REPORTS

OF

APPEAL CASES

IN THE

HOUSE OF LORDS,

During the Session, 1816—17.

57 GEO. III.

IRELAND.

APPEAL FROM THE COURT OF EXCHEQUER.

BARRETT—*Appellant.*
BURKE—*Respondent.*

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

LEASE in 1713 for three lives, renewable for ever on payment of a fine on the dropping of each life, at 50*l.* rent, by *A.* to *B.* *B.* leases the lands to *C.* at 100*l.* rent, with covenant to renew for ever to *C.* on the same terms; and *B.* also covenants to renew regularly with *A.* *C.* pays his fines and renews with *B.*, but *B.* never renews with *A.* a representative of *A.*, in 1793, accepts some money from *C.* towards the discharge of the fines due from *B.*, and makes demands for payment of the whole of the fines by *C.*, which *C.* neglects to comply with. A formal demand of the fines made by a representative of *A.* in 1799, against *C.*, who does nothing for nine months after demand, and then makes an illusory tender which is not accepted. Held, by the House of Lords, that under these circumstances *C.* had no claim in equity to a renewal.

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

Per Lord Redesdale. A *formal* demand is not necessary under the Tenantry Act. The true meaning of the Tenantry Act is to declare what was the Equity of Ireland, with respect to these leases, before the statute. When a demand is made, the neglect to pay, when it goes beyond what is a reasonable time for payment, ceases to be mere neglect and becomes wilful. What is a reasonable time for payment must depend on circumstances, and no precise time applicable to all cases can, with justice, be fixed. Though a formal demand is not necessary, yet, when such a demand is made, the prior demands are waived, and the time is to be computed from the period of the formal demand: but prior demands are to be taken into account in considering what is a reasonable time after the formal demand. When the first lessee receives the fines from his under-tenant, and neglects to pay them to the head landlord, that is fraud in the first lessee, who is therefore not entitled to a renewal, and the remedy of the under-tenant is against the first lessee, and not against the head landlord. The landlord, in making the demand, is not bound to state the precise sum due, nor to make a demand upon, or give notice to, every individual interested in the subject. The original design of these leases, was the better cultivation of inferior lands and the more easy recovery of the rent, &c.

Original lease, Dec. 23. 1713.

BY indenture, dated 23d December, 1713, the Honourable Edward Brabazon, being seized in fee of certain lands, those of Garrylish and others, in the county of Tipperary, demised the same to John Marshal, of Clonmell, for three lives (of the Brabazon family), at 50*l.* rent, with a covenant for perpetual renewal, upon the request, and at the expense, of the lessee, within twelve months after the expiration of any of the lives then inserted or thereafter to be inserted, upon payment of a fine of 25*l.* for each new life added. Robert Marshall, the son of John, having become entitled, he agreed to ex-

ecute a lease of the lands to one Terence Magrath, and then assigned his remaining interest to William Nash, whose nephew and representative, James Nash, afterwards specifically performed the agreement with Magrath, by executing a lease of the lands to Milo Burke, (the Respondent's ancestor) who had become entitled to the benefit of that agreement. The indenture, dated 9th Jan., 1761, after reciting the death of one of the *cestui que vies* in the original lease, and the nomination of a new life (that of Burke's son), witnessed, that in pursuance of the agreement, and in consideration of a 25*l.* fine then paid on the insertion of the new life, Nash demised the lands to Burke for three lives, with covenant for perpetual renewal, at a rent of 102*l.* 10*s.* Burke covenanted, within six months after the expiration of any of the lives, to name another life, and pay the fine; and Nash covenanted, in three months after a life so nominated and fine paid, to renew with the head landlord at Burke's expense. The indenture contained a proviso that, in case Burke neglected to nominate a life within the six months, Nash should be at liberty to nominate to the head landlord any life he might think proper: and Burke covenanted to pay interest to Nash on any of the fines that might be advanced by Nash to the original lessor before payment by Burke to Nash. The last of the *cestui que vies* in the original lease died in 1772, and, in point of fact, the lease never was renewed with the head landlord.

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

Nash becomes entitled.

Lease from Nash to Burke.

The original lease never renewed.

The Appellant became entitled to the lands as head landlord, in 1799, by devise from Edward

In 1799 Barrett becomes entitled as head landlord.

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

Formal demand.

Brabazon; and, having been unable to discover the representatives of Nash, he, by advice of counsel, calculated the renewal fines up to the 25th Feb., 1801, and executed a power of Attorney to one Dowling, authorizing him to demand and receive the fines. On the 27th Feb., 1801, Dowling, accompanied by the Appellant, went to the lands, and there a formal demand of the fines was made from the principal occupier, and also from the other occupying tenants; and a notice of the demand was then also served by Dowling on the several tenants, including Milo Burke, the Respondent's father, who was then in possession; and a copy of the calculation of the renewal fines was also served on Burke. The Appellant caused a notice of the demand to be published in the Dublin and London Gazettes, on the 5th March, 1801, which was continued for two months from that time. On the 24th March, 1801, Milo Burke furnished the Appellant with an account of money paid by him from 1774 to 1799 to the Brabazons, from which it appeared that Burke had paid considerably more than his own rent; and he alleged that the excess was paid on account of renewal fines. Burke however took no step towards settling the account till the 27th Nov., 1801, on which day he made what was called a tender of the fines, taking credit for the sum alleged to have been paid by him to the Brabazons beyond his own rent. The tender consisted of eight notes of the Bank of Ireland, two notes of Messrs. Finlay and Co., and seven bills of exchange, accepted by several persons in trade in Dublin, some of which bills were then over due, and in the

Demand in March 1801, and no step taken by the tenant to settle the account till Nov. 1801.

hands of the holder, dishonoured. When Burke made this tender he was accompanied by his law agent, Mr. Edward Kirby, who had been agent for Mr. Edward Brabazon, the devisor of the Appellant. The Appellant took a memorandum of the particulars of each note and bill, and of the dates of the bills, and then returned the notes and bills, and asked Burke whether he had any more to say, and Burke answered that he had not.

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

Tender.

In M. T. 1801, the Appellant brought an ejectment against Burke; and on the 4th Dec., 1801, Burke filed his bill in the Court of Exchequer, stating, that in 1780, William Brabazon, then the head landlord, had agreed to accept Nash's profit rent in discharge of the arrears of the head rent and renewal fines; and that from 1782 the head and profit rents had been regularly paid; and *that, in 1793, Edward Brabazon, the son of William, had distinctly agreed to accept of this mode of payment*, so that the forfeiture was waived; and praying that the Appellant, or the heir at law of Edward Brabazon, might be decreed to execute to Burke, as trustee for the heir or representative of Nash, a renewal of the original lease, and for an account and injunction. To this bill none of the Nashes were parties. The Appellant in his answer insisted that there had been such laches and neglect on the part of the Nashes, and those deriving under them, as amounted to gross fraud; and that the right of renewal was forfeited, particularly by the lapse of ten months from the time of demand and notice, without any attempt to pay the fines, except the illusory tender in November 1801.

Dec. 1801. Bill by the tenant for a renewal.

Alleged agreement in 1793.

Prayer for renewal to Burke as trustee for Nash.

Answer.

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

July, 1802. Amended bill.

Burke then, in July 1802, filed an amended bill, making the representatives of Nash parties, in which it was stated, that by an agreement in writing, executed in 1782, Nash consented to assign his profit rent to William Brabazon until the arrears of the head rent should be discharged;—a statement differing from that made in the original bill, inasmuch as it was not alleged in the amended bill that, in the agreement with William Brabazon, any thing was said respecting the renewal fines. The consent of Edward Brabazon in 1793 to accept the profit rent in discharge, both of arrears of head rent, and renewal fines, was stated as before; and the prayer was the same as in the original bill. Answers having been put in, and the cause revived by the Respondent on the death of his father, issue was joined, and witnesses examined.

Evidence

The only evidence material to be noticed for the present purpose is that of the law agent for the Plaintiff, Mr. Edward Kirby, who had been the law agent of Edward Brabazon relative to the transaction of 1793. He stated, that in consequence of letters written by him, at the desire of Edward Brabazon, to Milo Burke, requiring Burke to settle an account of arrears of rent due from the Nashes, a meeting took place in May 1793, between Burke and Brabazon, at which he, Kirby, was present; and it then appeared that all arrears of rent had been paid up to November 1792, with an over-payment of 100*l.*; that Edward Brabazon said "he "would allow the over-payment out of the renewal "fines due by the Nashes to him for the lands, "whereupon deponent did then communicate to

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

" said Burke that said Edward would expect imme-
" diate payment of all renewal fines due to him from
" the Nash family, and that renewals should be at
" once taken out, or words to that effect; to which
" the said Milo replied, that his father had paid up
" all renewal fines due by said Bourke to the Nash
" family and obtained regular renewals of said pre-
" mises, and that said Bourke had then a renewal
" executed by James Nash for three lives, all of
" whom he alleged were then living; and saith,
" said Bourke did then produce to said Edward and
" to deponent a deed or instrument engrossed on
" paper purporting to be a renewal of said lands ex-
" ecuted by said Nash, wherein said Milo Bourke,
" William Bourke, and John Bourke, said Milo's
" father and brother, as deponent believes, appeared
" to be the lives named therein; and believes the
" said William and John were then and still are
" living. Saith, on the production of said deed or
" renewal, said Edward expressed much displeasure
" that the Nash family should receive the renewal
" fines from said Bourke their under-tenant, and
" execute renewals without paying his, said Ed-
" ward's, family or himself their renewal fines,
" though the renewal fines payable by Bourke, on
" the fall of each life, to said Nashes, was same as
" was payable by the Nashes under their lease.
" Saith, said Bourke, under apparent distress of
" mind, informed said Edward, that he had a fa-
" mily of eight or ten children, and that he would
" be ruined if the said Edward would seek to en-
" force from him payment of the renewal fines,
" then appearing due to him; upon which, said

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOREVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

" Edward, with strong expressions of feeling and " kind disposition towards said Bourke, declared he " would not take advantage of him, and that for " the present he would not proceed for payment of " said fines; *whereupon deponent, or said Edward,* " *desired said Bourke should, as soon as he could,* " *endeavour to make up the amount of the renewal* " *fines, for that he, Mr. Brabazon, would not pay* " *any compliment to the Nash family.* And that " deponent did then ask said Edward, whether, as " all arrears of rent were then paid up, deponent " should continue to receive from said Bourke, the " profit rent of 52*l.* 10*s.* a year, arising out of said " lands, to said Nashes, which said Edward desired " deponent to do, saying, he would allow such " payments out of the renewal fines." And then, after adverting to some matters of account, he proceeded thus: " Saith, that prior to May 1793, de- " ponent believes he got instructions from said Ed- " ward Brabazon to demand or enforce renewal fines " from the Nash family; in consequence whereof, " deponent did, as he verily believes, apply to Milo " Bourke, deceased, and also to Mary Nash, the " widow of James Nash, for payment thereof. " Saith, that from 1st May, 1793, till within a " month of said Edward's death, as deponent best " recollects, said Edward never did, to this depo- " nent's knowledge, direct deponent to take pro- " ceedings to evict the interest in the lands in the " pleadings mentioned, in case said renewal fines " were not paid; but saith, that in the latter end " of November, or beginning of December 1799, " said Edward in conversation told deponent that he

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

" wanted a new coach; in answer to which, depo-
" nent told him he could easily get one; to which
" said Edward replied, that he would not go in debt
" for a coach, but that he would insist on Bourke's
" paying as much on account of the renewal fines
" as would purchase one, otherwise, that he would
" insist on payment of the entire, or evict the lease,
" or words to that effect. And saith, deponent did,
" immediately after such conversation, write to the
" said Milo Bourke, unless he did then, without
" delay; remit 200 guineas, as he best recollects
" and believes, on account of the fines due for said
" lands, to deponent, deponent would discontinue
" to receive the Nash's profit rent; but saith, said
" Bourke did not remit one shilling more than his
" usual payments of the head rent and some part of
" Nash's profit rent." And, in his cross examination, the witness made the following statement with respect to the renewal fines: " Saith, that prior to
" the month of May 1793, deponent was directed
" by Edward Brabazon, deceased, either to apply
" for or enforce the payment of the renewal fines
" and arrears of rent, if any arrears were due, on
" the lands in the pleadings mentioned, from the
" Nash family and said Milo; saith, he recollects
" to have received such instructions subsequent to
" 1st November, 1799, but does not recollect to
" have received any such instructions in the interval
" between May, 1793, and November, 1799; does
" not recollect that any person was present when
" he received such instructions or directions; be-
" lieves he answered on both such occasions that he
" would do as he was so directed; saith that it was

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

"in consequence of deponent's application to Milo "Bourke according to the first directions he re- "ceived from Edward Brabazon on the subject, "that a meeting took place on the 1st of May, "1793, between said Edward and Milo at Tara, "where an account was stated of the payments "made by said Milo on account of the rents of the "lands in the pleadings mentioned; saith deponent "hath no recollection, nor does he believe *that said* "*Edward, on any occasion, complained to deponent,* "*or in his presence, that no proceedings had been* "*taken* for the recovery of the said rents or fines, "or made any complaint of that or a similar nature "to deponent's knowledge or belief."

Amount of the evidence respecting the alleged agreement of 1793.

The amount of this evidence, as understood in the House of Lords, was that Edward Brabazon had accepted some money, part of the profit rent, on account of the renewal fines, but that he had not agreed that the whole should be gradually liquidated by payment to him of the profit rent, and that he had on the contrary insisted upon payment of the fines in a different mode, but without effect. The Court below, however, seems to have been of opinion that if Edward Brabazon accepted from Bourke any part of the profit rent on account of the fines, he thereby bound himself to accept the whole in that mode of payment, and had waived the forfeiture; and that the cause hinged upon the point whether Edward Brabazon had or had not thus accepted money from Bourke; and the Court ten-

Issue.

dered an issue to the defendant (Appellant, Barrett) to try that question, which issue Barrett declined to accept; and the Court seems therefore to have de-

cided as if the question had been tried, and the verdict had been against him. The decree was as follows: "That the Appellant having declined to accept an issue to try and inquire whether Edward Brabazon, in the pleadings mentioned, did at any time, and when, receive any and what sums of money out of the lands comprised in the lease of 23d Dec., 1713, for or on account of the renewal or septennial fines due under said lease; that it appears to the Court, that William Brabazon, in the pleadings mentioned, and the said Edward Brabazon, were respectively in receipt of the rent of 102*l.* 10*s.* a year, in pleadings mentioned, from the 10th day of Dec., 1782, to the 30th Dec. 1799, first in discharge of the rent and arrears of rent due to them, and next in and towards satisfaction of the renewal and septennial fines, and the interest thereon; therefore let the officer inquire and report the amount of all sums so received by the said William and Edward Brabazon out of the said lands during the period aforesaid, and let him apply the same as received, first in discharge of rent and receiver's fees, and arrears of rent due, and then in discharge of the renewal and septennial fines and interest thereon; and let him strike a balance on the foot of such fines, septennial fines, and interest, on 27th February, 1801; and in taking such accounts of fines, and septennial fines, and interest, (the parties admitting that Brabazon Ponsonby, Earl of Besborough, died on the 15th July, 1758, and that Chaworth Brabazon, Earl of Meath, died 14th May, 1763, and that Edward Brabazon, Earl of

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

Decree, May 15, 1807.

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

"Meath, died 22d Nov., 1772; and it appearing "that the said tenant has twelve months time to "nominate a new life in the place and stead of any "life named in said lease of the 23d Dec., 1713, "that should happen to fall, and so from time to "time upon all subsequent renewals), let the officer "charge one fine of 25*l.* with interest from the "15th July, 1759, and another fine of 25*l.* with in-"terest from the 14th May, 1764, and another fine "of 25*l.* with interest from the 22d Nov., 1773; "and so, at the end of every eight years from the "then periods last-mentioned, let him charge ad-"ditional fines of 25*l.* each with interest; and let "the officer distinguish and report how much of "the balance which will appear to be due for re-"newal and septennial fines, and interest thereon, upon "the said 27th day of Feb., 1801, according to the "directions aforesaid, is composed of renewal and "septennial fines which became payable to the said "Earl of Meath, the lessor during his life-time, "with interest for the same, and how much thereof "is composed of renewal and septennial fines which "became due in the time of William Brabazon "during his life-time, with interest for the same, "and how much thereof is composed of fines which "became payable to the said Edward Brabazon "during his life-time, with interest for the same, "and how much thereof is composed of fines due "to the Defendant, Roger Barrett (the Appellant), "in his own right, as the devisee of the said Ed-"ward, and reserve all equity between the parties, "and all further directions until the return of the "report."

The officer having made his report, a final decree was pronounced on the 24th June, 1812, whereby the Appellant was ordered to execute a renewal of the lease to Mary Nash, widow, and Richard Harold, the surviving trustee named in the will of James Nash deceased, &c. From these decrees Barrett appealed.

Feb. 26, March 5, 1817.

LEASE FOR LIVES RENEWABLE FOREVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

Final decree. Renewal to the Nashes. Appeal.

Sir Samuel Romilly and *Mr. Roupell* for the Appellant; *Mr. Hart* and *Mr. Wetherell* for the Respondent.

Lord Eldon (C.) In this case the Court of Exchequer pronounced a decree reciting "That Barrett having declined to accept an issue to try and inquire whether Edward Brabazon, in the pleadings mentioned, did at any time and when receive any and what sums of money out of the lands comprised in the lease of 23d Dec., 1713, for or on account of the renewal or septennial fines due under the said lease, &c.;" and, afterwards, a decree was pronounced, giving Bourke the benefit of the act usually called the Tenantry Act. The Court below, therefore, proceeded on this issue as an essential part of the case; and they seem to have thought that, as the Appellant had declined to accept it, the case was to be taken as if the issue had been tried and found against him; and on that ground they gave relief. On looking at the bill and the answer, and at the evidence of Kirby; and considering with whom he was connected at the time of the latter part of these proceedings, and with whom he had been before connected; and consi-

March 5, 1817. Judgment.

Ground of decision below, that Barrett had declined to accept an issue to try whether Edward Brabazon had received any payments on account of renewal fines.

March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

That issue ought not to be directed, and, though it had been found against the Appellant, it would not have been conclusive against him.

This not a case of mere neglect.

Demand made, and not complied with.

dering the evidence altogether, and the whole circumstances of the case, I am of opinion that no such issue ought to have been directed; and, if I rightly understand the Tenantry Act, though that issue had been tried and found against the Appellant, it would not have been conclusive against him.

Looking at the Tenantry Act only, I cannot, in that view of the case consider this as a case of mere neglect; and it would be mischievous not to distinguish between cases of mere neglect, and cases of wilful neglect. The tenant was in possession, and knew the *cestui que vies*; and he transacts with his intermediate landlord, paying him the fines, while no care was taken to pay what was due to the original lessor. In this case also a demand was made, and not acceded to; and it cannot be considered as a case of mere neglect.

I have stated the grounds of my opinion very shortly, because the reasons and principles on which it is founded will probably be stated and explained at large, and much better, by a noble Lord who presided for some time in the Court of Chancery in Ireland.

Lord Redesdale. I am clearly of opinion that the decrees ought to be reversed. The issue had no tendency to decide the case. The issue was, "whether Edward Brabazon, in the pleadings "mentioned, did, at any time and when, receive "any and what sums of money out of the lands "comprised in the lease of 23d Dec., 1713, for or "on account of the renewal or septennial fines due

"under the said lease." That was a question which would not decide the case; for, though some sums had been paid to Edward Brabazon on account of the fines, that would not decide whether there was such neglect on the part of the tenant, as ought to deprive him of the benefit of renewal. The issue has not been proposed according to the case contended for on the part of the Respondent; that is, a case of *contract*, and that, such being the *agreement* entered into between him and Brabazon, the representatives of Brabazon were bound to renew according to that agreement. That has been contended on the part of the Respondent. The issue, however, is not of that description, but one which has no tendency to decide the case.

But it is clear from Kirby's evidence that there was no such agreement. The evidence amounted only to this, that Edward Brabazon consented to apply what he received beyond the arrears of the head rent towards the discharge of what was due to him on account of the fines. But there was no contract that he would not call for the fines in any other manner; and it appears, from Kirby's evidence, that he did, in fact, call for the fines in another manner: so that the ground on which the Court of Exchequer proceeded is not a just ground. The only question is, whether the tenant, having clearly lost his legal right, ought to have the relief which, by the practice of the Courts of Equity in Ireland, was given, before the Tenantry Act was passed; for the true meaning of the Tenantry Act is to declare what was the Equity of Ireland before the statute. It is merely a declaratory act. The act itself recites

March 5, 1817.

LEASE FOR LIVES RENEWABLE FOREVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

The issue not decisive of the case, for though some sums might have been paid to E. Brabazon on account of the fines, there might still have been wilful neglect on the part of the tenant.

The real nature and effect of the transaction of 1793.

The Tenantry Act. It is a declaratory act, declaring what was the Equity of

March 5, 1817.

LEASES FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

what was the practice of the Courts of Equity in Ireland before it passed. When the case was one of simple neglect, it was relievable. Where the case went beyond simple neglect, it was not the practice in Equity to relieve.

Ireland before it passed. Demand. Neglect. Reasonable time.

In my humble opinion, and I have frequently had occasion to consider this act, the meaning of it is, that the moment a demand is made, the neglect, when it goes beyond what is a reasonable time for payment, ceases to be mere neglect, and becomes wilful. Lord Clare had the same view of the meaning of the act. "Reasonable time," he says,

Truman v. Waterford, 1 Scho. Lef. 451.

"which is necessary to give the tenant full oppor-
"tunity for ascertaining when the *cestui que vies*
"died, for computing the amount of the fines due,
"and for preparing the leases. The precise time
"cannot be defined." That I take to be the true meaning of the act; and it must depend upon the particular circumstances of each case, whether the tenant has applied for renewal within the proper time. It has been contended that some precise time ought to be fixed. But the circumstances are so various that it would be doing great injustice to the tenants to fix any precise time. Every case is different in its circumstances; and a singular circumstance in the present case is, that the only person who had the means of making up the account is agent for the lessee, and had been agent for the lessor; and he had in his possession all the documents necessary for the purpose of making up the account, and no other had them. He therefore, and no other, was competent to make up the account,

No precise time for renewing after demand can be fixed. What is a reasonable time must depend on the circumstances of each case.

and he might have done it in a short time. In the case of *Jackson v. Saunders*,* I was of opinion, and that opinion was confirmed by the decision of this house, that four months, or from four to five months, was, under the circumstances, an unreasonable time: and the circumstances there were, the frequently calling for the fines before a formal demand made. In looking at the act, it does not appear that any *formal* demand is necessary; but, the party having made it, the time is to be computed from the period of that demand: and the prior demands are waved by the subsequent formal demand if the fines are paid within a reasonable time after that demand. But then, I think, it is to be considered what former demands were made with reference to the point of neglect, and the question what is a reasonable time after the formal demand.

March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

* *Vid. ante*, vol. ii. 437.

A formal demand not necessary; but when made, the time is to be computed from the period of that demand.

But prior demands to be taken into account in considering what is a reasonable time after a formal demand.

In this case it appears from the evidence of Kirby, who stood in the singular situation which I have before mentioned, that demands were made several years before, and that, on Burke's representing that he had paid the fines to the Nashes, Edward Brabazon consented to give some indulgence to Burke, and to receive the profit rent; and then Kirby states, "whereupon the Deponent or "the said Edward (Brabazon) desired that the "said Bourke should, as soon as he could, en- "deavour to make up the amount of the renewal "fines; for that he, Mr. Brabazon, *would not pay* "*any compliment to the Nash family:*" and yet this decree gives the benefit of the lease to the Nash Family. Brabazon had given the indulgence merely out of compassion to Burke. Nash having

March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

* Bateman v. Murray. Ridge, P. C.

received the fines from Burke without paying to Brabazon what he had so received, which was a fraud on the part of Nash: so that it comes to the ground on which Lord Thurlow rested in the case of Lady Ross,* which was misunderstood by Lord Lifford, and which, by the by, produced the tenantry act. The ground on which that case was decided, and which was misunderstood by Lord Lifford, was, that the agent for Lady Ross had called upon the other lessees to pay their fines, and he himself had not paid them, though the lives had dropped, which was a fraud. So here it was a fraud in Nash, the receiving the fines from his own undertenant, without paying them over to Brabazon. It is clear then that the Nash family would not be entitled to renewal at their own suit, and yet this decree gives it them at the suit of Burke.

Nash receives the fines from his undertenant, and does not pay them to his landlord: this is fraud in Nash, and the Nashes have no good claim to a renewal. State of the case as to Burke. Prior demands.

All therefore we have to inquire into is, whether Burke was guilty of wilful neglect after the demand was made. The first demand was made in 1792, and no such arrangement as that contended for took place with respect to the profit rent. That appears by Kirby's evidence. Then the profit rent continues, however, to be received, and no further demand is made till shortly before the death of Edward Brabazon, when, as Kirby states, Brabazon said that he wanted a new coach, and would insist on Burke's paying as much, on account of the renewal fines, as would purchase one, otherwise that he would enforce payment of the entire: and then Kirby wrote to Burke that, unless he did then without delay remit 200 guineas, on account of the fines due for the lands, Brabazon would discontinue

to receive the profit rent. But Kirby says, that the money was not paid. The words are, "saith, said "Burke did not remit one shilling more than his "usual payments of the head rent, and some part "of Nash's profit rent;" so that he did not even remit the whole of Nash's profit rent. This was in 1799. After the death of Edward Brabazon, Barrett, who became entitled, insisted upon payment, and made a formal demand, with notice. It was contended that Barrett ought to have stated the precise sum that was due. But the act does not impose any such duty on the landlord; and it would be great injustice if it did, as he is not likely to be the most cognizant of the lives and deaths, the *cestui que vies* being usually named by the lessees from among their own families, and they are bound by the original obligation to tender the sum due. The lessor often cannot know who the lives are, as they are generally persons of the family of the lessee, and unconnected with the lessor. It is sufficient for the purposes of this act that a demand has been made; and the tenant is to be judged by this question, was it mere neglect or wilful neglect in him that he did not pay the fines? If it were wilful neglect, he is not entitled to a renewal. That is the construction put upon the act by Lord Clare; and Lord Clare knew the views of the legislature when the act was passed. I am, therefore, clearly of opinion that a simple demand is all that is necessary on the part of the lessor. A contrary construction would make property of this kind almost of no value to the lessors. A lease is made for three lives; one of the lives drops; the lessor demands payment of

March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

Formal demand.

The landlord, in making the demand, is not bound to state the precise sum due.

A simple demand is all that is necessary on the part of the lessor.

March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

the fine; the lessee does not pay; two of the lives still remain, and the lessor cannot recover the property. How is he then to keep alive the memory of the notice and demand? He can do so only by a bill to perpetuate the testimony of witnesses, the expense of which he must pay. But this difficulty is, in fact, imposed on the landlord; and if, in addition to this, he were bound to state the precise sum due when he made the demand, an estate of this kind would be worth nothing. It has been contended that the demand ought to be made upon, and notice given to, all who are interested. I know a property of 13,000 acres in the county of Tipperary, which is covered with leases of this description, divided and subdivided by under leases, five or six deep; and the owner has no conception of all who are interested. All he knows is who is to pay him the head rent and the fines of renewal. The demand, however, according to the construction contended for, must extend to lessees of every description. But when the act speaks of assignees, it means assignees of the whole interest: and this still leaves a difficulty where the whole interest is divided into a great many parts; the effect of which often is to make the interest of the lessor of such small value as to be scarcely saleable in the market. Your Lordships, under these circumstances, will not extend the meaning and benefit of the act beyond cases of mere neglect; and the demand is one circumstance by which wilful neglect is to be established.

In this case, a demand, though not a formal one, was made in 1799. On the death of Edward Brabazon a formal demand was made. What took

place? Burke suffered nine months to pass without doing any thing: and what does he do then? He comes with Kirby and makes a tender; and that, besides other objections, was not sufficient in amount. But could Kirby really have believed that Barrett would have accepted such bills as these? It was merely a delusive pretence, and not a real tender. What Barrett did, was to take a memorandum of the particulars of each note and bill tendered, and cause it to be subscribed by a person present. What passed then? Barrett said, "Burke, "have you any more to say;" and was answered, "No:" and upon this it is said that the tender was objected to merely because it was not sufficient in amount. But I take it that it was objected to altogether, not merely as being insufficient in amount, but also because the proper time was passed; and because it was a delusive, and not a real tender, and one which would not have been accepted, even if it had been in time, and to the proper amount; for it was not a tender that could be taken in payment.

March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

Burke suffered nine months to pass after a formal demand, without doing any thing, and then he made only an illusory tender.

This is clearly a case of wilful neglect; Burke having full time to be prepared to meet the demand; and Kirby, who had been agent to Brabazon, being agent for Burke, and having in his possession all the documents necessary for making up the account. Burke was bound to tender the fines, and the leases for execution, and one month was amply sufficient for these purposes. He was bound to offer the fines, and to present the leases for execution, for Barret was entitled to have a tenant acknowledging the tenure, which was an important object in regard

March 5, 1817.

LEASE FOR LIVES RENEWABLE FOREVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

The original design of these leases, the better cultivation of the lands, and the more easy recovery of rent.

to property of this kind. What was the original object of these leases? Lord Lifford says, that the object was the improvement of the lands, and the more easy recovery of the fines and rents. The original design of these leases, then, was the proper cultivation of inferior lands, and the more easy recovery of the rent, a thing which in Ireland was often very difficult. This tenure was particularly important in the disturbed state of Ireland, as the lands were by that means in the hands of persons acknowledging themselves as lessees; for it often happened that, in 'the course of many years, no rent was paid, and if they had been simply fee-farm rents, there would be presumptions against them which would often deprive the landlord of his property. The object therefore of this tenure was to preserve the property; and every time the lease is renewed there is an acknowledgment of the tenure; and there is also the benefit of the covenants, which is totally lost if the leases are not renewed. So that it is of very great importance that the lease should be renewed when a life drops; and this is often the chief value of the renewal, the fines being hardly adequate to the expenses of suits.

It is very important therefore that the relief should be confined to cases of mere neglect, and not extended to cases of wilful neglect; and that persons bound to pay the fines and tender the leases, should do so in a reasonable time. In the present case nine months were suffered to elapse before any thing was done, and then there was a jocular,

rather than a serious, tender, and nothing more was done. Nash had clearly forfeited his title by fraud, and the only one to claim was Burke, whose claim was founded merely in the indulgence of Edward Brabazon. Burke had no right, except under that indulgence, his remedy being, in my opinion, only against Nash, and not against Brabazon. I think therefore that these decrees are wrong; that Burke is entitled to no relief as against Barrett; that the issue tendered was nothing as to the merits; and that the decrees ought therefore to be reversed, and the bill dismissed.

March 5, 1817.

LEASE FOR LIVES RENEWABLE FOR EVER.—NEGLECT TO RENEW.—TENANTRY ACT, &c.

Decrees accordingly reversed, and bills dismissed.

Decrees of the Court below reversed.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (2d DIV.)

BLACK—*Appellant.*
CAMPBELL—*Respondent.*

The *set* or constitution of Inverkeithing requiring that the members of council should be resident burgesses, the clerk, at the election of a delegate for that burgh, in 1812, refused to reckon the votes of two persons whose names had been entered in the minutes, as part of the magistrates and town council, assembled for the purpose of the election, and to whom the qualifying oaths had been administered by himself, in consequence of an objection on account of non-residence; the fact of non-residence being notorious and consistent with the clerk's

May 7, 9, 1817.

POWER OF RETURNING OFFICERS IN CASES OF ELECTIONS OF DELEGATES FOR BURGHS.—PLEADING.—EVIDENCE, &c.