WIGHT, ... APPELLANT.
THE EARL OF HOPETOUN, ... RESPONDENT (*a*).

1864.
April 21st, 22nd, May 27th.

Lease of Land—Perpetual Renewal—Condition precedent.—A lease was declared to commence "as to the "houses and grass at Whitsunday, and, as to the arable "land, at the separation of the crop from the ground." It was to last for 19 years, perpetually renewable on requisition, to be made 12 months before its expiration. Held that the expiration of the lease was at Whitsunday 1861; that the requisition for renewal ought to have been made at or prior to Whitsunday 1860; and consequently that a requisition postponed till the 1st of August 1860 (though before "the separation of the crop from the ground") was too late.

Per the Lord Chancellor: The lease, if its expiration were at the separation of the crops, would not have a certain and definite termination, but separate endings, as to different and unknown portions of the arable lands at different and uncertain periods; and consequently there would be no possibility of computing either the beginning or the ending of the last year, and no certainty as to the day when the notice of renewal ought to be given, or when it would expire.

Per Lord Wensleydale: Looking at the object of this provision, that the owner should renew on a demand, giving 12 months' time before the expiry of the term, I cannot feel a doubt that the true meaning is, that the landlord should have 12 months to look out for another tenant, to whom he might give possession of the house and grass at Whitsunday, and the arable when the previous crop is taken away.

Per Lord Chelmsford: It appears to me that the term of 19 years expired at Whitsunday 1861, that the period between Whitsunday and the separation of the crop from the ground was not a continuance of the term, but only a continuance of the possession.

(*a*) See this Case reported below, 1 Third Series, 1074.

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A LEASE for 19 years of a valuable farm, called Mains of Ormiston, in the county of Haddington, was granted by the predecessor of the Earl of Hopetoun to the ancestor of the Appellant, his heirs and assignees, perpetually renewable on payment of a certain sum, and on a requisition demanding such renewal to be served on the landlord at a specified period.

The sole question involved was whether the requisition in the present instance was within the time denoted by the lease. The Second Division of the Court of Session decided in the negative; and by that decision the Appellant lost a valuable possession held by his family for more than a century at an almost nominal rent.

Successive renewals of the lease had taken place in past times every nineteenth year; the tenant's entry being "declared to begin, as to the houses and "grass, at the term of Whitsunday, and, as to the "arable land, at the separation of the crop from "the ground." The clause in the last lease as to the requisition for renewal was as follows:—

> The Earl binds and obliges himself and his foresaids, that upon the expiry of the said term of 19 years, and upon the said David Wight and his foresaids, their tendering and paying to him, the said Earl, or his foresaids, the sum of 32*l.* sterling money, by way of fine and consideration, to the said Earl and his foresaids, over and above the yearly rent after mentioned, and demanding a renewal of this lease from the said Earl and his foresaids, in a legal manner before a notary and two witnesses, *at least* 12 *months before the expiry of the above term of* 19 *years*, that then upon the said David Wight and his foresaids, their making such tender, payment, and demand, the said Earl and his foresaids shall reiterate and renew this lease in favour of the said David Wight and his foresaids, upon their own proper charges and expenses, for other 19 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 tack, and so forth, thereafter the tack of the said lands and others hereby set shall be renewable to the said David Wight and his

foresaids, from 19 years to 19 years for ever, upon their making the like tender, payment, and demand at least 12 months before the end of every 19 years in the terms above mentioned, and observing and performing the conditions, provisions, and prestations contained in this present lease.

It behoved the Appellant to serve the requisition for renewal at least 12 months before the expiry of the 19 years; but whether the 19 years expired at Whitsunday 1861, or at the subsequent "separation of the crop from the ground," was the point to be determined. In all the former instances it appeared that the demand for renewal had been made *prior to the term of Whitsunday*. But in the present instance it was not until the 1st of August that the requisition was served on Lord Hopetoun. The contention of the Appellant was that the requisition was in time, having been "made more than a year from the separation of the crop from the ground," which (and not the term of Whitsunday) he argued was the true period for the expiration of the lease.

The Respondent on the other hand maintained that the requisition to be valid must be made "at or prior to the Whitsunday term 1860." (*a*)

After hearing the *Attorney-General* (*b*) and the *Lord Advocate* (*c*) for the Appellant, and Sir *Fitz-Roy Kelly* and Mr. *Anderson* for the Respondent, the following opinions were delivered.

Lord Chancellor's opinion.

The LORD CHANCELLOR: (*d*)

My Lords, according to the common law or custom of Scotland, if a lease be granted to a new tenant of

(*a*) This the Respondent asserted was clear, not only by the law of Scotland, but by the law of England, as appeared by Woodfall on Landlord and Tenant, p. 565, where that writer defines an outgoing crop as "the crop sown during the last year of the tenancy, "but not ripe till after the expiration of it."

(*b*) Sir Roundell Palmer. (*c*) Mr. Moncreiffe.

(*d*) Lord Westbury.

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a farm, consisting partly of arable land and partly of meadow or pasture land, for a term of years to commence from Whitsunday, such tenant is entitled to enter on the grass or meadow land immediately on the commencement of the tack; but the outgoing tenant is entitled to continue in possession of such arable lands as are sown until the separation of the crop from the ground. Still the lease commences, and the term of years runs and is computed in law from Whitsunday, both as to grass and arable, although the common law or custom allows the outgoing tenant to reap and carry away the off-going crop, and gives him a limited right of entry and occupation for that purpose. Hence in common parlance the new tenant is said to enter on the arable lands at the separation of the crop of the outgoing tenant, although in law his occupation began at the commencement of the term. The new or in-coming tenant at the expiration of the lease has in his turn a corresponding privilege of a limited prolonged possession of the arable lands, until the actual separation of the crop, although the term or tack has actually expired on the preceding Whitsunday.

The supposed difficulty in the present case appears to have arisen from the fact of the framer of the lease having described the entry of the new tenant according to what such entry would in fact be by the common law or custom already described, but which is perfectly consistent with the lease, commencing as to all the lands on Whitsunday, after the expiration of the term of years expressed to be granted.

No one could be reasonably misled by the form of expression, for it is admitted on all hands that only one lease, not two leases, and one term of 19 years, not two terms, can be required to be granted

under the obligation to renew. On the other hand, one notice only, not two notices, is necessary to be given.

If, however, the renewed lease is to have its commencement as to the grass lands at Whitsunday, and its ish or end at Whitsunday 19 years afterwards, but its commencement as to the arable lands not at Whitsunday, but at the separation of the crop, and its ish or end at the like separation of the crop 19 years afterwards, it is plain that there are two distinct leases and two separate terms, having different beginnings and endings, and that the clause requiring notice of renewal to be given "at least 12 months before the expiry of the above term of 19 years," must be construed, not with reference to one term, but with reference to two terms, which would therefore render necessary two separate notices; with this further difficulty, that the notice as to the arable lands would be uncertain when it would end, and therefore, as it must be notice for a twelvemonth, the time when it ought to be given would be equally uncertain.

The *Lord Ordinary* justly observes that the separation of the crop is not the legal ish. Indeed, the phrase is not in its nature expressive of a proper term of expiry. For independently of its general uncertainty, it indicates a right to enter, and a corresponding obligation to leave in the case of each field, so soon as that field is cleared, and so may comprehend not one, but many terms.

The lease therefore, if its expiration were at the separation of the crops, would not have a certain and definite termination, but separate endings as to different and unknown portions of the arable lands at different and uncertain periods; and consequently there would be no possibility of computing either the

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beginning or the ending of the last year, and no certainty as to the day when the notice of renewal ought to be given or when it would expire.

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These are some of the absurd consequences which must follow from that construction of the lease which is contended for by the Appellants; but they do not exist if that natural and obvious interpretation of the words of the lease be adopted which has been already stated, and which agrees with the constant practice of the parties since the date of the first lease in the year 1747.

Another objection was raised founded on the fact that Lord Hopetoun having refused to grant a new lease on the last occasion of renewal was decreed to do so in conformity with the terms of the covenant, but that no new lease has been actually granted, both parties apparently being content to rest on the decree.

It is plain that there is no foundation for this objection. The case must be treated as if the lease had been actually executed in conformity with that judgment.

I am therefore of opinion that the Interlocutor appealed from is right and just, and that the Appeal must be dismissed with costs.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, the question in this case is whether the Appellants are entitled to a renewal by the Respondent of the lease of the farm in question for 19 years from Whitsunday 1861 as to the houses and grass, and from the separation of the crops of 1861 from the ground as to the arable land, pursuant to a covenant in a lease of the date of 1747, by the original owner, to whom the predecessor of the present Respondent, the Earl of Hopetoun, succeeded, and the covenant

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in the lease of another Earl of Hopetoun, a predecessor of the Pursuer.

The question depends entirely upon the terms of the covenant for renewal of the lease. The covenant in the lease from Lord Hopetoun in 1825 (and that in 1747 is similar) is, to renew the tack to the tenant for the term of 19 years from and after his entering thereto, which is declared to be and begin, to the houses and grass at the term of Whitsunday 1823, and to the arable land at the separation of the crops of 1823 from the ground. And further, the Earl binds and obliges himself, his heirs and successors, that upon the expiry of the said term of 19 years, and upon the tenant tendering and paying him or his heirs the sum of 32*l.* by way of fine, and demanding a renewal of the lease in a legal manner from the Earl and his foresaids, before a notary and two witnesses, at least 12 months before the expiry of the term of 19 years, that then. upon the tenant making such tender, payment, and demand, the Earl and his foresaids should reiterate and renew the lease (with certain exceptions immaterial to refer to) for other 19 years longer at the charge of the tenant.

Various demands for renewal for successive terms of 19 years were made, five in number, all terminating before Whitsunday in the year of expiry. The last was made on the 10th of May 1847, Whitsunday is constantly in Scotland considered as the 15th May —a fixed time.

Lord Hopetoun refused to comply with the last-mentioned demand for reasons immaterial to the present question. A suit followed by the tenant, and it was decerned that Lord Hopetoun was to renew, on the same terms, for 19 years from Whitsunday 1842, as to the houses and grass, and from the separation of that year's crop from the ground as to the arable land

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The tenant continued to occupy, and made a formal demand before a notary and two witnesses for a renewal of the lease for 19 years on the 1st August 1860. And the only question in the case is whether that demand was made in due time, one year before the expiry of the term.

I entirely agree in the opinion of the majority of the Judges of the Second Division of the Court of Session, and have not been able to entertain any doubt upon that question.

I consider it to be clear that the refusal of Lord Hopetoun to grant a new lease, both before and after the decree of the Court of Session decerning that he should, puts him in no worse condition than if he had done, what in equity he ought to have done, granted a lease for 19 years expiring, as to the houses and grass land, on the 15th day of May 1861, and as to the arable land on the separation of the crop of 1861.

Was a demand on 1st August 1860 in due form a demand effectual for a new lease for 19 years within the meaning of the original lease? Was it made in due time, one year from the expiry of that lease? I think it was not.

Two constructions are put upon the original lease. First, that it was nothing but a lease from Whitsunday to Whitsunday, with the privilege expressed, which would otherwise have been implied, of retaining what in England is called a right to an away-going crop, till the crop is separated after the end of the term; and, secondly, that if it is one lease with two endings, so as to give a real interest in the land, the one as to the houses and grass at Whitsunday, and the other as to the arable at the uncertain period of the separation of the crop, the making a demand 12 months before the expiry of the term must mean before the double

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expiry of the term, or, in other words, before any expiry of the term, from the clear and obvious meaning of the parties to be collected from the other parts of the instrument.

After considering the arguments of the majority of the Judges of the Second Division of the Court of Session, I cannot help thinking that this lease is really and in truth no more than a lease from Whitsunday to Whitsunday, with a privilege to keep the possession of the growing crops on the arable land, for the purpose of looking after them, and reaping them in due time, as a sort of excrescence of the term. And in that view of the case there is not the slightest doubt that a formal demand before a notary and witnesses, on the 1st August 1860, not 12 months before the 15th day of May, was too late.

But secondly, supposing that view is incorrect, and that this lease is a lease giving an interest for 19 years of houses and grass from Whitsunday, and of arable from the separation of the crop, a lease with a double termination or expiry.—Whitsunday as to the first, houses and grass, and the uncertain separation of the crop as to the arable,—I think the context clearly shows that the demand is to be made 12 months before either of the double events on which the expiry depends—that is, before both Whitsunday and the date of separation.

It may be that if a condition of a general nature unconnected with the tenancy of the land was covenanted to be performed at the expiry of the tenancy, it might be rightly construed as the last or final expiry or ending. But if connected with the land it would be otherwise, as, for instance, if there was a covenant to leave the fences of the grass land or the fences of the arable in good repair at the expiry of the

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term, it would be construed as a covenant to leave one in repair at Whitsunday, and the other when the crop was taken away later in the year.

Looking at the object of this provision, that the owner should renew on a demand giving 12 months time before the expiry of the term, I cannot feel a doubt that the true meaning is, that the landlord should have 12 months to look out for another tenant, to whom he may give possession of the house and grass at Whitsunday, and the arable when the previous crop is taken away. And that must be before the first of the double endings, before the beginning of the expiry, not before the latter end of it.

If it were for 12 months before the final consummation of the lease, the beginning of that period could never be ascertained before the end was known, that is before actual separation of the crop; and the landlord would not until that event know when the 12 months would commence which he was to have to look out for a new tenant, so as to put him in possession of the houses and grass at Whitsuntide.

If this be a holding from Whitsuntide to Whitsuntide, with a privilege of taking the off-going crop only, as I think it is, it is clear that the demand was insufficient.

If it is a lease with a double termination, one for the houses and grass land, and the other for the arable, I am clearly of opinion that the majority of the Judges have come to the right conclusion that the demand ought to have been made at least 12 months before either expiry of the lease.

I do not rely upon the circumstance that all the previous renewals were on demands made more than 12 months before Whitsunday, because such a practice could not alter the terms of the original contract; but

it is a satisfaction to think that the parties have understood the contract in the sense which has been held to be the proper one.

Lord Wensleydale's opinion.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, I agree with my two noble and learned friends that the opinion of the *Lord Ordinary* and of the majority of the Court of the Second Division is correct, and that their Interlocutors ought to be affirmed.

The question to be determined is whether the Appellant has performed a condition precedent to entitle him to the renewal of a lease for 19 years, renewable for ever, by demanding such renewal in the manner prescribed "at least 12 months before the expiry of the term of 19 years then subsisting." I add the words "then subsisting," because I think that the rights of the parties stood upon the same footing as if Lord Hopetoun had executed the lease from 1842 in terms of the judgment pronounced against him. By Lord Hopetoun's default the parties were not released from their rights and obligations. The right of the tenant to demand a renewal according to the terms of the original lease could only be enforced according to the stipulations of the contract, and could not be left at large, to be exercised at any other time or in any other manner. On the other hand, as the claim to a renewal depended entirely upon the contract, Lord Hopetoun was not precluded by his own default from insisting upon a strict compliance with the condition to entitle his tenant to demand the renewal.

The single question therefore is, whether the demand for a renewal made on the 1st August 1860 was a sufficient demand upon the landlord in the terms of the lease; in other words, was it made "at least 12 months before the expiry of the lease."

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If the lease had been executed (as it ought to have been) in 1842, the holding would have been for the space of 19 years from the tenant's entry, which would have been declared to begin as to the grass and houses at Whitsunday 1842, and as to the arable land at the separation of the crop 1842 from the ground.

The Respondent contends that such a lease is a lease from Whitsunday to Whitsunday, and therefore that the 19 years expired at Whitsunday 1861. The Appellant insists that the lease continued till the separation of the crop 1861 from the ground, or at all events until the expiration of 19 years from the period of the separation from the ground of the crop of 1842.

In forming a judgment which of these constructions ought to prevail, it must be borne in mind that it is a general rule in Scotland as to leases with Whitsunday entries that the tenant is entitled to an away-going crop from the arable lands which have been sown before the period of removal, and to the possession of the lands for the purpose of reaping the crop. Every lease with a Whitsunday entry must always be understood to be made with reference to this right. And as the possession of the arable lands cannot be given at the commencement of the lease until the separation of the crop by the preceding tenant, so, although the term of the lease may have expired, the right of possession will continue in the lessee as against any succeeding tenant for the purpose of enabling him to reap the crop which had been sown before the term of his removal.

The lease in question, therefore, in declaring that the entry as to the arable lands should begin at the separation of the crop from the ground, recognizes the right of the preceding tenant to the possession down

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to that time, and the words "to be thenceforth peaceably possessed and enjoyed during the space aforesaid" merely cover the period during which after the end of the term the lessee would be entitled to reap his away-going crop. It is evidently framed with reference to the law as to an away-going crop upon a Whitsunday entry. It seems to be impossible to adopt the suggestion of the *Lord Advocate* that the term as to the arable lands must be taken to have begun from the separation of the crop of 1842 and to continue for 19 years from that time. If there is anything clearer than another to my mind in the terms of this lease, it is that the intention of the parties was to secure to the tenant his way-going crop; and this intention might be frustrated by fixing the expiration of the 19 years to a day certain in the manner supposed, as in the case of a late harvest the term might expire before reaping time. The tenant would then only have 18 crops from the arable lands during his 19 years term. It appears to me that the term of 19 years expired at Whitsunday 1861; that the period between Whitsunday and the separation of the crop from the ground was not a continuance of the term, but only a continuance of the possession, and consequently that the demand of a renewal of the lease ought to have been made 12 months before Whitsunday 1861, which was the true and only expiry of the term of 19 years, and that the Appellant has lost his right to a renewal by non-performance of the condition precedent.

I certainly am strengthened in this opinion by the construction which the acts of the parties have put upon this stipulation for renewal. In all the four instances in which renewals have been made, the tenant has evidently regarded his right as one depending upon a demand being duly made 12 months before Whit-

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sunday. And that these acts of the tenants of the estate are evidence appears from the case of *Sadlier and another* v. *Biggs* (*a*), where upon a covenant for renewal of a lease for lives renewable for ever, this House held that the acts of successive tenants of the estate, though not evidence to prove the existence of the covenant, yet became, when the covenant had been otherwise proved, evidence of the construction which the parties interested had put upon it.

Upon these grounds I am satisfied that the Interlocutors ought to be affirmed, and the Appeal dismissed with costs.

Interlocutors affirmed, and Appeal dismissed with costs.

GRAHAMES & WARDLAW—CONNELL & HOPE.

(*a*) 4 House of Lords Cases, 436.