident to and go along with the reversion " and remainder of the same premises expectant, on " the determination of the said respective leases; " and so as the respective lessees to whom such lease " or leases shall be made, be not, by any express " clause to be contained in any of such leases re- " spectively, freed from impeachment of waste, other " than in the necessary and reasonable winning or " working thereof; and so as the said respective " lessee and lessees, to whom any lease or leases " shall be made respectively as aforesaid, doth and

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" do seal and deliver a counterpart or counterparts " of such lease or leases respectively; and so as " there be also inserted such proper and usual cove- " nants for the effectually winning and working the " said mines and smelting the ore, and doing all " other proper and necessary acts, as are usually " inserted in leases of the like nature."

The said George Venables Vernon after the said marriage became seised for life of the said premises, and entitled to the receipt of the rents, &c.

Before the making the said deed of settlement, and until the surrender hereafter mentioned, the said premises were under lease for a term of years determinable on the lives of three persons, who died before the 11th day of July mentioned in the declaration.

On the 5th September 1803, the said George Venables Vernon being seised of the said premises as aforesaid, and entitled to and in receipt of the rents, &c. by an indenture of lease between him (then Lord Vernon) of the one part, and Charles Smith (since deceased), and the said Henry Smith of the other part, in consideration of the surrender of the said former lease, and of 105*l.* paid to the said Lord Vernon by the said Charles and Henry Smith, and of other matters in the said indenture specified, let the said premises called Tal-y-Coba-Uchaf to the said Charles Smith and Henry Smith, their executors and administrators, for ninety-nine years from the date of the said indenture, if the said Charles Smith, Henry Smith, and John Smith, son of the said Charles, or either of

thiem, should so long live, yielding therefore to the said Lord Vernon, &c. the yearly rent of 2 *l.* at Michaelmas and Lady Day, and one couple of fat capons on the first of January yearly, during the term, or 1 *s.* 6 *d.*, in lieu, at the election of Lord Vernon, &c., also the heriots and services in the said indenture specified.

The said indenture contains a covenant by the said lessees for the payment of a proportion of the said reserved rent, in case the term should determine between any of the days of payment by the death of the persons named in the said lease; also a covenant by the said lessees for the payment of the said yearly rent of 2 *l.*, and for the performance of the duties, heriots, suits, services, &c. at the times and in the manner limited and appointed in the said lease. And the said lease contains a proviso in these words: "Provided always, that if it shall "happen at any time during the said estate hereby "granted, that *the said yearly rent or sum of* 2*l.* "*and every or any of the duties, services, reser-* "*vations and payments hereby reserved, or any* "part thereof, *shall be behind, unpaid, or undone,* "*in part or in all, by the space of fifteen days* "next over or after any or either of the days or "times whereat or whereupon the same ought to "be paid, done, or performed as aforesaid, *and no* "*sufficient distress or distresses can or may be had* "*and taken upon the said premises*, whereby the "same and all arrearages thereof, if any be, may "be fully raised, levied, and paid, or if the said "Charles Smith and Henry Smith, their executors,

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" administrators or assigns, or undertenants, or any " of them, shall suffer and leave the said premises, " or any part thereof, to continue in decay or un- " repaired, by the space of six calendar months " next after such view had, and notice given or left " as aforesaid, or shall do or commit, or cause or " suffer to be committed or done, any wilful waste, " spoil; or destruction in or upon the said premises, " or any part thereof, or shall at any time during " the said term grind any part of their corn or " grain at any other mill than such mill so to be " appointed by the said George Lord Vernon, his " heirs or assigns, or such person or persons to whom " the freehold or inheritance of the premises shall " as aforesaid belong (the same being in repair and " order to grind such corn and grain,) or if the said " Charles Smith and Henry Smith, their executors " and administrators, or any or either of them, shall " at any time during the estate hereby granted " give, grant, bargain, sell, assign, or otherwise de- " part with this present demise and lease, or with " their or either of their estate or interest herein, " without the license and consent of the said George " Lord Vernon, his heirs or assigns, or of the per- " son or persons to whom the freehold or inheritance " of the premises shall as aforesaid belong, in writ- " ing, under his or their hands thereunto first had " and obtained, or if any default shall be by them, " the said Charles Smith and Henry Smith, their " executors, administrators or assigns, made in the " payment or performance of all or any of the re- " servations, covenants, and agreements hereinbefore

" on their parts contained, that then and from " thenceforth, in all or any or either of the said " cases, it shall and may be lawful to and for the " said George Lord Vernon, his heirs and assigns, " and the person and persons to whom the freehold " or inheritance of the premises shall as aforesaid " belong, into and upon the said premises hereby " demised, and into every part and parcel thereof, " wholly to re-enter, and the same to have, hold, " retain, possess, and enjoy, as in his and their " former and proper estate, against the said Charles " Smith and Henry Smith, their executors, admi- " nistrators or assigns, these presents, or any thing " herein contained to the contrary thereof in anywise " notwithstanding."

The said lease does not contain any other than the above-recited power of re-entry for non-payment of the rent reserved. The said Charles Smith and Henry Smith executed and delivered a counterpart of the said lease.

The rents, duties, reservations and payments reserved by the said indenture, and secured by the render, covenants, and power of re-entry therein contained, at the time of making the said indenture, were ancient and accustomed, and then were as great and beneficial as any which at the time of making the deed of 2d July 1757, or at any time thereafter, previous to making the said indenture of 5th September 1803, were or had been reserved, in respect of the said premises demised by the said indenture.

The premises demised by the said indenture, and

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the premises mentioned in the said declaration, are the same.

The usual and accustomed form of leases of the estate, contained in the said settlement of 2d July 1757, for lives, or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the said indenture of 5th September 1803.

All the rents, duties and services reserved by the said indenture, which accrued in the lifetime of Lord Vernon, have been discharged and performed; and the said Henry Smith has been ready to pay and perform all things that would have accrued to this time, supposing the said indenture to have continued in force and undetermined.

The said Charles Smith died on the 1st January 1813; the said Henry Smith and John Smith are still living.

The said Louisa Barbara, by virtue of the said powers to her granted, made her will, dated 5th August 1783, duly attested, signed and published, and thereby devised the said premises, subject to the estate for life of her said husband therein, unto Thomas Earl of Clarendon for life, remainder to William Augustus Henry Villiers, afterwards William Augustus Henry Villiers Mansel, second son of George Bussey Villiers Earl of Jersey, and his heirs.

The said Louisa Barbara died on the 1st January 1786 without issue, and without altering her said will as to the said devise of the said premises.

The said Earl of Clarendon died on the 1st January 1787, whereupon the said William Augustus

Henry Villiers was seised in fee of the said remainder, subject to the said life-estate of the said Lord Vernon.

By indentures of lease and release, the former bearing date the 4th January 1812, and the latter the 6th January 1812, the said William Augustus Henry Villiers, being so seised of the said remainder as aforesaid, conveyed the same to George Earl of Jersey, Edward Ellice, and Alexander Murray, who thereupon were seised of the said last-mentioned remainders.

Lord Vernon afterwards, and before the 11th of July, the day mentioned in the declaration, died, whereupon the said George Earl of Jersey, Edward Ellice, and Alexander Murray, were seised in fee of the said premises.

The special verdict then finds the leases by the said George Earl of Jersey, Edward Ellice, and Alexander Murray, the lessors of the plaintiff, in support of the several demises in the first and second counts of the declaration mentioned, also the entries and ousters as in the declaration mentioned, and concludes in the usual form, referring the matters to the court.

This special verdict was argued before the judges of the Court of King's Bench, at Serjeant's Inn, at the sittings holden there before Michaelmas Term 1816, and in the ensuing term the Court pronounced their judgment for the defendant.*

From this judgment the plaintiffs brought their writ of error into the Exchequer Chamber, where

* 5 Maule and Selwyn, p. 467.

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the case was twice argued, and four of the Judges of that court being of opinion for a reversal, and three for an affirmance of the judgment of the Court of King's Bench, that judgment was reversed accordingly *. From that judgment of reversal the original defendant brought a writ of error returnable in parliament, praying that the judgment of reversal might be reversed.

For the plaintiff in error:

1st. The intention of the donor of a power is to be collected from the whole of the deed whereby that power is created; from the plan and design of it as well as the words, and also from the circumstances of the property which is by him subjected to the operations of that power; and in the construction of the particular instrument executed under such power, the law will expound it with an inclination to preserve rather than to destroy the instrument, "*ut res magis valeat quam pereat*;" "It is the office of a judge to preserve, not to destroy an estate." †

2d. The only objection raised to the lease under which the plaintiff in error holds is, that the proviso for re-entry therein contained is not such as is required by the leasing power under which it was granted by Lord Vernon, as not being absolute, unconditional, and capable of being enforced *instanter* upon every default of payment of rent, on the very day on which such default takes place; but the words

* 1 Bing. and Brod. p. 97; 3 Moore, p. 339.

† See *Cother* v. *Merrick*, Hardr. 93, per Parker, Baron.

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of the power do not require a proviso for re-entry absolute, unconditional, and capable of being enforced *instanter*, such words being only "so as there be con- "tained, in every such lease a power of re-entry for "nonpayment of rent." It is undoubtedly a condition precedent to the due execution of the leasing power, that there should be reserved in all leases granted under such power "a power of re-entry for non- "payment of rent;" but in what terms that power of re-entry is to be reserved the settlement is wholly silent, and the argument for the Defendant in error is, that from the non-expression of any terms in which that proviso is to be framed, it necessarily results that the comprehensive expression, "a power "of re-entry" (which comprehends and includes every proviso of re-entry adapted to the object for which it is required,) must be narrowed to one particular proviso for re-entry, absolute, unconditional, and capable of being enforced *instanter* upon every default. But the expression "a power "of re-entry" is no description of the particular form, though it is of the general object of the condition to be introduced into the lease, and the language of the leasing power is fully satisfied by a proviso for re-entry such as is contained in the lease now sought to be set aside by Lord Jersey, which, though not an absolute, unconditional proviso, and capable of being enforced *instanter* upon every default, is nevertheless "a power of re-entry," sufficient for the object for which it was required, such as was in use upon the estate to which the leasing power applies at the time when it was created, and such as the general term used in the leasing power,

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so far from either expressly or impliedly disapproving, seems advisedly to sanction, especially when it is recollected that in a subsequent part of the same leasing power, as applicable to the rack-rent estates, the donor of the power omits the general and larger term, "a power of re-entry for non-payment of "rent," and specifically chalks out the very power to be introduced into such leases, viz. "a clause of "re-entry, in case the rent to be reserved be behind "or unpaid by the space of twenty-eight days after "the times thereby respectively appointed for pay-"ment thereof." Thus, in this latter case, where large rents were to be secured, defining the extent of indulgence to the tenant, and furnishing the very clause to be introduced, as contra-distinguished from the more general and comprehensive expression previously used, viz. "a power of re-entry for non-"payment of rent." Can it be successfully contended that this expression conveys a perfect idea to the mind of the nature and form of the power of re-entry required? It points out, indeed, distinctly the wish of those who framed the settlement that there should be some power of re-entry in all leases of this description, but not the precise terms in which such power shall be reserved. Had the power required a covenant on the part of the lessee to build a house upon the premises, it would still have been a question what house; and a lease stipulating for the building a house of given dimensions, and within a prescribed time, must have been judged of by the law as a reasonable or unreasonable compliance with the condition.

3d. If the language of the leasing power has been

literally attended to in the lease executed under such power, the next consideration will be, whether the spirit also is preserved; or whether there be any thing in the plan and design of such leasing power, and the circumstances of the property to be leased, which, by disclosing a different intention in the donor of the power from that which occurs on the mere reading of the words themselves, thereby imposes a different construction upon such words. The leases under the power are of three sorts. First, leases for lives, or determinable on lives, which are renewable on fines, and where the rents reserved are nominal: secondly, leases for years, where a rack-rent is reserved: and thirdly, mining-leases, in which no reservation of a power of re-entry is required. The lease in question is of the first sort, and the proviso therefore for re-entry rather introduced with a view of enforcing regular acknowledgment of the tenancy, than of securing a succession of large payments at stated periods. It is not improbable, therefore, with such an object, that some discretion should be left to the person by whom the power was to be executed as to the form of the proviso. If the words of the leasing power allow such discretion, is there any reason on which its exclusion can be founded? Is the security of the nominal rents endangered by it? Are the acknowledgments of a subsisting tenancy less likely to be regular in a case where the property of the tenant, if hazarded by irregularity, is hazarded to so great an extent as that of the loss of a valuable lease for lives held under a nominal rent, than where it consists only of a short term at a rack-rent? On the contrary, considering that two objects

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must have been present to the mind of the framer of the leasing power: first, the securing the rents to those who were to benefit by them; second, the preservation of the estate in good condition when the lease determined: has not the language of the power been designedly varied, when directing the reservation of the right of re-entry in the two sets of leases? In the leases for lives, where a small proportion of the annual value is to be paid in the shape of rent, and where a distress might be resorted to without injury to the estate, a mere reservation of the right of re-entry is required, in such manner and form as should be found discreet and beneficial, and adapted to the object in view; but in the rack-rent leases a precise and well defined clause of re-entry is pointed out, because the interest of both tenant for life and remainder-man is materially consulted in the reserved power of re-possessing themselves of land for which the lessee is not able to pay the rack-rent within twenty-eight days from the time of its becoming due; and where a distress taken for such rent, if resorted to, would probably not secure the rent, but certainly injure the cultivation of the estate.

4th. If the literal language of the condition be not violated, and there be nothing in the spirit of the leasing power giving a meaning beyond the words used, the principle which has hitherto governed in cases of this kind must govern in this case, which is, that where a special clause of re-entry is prescribed by the power, that clause cannot be departed from, even in trivial circumstances, without defeating the lease made under the power; the donor of the power being in this respect the legislator, and having a

right to impose any condition precedent he pleases, provided it be not inconsistent with law, and which, when once plainly expressed by him, is not subject to any examination of its reasonableness or unreasonableness. But if no special clause be furnished by him, but merely a direction given that certain leases shall contain "a power of re-entry," then if a clause reserving the right of re-entry be inserted, the will and direction of the legislator is complied with, unless the power be executed in a fraudulent or illusory manner, which neither law nor equity would hold to be any compliance at all. Such is the true result of *Coxe* v. *Day**, explained as that case is by the subsequent decision in this case, when in the Court of King's Bench, of two of the same learned Judges who signed the certificate in *Coxe* v. *Day*; for in that case the power having prescribed a particular clause, that is, in the event of the rent being behind a specified number of days, those learned Judges held a proviso for re-entry, which added terms not used in the particular clause prescribed by the power to have vitiated the lease. But in this case the settlement only requiring "a power "of re-entry for non-payment of rent," and the lease containing the clause of re-entry in question, they considered the words of the power to have been complied with, such compliance being not only literal, but not impeachable on the ground of any fraud or contrivance, and, on the contrary, fair and reasonable.

5th. In considering whether the lease be bad on the ground of any excess in the indulgence given to

* 13 East, 118.

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the tenant, where the power, as in this case, prescribes no precise clause of re-entry, it is most material to ascertain what was the indulgence granted in leases of this estate prior and subsequent to the settlement creating this power. No such inquiry, it may be safely conceded, can be admitted where the precise clause is prescribed by the power; but where the power is silent as to the particular nature of the condition, if it follows from thence that some discretion is to be exercised by him who executes the power in framing the condition, the discretion heretofore sanctioned by the donor of the power, who if she had spoken, must have been obeyed, is fit evidence to guide the judgment where she has been silent. It seems difficult to maintain by argument, that where, by the terms of the condition, reference is made to prior leases impliedly, as where "ancient" or "accustomed rents, or rents "as beneficial as the ancient rents," are spoken of, such evidence is not admissible to ascertain either the propriety of the new rents as compared with the old rents in amount, or the propriety of the mode in which they are reserved or secured as compared with the ancient mode of reserving or securing them. But it is said, there is no implied reference in the very words directing the reservation of the power of re-entry. If however the words "a power of re-"entry for non-payment of rent" embrace every power of re-entry, properly so called, then some assistance is necessary to ascertain what particular power of re-entry should be introduced, and none better can be had than that which the leases prior and subsequent to the settlement furnish, as directing

the will of her whose will alone is to be consulted on the occasion: and though it is clear that her will of to-day cannot be contradicted by her will of yesterday or to-morrow, yet it is equally clear that those who contend that such will must be the sole guide, must be content to find it elsewhere if they cannot find it in the power itself. For however general the power in its terms, it seems not more repugnant to reason to contend that the execution thereof is thereby left absolutely to the tenant for life, since that would destroy the condition altogether, than to contend that the very generality of the words confines its execution to one, and one only form of proviso for re-entry, and that of the narrowest and most limited form. But upon sound reasoning it must be conceded, that in such case the limit to the exercise of discretion by the tenant for life must be sought for, either in the arbitrary rules of law, or in such facts as are fit to regulate the decision of the law; and as in the same power, for a different object, *viz.* the reservation of the rent, the settler has himself impliedly referred to former leases, why may he not be considered also, in this particular, as referring to former leases, and therefore framing the power in general terms? Either that must be the conclusion, or some more unsatisfactory source of evidence must be introduced, or there must be no limit to the discretion of the tenant for life, or the power must be narrowed to something less than its terms by some supposed will of the settler, not evidenced either by his words or his acts. The evidence therefore admitted at the trial was properly admitted;

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and the result drawn by the jury a matter of much weight in the consideration of this case.

6th. If the terms of the power be such as to leave the terms of the proviso unfettered by positive direction, there seems little reason to quarrel with the extent of the indulgence, in point of time, granted to the lessee; and such has been the concession throughout the argument of this case. Much more fault has been found with the latter qualification of the proviso, by those who have argued for the defendant in error, *viz.* with that part which restrains the right of re-entry to the case where no sufficient distress or distresses may be had or taken upon the premises. The reasonableness of this qualification, as applied to the particular rents reserved in these leases, and the nature of the property leased, has been already pointed out: in addition however it is to be observed, that the statute law has not only spoken the same language, but it may be doubted whether it has not restricted all lessors from exercising any right of re-entry not guarded by this reasonable qualification. The 4th Geo. II. ch. 28. s. 2, provides, that, as often as it shall happen, "that one "half year's rent shall be in arrear," the lessor "*shall and may*" without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the premises; and in case of judgment against the casual ejector, if it shall be made appear to the court that half a year's rent was due before the declaration was served, "and that no sufficient "distress was to be found on the demised premises," and that the lessor had power to re-enter, then he

shall be entitled to judgment and possession. It then proceeds to bar all relief against such judgments, except on payment of such rent and arrears, together with full costs, within six months. The interests of the lessor and the lessee are by this statute equally provided for: the former is relieved from the formalities of the old common-law entry; the latter is protected against the forfeiture of his interest, in case there be sufficient to satisfy the rent by way of distress upon the premises. The Legislature has thus recognized the reasonableness of a provision preventing forfeiture, where there is a sufficient distress, and so far affords a strong argument in favour of the clause for re-entry contained in the lease now under consideration. But has it not gone farther? Do not the words speak imperatively that no re-entry shall be enforced where there is such sufficiency of distress? The language of the 8th and 9th W. III., respecting the breaches to be assigned upon bonds, is not so strong; for there the Legislature only says the plaintiff "may" assign as many breaches as he shall think fit upon the bond, giving the defendant the opportunity of paying the money into court after judgment and before execution. But the courts of law have construed this statute as imperative upon the plaintiff to do what he is there told he "*may*" do; whereas in the 4 Geo. II, the language is "*shall and may*:" and as in both statutes the object is the same, *viz.* to relieve the subject from the necessity of seeking the aid of a court of equity against the technical difficulties of the common law, why should not this equitable provision in

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each statute be construed to be a compulsory provision, and especially in the statute of Geo. II. where it is introduced with the words "shall and may?" If it be a compulsory provision, applicable to all cases of re-entry, and not confined to cases of re-entry under that statute, then the clause in question conforms itself to the law, and no more: if it be applicable only to cases under the statute, then, by analogy thereto, this leasing power is reasonably executed, being qualified in its execution by what the law of the land has deemed reasonable, and being from the terms in which it is penned open to such qualification.

For the Defendants in Error:

1st. The leasing power in the marriage settlement of 1757 (a power granted by a person having the absolute dominion of the fee to a purchaser of a life-estate), expressly requires that the leases shall contain "a power of re-entry for non-payment of the rent "thereby to be reserved," which makes it necessary, that the right to re-enter should attach immediately on the rent being unpaid; whereas the lease under which the Defendant in the ejectment claims, postpones the right of re-entry for fifteen days after the day of payment, thus depriving the reversioner of a part of that benefit which by the condition annexed to the leasing power was intended to be secured to him. If such postponement be allowed for 15 days, why may it not be allowed for 30, 40, 100, or any other number of days so great as to make the power of re-entry nearly or quite unavailing? Where is the line to be

drawn? If it be allowable to deprive the reversioner of any part of that right of re-entry which the creator of the leasing power says he shall have, of what part may he be deprived? Only two lines can be drawn, either the tenant for life is obliged to reserve the whole right of re-entry, or no part of it. And as the latter rule cannot be supported, it follows, that the right of re-entry in the lease should be fully commensurate with that required by the leasing power, and that this lease is void as an execution of that power.

2d. The lease in question is liable to the further objection, that the leasing power requires that the lease shall contain "a *power* of re-entry *for non-payment of the rent thereby to be reserved*," whereas the lease contains no such power, but only gives the lord a right to re-enter for the absence of distress for rent unpaid. The meaning of the words of the leasing power is perfectly plain and unequivocal; "a power of re-entry," means something enabling a man to re-enter, and "a power of re-entry for the non-payment of the rent" signifies something enabling a man to re-enter on the occasion, or for the cause of non-payment of rent; now the lease in question certainly does not enable the reversioner to re-enter on such occasion, or for such cause; inasmuch as the whole rent for any number of years may be unpaid, and yet he may not be enabled to re-enter. In the case of *Coxe* v. *Day* *, this point was expressly decided.

3d. It is said, in support of the lease, that the

* 13 East, 118.

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creator of the power has used very general language, that *a* power is required, without saying what power; and that the power of re-entry in this lease is sufficient, because it is a reasonable power, and was usual on the estate. It is true, the language of the leasing power is general, so general, that only one quality is specified, which the power of re-entry is required to have, *that it should be for non-payment of rent*; but the creator of the power having exacted this one condition only, is certainly no reason why a compliance with that condition should be dispensed with. The leasing power requires that the power of re-entry should be *for non-payment of rent*, and it does not require that it should be usual or reasonable; why then should the leasing power be so construed as to dispense with the former condition, which by its terms is annexed to its execution, and to exact a compliance with the latter which is not so annexed. Besides, it is not found that this conditional clause of re-entry is reasonable, or that it is usual generally; it is only found to be usual on the estate, which is not only not the same thing as usual generally or reasonable, but may be the direct contrary. The generality of the word *a*, (relied on in support of the lease) must certainly exclude a reference to any particular class of clauses of re-entry, such as those on this estate, as nothing can be more opposite to a general word than a word of reference. If this leasing power be construed to require the power of re-entry usual in cases of the lands comprehended in the settlement, although in this particular case this construction will operate to the advantage of the lessee, yet

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it may in other cases be productive of the greatest inconvenience to him. Suppose a lease under a power, in the terms of this leasing power, to be on the face of it conformable to the power, yet if this construction prevail, the reversioner will have a right to avoid the lease, if he can show that the clause of re-entry is different from that which is usual on the estate comprehended in the leasing power. The inconvenience to both parties will be extreme, if a lessee cannot be sure that he has a valid lease, by comparing his lease with the power, without inspecting all the leases formerly granted of lands within the same estate. It is submitted, that what the creator of a power has required, must be done for this one reason, of itself sufficient, that it is required, and that it is a much safer rule to adhere to that condition which is expressly annexed to the execution of a power by one who has all the circumstances of the property before him, and who has the right to enlarge or narrow the power to any degree, than to substitute for what he has exacted something which it may be conjectured he ought to have exacted, but has not.

4th. The power of re-entry in the lease is not only different from that required by the leasing power, but much less beneficial to the reversioner. Under an absolute power of re-entry, the reversioner would be entitled to succeed in an ejectment, on proving the rent in arrear, a demand made, and the execution of the counterpart of the lease by the Defendant. Under a power to re-enter on failure of distress, it would be necessary for him to prove that he had searched every part of the premises demised,

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and that no distress was to be found *, a matter of extreme difficulty where the rent is small and the premises extensive. A conditional clause of re-entry, which may be an adequate remedy in the case of high rents and lands of small extent, becomes quite insufficient when the rent is small, as is usually the case with ancient rents, and the lands demised of considerable extent. And as the absolute power of re-entry becomes the more necessary for the lord, in case of small rents for large property, so it becomes the less inconvenient for the tenant, who might have some difficulty, and expect some indulgence to raise a large sum, but can have none in being ready with a small one. It is indeed universally true, that in order to secure a small demand, the remedy should be more summary and less expensive than is requisite to enforce a large one.

5th. The finding of the Jury, that the usual and accustomed form of leases of the estate contained in the marriage settlement was with a conditional proviso of re-entry, ought not to be taken into consideration in deciding this case. The words of the leasing power are "a power of re-entry for "non-payment of the rent thereby to be reserved;" they contain no reference to the former practice of leasing the estate, nor is there any fact stated on the special verdict which raises any ambiguity in them; and a provision contained in a written instrument may not be explained or construed by any extrinsic matter, except in two cases; first, when the provision refers to extrinsic matter; secondly, when its terms contain a latent ambiguity, that is,

* *Rees* v. *King*, Forrest. Exch. 19.

when, in consequence of some matter of fact shown by evidence, it appears that the language of the instrument has more meanings than one, neither of which is the case with the clause in question.

6th. Even supposing the former practice on the estate might legally be taken into consideration, it is far from affording any inference favourable to the lease in question. It is not found that the former leases were granted under similar powers. There is nothing to show that the creator of the power was not dissatisfied with the former clauses of re-entry, and did not insert the provision in question for the very purpose of introducing a new one, which might well be, for the reasons stated above. And this is the more probable, because the leasing power, in several instances, expressly refers to the former practice on the estate, where it was intended that the tenant for life should be guided by it; there is no such reference in the clause relating to powers of re-entry; the inference is, that the practice was not intended to prevail with respect to powers of re-entry.

For the Plaintiffs in Error, the *Attorney General* and *Mr. Puller*.

For the Defendants in Error, *Mr. Jervis* and *Mr. Maule**.

In the course of the argument the *Lord Chancellor* observed, that if the settlement had said there should be "a reasonable power of re-entry," some-

* The arguments and authorities cited are all noticed in the opinions delivered by the Judges and the Lords in moving judgment. The argument in detail is therefore omitted.

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body must have judged, in the first instance, what was reasonable in that respect; and he added, that in his experience he had never seen a settlement which directed any thing as to the number of days allowed for rent to be left in arrear; and that as to leases granted under powers in such settlements he had never seen any which did not contain some allowance of days.

After the argument, the *Lord Chancellor* proposed the following question for the opinion of the Judges:

Whether, having due regard to the true intent and meaning of the indenture of the 2d July 1757, according to the legal construction of the several parts of that indenture as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th September 1803, as the same is stated in the special verdict, is for any and what reasons invalid?

There being a difference of opinion, the twelve Judges, in answering this question, delivered their opinions *seriatim*.

16th & 18th May.

Richardson, J.—After having shortly stated the case, the proceedings, and the question put to the Judges, proceeded thus:

I am of opinion that the lease of 1803 is invalid, because I think it is not made in conformity with the leasing power contained in the indenture of 1757.

The leasing power for that class of leases, of which the lease in question is one, requires that "there be contained in every such lease a power of

" re-entry for non-payment of the rent thereby to be reserved:" and the question resolves itself into this,—what is the true construction of these words?

In order to decide this, I must first consider, whether the words themselves import and convey any distinct meaning: and I think they do; I think they mean, that the lessor should have power to re-enter if the rent reserved should not be paid according to the reservation.

One test, and, I think, a fair one, whether such meaning is conveyed by the words of this power, would be to insert in a lease a proviso for re-entry, expressed as nearly as possible in the very words of the power itself, and then to consider what construction a proviso so expressed would require, and whether the meaning would be sufficiently distinct to be capable of being enforced by a court of justice.

Suppose, then, in the lease of 1803, it had been provided, that it should be lawful for the lessor or person entitled to the rent, " to re-enter for non-payment of the rent hereby reserved." In that case would the person entitled to the rent have been empowered to re-enter if the rent had not been paid on the days of reservation? It seems to me, that he would have been so empowered; and *that* without any delay or condition other than the previous demand required by the common law: for all that he would be bound to prove, in order to justify and enforce his re-entry, would be, that there was *a non-payment* on demand of the rent reserved by the lease.

If this be so, it seems to me to prove that the necessity of waiting fifteen days, and the necessity

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of proving a deficiency of distress on the premises imposed by the proviso actually contained in the lease of 1803, are conditions not warranted by the leasing power.

It has been said, that the leasing power requires only "*a* power of re-entry," much stress having been laid on the indefinite effect of the article "*a*;" and it has been further said, that, though such power of re-entry is to be "for non-payment of the "rent," yet, that the words "*for* non-payment" are not equivalent to "*on* non-payment," but only point at the purpose or object of the power of re-entry, namely, that of securing the payment of the rent.

It appears to my mind, however, that, although the article "*a*" be indefinite, yet it cannot, in just construction, extend an indefinite meaning to the subsequent words, if they sufficiently import (as I think I have shown they do) a distinct and definite meaning. In this sentence, the word "*a*" seems to me neither to add to nor to qualify the meaning; but, that the meaning would have been the same, if that word had been wholly omitted, and the sentence had stood thus, "so as there be contained "in every such lease power of re-entry for non-payment of the rent thereby to be reserved." And, as to the observations made on the meaning of the words "for non-payment of the rent;" although it is true, that the word "*for*" does often import the purpose or object, (and so it might here, if the words had been "a power of re-entry *for payment* of the rent:") yet the same word "for," as often imports the cause or occasion of that which is predicated;

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and such I think is its import here, where the words are "a power of re-entry for *non-payment* of the "rent," meaning on occasion of the *non*-payment.

If the words of this leasing power import, as I conceive they do, by themselves, a distinct and definite meaning, I think it follows, that the fact stated in the special verdict respecting the usual and accustomed form of leases of the estate mentioned in the marriage settlement can have no legal effect on the construction to be put on these words. Such evidence, I conceive, is never admissible in the construction of a written instrument, unless the words of the instrument itself import a reference to something extrinsic, or unless the words involve some latent ambiguity, that is, an ambiguity not appearing on perusal of the instrument itself, but which becomes apparent on applying its provisions to the subject matter. The words of this leasing power, in that part which respects the clause of re-entry, seem to me to involve no latent ambiguity, nor to import any reference to any thing extrinsic; although some former parts of the same leasing power do import such reference, namely when it is required, that the lands to be leased for lives should be such lands as were in lease for lives at the time of making the settlement, and that the rents to be reserved should be the ancient rents, or rents as great and beneficial.

I admit that a court is bound to look at every part of a written instrument, in order to ascertain the meaning of the parties in a particular part. But I think it by no means follows, because this settle-

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ment, in respect of the rack-rent leases, expresses that the tenant is to be allowed twenty-eight days for payment, that therefore it was intended, in respect of the leases for lives, to give a similar or any allowance of time, which is not only not expressed, but which appears to me to be at variance with what is expressed.

Supposing, however, it were possible on this ground to get rid of the objection made against the lease of 1803, in respect of the allowance of fifteen days; another and still more decisive objection remains, namely, that this lease fetters and confines the power of re-entry to such cases only where there is a want of sufficient distress; a condition which appears to me, to be equally inconsistent with the power applicable to leases for rack-rent, and to that which is applicable to leases for lives.

The case of *Coxe* v. *Day* *, which I think was rightly decided, appears to me to be in point, and I cannot draw any distinction which is satisfactory to my own mind from the circumstance that the leasing power *there* allowed a period of twenty-one days for payment; whereas the leasing power *now* under consideration as to the leases for lives, expresses no such allowance. It is true, that in *Coxe* v. *Day*, the case of *Hotley* v. *Scot* †, does not appear to have been cited; and it seems that in the last-mentioned case a similar objection taken to a lease granted under a power was over-ruled by the Court

* 13 East, 118.

† *Lofft*, 316. S. C. Mr. *Butler*'s MS., see note (*a*), p. 331.

of King's Bench: on what ground* the Court proceeded we are not apprized, and being obliged now to make an election between the two authorities I must express my concurrence with that of *Coxe* v. *Day*.

It has been suggested, that the statute of 4 *G.* 2. *c.* 28, though professedly made for the benefit of landlords, does in effect take away their right of re-entry at common law, and confine them in all cases to the statutable remedy thereby given, which remedy can never be exercised without proof that no sufficient distress was to be found on the demised premises countervailing the arrears then due. And I think it must be admitted, that such a construction of the statute, if it be the true construction, furnishes a sufficient answer to the second objection made to the lease of 1803; for in that case the lease has only expressed that which, whether expressed in the lease or not, the statute law has provided.

But I cannot think that this is the true construction of the statute. The object of the statute, as appears to me, both from the recital and the enactments, was to relieve landlords from certain inconveniences to which they were subject by the law as it then stood, and to give them certain remedies to which they were not before entitled; but not to deprive them of any remedies or rights to which they were already entitled by law. It contains no negative or prohibitory words, which I think would obviously have been inserted if the intention had been to deny to the landlord the future exercise of any ancient right; and it would, as it strikes me, be

* See the arguments and judgment, *post*. p. 332, *et seq*.

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a strange construction to hold, that the words apparently intended for the landlord's benefit do, from their generality, operate to extinguish any of his ancient rights; when if such had been the intention it would have been so easy and so obvious to express it. That such however was not the intention I think manifestly appears from this, that whenever the new mode of proceeding in ejectment given by the statute is pursued, the statute declares that "then and in every such case the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made." It refers to the legal demand and re-entry as a still subsisting mode of proceeding, not repealed or affected by the statute; and thereby shows that the old mode of proceeding was intended to be left as it was, although the new one, if adopted, is declared to be equivalent for the purpose of obtaining a valid judgment and execution. This, I believe, has always been considered as the intent and effect of the statute; and although I am not able to point out any case where it has been expressly decided that the statute does not take away the landlord's remedy at common law, several cases have occurred where landlords have so proceeded without objection on that ground, and it has been taken for granted that they were well entitled to do so. *Doe dem. Forster* v. *Wandlass* * and *Roe dem. West* v. *Davis* †, are cases to this effect, and so is 1 *Wm. Saund.* 286. No. 16.

* 7 T. R. 117. † 7 *East*, 363.

It has been said, that if the lease of 1803 be invalidated the decision will shake many titles. I have no means of knowing whether this observation is well founded, or to what extent. If such should be the consequence I shall regret it; but I cannot feel that such an apprehension can afford a legitimate ground for deciding the present case, otherwise than as the words and legal effect of the instruments now under consideration seem to me to require. Upon the whole, therefore, I am bound, for the reasons before given, to answer the question in the affirmative.

Best, J.—The words of the power are, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be "reserved." The terms in which it is expressed are general and indefinite. Instruments in such terms are not to be abstractedly and absolutely considered, but with reference to the nature of the subject to which they relate. They are in law taken to contain such qualifications as are manifestly just and reasonable, and such as according to practice, have before been introduced in similar cases, and which, not being expressly excluded, must be understood to be within the intent of the parties. This rule of construction is universal; it cannot be departed from without destroying the excellence of the law, which consists in its bearing a just relation to the state of things on which it is to operate. Thus, under contracts to sell goods, in which nothing is said as to the time of delivery, the vendor is not bound to deliver them the instant that the contract is made. Under a contract to perform

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a particular service the contractor is not bound to begin his work immediately. In both these cases the law allows a reasonable time for the performance of the contract. Under a contract for service for a year the law will not compel the servant to serve every hour of the year; but excepts such a portion of time as is necessary for refreshment and relaxation. So, if there be an established usage, regulating the manner in which a thing contracted to be done, is to be done, as the time and circumstances of delivering articles sold, or the payment of the price, or the time for paying a bill of exchange. Such usage is by law incorporated into the contract without any words of reference to it.

Our books do not furnish many cases on this subject. There are enough, however, to satisfy us that according to the practice that has long prevailed among conveyancers, the proviso for re-entry in this lease is a sufficient execution of the power. The existence of this practice, and its being considered reasonable, account for there being no more decisions of courts on the subject. From the few cases that are to be found, the balance of authority seems to me to incline much in favour of the validity of this lease. But the authority of the cases in favour of the lease is much strengthened by the practice of that branch of the Profession of the law who have been accustomed to prepare powers, and leases under powers.

The first case is that of *Jones* dem. *Bromefield* v. *Verney* (*a*). Sir *John Cowper* had been enabled

(*a*) *Willes*, 169.

by act of parliament to grant building leases for any term not exceeding sixty-one years, "so as in every "such lease there be contained a condition of re-"entry for non-payment of rent." The clauses of re-entry in the leases granted by Sir *John* were for non-payment of the rent *in forty-two days after the days of payment.* An ejectment was brought in the Common Pleas to turn a tenant out of possession who held under one of these leases; but no objection was made (although it was stated in the judgment that the case was fully argued) on the ground of the qualification introduced into the lease, by the words "forty-two days after the day of pay-"ment." This is but negative authority; but considering the great learning and industry employed in the discussion of this case, an objection must have been raised if the law had not been considered to be settled; and if it had not been thought that the lease was sanctioned by a practice which no argument could overturn.

The next case is *Hotley* v. *Scot* *: The words

MICHAELMAS TERM, 14th GEORGE III. B. R.

* This case is reported in *Lofft* 316, under the name of *Hotley* v. *Scott.*]

In a manuscript note taken by Mr. Butler (of which a copy is subjoined) it is given under the name of

LORD TANKERVILLE *v.* WINGFIELD *and* PRITCHARD;

Upon ejectment; the case was as follows. Upon the marriage of Sir John Astley, his lady's estate was settled upon Sir John for life, with several remainders over, which never took effect; remainder to the lady's right heirs. A power of leasing was given to Sir John, such leases to be made for any number of

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of the power were, that if the rent should be behind or unpaid for twenty-one days the lessor should have years, at the accustomed rent, to take effect immediately in possession, and not by way of future or reversionary interest; and on every such lease there was to be inserted a clause of re-entry if the rent should be behind for twenty-one days; the rent to be made payable, and the re-entry to be incident to and go along with the reversion or remainder. In the same settlement there was also a power of revoking all the uses thereby declared, and appointing new.

Some time after the marriage, Sir John Astley and his lady revoked all the uses of the settlement that were subsequent to Sir John's life-estate, and the powers incident thereto, and declared new uses. There was also a fine levied to the same effect.

September 21, 1766, Sir John made two several leases of this date to the two defendants, Wingfield and Pritchard, for twenty-one years, conformable to the power he had by the said settlement, and the other deeds and the fine, except that previous to the entry distress was to be made, and it was nearly in the following words: "That if the rent should be behind or unpaid by the space of twenty-one days, and no sufficient distress or distresses could be had, or if the lessee should assign over the leased premises, (except as therein is excepted) then it should be lawful to Sir John Astley, his heirs and assigns, to enter."

Sir John Astley and his lady being both deceased, the estates are descended upon Lord Tankerville, the Plaintiff, &c.

Dunning, for the Plaintiff:—The Court always takes a difference between powers when exercised by a man upon his own estate, and the exercise of powers by a man upon another's estate, or which he holds in another's right. The first are always construed favourably to the persons making use of this power; the second are taken in a strict light: here it was certainly the second. It was a power to be exercised on the wife's estates, and, in some respect, in prejudice of his wife; and therefore to be taken strictly.

1st objection, that the settlement declares that the power of re-entry should be reserved and made incident to the inheritance of the estate; and by the lease it is reserved to Sir John Astley, his heirs and assigns. 2d objection, the settlement directs the re-entry so to be reserved as above, to be made immediately, if the rent should be behind by twenty-one days. By the lease it is to be preceded by demand and distress.

These are strong, plain, and conclusive objections.

Bearcroft, for the defendants.—The remainder-man, Lord

power to re-enter. The condition in the lease was, if the rent should be behind and unpaid for twenty-Tankerville, has, substantially, all the powers he ought to have, or can have. As to the first objection, the rent cannot be made payable but to those in remainder or reversion, to which it is inseparably incident. The heirs and assigns of Sir John Astley, mean those who are heirs and assigns to the estate under the settlement by which Sir John claims the estate. See *Cother* v: *Merrick* *. Tenant in tail died seised, his son entered, and made a lease for twenty-one years, rendering rent during the term to the lessor, his heirs and assigns, and died.

It was unanimously adjudged to be a good lease, and within the 32 H. 8.; the opinion of the Court being, that the word heirs being a comprehensive word, it ought to be construed *secundum subjectam materiem*, and to have that construction which the nature of the deed requires. This is much the stronger in the present case, as Sir John Astley having joined with his wife in the deeds which raised the limitations, those who take by virtue of those limitations may, in some respect, be said to be the heirs and assigns of Sir John Astley. As to the second objection, that the re-entry, which is directed by the power in the settlement to be reserved immediately on the rent being behind twenty-one days after it is due, is by the lease to be preceded by distress and by demand. The words in the settlement are short and loose, and seem to be no more than a general direction that in every lease to be made under this power there should be a clause of re-entry. It is not a formal description what kind of re-entry should be reserved, or of any particular clause of re-entry; it is a direction that the power of re-entry, usually inserted in leases, should be inserted in the leases to be made under this power in the usual manner. This, I apprehend, is a sufficient answer to the objections raised against these leases; each is a verbal objection, and I have given each a verbal answer.

Mr. *Dunning*, in reply:—The distinction I set out with, and the consequence of that distinction, that these leases are to be considered in a strict light, is not denied. And besides this claim to the favour of the Court, Lord Tankerville has that of being the heir at law of the owner of the estate on which this power has been exercised. Lord Tankerville is neither the heir nor the assignee of Sir John Astley; he claims by a title paramount to Sir John's. The rent is directed by the settlement to be incident to the inheritance, that is to say, to be to the several

* *Hard.* 89.

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one days, *and no sufficient distress could be had*, then it should be lawful for the lessor to re-enter. limitees of the settlement when respectively in possession. The reservation is to the heirs and assigns of Sir John Astley. They are not limitees. This is therefore not a proper execution of the power. The case quoted, and the act of parliament * only show that if a tenant in tail make a lease according to the statute, and reserves rent to himself and his heirs, the words "heirs and assigns" may be construed to be such heirs as may succeed by force of the entail. This construction can never in the present case take in Lord Tankerville, who cannot, in any sense or meaning whatever, be deemed the heir of Sir John Astley or his assign. It is sufficient to say, that in pleading he could never be described as such. As to the words being loose, and directing what should be done, and not describing *how* it is to be done, this seems a frivolous distinction. The settlement directs a clause of re-entry to be inserted in the lease; the lease says it shall not be lawful for Sir John Astley to enter as long as there is a sufficient distress or distresses to be taken. Till then it is postponed. This is contrary to the words of the settlement, and is not, certainly, a proper execution of the power.

Lord Mansfield.—The two objections to these leases are, 1st, That by the settlement the re-entry is to be made incident to the rent; but by the lease it is reserved to Sir John Astley, his heirs and assigns. And in the event it has not followed the rent, but gone to the heirs of the lessor, Sir John Astley, while Lord Tankerville is in the lawful possession and receipt of the rents. The second objection is that the clause of re-entry, which by the settlement ought to be immediate, is by the lease fettered, being on a previous demand † and previous distress. As to the first, by the nature of the power it must go with the reversion and inheritance. The person who is in the reversion and inheritance is he that is to enter on the forfeiture of the lease, and no one can enter but he to whom the rent is payable; for as Littleton says, no stranger can enter for forfeiture, for a stranger cannot be in by his former estate. If the rent had been reserved for the term, as in the case cited from Hardres, still it goes with the inheritance. Heirs and assigns can only mean those who have the reversion and inheritance; otherwise, as is said, 2 *Saund.* ‡, they would be words of surplusage. The clause of re-entry must go with the inheritance the same as the rent, for it cannot be reserved to any body but to him who is seised of the inheritance. It was said, that it ought to have been worded, to the person next

* 32 *Hen.* 8.
† This does not appear by the clause as set forth, *ante* p. 332.
‡ 370.

Lord *Mansfield* in giving judgment, said, "The "clause of re-entry is short with words of course, and "does not preclude the operation of law—a re-entry "is to enforce the payment of rent—by statute it "cannot be without distress." The report of this decision is very short. It is probable that it does not give us the very words of Lord Mansfield, but we learn with certainty from it that the Court decided the very point now before your Lordships in favour of the lease: for the power does not contain a syllable about a sufficient distress; this qualification is introduced into the proviso for re-entry, and yet the Court upheld the lease. It is clear, also, that Lord Mansfield must have referred to some form of drawing up these powers and clauses of re-entry which were then in use, and have expressed himself, that the power and clause in that case were agreeable to usual form. He is made to say, "The "clause of re-entry is short with words of course." It is most probable that he said the *power* was short with words of course; the obvious meaning of which is, that the power was expressed in the terms commonly used in such cases, and imported that sort of clause of re-entry which it was then the practice to introduce into leases made under powers; that the only object of the power being to secure the payment

in the reversion or remainder. The words heirs and assigns are general words, and are as good as and quite tantamount to particular words. As to the second, the clause of re-entry is short with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress. Therefore in both points we agree to support the leases. So the verdict must be entered for the Defendants.

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of the rent reserved, such qualifications as the law considered reasonable and consistent with this object were not excluded:—as the Legislature had thought the landlord ought not to have any greater facility for recovering possession of the estate than he had at the common law, when there was a sufficient distress on the demised premises, the introduction of such a condition into the clause of re-entry was but a reasonable qualification. This decision is an authority to show that reasonable qualifications may be introduced into clauses of re-entry when the terms of the power are general; and also, that the qualification most objected to in this lease is reasonable.

That a power expressed in general terms is well executed by a lease containing a proviso with legal qualifications, is further proved by *Dormer*'s case *. "By special consent of the parties a re-entry may be for default of payment of rent without demand of it. And divers other cases were put where the consent of the parties shall alter the form and course of the law." Although a clause of re-entry was absolute for nonpayment of rent, yet the common law superadded the qualification to that clause, that the rent be demanded on the estate demised on the last hour of the day when it was payable; and according to *Dormer*'s case, the demand of the rent can only be dispensed with by special consent, or, (as it is expressed in *Newdigate*'s case †,) "that it shall be lawful without *further demand* to re-enter."

If at common law a landlord could not recover possession against a tenant holding under a lease,

* 5 *Co.* 40. *b.* † *Dycr*, 68.

containing a general clause of re-entry for non-payment of the rent without a demand of the rent, surely, when the Legislature has relieved the landlord from making a demand of the rent, and substituted in the place of that demand the condition, that there be not a sufficient distress on the premises, the law will not allow the tenant to lose his estate if there be a sufficient distress on it to satisfy the rent due. It will require the same express consent to exclude the condition of there being no sufficient distress since the statute of *George* the 2d., as was required to exclude the necessity of a demand of the rent at common law.

I do not mean to say that since the statute of *George* the 2d. a man may not proceed at common law. My argument is, that the law annexed the condition of demand of rent before the statute, and as the statute has now dispensed with a demand of the rent when there is not a sufficient distress, the law will annex the condition of there not being a sufficient distress to a power expressed in general terms; and therefore a clause of re-entry containing this condition is not inconsistent with such a power; otherwise the tenant would not have the protection which according to the spirit of the law he ought to have; for by an omission to pay the nominal rent on the day it became due, he might, without notice, and with abundance of property on the land to satisfy the rent, be dispossessed of an estate for which he had paid a large rent in advance under the name of a fine. This would be making that remedy which was intended only as a security for the rent a forfeit-trap.

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The decision in the court of King's Bench in *Coxe* v. *Day* is supposed to establish a contrary doctrine. Lord *Ellenborough*, during the argument of that case, seems to have intimated an opinion inconsistent with that which I have offered to your Lordships. But it is not dealing fairly with that great Judge to hold him to what he threw out whilst he was forming his opinion, particularly when it is contrary to what he afterwards decided, when the case now before your Lordships was in the King's Bench. The wisest of men could not escape the charge of inconsistency, if expressions, which are dropped while the mind is struggling with the different considerations presented by conflicting arguments, are to be recorded. I know not on what ground the Court agreed to the certificate which was sent to the Court of Chancery: but I cannot admit that this certificate is an express authority on the point now under consideration, when the case presents a ground, on which, with the opinion that I entertain on this case, I should have signed that certificate. The power in *Coxe* v. *Day* was in these words, "so as in every such lease there be contained a condition of re-entry for the nonpayment of the rent reserved by the space of twenty-one days." The words of the proviso were, "if the rent should be in arrear for twenty days—"*being lawfully demanded.*" The words "being "lawfully demanded" weakened the landlord's security for his rent by imposing on him the necessity of demanding it on the last hour of the day on which it became due, a thing always found to be attended with difficulty, and often impracticable, and from

which landlords are relieved by the statute of *George* the Second. Such a proviso could not be sufficient under such a power.

If authority be doubtful we must recur to principle. When property in lands is divided into estates for life and estates in remainder, it becomes our object to secure to the possessor all the advantages which belong to his estate. The mode of doing this is by giving to the tenant for life a power to grant leases for certain terms not determinable with his life. Unless he has this power the estate will not be cultivated as it ought to be; much less will it be improved: and not only tenants for life but the public would suffer from the want of such powers. In the granting these powers care must be taken that in granting their leases tenants for life do not prejudice the estate of the remainderman: possession of the lands must be secured to the tenant, and the rent to the landlord. Considering this as being the object of these powers, Judges in the construction of them will only have to consider —What did the maker of the power consider sufficient to attain this object? Can any one doubt that the maker of this power would have considered the clause of re-entry in this lease abundantly sufficient to secure the rent? But for the respect which I feel for those learned Judges from whom I differ on this subject, I should have said, without doubt or hesitation, "*a* clause of re-entry" means in law what these words would in common conversation, viz. such a clause of re-entry as is generally inserted in leases. That this clause answers that description will not, I think, be disputed.

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That the principle on which I found my opinion is a sound legal principle is evident from the following cases: In *Hotley* v. *Scot*, Lord *Mansfield* says, "a re-entry is to enforce the payment of rent." In *Wadman* v. *Calcraft* *, Sir *William Grant* says, "there is no doubt equity will relieve against the "forfeiture; considering the purpose of the clause "of re-entry to be only to secure the payment of "rent; and that when the rent is paid the end is "obtained." In *Opey* v. *Thomasius and others* †, *Twisden*, J. says, "powers are to be expressed ac-"cording to the intent of the parties." In *Goodtitle* v. *Funucan* ‡, Lord *Mansfield* says, "powers "are now a common modification of property in "land, and as such are to be carried into effect "according to the intention of those who create "them."

I shall not advert to some facts which are found by this special verdict, and on which arguments might be offered in favour of this particular case. My opinion is formed on these general grounds: Where the power is expressed in general terms, as it is in this case, reasonable qualifications are not excluded, but may be introduced into the clause of re-entry; and the qualifications introduced into this clause have been acknowledged by the Legislature and the course of law to be reasonable. "A clause of re-entry" means the usual clause of re-entry, and the clause of re-entry in this lease is such as is usually inserted in such leases.

* 10. Ves. jun. 69.

† Sir T. Raym. 134.

‡ Doug. 573.

I believe that it has been so much the general practice of conveyancers to insert such clauses, that if your Lordships were to declare this lease invalid you would destroy the titles of a very large proportion of the landholders in the kingdom. Much of the property in the *West* is held by leases granted by tenants for life: I know that in other parts of *England* actions are already brought to turn tenants out of possession of those estates on the same objections as are made to this lease. Some of these actions have been brought to trial before me, and now await the judgment in this case.

I have heard the learned Judges say that they would never allow a practice to be set aside on which the titles to many estates depended, however much they might disapprove of such a practice. If you set aside this lease you will turn a large proportion of the tenantry of England out of estates for which they or their ancestors have paid large sums of money, and which have been continued in their families by a successive renewal of leases for as great a length of time as any of your Lordships families have held their estates. The personal property of tenants for life, the fund out of which provision is to be made for the younger branches of families, will be drained to make compensation to the leaseholder for the loss that he has sustained by being deprived of his lease; and where these funds fail the families of the leaseholders will be ruined.

I have only further to say, that I see no reason to hold the lease stated in the special verdict invalid.

Garrow, B.:—The settlement made upon the marriage of Lord Vernon with Lady Louisa Barbara

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his wife, of the 2d July 1757, on which this question arises, gives a power of leasing, requiring, with respect to property of the nature in question, that there shall be contained in the lease a power of re-entry for non-payment of rent. In this leasing power no time is specified, by way of indulgence to the tenant, as to the payment after the day on which it shall fall due, nor are any other terms required than that the person who from time to time shall be in possession of the estate shall insert in the lease a power to resume the possession for nonpayment of the rent.

The lease granted by Lord Vernon to the defendant and another, contains a clause for re-entry if the rent shall be in arrear for the term of fifteen days, and if there shall be no sufficient distress upon the premises to satisfy the rent; and the question is, whether this is a good execution of the power, or in other words, whether this is such a power of re-entry as was required by the creator of the settlement?

It is observable, that the creator of the power, or those who advised her, knew how to make distinctions as to powers of re-entry applicable to different estates; and in the case where the rent reserved is of the most valuable description, there the creator of the power only requires of those who shall come in succession into the possession of the estate, as tenants for life, that they shall, for the preservation of the estate, in the most beneficial form and extent, for those who shall be from time to time interested as reversioners, insert a provision, that if the valuable rent reserved on leases for years absolute shall not be paid for twenty-eight days, then there shall

be a right to enter at the expiration of these twenty-eight days.

In the case of the render of 2*l.* a year, and a couple of fat capons, or 18*d.* at the option of the lessor, it is insisted that the power of re-entry should be altogether absolute and unconditional; and that at the first moment when the day has expired on which the money is demandable, the power of re-entry is to attach, and enable the reversioner at that moment to turn the person out, who upon a valuable lease for years determinable upon lives should have permitted the day to expire before he had paid his sum of 2*l.* I admit that if the maker of the settlement had in express terms said, "the "power shall be to re-enter the moment at which "the rent is due, and not paid or tendered," a court of law could not alter, but must execute such power so expressed. We must see whether the power has been complied with or not.

Now the terms of the condition in the settlement are, that there shall be contained in the leases a power of re-entry on non-payment of the rent. Is there not in the lease granted to the defendant a power of re-entry on non-payment of the rent? There is; but it has been urged with great force that it is not such a compliance with the power as the reversioner had a right to expect the lessor should have made; for he has clogged the clause of re-entry with a delay of fifteen days, and with the necessity of seeing that there is no sufficient distress upon the premises. The answer to this appears to me to be, that according to our experience such an event is so improbable, that it probably did not occur to

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the maker of the power to guard against it; and not having in express terms required any particular form or terms of the clause for re-entry, I think the power is satisfied by that which has been inserted in the lease in question, and consequently that the lease is not invalid.

Burrough, J.:—After the fullest deliberation, I am of opinion that the demise of the 5th September 1803, is invalid; that it was valid only during the life of the lessor, and that his death determined the estate of the lessee.

The statute of the 4 Geo. 2, c. 28, was relied on in the Exchequer Chamber, and in the argument here, as bearing on the subject. In my view of this case it has no application to the subject before the House. That statute, as I conceive, applies only to leases which before the statute might and must have been avoided by entry; to cases where the cause of avoidance might have been waved. Such leases were valid till a strict legal entry was made, and before such entry they were capable of confirmation by suitable acts done by him in whom the right of re-entry was. But a lease by a tenant for life having a special power to demise, if not made conformable to the power, is the lease of a mere tenant for life, and has validity only during his life, and not a moment longer.

I cannot see that any well-grounded argument from a provision made by an act of parliament, in the case of demises of a description wholly different from the demise in question, can be urged in support of that demise. In forming our judgments on the

questions submitted to us we must consider that we are required to give our opinion on the construction of a deed. There are certain rules of the common law which must govern us on such an occasion. One rule is, that the construction must be made on the whole deed. The principle of the common law is, that *Ex antecedentibus et consequentibus est optima interpretatio* (*a*). There is another rule which also strongly applies to the case in question, and that is, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*. Acting on these rules, I contend that there is no ambiguity in the words of the power; and that it is manifest, from the various parts of the deed of the 2d July 1757, that it was the intention of the parties to have these words understood as they are written, and without addition.

The clause of re-entry in the demise ought, I contend, to have corresponded with the *reddendum*, which is to this effect, "yielding and paying the yearly rent of 2*l.* at *Michaelmas* and *Lady-day*, by equal portions;" and not so corresponding I am of opinion the lease is invalid. First, because there can be no re-entry unless the rent is behind and unpaid for fifteen days from *Michaelmas* and *Lady-day*, which is an extension of the time beyond that in the *reddendum*. Secondly, because the re-entry for the non-payment of the rent cannot, by the express terms of the demise, be made if there is sufficient distress to be had on the premises. The general scope of the deed is too well known to require repetition. It has heretofore been considered

(*a*) Shep. Touch. c. 5, rule 4, fo. 87.

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that there are three distinct powers in this deed. I conceive that, correctly speaking, there is only one power, consisting of three distinct parts. I say this, because the enabling words "that it shall and may be lawful, &c." are placed at the head of the whole, and are not afterwards repeated; and the other parts are introduced by the words "and also." It appears to me, from this mode of looking at the deed, that it may be fairly collected that the framers of it must have had their minds directed to the different *parts* of the power; and must have designedly and deliberately introduced an additional restriction on that part of the power which relates to leases for years, and references in other parts to extrinsic matters, and designedly and deliberately omitted any such additional restriction in the part of the power in question, and also all words of reference to extrinsic matter or former leases.

The first part of the power is that which relates immediately to the demise in question; by this Mr. Vernon and his wife (who by the deed took successive estates for life) are enabled to grant leases for life, or years determinable on the death of a life or lives, of such lands as at the time of the deed were leased for life, or years determinable on the dropping of a life or lives; so as the ancient and accustomed yearly rents, dues, and services, or more or as great and beneficial rents, &c. be reserved or made payable, and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved. Now, what is the rent thereby to be reserved but the *reddendum?*—the power of re-entry is to be for the non-payment of

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that rent. If that rent was not paid at Michaelmas-day or Lady-day, I contend that it is plain by the very terms of the deed that the right of re-entry ought to be complete.

It is not to be doubted that former leases were admissible in evidence for two purposes: first, to show what lands were, at the time of the demise, leased for life or years, as described in the deed; secondly, to show what the ancient and accustomed rents were; for former leases are for these purposes necessarily referred to. But, it appears to me to be free from doubt that, as to the power of re-entry prescribed by the deed, there is no reference to former leases or to prior circumstances, but to the *reddendum* only, ascertaining not only the rent itself, but also the mode and time of payment. This power of re-entry prescribed by the deed is framed in plain terms; it contains a clear proposition in itself, and therefore I contend, that the maxim that *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*, is precisely applicable to the point. Thus to decide is to avoid the vicious mode of interpretation which is reprobated by a maxim to be found in Lord Bacon's Tracts (*b*). *Divinatio, non interpretatio est quæ omninò recedit a literâ.* If you stir beyond what the deed expressly prescribes then commences the *divinatio*, and the *interpretatio* is at an end.

Next follows in the deed what, I say, is more properly a second part of the same power than a distinct and separate power. The general enabling words being at the beginning of the whole; this part

(*b*) 67.

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is connected with the former part by the words "and also." "And also, by indenture, to demise any of the lands in the settlement for any term not exceeding twenty-one years in possession, so as there be reserved as much or as great and beneficial yearly and other rents as were then yielded, or the best and most improved yearly rent or rents as can be reasonably had or obtained, and so as in every such lease for an absolute term of years,—(thus distinguishing them from the former leases,)—there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid for the space of twenty-eight days after the time thereby respectively appointed for payment thereof." This part of the power, which is, as it were, uttered in the same breath with the former part, under the same enabling words, and united to them by the words "and also," affords very important observations. First, the rents to be reserved in these leases are to be as much or as great and beneficial as were then yielded; here, then, is a plain reference to the then existing state of rents. To prove this the former leases were good evidence. Or, secondly, the rents are to be the best and most improved that can be reasonably gotten: this admits, too, of reference to extrinsic matters. The third observation is as to the clause of re-entry prescribed by this part of the power, in case the rent be behind or unpaid for twenty-eight days. With great deference to the judgment of those who entertain a different opinion, I cannot refrain from expressing my strong opinion on this part of the deed. In my mind, it affords an argument of irresistible weight, that the parties

to this deed intentionally omitted an extension of the time of payment in the first part of the power under which the demise in question is contended to be valid; and that they intentionally inserted the extension of twenty-eight days in the second part: and I confess I feel myself alarmed at the fate of men's deeds, if it shall be holden that the demise in question is valid which contains an extension of the time of payment to fifteen additional days, not hinted at in the power itself, and inconsistent with the *reddendum*; and which also contains a provision which deprives the reversioner of his re-entry if on any part of the premises there may chance to be sufficient distress. That the clause of distress imposes a difficulty on the reversioner is proved by the case of *Rees on dem. Powell* v. *King* and *Morris*, tried before Mr. Justice *Heath* in the summer of 1800, at *Hereford*, whose opinion was ratified by the opinion of the Judges of the Court of Exchequer in the following term. It was there held, that a clause of forfeiture in a lease, in case no sufficient distress was to be found on the premises, must be pursued strictly, and every part of the premises must be searched.

The third part of the power is introduced in the same manner as the second part: this is the part which empowers the leasing mines then open, or lands wherein persons may be willing to open mines. Annexed to this there are several restrictions running in this language: "So as in every such lease there be reserved or made payable such parts of the lead, copper ore, coal, and other produce to be gotten from the said mines, or such other yearly rent or

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income in respect thereof, as can be reasonably had or gotten for the same, without taking any fine, &c., and so as the lessees execute counterparts; and so as there be inserted such proper and usual covenants for the effectually working the mines, &c., and doing all proper and necessary acts as are usually inserted in leases of the like nature. It is to be observed, that with respect to these leases there are special restrictions peculiarly applicable to them. The parties to the deed had all the parts of this power before them, and have cautiously introduced restrictions applicable to each part: and can a court of law add to these restrictions? The rents of the mines, or the parts of the produce to be reserved, are to be such as can be reasonably gotten; the covenants are to be the usual covenants for effectually working them and doing all necessary acts.

In the second and third parts the word "reason-"ably" is introduced; but it is wholly omitted in the first part. Is a court of law authorized to transplant the word "reasonable" to the first part, when the parties have introduced it in the second and third parts, and omitted it in the first part? This cannot be done if it varies the construction of the words as the parties have penned them. We are required to state our respective opinions, whether, having regard to the due intent and meaning of the indenture of July 1757, according to the legal construction of the several parts of it, and having due regard to the legal effect of the facts and circumstances found by the verdict, the demise is for any and what reasons invalid? I feel that if I depart from the plain meaning of plain words, made (if it were possible) more

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plain by the context, that I shall be at sea without a compass. If the demise in question had contained a power of re-entry framed in words literally corresponding with the words in the settlement, I conceive it would have been good. I have heard no valid objection to such a power of re-entry, notwithstanding the most earnest attention to the subject before and since the arguments in the Exchequer Chamber, and here: I have not been able to raise in my mind a doubt of the fitness of such a clause, or of its being that which the parties intended.

For the reasons I have stated, I am of opinion, first, that the former leases were not admissible in evidence to show that they contain clauses similar to those to be found in the demise in question, respecting the extension of the time of payment, and respecting the distress. Secondly, I am of opinion, for the reasons I have given, that the demise in question is invalid. The House has been told at the bar, that a decision, that this demise is invalid, will have the effect of destroying other leases made under similar powers. I cannot take notice of such a statement, first, because it is an assertion of a fact, of which, as a Judge, in a court of law, I can have no knowledge; secondly, if it were fit that it should weigh with us, ought we not to see the settlements and the leases, in order to know that the *antecedentia et consequentia* are the same as in this case. A variation in the words and context matter might vary the grounds of our judgments. Thirdly, if there were other leases made under circumstances precisely similar it would not vary the opinion

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I have formed. I cannot accommodate my opinion to the convenience of lessees under powers; their estates must stand or fall by the authority under which they are made. It is a maxim of our law, that it is better to suffer a mischief than an inconvenience: the mischief (if it be any) we can see the extent of; it will be, that certain demises, in consequence of the carelessness or ignorance of those who drew them, will be invalid, and they who were intended to take, in the event of there being no good subsisting leases, will take. On the other hand, no one can foresee the end of inconveniences which would arise from the relaxation of the rules of law in the construction of these deeds.

As to the cases of *Hotley* v. *Scot*, and *Coxe* v. *Day*, from the report of the first case I cannot discover what was decided, it is to me unintelligible; but supposing it to be applicable, we have the later case of *Coxe* v. *Day*. The decision of the four learned men on the second question has great weight with me, and I cannot see why it ought not to guide our judgment on the present occasion. It is well known that the late learned Lord Chief Justice of the Common Pleas, Sir Vicary Gibbs, thought that decision right, and was of opinion that the present lease was invalid: he was in office when the present case found its way into the Exchequer Chamber.

Holroyd J.:—I think that, having due regard to the true intent and meaning of the indenture of the 2d day of July, 1757, according to the legal construction of the several parts of that indenture, as

stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th of September, 1803, as the same is stated in the special verdict, is invalid.

By the death of Lord Vernon, the lessor, who had an estate in him for life only, that demise became invalid, unless it were made in conformity to one of the powers of leasing contained in the above-mentioned indenture of the 2d of July, 1757. That indenture contains three powers of leasing; one, for a life or lives, or for a term determinable on a life or lives; another, for years not exceeding twenty-one; and the third, for working mines or ore for years not exceeding thirty-one. Each of these powers is clogged with qualifications of two descriptions; one class of which is comparative, or with reference either to the existing or previous state of things, or to usage or custom, or to what can reasonably be had or obtained; the other class is direct and absolute, without any reference or regard either to the existing or previous state of things, or to usage or custom, or to what can be reasonably had or obtained, or to any matter whatever; these last qualifications are superadded by the creatrix of the power, to be complied with at all events, as I think, without reference or regard to any matter, and not to be varied, changed, or altered by, or at all to depend upon, any usage, custom, or state of things, or any matter whatever.

The first of the above powers of leasing is that upon which the present question depends, the power of leasing for a life or lives, or for years determinable

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upon a life or lives. The qualifications with which that power is clogged, are, as to the reservation of the rents, duties, and services, that they be such as were the ancient and accustomed, or more or as great or beneficial as at the time of the demising were payable, or as much as a just proportion thereof amounts to, according to the value of the premises demised, or more, with the exception of heriots. These qualifications are comparative, or with reference, expressly, to the things there expressed; and must be such as, on such comparison or reference, shall be found conformable thereto, and are wholly dependent thereupon. But the other class of qualifications superadded to this power is direct and absolute, and without reference to and wholly independent, as it seems to me, upon any other matter except what the law requires, and to be complied with at all events, whatever may be or may have been any usage, custom, or state of things whatever.— These other qualifications are, that the rents, duties, and services be incident to and go along with the reversion and remainder; that the leases contain a power of re-entry for non-payment of the rent reserved, and not contain any express clause freeing the lessees from impeachment of waste, and that the lessees seal and deliver a counterpart of the lease. It is upon one of these direct, absolute, and independent qualifications of that power that the present question has arisen. That qualification is in the following words: "So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." This qualification being expressed in words that are direct

and absolute, and without reference to any former leases, or to any prior or then existing state of things, or former management or disposition of the property, the fact found by the jury, with respect to the former leases, cannot, I think, vary the legal construction to be given to this qualification. There is in the words no latent ambiguity which those former leases either raise or remove. If the words be not clear and explicit in themselves, their ambiguity, if any, is upon the face of the deed itself, and they cannot, I think, by law be allowed to crave in aid any former usage to vary or alter their construction; and this more especially in the case of such a deed as the present, wherein the parties expressly direct, that a reference to the then existing or former usages should be had recourse to, where they intend that either of them should be called in aid on the subject matter of these qualifications. Besides, it has been held by the Court of King's Bench, in *Iggulden* v. *May* (*d*), as well as by the Lord Chancellor in the same case (*e*), ratifying a similar doctrine that had before been held by Lord Alvanley and Sir William Grant, when Masters of the Rolls, on covenants for renewal of leases, that the construction of deeds cannot be varied by the acts of the parties; and therefore, various other leases, that had before been successively made by the owners of the inheritances for the time being, could not be taken in aid to construe the meaning of a covenant for renewal. The instability and uncertainty introduced into rights of property created by deed, by

(*d*) 7 East, 237.

(*e*) 9 Ves. jun. 329.

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letting in such extrinsic evidence, and the mischief arising therefrom, would apply equally, as it seems to me, to the present case.

The present question arises in a case where the exercise of the power is by a person (namely, Lord Vernon) who, previous to the creation of the power, was a stranger to the estate; and in a case, where this qualification of the power given to him by his wife must be taken to have been inserted as well for the benefit of herself, as of the several other persons in remainder, in derogation of whose rights his exercise of the power would operate so long as the lease should continue valid after the extinction of his life-estate. It would operate in derogation of her and their rights, by depriving them, successively, of the actual occupation and enjoyment of the demised premises themselves, which they would otherwise be entitled to have, and giving them, successively, in lieu thereof, a rent or rents such as the power required, however inadequate the same might be.

The power given to the tenant for life to lease for a term that may last beyond his own life, is, agreeable to what is said by Lord Ellenborough in *Coxe* v. *Day* (*f*), for the benefit of the tenant for life; the qualifications only, as he there also says, are for the benefit of those in remainder: and, in this case, those in remainder, who are to be protected by these qualifications (except the creatrix of the power herself), are not parties or privies, but are strangers to the deed; and therefore as to them,

(*f*) 13 East, 127.

the words of the deed are to have their full operation for their protection against the tenant for life, who executed the power, and against whose act, which would or might be to their detriment, they were to be protected by this qualification. The very intent of prescribing these requisites is to protect the several remainder-men from the discretion of the tenant for life in the exercise of this power of leasing given to him. The object of the qualification is to secure to them the rent itself, and not to give them any substitute whatever in lieu thereof, other than and except the land itself for which the rent was to be paid. For this purpose this qualification looks to and specifies some occasion or event, and that a simple unqualified one, namely, the nonpayment of rent, not under any particular circumstances only, but generally whenever there is a nonpayment of rent, that is to say, it looks to and specifies the default of the lessees by the nonpayment of the rent as the occasion or event on which those entitled to the rent to be paid for the land shall, for want of the rent, have the land itself, the *quid pro quo* the rent was to be paid. Whenever that event or default arises the case then exists, I think, on which the land was to be had for that default, without any other matter being to be superadded thereupon, except what the general rules of law, independently of particular terms of contract, would require, such as those requiring in a particular manner and form a demand of the rent due.

The words applying to the power of re-entry required to be contained in the lease are "a power "of re-entry *for* nonpayment of the rent thereby

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" to be reserved ;" that is, as I think, such a power as will authorize the party, whenever there is a non-payment of the reserved rent, to re-enter. That is the express cause on account of which he is to be at liberty to re-enter, which liberty must, I think, be co-extensive and co-existent with that cause ; and that cause, which is nonpayment of rent, (such I mean as will authorize a re-entry) exists from the very instant that there is such a default of payment as the law requires to authorize a re-entry ; and that default of payment equally exists from the moment of such a demand as the law requires being made of the rent due and nonpayment thereon, without any subsequent definite period of time having elapsed ; and whether there be or be not distrainable goods on the premises sufficient to pay the arrears of the rent, and by the sale of which the remainder-man may, *at his own trouble and risk*, pay himself those arrears. The words " for nonpayment," must in this case, I think, be taken to mean the same as either, " because of"—" by reason of"—" on ac-" count of," or " in case of nonpayment ;" that is to say, when that event occurs, and the same there-fore as if the words were *on* nonpayment of rent. That appears to me to be the proper sense and meaning of the words ; and it is also, as I think, agreeable to the object of the qualification, which is, that the party shall have the land whenever the lessee fails to pay the rent for it. The lessee's failure or default in the performance of a duty which it is incumbent on him to perform, is the sole ground and consideration for entitling the party to re-enter and have again the land, without regard to

any possibility or power which the rent-owner may have to obtain the rent by any other means or exertions of his own.

But it has been argued that this qualification in requiring a power of re-entry is silent as to the time when it should be carried into effect; and therefore that it may be considered to require only that there should be some reasonable power of re-entry for nonpayment of the rent, and that the power of re-entry reserved upon the lease in question is a reasonable power of re-entry for nonpayment of the rent, and therefore as much as the creatrix of the power has required. To this, besides observing that the word "reasonable" is not here used in the deed, though it is used in two other instances in giving those powers where a discretion was intended to be given, I answer, that this qualification in my opinion is not to be so considered, if upon the due and proper construction of this leasing power, this leasing power, if fully executed, would have authorized a re-entry for nonpayment of rent in any case in which such entry would not be authorized for nonpayment of rent upon the lease in question. And I say that there are cases in which, if the power of leasing had been fully executed, a re-entry might lawfully be made for the nonpayment of rent, in which it could not lawfully be made under this lease.

To try whether this be so or not, suppose the right of re-entry reserved by this lease, instead of its being in its present form, had used the very words of qualification used in the deed creating the power of leasing. Suppose the lease had been, "Provided that it shall be lawful for the lessors, &c.

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"to re-enter" (or, "that they shall have power of "re-entry,") "for non-payment of the rent hereby "reserved." That is an easy and obvious way of framing the proviso, and most likely to be adopted, as I should think, by a person having recourse to and looking at the leasing power, as he ought to do who is anxious to be secure; and that clearly, I think, would have been a due execution of the power, and under such an execution of the power, by using those words in the lease, whenever there was a default of payment, whether fifteen days had elapsed or not since the rent became due, or whether a sufficient distress was on the demised premises or not, the right of re-entry would have arisen in case the landlord had made such a demand of the rent as the law for that purpose requires: so that the same construction would be given to those words where used in the lease, as if the words had been *on* non-payment of rent; whereas according to the right of re-entry actually reserved the landlord has no such right of re-entry (though the rent is due and has been so demanded,) for fifteen days, during which he would have such a right, under such a due execution of the power of leasing as I have above supposed, nor would he have such right of re-entry at any period of time when there was a sufficient distress on the premises on which he might levy for his rent, though upon the goods of innocent third persons; which right of re-entry he would have during all that period in the other case, and without the painful necessity of being driven, in any case, to his remedy by distress upon the goods of innocent strangers. So that he has not that right and

specific remedy in lieu of his rent in those cases, under the lease in question, which he would have had under it on such a due execution of the leasing power as I have above supposed; but a different one, and such as in some of such cases at least some conscientious persons would not resort to or enforce, such as enforcing the power of distress upon the goods of innocent third persons. The construction of the words in question, therefore, if used in a lease instead of being used in the leasing power, taken according to the proper and ordinary sense and meaning of the words used, would, as it appears to me, have given a right of re-entry immediately on non-payment of the rent. They cannot, therefore, I think, be properly deemed to have a different import and signification when used in the leasing power, from what they would have in a lease made in conformity to that power, or that they would have if they were used in any lease whatever. There is not only no right of re-entry given for nonpayment of the rent until a default of payment for fifteen days, but even on such default the right given by the proviso is not a right of re-entry to possess or enjoy the land, but a right only of distress in case there be a sufficient distress upon the premises. In the forms of leases contained in Horseman's Conveyancing, in the edition that I have, I have been able to find only one that is clogged with the insufficiency of distress, all the others appear to be without it. Those leases appear to have been between the times of the statutes of William and Mary and Geo. 2, and several of the conveyances there for securing annuities give, first a power of distress, in

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case the annuity be in arrear for a given number of days, and a right of entry and enjoyment till satisfaction, in case it be in arrear for a larger number of days, without regard to whether there be or be not any sufficient distress upon the premises. I think too that it affords an argument in favour of the above construction, and that nothing else can legally be deemed to have been in the contemplation or intention of the creatrix of the leasing power when she used the words in question, than a mere simple nonpayment, or default of payment of rent *generally*, unaccompanied with any other fact or circumstance, except that which the general rule of law requires, viz. a demand. It is manifest, that where she meant any other fact or circumstance should accompany that nonpayment before the right of re-entry should be given, she has expressly mentioned it, for in the second leasing power she enables leases to be granted, though the right of re-entry be not reserved except upon a lapse of nonpayment for twenty-eight days after the time appointed for payment of the rent. And I do not see how the lease in question can be held to be valid except upon principles of law that would have rendered it also valid, in case the creatrix of the leasing powers had also expressly added in the second leasing power another ingredient besides that lapse of twenty-eight days, namely, the want of a sufficient distress upon the premises, without both which, in addition to the mere nonpayment of rent, a right of re-entry need not, in that case, have been reserved under the second leasing power.

But, in truth, the reserved right of re-entry which

is now in question (whether it is to be deemed reasonable or unreasonable) is not a right of re-entry for nonpayment of rent, but it is in truth a right of re-entry for a different thing which may never exist, notwithstanding there is a default of payment of rent, namely, for an aggregate, consisting in part indeed of that default, but of two other things besides, namely, a certain lapse of time and a want of sufficient distress. It is, in reality, not a right of re-entry for nonpayment of rent, but a right of re-entry for want of a sufficient distress in case of such nonpayment. Instead of giving a right of re-entry for nonpayment of rent it refers the remainder-man to the right of distress on that event, a right which he would have by the general law, even without such reference; and it gives him the right of re-entry only at a later time for a different thing, and on a further event, viz. the want of sufficient distress.

It is not, therefore, in reality a right of re-entry for the same thing as the creatrix of the leasing power required it should be for (and which right, as I have said before, must I think be co-extensive with the existence of the thing, or event, or default for which it was given); but it is a right of re-entry for a combination of things, all of which must exist before the right of re-entry can be exercised. And how reasonable soever it may be thought that this qualification of this leasing power might have been given by its creatrix for the securing of the rent instead of the qualification she has actually given to it, it cannot I think be substituted for the qualification which she has actually given and required.

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But it has been argued that all this is immaterial; because of the general clause of re-entry that follows for default of the performance of any of the reservations, covenants, &c. But it is so completely settled, both on the maxims and authorities of law, that the general clause of re-entry can extend only to cases not before specially provided for, more especially when it would otherwise contradict and defeat the prior express provision, that I shall say no more upon this point.

But then it has further been objected that this leasing power being given and executed since the statute 4 Geo. II.,* the insertion of the want of a sufficient distress on the demised premises in the leases, in order to give the right of re-entry, has become immaterial; because it has been urged, that since that statute no right of re-entry for nonpayment of rent can be rendered effectual so as to regain the actual possession, unless where there is no sufficient distress to be found on the demised premises countervailing the arrears of rent due. But that statute does not appear to make any difference in the present case. That statute applies only to cases where the landlord has omitted to make such a demand of the rent as would entitle him to the forfeiture, and substitutes for his relief other things to be done in lieu, and then gives him the benefit of a forfeiture (to which he would not be otherwise entitled), and gives him that benefit only in certain cases, amongst which is the want of a sufficient distress, and on certain terms. But notwithstanding

* c. 28, s. 2.

that statute, where a due demand of the rent has been made, a right of re-entry may be given, and may be effectually enforced, though a sufficient distress be upon the demised premises. That statute too applies only to cases where a half year's rent is in arrear, and not to cases where a less arrear of rent is due, as may be on the lease in question by a part payment, although the rent is reserved not quarterly but half-yearly.

But it has been further urged, that not only the above statute of the 4th Geo. II., but also the cases both at law and in equity show that the object of a power of re-entry is only to secure the payment of the rent. It was then contended, that this payment of the rent is as effectually and as beneficially secured by the power of re-entry actually reserved in the present case, as if that power had been reserved in the words used in the leasing power, inasmuch as it is said that it reserves the right of re-entry in all cases where the landlord cannot himself by a distress obtain the payment of the rent. This, it was argued, appears by the necessity there is (even after entry) of obtaining judgment and execution in an action of ejectment before possession can be obtained; and by the relief which the courts both of law and equity, but more particularly the latter, give, independently of the provisions of that statute, in cases of forfeiture for nonpayment of rent. But let us see how the case as to this point stands: If the right of re-entry reserved had been merely for nonpayment of the rent, in the terms of the right of re-entry required by the leasing power, it is clear, I take it, that on a due demand of the rent being made (and by

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the statute 4th Geo. II., even without such demand, where half a year's rent remains due), the landlord would have been entitled either to have the rent itself actually paid to him, or to have the land. No other act in that case need be done, or any trouble or risk undergone by him with regard to the rent; but without further act, trouble or risk on his part, he might immediately enter into the land, or immediately proceed to recover the possession thereof by an action of ejectment, against which the tenant could not gain relief without his paying the rent itself, with costs; and unless he thus gets such relief, the landlord would be entitled to recover all the mesne profits from the time of the default by the nonpayment of rent. The right of re-entry actually reserved in the present case gives him no power to re-enter, or to proceed by ejectment, until the expiration of fifteen days, nor at any period of time, unless there is the want of a sufficient distress upon the premises, nor any right to recover the mesne profits farther back than not only the expiration of fifteen days, but also the time when there can be proved to be or when there was such want of distress; and so long as there continues such a distress the only remedy the landlord has for the rent is by action for it, or by distress; so that instead of having the rent by the payment and act of the lessee himself, or, in default thereof, an immediate right to enter or recover possession of the land itself, the remainder-man is driven to the necessity of incurring not only the trouble and expense of ascertaining whether there is or is not a sufficient legal distress upon the premises,—whether of the

property of the tenant, or of third persons,—of waiting, where the distress is of standing corn, until it is ripe and cut (for till then it cannot by the statute be appraised or sold for payment of the rent,) but also of incurring the trouble, delay and risk attending the making the distress in such manner as is in no respect illegal, either by reason of the manner of making or disposing thereof, or by reason of the distrained property being privileged from distress by the same being in the way to market, or by reason of trade or otherwise. Not only is the remainder-man driven to this trouble, but the tenant may also deprive him of the power of sale by a replevy of the distress; and it may happen at the end of the replevin-suit, that by the eloignment of the distrained property the insufficiency of the pledges in replevin, and the insolvency, or death without sufficient assets unadministered of the sheriff and the tenant, his remedy by distress may finally fail, with the additional loss and costs both of the distress and of the replevin-suit; and if this does not happen, he may still be without his rent unless he take upon himself the trouble and expense of prosecuting execution *pro retorno habendo*, or for his debts and costs, and the trouble and risk of prosecuting some further action or actions against the sheriff or the bail in replevin in case such execution shall prove ineffectual; and his remedy by ejectment would be in that case delayed until these results of the replevin-suit shall have been ascertained, even if an action of ejectment would then lie for the nonpayment of that rent which had been before distrained for. So that after the termination of the distress

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and replevin-suit it may happen that the remainder-man may lose his rent, with the addition of costs. The payment of the rent is not, therefore, I think, as effectually and beneficially secured by the right of re-entry actually reserved as if that right had been reserved in the words of or according to the leasing power.

I have considered the question as above, independently of the disputed authorities of *Coxe* v. *Day**, and *Doe dem. Vaughan* v. *Meyler*,† both which cases I think were rightly decided, notwithstanding the prior case of *Hotley* v. *Scot.* I have considered the question, too, as if in the lease the rent reserved had been a money-rent only, because it has been so treated in the arguments here, and in the courts below. But it is to be observed that this is the case, not of a lease for a money-rent only, but also for a rent of another nature, although certainly a very small one, namely, the additional rent of a couple of fat capons, or money, at the election, not of the tenant, but of the lessor or remainder-man, who would therefore be entitled, if he pleased, to have that rent in kind instead of money. It has been considered on all sides as the case of a lease for a money-rent only. I presume on this ground that the special right of re-entry depending on the want of a sufficient distress does not apply to this additional rent or reservation, but to the money-rent only; and that the right of re-entry applicable to this additional rent is the general right of re-entry subsequently given by the lease, in case of default in payment or performance of any of the reservations, covenants,

* 13 East, 118. † 2 M. & S. 276.

&c. : and this may be the case if the statute 2 W. & M.* which is the statute giving the power of sale of a distress for rent, be deemed to be confined to money-rents only. But if the default of payment of this additional rent be within the special rights of re-entry depending on the want of a sufficient distress, more especially if this kind of rent be also not within the above statute of William & Mary, so that the distress could not be sold under that statute for the purpose of raising or paying that rent, though if it could be sold for that purpose it would not raise the rent in kind agreeable to the landlord's right of election, but in money only, at least not without additional trouble and expense to the landlord of purchasing the rent in kind with the money raised by the sale, that is, either by doing it himself or procuring another to do it, I say that in such case the question proposed to us by your Lordships, as it appears to me, would embrace still further considerations arising from those circumstances, as the distress for that small rent in kind, viz. the two capons, would in that case, that is to say if it could not be sold under the statute, remain only a dry, unprofitable, chargeable pledge for that rent, in lieu of the productive security and enjoyment of the land. This however it is unnecessary for me to consider, inasmuch as whether the additional rent in kind would embrace further considerations as to the law of the case or not, I think, for the reasons which I have before stated, that having due regard to every thing alluded to in the question proposed to us by your Lordships, the lease in question is invalid.

* C. 5.

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Park, J.—The objections to this lease are two: viz. that it does not pursue the power, inasmuch as a clause is required to be in every lease in these words: "So as there be contained in every such "lease *a* power of re-entry for nonpayment of the "rent thereby to be reserved," and nothing more: whereas it is said this lease contains a power of rentry, not *generally*, but clogged with two conditions,—"Provided the rent, &c. shall be behind "and unpaid, &c. *for fifteen days*, and no sufficient "distress can or may be had or taken upon the pre-"mises." And these two objections fall under very different considerations; but it must be admitted that if either of them prevail the lease is invalid. As to the general rules which govern the courts in the construction of leasing powers they are all now well understood, and have been so fully explained and commented upon by some of my learned brothers who have preceded me, that it would be a silly parade of learning, and a useless waste of the time of the House to enter upon them; it being sufficient to state that the intention of the parties, which is to be collected from the instrument, is to be the governing principle in the construction.

The words of the power having been read to your Lordships, "So as there be contained *a* power of re-entry for nonpayment of the rent thereby to be reserved," it has been asked, "if a plain man were asked how he would execute such a power, what would he say?" I answer distinctly that he would say, "insert a clause in the very words of the power, that the lessor shall have a power to re-enter for nonpayment of the rent thereby reserved." I an-

swer that such a plain man, in my conception, would be grievously surprised to find two conditions, which he will in vain look for in the power, but which materially alter the rights of the remainder-man. The power to make leases is to be construed so as to lean neither to the one party nor the other, for the maker of the power certainly intended that they should operate for the benefit of both, of the one, by giving him the enjoyment during his life of an estate well cultivated, of the other (*viz.* the remainder-man), by preventing him from coming to an impoverished one.

It seems to me that to contend for what is insisted on by the Plaintiff in error is to say, that "absolute" and "conditional" mean the same thing; or, that a power clogged with two conditions is the same thing as an unclogged and unconditional power. When this case was before the Exchequer Chamber I stated, that if the only objection to this lease were the time given, before the lapse of which he could not re-enter for nonpayment of the rent, as then advised, I should think the objection fatal. I have heard nothing since to remove my doubt. It is said indeed that the indefinite article *a* being used, namely, *a* power, *any* power that is reasonable may be inserted. But what right have we to do this for the grantor of the power? Who has a right to insert this word? Who, if inserted, is to construe it? The court or the jury? If fifteen days be reasonable, why not twenty, twenty-five, and thirty? That this was never contemplated I think quite clear; for whenever time is meant to be given it is expressed, and therefore she must be presumed to

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have known that where she meant to give time it ought to be expressed, lest the giving it in one case should be construed, as it is by me, that it was not intended to be given in the other. But I have said, and I repeat it, what right have we to insert the word "reasonable" into this power? If this word "reasonable" never found its way into powers, it might perhaps more fairly be argued that it was inherent in all. But looking at precedents and adjudged cases we do find the words "usual" and "reasonable" sometimes jointly introduced, sometimes separately; and these words when introduced compel the courts to consider what are usual—what are reasonable covenants—under such powers. If then it is not unusual to insert such words, why are the courts to introduce them where the creator of the power has not; and who by omitting them must be taken to have intended that they should not be inserted? But I am staggered by what is said in a book of great authority, and to which I think the Professional Public are much indebted *, that if this objection were to prevail it would invalidate nine tenths of all the leases in the kingdom granted under powers. I can only say such a consequence is to be deeply deplored; but it is entirely owing to this, that those who have prepared such leases have chosen to follow their own new-fangled conceits, instead of using the exact words of the power conferring the right to lease upon certain terms, and upon certain terms only. This argument, that many leases will be invalidated, may be a very good one to your Lordships in your legislative capacity,

* Sugden on Powers.

on account of the hardship of the case, but cannot, and ought not, to influence you when your province is *jus dicere, non dare.* However, if this were the only objection to the lease in question, on account of the long practice which has prevailed, as it is alleged, I might be inclined to pause before I presumed to offer my humble advice to your Lordships, that on this ground alone the lease would be void.

But the second objection seems to me to be impossible to be got over. I have thought much about it, both before I gave my judgment in the Exchequer Chamber, and since. I have turned it in every point of view; I have heard all that learning and ability at the bar could suggest; I have of course been present at all the conferences with my learned brethren; I have been most desirous to be convinced if my opinion be erroneous; but after all I cannot raise in my mind a probable doubt; and though if the decision of your Lordships should be ultimately in favour of the lease it will be my duty to conform to that opinion, I am at present bound to state my entire concurrence in this point with my learned brothers, Richardson, Burrough, and Holroyd, who have preceded me. Their luminous exposition of the argument, and my own judgment in the Exchequer Chamber, which is very accurately reported, both by Messrs. Broderip and Bingham, and by Mr. Moore, and which is in the possession of some of your Lordships, render it unnecessary for me to do more on this head than to make an observation or two on the cases that have been quoted.

The main reliance on the other side is on the case of *Hotley* v. *Scot*, Lofft, 316. Of that reporter

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I shall say no more than this (without forming any judgment of my own), that during a long professional life of forty years, and Lofft's reports embracing a period of that great man's life who then presided in the Court of King's Bench, during which, as to this part of them, there is no other reporter (for the reports of the very learned person now at your Lordships table * did not commence till 1774, nearly two years after Mr. Lofft's), I never heard them quoted three times in my life. But without any observations of this kind, it is quite clear from that report that none of the learned counsel then at the bar, neither Mr. Dunning nor Mr. Bearcroft, neither my Lord Mansfield nor any of the Judges, appear to have taken the least notice of the condition as to the want of a sufficient distress, which is the very point now under consideration, and which from the terms of the power and lease in that case might have arisen. But it is said there is a note of that case by Mr. Butler, taken by himself, in which it appears to have been mentioned; I have not seen that note, and therefore I can say nothing to it. I entertain great respect for that gentleman, and I do not wish to depreciate the labours of the young; but unless he be much more advanced in life than, for the sake of the public I wish him to be, he must forty-eight years ago have been a very young man. But, admitting the point to have been mentioned, it cannot have formed a prominent feature either in the argument at the bar or in the consideration of the court, for if it had it is impossible that Mr. Lofft, or any other man, in a report

* Henry Cowper, Esq.

of four pages should have omitted it. Can such a case for a moment be put in competition with *Coxe* v. *Day* *, where this clause was the main objection to the lease, a case most ably argued at the bar by the now Chief Justice of that Court, and receiving the deliberate certificate of four very eminent Judges, Lord Ellenborough, Justices Grose, Le Blanc and Bayley? In the course of that argument Lord Ellenborough said, "There can be no doubt that it "is more beneficial to the owner of the estate to "have a power of re-entry *at once* upon the tenant, "upon nonpayment of the rent within a certain "time, than to have such a power only *in case* there "shall be no sufficient distress upon the premises." And in another place, when Mr. Abbott was strongly pressing on the Court that such a clause secured the landlord's object, namely, satisfying his rent more speedily than in any other way, Lord Ellenborough said, in answer, "In the one case it is to be secured "from time to time by successive suits, with the risk "of sureties if the distress be replevied; in the "other, it is secured once for all by the landlord's "re-possessing himself of the land out of which the "rent is derived." Can any one say, my Lords, that the one remedy is not more easy, more direct, and less circuitous than the other? And that great man, Lord Ellenborough, again says, "Surely the "direct power is more beneficial to the landlord." And the certificate of all the learned Judges is in direct conformity with these *dicta* of Lord Ellenborough; for it is said, "We are of opinion "that the power of re entry reserved in and by the

* 13 East, 118.

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" said lease for nonpayment of the rent is not made " in conformity to the power in the settlement for " granting leases of the freehold part of the said " premises, and that the lease is void on that " ground." Not having seen any report of the judgment of the Court of King's Bench upon this case of *Doe* dem. *Earl Jersey* v. *Smith*, I cannot tell whether this case of *Coxe* v. *Day* was recalled to their attention; but I am quite sure it is impossible to reconcile the one with the other. This was so strongly felt by two very learned Judges in the court below, that at once they doubted the propriety of that decision; and one of them says, " it is " not law, for it is diametrically opposite to reason " and common sense *." I am sorry to say I think directly the contrary; but I, for one, seriously object to this mode of getting rid of decisions, because they militate against our own notions. I agree with the pointed manner in which this was expressed lately in this House by the Lord Chief Justice of the Court of Common Pleas, and I hope I shall be excused for using his language. " If the law so settled is now to be considered unsettled, I know not on what foundation, in point of law, any decision can stand. †"

But the case of *Coxe* v. *Day* is not a solitary case, for the question again, in about three years after, came under the consideration of three of the same Judges who decided *Coxe* v. *Day*, namely, Lord Ellenborough, Judges Le Blanc and Bayley, with the addition of another learned person, now no more (Mr. Justice Dampier), and who could not

* Vide ante, vol. 1, 195. † Vide ante, *Rowe* v. *Young*, 273.

have decided as they did without determining that such a clause as we are now considering rendered a lease void where the power did not authorize it. The case I allude to is *Doe dem. Vaughan* v. *Meyler* *. The case was tried before the latter Judge at Hereford, who thought the objection, such as we have here, was one that went to the whole lease, though it was partly of lands of which the lessor was seised in fee, and partly of lands in which he had only an estate for life with a leasing power, provided there was a clause of re-entry for nonpayment of rent for fifteen days. The lease was not executed according to this power, for it added, "and if there be no sufficient distress;" but the Court held, though the lease was void, because not executed according to the power, yet it was good as to the land of which the lessor was seised in fee, and the Court apportioned the rent; which was an erroneous judgment, if the objection to the present lease be not a good one.

The case of *Rees on the demise of Powell* v. *King* †, I formerly thought, and still think, sets this point at rest, by showing that such a clause as this throws a burden upon the right of re-entry which the maker of the power never contemplated. That case has been so often mentioned that it is enough to say of it that it has decided, that before a plaintiff in ejectment can recover upon a clause of re-entry in a lease, in case there be no sufficient distress on the premises, he must show that every part of the premises has been searched, else he cannot say there was no sufficient distress. The Judge who first

* 2 M. & S. 276.

† Forrest, 19.

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decided this was well known to some of your Lordships, and no man will decry the knowledge of the late Mr. Justice Heath, and his opinion was confirmed by the Court of Exchequer. If the Courts of Westminster Hall were to overturn that decision it would go a great way to shake my present opinion; but I do not learn that any of my brethren are prepared to do so; and if, therefore, I feel myself bound, as I shall feel, to call upon any plaintiff in ejectment on the circuit, who has such a clog on his clause of re-entry as this, to prove that he has made a full search for a distress before I permit such a plaintiff to recover, I cannot conscientiously advise your Lordships that this lease is valid; most sincerely, however, wishing that consistently with my honest opinion I could do so.

Of one other point I must take notice, namely, that as this lease contains a general clause of re-entry it must necessarily control the special clause. To that position, I, for one, at present, cannot agree; for I find the contrary doctrine maintained, from Altham's case * down to the present day. In Altham's case we find this position or rather this maxim adopted. In the first part of the argument, putting every point that can possibly occur, his Lordship says, "*Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundùm verba specialia.*" But he goes on to add, there is another rule or principle of law, viz. "*generalis clausula non porrigitur ad ea; quæ antea specialitèr sunt comprehensa.*"

* 8 Co. 154, b.

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Therefore, I say, this point for which I am now arguing being first specially defined cannot be enlarged by a subsequent general clause, which can only apply to cases not before specified or defined. So in Sheppard's Touchstone (which is supposed to be the work of no less a man than Mr. Justice Doddridge) on the exposition of deeds *, in confirmation of the above doctrine, that writer says, "If there be two clauses or parts of the deed repugnant to one another, the first part shall be received and the latter rejected, unless there be some special reason to the contrary." If we descend to more modern times, we find the same rule universally adopted and confirmed by Judges on particular cases depending before them. In *Cother* v. *Merrick* †, Mr. Baron Nicholas, quoting the Year-Books in support of his opinion, says ‡, "When there are two clauses in a deed of which the latter is contradictory to the former, there the former shall stand." And not to multiply authorities upon a point on which Lord Ellenborough intimated a strong opinion, when he expressed himself against the validity of an argument founded upon such a point, I shall only quote one more from what Lord Chief Justice Holt and two of his brethren said in *Thomas* v. *Howell* §, that "in deeds it was admitted that subsequent clauses which are general shall be governed by precedent clauses which are more particular." I therefore think that this ground does not, in any way, strengthen the argument as to the validity of the lease.

* Ch. 5, p. 88, fo. 7.
† Hardr. 89.
‡ Hardr. 94.
§ 4 Mod. 69.

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The point upon the statute of 4 Geo. 2, has been so luminously explained by my learned brother Holroyd, that I shall not trouble your Lordships on that point, except to say I entirely concur with him.

The next point is, whether the other leases should be admitted as evidence? I am willing to admit that if this deed upon the clause in question contains any latent ambiguity raised by extrinsic evidence, parol evidence or extrinsic evidence may be admitted to explain it, or to render it unambiguous. But I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed. It would be of most dangerous consequence to admit such testimony; for then, parties dealing in matters on writing made upon advice and consideration would be subjected either to the uncertain testimony of vague and precarious memory, or, as in the case at bar, to matter, of which at the time of contracting they might have no knowledge, and never intended to be under its control. The written instrument, therefore, except in cases of fraud, or other excepted cases, of which I insist this is not one, must be considered as speaking the sense of the parties to that deed or instrument. Upon this ground it was, I conceive, that the case of *Cooke* v. *Booth* * met with such a decided opinion against it in *Baynham* v. *Guy's Hospital* †, by Lord Alvanley when Master of the Rolls, who not only states his own opinion, but that of Mr. Justice Wilson, who had argued the case of *Cooke* v. *Booth*, (who, Lord

* Cowp. 819. † 3 Ves. jun. 298.

Alvanley says, was astonished at the decision) as well as that of Lord Thurlow. The Master of the Rolls says, "I protest against the argument of the learned Judges as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it." The case of *Tritton* v. *Foote* * seems directly at variance with *Cooke* v. *Booth*. In *Iggulden* v. *May* † the Court of Exchequer Chamber, unanimously affirming a judgment of the Court of King's Bench, held, that a covenant in a lease to grant a new lease, with all covenants, grants, and articles as in the said indenture is contained, does not bind the lessor to insert a covenant of renewal in the renewed lease, although it was alleged in the pleadings that the covenant required had been introduced in various other cases before then successively made and executed on renewals from time to time granted. Lord Chief Justice Mansfield, stopping the then Mr. Abbott, who was to have argued against the construction contended for on the other side, said, that the case of *Cooke* v. *Booth* was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of a deed: and in another part of his judgment his Lordship says that case had been impeached upon all occasions, and that the Court of King's Bench were misled by the renewals stated in the case sent by the Court of Chancery. Now what is asked for in the present case but to assist the construction of an unambiguous deed by the prior acts of the parties? In a case which I argued as

* 2 Bro. C. C. 636.

† 2 N. R. 449. See the original case and pleadings, 7 East, 237.

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counsel *, though the lease there was according to the custom of the country as to the times of holding, yet the lease, dated 29th March, was held not to be a lease in possession, within a power to grant in possession, and not in reversion, because the days of holding were as to the tillage from 13th February past the pasture ground from 5th April next, and the residue of premises from 12th May next.

But, my Lords, in my opinion no cases are wanting to prove that no evidence can be admitted to explain a deed which is plain and perspicuous in its terms, containing no ambiguity, much less to add clogs and conditions to it. I am asked then, is this a deed of that description? I answer, that in my opinion it is. I see no ambiguity; it is precise and definite in the powers granted; every person of plain and common understanding, much more every person with a legal mind, can give it a clear and satisfactory solution. But I am told the case of *Fonnereau* v. *Poyntz* †, before Lord Chancellor Thurlow, is against my opinion. Upon the best attention I can pay that case I do not think so. The case was a bequest of the sum of 500*l.* stock in long annuities, and similar bequests of smaller sums in the same stock. The question was, whether this was a bequest of 500*l.* a year long annuities, or only 500*l.* in the long annuities. This case was very powerfully argued by one of your Lordships; I own I should have thought there was no difficulty in the construction; and Lord Thurlow seemed at first to be of that opinion, but afterwards admitted evidence

* Doe, dem. *Allen & others*, v. *Calvert*, 2 East, 376.

† 1 Bro. C. C. 472.

to show the extent of the property of the testatrix, to see whether she could possibly mean 500*l.* a year, when she had no such stock. But though his Lordship admitted this, he states the clear principle of law to be, that for the wisest reasons it will not admit of an instrument being construed *aliundè*. And in the close of that case his Lordship says, what I quote to your Lordships as strong in my favour, because he only lets in the evidence to explain what is uncertain, "There is no doubt, if the word *stock* had been left out, but the meaning would be that the sum of 500*l.* was to be disposed of in long annuities, and to make a produce, and that produce to accumulate until the legatee should attain twenty-one. This being the doubtful interpretation upon the face of the will, the question arises whether the state of the testatrix's fortune is not applicable to the construction of the will. It appears by some other parts of the will that she was extremely anxious to make an ample provision for the family of the *Fonnereaus*; considering then the situation of her fortune, it is perfectly inconsistent to say that she could mean to give ten times more than she was worth in legacies. My opinion therefore is that the judgment must be reversed, and that I can let in the evidence of the value of the estate, not to control the bequests, which the testatrix has made in words themselves distinct, nor to control the bequest which she had made of a subject which she had accurately described, but because the words she has used in the description are upon the whole of the context uncertain." "The peculiarity of this will furnishes sufficient doubt to warrant the

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admission of collateral evidence to explain it; and if so, the statement of the testatrix's fortune is applicable to the purpose of such an explanation." His Lordship, whether right or wrong in his notion, clearly admits evidence *aliundè* on the ground of uncertainty and ambiguity only, and leaves the principle wholly untouched, that parol evidence, or evidence *aliundè*, cannot be admitted to contradict, add to, or vary the terms of a deed, will, or other written instrument. Now here the terms of this power are clear and express, without limitation, clog, or condition, nothing being doubtful or ambiguous; and the evidence sought to be admitted is not to explain that which is doubtful, but to add two clauses or two conditions to that which is absolute and unconditional: in short, to make a new deed in this respect.

The decision I am humbly recommending steers clear of all vagueness and uncertainty; leaving nothing to the variety of conflicting opinions. For who is to decide what is reasonable? If the Judges, as I should be inclined to think,—(but worse, if the jury) are,—what can lead to such contrariety of decision? We all know, in every transaction of human life, what is held reasonable or unreasonable depends upon the reasoning and feeling of every individual man who has to consider the question.

I heard it said this will unsettle many leases. I lament that it is so. The Legislature may interpose; but if my mode of construing powers had been always adhered to, no such evil could have ensued. The hardship of the individual case is represented; and if there be hardship, I also, as an

individual, lament it; and this statement of hardship, and the consequences of what I should propose, have made me, again and again, examine this point with all the ability in my power: but after all this consideration, feeling that it is my sworn and therefore bounden duty to declare what I believe the law to be now, not to say what it ought to be, I think that to decide in favour of the lease would be to make a power differing substantially from that which was made, and making conditions which the creator of it never intended. This would be my opinion, if I stood alone; but I am happy not to be singular in my judgment on this important question, although I am opposed to others whose ability I respect, and whose learning I revere.

Bayley, J.—I am of opinion that the lease in this case is conformable to the leasing power, and that it is valid. Nor do I think that that opinion will trench on the case of *Coxe* v. *Day*. The settlement in this case requires "a power of re-entry for non-payment of the rent;" and the first question I propose to consider is, whether this lease does or does not contain "a power of re-entry for non-payment of the rent?". It provides, that if the rent be behind for the space of fifteen days, and no sufficient distress can be had upon the premises, the person entitled to the freehold and inheritance may re-enter. Is this then, or is it not, "a power to re-enter for non-payment of the rent?" Does it give any power to the landlord? Undoubtedly.—To do what? To re-enter.—For what cause? For non-payment of rent. It is then a power of re-entry for non-pay-

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ment of the rent. I admit it is not an immediate power of re-entry; I admit it is not an unconditional power; but still it is a power of re-entry. In referring to Littleton, s. 325, I find instances of powers of re-entry if the rent be behind a week, or a month, or half a year; and as far back as the year-books * it is established, that under such powers the time to demand the rent to warrant a re-entry is at the end of such week, month, or half-year, and not on the preceding rent-day; so that it is consistent with a power of re-entry that it should not be immediate, but postponed till some given time after the rent should have accrued; and in Godbolt † I find the instance of a power of re-entry if the rent be behind, and there be no sufficient distress upon the land; and from these instances I infer that a power of re-entry, if the rent shall be behind fifteen days, and there is no sufficient distress upon the premises, is "a power of re-entry for non-payment "of rent." It may not be the most beneficial species of power; it may be clogged with what in some cases may, by possibility, produce an inconvenience, but still it is a power. And if it be a power of re-entry for non-payment of the rent, this lease does contain what (in the words of the settlement) is "a power of re-entry for non-payment of rent;" and persons who impeach the lease are then driven to the argument, that though it be a power, yet it is not such a power as, having due regard to the intent and meaning of the indenture of the 2d July 1757, that indenture according to legal construction

* 20 H. 6. 30, 31. 6 H. 7. 3. Brooke, *entre congeable*, pl. 90.

† 110, pl. 130.

requires. Now this argument assumes that the words are capable of more than one meaning, if they are not so clear and precise and definite as to admit but of one sense; and it was to point out this assumption that I have been troubling your Lordships upon what might otherwise have appeared nearly a self-evident proposition. The words are "a power of "re-entry for non-payment of the rent." The law knows of many such powers; some more beneficial, some less so; some qualified, some not; some to hold the land till the rent is satisfied out of the profits; some to hold till the rent is satisfied *aliundé**; some, as here, to restore the reversioner to his former estate; and some with the conditions I have already noticed, viz. postponement of time, and absence of distress upon the land; and some (though very few) with neither of these conditions. And which of these powers, having due regard to the intent and meaning of the indenture of 2d July 1757, does that indenture, according to legal construction, require? The intent and meaning of that indenture is to be collected either from that indenture, without looking out of it or beyond it, or from that indenture, combined with the consideration of the state of the property at the time when that indenture was made, if the evidence of the then existing leases, and of the powers therein contained (which I shall by-and-bye consider), be admissible. The intent and meaning of that indenture (*per se*, and without looking beyond it or out of it) was, as it seems to me, that the reversioner should have such of those powers as would give him a proper and rea-

* Co. Litt. 203. a.

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sonable security for his rent by way of re-entry; and that if nothing short of a right of immediate re-entry, and of re-entry whether there were or not a sufficient distress upon the land, would give him that security, I should say he was entitled to such a power in the lease as would give him those rights; but if any of the other powers would give him a proper and reasonable security, it seems to me that giving him any of those other powers would be all the indenture of 1757, according to legal construction, requires. The rent is not a rack-rent. It is only 2*l*. 1*s*. 6*d*. per annum, payable half-yearly; and for a lease for three lives the lessees surrendered a subsisting lease, upon which at least one life was *in esse*, and paid 105*l*. A half year's rent therefore would be 1*l*. 0*s*. 9*d*. only; and for such a rent a delay of fifteen days was not likely to occasion the reversioner much probability of loss; it was not likely the premises would ever be so completely deserted as to have no sufficient distress upon them; nor was the rent such as could be any inducement to the tenant to replevy. For such a rent the power in question to re-enter at the end of fifteen days, if there were no sufficient distress upon the premises, appears to me an adequate and reasonable security; and I should be disposed to think that for such a rent, a clause without giving any days of grace would be unreasonable; because I think the immediate exercise of such a right would be oppressive. Nor do I think it unreasonable to deny the reversioner the power of re-entry where there is a sufficient distress upon the premises, because the Legislature did not think it unreasonable to deny the

landlord the benefit of 4 Geo. 2, c. 28, where there was such a distress; and because a landlord can have no difficulty in ascertaining whether there be such a distress or not. He has a right to enter with his bailiff upon the premises, to see whether there be such a distress; and according to Godbolt*, if there be nothing that he can see upon the premises to distrain he is warranted in concluding that there is no distress there. Godbolt's words are, "It was "holden by all the justices that if a man make a "lease, rendering rent upon condition that if the "rent be behind, and no sufficient distress upon "the land, the lessor may re-enter; if the rent be "behind, and there be a piece of lead or other thing "hidden in the land, and no other thing there to "be distrained, the lessor may re-enter; for the "distress ought to be open and to be come-by." I am therefore of opinion that, without looking beyond the indenture of July 1757, the power in question is within the true intent and meaning of that indenture and the legal construction thereof as large and beneficial a power of re-entry as that indenture required.

But I apprehend that in judging of the true intent and meaning of the indenture of July 1757, in this respect, we are at liberty to look at the state of the property at the time that indenture was made, and see to what restrictions it was then subject, and what rights the settler then had. The settler has used the indefinite words, "a power of re-entry." By showing, as I do, that there are many such powers, I show that there is an ambiguity in those

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words, either latent or patent; and may I not refer to the existing state of the property at the time these words were used, to see what was the intention of the settler, and in what sense she used those words? This is the first time I have ever known it doubted whether the estate and interest and powers of the settler over the estate he was settling was admissible in proof. I am not offering declarations of what the party said she meant; I am not construing a legal instrument by the acts of the parties, or by their understanding upon it (as in *Cooke* v. *Booth**); but by showing the circumstances and situation of the party, and the estates and interest she had at the time, I am enabling the House to judge what in legal construction was her meaning. And I am not aware that there is any legal authority to exclude the evidence of such circumstances and situation. *Doe* v. *Calvert*† certainly is not. That case only decided that a lease of 29th March of tillage-land from 13th February preceding, of pasture-land from 5th April, and of the residue from 12th May, reserving the rent in April, was substantially a lease from April, and therefore a lease not in possession but in reversion; and the custom of the country, that these were the ordinary periods of letting, was admitted without objection, and argued upon without objection, but was held not to contract the power so as to warrant a lease before April. If a man makes any deed or will, have I not a right to know what estate he had at the time he made such deed or will? and does not the construction vary in some cases according to the estate? If I grant a

* Cowp. 819. † 2 East, 376.

man an estate for life, without saying whether for his life or for mine, is not evidence admissible to show what interest I had in the premises? For if I was tenant in fee he will take an estate for his own life; if I was tenant in tail, or for life only, he will take for mine*. If a man bequeath me 10,000 *l.* 3 per cent consols, it will be a specific legacy if he have that stock at the time; not specific, if he have it not, *Selwood* v. *Mildmay* †. Evidence is therefore admissible in such case to show what was the state of his property at the time he made his will, and the construction upon the will is one way or the other, according to the result. In *Masters* v. *Masters* ‡, where a lady by her will gave 5 *l.* to each of two hospitals in Canterbury, and by her codicil gave 5 *l.* per annum to "all and every the hospitals," the latter legacy would have been void for uncertainty; but it appearing (which must have been by extrinsic evidence) that the testatrix lived at Canterbury for many years, and died there, and that she took notice by her will of two Canterbury hospitals, the general words "the hospitals" were limited and considered as intended for "all the hospitals in Canterbury." But the case to which I wish to call your Lordships particular attention is *Fonnereau* v. *Poyntz* §. The testatrix there gave to Mary Poyntz the sum of 500 *l.* stock in long annuities; to Mary Haye the sum of 500 *l.* stock in long annuities; to Miss J. L. Barbauld the sum of 200 *l.* stock in long annuities; the interest thereof to accumulate till she attain twenty-one; the sum of

* 1 Shepp. Touch. 88.
† Per M. R. 1797. 3 Ves. 310.
‡ 1 P. Wms. 421.
§ 1 Bro. C. C. 472.

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100*l.* stock in long annuities to Miss H. Dawson in like manner; and the residue of her estate both real and personal to her two nephews. Parol evidence was given that the testatrix had only 120*l.* per annum long annuities; but Lord Thurlow doubted at first whether he could admit that evidence to explain the words; and he afterwards decreed against receiving it, because he thought it would produce a construction against the direct and natural meaning of the words. But upon a re-hearing he admitted the evidence, and acted upon it; and the ground of his decision was, that upon the face of the will itself it was doubtful whether the testatrix meant to give legacies of 1,300*l.* per annum, or only a gross sum of 1,300*l.*; and he considered the state of the testatrix's fortune applicable to the construction. The situation of the fortune made him conclude she never could have meant to give in legacies ten times more than she was worth; and he let in the evidence, not to control a bequest which was distinctly and accurately described, but because upon the whole context it was uncertain whether she meant so much per annum, or so much as a gross sum. He thought the peculiarity of the will furnished sufficient doubt to warrant the admission of collateral evidence to explain it; and that the statement of the testatrix's fortune was applicable to that explanation. Lord Thurlow decided that therefore as a case of ambiguity; as a case in which, from the use of the doubtful expression "sum of 500*l.* stock," and the "interest thereof," he might let in the extrinsic evidence of the circumstances of the testatrix to explain what was her

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meaning. In noticing this case * Lord Alvanley says, Lord Thurlow's only doubt was whether parol evidence was admissible to ascertain whether the testatrix did not mean capital; but *he had no doubt he must know all the circumstances of her affairs.* Apply that case to this. The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinctly and accurately described; but because there is an ambiguity upon the face of the instrument; because an indefinite expression is used capable of being satisfied in more ways than one: and I look to the state of the property at the time, to the estate and interest the settler had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest or situation, would assist us in judging what was her meaning by that indefinite expression. And then the case will stand thus: Lady Louisa Barbara Vernon being tenant for life, with power of appointment in fee, of a very considerable estate, part of which was then out upon leases for lives at small rents, payable partly in money and partly at her election in fat capons, subject to powers of re-entry if those rents should be behind fifteen days, and there should be no sufficient distress upon the premises, settled that estate with powers to make life-leases of that part of the estate at the ancient rents, so as those leases should contain *a power of re-entry* for nonpayment of the rent thereby reserved; and with power to make leases at rack-rent of the other parts of the estate, so as those leases

* 3 Ves. 320.

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should contain clauses of re-entry if the rent were in arrear twenty-eight days; and then the question is, whether by requiring upon the life-leases generally "a power of re-entry" she required more than that description of power which the then life-leases had. She must be taken to have known what that power was; and had she been dissatisfied with it, or required any alteration, can it be supposed she would have contented herself with the indefinite expression "a power of re-entry?" When she is providing for the rack-rent leases, where the right of distress is much more important, she gives the tenant twenty-eight days; and can it be believed that she intended to be less indulgent where the rent bore scarcely any relation to the value of the property? I cannot believe she did; and for these reasons, because the settler has not said what particular species of power she required, and this is a reasonable power, and the very power in force upon this estate at the time this settlement was made. I submit to your Lordships that this lease was warranted by the power, and that the judgment of the King's Bench ought to be affirmed.

Wood, B.:—I am of opiniou that the power contained in the marriage settlement is well executed. That power applies to lands "leased for lives, or for "years determinable on lives, to any person or "persons in possession or reversion;" and one of the conditions of such letting is in these words, "and so as there be contained in every such lease "a power of re-entry for nonpayment of the rent "thereby to be reserved." There is another power

of re-entry which applies to leases for years absolute, not exceeding twenty-one years, to take effect in possession, and to be made at as beneficial yearly rent as was then paid, or the most improved rent, without fine or foregift; and there it is provided that there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the time appointed for payment.

The lease in question is under the first power, which provides re-entry on non-payment of the rent generally, without prescribing any time of re-entry at all, or any special terms whatsoever. The proviso in the lease in question is, if the yearly rent of 2 *l.* or any of the duties, services, reservations, and payments thereby reserved shall be behind, unpaid, or undone in part or in all, by the space of fifteen days after any of the times of payment or performance, and no sufficient distress or distresses can be had or taken whereby the same and all arrearages may be raised. It is contended on the part of the Defendant in error that this proviso of re-entry in the lease is not such a one as is required by the settlement, inasmuch as it has limited a time for re-entry, which the power has not; and inasmuch as it is clogged with a condition, that there be no sufficient distress, which the settlement does not mention.

The clause requires no more than a power of re-entry for non-payment of rent, giving it no qualification or modification at all. There is a clause of re-entry, and that is a literal compliance. But though the power is general, I admit it must be exe-

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cuted, not in a fraudulent or illusory manner, but in a reasonable manner, such as the law will deem reasonable. In the clause of re-entry for the rack-rent the time is limited, viz. twenty-eight days. I admit that cannot be departed from. Why was no time limited in this?—Because the settlement meant to leave it to the discretion of the tenant for life to insert such a reasonable power of re-entry as might secure the rent to the reversioner. The object of re-entry is merely to secure the rent, and has been always so considered in law and equity; and when I see that object is secured reasonably and fairly, and we are not tied down to any specific terms, I think the power is well executed, being according to the intention of the parties. I think we ought to consider the deeds and acts, *ut res magis valeat quam pereat.* In *Cother* v. *Merrick* * in the Exchequer, on a special verdict, the question was whether the lease was a good lease within the statute 32 H. 8, c. 28. That statute is to enable tenants in tail to make leases to bind as if they were tenants in fee simple. The second section is, provided such leases be not for more than twenty-one years, and provided that upon every such lease there be reserved, payable to the lessors, their heirs and successors, to whom the said lands should have come after the deaths of the lessors if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interest, so much yearly ferm or rent, or more, as had been accustomably paid. The lease was made reserving the rent to the heirs and assigns of the

* *Hardr.* 89.

lessor, who were not the heirs in tail entitled to the rent, yet it was held a good lease. Hill, B. says, " In the exposition of statutes, the Judges " must make such a construction as to advance and " not to frustrate the intention of the makers." Parker, B. says, " It is the office of a Judge to pre- " serve and not to destroy an estate." In this case the Judges gave their rational construction to the lease, which gave it effect. So, here, in this case before your Lordships, I conceive we ought to do the same, taking the true interpretation of the power to be to leave the mode of re-entry to the direction of the lessor. Has that been fairly and *bonâ fide* and reasonably executed? Is the period of fifteen days a reasonable time to allow for re-entry? In the case of rack-rent twenty-eight days is expressly given; if the parties have thought that a reasonable time, surely the fifteen days must be; it is the usual time as found by the jury; the law will judge what is a reasonable time.

The last objection, which was mostly if not entirely relied on, was the clogging the right of re-entry with the condition of their being no sufficient distress. Is that reasonable with reference to the law as it stood when the lease was made? I conceive it is. The 2d July 1757, was the date of the deed of settlement which gives the power of leasing, and which was subsequent to the statute of the 4th Geo. II, c. 28, which was in the year 1731, which regulates the powers of re-entry for the nonpayment of rent. Before the making of this statute, the carrying into execution a power of re-entry was attended with great difficulty and nicety. There must have

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been a demand of the rent upon the land; if there were a house, it must have been demanded at the fore door; and it must have been demanded at a convenient time before the sun-setting of the last day of payment, so as that money might be numbered and received. The landlord then had to make an actual entry and bring an ejectment. If all these circumstances were not critically and exactly performed he lost the right of re-entry for that time, and was forced to wait till other rent accrued, and then had to make fresh demand and re-entry for the subsequent rent. If he had complied with these formalities, and brought his ejectment, it was the uniform practice of a court of equity to relieve against a forfeiture upon payment of the rent and costs, considering the clause of re-entry as a mere security for payment of rent. What is the alteration made by the statute? It has dispensed with the formalities attending re-entries by the common law, and said that when the landlord has a right to re-enter, and half a year's rent is in arrear, he shall and may at once bring his ejectment and recover possession, provided there is no sufficient distress to be found on the premises to countervail the arrears then due. The tenant also may pay or tender the rent and costs to the landlord or his attorney, or pay the same into court before trial, and all proceedings shall cease. The policy of this law is to prevent forfeiture for nonpayment of rent, and to facilitate the landlord's remedy for the recovery of it; and at the same time the Legislature has thought it right to impose this condition:—you shall not eject the tenant if there be a sufficient distress to secure the

rent; you may have an action or a distress as soon as the rent is due, without waiting fifteen days. It is said, "still the statute leaves the common-law "remedy open to a landlord if he will comply with "the formalities of demand at the last hour of the "day, and make re-entry; and in that case the ne-"cessity of distress is not imposed on him." What then? Why the tenant will be relieved against the forfeiture in a court of equity; yet it does not seem clear, even in that case, that the statute does not shut the door against proceedings by re-entry at the common law; but upon that I do not found my opinion. The words of the statute are, "that the "landlord shall and may bring ejectment;" and *shall* is imperative. Under the statute of 8 & 9 W. 3, c. 11, an act for the better preventing frivolous and vexatious suits in actions for penalties for nonperformance of covenants, the plaintiff *may* assign as many breaches as he shall think fit. It was at first contended that the statute was not compulsory on the plaintiff to assign breaches, for that the statute was made for his benefit, and therefore he might wave it, and leave the defendant to his remedy in equity: but all the courts in Westminster Hall held it to be compulsory on the plaintiff to assign breaches and assess damages, and the defendant shall not be put to seek relief in equity. This is the fair construction to be put on the statute of the 4th Geo. II, where the words are stronger, being "shall and may;" and, upon the same principle, if this be the true construction of the statute, and there is no decision to the contrary, then there is an end of the question, for the lease will then have expressed

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no more than that condition which the statute requires. It might not be necessary to express the condition, because the law imposes it. But I will suppose it to be left open to the landlord to proceed in the old way, as before the statute, and a reasonable clause of re-entry is all that the power required, can the adoption of the same condition which the Legislature has adopted in similar cases be considered as unreasonable? The case of *Coxe* v. *Day** has been cited as an authority of the Court of King's Bench that the inserting a condition of re-entry in a lease made under a power in these words, "in "case no sufficient distress can be taken on the "premises," they not being in the power, was not a good execution of that power. I doubt very much the propriety of that decision; but be that case as it may, it is different in one material feature from the present case. The re-entry required was for nonpayment of the rent reserved by the space of twenty-one days, so that there was a specification of a particular mode, and therefore it perhaps might be inferred no other qualification would be warranted. Here no time is limited: a power of re-entry *generally* is all that is required; and therefore I think reasonable qualifications may be made.

In this present case, which was only a few years afterwards, the same court thought this power well executed. They must have thought their former decision was wrong, or that this case was distinguishable from it: Lord Ellenborough and Mr. Justice Bayley sat upon both those cases. But whatever may be the construction upon the statute

* 13 East, 118.

of the 4 Geo. 2, I do not rest my opinion upon that. My opinion is founded upon this, that the power of leasing leaves it to the discretion of the lessor to make a reasonable clause; and that the power of re-entry which is contained in this lease is a reasonable one; and therefore I think that the lease is not invalid.

Graham, B.—In my opinion the demise of the 5th September 1803 is valid. All the directions are strictly observed in the lease, yet how the penner of the lease was enabled to be correct in those reservations but by the aid of the then subsisting or former leases, I cannot readily conceive. But it seems he is mistaken, though with the same guides, in the clause of re-entry for non-payment of rent; for it is said he has unwarrantably and without authority or power, given 15 days respite, and annexed a qualification that no sufficient distress can or may be had on the premises, whereby the arrearages of this 1 *l.* half-yearly rent may be fully raised, levied, and paid.

And the question is, whether this lease, with a clause of re-entry so qualified, is a proper and valid execution of the power created by the settlement? Whether it be so or not must depend on these considerations, viz. whether it is substantially conformable to the intention of the creator of the power, suitable and adequate to its object and purpose, and not injurious or inconvenient to the person next in remainder or succession.

I will not trouble your Lordships with cases to show that powers of this kind should receive a liberal

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construction. I ask only the construction of plain common sense: but as these powers pervade the settlements of all the great and potent families of the kingdom, it is important that the execution of them should not be avoided on slight or immaterial departures, even from a prescribed form, still less where no specific form, but a general direction is given. A prudent father, tenant for life, with such a power, makes his leases with the fairest intention; he provides for his wife and younger children by his savings and personal estate; his eldest son succeeds him, and upon an objection of this kind avoids his leases, and the personal estate of the father is exhausted to indemnify the lessees. This consideration would, I may presume, dispose your Lordships not to be rigid in the construction of the execution of these powers, but to give effect to them when they are fairly and honestly executed, and without injury or sensible inconvenience to the remainderman.

What then did the maker of this power mean by the words, "so as there be contained in every such "lease a power of re-entry for nonpayment of the "rent?" The maker does not say what power—he prescribes no form of the clause. What is it but a general direction to insert a clause of re-entry because of nonpayment of rent, that is, where the rent is not duly paid? This general direction was never intended to be inserted verbally in the future lease; it left the verbal exposition and specific form of the clause to further care and provision; no conveyancer would think of transcribing the terms of this general direction. Besides, "*a* power of re-entry" for non-

payment of rent necessarily implies a selection of one out of several. It might be a power of re-entry at common law, or under the statute, or what is likeliest of all, a power such as had been inserted in all former leases of the same subject, and in the very lease which was surrendered to make way for the present. I repeat it therefore, that this general direction necessarily calls for the exercise of judgment in preparing the clause. I speak not of a definitive judgment, that must ultimately rest with a court of law or equity, but of a judgment of the person who executes the power, or his conveyancer, as to what power is meant; the answer to which to me appears obvious, clear, and necessary—a power fit, suited, and adequate to the occasion. Then what is the object and occasion? The coercive means of enforcing the payment of rent: for my error, if it be an error, is this, that clauses of re-entry are intended for that purpose only, and that courts of equity would at no time suffer them to be used for any other purpose; and that if the clause of re-entry in this lease had been unqualified, as it is contended it ought to have been, a court of equity would have enjoined the landlord, on payment of the rent in arrear and costs; so that the remainder-man would not have been at all the better for the unqualified clause. Looking therefore at this general direction as referring to the exercise of some judgment or discretion to be used in the formal execution of this power, let me consider in what manner a tenant for life most anxious to execute it with scrupulous fidelity would act. He would consult his man of the

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law. The lawyer reads this general direction, he finds he must look into former or subsisting leases, to know first what lands were formerly letten for leases; secondly, what the rents were before and at the then moment; thirdly, what heriots had been heretofore reserved, what duties, what other reservations were to be made and secured. Could he forbear, or would he be bound to forbear, to look into the clause for nonpayment of these nominal rents? Were he so bound, I should much regret that the law had established a rule which excluded the very best information he could obtain. But suppose that he must shut his eyes to those clauses in former leases, and in the very subsisting lease of the same lands, he must, in the first instance, consider what is a fit and proper clause for the purpose. He would naturally say, I cannot pen this clause in the language of the settlement; and if I make it without any qualification by a more obvious and easy means of obtaining the rent, I make it a re-entry at common law, with all the inconveniences attending it, and its ultimate control in a court of equity. He would therefore conclude that he had better take the statute of the 4th Geo. II, c. 2, for his guide, and pen the clause in the manner which that statute seems to have pointed out on a view of the law and equity applicable to that subject. I cannot be supposed to mean that this first exercise of judgment in preparing a proper clause could ultimately weigh, if in the execution of the power the lawyer had misconstrued its meaning and the intention of the maker; nor can I be supposed to mean that the

validity of the execution of the power could properly be left to a jury;—the decision on that point could only be by a court of law or equity.

I have said that the clauses for re-entry in the former and subsisting leases were a proper guide to the exercise of discretion in preparing those clauses; but I say it subject to the doubt which some may entertain; and if I am not allowed to use that evidence I do not feel that the argument in support of my view of this question is much inipaired; though with that evidence the point is decided. But I take this to be a case very different from *Cooke* v. *Booth*, which I know has been over-ruled by many subsequent approved decisions. In that case the Court of King's Bench were called upon to put a construction on a written and explicit covenant of no ambiguity, or if any, of á patent ambiguity; it was a covenant to grant a new lease on the dropping of one of three lives, for the lives of the two remaining, and the third life under the same rents and covenants. But this is nòt a question on the language of a written instrument; it is impossible to contend that it should be literally transcribed into the clause; it must have some modification: and if you admit any you admit the exercise of common sense and the consideration of the fitness and propriety of the power; and to my apprehension you admit inquiry as to what clause of re-entry the settler meant. She has bid you look to former leases as to the lands so usually letten, the usual rents, heriots, services, and covenants for their recovery, and for doing suit at the mill; has she not therefore bid you look for what was the usual

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and proper clause of re-entry for non-payment of those nominal rents? This extrinsic evidence is not resorted to for the purpose of explaining the written and unfolded language of an instrument, but as a guide how to unfold and prepare a future instrument under a general direction, to observe in all particulars what had theretofore been done. That is the substance of all the restrictions; "do as has been done heretofore." But I do not wish to involve the case in this discussion; though for my own part I think the facts found by this special verdict and rightly admitted in evidence decide the question.

As to the question arising on the assumption that the giver of the power meant that the clause of re-entry should be simple and absolute, it is said, with great impression on many, that there is a manifest distinction between a simple power of re-entry, and a power clogged, as it is said, with a condition or troublesome qualification; but the question is not on a difference in terms, but on a difference in substance and effect; a difference which may sensibly injure the remainder-man, not on a difference which leaves him effectually in the same situation, or, as I think, in a situation which may be proved to be better. To judge of this, let me suppose that a clause, such as has been suggested, had been inserted in the present lease; how would it have availed the remainder-man? He must have begun by a demand of his rent of 1 *l.* at proper time and place. It is hardly necessary to quote Lord Coke's Commentary on Littleton* to show with what punctilious and expensive accu-

* 153 a, 154 a, 201 & 202.

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racy this must be done ; the preamble of 4th Geo. 2, sufficiently shows how much those niceties were felt as impediments. He must then with much trouble and expense serve his ejectment, and for a rent arrear of 1 *l.*, and he is immediately met, first by the disgrace of such a proceeding, and then by a bill in equity, with a tender of his 1 *l.* and costs. I may presume that it was the knowledge and prevalence of this equity that gave occasion to the statute 4th Geo. 2, which empowered the courts of law to exercise the equitable jurisdiction, and provided, on the one hand, an easier remedy for the landlord to enforce the payment of his rent; and to the tenant a more prompt and less expensive relief, when powers of re-entry were abused. I do not contend that this statute has taken from the landlord his right of reserving to himself a power of re-entry absolute; but it excludes him from all benefit under the statute if he does not pursue the steps which it points out; and when a question arises, as here, of a fit and proper power of re-entry for non-payment of rent, what better guide presents itself for the judgment of a man who is to prepare the clause, than the directions of a statute framed on the view of all the legal rights of the landlord, and the equitable relief of the tenant? And we may remember that when this power was created the statute of 4 Geo. 2, had passed many years, and its operation was known and prevalent.

I have said, that the giver of this power meant by the words used a power fit, and suited, and adequate to the occasion, that is, to its proper and allowable use, the security and enforce-

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ment of the payment of the rent: and I take it for a clear principle of equity that the landlord shall use it for no other purpose. But two inconveniences are pointed out as affecting the remainderman; first, that of proving that there was no sufficient distress on the premises; secondly, the delay and expense of a replevin. The first is applied to an estate for lives, where the rent is merely nominal, and intended only to preserve the relation of landlord and tenant, and the right to future fines. It is almost impossible to suppose property of that kind so dismantled as that the landlord should be put to any difficulty to find a cow, or horse, or piece of furniture, to pay a rent of 1 *l.* and, with respect to the second difficulty, the same may be said of the improbability of any replevin for so small a rent. But the best answer is, that if the clause of re-entry stand ever so absolute, the tenant, though he would not be heard in equity to say that there was a sufficient distress on the premises, could stay the proceedings at law on payment of the rent and costs; for I take it that it was always and originally in the jurisdiction of a court of equity to relieve against clauses of re-entry for non-payment of rent, where the tenant was ready to pay the rent, or to give better security if required, for the punctual payment of it, whatever doubts the court of equity might entertain of clauses of re-entry for breaches of other covenants, where it might not be so easy to place the landlord in that situation with regard to his property, which he had a right by all means to secure to himself.

With respect to the cases cited I shall con-

fine myself to a very few observations on only two, those of *Coxe* v. *Day*, and *Hotley* v. *Scot*. With respect to the former, I am reported to have expressed myself too strongly, by saying that it was contrary to law and common sense; and those expressions have been justly animadverted on by one of my learned brethren. I do not recollect to have used such expressions as applied to that case; but if in the warmth of argument any such expressions did escape me, I have only to regret that I have been so faithfully reported. This, however, I may say, that from my manner of introducing my own opinion I could not fairly be understood to mean an attack on that authority so unbecoming. I certainly mentioned that case as standing in the way of the present decision, and opposed to it the contrary decision of *Hotley* v. *Scot*, that in that equipoise of authorities I might more fairly exercise my own judgment; and I said upon that occasion, what I now repeat, that notwithstanding the imperfect printed report of *Hotley* v. *Scot*, it is impossible to read Mr. Butler's note, (whatever may be said of his then youth and inexperience), and not to see, that the point of the effect of a qualification similar to the present was distinctly made, argued upon, and over-ruled, Lord Mansfield saying, as I apprehend, with perfect accuracy and truth, that the clause was a reasonable one and conformable to the statute of Geo. 2; and that clauses of re-entry for non-payment of rent were in equity considered only as the means of enforcing the payment of it. But, perhaps your Lordships may think the case of *Coxe* v. *Day* distinguishable from the present. The ob-

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servation of my learned brother, who first delivered his opinion, is material, and in that case there was no reference, nor necessity of reference, to former leases as to what lands should be letten, what ancient rents, what heriots, *suits*, duties, or services should be secured. It was a power to lease *any* of the lands, with the single qualification, that the leases should reserve the best and most improved rents.

The decision of the Court of King's Bench in the present case may be thought to throw some doubt on *Coxe* v. *Day*; and, all the cases considered, the present is open to your Lordships decision. I humbly offer my opinion, that the lease in question is not, for any reason that I can suggest, an invalid execution of the power.

Richards, C. B. The question arises upon a deed of settlement made on the marriage of Lady Vernon, by which her Ladyship was made tenant for life, with remainder to Lord Vernon, her intended husband, for life, with powers of leasing, which were given to each of them as they should happen to be in possession of the premises. One power is to lease the mineral lands, in which there is no clause of re-entry at all; the power mentioned secondly in the settlement is to grant leases at a rack-rent, with a proviso for re-entry in case the rent be in arrear for twenty-eight days: in that case there is a power of re-entry required in the lease to be granted for non-payment of the rent; but there is an extension of the time from the days fixed for the payment of the rent to twenty-eight days. The clause is to be

introduced into a lease in which the rent and the occupation run together, and are considered as of the same value, the rent is paid and payable for the year during which the enjoyment of the premises has been had; yet by the power in that case there is expressly an extension of twenty-eight days given for the payment of the rent. The power now in question authorizes Lord and Lady Vernon, as each of them shall come into possession of the premises, to grant leases of such parts of the land as were then leased for life or lives, so as there be reserved the ancient and accustomed yearly rents, duties and services.

It seems to me impossible to ascertain what lands were then leased for life or lives without looking into the leases and other instruments which were produced at the trial; and the production of the same instruments is equally necessary to show what the ancient and accustomed yearly rents were. In this view of the case, as it seems to me to be impossible to consider the effect of these powers without looking to the instruments to which I refer, it follows, that in my judgment they were properly admitted in evidence at the trial. Then come the words of the clause in question, viz. "and so as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved." A more general power can never be expressed: It is not clogged with any qualification; it requires only a clause of re-entry "for nonpayment of the rent," not *on* nonpayment of the rent. There is no allusion to an immediate entry *for* or *on* nonpayment of

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the rent, but a clause of re-entry generally for non-payment of the rent.

Now in this last case, which is the case before your Lordships, the lessee pays the fine contracted for to the tenant for life, the lessor, at once, in the very commencement of the term. The tenant for life receives at that time the whole value of the lease and of the premises demised, except the nominal rent of 2*l.* per annum, and the small duties; and it can hardly be supposed that it could be the intention of the parties to the settlement, in a case where the lessee paid all the value at the first instant, that he should be in a worse condition than the lessee under the other power, paying rack-rent, who was not to pay any rent until he had enjoyed the possession of the premises, and to whom an extension of twenty-eight days beyond the time fixed for the payment of his rent was given.

Now Lord Vernon, intending to execute this power, executed the lease in question, containing a power of re-entry for nonpayment of rent, with this proviso, " that if it shall happen at any time during the said estate hereby granted, that the said yearly rent or sum of 2*l.* and every or any of the duties, services, reservations and payments hereby reserved, or any part thereof shall be behind; unpaid or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all

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arrearages thereof, if any be, may be fully raised, levied and paid," it shall and may be lawful to and for Lord Vernon, or the person to whom the freehold or inheritance shall belong, to re-enter: and the question before your Lordships is, whether this proviso is agreeable to the power, which directs that in the lease there should be a power of re-entry for nonpayment of rent.

There are two objections stated; the first is, that in the lease the time for the payment of the rent is extended to fifteen days, whereas it is insisted that the re-entry ought to have been immediate, and at the time when the rent was reserved to be payable. The second objection is that the re-entry is given in reference to a want of a sufficient distress.

It is clearly established that the construction of powers is to be governed by the intention of the parties who make them, that intention to be ascertained by a fair interpretation of the language in which the power is worded; in this case, Lord and Lady Vernon, uniting in marriage, may be considered under their settlement as owners of the estates, though before marriage it was her Ladyship's property. By this settlement they propose to grant leases to all who choose to take them upon the terms mentioned in the powers; one of which, relating to the property under consideration, is, that the lease should contain a condition of re-entry for non-payment of rent. It has been considered, and has been ruled in many cases, that in the construction of powers the courts ought to be as liberal as may be; and more liberal in favour of a lessee where the power is executed by the person out of whose

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inheritance the estate issues than when executed by a third person, a stranger. It has been contended, that in this case, the estate moving originally from Lady Vernon, Lord Vernon was to be considered as a stranger, and that there ought therefore to be a greater strictness applied with regard to the lessee than if he was originally the owner of the estate; but I beg of your Lordships to observe, that in this case Lord and Lady Vernon had each of them, when in possession, the same power to grant leases; the words of the power are precisely the same as applied to each of them, and must be construed as much to apply to a lease made by Lady Vernon, as to this lease made by Lord Vernon; and therefore they must be construed with the same attention to the meaning as if the words were applied to a lease by one or the other, and we are bound to consider, in construction, the lease in question as if made by Lady Vernon, from whom the estate originally moved, and who may fairly be considered as in a situation similar to the case which I am about to mention; and upon which some of your Lordships can have no doubt. Suppose a landlord seised in fee simple enters into an agreement in writing with a man to grant him a lease for a number of years, with a right of re-entry for non-payment of rent at the time specified: Suppose a bill filed in a court of equity by one or the other of the parties for a specific performance of the agreement, the Court would refer it to a master to settle the terms of the lease; and any gentleman who has ever sat in a court of equity must admit, that the Court will, if applied to, direct the insertion of a power of re-

entry upon reasonable and usual terms, and unquestionably extend the time of re-entry to a reasonable time beyond the time fixed for payment of the rent; referring at the same time to a sufficiency or deficiency of distress, as in the present lease. I mention this case of an agreement, because it seems to me to apply very closely to the case before your Lordships. Courts of equity adopt the same principle and practice in hundreds of instances, such as leases by guardians of infants, committees of lunatics, and the like. The Court so acts because it executes the intention of the parties; and a court of law in construing powers, is equally bound to adopt the intention of the parties creating the power; and there is no difference in the construction of words in a power, and of words in any other instrument. Suppose Lord Vernon had agreed to grant a lease pursuant to his power, and had not granted it, and there was a bill in equity filed to compel him, or by him, to compel the person who had agreed, to execute the lease according to the power, the court would, I doubt not, direct a lease to be executed with a power of re-entry upon the usual and reasonable terms, which would be according to its construction, according to the intentions of the parties creating the power; and, I presume, the lease to be executed under the orders of the court would be similar to that which has been executed in this case. I am more willing to refer to the proceedings of a court of equity, because I am speaking in the presence of those who have, perhaps, more knowledge and experience than any persons of the present or any former times.

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I understand from extensive information, and my own experience, such as it is, justifies me in believing that the practice of all conveyancers has been consistent with what I have stated now, so far as the extension of the time is concerned; and if it be so it certainly must be considered as founded upon the intention which is ascribed to the party making the power, for it is obvious that if the power, as it is contended, required a right of re-entry at the moment the rent was due, the enlargement of the time would be in some degree unjust to the reversioner, as it would cause a postponement of the day of payment: but the practice has been, I believe, so general that it must be strong evidence of the intention ascribed; and so inveterate, that it would be very highly dangerous to affect it: and I have always understood that the Judges have always considered an universal or very general practice amongst conveyancers a sufficient ground for their decisions, though they did not entirely approve of the principles on which the practice had proceeded.

On this point, *viz.* the extension of the time, I have been always inclined to support the lease, and I am of opinion that the objection ought not to prevail.

With respect to the other objection to the lease, *viz.* that a re-entry cannot be had unless no sufficient distress can be had upon the premises, I do not find, from the best inquiry that I have made, that any very general practice or understanding upon the subject, namely, with respect to the execution of powers, has prevailed among conveyancers; and I have not been able to find that any decision has

yet taken place by which I am in a judicial point of view bound to abide. I must confess that I was for some time convinced by the reasoning so strongly pressed by some of my learned brothers; and that I formed an opinion on this part of the case agreeable to theirs from whom I am now under the necessity of dissenting; but your Lordships commands have obliged me to re-consider the case, and I feel great consolation in having had the opportunity, as I hope that I have been able, to take a more correct view of the subject.

The objection to the part of the lease with which I am now troubling your Lordships is certainly greatly supported by the inconveniences imposed on the reversioner; but if I am right in deeming the lease good, notwithstanding the extension of the time for the payment of the rent, it must be because it is agreeable to the true intent and meaning of the power, though there are no words that expressly allow that extension. If so, it may be right to presume that the words used in the power meant more than is expressed, and that any right of re-entry on reasonable and usual terms, so far as the extension of the time is concerned, is good. If so, what prevents us from inquiring whether the other terms are reasonable and usual, I mean with respect to the distress; and from holding that if they are usual and reasonable they are within the power? It cannot, I think, be said, that the circumstance of the want of a sufficient distress can be considered as imposing any condition either not reasonable or not usual. Every one's experience shows that in leases in general it is not only usual but most general, and

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it cannot be supposed to be otherwise than reasonable; and the leases produced in evidence, which I think were properly received, prove the existence of this clause in all of them as applied to the power.

It is observable, however, that the power now under consideration is the first in the settlement; it requires in very general terms that in every lease pursuant to it there should be a power of re-entry for nonpayment of rent, or because the rent is not paid; it does not specify any qualification or condition, and only requires that clause of re-entry without more, excepting for non-performance of the covenants. Now it is clear that the clause does contain a power of re-entry for the nonpayment of rent, than which nothing in the world can be more general and unrestricted; and under words so general I humbly conceive that there is in the lease a clause of re-entry on reasonable and usual terms. In a condition of re-entry all that the law requires is to secure the payment of the rent, and re-entry is, as it were, penal; and therefore the clause in this lease under the general words of the power is nothing more than what the law would enforce and require, and therefore the clause is exactly agreeable to the power, as it is reasonable and usual.

That the real object of the power of re-entry is to secure the payment of rent is quite obvious; for a Court of Equity acting on reasonable grounds has always prevented a re-entry from taking place if the rent is paid, though the time of re-entry has arrived; because it was considered merely as a security for the payment of the rent. The maker of it cannot be supposed in directing the clause of re-entry to

have intended really to destroy the interest given to the lessee, but to secure the re-payment of the rent reserved to the reversioner: and now by the 2d Geo. II. the Legislature has given a sanction to the clause which is used here; and directed the effect of it in general. Surely it is very difficult to imagine it is not a reasonable clause, since the Legislature has authorized it in an Act of Parliament made expressly for the purpose of assisting landlords; and I apprehend that the clause must be considered as agreeable to a power which requires only a clause of re-entry for nonpayment of rents.

I beg here to request your Lordships attention to the observations which I have made on the proceedings of Courts of Equity, which apply to this head as well as to the former; for I conceive that those courts would direct a clause similar to that which is now in question.

Now suppose this was a lease by Lady Vernon, it seems to me that according to the argument itself used at the bar, there would be very great difficulty in maintaining that the lease was not according to the power, as the estate moved from her ladyship, and therefore the construction of the power would be more favourable to the lessee; and if the words were the same in the lease she might have made as they are in this lease which Lord Vernon has made, the lease would I think be considered as valid; and there can be no different construction of the same words, for the construction in both cases must be on the intention ascribed to the parties who used them in the settlement.

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The lessees are purchasers for valuable consideration under the settlement, and upon the faith of the power in the settlement, they have paid the value of the estate for the term demised to them, except the small rent and duties. I am persuaded that every court must feel very desirous of supporting the lease executed. The clause objected to is reasonable, and perfectly calculated to secure the rent. It is inserted in all general leases—it is sanctioned by Parliament—it is, as I conceive, agreeable to the proceedings in Courts of Equity, which act on the intention of parties, collected from the instruments executed by them; it is consistent with all the other leases in the family made under similar powers.

Under these circumstances I confess it appears to me, on the best consideration I have been able to give the case, that this lease is warranted by the words of the power in the settlement, and that the lease is valid.

Dallas, C. J.—I am of opinion that the lease in question is bad, as not being a good execution of the power.

Two objections arise. The first, as to the fifteen days: the second, to the clause providing as to distress: and the case has been argued at the bar, and considered by the learned Judges on the double ground of authority and principle; to each of which I shall separately advert.

And first, as to the fifteen days. The single case cited is of a negative nature; that is, one in which, though other objections were taken, this was

not. And on this case I think a great deal too much stress has been put; for without saying at present whether the objection be well or ill founded, good or bad, intrinsically considered, I will only observe, that when it is seen how it weighs with many learned persons, now that it *is* taken, it seems to me it is going a great way indeed to assume that if it *had been* taken formerly it could not have succeeded; and, much too far to infer, that its not having been taken is to be considered as proof that by common consent it was treated as not fit to take. The more natural and rational supposition I should apprehend to be that it was not adverted to at the time, at least this is the opinion I should form, for I know not on what legitimate ground of reasoning we can assume that what appears to be so important *now*, was considered and rejected as unfounded *then*. Still, however, let this case weigh as much as it fairly ought it is admitted to be but negative authority; and the question now occurring, and requiring positive decision, it must be examined and determined on authority, if there be authority; and if there be no authority then on principle. Such then is the only case relied upon with respect to the objection applying to the fifteen days.

I come next to the provision as to there being no sufficient distress. And here again, in support of the validity of the lease one case only has been cited, viz. *Hotley* v. *Scot*, as bearing directly on the point. On this I shall not waste time by dwelling longer than, in this last stage of the discussion, I feel to be necessary; and therefore, as to the imperfection of the report, the character of the re-

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porter as such, the insufficiency and invalidity of the reasoning as reported, and the other grounds of objection made by some of the learned Judges, with whom I agree in opinion, to these I shall merely refer, repeating only for myself what I said upon a former occasion, and am not disposed on reflection to retract, namely, that though the particular point now under consideration was not adverted to then, in the decision, reported as it is, still, as it must have been different if the objection then and now made had been deemed valid, I think that in fairness I must take it, such as it is, to be a case adverse to the opinion I entertain. Taking it then as such, and trying it as authority, the only ground to which at present I am addressing my observations, the first objection to it is that it is a single case, not professing to be grounded on any that had preceded, nor appearing to have been supported by any that had followed it, but on the contrary the only similar case, *Coxe* v. *Day*, standing in opposition to it; for as such I consider it, and for reasons which I shall presently give. I need scarcely add that such a case, dissented from as it now is by so many of the learned Judges, admitted to be inconsistent with the decision in *Coxe* v. *Day*, and at all events confessedly at variance with the observations and reasoning of Lord Ellenborough throughout the whole of that case, can scarcely, as mere authority, be considered of much avail. In opposition to it, I have said, appears to me to be the case of *Coxe* v. *Day*. But here again I wish to deal correctly with the subject of authority; and though to a certain degree (and to what degree I shall examine) *Coxe* v.

Day must be permitted to operate, still I think it is not to be relied on strictly as mere authority, even in favour of my view of the subject; first, because if *Hotley* v. *Scot* was rightly decided, *Coxe* v. *Day* would be in opposition to it, and thus we should only have case against case; and further, that with respect to *Coxe* v. *Day*, of the learned Judges who now support the judgment of the King's Bench, it is disapproved of by one, as to the grounds on which it stands, and expressly and in terms dissented from by the other; and lastly, because being a decision by the same court by which this case was in the first instance decided, if to be distinguished, as it is contended it is to be, then it does not apply; if not to be distinguished, nothing of authority can result from two cases decided by the same court in opposition to each other.

To dispose, therefore, of the whole subject of authority, it appears to me, that though these cases as cited have afforded much matter for observation and argument, they furnish nothing like authority when correctly considered, and in a judicial sense. A word or two only, before quitting this part of the subject, on what has been much relied on as applied to the objection of the fifteen days, namely, the general prevalence of such leases to be taken as evincing, it is said, the sense of the Profession, and the mischief that will result from now holding the objection good. I allow to these topics their weight, and much weight undoubtedly belongs to them; but if, when strictly examined, the practice proves to have crept in against principle, and is not pretended to depend upon any positive authority, I can only say, that being bound

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to look at the objection now that it is made, I must decide upon principle; and if principle and practice are at variance practice must give way; and in this case, as in others, if the mischief be extensive, the proper remedy, if such there be, must be sought for and applied elsewhere. This however at most confines itself to the objection as to the fifteen days; for with respect to the clause of distress, it is not pretended to have any usage or practice in its favour; and the only decided case is directly the other way. And with respect to practice, the extension as to the fifteen days operating, I admit, in proportion to length of time and number of leases, becomes for this very reason, and in the same proportion, stronger against the clause as to distress, inasmuch as in all such leases no such clause is to be found; and my brother Holroyd, to whose labour of research and solidity of learning we are all of us, at all times, so much indebted, has informed your Lordships, that on an accurate research he has not been able to find in the books of precedents beyond one instance of such a lease, and that not appearing to be adopted in common use. Practice is therefore not only wanting in its favour, but practice is the other way; and in this respect practice and decision go hand in hand.

I come now to consider the case on principle. And first, I admit, that if the power is to be deemed indefinite as to time, and therefore to be exercised in a reasonable manner, leaving it to the discretion of the party by whom it is to be executed to decide what is reasonable, it does not appear to me that the giving fifteen days in the way in which they are

given can be considered as unreasonable. In truth, I deem it quite immaterial to any real interest of the parties, or as to any substantial effect, whether 20*s.* are to be paid by the one and received by the other fifteen days sooner or later; and so I apprehend the party might have thought had his attention been drawn to the point. But when I am told of what the party really intended, as of an independent and substantive intention, collateral to the instrument itself, pre-existent, and having caused the power to be framed precisely as it is, I can only say I take the probability to be, if we could look to the mere matter of fact, that the party himself never entertained a precise intention of any sort on the occasion. The substantial purposes were to be accomplished; the detail of execution was of course left to others; and this may account for the difficulty that has arisen. Drawn as the power is, it was probably supposed by professional persons that the former leases might be looked at, and the clause in question being found there was adopted, and I agree reasonably adopted, if such leases were to govern or might govern; but whether so or not is one of the questions in this cause, and which, if decided in the affirmative, would support the lease as far as this objection goes, though, decided the other way, the case will still depend on the other general grounds, and the lease may notwithstanding be valid. Fifteen days therefore, if time might be given, I should consider as not unreasonably given.

In like manner as to the clause of distress, I see no actual injury as likely to result from it in this particular case. I agree with several of the learned

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Judges that it is not likely that 20*s.* of half-yearly rent would be suffered, if demanded, to remain in arrear; or if in arrear, that in the case of leases upon fines a distress to the value of 20*s.* would not be found. But this is a way of trying the question precluded by the very nature of the question itself. The providing for a particular event not only pre-supposes the possibility but even the actual occurrence of such event; it pre-supposes to provide for it; it anticipates and adapts itself to it.

The question therefore arises on what the parties have said and done, not on the reasonableness of doing it, or on the sufficiency or insufficiency, the weight and value, which we are not at liberty to consider; and therefore without looking out of the instrument, but to the instrument, and searching in it for the intent to be collected from what is there expressed, if sufficiently expressed, in other words, treating the question as your Lordships desire us to treat it, that is, as a question of construction arising on the instrument such as it is,—what is the legal effect of the lease compared with the power?

And first, to look to the power, (agreeing, as I do, that the intention of the party must govern,) as to be collected from the whole instrument. It directs a clause of re-entry for nonpayment of rent, and this merely; nothing is said as to time, nothing as to distress; nothing as to reasonable, nothing as to usual; nothing that refers to any former lease or leases in any way whatever, so as to furnish a rule, though reasonable and usual, ancient and accustomed, are terms to be found as words of reference in several parts of the instrument, directly connecting

themselves with former leases and for various objects and purposes.

First then as to time. That time may be as properly fixed by the occurrence of an event as by the express specification of time can scarcely be denied; and when rent is made payable on a particular day, connected with a clause of re-entry for rent not paid, I can only understand not paid on the day when payable. In this there is nothing ambiguous, nothing deficient, nothing to be implied to complete what is expressed. Nor has it been argued, that if the lease had been drawn in the very terms of the power it would not have been a proper execution of the power. But it is said in the same instrument twenty-eight days are given for payment on the leases at rack-rent, being a substantial and heavy rent, before forfeiture can attach for nonpayment; and it is argued,—Could the party intend a provision so preposterous and harsh as that forfeiture should become the immediate consequence of a half-yearly rent of 20 *s.* falling into arrear? To which I answer, that this suggestion of harshness appears to me to be imagination, and nothing more; for what of real harshness is there in making an estate liable to forfeiture upon nonpayment of a sum so small, as from its very smallness not to require time to be given to pay it? Fifteen days were scarcely necessary to put a party into condition to pay 20 *s.*! And further, why the party to receive could not judge if time were to be given as to the fifteen days as well as to the twenty-eight, I am altogether at a loss to conceive. If at liberty, therefore, to conjecture as to intent, independent of the words made

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use of, my conjecture would be, that the party himself meant nothing as to the fifteen days beyond what he has said; that he meant only what he has said, and still less, if possible. Can I suppose that he actually meant time to be given, intentionally avoiding to decide what that time should be, and this merely to leave it open to the discretion of another to decide for him what he could just as well have decided for himself? In the particular case time may be of no moment any way; but as applying to future cases, and involving principles applicable to the construction of all instruments, it becomes of real magnitude and importance. It is not in the operation of the clause, as it applies to the lease, treated as a valid lease, that any difficulty arises, but in the application of the lease to the power, with a view to the validity of the lease.

But I go farther, and will suppose the question to be, whether the power should not be so construed as to imply a reasonable discretion to have been intended as to time. In such event, it has been asked who is to construe what would be reasonable time? Now, passing by all the difficulties that may arise in this respect, I am willing to answer—the competent tribunal according to the nature of the case. But which, according to the case, is the competent tribunal? This becomes a question. On the trial of this ejectment was it the Jury or the Judge? and though, in the result, which of the two might be ascertained, yet the result could only be got at through, as now, a doubtful controversy; and this uncertainty as to tribunal, with the additional uncertainty as to result, that result depending on the un-

certainty of opinion, which may be different with different men, and of which these proceedings have in every stage afforded ample proof, and, this day in particular, a striking instance, are all inconveniences introduced by holding the power to be indefinite, and would have been avoided by framing the lease in the words of the power. One way it would be certain; the other opens at least to question; and it is this substitution of uncertainty for certainty, this rule of discretion, which throws open the gate to litigation, that would otherwise be closed and fastened against it, that constitutes my fundamental objection so to understand and so to construe this power. If therefore the question be, whether reasonable or not should be implied, I should hold that it ought not to be implied, even if we were at liberty to imply it, framed as the power is.

I come now to the second objection; and though in one light it is the most material, yet it will not be necessary in this late stage of the proceedings to discuss it at any length; I mean restraining the right to re-enter to there being no sufficient distress to be found on the premises. And with respect to this, all I have hitherto said as to time applies with increase of force. It is a further clog, not warranted by the original power, and it is one which, as to possible injury, does not rest in speculation merely. The case so often referred to in the Exchequer forms a practical comment. When resorted to as a remedy it shows the wrong which may result. The lessor of the plaintiff failed because some obscure corner of the premises had not been searched. That case is this; and in a similar proceeding the effect would

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have been or would be the same. To the validity of this objection *Coxe* v. *Day* is in point. It is so, I conceive, in the decision; it is so beyond all doubt, as I apprehend, from what is said by Lord Ellenborough throughout the whole case. Whether to be fairly distinguished or not, in any respect, I have already examined, and will not repeat. The argument drawn from the statute, and the general nature of such a clause considered as a mere security for rent, was brought forward then, as now, but was mentioned only to be over-ruled, the point not appearing to the Court to be sufficiently tenable to admit of discussion.

To one or two other points I shall now barely advert. I can scarcely think that the question can be reduced to one of mere verbal consideration. But if so, I cannot myself feel the difference between "on" and "for;" "*for* nonpayment of "rent," I consider to be equivalent to "*on* non-"payment of rent;" though I have no hesitation in admitting that "on" and "for" may be sometimes different and sometimes synonymous, and this depending on the context and the subject-matter. But looking at the subject-matter, and taking the whole of this instrument into consideration, I think there is no reason for distinguishing on the present occasion. In like manner, as to the term "beneficial," I conceive it to refer to the lessor or the remainderman, and not to the lessee; and so understood, if there be any weight in the observations I have hitherto made, such a reservation would be less beneficial to the lessor than the direct clause unclogged with any conditions as to time or distress.

Taking, further, the words of the power to apply to former reservations, and that with this view former leases might be looked at, it seems to me the argument turns the other way. The power directs that there be reserved the ancient and accustomed rents, or as great or beneficial rents, duties, and services, thereby letting in, I admit, the former leases as evidence of what rent was ancient and accustomed; and so as to duties and services; but following up these general words with special and particular words, showing the powers were not intended to include the clause as to re-entry, particular words specially providing for this right, and in terms directing how it shall be reserved: and having mentioned former leases as admissible in these respects, I will only further say I think they were not admissible, except for the purposes as to which they expressly, or by necessary implication, refer. This is indeed a necessary consequence of all I have already said, and without therefore going at large into the wide field which the argument in this respect has occupied, but referring generally to the opinions and reasoning of those who think as I do, I will merely state the broad ground of my opinion, which is, that there being no ambiguity of any kind, nor any words of reference to any other or former leases as connected with this subject, nor any generality of expression, so as to let in extrinsic evidence to restrain or qualify or to exclude, but a clear, specific, and definite sense and meaning, such evidence is not admissible. This conclusion, it will be admitted, must follow if the premises are well founded, but whether so or not

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depends, as far as my opinion goes, on the validity of the general grounds on which that opinion rests, and of which it is for your Lordships to judge.

Abbott, C. J.—I am of opinion that the demise of the 5th September 1803, is not invalid.

The objection upon which it is now sought to avoid the lease is, that the clause of re-entry for nonpayment of the rent is not such as is required by the settlement; and this for two reasons. First, because it allows to the tenant fifteen days for payment beyond the days mentioned in the lease; and secondly, because it is restricted to instances wherein no sufficient distress or distresses can or may be had or taken upon the premises, whereby the same, and all arrearages thereof, if any be, may be fully raised, levied, and paid.

This objection is *strictissimi juris*, and as such is by no means to be favoured; though if the *strictissimum jus* be found upon due consideration to be with the objector a court of law is bound to yield to his objection. As I have already intimated I think the right is not with the objector.

In the course of the argument your Lordships attention was called to a supposed distinction in the construction of powers, between such as are created by the owner of the inheritance limiting a partial estate to himself, and to be exercised by himself as owner of such partial estate, and such as are created by the owner of the inheritance to be exercised by a stranger, to whom he may have limited a partial estate, or to whom he may have given the power as

a naked power, unconnected with any estate in the land. Such a distinction appears inapplicable to the present case, because the owner of the inheritance has here limited a partial estate, first to a stranger, and secondly to herself; and the words of the power must have the same meaning, whether the question had arisen upon an execution thereof by the stranger or by herself.

It was also argued, that the power of leasing being for the benefit of the tenant for life, the qualifications and restrictions imposed upon the exercise of the power are for the benefit of the remainder-man; and therefore that the clauses of qualification and restriction are to be construed most beneficially for the latter. This point also appears to have little weight in the present case; because, adverting to the amount of the fine paid upon the surrender of an existing lease, and to the amount of the rent reserved, I think it cannot be supposed that the purchaser of the present lease would have given one farthing less if the clause of re-entry had been strictly confined to nonpayment of the rent at the very day; or that the estate of the remainder-man would now be worth one farthing more if the lease in question had contained a clause to that effect, instead of the clause upon which these objections have arisen.

And being of opinion that the tenant for life could derive no benefit, and that the remainder-man sustains no prejudice as to the value of his interest, from the form in which the clause of re-entry is found in this lease, I think a court of law may reasonably regard the interest of the tenant, *the purchaser of the lease*, and put such a reasonable and liberal con-

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struction upon the words of the power in the settlement as will give effect to the lease, rather than yield to critical forms and subtile objections adduced for the purpose of defeating it. And this becomes the more important, if it be true, as has been suggested, that very many leases are in existence containing clauses similar to the present, and demised from powers expressed in language similar to that of the power from which this lease was derived. Considerations of this nature certainly ought not to control or vary the sense of plain and unambiguous words; but they may be reasonably entertained for the construction of words of doubtful import; not merely by reason of the consequences of a decision in a particular case affecting numerous other cases of the like nature, but because the fact suggested is evidence of the general opinion entertained by professional men upon the meaning of the words of a legal instrument.

These words, in the present case, are "a power "of re-entry for nonpayment of the rent to be "thereby reserved." And the first question is, whether these words may be understood to mean a reasonable power, or must be confined to a power which the landlord may exercise if the rent be not paid at the very day, and without regard to any property to be found on the demised premises, upon which he may levy his rent, and thereby compensate himself at his tenant's expense for his tenant's neglect.

If the words may be understood to mean a reasonable power, the only remaining question will be, whether the power of re-entry contained in this

lease be a reasonable power. I shall proceed in the first place to show, that in my opinion the words in question may be understood to mean a reasonable power. Nonpayment is a mere neglect or default, and if the words " a power of re-entry for non-payment of the rent" are to be taken strictly and *ad literam*, they will import a power of re-entry for the mere neglect or default of the tenant; but this cannot possibly be their legal import or effect, because by the common law of England a landlord never could enter for the mere neglect or default of his tenant in this respect under any power or clause in whatsoever language expressed. Some act is always required to be done by the landlord in order to entitle himself to exercise his power, and this is required to prevent the tenant from being surprized or injured. This act at the common law was an actual demand of the rent on the part of the landlord. And the common law required this demand to be in a most precise and peculiar manner. It was to be made just at the close of the last day of payment (allowing the tenant the whole day to prepare his money) at the time when so much day-light remained as might be sufficient to view and count the money, and no more. It was to be made at the door of the demised messuage, if any on the premises, and if none, then at such usual and notorious place of resort where the tenant might reasonably be expected to be found, if he was not altogether absent; and it was to be of the precise sum then accruing due, not including any former arrears, all of which, although due and recoverable by distress or action, were considered as waved by the landlord

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on a question of forfeiture by his prior neglect to demand or enter for them.

Then if the words of the power, or rather of the qualification of the power contained in the settlement, cannot receive a literal construction, and be held to apply to a case of neglect or default only according to their literal purport, they must receive some other and different construction, which must in my opinion be a reasonable construction, and a construction properly suited to the object and purpose in view; that is, to secure and enforce the payment of the rent, so that on the one hand the tenant may not hold the land without payment to the prejudice of the landlord, nor on the other hand, be dispossessed of it, if either himself or the land, which is emphatically said to be debtor for rent, presents payment, or the means of payment, without unreasonable delay or prejudice to the landlord.

It has been objected however, that if the literal or strict meaning of the words be not adopted no other meaning can be, because, as it was said, courts of law cannot say what is a reasonable power or clause of re-entry. But I conceive that in this as in all other cases courts of law can find out what is reasonable, and that in some cases they are absolutely required to do so. In many cases of a general nature or prevailing usage the Judges may be able to decide the point of themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite, and wherever such assistance is requisite there are ready modes of obtaining it. I will mention one instance in which courts of law are required by the Legislature

to discover and decide, if the point be litigated, a question upon the reasonable execution of a power. By the general inclosure act * a rector or vicar is enabled to lease his allotment under certain restrictions mentioned in the act, and among others, so that there be inserted in the lease, "power of "re-entry on nonpayment of the rent or rents to be "thereby reserved within a reasonable time to be "therein limited after the same shall become due." A lease of such an allotment must therefore provide, that if the rent be unpaid for some specified number of days or weeks after the day of reservation, the rector or vicar may re-enter; and if any question should arise, whether the number of days specified in a particular lease be or be not a reasonable time, the courts of law must necessarily find some mode of deciding the question.

For these reasons I am of opinion that the words of the clause in question may and ought to be understood to mean a reasonable power of re-entry. And taking this to be the legitimate meaning of the words, I proceed to show that in my opinion the power of re-entry contained in the particular instance of the lease in question is a reasonable power. Usage is of great weight in considering what is reasonable; and it cannot be denied that the power of re-entry, as expressed in this lease, is in form and substance such as was frequently found in leases before the execution of the settlement by Louisa Barbara Mansel, which was in 1757. This is a fact which must be in the knowledge of some of your Lordships, without recurring to the special verdict

* 41 Geo. III. c. 109. s. 38.

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for information as to the leases of this particular estate. If any space of time could be allowed beyond the days of payment prescribed in the reservation, the space of fifteen days, which is the period allowed in the present lease, will not I am persuaded be thought an unreasonable space of time. Indeed, although this objection was pointed out, it was not so much insisted upon, nor could be in the construction of a settlement allowing twenty-eight days for payment in leases to be made at a rack-rent. The main stress of the argument was applied to that part of the clause in the lease which narrows the power of re-entry to cases wherein no sufficient distress can or may be had and taken upon the premises, whereby the rents and services, and all arrearages thereof, may be fully raised, levied, and paid.

Upon this part of the argument the case of *Coxe* v. *Day* * was quoted and relied upon. It has however been discovered that the decision in that case is contrary to a prior decision of the Court of King's Bench in a case of *Hotley* v. *Scot*, reported in Lofft, and of which a more correct manuscript note was also cited. This earlier case was unknown to the counsel by whom *Coxe* v. *Day* was argued, and probably to the Court also; so that the decision of *Coxe* v. *Day* is not wholly free from question as to its own particular circumstances. It was certainly not thought applicable to the present case by the two surviving Judges of the Court when the present case was before them; and it is distinguishable from this by the difference of the language of the clause

* 13 East, 118.

upon which it arose. For in that case the words of the clause were not general, as in the present, "a power of re-entry for nonpayment of the rent," but special, "a power of re-entry, if the rent be "behind for the space of twenty-one days," which words do not so easily admit the introduction of any other qualification or matter as the general words of the present clause; so that upon the whole the case of *Coxe* v. *Day* does not appear to contain a decision precisely in point to the present case. And therefore in respect of authority the question still appears to be left open,—whether in the absence of any words denoting a contrary intention in the mind of the framer of the clause, a restriction of the right or power of re-entry to the absence of a sufficient distress be a reasonable restriction in a lease like the present; for if it be, then a right or power so restrained is a reasonable right or power of re-entry, and the introduction of such a right or power into the present lease is a good execution of the leasing power contained in the settlement.

Such a restriction of the right had prevailed in practice before the execution of this settlement in 1757. It was known and in use, though probably less general or frequent before passing the statute 4 Geo. II.* in 1731. If the effect of that statute be (as at least one very learned person has thought) 'to alter entirely the common law, and to take away the right of re-entry under any circumstances of demand and refusal of the rent, where a sufficient distress can be found, then certainly the express introduction of the words of restriction cannot invalidate the lease,

* C. 28, s. 2.

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because it is only an expression of a matter tacitly contained and implied by operation of law. But supposing the statute not to have this effect, still in my opinion the restriction is reasonable in itself in a case like the present. The instances of proceeding at the common law by demand of the rent since the statute was passed are very few; the proceeding is in itself troublesome and difficult, as will appear by the circumstances required, which I have already mentioned; it was indeed so troublesome and difficult, and found to be attended with so little benefit to landlords, that the statute was passed for their relief, substituting the absence of distress in the place of demand. Can it then be said that the reversioner is unreasonably restrained or prejudiced by the introduction of a matter which the Legislature has thought generally beneficial to landlords, and which in all probability he himself would have adopted, even if the terms of the lease had been such as to have allowed him to act otherwise? I say that in all probability he would have adopted it, because I presume his only wish, like that of every other reasonable person, must be to obtain the payment of his rent in the most easy and speedy manner. And whatever difficulty there may be in viewing a messuage or farm, so as to ascertain whether sufficient be found upon it to answer the arrears of a rent, bearing, as in this case, a very small proportion to the annual value of the tenement, still I have the authority of the Legislature, and of the experience upon which the statute was founded, for saying that this difficulty is less in practice than the difficulty of making such a demand as would authorize a re-entry

at the common law. If any thing more be desired by the reversioner than a speedy and easy mode of securing and enforcing the payment of the reserved rent, I should say that he desires more than the framer of the settlement intended to give, and more than the law ought reasonably to allow. The power of re-entry, in whatever words it be expressed, can be exercised only in one of two modes; that is, either by making a demand at the common law, without regarding the value of distrainable goods on the premises, or by ascertaining that no sufficient goods are to be found on the premises, without regarding a demand of payment. For the reasons already given I think the latter must be considered as the most effectual and beneficial mode, and therefore, speaking generally of cases of this nature, I can discover no reason for resorting to the former, except a hope (certainly not entertained in this particular case) that the tenant, being taken by surprise, and not expecting a demand, may not be prepared for immediate payment of money, and a desire to take advantage of his want of preparation and deprive him of the residue of his term or harass him with a law-suit. To such a motive a court of law will never lend its aid. And a construction calculated to give effect to such a motive would be contrary to the general principles of the law. And it ought not to be omitted that the present question arises upon the construction of that part of a leasing power which is intended to create a forfeiture of the lease executed under the power. It is said in our books that forfeitures are odious in the law, and this is the reason assigned for requiring so much formality and

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precision in the demand of the rent at the common law. And for the same reason, in addition to all others, I think such a construction ought to be put upon the words of the settlement as will tend rather to the exclusion than to the introduction of forfeitures of the leases to be granted under it.

For these reasons I am of opinion that the demise of the 5th September, 1803, is not invalid.

The Lord Chancellor.—The question which is now brought before your Lordships for decision is undoubtedly a question of very great importance to the parties. We have to determine upon the validity of a particular lease, which is stated in the special verdict. The decision upon that lease however will not only give validity or invalidity with respect to the lease in question, but, as we have been informed upon the argument at the bar, will give validity or invalidity to the leases of a very considerable property. The plaintiff therefore has a great interest in your decision. The tenants of course have a very considerable interest in your decision; but the interest in your decision is not confined to the landlord and the tenants in this case, because I apprehend that if these leases are invalid, the tenants in this case, probably, as in a case from another part of the united kingdom, I mean the case of the Queensberry leases*, will have a title to recover against the assets of the deceased lessor the value of the interest in the lease, if the decision should be against the validity; but however great the interest of any of these parties may be, it is most for the

* *Ante*, Vol. 2, p.

public interest that you should take care to decide rightly.

If I could foresee that by asking for further time I might alter that opinion which it is my duty to inform you I have long entertained upon the question now before you, or if I could, consistently with my other important engagements and duties, hope to find time to lay down the statements which I am now about to make with more method, I should certainly wish your Lordships to delay hearing what I have to say on this subject. If I could hope to relieve myself from the pain which I do most sincerely feel in maintaining an opinion upon this subject different from that which has been expressed by persons for whose learning and abilities I entertain the greatest respect, I should for that reason also endeavour to press your Lordships to delay hearing what I have to offer.

I must confess, that, from the habits of my professional life, I felt at first considerable surprise indeed how it could be that upon some of the questions agitated in this House there could be any difference of opinion any where. With respect to the authorities, you have heard observations which are perhaps much more apt than any I could presume to offer to your attention upon the conflicting cases of *Hotley* v. *Scot* and *Coxe* v. *Day*, and the negative authority of the case before L. C. J. Willes, who I believe was a very great lawyer. Those authorities, I hope I shall not be thought to treat with any disrespect, which certainly I do not mean, when I avail myself of what has fallen from the two learned Chief Justices in their observations on

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Coxe v. *Day*. If *Coxe* v. *Day* is an authority one way, *Hotley* v. *Scot* is an authority the other way; and the judgment of two of the Judges in the court below on this very case conflicts with the case of *Coxe* v. *Day*. But such have been the habits of my professional life that I cannot think that we have attended to all the authority which deserves consideration. That the practice of conveyancers amounts to a very considerable authority on this subject I am justified in saying, by the opinions of the greatest lawyers in Westminster Hall, who I am persuaded, in many instances, would have come to a different decision from that which they thought proper to adopt, if they had not taken notice of the practice of conveyancers. But upon this subject I take the liberty, with very great respect, to intimate an opinion, that upon cases of this nature it might not be much amiss if courts of law would inquire a little more what has been done in courts of equity, for the purpose of knowing how far Judges who have sat in courts of equity have determined the legal point before they have applied themselves to those directions, and decrees, and orders which they are daily in the habit of pronouncing. Between the year 1772 and a period approaching the year 1780, I spent many of the most profitable years of my life in the office of a conveyancer, and I was led at that time to a knowledge not only of the practice, but of what were the sentiments of the great conveyancers of those days; and I am sure it never would have occurred to any one of them, if there was a leasing power in any marriage settlement requiring such a power as this,

that to give the time of fifteen or twenty days was making the execution of the power invalid. I am sure all practice was the other way, and practice in this respect is evidence of what is reasonable.

But it does not rest there, because you have to consider the question as applied to marriage-settlements which are framed in different ways. You have marriage-settlements where an estate for life is granted to *A*, with remainder to the wife for her life, with an interposition of trustees to preserve contingent remainders before the limitations to the issue. In some settlements there is a power to the tenant for life to make leases, which is given not only for the benefit of the tenant for life, but it is a power which you are permitted to insert in the settlement for the purpose of the due cultivation and management of that estate which they are first to enjoy, and others after them; but that power of leasing in a well-framed settlement is not merely given to the tenants for life, but frequently to the trustees, while there are infants who do not as yet take an interest entitled to the benefit of it, but who are not capable of managing the estate. Suppose the father and the mother to die, and then there being trustees to preserve contingent remainders, it becomes necessary to make leases. Or suppose that a settlement is made, in which the legal estate of inheritance, the legal fee, is entirely vested in the trustees; where therefore a legal lease cannot be made by the equitable tenant for life, nor the remainder-man, nor the issue, but during the infancy, it may be made by the trustees. In both those cases it frequently happens that the trustees in the one case to preserve contingent remainders, in the other

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case the trustees of the inheritance are called on to make leases, and in most of those settlements there is no mention of the period of forbearance which shall be given; some do, but there is an infinite majority which do not mention any days at all. I venture to say this as matter of my own knowledge. The practice as to leases made by such trustees would, I say, of itself form a weighty consideration here; but in leases of that kind, made under such powers by the authority of the Court of Chancery, you must permit me, for my predecessors and successors, though not for myself, to say, in every one of those cases there is an authority of law that that is a due execution of the power, because the Chancellor has no right to direct such a lease to be made, if when it is executed it is not according to the power; he is a judge of law and equity, and when he has determined as a judge of law that such is a due execution of the power, then and then only has he authority, according to the constitution of this country, to direct any such trustees to make such leases. I should be glad then to know whether the constant practice of that court is not to be looked at as a practice fixing what is the legal construction of such a power to lease.

It does not rest there; for in the case put by one learned Judge, suppose the tenant for life here had agreed with this occupying tenant to make him a lease, with a power of re-entry giving such an extension of time, and then the tenant had filed a bill in equity to compel him to make a lease according to the agreement. No Chancellor could possibly have directed a lease to be made with fifteen days time in case of a nonpayment of rent, unless he was satisfied

according to law that would be a due execution of the power; he could not have done it in the numerous cases in which there have been such decrees made. I disclaim, for those who have gone before me, and those who are to come after me, the charge that it was not done upon the authority of cases which have at least as much, if not a great deal more, authority than those which have been stated.

Suppose the case where commons are divided under the General Inclosure Act*. There are certain persons having a portion of those commons, who though perhaps seised of a large property yet only have an enjoyment for lives, I mean parsons and vicars. A parson or vicar under the inclosure act is authorized to make leases in which there must be a power of re-entry within a reasonable time. We have acted under that general inclosure act ever since it passed. Parsons and vicars have been making leases ever since; and I believe you will find that the universal practice has been to give days in the manner days are given in this lease. It is truly said, that is within reasonable time which is authorized. But I should be very glad to know what difficulty there can be in courts of justice deciding what forms reasonable time, when the Legislature has expressly said all these leases shall be made with allowance of a reasonable time. In the very parish in which parson and vicar have this sort of power there may be fifty tenants for life for successive estates in land. In such a case the course of proceeding is, that the allotments are to be enjoyed

* 41 Geo. 3, c. 109, § 38.

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according to the limitations of the settlement of that land in respect of which they are made. What is the consequence? The consequence is, that the power of leasing in the settlements under which those respective persons (lay persons, not ecclesiastical persons) are made tenants for life, apply themselves to the whole of the lands after the allotment is made; and a most singular thing it would be to say that fourteen or fifteen days is a reasonable time for a power of re-entry for a parson or vicar, but a direct breach of all that is reasonable with respect to the tenant for life claiming under a settlement, which settlement has a new object to operate upon in the allotment made under that very act of inclosure. I say therefore, as to this case, that if it does not stand on peculiarities in this settlement, there is a weighty authority to be found in practice of long endurance, which I will venture to say would make your decision one of the most mischievous that ever was pronounced in this House, if you were to decide against such practice.

But I think we may lay out of the question the authority of practice. I proceed to comment upon the terms of this settlement, taking it for granted that it is understood on all sides that this special verdict completely finds every thing that ought to be found. I put that upon the understanding of the parties. We have had in the course of argument at the bar a great deal of discussion upon the admissibility of extrinsic evidence. Now, with reference to extrinsic evidence, my humble opinion is, that this is a case in which you must admit some extrinsic evidence; you ought not to admit

any extrinsic evidence which falls within the range of the principle, which says that you must construe instruments by what is to be found within the four corners of them, generally speaking; but it is impossible, in my judgment, in this case, for the reasons I have stated, that you can come to a conclusion without looking at a great deal more than the lease itself; because, when you are considering the question whether the lease is conformable to a power in another instrument, you must look into that instrument which contains the power, and if you must look into that instrument which contains the power, then, in order to get at the true construction of the power itself, you must look at every part of that instrument; and if the instrument which contains the power be referred to by the instrument which is the execution of the power; if the instrument which contains the power also refers you to other instruments, which you must look at, as appears upon the face of the instrument which contains the power, for the construction of the power, you must then look at other instruments to see the meaning of the power.

I think in this case you might state it thus:— Here were leases made prior to 1757; the settlement refers to existing leases at the time when the new instrument is made, it refers in that part of it which gives the power of making future leases to the existing leases. I do not carry it so far as to say you shall go back to a great length of time to see what were the habits of leasing prior to those existing leases, but I say you must go to those existing leases, or it is impossible to collect

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what the meaning of that power is. I say also, that if the instrument in which the power is contained shows what was the nature of the estates that the persons had who were making that settlement in which the power of leasing is contained, you cannot shut your eyes against that part of the instrument which shows what was the nature of the estates.

With these general observations I call your attention to what this case is. A lady, named Louisa Barbara Mansel, afterwards Louisa Barbara Vernon, was tenant for life of the estates, with several remainders over. The will under which she claimed as tenant contained a power to her in consideration of marriage, either before or after marriage, of revocation and appointment, as afterwards pursued by her in the deed of settlement. The special verdict states, that upon the 20th of July 1757 she intermarried with Mr. Vernon; that before the marriage, upon the 2d of July 1757, she by her deed revoked the uses and devises contained in the said will concerning the said premises, and appointed and limited the same to Francis Earl of Guildford, and Charles Montague, and their heirs, in trust, to hold the same to the same uses as before limited, until after the said marriage, and then to the uses of the said George Venables Vernon for life, without impeachment of waste, remainder to the said Louisa Barbara for life, without impeachment of waste, and in the mean time to the said Francis Earl of Guildford, and Charles Montague, and their heirs, to preserve contingent remainders, and to permit the said George, during his life, and afterwards the said Louisa Barbara, during her life, to

take the rents, &c., and after the decease of the survivor of them, to divers other uses for the benefit of their issue, and in default of issue to the use of the will of the said Louisa Barbara, and subject to the powers and limitations to be thereby directed and appointed, and in the mean time to the use of the said Louisa Barbara, her heirs and assigns for ever. And then follows the clause upon which this question principally arises.

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Before I state that clause I will mention another head of authority, which I confess has disturbed me a good deal with respect to these fifteen days. By a statute * made some years ago the Legislature empowered the committees of lunatics, by authority of the Court of Chancery, where those lunatics were tenants for life, with powers of leasing, to make such leases as the tenants would have made if they had been of sane mind; and I never had the least doubt, in consequence of the habits of my professional life, in directing them to make leases with this ordinary reservation of fourteen or fifteen days, with respect to the time of forfeiting the estate. I certainly did, however, think it right, in deference to the opinions which I understood had been stated in the Exchequer Chamber, to check myself in that practice, and to take care that that habit should no longer be acted on. So, if a parson or vicar should be a lunatic, who had an allotment under an inclosure act, and it should become necessary for the Court to act, I should have directed the execution of the power in a similar manner.

Where a power of this sort is given in a mar-

* 43 Geo. 3, c. 75, § 3 and 4.

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riage-settlement it is part of the contract which all the parties in the marriage-settlement are understood to enter into with respect to each other; it is for that reason to be construed in questions between the parties to the settlement and those taking under it according to the intention of the parties. In a question, between a landlord for the time being and a tenant, I apprehend the landlord for the time being is to be considered, in an instrument of this kind, as acting on the behalf of all the parties who have interest in the inheritance of the estate; and that therefore there must be that *bona fides* on his part with respect to the tenants which would be required in other cases, and upon a question of forfeiture, if the parties really are dealing *bonâ fide* according to what they conceive to be the intention of the parties, (not misconceiving that intention, which would vitiate the lease;) but if a fair construction will authorize you to say they have not misconceived it, you are not to look *astutely* to defeat it.

In this case there were three species of estates of which leases were to be made; one of these estates, as I understand, usually demised for lives upon payment of a fine, which payment of a fine is in truth a great portion of the consideration which is paid for such leases; and the small annual rents and other services, though of some value positively speaking, are of little value compared with that other part of the consideration; they are a sort of rental, which is rather from time to time calculating a small sum of money off the value, than paying any part of the value of the estate. The next species of lands are lands to

be let at rack-rent for years absolute, and with reference to them it is very easy to reserve a power of re-entry: and the third is of mines; with regard to which, unless conveyancers are more able at this time of day than some of the old ones used to be in the last century, it would be difficult to find out what sort of power of re-entry you could apply to it; they are therefore in general obliged to content themselves with alluding to proper and reasonable modes of working the mines.

The condition to which we are particularly to attend is this; "and so as there be contained in every "such respective lease, demise, or grant; and so as "on every such respective lease, demise, or grant for "a life or lives, or for years determinable on the "dropping of a life or lives, there be reserved and "made payable, during the continuance of the estates "and interests thereby to be demised, leased or "granted respectively, the ancient and accustomed "yearly rents, duties, and services; or more, or as great "or beneficial rents, duties, and services, or more, "as now are, or at the time of demising or granting "the premises so to be demised, leased, or granted "respectively, were reserved or made payable for "or in respect of the same premises respectively, "or a just proportion of such ancient or the present reserved rents, duties, and services, or more, "according to the value of the premises so to be "demised, leased, or granted respectively;" and then come the exceptions with respect to the heriots, and the usual clause, that these were to be for the benefit of the persons entitled from time to time.

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Now, let us suppose ourselves sitting down to make a new lease of these premises after the year 1757, of premises which in the year 1757 were held under a then existing lease, addressing ourselves to the execution of that power. Is it possible to deny, that in order to see how the power is to be executed you must look at that existing lease which is the lease immediately preceding that which you are to execute? I do not carry it farther; I do not enter into the question whether you are to go back into the more remote periods of time and see what was the habit in all times past; but I say you are bound to receive the evidence to which the language of the power refers you; and you are bound to receive the evidence of the deed containing the power. If you mean to demise the lands according to the ancient and accustomed rent you must go to former leases to know what it is; so as to the duties and services. It is not necessary they should be the same yearly rents, duties, and services, or more, but they may be as great *or* beneficial rents. I have no difficulty in saying, that under this clause you might reserve as *great* a rent, or as *beneficial* rents. I have a right to look at this word " or " as being of some signification. I find in other parts of the lease as great *and* beneficial. This is to be as great *or* beneficial; and I cannot help expressing the opinion, that I entertain a very considerable doubt whether, if this clause as to the distress had not been contained in the new lease, the new lease for that reason would not have been bad.

If it be argued, that demising for a rent of 2*l.*

and instead of reserving a power of re-entry for the nonpayment of the rent, in the sense which has been put on the words, reserving a power of re-entry on nonpayment of the rent for fifteen days, that you thereby affect, though in a small degree (and I agree entirely with what the Lord Chief Justice says, that it is not the degree, if you affect) the principle on which you ought to act; I answer if this power authorizes me to make a lease, provided the rent is as beneficial, if I demise upon the same rent, in the same way, do not I reserve as beneficial a rent as formerly. The stress laid on these words would go a great way to convince those who consider what the case would have been if there had been no such words; the former leases having that power of re-entry for nonpayment of rent, would not this power have been the same in construction whether those words formed part of the instrument or not, because without that power of re-entry the rent would not be so beneficial as under the former leases.

Then, come these words, and let us suppose that they are necessary; "and so as there be contained "in every such lease a power of re-entry for non-"payment of the rent thereby to be reserved;" and this occurs in an instrument, where with respect to property upon which the best and most improved yearly rent was to be reserved, and where, with respect to that rent which was to be so reserved a rent which was *de anno in annum*, and from half year to half year, rendering to the landlord the value of the enjoyment for those periods by the

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tenant, the authors of this settlement say that in such a case as that there shall be nonpayment allowed for twenty-eight days.

I take it now upon the first objection as to the fifteen days; and I should be very glad to ask whether a power of re-entry for nonpayment of rent in fifteen days is not a power of re-entry for nonpayment of rent? No man can deny to me that it is a power of re-entry; no man can deny that it is a power of re-entry for nonpayment of rent. It is not the same power as it would be if it was twenty days, or twenty-five days, but still it is a power of re-entry for nonpayment of rent; and where are the words on which the parties insist there shall be an unconditional power of re-entry for nonpayment of rent. They have said no such thing.

Now, to recur again to the impression that old habits make on one's mind, it would have appeared to me, previous to the agitation of this case, one of the most astonishing things, having had a good deal to do with decisions at law, that where powers are so generally expressed as to leave it in the party to say this is a power of re-entry for nonpayment of rent, that these words generally expressed, considering the practice, are to be an actual execution of the power: it would be most astonishing to me, that if there was a lease to be made, the lessor could insist it should be no lease, but a lease giving a power of re-entry at the day. I should say that was contrary to the habit and usage of a Court of Equity. Speaking from that

habit and usage, the language of the law, before it made any order or decree, the Court ought to decree in favour of the tenant if he were willing to execute a lease upon a reasonable period of days for the nonpayment of the rent; and I cannot help thinking that from the circumstance of pointing out the twenty-eight days in the other case, you are bound to see a difference between the reservation of a rent which is the actual value from year to year, of the land that is occupied, (as far as a tenant ever pays the actual value;) and where a tenant pays a great fine. It does appear to me that this deed affords sufficient evidence, particularly with reference to the words I have before commented on, that if the rent was as beneficially reserved as in the existing lease, that it is a due execution of the power unquestionably.

But that does not touch the question about distress, I admit, save as it touches the question if the same qualification of distress was in the former lease; because if the same qualification of distress was in the former lease, then the same arguments that you build on giving the period in the former lease applies to giving the distress; but if this means a reasonable power of re-entry, and if that has been the construction usually put on it, it is the same as if the lease was directly conformable to the power. The practice has applied that quality to the reservation of a power; and I know no difference between determining what is reasonable with reference to that object, and what is reasonable as applied to the other objects: when you speak of a reason-

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able rent, that means the *quantum* of rent; but a reasonable power admits of different considerations.

I might stop there, because though I cannot agree with the learned Judge, who thinks that the statute of 4 Geo. 2 is imperative, yet it is impossible for me to deny that the statute of 4 Geo. 2, and the General Inclosure Act, and all the practice to which I have been alluding, does establish, beyond all question, that it is a reasonable execution of a power even where this clause of distress is put in; and when we are considering these circumstances let us attend to the extreme importance of the question before us in one respect. You are not merely in the execution of a power to consider what is most beneficial as between *A.* the tenant for life, and *B.* the remainder-man, but what is most beneficial to both, and to each with reference to the terms on which tenants are to be procured; and though in this case there is very little difference, perhaps, of convenience or inconvenience to the tenant, whether he is to pay on the day it is reserved, or fifteen days afterwards, yet on the one hand, if there be that little inconvenience, I say that is a ground why if the words of the power contained in the settlement will allow you to give those days, you shall not say that it is a forfeiture of the lease; and on the other hand I say, though the *quantum* of convenience be ever so small, yet that the principle in deciding these cases requires you to consider, not merely what is for the benefit of a person having an interest in one parcel of the

inheritance, but what is for the benefit of the whole inheritance, and all the persons to take in it.

There is another way of putting it, which is material, if I am not wrong in my notions of the practice, if powers are to be executed for the benefit of all persons having an interest in the inheritance, what will be the situation of persons who have those powers is a most serious consideration; and I cannot agree with those who profess to have paid less attention to the state of titles than they ought, because, unless I mistake, nothing requires more attention; so as to what practice has introduced, and what would be the inconvenience of shaking that practice; and you are to consider, too, that unless you are to adopt the principle, that in a settlement where a power is given as nakedly in the terms of it as here, you are to execute that power in the precise terms; that no tenant for life, no trustee, nobody, in short, who has not an absolute inheritance in the estate, will ever think of executing a power without the direction of the Court to tell him whether it is right or wrong; the inconvenience of which would be infinitely great. But I am of opinion that these words are words of course; in the language of Mr. Justice *Bayley*, (and the diversity of powers is acknowledged in Brook;) that this is an entry for nonpayment of rent; that the words of the settlement do not condemn such a power for reentry for the nonpayment of rent as is here reserved; and I think the qualifications in this power have had the authority of the Legislature for saying that they are reasonable; and therefore on these grounds I shall offer my opinion that these leases are valid.

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Whether your Lordships may think proper to adopt that opinion it is not for me to say; it is my duty to express that opinion.

Lord Redesdale:—Having attended throughout the discussion of this question, and having from a very early period of life had much converse with that part of the law which enables me more particularly to consider cases of this description, I mean conveyancing, I think it my duty to offer a few words to your consideration.

With respect to what has been said as to general opinions upon the subject, and the practice of conveyancers, I cannot agree with much that has been said, because I do conceive that the law has frequently been decided even in the construction of Acts of Parliament upon what has been the general understanding of lawyers as to the true construction of these Acts of Parliament; and I will instance such a case under the statute of jointure. This House determined in the case of *Drury* v. *Drury* * that a rent-charge settled on an infant was within the statute † of jointure a good bar of dower, not because such was the literal interpretation of the statute, but because such had been the constant practice of conveyancers and others touching the subject, and it was expressly upon that ground that the decision at that time went; and I do conceive that it is of the utmost importance that the House should use its judgment by such a criterion whenever the case occurs, for otherwise all property must be in

* 3 B. P. C. 492; by the name of the *Earl of Bucks* v. *Drury*. See Eden's Rep. vol. 2, pp. 39 & 60.

† 27 H. 8, c. 10, s. 6.

hazard. It is more especially so with regard to settlements which are ordinarily prepared by those persons who employ their minds in the construction of deeds, and what persons of that description consider to be the law thus acted upon for a length of time, and not disputed in courts of law, should be taken to be the general impression upon the minds of lawyers upon the particular subject, and more particularly it must have reference to that construction which ought to be put upon settlements prepared by persons of that description. How are you to understand the intent of parties in a settlement which really and truly is as much, I may say, the view which the person who prepared it has upon the subject, as the view of the parties; for the parties to a certain degree are ignorant of the words that are used, unless they are advised by the persons they may consult; and therefore the practice of conveyancers upon subjects of this description is, I conceive, a most important consideration, and whenever that has prevailed for a great length of time without impeachment in a court of justice, I take it it ought to be considered as a true exposition of the law.

I have thought it necessary to say so much upon that part of the case, because I think it would be highly dangerous to treat it in the manner in which it has been treated by a learned Judge, and, with great deference, I cannot agree to what the learned Judge said, because I think that practice is most important to the consideration of the case if you wish to preserve property to persons who are in possession,

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which may be defeated upon the construction of deeds and instruments, unless you give them that construction which lawyers have constantly put on them, though not conformable to the precise rule, supposing the language to be literally understood.

With respect to the case before you, it appears to me that it is necessary only to consider, for the purpose of the final decision of this question, the very words of the instrument. Words used in an instrument of this description must be construed according to the subject to which they are applied. The words here used, and which are in question, are applied to a power over a particular description of property. The power is one power applying to three descriptions of property, and varying according to those three descriptions: First, of property which was under the settlement, let upon leases for life, or lives, or for years determinable upon life or lives: Secondly, of property that consisted of lands not under such leases, but under rack-rent leases; and thirdly, of mines. Now is not that evidence that the persons who framed this instrument contemplated those three species of property under the different circumstances in which they stood; and what is the manner in which they contemplated that property which was leased for lives, or for years determinable upon lives? what did they mean to give by the power? As to that property they meant to give the same power of enjoyment which the person who had gone before had of the property. By the nature of that property no benefit could be derived from it for a considerable term of years

but by renewing the leases from time to time as they dropped, and therefore they gave a power to grant leases of that part, reserving what had been before reserved, in as beneficial a manner in all respects, or more, giving them the power to reserve more, but not to reserve less, not only as to the rent but as to the services. The services in every instance of a particular lease, every thing, was to be reserved exactly in the same manner as it had been reserved by the prior leases. With respect to the second description of property, there the power is to lease at the best and most improved rent, the words are added, "that can be reasonably had or obtained;" does that word reasonably, really, and truly, though perhaps introduced from caution into it, vary the instrument the least in the world? would it not be a sufficient execution of the power if the best and most improved rent had been obtained according to a reasonable estimation of the best and most improved rent? I should consider that, although the rent reserved may not be the very best rent that could be got, yet if it is fairly, and honestly, and reasonably, the best rent that can be reserved, without any fine derived by the person who granted it, that it is a good lease. The word reasonable therefore, though introduced in this part of the instrument, is a word merely of caution, and would not alter in any degree whatever the construction of the power under the settlement.

With respect to the two parts of the property, that which is on leases for lives, or for years determinable on lives, and that at rack-rent, there were introduced

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words with respect to a power of re-entry on non-payment of rent; the first is expressed in one way, the second in another way; we find different terms used, obviously, as it seems to me, for this reason; with respect to the second description of property, the words are precise 'and so as that a clause shall be inserted, containing a power of re-entry for non-payment of the rent for twenty-eight days after it becomes due;' the words there are precise; why were they not precise in the other case? for this manifest reason, because the other power referred to existing leases; they referred to that which was the ordinary mode of executing the power with respect to such property; namely, that on the dropping of one life the lease shall be surrendered, and a new lease granted for three lives. The powers which were contained in the former leases of every description were the very powers to which the settlement meant to refer. If in any of the leases that existed there was not a power of re-entry for non-payment of the rent, they meant that such a power should be contained in future, and therefore the words there used are of loose description. I think it is a mistake to suppose the words are precise; the words are not precise; the words are loose; and the great error, as it seems to my mind, in the opinions that have been formed that this lease is invalid, is in the supposition that the words are precise; I repeat they are not precise, they are merely a note or memorandum intimating that a power of re-entry is to be reserved, and if in the former leases such a power has not been reserved, (and probably the person who made the settlement

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had not an opportunity to look into all the leases, to see the form in which they were made) if such power was not reserved, then there should be such a power reserved, but in any other respect that they should be in conformity to the prior leases. It appears in the case of the lease in question that the power of re-entry was reserved in the former lease, not simply on the nonpayment of rent, but it was reserved on the non-performance of the services, a service at the mill, a reservation of a capon. If the engagements were not observed the power of re-entry extended to the whole. Taking it, therefore, that the meaning of the settlement was this, not to give any precise direction with respect to the nature of the power, but to give a general direction in the nature of a memorandum, if I may so express it, that there should be a power of re-entry; is not that the natural construction of the words, and is not the construction which is attempted to be put upon the words a forced construction, an attempt to make them more strict than they really are?

Suppose a contract was entered into between two persons, the one having the property, and the other willing to take that property, and that contract was so executed as that it purported there should be in the lease to be granted under that contract a power of re-entry for the non-payment of the rent, how would that contract be executed if it was to be specifically performed under a decree of a court of Equity? would a court of Equity have ever thought they were compelled under the terms of that contract, by those words to require that the power of

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re-entry should be a power of re-entry absolutely upon the nonpayment of the rent at the day, and without the common and ordinary provision that it should only be in case there was not a sufficient distress? would not those words be construed by what was the common and ordinary practice? The common and ordinary practice certainly is to frame a power of re-entry in the manner in which the power of re-entry in this lease is framed. What then must have been the mind of the person who prepared this settlement, the conveyancer who prepared that settlement, when he inserted in the settlement that a power of re-entry for nonpayment of rent should be reserved, without expressing more? It must have been in his mind, according to the usual habit of persons of that description, and you must take it to have been in the mind of the parties to the settlement, (for it is the mind of the person who prepares the instrument that ought to give the construction of the instrument;) you must take it to have been in the mind of the person who prepared the instrument that this was a species of note or memorandum which would have been more fully expressed in the lease to be executed.

I conceive, therefore, that in this case it must be taken to be the intention of the parties to the instrument not to be precise with respect to the terms in which the power of re-entry was to be reserved, but merely to give a note signifying that a power of re-entry should be reserved for nonpayment of rent, meaning thereby that that power which was contained in the former leases, should be inserted

wherever that power did exist in the former lease of the same lands; but where no such power was reserved (if that was the case) then that a power such as would be a reasonable power in such a contract as I have mentioned should be inserted in the lease. If a power of re-entry was before reserved, the words were not necessary, because the rent was to be reserved in as beneficial a manner, and therefore if there was a power of re-entry in the former lease, that same power of re-entry, and no other, could be reserved; and therefore I do conceive that when you come to apply your minds to this particular case there really is no ground of doubt, because all the doubt that has been suggested upon the subject has been founded upon a construction of the words of this instrument, which I submit they do not by any means bear; they were not intended, as it has been supposed they were intended, to express precisely and positively what should be done; they were intended to refer to the leases that had been previously executed of the same property, that the rent should be reserved in as beneficial a manner in every respect as before; and if there was an exception in the former leases of the power of re-entry, that a power should be given, that is, such a power as a Court of Equity would insert in a lease, under a contract, in these loose words directing a power of re-entry to be inserted in the lease. I take it there can be no doubt whatever that upon a contract of that description so would a Court of Equity act.

But suppose this had not been a question before a Court of Equity, but before a Court of Law;

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suppose the person who entered into that contract had executed a lease, with a power in the terms in which the power is conveyed in this case; or suppose, on the contrary, he had executed it with a power of re-entry upon nonpayment of the rent at the day; and the question had been whether in either of those cases the contract had been properly executed, or not, if the lessee had in one case objected, you have made it too strict; not according to the intention of the parties in the contract; if on the other hand it had been made in the present form, and had been objected to, that the lease was invalid, and the question had come to be agitated in a Court of Law, would a Court of Law have differed from a Court of Equity on the subject, if they had inquired in what manner will a Court of Equity execute such a contract as this? in what manner would a person employed as a conveyancer in the habits of business have framed a lease under such a contract? and then taking it to be a proper or an improper execution of the contract according to that which the habits of men engaged in the business would have led them to consider proper.

Upon the whole, therefore, it appears to me that the lease is a valid lease, because it is made, as it is found by the special verdict, in conformity to the other leases; and I consider the words of the settlement referring to those leases to have the effect of saying in this particular case,—if in any of the renewals of a lease, where there had been no power of re-entry in any particular case of that description, the question should arise how that power of re-entry was to be reserved, that it was to be reserved according to that which had been the prac-

tice of the owner of the estate in letting leases of other parts. Because in a case where the power of re-entry was actually reserved in the former leases, for the purpose of making them conformable to the former leases; which it was evident was the manner intended, it must be made conformable to a former lease, but if there was any lease in which a power of re-entry had been omitted, then it could not have reference to that lease; but the way in which a court ought then to act would have been to see what was the manner in which leases of property of the same description, under the same settlement have been granted, reserving a power of re-entry; and that that would have been deemed a sufficient execution of the power under the settlement; and that the words of the power ought not to be construed as meaning that precise and positive reservation of a power of re-entry which has been contended for in this case.

Therefore it is upon the particular words of this instrument, the settlement of 1757, and not upon any general view of the case, that I conceive that this lease ought to be supported, and that the judgment of the Exchequer Chamber should be reversed, and the judgment of the King's Bench affirmed.

Ordered accordingly.