LORD WENSLEYDALE.—The general rule is so, undoubtedly; but there have been two or three instances since I have sat in the House, in which exceptions have been made.

LORD CHANCELLOR.—My Lords, I should be extremely sorry if any sanction were given by your Lordships to the suggestion now made by my noble and learned friend. There is hardly an appeal from Scotland in which there is not some difference of opinion between the learned Judges. Having regard to that fact, and to the smallness of the amount of property frequently involved in these cases, it would be productive of the greatest possible mischief, if your Lordships were to abstain from abiding by the rule, which is the only wholesome one, namely, that, save under particular circumstances, the costs should follow the decision when the appeal is dismissed.

LORD CHELMSFORD.—My Lords, I entirely agree with my noble and learned friend upon the woolsack. The general rule unquestionably is to give the costs to the respondent when the successful party; but there have been particular cases in which, under peculiar circumstances, that rule has been departed from. I see nothing peculiar in this case, except a difference of opinion amongst the learned Judges of the Court of Session, which, as my noble and learned friend upon the woolsack says, frequently occurs, and I therefore think that there is no ground for departing from the general rule in this case.

LORD WENSLEYDALE.—I will not press it further; but, certainly, there have been cases within my recollection in which, where there has been a difference of opinion between your Lordships and also in the Court below, the costs have not been insisted upon; but, of course, I acquiesce in the decision of your Lordships.

Interlocutors affirmed, and appeal dismissed with costs.

Appellant's Agents, H. Buchan, S.S.C.; Martin and Leslie, Westminster.—*Respondent's Agents*, Adam, Kirk, and Robertson, W.S.; Loch and Maclaurin, Westminster.

MAY 27, 1864.

CATHCART BOYCOTT WIGHT, and his Tutors and Curators, *Appellants*, *v.* The EARL OF HOPETOUN, *Respondent*.

Landlord and Tenant—Demand of Renewal of Lease—Entry at Whitsunday—Entry as to Arable Land—*H., in* 1842, *granted a lease of a farm to W. for nineteen years, the time of entry as to houses and grass to be Whitsunday, and as to arable land at separation of the crop of* 1842. *H. bound himself to renew the lease on a demand made "at least twelve months before the expiry of the above term of nineteen years." The demand of renewal was made on* 1st *August* 1860, *the lease expiring in* 1861.

HELD (affirming judgment), *That the "twelve months before expiry" were to be computed as ending on Whitsunday* 1861, *and, therefore, the demand being too late, the landlord was not bound to renew.*[1]

This action of declarator was raised by the Earl of Hopetoun against Cathcart Boycott Wight, tenant of the Mains of Ormiston, seeking to have it declared, that the pursuer was not bound to renew a lease which expired at Whitsunday 1861, and that the defender was bound to remove.

The original lease was granted in 1747 by George Cockburn, Esq., now represented by the pursuer, to Alexander Wight, now represented by the defender. The time of entry was declared to be, as to the grass and houses, at Whitsunday 1747, and as to the arable land, at the separation of the crop 1747. The lease contained the following stipulation:—"Upon the said Alexander (Wight) and his foresaids, their tendering and paying to him, the said George (Cockburn) or his foresaids, the sum of thirty two pound sterling money as a year's rent of the subjects hereby set by way of fine and consideration to the said George and his foresaids, over and above the yearly rent after mentioned, and demanding a renewal of this lease from the said George and his foresaids, in a legal manner, before a notary and two witnesses, at least twelve months before the expiry of the above term of nineteen years, that then, upon the said Alexander and his foresaids making such tender, payment, and demand, the said George and his foresaids shall reiterate and renew this lease in favours of the said Alexander and his foresaids, upon their own proper charges and expenses, for other nineteen years longer for payment of the same yearly rent, att

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[1] See previous reports 1 Macph. 1097: 35 Sc. Jur. 612, 623. S. C. 4 Macq. Ap. 729: 2 Macph. H. L. 35: 36 Sc. Jur. 543.

the same terms, and with and under the same conditions, provisions, and qualifications contained in this present tack, and so furth thereafter the said tack of the saids lands and others hereby set shall be renewable by the said Alexander and his foresaids from nineteen years to nineteen years for ever, upon their making the like tender, payment, and demand, att the end of every nineteen years, in the terms above mentioned, and observing and performing the conditions, provisions, and prestations contained in this present lease."

The lease was duly demanded and renewed until that which ended in 1842, when the Earl of Hopetoun, the landlord, declined to renew. But by a decree of the Court of Session, dated in 1858, the tenant was declared entitled to another renewal of a term of nineteen years from 1842. That lease was never granted, but if granted would have ended in 1861. The defender had, on 1st August 1860, demanded another renewal, when the pursuer declined to grant it, on the ground, that the demand should have been made on Whitsunday 1860.

The Lord Ordinary (Kinloch), by his interlocutor of 20th June 1862, held, that the demand of renewal was too late. The Second Division adhered.

The defender, having appealed to the House of Lords, contended, in his *printed case*, for a reversal on the following grounds:—1. Because, even supposing, that a renewed tack had been granted in terms of the requisition of 10th May 1841, such renewed tack would not have expired till the separation of crop 1861 from the ground, (Michaelmas 1861,) and the appellant's notice, tender, and requisition of 1st August 1860, was made more than a year before such tack would have expired. 2. Because the respondent, having wrongfully failed to grant the renewed lease which the tenant demanded in 1841, is barred, by his own wrongful failure, from obtaining decree in the present process. 3. Because the farm in question, being in reality held under perpetual lease, and the termly renewals being required only to perpetuate the title, the landlord is not entitled to found on accidental delay in the requisition for renewal as a ground for forfeiting the lease, where he cannot qualify actual damage by such delay, and where it is not pretended, that the tenants did not intend to continue the lease.

The pursuer (*respondent*), in his *printed case*, supported the interlocutors on the following grounds: 1. The lease, dated 13th and 24th June 1747, and the successive renewals thereof, and, in particular, the lease of 14th May 1825, require, that at least twelve months before the expiry of nineteen years, being the term of endurance of the current lease, the tenant shall make a tender, payment, and demand, as provided in these leases, as a condition of his right to obtain a renewal of his lease. 2. The lease of 24th June 1747 and the successive renewals, were leases for nineteen years, with Whitsunday entries, the term of each of which commenced to run at its Whitsunday term of entry, and expired at the Whitsunday term nineteen years thereafter, and the provisions that the tender, payment, and demand for a new lease should be made at least twelve months before the expiry of the said term of nineteen years, imported and required, that such tender, payment, and demand should be made on or before the term of Whitsunday of the year preceding the last year of the lease. 3. The true construction of the lease, and the intention of the parties, was, that the tender, payment, and demand should be made at or prior to the said Whitsunday term; and the clause in question duly expresses that intention. 4. The clause provides, that a new lease shall be granted on the expiry of the previous lease, and that the tender, payment, and demand shall be made at least twelve months previously; and, as the new lease under their provision would fall to be granted at the term of Whitsunday of the last year of the prior lease, so the tender, payment, and demand fell to be made at the latest, on the previous Whitsunday term. 5. According to the true construction of the clause, and the intention of the parties, the tender, payment, and demand fell to be made at least twelve months before the last Whitsunday term of the lease current from Whitsunday 1842.

The *Attorney General* (Palmer), and *Lord Advocate* (Moncreiff,) for the appellant.—The demand for renewal of the lease was made in time. Assuming that the last lease had been duly renewed, in 1842, as the decree of the Court ordered, and what ought to have been done may be taken to have been in fact done, it would have ended at the separation of the crop of 1861. As the present demand was made on 1st August 1860, it was more than a year before such separation. The true construction of the clause of renewal was to fix the end of the lease at the separation of the crop, and not at Whitsunday. In one sense there were two terms of expiry; but as the clause in the lease speaks only of one, it must refer to the latter, and, therefore, the word "expiry" must mean "complete expiry." This is proper, because if one of the two periods is to be selected, that which relates to the important part of the farm, viz. the arable land, should govern, the house and grass being mere accessories of the arable land. If the lease be taken to end at Whitsunday, then there would not have been nineteen years' possession of the arable land, but only about eighteen years' and a half. That the lease continued as to the arable land until the separation of the crop in 1861 is obvious from this, that the tenant was entitled to the exclusive possession up to the last day, and could bring an action of trespass against any third party who went on the land—*Keith* v. *Logie's Heirs*, 4 S. 267. The lease expressly says, that the tenant is to hold the arable land for nineteen years from the separation of the crop of 1842. This construction is confirmed by the other clauses of the lease, as, for example, the clause as to fences, enclosures,

etc., all of which the tenant would have to keep up not merely till Whitsunday 1861, but till the separation of the crop. But even assuming the appellant was too late in demanding renewal, it does not lie in the mouth of the respondent to object, seeing that he is himself barred by the wrongful refusal to grant the lease commencing from 1842. Therefore strict law cannot or ought not to be enforced between the parties. So long as the renewed lease was withheld, the appellant in effect held from year to year on tacit relocation. Moreover, this being in the nature of a forfeiture, and the object of the twelve months' notice being merely to secure the payment of the fine or grassum, the condition ought not to be enforced, seeing that no special damage is alleged.

Sir F. Kelly Q.C., and *Anderson* Q.C., for the respondents.—The Court of Session was right in holding, that the twelve months must be counted from Whitsunday. The common law is, that the tenant who sows the crop is entitled to reap it, and he has in all leases which end at Whitsunday the right to do all things necessary towards reaping the last crop sown—Bell's Pr., § 1262. But this right is not possession *qua* tenant, but merely a reserved power to go on the arable land between the last Whitsunday and the time of separating the crop, by virtue of his having sown that crop. The lease continues for nineteen years till Whitsunday, *plus* a power of entry to reap the crop. That during the extended time beyond Whitsunday there is not complete possession of the outgoing tenant is clear from this, that he is not entitled after Whitsunday to the use of the barns. The new tenant gets legal possession at Whitsunday of both houses and arable land. Therefore the lease in substance only expands the common law, and does not alter the legal result, being in legal effect a lease from Whitsunday to Whitsunday—*Bruce* v. *Kinloch*, 9 S. 831. If it were otherwise, then the separation of the crop being an uncertain time, the twelve months could never be known with certainty till the last day, and the landlord could never tell, whether he is bound to renew the lease, or is free from it. Both parties have a clear right to know, whether they are to look out during the last year for a new landlord or new tenant respectively. It is plain the lease meant only one period, and not two periods from which to calculate the twelve months. Even if there were an option of two periods, as the stipulation was for the benefit of the landlord, that construction ought to be adopted which is most favourable to him. It is said, that, because the lease from 1842 was not actually granted, the landlord is now barred from relying on this objection; but that is not so, for equity supposes that to be done which ought to be done. The compliance with the stipulation as to the twelve months' notice was a condition precedent to the renewal of the lease, and not being complied with, the respondent was not bound to renew.

Lord Advocate replied.—The objection as to the uncertainty of the period from which to compute the twelve months, if the separation of the crop be the *datum*, is answered by this, that the date at which the lease of the arable land commenced in 1842 was well known, and all that is to be done is to compute nineteen years from that date, and so ascertain when the lease was to end in 1861. There is no mystery or importance attached to Whitsunday any more than to any other part of the year, if the lease distinctly says when the time of entry is to be. Under the present lease, the appellant was tenant in all respects *quoad* the arable land up to the separation of the crop, and had all the rights of a tenant as to that part of the farm.

Cur. adv. vult.

LORD CHANCELLOR WESTBURY.—My Lords, according to the common law or custom of Scotland, if a lease be granted to a new tenant of a farm, consisting partly of arable land, and partly of meadow or pasture lands, 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. The new or incoming 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 reasonably be misled by the form of expression, for it is admitted on all hands, that only one lease, not two leases, and one term of nineteen 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, are 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 on Whitsunday nineteen 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 nineteen 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 twelve months before the expiry of the above term of nineteen 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 as to when it would end, and therefore, as it must be a notice for twelve months, the time when it ought to be given would be equally uncertain.

The Lord Ordinary justly observes, 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 ish be at the separation of the crop, 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 of the tack, and no certainty as to the day when the notice of renewal ought to be given, or when it would expire.

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.—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 of the Mains of Ormiston for nineteen 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 the 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 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 nineteen 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 nineteen years, and upon the tenant tendering and paying him or his heirs the sum of £32 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 twelve months before the expiry of the term of nineteen years, that then, upon the tenant making such tender, payments, and demand, the Earl and his foresaids should reiterate and renew the lease, with certain exceptions immaterial to refer to, for other nineteen years longer at the charge of the tenant.

Various demands for renewal for successive terms of nineteen years were made, five in number, all terminating before Whitsunday, in the year of expiry; the last was made on the 10th 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 nineteen 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.

The tenant continued to occupy, and made a formal demand before a notary and two witnesses, for a renewal of the lease for nineteen years on the 1st August 1860, and the only question in the case is, whether 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* decree of the Court of Session decerning that, should put him in no worse condition than if he had done what in equity he ought to have done, granted a lease for nineteen years, expiring, as to the houses and grass land, on the 15th May 1861, and as to the arable land on the separation of the crop of 1861.

Was a demand on the 1st August 1860, in due form, a demand effectual for a new lease for nineteen 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, 1*st*, 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 a waygoing crop, till the crop is separated after the end of the term; and 2*d*, 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 land at the uncertain period of the separation of the crop, the making a demand twelve months before the expiry of the term must mean before the double 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 part 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 on the term, and, in that view of the case, there is not the slightest doubt, that a formal demand, and before a notary and witnesses, on the 1st August 1860, not twelve months before the 15th May, was too late.

But thirdly, supposing that view is incorrect, and that this lease is a lease giving an interest for nineteen years in the houses and grass from Whitsunday, and in the arable land 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 land—I think the context clearly shews, that the demand is to be made twelve 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, or the fences of the arable land, in good repair at the expiry of the 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 given twelve months' time before the expiry of the term, I cannot feel a doubt, that the true meaning is, that the landlord should have twelve months to look out for another tenant to whom he may give possession of the house and grass at Whitsunday, and the arable land 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 twelve 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 twelve 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 Whitsunday.

If this be a holding from Whitsuntide to Whitsuntide, with a privilege of taking the off going crop only, as I think, then 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 a right conclusion, that the demand ought to have been at least twelve 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 twelve 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 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 applicant has performed a condition precedent to entitle him to the renewal of a lease for nineteen years renewable for ever by demanding such renewal in manner prescribed at least twelve months before the expiry of the term of nineteen 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 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 twelve months before the expiry of the lease? If the lease had been executed as it ought to have been in 1842, the holding would have been for the space of nineteen 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 nineteen 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 nineteen years from the period of the separation from the ground of the crop of 1842.

In forming a judgment as to which of the 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 a waygoing 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 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 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 waygoing crop. It is evidently framed with reference to the law as to a waygoing 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 nineteen 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 waygoing crop. And this intention might be frustrated by fixing the expiration of the nineteen years to a day certain, in the manner supposed; as, in the case of a late harvest, the terms might expire before reaping time. The tenant would then only have eighteen crops from the arable lands during his nineteen years' term. It appears to me, that the term of nineteen 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 twelve months before Whitsunday 1861, which was the true and only expiry of the term of nineteen 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 twelve months before Whitsunday. And that these acts of the tenants of the estate are evidence, appears from the case of *Sadlier and Another* v. *Biggs*, 4 H.L.C. 436, 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, with costs.

Appellants' Agents, J. W. and J. Mackenzie, W.S.; Grahames and Wardlaw, Westminster.—*Respondent's Agents*, J. and J. Hope, W.S.; Connell and Hope, Westminster.