1865. April 4th and 28th, June 13th.

HUNTER, ET AL., ... APPELLANTS.
THE EARL OF HOPETOUN, ... RESPONDENT (a).

Lease—Conditional Renewal—Excuse for non-performance of Condition.—Held (reversing the Decree below), that the non-performance of a condition may be excused by the conduct of the party who is to receive the performance; as by his preventing or obstructing the performance; by his misleading or deceiving the party who is to make the performance; or by his omitting, or evading, or contesting, the execution of some necessary act incumbent on himself, and which ought to antecede the performance of the condition.

In such a case the object which the performance of the condition would have secured, will in equity be considered as attained.

Per Lord Cranworth: By the conduct of the parties it had been agreed that the new lease should be granted; and they stand in the same light as if they had constituted between them the relation of landlord and tenant.

Lis pendens asleep.—A suit though asleep continues *in pendente* till disposed of; and the parties are still at issue though the *lis* may have been for years comatose.

An action was commenced in 1845, and a defence lodged. In 1847 the proceedings ceased, and the action became dormant. Held (18 years afterwards), that the *lis*, though still asleep, was nevertheless *in pendente*, and liable to be roused at the volition of either party.

(a) Reported in the Third Series of the Court of Session Cases, vol. i. p. 1074; and in the Scottish Jurist, vol. xxxv. p. 612. The case involves an important principle, but is given here *briefly*, the present Lord Chancellor being of opinion that "every Law Reporter deserves well of his country who condenses." His Lordship adds, that "he best performs his duty who gives only the pith of what is necessary to the decision." *Suprà*, vol. i. p. 724. The object is not to beget doubts, or excite criticism, or promote or furnish weapons for litigation, but to advance, and simplify, and fix, the national Jurisprudence.

A long succession of leases, perpetually renewable every nineteenth year, of a valuable farm in the Lothians, had been granted by the Respondent and his predecessors to the Appellants and their predecessors, on the performance of a condition which required the lessees to pay a fine, and make a formal requisition as the necessary antecedent to the granting each consecutive renewal. The last performance of the condition was at Whitsunday 1841. It failed of effect; for the Respondent disputed the Appellant's right, and refused to renew. A litigation thereupon ensued, and then a treaty, and afterwards a long correspondence (*a*), the effect of which was, that the Appellant (who continued in possession without a renewal till the expiration of a further term of 19 years) omitted at Whitsunday 1860 to pay the stipulated fine, and to serve the stipulated requisition.

The Respondent, Lord Hopetoun, thereupon insisted that the Appellant's right had, by his own default, come to an end.

The question was, whether the performance of the condition at Whitsunday 1860 was or was not under the circumstances excuseable, and sufficiently satisfied by the agreement at which the parties had arrived by correspondence and otherwise.

(*a*) The quarto prints laid before the Lords consisted of 125 pages, made up of pleadings, leases, letters, and other documents. Are these to be set out in a report? Lord St. Leonards says No. His Lordship, addressing the Committee of the English Bar on the 12th February 1864, remarks that "cases depending upon the construction of a long correspondence can hardly be usefully reported, unless the Judge lays down or explains a rule of law. A Judge may with great propriety go at large into an examination of the facts for the satisfaction of the suitor, which it may not be necessary to report at length, although no doubt the Court frequently, in its own view of the facts, clears up half the difficulties in the case." The construction put upon documents by the Court of Last Resort is final. This is a reason for not always giving the documents themselves.

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On the 10th July 1863 the Second Division of the Court of Session (a), adhering to the Lord *Ordinary's* Interlocutor, decided that all right on the part of the Appellants to obtain a renewed lease had ceased and determined by reason of his failure to comply with the condition. Hence the present Appeal.

Mr. *Rolt* and Sir *Hugh Cairns*, on behalf of the Appellant, insisted that from the evidence it appeared that the Respondent had beguiled the Appellant into a belief that the lease would be granted, and that he held out this expectation by his letters till the time was gone by for making requisition. The Respondent then turned round and said, " Your right is at an end." Such conduct equity would not permit. Cruise's Digest (b), *Duke of St. Alban's* v. *Shore* (c), *Planche* v. *Colburn* (d), *Hochester* v. *Latour* (e), Lord St. Leonards' Laws of Property in the House of Lords (f), *Hawes* v. *Bryant* (g).

Sir *FitzRoy Kelly* and Mr. *Anderson* for the Respondent. This case is concluded by the judgment of the House in *Wight* v. *Earl of Hopetoun* (h).

[The LORD CHANCELLOR : The only point there was whether the lease terminated at Whitsunday, or at the removal of the away-going crop.]

Relief will not be granted to a tenant who has been guilty of laches, 4 Jarman's Bythewood (i).

Lord Chancellor's opinion.

The LORD CHANCELLOR (k) :

Mr. Hunter, on the 12th May 1841, being more than 12 months before the expiration of the lease, duly demanded a renewal in his favour. With that

(a) Lord Neaves dissenting.
(b) Estate on Condition, Tit. 13, sect. 2.
(c) 1 H. Black, 270.
(d) 8 Bing. 14.
(e) 2 Ell. & Bl. 678.
(f) p. 540.
(g) 4 Russ. 89.
(h) *Suprà*, p. 729.
(i) Third edition, p. 397.
(k) Lord Westbury.

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demand the landlord refused to comply, and insisted that Mr. Hunter was not entitled to a renewal, or to continue in the tenancy of the farm. Mr. Hunter consequently, in the month of December 1845, commenced an action against the landlord, concluding to have it decreed that he should renew the lease for the term of 19 years from Whitsunday 1842.

In his defences to this action the landlord insisted that the obligation to renew was dependent not only on the tenant's making tender and demand at least 12 months before the end of every term of 19 years, but also on the tenant's acquiescence in certain restrictions which the landlord proposed.

This action has never been disposed of, no further step having been taken since the defences were lodged. It has been asleep since 1847, but it is still *lis pendens.*

From the issues raised two things are plain; 1stly, 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; 2ndly, that until the question as to the proposed restrictions was disposed of, the tenant could not know what would be the exact terms of the lease to be granted by the landlord, and what he would be entitled to receive under the covenant to renew.

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 (a refusal now in effect admitted to have been unfounded), the landlord has a right to insist that it was the duty of the tenant to treat the refused lease as granted, and to give notice of renewal 12 months before the day on which the lease so refused would have expired.

It is difficult to understand how the landlord,

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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 treat the lease as if it had been granted instead of having been 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 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, the landlord immediately treats him as 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 the landlord's agent. It is true that in his letters the agent carefully reserves all the benefit of the defences put in by the Earl to Mr. Hunter's action. But the correspondence of the agent 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.

There had been much correspondence as to the form of the intended lease, the draft of which had been prepared by the landlord's agent, and with some alterations had been remitted to him by the tenant's agent for final adjustment. This draft lease remained in the possession of the landlord's agent; and the tenant's

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agent was unable to obtain from him any answer as to the completion of the lease. In the letters there is no intimation by the landlord's agent that he would refuse to renew. At length, on the 12th February 1861, the agent of the tenant wrote to the agent of the landlord a letter containing the following passage:

As to the 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.

The mask is then thrown off by the following intimation from the landlord's agent of the 16th February 1861:

Dear Sir,—As no demand for the renewal of this lease has been made by the tenant, the obligation to renew has come to an end.

This assertion, however, is 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 and tenant 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, that as long as the landlord is in default, he cannot maintain the present action, by which he seeks to prejudice the tenant for not complying with a contract which

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had no actual and formal existence in consequence of the landlord's default.

There is an attempt by the landlord to show that the objections to granting the lease of 1861 was tacitly withdrawn by the landlord, and that it was understood that the tenant should hold and enjoy the farm as if the renewed lease had been duly 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 landlord's agent of course knew that the principal object of the tenant in demanding the renewed lease was the covenant for renewal that would be contained in it. But if the object of the landlord's agent 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.

The Court below 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. I submit that this view of the case is not the correct one; and I must therefore advise your Lordships to declare that, having regard to the action commenced by the tenant 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 landlord and the tenant respectively, this House doth reverse the Interlocutors complained of with expenses.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, it is not in dispute that before Whitsunday 1841 Mr. Hunter duly tendered his fine and

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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 as that of 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, Mr. Hunter raised an action to compel implement of the covenant.

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 the tenant did; and he returned the draft with several alterations, to all of which, except three, the landlord agreed. The tenant pointed out reasons why he could not agree on these three points, but proposed an arbitrament. After two letters from the tenant's agent, and the expiration of nine months, the landlord's agent apologized for his delay; and six months afterwards he wrote that he hoped that 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 this delay is to be attributed

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to the landlord's agent; and that till the landlord had granted, or acknowledged his obligation to grant, a lease on 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's opinion.

Lord KINGSDOWN:

This case cannot be governed or affected by the judgment in *Wight* v. *Lord Hopetoun* (a). The grounds on which the Appellant relies in the present case are,—1st. 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. 2nd. 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 suit two questions were at issue: 1st, whether the Plaintiff was entitled to a lease at all; and, 2ndly, what were to be the terms of the lease if one were granted?

Now it seems to me that 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. By whose default was it that the terms of the lease were not settled before the time for giving the notice had expired? Upon that question I think no doubt can be entertained.

(a) *suprà*, p. 729.

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On the 10th March 1846, Lord Hopetoun filed his pleas, insisting, first, that the Plaintiff had forfeited all right to a renewal; secondly, that the Plaintiff was not entitled to a lease expressed in the same terms as the previous one.

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

Till something was done by Lord Hopetoun's agents, I think that it was not incumbent on the Appellants to take any step, but that they had a right to consider that matters were to remain *in statu quo.*

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 had filed. 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 rights 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 the immediate lease, of course he 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

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right to the immediate lease had either been decreed or admitted.

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.

Ordered and *Adjudged*, That having regard to the action raised by William Hunter in 1845 against the Earl of Hopetoun, in the proceedings mentioned, and which action is still undisposed of, and to the defences of that action, and the subsequent treaty and correspondence between the agents of the Pursuer and the Defender respectively, also in the said proceedings mentioned, the said Interlocutors complained of in the said Appeal be and the same are hereby reversed; and that the Defenders (Appellants) be assoilzied from the conclusions of the summons in the action in which the said Interlocutors were pronounced, with the expenses incurred by them in the Court of Session, but without prejudice to any question which may fall to be determined in the said first-mentioned action of 1845: And it is further *Ordered*, That the Pursuer (Respondent) do repay to the Defenders (Appellants) the expenses to which the said Defenders (Appellants) were found liable under the said Interlocutor of the 10th of July 1863, if paid by the said Defenders (Appellants): And it is also further *Ordered*, That the cause be and is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this Judgment.

LOCH & MCLAURIN—CONNELL & HOPE.