same sum, and for the same purposes as the charge which Lord Galloway had bound himself to create upon his estates for the benefit of the children of the marriage, with the exception of an eldest or only son. The charge upon Lord Galloway's estate was to remain until such times as the children should attain twenty one years or marry, or until the £5000 should be required for the advancement in the world of a son or sons, and the trustees were at such time or times to call or levy and raise the principal sum, and pay, apply, and dispose of the same according to the provisions of the settlement. The covenant of Colonel Stewart is, that he will effectually charge the estate of Broughton with all payments of the said sum of £5000, upon the trusts thereinbefore declared, (with the exception mentioned,) "or so many of them as shall be then subsisting and capable of taking effect."

The parties may have intended, that the covenant should be one of indemnity, and not of substitution. They may have meant, that Lord Galloway, if compelled to pay the £5000 under his obligation, should be repaid out of the estate of Broughton, whenever it should fall to Colonel Stewart, or to any heir of his body, however remote. But if this were their intention, they have failed to express it. They have merely stipulated, that there should be substituted for the charge on Lord Galloway's estates a charge upon the estate of Broughton, upon the same trusts, and for the same ends, intents, and purposes. The intended charge upon the estate of Broughton being thus one of mere substitution for a similar charge for a defined and limited purpose, it appears almost necessarily to fix a limit to Colonel Stewart's covenant. That limit must be the period of time when the trusts for which the £5000 was to be provided, are all satisfied. The charge, then, has no object to which it can be applicable, and if created, would be created in vain. Therefore the trusts for which the original charge was created, having, in my opinion, been performed and satisfied long before the succession to the estate of Broughton opened to the respondent, there was no trust then subsisting and capable of taking effect to which the proposed substituted charge could be applied.

On this ground alone, and without adverting to other arguments on the part of the respondent which support this conclusion, I cannot bring myself to agree with my two noble and learned friends, whose opinion, however, must of course prevail, and the interlocutor be reversed.

Mr. Rolt asked, that the expenses in the Court below be repaid.

Order, that the interlocutors be reversed, so far as extends to the pursuer's right to claim payment of £1700, and interest thereon, and that the expenses paid by the appellant under the interlocutor of the Court below be repaid to him.

Appellant's Agents, J. Ronald, S.S.C.; Loch & Maclaurin, Westminster.—*Respondent's Agent*, H. Scott Turner, Westminster.

JUNE 13, 1865.

HUNTER and Others, *Appellants*, *v.* The EARL OF HOPETOUN, *Respondent.*

Landlord and Tenant—Perpetual Renewal of Lease—Dispensation of Condition—Equitable Relief of Tenant—*T., a tenant under a lease for nineteen years, with right of perpetual renewal on twelve months' previous demand before the expiry of each term, raised an action to compel L., the landlord, to renew from* 1842 *to* 1861. *L. pleaded in defence, that the lease was forfeited for breach of the stipulations as to timber; but that action went to sleep, and the parties negotiated as to a draft of renewal, L. threatening, that if his proposed alterations in the draft were not agreed to, he would fall back on his defence, that the lease was forfeited. During the negotiations, and the delay not being caused by T., the time arrived for a new demand by T. of a further renewal from* 1861 *to* 1880, *which T. omitted to make.*

HELD (reversing judgment), *That while the* lis pendens *as to the existence of the former lease existed, T. was excused from making further demand of renewal, and that he had not lost his right of renewal.*[1]

This was an appeal from a decision of the Court of Session, as to the right of the appellant to have a renewal of a lease of the farm of Cotterwell, or Westfield, of Ormistoun. The action was raised by the Earl of Hopetoun against the tenant, to have it declared, that such tenant had no right to have the lease renewed, but was bound to leave the farm at Whitsunday 1861. In the

[1] See previous report 1 Macph. 1074: 35 Sc. Jur. 612. S. C. 4 Macq. Ap. 972: 3 Macph H. L. 50: 37 Sc. Jur. 489.

condescendence the Earl set forth, that in 1747 George Cockburn, the then proprietor of the barony of Ormistoun, granted a tack to Andrew Wight, therein designed linen draper in Ormistoun, and his heirs and assignees, of "those parts of the lands and barony of Ormistoun, called the Westfield of Ormistoun, *alias* Cotterwell, and that during all the years and space of nineteen years, from and after the said Andrew Wight his entry thereto, which is hereby declared to have been and begun to the houses, and other buildings upon the said farm and others, the pasturage, grass, and meadow land thereof, at the term of Whitsunday last, and to the arable land at the separation of the current crop, 1747 years, from the ground."

The rent was £53. The said lease also stipulated, that, "upon the said Andrew Wight and his foresaids their tendering and paying to him, the said George Cockburn, the sum of £53 sterling money as a year's rent of the said farm, by way of fine and consideration to the said George Cockburn and his foresaids, over and above the yearly rent after mentioned, and demanding a new lease from the said George Cockburn or his foresaids, in a legal manner, before a notary and two witnesses, at least twelve months before the expiry of the said term of nineteen years; that then, upon the said Andrew Wight and his foresaids making such tender, payment, and demand, the said George Cockburn and his foresaids, shall reiterate and renew this lease or tack in favour of the said Andrew and his foresaids, upon his or their proper charges or expenses for other nineteen years longer, for payment of the same yearly rent, at the same terms, and with and under the same conditions, provisions, and qualifications contained in this present lease, and so furth thereafter, the said tack of the foresaid farm and others above mentioned, shall be renewable in favour of the said Andrew Wight and his foresaids from nineteen years to nineteen years for ever, upon their making the like tender, payment, and demand at the end of every nineteen years, and in the terms above mentioned, and observing and performing the conditions, provisions, and prestations contained in this present tack."

A renewal of the said lease had been duly made at the end of every nineteen years, from 1747, the demands being made always previously to the Whitsunday term of the year. The last renewal was made in 1823, the lease being dated 1825, and repeated the usual clauses. Andrew Wight, grandson of the first tenant, succeeded in 1830, and in 1837 he obtained the consent of the Earl of Hopetoun (as the lease required such consent to be obtained) to an assignation of the said lease being granted to William Hunter, farmer at Outerston. On 12th May 1841, being twelve months before the Whitsunday of the year 1842, William Hunter demanded a renewal of the lease for another term of nineteen years. No renewal lease, however, was granted; but if it had been granted, it would have expired in 1861. The reason why the lease was not in form renewed in 1842, was, that some dispute had arisen between landlord and tenant, as to the repair of fences and other stipulations of the lease, and the landlord refused to grant a formal renewal; but the said William Hunter continued to possess the farm on the footing, that he had right thereto for a nineteen years' lease from the year 1842, and the tenants would have been bound to remove from the houses and other buildings, and the pasturage, grass, and meadow lands at Whitsunday 1861, and from the arable land at the separation of the crop of the year 1861 from the ground.

William Hunter, the tenant and assignee, died in 1852, leaving a trust disposition and settlement, whereby he assigned the lease to the appellants as trustees, and the Earl never assented to this assignation. Since the death of W. Hunter, however, his trustees had continued in possession of the farm. But the Earl of Hopetoun alleged, that no tender or demand for a renewal of the lease for nineteen years from 1842, was made by William Hunter, or his heirs or assignees twelve months before the expiry thereof, till 11th May 1861, when a schedule of requisition was served on the Earl by Mr. Hunter's trustees. The Earl, holding, that they had not formally complied with the lease, required them to remove at 1861; but they failed to do so, and hence the present action. The farm was worth about £350 per annum, though the rent payable under the original and renewed leases was only £53.

The trustees of Mr. Hunter, the tenant, in their answers, set forth, that the lease had been regularly renewed up to 1822, and that the lease granted in 1825, for nineteen years from Whitsunday 1823, made a variance in the renewal clause. Andrew Wight, with the assent of the Earl, assigned the lease in 1837 to William Hunter. In May 1841, Mr. Hunter made a formal tender and demand to the Earl, who failed and refused to execute a renewal on grounds which were untenable; and in consequence of this wrongful refusal, Mr. Hunter never obtained a written title. A correspondence had been carried on between the parties for some time; until Mr. Hunter commenced an action against the Earl, who set up as an answer the alleged contravention of obligations by the tenant, and forfeiture of the lease; at all events, he contended, that the new lease ought to be varied with regard to the timber on the farm. That action was still pending, and the parties allowed it to go to sleep chiefly because, meanwhile, the correspondence between the parties was resumed, and Mr. Hunter's agent offered to modify his claim as to the buildings, but the offer was not accepted. Mr. Hunter died in 1852. In 1860, the correspondence as to the renewal of the lease was renewed, and Mr. Patrick Turnbull, the tenant's agent, wrote, on 12th February 1861, as follows to the Earl's agent:—"As to Cotterwell lease, the draft of which

you have not yet adjusted, I see the term of it expires at Whitsunday. I made no tender and demand, as the lease had not been adjusted, but I have now to submit, that the draft be altered so as to include another nineteen years. The present fine and interest, as well as the former one, are of course ready to be paid whenever you please."

To this request the Earl's agent wrote, that as no demand for renewal had been made at the proper time, viz. a year before Whitsunday 1861, the lease would come to an end in Whitsunday 1861. Accordingly, the Earl commenced the present action.

The defenders alleged, that the omission to make the formal demand for renewal was caused by the evasions and delays of the pursuer in adjusting the lease for the previous nineteen years; that during the whole of that delay the Earl and his agent were well aware, that the lease was renewable perpetually, and was of great value, and that the lessee's family intended to renew it and pay the requisite fine, and that large sums had been expended by them on improvements; that the price paid by Mr. Hunter for the lease was £6500, and he had expended about £1500 in buildings, draining, and permanent improvements, and that the Ormistoun property had been acquired by the Hopetoun family at a comparatively small price, in respect of this and other perpetually renewable leases affecting it; that the proviso as to twelve months' notice had reference to a state of circumstances different from the present, and was intended to enable the landlord to find a new tenant, in case the old tenant was about to leave; that the Earl, on the present occasion, had taken advantage of the circu nstances to procure the loss and forfeiture of the lessee's rights under the lease, and that the want of twelve months' notice was due to his fault. Moreover, that at the term of Whitsunday 1860, when the formal notice of renewal ought to have been given, the heir at law of William Hunter was deaf, and dumb, and insane; that the lessees were ready and willing to pay the fine; and that no loss or damage had been caused to the pursuer.

The Lord Ordinary (Kinloch), by his interlocutor, found, that the right to demand a renewal had ceased by reason of the failure to make the demand twelve months before Whitsunday 1861. The Second Division adhered (Lord Neaves dissenting).

Rolt Q.C., and *Sir H. Cairns*, Q.C., for the appellant.—The decision of the Court below was wrong. A lease with a clause of perpetual renewal on certain conditions is a perpetual right which is determinable on nonperformance of some obligation; but such a right cannot be determined without an action of declarator, and before declarator the irritancy may be purged—Stair, iv. 18, 1-4; Ersk. 2, 5, 25; M. 7210-7244. Here a formal tender and requisition were made before any decree of declarator. But there is another ground on which the landlord ought not to have been allowed to take advantage of the failure of the tenant to demand a renewal on Whitsunday 1860. At that time there was a suit pending between the parties, and the landlord set up as a defence, that the lease was at an end, and that the tenant was no tenant. It is true a negotiation went on afterwards, which was not quite consistent with this plea of the landlord, who admitted his liability, or, at least, offered to renew the lease if certain changes were made in the draft lease. But throughout the whole negotiation, Mr. Hope, the landlord's agent, held out, that if these alterations were not agreed to, he would revert to his plea in law, that there was no subsisting lease, and that the relation of landlord and tenant did not exist between them. Besides, the delay in the negotiations was entirely caused by the landlord. That being so, how can it be held in a court of equity, that the landlord can blow hot and cold, and one moment insist on the lease being at an end, and at the same moment in full force? The landlord kept the tenant at arm's length, and played with him until the time arrived for a new renewal; and having thus thrown the tenant off his guard, he turns round and says, "You have not done what the lease required, and I now hold the lease to be forfeited and at an end." In England, a court of equity would not allow such conduct—*Harris* v. *Bryant*, 4 Russ. 89. A court of equity will, while the *lis pendens* exists, keep things *in statu quo* till the question is settled. And the Court will relieve a tenant, who, in circumstances like the present, is prevented from obtaining a renewal—Sugden's Prop. in House of Lords, 540; *Butler* v. *Mulvihill*, *ibid.* 553. Even assuming this was a case of a condition precedent, the Court will dispense with its performance, if the other party acts improperly, and leads to the neglect of the condition—Cruise, Digest, xiii. 2, 24; *D. of St. Albans* v. *Shore*, 1 H. Bl. 270. So, in ordinary continuing contracts, if one party break his contract and repudiate it, the other is dispensed from doing his part—*Planche* v. *Colburn*, 8 Bing. 14; *Hochster* v. *De Latour*, 2 E. & B. 678. In Ireland, where leases containing a covenant for perpetual renewal are not uncommon, it is settled, that if the landlord throws difficulties in the tenant's way, he cannot insist on a literal compliance with the covenant on the part of the tenant—Lyne on Leases, 194. The correspondence between the parties clearly shews, that the landlord was playing with and lulling the tenant, diverting attention to another subject, until the objection now relied upon could be taken.

Sir F. Kelly Q.C., and *Anderson* Q.C., for the respondent.—This case is concluded by the decision of the House of Lords in *Wight* v. *Earl of Hopetoun*, in 1864, 36 Sc. Jur. 542; 4 Macq. Ap. 729; *ante*, p. 1250. That case involved a point identical with the present, the lease being identical in terms. There also the tenant relied upon the equity and hardship of his

case, but the House held, that that was no excuse for not applying for a renewal at the proper time.

[LORD KINGSDOWN.—I rather think the point there was different, and it all turned on whether the beginning of the lease was at Whitsunday or the separation of the crop.]

That other point was the main point, but the equitable defence was also raised and relied upon, as fully appeared from the report in *The Scottish Jurist*, the other reports not shewing what were the grounds relied upon at the bar. Therefore, there being an express decision of the House, the present case is concluded by that case.

[LORD CHANCELLOR.—I think there is this important distinction between the two cases. In *Wight's case* there had been a decree of the Court ordering a new lease to be granted, so that the *lis* was ended; but here the *lis* was pending, and had never been concluded.]

That makes no difference. In both cases the fact, that no lease had been renewed for the preceding term of nineteen years, only amounted to this, that the tenant continued in all respects to hold the farm on the same terms as if the lease had been actually granted. What ought to have been done may be taken to have been done; and the tenant must be taken to have been in no worse, or better, position than if the preceding renewal had been in fact made. If, then, the terms of the lease were binding on the tenant, it was imperative on the tenant to tender payment of his fine, and demand the renewal twelve months before the expiration of the term of 1861, and nothing can be taken to be an equivalent or excuse for his omission to do so. No Court of equity or law has any power to dispense with performance of such a condition. If the condition is not performed, the lease is at an end. Either it was a contract or it was not; if it was a contract, how can the conduct of one party release the other from doing his part? The tenant cannot be free and yet the landlord bound. Even in England a Court of equity will not relieve a tenant who has been guilty of laches—4 Jarman's Bythewood, 3d ed. p. 397. Here no doubt a suit was pending between the parties, but either party could have resumed the litigation. The truth was, that the litigation was held to be unnecessary, and was jointly abandoned, because the tenant had just as good a title without the actual renewal as with it, and his obligation in both cases was the same. The mere fact, that the landlord pleaded an erroneous plea to the pending suit, could not in any way alter his legal right under the existing lease. There is no proof of fraud in the landlord.

[LORD CHANCELLOR.—Can you say, that the landlord's agent here did not beguile the tenant over the day when a fresh demand of renewal must be made, in order to preserve the lease for a further term after 1861?]

No doubt, if the evidence supports a case of beguiling on the part of the landlord, it might be otherwise; but here there was no beguiling: each party stood on his rights—one as landlord, and the other as tenant. There is no evidence, that the tenant considered he had been beguiled or deceived.

Sir H. Cairns replied.—It is quite clear this case is not concluded by *Wight's case*. There the decree had been made; here the litigation was going on. Here the landlord was repudiating the contract and denying that there was a lease; yet, in the midst of all that, the moment a certain day arrives, he suddenly turns round and says: "I insist on your complying with the lease, and as you have not done so I will eject you." To allow a landlord so to act, is contrary to the first principles of equity. His conduct was an implied waiver of all further compliance on the part of the tenant with the lease, till the outstanding dispute between them was concluded by a decree of the Court. A renunciation by one party to a contract dispenses with further performance by the other. The parties here were at arm's length about the existence of the contract, and how could one of the parties be expected to act on the faith of the contract till that dispute was settled?

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, the last lease granted by the Earl of Hopetoun, the father of the present pursuer, was executed in April and May 1825. It was for a term of nineteen years from Whitsunday 1823, and was granted in pursuance of the covenant for renewal contained in the original lease. But the covenant for renewal contained in the last granted lease of 1825 is somewhat differently expressed from the covenant contained in the original lease of 1747. For the purposes of this cause, however, I think the difference is immaterial. The right to a renewal must be regulated by the terms of the covenant in the lease of 1825. In conformity with this covenant the late Mr. Hunter, to whom the lease of 1825 had been assigned, did on the 12th May 1841, being more than twelve months before the expiration of the lease, duly demand a renewal in his favour. With this demand the landlord refused to comply, and insisted, that, by reason of certain alleged breaches of the covenant contained in the lease of 1825, Mr. Hunter was not entitled to a renewal, or to continue in the tenancy of the farm. In consequence of this refusal, Mr. Hunter in the month of December 1845, commenced an action against the Earl of Hopetoun, concluding to have it declared, that the Earl should renew the lease for the term of nineteen years from Whitsunday 1842 on payment of the same rent, on the same terms, and

with and under the same conditions, provisions, and qualifications as were contained in the lease of 1825.

In his defence to this action the Earl insisted, that the obligation to renew was dependent not only on the tenants making tender and demand at least twelve months before the end of every term of nineteen years, but also on the tenants observing and performing the conditions and prestations contained in the lease, and the Earl proceeded to specify various breaches of covenant, concluding in these words—First, in consequence of the violation of the conditions and obligations imposed on the tenant by the lease libelled, the pursuer, as assignee to the lease, and as standing in right of the original tenant, is not entitled to demand a renewal. The original right of lease is forfeited, which may be established by declarator at the instance of the defenders, should that be thought necessary. Second, even if the pursuer were entitled to obtain a renewal of the lease of 1825, he is not entitled to insist, that the renewed lease shall be drawn up so as to make the obligation as to furnishing timber for the repair of houses, etc., apply to buildings recently erected upon the farm.

This action has never been disposed of, no further step having been taken since the defences were lodged. This action has been asleep since 1847, but it is still *lis pendens*. This is admitted by the respondent in the answer to the 11th statement of the appellant.

From the issues raised in this action by the respondent, two things are plain; *Firstly*, That the landlord denied the existence of any tenancy, and refused to grant the lease, which, if granted, would have contained that covenant to renew, which the appellants would have then been entitled to exercise. *Secondly*, That until the second defence and the question thereby raised was disposed of, the tenant could not know what would be the exact terms of lease to be granted by the landlord, and what he would be entitled to receive under the covenant.

The question is, whether, pending this denial by the landlord of the relation of landlord and tenant, and his refusal to grant a new lease, which it is now in effect admitted was unfounded, the landlord has a right to insist, that it was the duty of the tenant to have treated the refused lease as granted, and to have given notice of renewal twelve months before the day on which the lease so refused by the landlord would have expired.

It is difficult to understand how the landlord, refusing the lease and insisting, that the relation of landlord and tenant was at an end, can yet be heard to allege, that he has a right to that lease as if it had been granted instead of being withheld, and to require the lessee to fulfil the obligations which would have attached to him, if the relation of landlord and tenant had been admitted, and the lease had been executed in pursuance of the covenant to renew.

The landlord seeks to avail himself of two inconsistent defences. If the tenant gives notice to renew, the landlord claims the benefit of his defences to the action, and denies the tenancy, and if the tenant, by reason of the suit, does not give notice, he immediately treats him as a tenant, and insists on the want of notice in conformity with the covenant.

Such conduct is plainly inequitable. Until the lease of 1841 was duly constituted, no legal formal notice could be given. In fact there was nothing in existence, that could be the subject of renewal, or of a demand of renewal.

That Mr. Hunter's action was not more actively prosecuted, must be attributed to the evasive conduct of Lord Hopetoun's agent. It is true, that in his letter of the 18th April 1846, and also in his letter of the 4th November 1846, the agent, Mr. Hope, carefully reserves and saves all the benefit of the defences put in by the Earl to Mr. Hunter's action. But the correspondence of Mr. Hope, and the acts done by him, are such as to induce Mr. Hunter and his representatives to believe, that the lease claimed would be granted, and this is continued until the death of Mr. Hunter.

There had been much correspondence between the agents as to the form of the intended lease, the draft of which had been prepared by Mr. Hope, and, with some alterations, had been remitted to him by Mr. Hunter's agent for final adjustment. This draft lease remained in the possession of Mr. Hope, and Mr. Hunter's agent was unable to obtain from him any answer as to completion of the lease. After the death of Mr. Hunter, the trustees of his will applied to Mr. Hope for Lord Hopetoun's consent to their sub-letting the farm. This was on the 14th December 1860. A correspondence ensued, in which there is no intimation by Lord Hopetoun's agent, that the Earl would refuse to renew. At length, on the 12th February 1861, the agent of Mr. Hunter's trustees wrote to Mr. Hope, the agent of Lord Hopetoun, a letter containing the following passage: "As to Cotterwell lease, the draft of which you have not yet a justed, I see the term of it expires at Whitsunday. I made no tender and demand, as the lease had not been adjusted; but I have now to submit, that the draft be altered, so as to include another nineteen years. The present fine and interest, as well as the former one, are of course ready to be paid whenever you please."

The mask is then thrown off by Mr. Hope, who, by a letter of the 16th February 1861, stated in answer "Cotterwell. As no demand for renewal of this lease has been made by the tenant, the obligation to renew has come to an end."

This assertion, however, is, in my judgment, founded on a mistake in law. The relative

position of the parties at the time when, as the landlord now alleges, notice ought to have been given, is to be considered. At that time the landlord had cautiously preserved the benefit of his defences in the suit by which the existence of the relation of landlord had been repudiated and denied. The demand made by the tenant of the lease of 1841 was of course a demand of the covenant for renewal, which that lease, if constituted, would have contained. Until that covenant was granted, the tenant had no power, nor was under any obligation, to make any other demand for renewal than that involved in the subsisting suit.

I concur in the observations of Lord Neaves, where his Lordship uses the following words: "The pursuer's present plea is, that the defender has lost his right to any renewal from his failing to fulfil with strict accuracy the conditions which would have been inserted in the lease of 1842, if the pursuer had granted it, but which are not to be found in any such lease which in point of fact he did not grant. The lease of 1825 did not contain any obligation to grant a lease in 1861, and the defender held no such formal obligation granted in 1825 to grant another obligation in 1842, which could have inferred such a renewal in 1861. The defender was insisting on getting that obligation from the pursuer, but without success, and as long as the pursuer was in default in that respect, I do not think he can maintain the present action, by which he seeks to prejudice the defender for not complying with a contract, which had no actual and formal existence in consequence of the pursuer's default."

There is an attempt by the respondents in the present suit to shew, that the objections to granting the lease of 1861 were tacitly withdrawn by the landlord, and that it was understood, that Mr. Hunter and his representatives should hold and enjoy the farm as if the renewed lease had been actually granted. It is a sufficient answer to say, that, at the commencement and throughout the whole of the correspondence and treaty, the agent of the landlord carefully saved and reserved the benefit of the defences in the pending action.

The agent, of course, knew, that the principal object in demanding the renewed lease was the covenant for renewal that would be contained in it. But if his object had been to keep Mr. Hunter in play, and induce him not to prosecute his suit until after the time for demanding a renewal had expired, he could not have acted more effectually. This is exemplified by Mr. Turnbull's letter of the 15th October 1847, and Mr. Hope's answer of the 16th October 1847, and again by Mr. Turnbull's letter of 29th December 1847, and Mr. Hope's answer of the 1st April 1848.

Under these circumstances the Earl of Hopetoun commenced the present action on the 2d of April 1861, by which he seeks to have it found and declared, that all right of renewal of the lease has ceased and determined, and that the defenders, the present appellants, have no right to require the Earl to grant any lease or any renewal of any lease of the farm. To this action the action commenced by Mr. Hunter in 1841, and still pending and undisposed of, was in reality, in my judgment, a defence. If the landlord ought to have complied with the demand of the tenant in 1841, and granted a renewed lease, his refusal to do so was in my judgment an answer to the present action. The Court below, however, has apparently assumed, that the lease of 1841 ought to have been granted, and that the case must be treated as if it had been actually granted; and on that basis it has pronounced an interlocutor in terms of the conclusions of the summons.

For the reasons I have given, I submit to your Lordships, that this view of the case is not the correct one. I must therefore advise your Lordships, by your order on this appeal, to declare, that having regard to the action commenced by Mr. Hunter in 1841, which is still undisposed of, and to the defences to that action, and the subsequent treaty and correspondence between the agents of the pursuer and the defender respectively, this House doth reverse the interlocutors complained of, and doth assoilzie the defenders from the conclusions of the action with expenses, but without prejudice to any question, that may fall to be determined in the said other action.

LORD CRANWORTH.—My Lords, it is not in dispute, that before Whitsunday 1841, Mr. Hunter duly tendered his fine, and applied for a new lease for 19 years from Whitsunday 1842. He did not tender the fine before the end of 19 years from Whitsunday 1841, and the question whether he is entitled to the lease seems to me to depend upon this, whether, by the conduct of the parties, it had or had not been agreed, that the new lease should be considered as granted, and that the parties should stand in the same light as if they had legally constituted between them the relation of landlord and tenant. Whether they had or had not so done depends upon the effect of the correspondence which passed between them. I have gone very carefully through the correspondence, and have come to the same conclusion with my noble and learned friend.

The fair import of what passed is, that Mr. Hunter, after his tender in 1841, pressed the landlord to send the draft of a new lease, and that after a delay of above four years during which several letters passed, he raised an action to compel implement of the covenant to grant a lease. The landlord's agent answered, that he was not bound to grant a lease. Nevertheless he eventually sent the draft of a lease which he was willing to grant, desiring the tenant to consider it. This he did, and returned it with several alterations, to all of which, except three, the landlord agreed. The tenant pointed out reasons why he could not agree on the three points, but

proposed an arbitration. After two letters from the tenant's agent, the landlord's agent, after nine months, apologized for his delay, and six months afterwards he wrote, that he hoped matters might now be settled. But in spite of a further application from the tenant he eventually let the matter drop. I think the blame of the delay is to be attributed to the landlord's agent, and that till the landlord had granted, or acknowledged his obligation to grant, a lease on the terms agreed upon, he has no right to complain, that the tenant has not tendered money, and done acts which, if the lease had been granted, he would have been bound to tender and do, but his obligation to tender and do which did not exist until the lease was made. I am therefore clearly of opinion, (without going further into detail,) that the conclusion, at which my noble and learned friend has arrived, is that which your Lordships ought to adopt.

LORD KINGSDOWN.—My Lords, whatever may be the proper decision of this case, it cannot, I think, be governed, or indeed materially affected, by the judgment in *Wight* v. *Lord Hopetoun* in this House. In that case the right of the plaintiff to a lease was not in dispute. The only question was as to the particular covenants to be contained in the lease. That question was decided in favour of the plaintiff, and a decree was made against Lord Hopetoun, ordering him to grant the lease containing the covenants. If the tenant desired to have the lease executed, he might have enforced the execution of the decree; but he preferred, probably with a view to save expense, to hold under the title established by the order of the Court, instead of requiring the execution of a formal instrument. It was held by this House, as it seems to me quite rightly, that under those circumstances the tenant must be considered, with respect to the necessity of giving the notice, in exactly the same situation as if he had obtained the lease, which, if he had pleased, he might have had.

The other question decided in that case has no application to this. The grounds on which the appellant relies in this case are—*first*, That the respondent had denied his liability to grant any lease at all, and had insisted, that the tenant had forfeited his right to demand one. It is contended, that, under those circumstances, the tenant was relieved from the obligation to give a notice which, he was entitled to consider, the landlord had by anticipation refused to comply with. *Second*, That if the appellant were bound to give the notice, he was lulled into security, and prevented from doing so by the acts or neglect of the respondent.

With respect to the first point, it must be remembered, that, in Hunter's suits, two questions were at issue: 1*st*, Whether the plaintiff was entitled to a lease at all; 2*dly*, What were to be the terms of the lease, if one were granted?

Now it seems to me, that if this case is to be decided according to strict law, (as the respondent insists, and has a right to insist, that it shall be,) the appellant may, with reason, say, that, before he exercised his option as to requiring a renewal of the lease, he was entitled to know what the terms of it were to be. That point had been settled by the decree in *Wight's case*. No doubt, in *Hunter's case*, it was really as immaterial to Hunter to have the terms settled, as to Lord Hopetoun to receive the notice. He was sure to desire a renewal in either case; but if form be insisted upon on one side, it must also be allowed to prevail on the other.

It seems to me, that the old lease being the foundation of the right to the renewal, and the defendant having denied the right to the old lease, he could not complain of a failure on the part of the plaintiff to comply with any conditions which could be capable of performance only on the foundation of the old lease; and further, until the terms of the old lease were settled, (unless the omission to settle them could be attributed to the fault or default of the tenant,) he could not be required to exercise his option.

In this view of the case the question would be—By whose default was it, that these points were not settled before the time for giving the notice had expired? Upon this question I think no doubt can be entertained.

It appears, that the lease was to be prepared by the agent of the lessor. Wight's claim to a renewal of lease under the same original covenant was pending. In December 1845 Hunter commenced his suit. On the 11th December 1845 Lord Hopetoun's agent, Mr. Hope, wrote a letter objecting to the mode of service of the summons, and used these expressions:—"There has been delay, no doubt; but all the Wight papers are now before me, and I see my way for speedily now getting through them. I will write to you very soon; and I beg you will have the goodness to wait a little longer." By this letter he suggested, that Wight's claim and Hunter's claim might be settled at the same time.

After some further correspondence between the agents, on the 10th March 1846, Lord Hopetoun filed his pleas in the action, and insisted, *first*, that the plaintiff had forfeited all right to a renewal; and, *secondly*, that the plaintiff was not entitled to a lease expressed in the same terms as the previous lease, and requiring variations therefrom in reference to the timber upon the farm.

After these pleas had been filed, and on the 18th April 1846, we have a letter of Mr. Hope upon the subject of this question of the timber, stating, that if a concession be made by Hunter "then upon this point, he thinks, that the matter may be settled; but if not, the suit must proceed, and all pleas be maintained."

He stipulates, that neither this letter, nor any other which he may write, is to be founded on in any proceedings which may take place in the event of no agreement being come to, and that no bargain is to be considered as concluded till the lease is actually signed. In answer to this Mr. Turnbull, on the 23rd of April, suggests, that Mr. Hope should prepare such a lease as Lord Hopetoun was willing to grant; and that, if the terms could not be agreed on, the matters in dispute should be referred to arbitration. On the 26th May 1846, the draft of a lease was sent by Mr. Hope. It was returned by Mr. Turnbull with alterations on the 10th June 1846. On the 4th November 1846, after several applications had been made to him, Mr. Hope returned the draft, accepting some and rejecting others of Turnbull's alterations, stating, that no further approximation to Turnbull's views can be agreed to, that this is the final answer of Lord Hopetoun's guardians, and that, should the matter not be settled extrajudicially, there was no departure from any of the pleas taken on the defence.

Mr. Hunter refused to admit these alterations; and on the 7th of January 1847, his agent wrote to Mr. Hope to that effect, and the concluding passage of his letter was in these words:—"From the terms of your letter, I presume I am to understand, that you will not voluntarily admit of any modifications of your draft as sent to me on the 4th November; and therefore, as Mr. Hunter will not yield the points now adverted to, I beg to know if you are willing to name an arbiter for determination of these points in terms of the clause in the lease to that effect. Mr. Hunter is quite ready to submit the matter to that mode of adjustment."

After repeated applications by Turnbull to Hope for some answer to this proposal and letter of Hope apologizing for his delay, he finally, on the 1st April 1848, wrote this letter to Turnbull: "Dear Sir,—Mr. Andrew Wight, after a long interval, has returned to me the draft of the submission for the adjustment of certain questions connected with the Ormiston leases, resolving themselves into pecuniary clauses. I let you know this, as I think matters will now proceed to a settlement some way or other. I have not yet looked to the alterations in the draft."

Connecting this letter with what had passed in 1845, I can understand it only in this sense. The questions with respect to Wight's lease are on the point of settlement; this will enable us to settle at the same time Hunter's lease; let the matter in the mean time stand over.

Now it seems to me, that by this letter Hunter was naturally led to expect that, as soon as the settlement with Wight took place, information would be given to him, and that, at all events, the next step to be taken in determining the terms of Hunter's lease was to be taken by Lord Hopetoun's agent, in whose hands the draft then was, and who said, that he had not yet looked to the alterations.

On the 17th January 1849 Turnbull wrote again to inquire into the cause of the delay, and received, as far as appears, no answer.

It turned out, that, instead of the differences with Wight being settled in the manner suggested by Hope, they led to the institution of a suit by Wight against Lord Hopetoun, the exact date of the commencement of which does not appear, but which was not terminated till May 1858, when it ended by a decree in favour of Wight.

Now it seems to me, that it was the duty of Hope, when this suit was commenced, to have communicated to Hunter the fact, that his expectations had been disappointed, seeing, that if the question with Hunter was to stand over till the disputes with Wight were settled, it would wait probably for several years. If this communication had been made when it ought to have been, all difficulties which subsequently arose would have been avoided. Hunter lived till 1852; and if the matter had been settled in his life, the questions as to the trustees and the lunatic heir would never have occurred, and the terms of the lease would have been adjusted, and an actual lease granted.

Till something was done by Lord Hopetoun's agents, I think that it was not incumbent on Hunter's representatives to take any steps, but that they had a right to consider, that matters were to remain *in statu quo*. Though the personal incapacity of the heir of Hunter to act cannot of itself dispense with the performance of the conditions, yet I think, that, if the delay of Lord Hopetoun's agents produced that state of circumstances at the time when the notice ought to have been given, it is entitled to consideration.

On looking at the whole effect of the evidence, I think, that Lord Hopetoun must be considered to have retained to the last the position which he had assumed in the suit with Hunter, and to have insisted on the pleas which he has filed, and which his agent, by his letter of the 18th April 1846, had expressly declared were to be treated as reserved, notwithstanding any correspondence which might take place till a lease was actually signed, and on which he had again insisted after the draft lease had been sent, and had been the subject of discussion in his letter of the 4th November 1846. I think, therefore, that notwithstanding Lord Hopetoun received the rent according to the lease, and did not attempt to disturb the possession of the tenant, he has no right to say, that he acknowledged the right of the tenant to have such a lease granted. On the contrary, I think that he must be treated as having repudiated his obligation to grant any lease, and to have insisted on the forfeiture which he had set up in the suit, which, although it had fallen asleep, was, when the notice should have been given, and I imagine still is, a *lis pendens*. If

Lord Hopetoun denied the right to any renewed lease, the immediate lease sought was the foundation of the right to the renewal. He cannot, therefore, in my opinion, complain, that a claim was not formally made, which, in fact, could not arise till the right to the immediate lease was either decreed or admitted.

I think further, that before the tenant exercised his option as to claiming a renewal, he had a right to have the terms of the immediate lease settled, which would have settled at the same time the terms of the renewed lease. It appears to me, that it was owing entirely to the fault of my Lord Hopetoun's agents, that these terms were not settled long before the time for giving the notice had passed. Under these circumstances, I think, that Lord Hopetoun is precluded in equity from availing himself of the plea, that the notice was not given in proper time; and I therefore concur in the judgment proposed by the LORD CHANCELLOR.

Interlocutors reversed.

Appellants' Agents, Mackenzie and Kermack, W.S.; Loch and Maclaurin, Westminster.—*Respondent's Agents*, J. and J. Hope, W.S.; Connell and Hope, Westminster.

JUNE 22, 1865.

THE TRUSTEES OF THE CLYDE NAVIGATION, *Appellants*, *v.* EBENEZER ADAMSON (Inspector of the Poor of the City Parish of Glasgow), and Others, *Respondents*.

Poor Rate—Exemption of Public Buildings—Harbour Works—Crown Buildings—*Lands and buildings are not exempt from assessment to the poor rate merely on the ground, that they are used solely for public purposes, and that the trustees derive no personal benefit from them. The sole ground of exemption is, that the lands or buildings are used by the Crown, or the immediate servants of the Crown, or for purposes connected with the government of the country. Therefore the Clyde Navigation Trustees are assessable in respect of their occupation and ownership of their docks and buildings attached.*[1]

The *defenders*, the *Clyde Navigation Trustees*, appealed against certain interlocutors, and in their *printed case* contended, that the interlocutors appealed against, in so far as submitted to review, ought to be reversed, for the following among other reasons:—1. Because the appellants are not trustees or commissioners in the actual receipt of the rents and profits of the Clyde Trust estate, and are therefore not liable to be assessed for poor rates under the Poor Law Amendment Act. 2. Because trustees are liable to be assessed only where the beneficial enjoyers of the property would be themselves assessable if in actual possession, and the appellants are trustees for the public at large, who are not by law assessable under any circumstances. 3. Because, if the public at large are liable to be assessed, the proposed mode of ascertaining the rateable value is erroneously based upon the sums raised to defray the outgoings, instead of upon the benefit derived from the property. 4. Because, if the appellants are liable to be assessed as trustees, in respect of the statutory tolls taken by them from the shipping using the port of Glasgow, their interest therein is not, and never can be, of any rateable value, inasmuch as the working expenses and other statutory charges upon the tolls must necessarily always be equal to the amount received, and it is impossible that the appellants can, under any circumstances, have a balance beyond those outgoings. 5. Because, if the amount received from the tolls is to be deemed the gross rateable value, the nett rateable value will be the difference between that sum and the working expenses and the other statutory charges, which will leave no balance to rate. 6. Because by the proposed mode of assessment a part of the statutory tolls would be included, although such tolls are payable in respect of vessels simply entering the port of Glasgow, whether the lands and heritages in the City parish be used or not used. 7. Because in no view are the appellants liable to be assessed in respect of the court rooms, police office, and watch houses in Robertson Street belonging to the tru t.

The *Lord Advocate* (Moncreiff), and *Sir F. Kelly*, for the appellants.

Rolt Q.C., and *W. M. Thomson*, for the respondents.

[After the appellants' argument had been heard, the further hearing was stopped, on the

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[1] See previous report 22 D. 606: 1 Macph. 974: 32 Sc. Jur. 203; 35 Sc. Jur. 569. S. C. 4 Macq. Ap. 931: 3 Macph. H. L. 100: 37 Sc. Jur. 512.