IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

THOMAS LIDWILL, Esq. . . . . *Appellant.*
WILLIAM HOLLAND P.—Trustee and Executor of THOMAS LIDWILL, Esq. deceased, and others } *Respondents.*

BY a marriage settlement, containing the usual limitations, the husband, having a life estate in reversion, expectant upon the death of his father, was empowered when in possession under the limitations of the settlement, to revoke, &c. as to so much and such part of the premises conveyed, "as shall be then in possession of any one or "more tenants, by virtue of any one or more lease or "leases, whereon a rent or rents, not exceeding 300*l.* by "the year in the whole, shall be reserved, &c. so as "there shall not, at the time of such revocation, be less "than twenty years, or three lives, unexpired of such "lease or leases." The clause of the settlement conferring the power concluded, with a declaration, that it was the true intent and meaning of the parties that the husband should, at any time during his life, after he should come into, and be in the actual possession of the premises (settled), have absolute power and dominion over so much thereof as should be of the clear yearly value of 300*l.* sterling, and be at full liberty to dispose of the same in such manner, and to such uses and purposes, as he should think proper.

The husband (donee of the power), after the death of his father, when he was in possession under the trusts of the settlement, by a deed of revocation, purporting to be an execution of the power, and reciting that certain lands therein specified then produced a clear yearly rent of 300*l.* or thereabouts, revoked the uses of the settlement as to those lands, and appointed the same in trust for him (the donee), his heirs, and assigns. Afterwards the donee died, indebted to an amount exceeding the value of the lands so appointed, and having no other estate or effects. By his will duly attested, and reciting his title and power to dispose of the lands specified in the deed of revocation and appointment, he devised to trustees his right and interest therein, upon trust, to sell the same, and out of the purchase money to pay his debts, &c. The lands

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revoked, appointed, and devised, except a very small part, to the value of 8*l.* a year, were not (as recited in the deed of revocation) under lease at the time of the appointment by that deed, nor at the date of the will; but, in a suit instituted on behalf of creditors and legatees, to carry the trusts of the will into execution, it was found and reported by the officer of the Court that the lands so appointed and devised were of the value of 300*l.* a year. By the decree in that suit the will was established, and the revocation and appointment held valid; and, upon appeal to the House of Lords against the decree, it was held that the power was rightly applied to the subject, and that the appointment was well executed.

Marriage settlement dated 13th and 14th January, 1774.

BY indentures of lease and release, dated 13th and 14th January, 1774, (being the settlement executed previous to the marriage of Thomas Lidwill the younger, and E. J. O'Grady) certain lands held upon leases for lives, with covenant for perpetual renewal, the property of Thomas Lidwill, the elder, for life; remainder to T. L. the younger, for life; remainder to his sons, in tail male; remainder to M. L. (the Appellant's father) for life; remainder to the sons successively of M. L. in tail male, &c.

By the indenture of release, power was given to T. L. the younger, and the other tenants for life in remainder after him, when in possession, to demise or let all or any part of the premises, for any term not exceeding three lives, or thirty-one years in possession, and not in reversion, at the best improved rent, without fine.*

* A power of leasing as to part of the lands in settlement, was also given to Thomas Lidwill the elder. But the original deed of settlement was not produced upon the hearing of the appeal, nor was the power set forth in the printed papers upon this subject. See the Censure of the Lord Chancellor, p. 124.

The release also contained a power of revocation, by which it was provided that T. L. the younger, after he should be in possession of the premises, might, by any writing under his hand and seal, attested by two witnesses, or by his will attested by three witnesses, revoke, alter, or determine, all or any, the use and uses, estate and estates before limited, "*as to so much and such part of* "*the premises as shall be then in possession of any* "*one or more tenant or tenants, by virtue of any* "*one or more lease or leases, whereon a rent or* "*rents not exceeding* 300*l. by the year, in the* "*whole*, shall be reserved and payable during the "continuance of such lease or leases, so as there "shall not at the time of such revocation be less "than twenty years or three lives unexpired of "such lease or leases; and that from and imme- "diately after the execution of such revocation, "Standish Grady and Richard Lalor, (trustees in "the settlement) and the survivor, &c. shall stand "seized of such part of the premises, concerning "which such revocation shall be executed for the "use of T. L. the younger, his heirs, and assigns, "and that he and they shall and may hold and enjoy "the same, and receive to his and their own "use the rents, &c. clear of the rent reserved "out of the premises, or any of the uses, &c. "before expressed. It being the true intent and "meaning of these presents, and of the parties "hereunto, that the said Thomas Lidwill the "younger, shall at any time during his life, after "he shall come into, and be in the actual posses- "sion of the said hereby granted and released

Power of Revocation in said marriage settlement to Thomas Lidwill the younger.

The parties to said marriage settlement declare their intent and meaning of the power of Revocation given

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"premises, have an absolute power and dominion "over so much thereof as shall be of the clear "yearly value of 300*l.* sterling, and be at full "liberty to dispose of the same in such manner, "and to such uses and purposes as he shall think "proper."

to Thomas Lidwill the younger.

Thos. Lidwill, the elder, died Nov. 1782.

Thomas Lidwill the elder died in November, 1782, whereupon Thomas Lidwill the younger became seized of the lands of Clonmore, &c. under the settlement of the 14th January, 1774.

Deed of Revocation dated 20th Dec. 1782.

By indenture dated the 20th December, 1782, signed, sealed, and delivered, by Thomas Lidwill the younger, attested as by the deed of settlement required, and made between Thomas Lidwill the younger of the one part, and Standish Grady and Richard Lahor of the other part, reciting the marriage settlement and the power of revocation therein contained, and that the lands of Coologenafrian or Graffin, containing 300 acres or thereabouts, with the bog and common thereto belonging, and part of the lands of Clekile, containing about 41 acres, with 14 acres of bog, *then produced a clear yearly rent of* 300*l.* or thereabouts; and were part and parcel of the lands mentioned in the marriage settlement; Thomas Lidwill, in execution of the power of revocation, and of all and every other power and authority in him being or him thereunto enabling, for the purpose of revoking, altering, making void, and changing all and every the use and uses, trusts and limitations, in the deed contained, so far as the same related to the 300*l.* a year, did declare, order, direct, limit,

and appoint, that Standish Grady and Richard Lalor, and the survivor of them, and the heirs and assigns of such survivor, should stand, and from thenceforth be seized of that part of the lands in the settlement mentioned, called Coologenafrian or Graffin, containing 300 acres or thereabouts, with the bog and common thereto belonging; and that part of the lands of Clekile, containing about 41 acres, with 14 acres of bog, together with all and every their rights, members, appendances, and appurtenances thereto, or to said lands of Mucklonemore, otherwise Clonmore, Coologenafrian, and Coologenvodeale, belonging or in any wise appertaining,

To hold to the only proper use, behoof, and benefit of the said Thomas Lidwill, his heirs, and assigns, for ever; and to, for, and upon no other use or uses, trust, intent, or purpose whatsoever, any thing therein, or in the marriage settlement contained, to the contrary in any wise notwithstanding. It being thereby declared to be the true intent and meaning of the said deed of revocation, and of the parties thereto, to carry into execution the said power of revocation as fully and effectually as in them lay, according to the true intent and meaning of the said deed, and of the parties thereto, so as that Thomas Lidwill, his heirs, or assigns, or Standish Grady and Richard Lalor, and the survivor of them, and the heirs of such survivor, in trust for Thomas Lidwill should, from the day of the date of the deed of revocation become, and then were actually seized and possessed of the revoked lands, to the only

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proper use, behoof, and benefit of said Thomas Lidwill, his heirs and assigns for ever; and it was thereby agreed that it should and might be lawful for Thomas Lidwill, his heirs and assigns for ever, thereafter, to have, hold, and enjoy the revoked lands and premises with the appurtenances: and to have, receive, and take to, and for his and their own use and benefit, the yearly rents, issues, and profits thereof, separately and apart, and free and cleared, and absolutely discharged from the rent payable out of the lands of Clonmore to the head landlord, by virtue of the original lease, or renewal or renewals thereof, to be thereafter had by virtue of the covenant of renewal in the original lease; and of and from the payment of all and every, or any part whatsoever of such renewal fine or fines which then were, or thereafter might become payable by virtue of the original lease or renewals to be thereafter had thereof, and freed, acquitted, exonerated, and discharged of and from all or any and every of the use and uses, estate, trusts, charges, and limitations contained in the marriage settlement; and from all manner of judgments, mortgages, or incumbrances whatsoever, which could or might affect the lands.

16th June, 1809, Thomas Lidwill the younger died.

On the 16th June, 1809, Thomas Lidwill the younger died, without issue male, having no other property but in the lands, subject to the revocation, and indebted to several persons, leaving his widow, Elizabeth Julia, and the Respondent, Mary Grady, his only child, and heiress at law.

His will, dated 13th June, 1809.

By his will, dated on the 13th of June, 1809,

and duly executed and attested in the manner required by law for devising freehold estates, reciting, that he was entitled to 300 acres of the lands of Clonmore or Graffin, under and by virtue of his marriage settlement, and to dispose thereof as he should think proper; he devised and bequeathed all his right, title, and interest in and to the said 300 acres of the said lands of Clonmore or Graffin, and all other his estates of what nature or kind soever which he should die seized possessed of, or entitled to at the time of his decease, unto the Respondents, John Maherg and William Holland P. and the survivor of them, and his heirs, executors, administrators, and assigns in trust, to sell and dispose thereof, and out of the monies arising from such sale, to pay all his just debts, funeral expenses, and the several legacies therein mentioned, and, among others, a sum of 2,500*l.* which he bequeathed to the Respondent, Mary Grady's children, and thereof appointed the Respondent, Mary, residuary legatee, and William Holland P. and John Maherg his executors.

5th January, 1810, bill filed for a sale of revoked lands for payment of debts and legacies of Thomas Lidwill the younger.

William Holland P. alone proved the will in the proper ecclesiastical court in Ireland; and on 5th January, 1810, being trustee and executor, and also a judgment creditor of T. L. filed his bill in the Court of Exchequer in Ireland against the Appellant, (who had become intitled as next in succession, under the limitations of the deed of settlement,) and others, stating the indentures of 14th January, 1774, the power of revocation therein contained, the deed of revocation of the 20th December, 1782, and also the will of Thomas

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Lidwill the younger; and charging that Thomas Lidwill, at the time of his death, owed several sums of money by judgments and otherwise; and that he bequeathed the several legacies therein mentioned, to the persons therein named, and insisted that the deed of the 20th of December, 1782, (which was not then in the possession of William Holland P.—) was a due execution of the power of revocation, and that even if the same had not existed, the will was in itself a sufficient execution of the power, and that, if defective, the Court would set it right; and praying that the Defendants might set forth what estate or interest they claimed in the lands revoked, and that the trusts of the will might be carried into execution; and that it might be declared that the power of revocation had been well executed by Thomas Lidwill; and that accordingly the revoked lands might be sold by the decree of the Court for the purposes mentioned in the will; and that in the mean time, until such decree should be obtained, a receiver should be appointed to receive the rents, and that an account might be taken of Thomas Lidwill's personal estate, and of his debts, legacies, and funeral expenses; and that, the marriage settlement and deed of revocation might be lodged in Court.

Defendants answered said bill, and cause heard on pleadings and proofs; and on 13th May, 1813, decree made.

The Defendants having filed their answers to the bill, and issue being joined, witnesses were examined, and publication of their depositions having passed, the cause came on to be heard on the 13th of May, 1813, on pleadings and proofs, when the Court decreed, that the trusts of the will of Thomas Lidwill, deceased, in the

pleadings mentioned, should be carried into execution, and that the proper officer should take an account of his real estates, and the rents, issues, and profits thereof, into whose hands the same came, and how applied; and also an account of his personal estate, and the nature and value thereof, into whose hand the same came, and how applied, and of his debts, legacies, and funeral expenses, and of all charges and incumbrances affecting his said real and freehold estates, and the nature, priority, and amount thereof, and what was due thereon respectively, and whether any and which of them had been paid, and out of what fund: the officer was also directed to inquire and report, whether, on 20th December, 1782, the lands of Coologenafrian or Graffin, containing 300 acres, with the bog and common thereunto belonging; and also the said part of the lands of Clekile, containing about 41 acres, together with about 14 acres of bog thereunto belonging, comprised in the deed of 20th December, 1782, in the pleadings mentioned, or any and of which of them, or any and what part thereof were in the possession of a tenant or tenants having, at the time of the date of said deed of 20th December, 1782, a term or terms of three lives, or twenty years, then to run of their lease or leases;* and if he should find that the entire of the lands *were not in the possession of such tenant* or tenants at the time (when the deed of revocation was executed),

Inquiry directed as to leases, or value of the lands.

* Against this part of the decree no objection, in any shape, appears to have been made.

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that then he should *state the clear yearly value of the lands at that time, and how much and what parts thereof were of the clear yearly value of* 300*l.* on the 20th December, 1782; and if the officer should find that any part thereof was, at that time, in the possession of such tenant or tenants as aforesaid, then he was directed for so much to take the reserved rents as the value; and that the officer should also inquire and report, whether any and what other part of the lands comprised in the settlement of the 14th January, 1774, were in lease to a tenant or tenants having, on the 20th December, 1782, three lives, or twenty years unexpired of such lease or leases.

27th December, 1813, Plaintiff filed his charge.

The Respondent, William Holland P.—the Plaintiff, on 27th December, 1813, filed his charge under said decree, and the Appellant, on the 28th of January, 1814, filed his charge and discharge to Plaintiffs said charge; and among other things charged and contended before the officer, that

28th January, 1814, Appellant filed his charge and discharge.

he was entitled to be repaid as a creditor of Thomas Lidwill, the younger, certain sums in his said charge mentioned, out of the real freehold and personal estate of Thomas Lidwill; and further charged that the whole of the lands in the deed of revocation of the 20th of December, 1782, were then unset and out of lease, and that no part thereof was in possession of a tenant or tenants, having, on the 20th of December, 1782, a term or terms of three lives or twenty years then to run; and that parts of the lands comprised in the marriage settlement of 14th January, 1774, and distinct from the lands comprised in the deed of

revocation of the 20th of December, 1782, were in lease to tenants having, on the 20th of December, 1782, three lives or twenty years unexpired of such lease or leases.

The Appellant also insisted, that the lands comprised in the deed of revocation exceeded the clear yearly value of 300*l.* on the 20th December, 1782, and contended before the officer, that those lands were of considerably greater value at that time.

On the 3rd of November, 1815, the officer reported (among other things) that Thomas Lidwill, deceased, in the pleadings mentioned, died seized of a real estate in the lands of Coologenafrian or Graffin, and also in part of the lands of Clekile, with the bogs and common thereto belonging, comprised in the deed of the 20th of December, 1782, and that Thomas Lidwill was not at the time of his decease seized of any other real or freehold estate. November 3, 1815, officer's report.

The officer also found that Thomas Lidwill, by his will, dated 13th June, 1809, charged all and singular his real estates with the payment of his debts and legacies (in the report mentioned), and directed his trustees, therein named, to sell the same for payment thereof; and that Thomas Lidwill was indebted, at the time of his decease, to several persons therein particularly named in the several sums therein mentioned, amounting, in the whole, to the sum of 7512*l.* 17*s.* 4*d.*, and that the debts and legacies were charges and incumbrances affecting the real estate of which Thomas Lidwill died seized.

He further found, that there was one tenant

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who occupied a part of the lands of Coologenafrian or Graffin, on the 20th of December, 1782, of whose lease a term of 23½ years was then unexpired, at the yearly rent of 8*l.*, but did not find that there was any other tenant or tenants on the 20th of December, 1782, in possession of any part of the lands of Coologenafrian or Graffin, or of the part of Clekile, mentioned in the deed of the 20th of December, 1782, under any lease thereof, of which a term of three lives or twenty years was then to run.

He also found, that, on the 20th December, 1782, the part of the lands under lease were of the yearly value of 8*l.*, taking the same at the reserved rent, and that the remainder of the lands of Coologenafrian or Graffin, and the lands of Clekile, and the bogs and common thereto belonging, in the said deed of revocation mentioned, were, on the 20th day of December, 1782, of the yearly value of 292*l.* (both said sums making together the yearly value of 300*l.*) and no more, and that no further or other part of the lands of Mucklonimore, otherwise Clonmore, comprised in the marriage settlement of the 14th of January, 1774, were, on the 20th day of December, 1782, leased or demised to a tenant or tenants having, on the last-mentioned day, a term for three lives, or twenty years, unexpired of their said lease or leases.

9th November, 1815, Appellant filed four exceptions thereto.

Thomas Lidwill, the Appellant, on the 9th of November, 1815, filed four exceptions* to the officer's report, because he had not reported cer-

* The matter of these exceptions form no part of the present appeal.

tain, claims of the Appellant, as incumbrances affecting the revoked lands.

On 17th February, 1816, the cause came on to be heard on the report, exceptions, and merits, when the Court ordered, that the first and fourth exceptions should be over-ruled, without prejudice to any suit then depending, or which might thereafter be instituted as to the matter thereof, and that the second and third exceptions should be also over-ruled, and the report confirmed; and that the defendant (Appellant) should in one kalendar month, to be computed from the date thereof, bring in and lodge in the Bank of Ireland, to the credit of the cause, with the privity of the accountant general of the Court, the sum of 1303*l.* 2*s.* 5*d.*, being the balance of the rents, issues, and profits of the revoked lands and premises remaining in the (Appellant's) hands; and that the register should tot up the interest of the several sums in the decree particularly mentioned, due to the several creditors and legatees therein named; and that the Defendants, or such of them as ought so to do, should, in three kalendar months, to be computed from the date of the decree, pay to said William Holland P., and to the several other creditors and legatees therein named, the several sums therein mentioned, with interest from that day until paid, with costs to the persons therein named; or, in default thereof, that the chief remembrancer of the Court, or his deputy, should set up and sell by public cant, to the highest and fairest bidder, the said revoked

February 17, 1816, final decree.

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lands and premises in the decree particularly mentioned, or a competent part thereof; and that out of the monies arising by such sale, the Plaintiff, William Holland, P. and the several other creditors and legatees therein named, should be paid the respective sums therein mentioned due to them, and that the remainder (if any) of the money arising by such sale, should be disposed of as the Court should thereafter think fit: and that all proper and necessary parties should join with said chief remembrancer, or his deputy, in executing proper deeds of conveyance to such person or persons as should be declared the purchaser or purchasers of the lands and premises, or such parts thereof as should be sold; and that either party should be at liberty to apply to the Court in the mean time for such further and other directions as might be necessary; and that the other Respondents should recover their costs expended by them, in the cause, out of the money arising by such sale; and that the Plaintiff, W. Holland, might accordingly make up and enrol the decree, with costs as aforesaid, for the performance whereof, the process of the Court was, from time to time, to issue as in such cases usual.

The several sums so decreed due to the creditors of Thomas Lidwill, the younger, amounted to 7512*l.* 17*s.* 4*d.*, and to his legatees 4824*l.*, and Plaintiffs taxed costs, to 470*l.* 0*s.* 11*d.*, making, in all, 12,806*l.* 18*s.* 3*d.*, exclusive of Respondent Grady's and the other parties' costs, which amounted to a considerable sum.

On the 5th of June, 1816, the lands were put up to sale by public auction, pursuant to the decree: the Respondent, Henry Grove Grady, was declared the highest bidder at a sum of 6000*l.*: the sale was confirmed, and out of purchase money advanced by the Respondent, Henry Grove Grady, the creditors and legatees of Thomas Lidwill the younger were satisfied.

This appeal was presented against the decrees of the Court of Exchequer, by the remainder-man next in succession, under the limitations of the settlement upon the decease of T. L. the donee of the power.

For the Appellants—*Mr. Hart* and *Mr. Phillimore.*

Argument for Appellant, May 16, 1820.

Whether the power to revoke the uses of the settlement by the said Thomas Lidwill the younger be considered (as intended to be executed by him) either by the deed of revocation of the 20th day of December 1782, or by his will; such executions of the power were both defective (except as to a very small part of the lands in question), since a power can only be regarded as duly executed, when all the conditions and circumstances required by the deed or instrument creating it are complied with.

An express condition is explicitly stated in the deed of settlement, creating the power by which Thomas Lidwill the younger is restricted, in his exercise of the power, " to so much and such " part only of the lands in question, as should " be then in the possession of any one or more " tenant or tenants, by virtue of any one or

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"more lease or leases, wherein a rent or rents, "not exceeding three hundred pounds by the "year in the whole, should be reserved, and made "payable during the continuance of such lease "or leases, and so as there should not, at the "time of such revocation, be less than twenty years, "or three lives, unexpired of such lease or leases;" which restriction must be considered as in the nature of a condition precedent, and any execution of the power, in which this restriction or condition is not attended to or complied with, must consequently be regarded as void and inoperative.

The condition annexed to the execution of the power, requiring that the lands over which it should be exercised should be held for a term not less than three lives, or twenty years, at the time of the execution of the power, was not introduced into the settlement without due consideration or a sufficient reason. One object of it was to relieve the remainder-men from the difficulty, at a future and possibly a remote period, of showing the value of the lands at the time of the execution of the power,—a difficulty which would occur if the lands were either actually out of lease, or held for a term nearly expired, a difficulty which the Appellant has actually experienced in this cause. It was also intended to guard against a fraudulent execution of the power, by first letting the lands at low rates for a short term, and then executing the power of revocation. It was considered by the parties to the settlement containing the power, that leases for three lives, or of which twenty years were unexpired, must be supposed to have been granted under the leasing power, and con-

sequently at the best rent, and, therefore, that the rent reserved in such leases would be a fair criterion of value.

Neither by the deed of revocation of the 20th day of December, 1782, nor by the last will of Thomas Lidwill the younger, is the restriction or condition annexed to the power strictly complied with, save only as to a very small portion of the lands in question.

If the intended execution of the power by the deed of revocation of the 20th day of December, 1782, be duly considered, it will be found defective or fraudulent, since there is in that deed an express but false recital, stating that the lands in question were then actually leased to solvent tenants, who had more than twenty years or three lives then to run and unexpired of their leases, and that the lands produced a profit rent of the clear yearly value of 300*l.* or thereabouts, (thus explicitly admitting and recognising, on the part of Thomas Lidwill the younger, the necessity of a full compliance with the restriction or condition annexed to the power in that respect;) whereas it has been clearly proved and reported by the officer, to whom that matter was referred, that the recital was wholly false or erroneous, (except as to a very small part of the lands in question;) since it was found by the officer, that at the time when the said deed of revocation was executed by Thomas Lidwill the younger, a very small part only of the lands in question was actually let agreeably to the power, and that no further or other part of the lands was then in lease.

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If it be contended that the will of Thomas Lidwill the younger was an execution of the power of revocation, it will be found liable to the same objection on account of the non-compliance with the condition or restriction annexed to the power, the lands in question not being let agreeably to that condition, for three lives, or twenty years, at the time of the execution of Thomas Lidwill's will, or of his death; and such execution by will must also, for that reason, be regarded as wholly void and inoperative; the term of twenty-three and a half years of the part of the lands, which was, at the time of executing the deed of 1782, in lease, according to the terms of the power, having expired, and that part of the lands not being, at the execution of the will, actually let in the manner required by the deed creating the power. The will recites a title to the 300 acres: the power is to appoint land of the value of 300*l.* The will, therefore, is merely an appointment of 300 acres, which he was not empowered to appoint; and Thomas Lidwill the younger must be considered as having been fully aware of the necessity of all the lands being so let, in order to render any execution of the power valid and effectual, because he had previously recognised and fully admitted the necessity of such a compliance with the requisitions of the power, by the specific introduction of the recital or statement to the effect before mentioned, in the deed of revocation of the 20th day of December, 1782.

The execution of the power of revocation, by the deed of revocation of the 20th day of Decem-

ber, 1782, being thus defective, can be considered as an effectual execution of the power, so far only as relates to that part of the lands in question, which was found by the officer, to whom the cause was referred, to be actually let agreeably to the power, at the time of the execution of the deed of revocation.

The will of Thomas Lidwill the younger cannot be considered an effectual execution of the power, with respect to any part of the lands, because the term in that part of the lands leased in the year 1782, had then expired. Both these executions of the power must be considered as defective, and consequently void and inoperative as to the lands in question, so far as they were not under lease, according to the requisition of the power. The Appellant is clearly entitled as immediate tenant in tail in possession, under the uses of the settlement, to the lands and premises of Coologenafrian or Graffin, and the part of Clekile in the pleadings mentioned, together with the rents and profits which have accrued due thereon, from the time of the decease of Thomas Lidwill the younger.

If this were a case of mere informality in the execution of a power, the defect might be supplied in a court of equity in favour of particular objects; but the record makes no such case. The only question presented is, whether the power was legally executed. Error or mistake in the instrument creating the power or the appointment might have been rectified in equity; but no such case is alleged. The decree does not even comprise a declaration to such effect, or any thing

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which can clear up the doubts which hang over the case. The exceptions taken to the report do not indeed touch the matter of the present appeal; but that is not a material objection, for the subsequent directions are consequential, and must stand or fall with the decree. The contract between the parties to the settlement provides what lands shall be appointed, and under what circumstances. A court of equity cannot make a new contract for the parties, or strike out of the settlement a material provision. It may be thought a capricious mode of ascertaining the value of the lands; but it has the character of caution, and, at all events, it is the caprice of parties contracting, and it is not the province of a court of justice to control such caprice, if it be legal. That the lands were, in fact, of the value contemplated is immaterial, if the mode prescribed to ascertain that value has been neglected. Appointments, in a multitude of other cases, which, apparently, have been inno-cent variations from the power, have been held void. In this case the defect is not in form but in substance. The Court is required in this case to substitute a new power.*

For the Respondents—*Mr. Wetherell* and *Mr. Shadwell.*

The decree, if right in substance, is not bad for form. The question is, whether the direction of the power as to lands in lease is material, or a point of form.

The father had power to make a beneficial lease

* As to the restrictions, the doctrine in the case of the Earl of Montagu *v.* the Earl of Bath, 2 Ch. Rep. 191, was cited by Mr. Phillimore.

provided the rent was not below a certain depreciation.* Thomas Lidwill the father never having executed his power, it was indifferent whether Thomas Lidwill the younger exercised his power of leasing or not. He might have leased before he revoked; but the essential part of the power is that lands, not exceeding 300*l.* in value, should be revoked and appointed. The report finds the value. There is no excess of the power in point of value. How can it be represented that the leasing was essential? If any prejudice to the remainder-man could have arisen from the non-leasing, the omission to do so might have avoided the power; but those interested in remainder could not be injured by the omission. The value, at the date of the revocation, was always capable of being ascertained. If leases had been actually subsisting, the revocation, no doubt, must have applied to them. If a lease had been made by Thomas Lidwill the father, there would have been a tenant at an undervalue. The revocation in such case could not have extended to lands in Graffin. The power not having been executed by the father as to those lands, the revocation might extend to them. The last clause shows that the power to Thomas Lidwill the younger is absolute. If the words of the power are ambiguous, the construction ought to be favourable to the object of the power.

* This power, it seems, extended only to lands in Graffin, and a mode was prescribed of ascertaining the yearly value of the lands to be leased under the power. It was not set forth in the printed cases; nor was the deed containing it before the House of Lords upon the hearing.—See the observation of the Lord Chancellor upon this subject, post, 124.

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We stand on the right of creditors. Thomas Lidwill had a power to appoint by will as well as by deed, and he expressly refers to the deed by the will. It is the same thing as if he had sold to a purchaser in his lifetime.

The Lord Chancellor. Do the debts cover the estate? Is there any other fund to pay debts?

For the Respondents. The debts exceed the value of the estate appointed, which is the only fund for payment. In what form an agreement or appointment is made a court of equity does not regard—a bond or any writing may operate as an appointment. By the will, the fund is given to trustees to sell and dispose in payment of debts. In the case of the *Earl of Montague* v. the *Earl of Bath*,* the judges intimated, that if it had been the case of creditors, purchasers, or children, they would have decided for the validity of the revocation; but it was the case of a volunteer, and that circumstance was the ground of the judgment.

The Lord Chancellor. I apprehend they will not dispute, that, if he intended to execute, it would, in that respect, operate as an appointment: but they say he has failed in the subject of the power.

For the Respondents. The remainder-man cannot be affected by this mode of appointment.

Such construction should be made upon the instrument creating and the instrument executing a power as will effectuate the intention of those creating the power, and further the objects of such power.

Upon this principle the deed of 20th December, 1782, is a due execution of the power of

* 2 Ch. Rep. 191.

revocation contained in the settlement of 14th January, 1774, so far as the estate, the subject of the power, would extend, it has been literally pursued: throughout it has been substantially executed. It appears by the officer's report, unexcepted to (in this respect), that the revoked lands at the time of the execution of the deed of 20th December, 1782, did not exceed 300*l.* a year in value. The intention of the power was to allow lands of that annual value to be revoked; and it pointed out the means of ascertaining that value by the existence of leases of a certain description; but where no such leases existed on the estate, the subject of the power, the donee of the power was not to be deprived of the benefit of the execution of the power; he was not to be driven to a formal execution of leases, so as to bring himself and the lands within the very letter of the power.

Although the deed of the 20th of December, 1782, and the will of Thomas Lidwill should be deemed a defective execution of the power, a court of equity will supply a defective execution in favour of creditors:—and it appears that the debts reported due by Thomas Lidwill, the donee of the power, amounted to the sum of 7512*l.* 17*s.* 4*d.* and that his creditors have no other fund for payment of their debts but the revoked lands, the subject of the power.

The Appellant has submitted to this view of the case, for he took no exception to the officer's report, which finds that Thomas Lidwill died seized of the revoked lands; but, on the contrary, he took several exceptions, because the

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officer did not report him to be a creditor of Thomas Lidwill on the revoked lands, a case altogether inconsistent with that which he now brings by way of appeal: and, moreover, the Appellant went into evidence before the officer, to show that the revoked lands exceeded in value, at the time of the revocation in 1782, 300*l.* a year. —He failed in making such proof; and it was satisfactorily proved by the Respondents, that the lands did not exceed 300*l.* a year in value: the officer so reported, and his report stands unimpeached in that point.

The whole power must be read together: the last clause is the key to its meaning. There it is expressed to be the true meaning and intent that Thomas Lidwill the younger should have absolute power over and property in the lands to the amount in value of 300*l.* a year. A special mode of leasing is provided,* by the deed of settlement, as to part of the estate called Graffin; but not as to other parts of the estates. They might never be under lease. No direction to lease is given, nor any mode prescribed by the instrument of contract. It is analogous to the cases of leasing powers, where it is provided that leases shall be made at the usual rent. In such cases, with respect to lands which have never been leased, and for which, consequently, there can be no usual rent, it has been held † that the power extends to such lands, if it appears to be the intention of the parties to the instrument raising the power. It can only extend to such lands by estimate or valuation; it

* See the notes, *ante*, p. 119, and post, 124.

† Goodtitle *v.* Funucan, Doug. 544.

is reduced therefore to a question of intention. In *Bagot* v. *Oughton*,* as *Lord Mansfield* said, in *Goodtitle* v. *Funucan*, it was evident, from the nature of the thing, that the power of a temporary owner could not extend to the letting the ancient manor house, and excluding the representatives of the family who might succeed him.

The objection to the frame of the suit is too late; it should have been taken when a reference was decreed as to the value of the lands not leased. There has been no exception to the report on that point; nor is there any appeal against the decree which assumes that the value was the material question.

Mr. Hart in reply. The owner of property may exercise the most arbitrary and capricious will, and annex unreasonable conditions to his gifts. The Court cannot interpose a Prætorian equity.

The Lord Chancellor. The real question is, had he or not a right, by a due execution of the power, to affect the land made the subject of appointment. The true meaning and intent of the power is to be considered, and whether the condition is mere matter of form.

Lord Redesdale. The decree supposes that the power is well executed at law.

Reply. It has been argued that the generality of the latter part of the power supersedes the restrictions of the former part. The power directs that the appointment shall be of so much and such parts of the premises as shall be in possession of tenants having interests, by way of lease, for twenty years to come, or for the duration of three lives, from the date of the revocation, and that

* 1 P. W. 347; Fortescue, 332; Mod. Cas. 249; 381.

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the rent payable on the leases shall not exceed 300*l.* What is there in the clause which follows expressly rescinding this provision and condition? What is there to furnish an implication that it could be within the intent of the parties to annul this express condition? It has lately and often been regretted that courts of equity, in the cases even of meritorious objects, should have adopted the practice to supply the want of form in appointments.

The latter clause must be taken with and explained by the first. The restrictions were material to ascertain the value before it had become difficult by lapse of time. It was a security taken by making the son the first victim of any indiscreet exercise of the power.*

The Lord Chancellor, on the day after the argument, said, upon the whole, we think that the power was well applied to the subject, and that the appointment has been well executed; and, without further observation, the judgment of the Court below was affirmed.

* In the course of the argument the *Lord Chancellor* censured the omission to furnish instruments referred to in the printed papers, observing, that the power to Lidwill the elder to grant leases contained provisions as to the mode of ascertaining the full improved yearly value at the time of making leases under the power. Those provisions were not set forth, but only alluded to in the printed cases as "therein (i. e. in the deed of "settlement) particularly mentioned," and the instrument containing that power was not before the House.

*** The rule of construction as to powers has varied materially in different ages of the law, in different courts, and with different judges. What is essential to be observed in the conditions or circumstances *prescribed* by the power is now, and, perhaps, from the nature of the subject, ever will be a matter of uncertainty, unless all discretion of the judge is taken away, and a literal observation of the power in every particular is required. The same uncertainty prevails in many similar questions of this

branch of law, as, for example, what is a valid, what an illusory appointment? What a reasonable time to be allowed for payment of rent, in a lease made under a power requiring a right of re-entry to be reserved for non-payment of rent? The cases decided on these points seem to furnish rules only for cases exactly similar. In a new case, where the appointment varies in any circumstance from the authority, whether it be a valid execution of the power, can only be matter of probable conjecture, until the opinion of some court has been pronounced upon the particular case. Every new decision upon these questions does, indeed, make an approximation to certainty; but it never will be fully attained until every variety in powers is exhausted, and it can be declared to be impossible to contrive a new condition or circumstance to accompany any power.

A distinction has been taken between the cases where a man has power to make leases, &c. which shall charge and encumber a third person's estate; and where the power is to dispose of a man's own estate, as upon a settlement in tail or otherwise, with power of revocation in the settlor. In the first case, it is said, such powers are to have a rigid construction; but where the power is to dispose of a man's own estate, it is to have all the favour imaginable.—See Sayle *v.* Freeland, 2 Vent. 350.

In Comberbach, 11, 12, (a book, indeed, of little authority,) it is said, powers of revocation are to be largely taken. This is probably to be understood of such powers, where they are reserved by the owners of the estate to themselves. In Scrope's Case, 10 Rep. 144, where the power was to determine existing uses and limit new ones, and the donee, (who was before owner of the estate,) covenanted upon a second marriage, to stand seized to new uses, without determining or declaring any purpose to determine the former uses, it was held a valid revocation, on the ground, that when he limited new uses, he thereby signified his purpose to determine the former uses: and a case is cited, as an authority for the decision, with the maxim, "Non refert an quis intentionem suam declaret verbis an rebus "ipsis vel factis."

In the case now reported, the decision seems to have been made on the ground that the intention of the donor was not transgressed in the execution of the power. The noble Lords who moved the judgment apparently considered the power to be well executed at law. The doctrine of equity, by which the defects in the execution are supplied in favour of special objects of appointment, cannot be considered as a ground of decision in this case, although the Lord Chancellor, in the course of the argument, put a question, which seemed to point to such a ground.—See and compare the observations, pp. 120 and 123.

In these questions, upon the execution of powers, the difficulty lies, and insuperable it seems, between discretion with uncertainty on the one hand, and a literal construction with intolerable hardship on the other.