having got possession of the subjects ought to pay their full value.

LORD JUSTICE-CLERK—I think that by accepting the renunciation the landlord necessarily agreed that the date of the renunciation should be the termination of the lease.

LORD YOUNG and LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff, and assoilzied the defenders, with expenses.

Counsel for Pursuers—Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Defenders—Rhind—Orr. Agent—William Officer, S.S.C.

HOUSE OF LORDS.

Thursday, March 4.

(Before Earl of Selborne, Lords Watson, Fitzgerald, and Ashbourne.)

NEILSON *v.* MOSSEND IRON COMPANY.

(*Ante*, vol. xxii. p. 265, Dec. 19, 1884.)

Partnership—Dissolution—Partnership-at-Will—Tacit Relocation.

Where there is a partnership for a term of years, and it is, after the expiration of the term, continued at will, the presumption is that the new partnership is on the terms of the old so far as applicable, but so far only.

A clause in a contract of partnership provided that "if within three months before the termination of this contract the whole partners of the company shall not have agreed to carry on the business thereof, any one or more of them who may be desirous of retiring shall be entitled to do so, and shall immediately on the completion of the balance after mentioned be paid out by the partners electing to continue the business his share in the concern as the same shall be ascertained by a balance of the company's books as at the termination of the contract, to be completed within not more than three months from said termination," and it provided for a certain mode of winding-up if the partners wished. The time for which the contract was to run expired, and the business was carried on as a partnership at will. *Held* (*alt.* judgment of First Division) that this provision as to three months from a fixed period, the termination of the original contract, were inapplicable to a partnership-at-will, and therefore that that article was not carried into the partnership-at-will.

This case is reported *ante*, 19th December 1884, 22 S.L.R. 265, and 12 R. 499.

The present appeal was by Hugh Neilson jun. in his action founded on his notice of dissolution of 4th May 1883, to have decree of winding-up and realisation of the assets of the company. It will be necessary only to refer to the following facts:—The company was founded in 1842. In 1867 a seven years' contract was entered into. In 1875 Hugh Neilson jun., the appellant, was assumed as a partner, and a draft new contract prepared, which slightly modified the provisions of the 1867 contract, and stated that the term was to be seven years or till 31st May 1882. There were 96 shares, of which Hugh Neilson jun. had five. During the litigation previously reported (see reference *supra*), in which the trustees of the late W. Neilson claimed to be partners, Hugh Neilson jun. gave on 4th May 1883 his notice of dissolution, and raised this action on 14th May 1883.

The Mossend Company contended that the provisions of the draft contract for 1875, or at all events that of 1867, were still applicable although the partnership had become one at will, and that Hugh Neilson jun. was only entitled to have his share paid out in terms of article 12 of the draft contract of 1875.

The clause (12), so far as material, was—"If three months before the termination of this contract the whole partners of the company shall not have agreed to carry on the business thereof, any one or more of them who may be desirous of retiring shall be entitled to do so, and shall, immediately on the completion of the balance after mentioned, be paid out by the partner or partners electing to continue the business, his or their share and interest in the concern as the same shall be ascertained by a balance in the company's books as at the termination of the contract to be completed within not more than three months from said termination, and that either in cash or by his or their bills with security, and in the event of the partners differing as to the security, or as to the date at which the bills shall be drawn, or otherwise, the terms shall be fixed by the arbiter after mentioned, but if the whole partners wish, the property and assets of the copartnery shall be disposed of as follows." . . . .

At delivering judgment—

EARL OF SELBORNE—This is a short and, in my view, a simple question of construction.

There is no doubt about the law that when there is a partnership for a term of years, and it is afterwards, after the expiration of the term, continued at will, the rule, in the absence of contract to the contrary, is that it may be presumed that the new business is carried on upon the old terms as far as they are applicable to it, and only so far; and as far as the principle is concerned I do not think there is any discrepancy between any of the authorities. It is not at all necessary to examine into the particular cases in which it has been held that a particular term of a written contract did or did not go into the new and unwritten contract, because every case has turned upon its own particular circumstances, and upon the question as applied to the words of the particular instrument, whether the old term was or was not applicable to the new contract.

Now, here we have to consider whether the 12th article of the contract, which was for seven years ending on the 31st of May 1882, is applicable to the subsequent partnership at will. The proper way to examine that question, as it seems to me, is first to determine what is the true and proper construction of the words of that article

as they stand in the written contract, and as applicable to the partnership for seven years, ending on the 31st of May 1882. All must agree that it is a strangely and singularly worded article. In the first place, the commencement of the article which we have to consider is, in any view of the matter, not so happily and clearly expressed as it might have been; and then, secondly, the greater part of the article which follows it deals with alternatives which, if the words introducing them are to receive construction upon any ordinary principles, are placed entirely in the power of the partners themselves, and depend upon the consent of them all. Therefore those latter portions of the article are immaterial unless (which I do not think) there were found in them anything throwing light upon the construction of the first part. [*His Lordship then read the first part of clause* 12 *as above*].

Now, in order to construe that upon sound principles, we must dismiss from our minds entirely the subsequent event of the partnership having expired without anything having been done under this clause, and a new partnership at will having been formed between the former partners, and this question which we have now to determine, arising as to that new partnership at will. We must find out what the words mean, as they ought to be construed with reference to the original contract in which they are found.

The first thing we see is that there is a definite period mentioned of three months before the termination of that contract. That contract was to terminate on the 31st of May 1882. The words necessarily mean three months before the 31st of May 1882. It is said that those words are introduced for a negative purpose—to exclude a particular thing by hypothesis—not to introduce one. I think that is not a sound construction of the words. It is very true that the term is fixed as that at which it is to be ascertained whether a particular thing is to be done or not, but if at that time so ascertained that particular thing has not been done, then and from that time the consequences are to follow for which the clause provides. The fixing of three months would be absolutely nugatory and inofficious if they had nothing to do with the consequences which are to follow. But to my mind it is plain that a period of three months before the 31st of May 1882 is fixed for the purpose of introducing the option given to the different members of the partnership (not all) of agreeing to carry on the business at that time—the option for some to continue, and some to go out; well, if that is so, what is the rational construction of the words of time? Why, that the option so given is either to be exercised at the exact period of three months, when the other event is ascertained, or, at all events, within the period of three months measured from that event, and to be exercised during the continuance of that particular partnership which expires on the 31st of May 1882; and although the words are not skilfully drawn, yet it appears to me that no one having to construe them with reference to the original contract could hesitate for a moment to say that the influence of that definition of time pervades every part of the clause. If at that time there has not been a common consent that all shall carry on the business, it is contemplated that one or more may be desirous of retiring, and that one or more may elect —declare a choice which they have a right to make—to continue the business. Now, when is that to be done? Why within the time which for that purpose has been fixed, the period of three months next before the termination of the partnership; and if so, the whole operation of the clause is confined within those three months, all of them antecedent to the actual termination of the partnership; and the right—a right that may be of importance to one party or to both—certainly it must be in his own view to the party exercising the option—that right (which is a substantial right to be paid out upon certain terms) must be ascertained by the exercise of the option during the period of three months. If, as was suggested in the argument, one partner after the three months had begun to run, or upon the day when they did begin to run, no general agreement having been made, says—"Now I wish to go out, and I call upon you to elect whether you will continue or not," it may be that the other partners could say "We are not obliged to make an immediate election; we postpone that, and reserve to ourselves the right to make it during the whole time that the contract permits us;" but that could only be at the most during the residue of the partnership, commencing from three months before its termination; and if the partnership were actually first terminated, it appears to me that a man then declaring his wish to retire on these terms could not without the will and consent of his copartners be entitled to be paid out on these particular terms.

If that be so, it is quite plain that it is a provision inapplicable to the subsequent partnership at will, because you never can get those three months in any such subsequent partnership, and there is an end of the case.

I have looked at the judgments of the learned Judges in the Court below, and I find, without going minutely into the matter, that the learned Lord Ordinary has in substance taken that view of the case; not disguising that, looking to the preponderance of interest as between these partners, he would have been well satisfied to see his way to a different conclusion; but he could not do so, and he took that view which I believe we all consider to be correct.

Now, how was the matter dealt with when the case came to the Inner House? Three very learned Judges, for whose opinions no man can have a greater respect than I have, undoubtedly did agree in reversing that judgment, but when I look to the reasons I find that one of them (Lord Mure) simply expressed his adhesion to the views of Lord Shand; another, the learned Lord President, agreeing in the same result absolutely said not a single word about the construction of the particular words of the clause—did not deal with the words at all—did not even address himself to the question of the effect of those words of time upon which your Lordship's opinion so much depends. It cannot be said that Lord Shand did not notice those words, but he said he did not attach importance to them. He says—"I do not, in reference to article 12 of the contract, attach importance to the opening words, 'If three months before the termination of this contract.' It was intended no doubt that the parties should consider the matter three months before the expiry of the contract, but I can see no difference in substance as to the rights

of the parties if they did not consider it two or three months before the expiry. It would have been all the same had it been three days, and I read the provision as being applicable to the natural termination of the contract." Now, with great respect to the learned Judge, I must own that this seems to me to be a very unsatisfactory way of dealing with a question of construction. He does not examine the words. He looks to what he thinks substance—that is to say, thinking that the whole thing applies to the natural termination of the contract. I do not know whether he means "after the termination." I suppose he does. Coming to that conclusion, yet not pointing out the mode in which he arrives at it, he rejects as practically inofficious those introductory words, because he thinks if it is to operate at the natural termination of the contract it is wholly immaterial (as certainly it would be) whether the parties do or do not consider the matter two months before the termination, or three months, or three days, or any other time—in fact he attributes no office whatever to those words.

I cannot help thinking it improbable that the learned Judge would have passed over those words quite so easily if the question had arisen under the original contract, and if a partner not having declared his desire to retire or to take the benefit of that provision before the contract had expired claimed the right to do so afterwards. I cannot help suspecting that the matter might have received in that case different consideration, but it is manifest that it must be governed now by exactly the same considerations by which it would have been governed in that case.

The result is that I think the interlocutors appealed from, so far as they relate to the action of the appellant, Hugh Neilson the younger, and to the costs ordered to be paid by him, should be reversed, and I think we should in substance, according to the interlocutor of the Lord Ordinary, but not adopting the whole of his words, declare in that action that the pursuer Hugh Neilson the younger is entitled to have the copartnery and the business thereof now wound up as at the 14th of May 1883, in such way or manner as shall be mutually agreed upon, or as shall be fixed by the arbiter named in the draft contract of copartnery. And I see no reason why we should not adhere to the ordinary rule of giving the successful appellant his costs here and below.

As to the other respondents, who represent the trustees of William Neilson, they appear to me to have entered a gratuitous appearance in a case in which they have no interest, and I think they ought to have no costs.

Lord Watson—I am also of opinion that the interlocutors appealed from, so far as they are brought under review, ought to be reversed.

When the members of a mercantile firm continue to trade as partners after the expiry of their original contract, without making any new agreement, that contract is held in law to be prolonged or renewed by tacit consent, or as it is termed in the law of Scotland by "tacit relocation." The rule obtains in the case of many contracts besides that of partnership, and its legal effect is that all the stipulations and conditions of the original contract remain in force, in so far as these are not inconsistent with any implied term of the renewed contract. The main distinction between the old contract and the new in the present case consists in this, that the latter is a contract determinable at will. It is an implied term of such a contract that each partner has the right instantly to dissolve the partnership whenever he thinks proper. The right must, of course, be exercised in *bona fide*, and not for the purpose of deriving any undue advantage from the state of the firm's engagements; but no question of that kind arises here.

The objects which a partner has in view in exercising his right to dissolve a partnership at will are, in the first place, that he shall be freed from the contract and the liabilities which it involves, and in the second place, that he shall receive payment of his interest in the stock of the copartnery upon the realisation of its assets and the discharge of its liabilities. I think it would be inconsistent with the existence of a proper partnership at will that its members should be restrained from effecting the first of these objects whenever they saw fit. But it is not, in my opinion, inconsistent with the nature of a partnership at will that a member should agree upon its dissolution at any time to receive payment of his share and interest in the shape of a sum of money, to be fixed with reference to a particular balance-sheet, without having resort to a legal winding-up, and to leave the other members to carry on the business. Such an arrangement is in reality a mode of winding-up which is not less applicable to a contract at will than to a contract having a definite term of endurance.

Accordingly, it appears to me that there is nothing in the subject-matter of article 12 of the draft contract of 1875 which could make it incapable of application to a contract determinable at will. So far I agree with the reasoning of the Lord President (Inglis) in the Court below. But it does not necessarily follow that the special character of the stipulations contained in article 12 is such that they can be reasonably applied to a contract of that kind. The only stipulations of importance in the present case are to be found in the commencement of article 12. The remainder of the article refers exclusively to a method of winding-up, which may be adopted, with the consent of all the parties concerned, in case of none of the partners choosing to continue the business.

I take the general import of these stipulations to be this, that a partner or partners desirous of a dissolution at the termination of the original contract shall, if the other partners elect to continue the business, have a right to retire on payment to him or them of his or their share and interest, "as the same shall be ascertained by a balance of the company's books as at the termination of the contract." If a partner is in a position to assert, and does assert, that right, he incurs a corresponding obligation to go out on these terms. The right and relative obligation are, however, made subject to this condition: "If three months before the termination of this contract the whole members of the company shall not have agreed to continue to carry on the business thereof," and so forth. What is the true meaning to be attached to these words is, in my opinion, a question of vital importance in the present case.

Lord Shand says—"I do not, in reference to article 12 of the contract, attach importance to

the opening words, 'if three months before the termination of this contract.' It was intended, no doubt, that the parties should consider the matter three months before the expiry of the contract, but I can see no difference in substance as to the rights of the parties if they did not consider it two or three months before the expiry. It would have been all the same had it been three days, and I read the provision as being applicable to the natural termination of the contract, or if thereafter carried on as a partnership at will, then to its termination by a notice from any of the partners." I should be inclined to agree with these observations if I were satisfied that the opening words merely imply that the obligation shall attach to the retiring partner, at the termination of the contract, in the event of no agreement having been made three months previously, by all the partners, to continue to carry on the business together. That construction would, however, make the words of the condition mere surplusage, because it is obvious that no partner could have a right or be under an obligation to retire at the termination of the contract who had three months before agreed with his remaining copartners to extend its currency beyond that term. I think a great deal more is implied in these words. They appear to me, when read in the light of the context, to imply that three months at least before the time appointed for the termination of the contract the partners shall then ascertain definitely whether all are agreed to continue the concern, and, in the event of their not being so agreed, that those members who desire to retire shall intimate their resolution before the termination of the contract; and I am of opinion that all these things must be done at and during the periods specified, and that they are made a condition-precedent of the right of the retiring partner to be paid out in terms of article 12, as well as of the right of the partners electing to continue, to insist that he shall retire on these terms.

Is then the appellant bound to retire in terms of article 12? I venture to think that he is not. He gave notice on the 4th of May 1883, to terminate the copartnership as at that date. In so doing he acted within his powers as a member of a firm trading under a contract at will. Nothing had been previously done, by the appellant or his copartners, in compliance with the condition upon which the obligation they seek to enforce against him depends; and I cannot understand how the respondents can bring the appellant within the obligation of article 12 except on the footing that the notice of the 4th of May 1883 was not duly given.

But I desire to rest my opinion not upon the circumstance that the condition was not observed, but upon the ground that the condition and the rights and obligations arising out of it are totally inapplicable to a contract at will. They have plain reference to a fixed *punctum temporis*, the termination of the original contract; but how are they to be applied to a contract which has no definite currency? Time is of the essence of the condition, but a contract at will affords no terminus from which it can be measured or computed. I need, however, say no more upon this subject, because I concur in the observations which have been already made by the noble and learned Earl.

I have only to add that I agree with the noble and learned Earl in thinking that the mode of winding-up the partnership must be determined by the arbiter, and that it ought not to proceed according to the legal method as concluded for in the summons. Upon the question of expenses I also entirely agree with his Lordship.

Lord Fitzgerald—My Lords, I would willingly have come to a different conclusion, but I have been coerced to say that in my judgment, as in that of the noble and learned Lords who have preceded me, it is impossible upon any reasonable construction of the first article, if it is applicable, to apply it to a partnership at will terminable at a moment's notice. If it terminates by a partner saying—as in words like those put in the case of *Featherstonhaugh* v. *Fenwick*, 17 Ves. 309—"It is my pleasure on this day to dissolve the partnership," then *ipso facto* it ceases to exist as a partnership, and the legal results follow unless they are controlled by some article. Even omitting the first article and striking it out altogether, I tried as well as I could to apply the 12th article to a partnership at will, but I found it utterly impracticable; and therefore I feel myself coerced to agree with the judgment which has been proposed.

Lord Ashbourne concurred.

Ordered and adjudged: Interlocutors appealed from reversed so far as they relate to the action of the appellant Hugh Neilson junior. Declared in that action that the pursuer Hugh Neilson junior is entitled to have the copartnery and the business thereof now wound up as at the 4th of May 1883, in such way or manner as shall be mutually agreed upon or as shall be fixed by the arbiter named in the draft article of copartnership. With that declaration cause remitted to the Court below. The appellant to be paid his costs in this House and in the Court below by the respondents, the Mossend Iron Company. The Mossend Iron Company and James Neilson and James Thomson, trustees of William Neilson, to severally repay any costs paid to them by the appellant.

Counsel for Hugh Neilson jr. (Appellant)—Rigby, Q.C.—Rawlins. Agents—Clarke, Rawlins, & Co., for H. B. & F. J. Dewar, W.S.

Counsel for Mossend Iron Co.—Lord Adv. Balfour, Q.C.—Low. Agents—Hollams, Son, & Coward, for Webster, Will, & Ritchie, S.S.C.

Counsel for William Neilson's Trustees—Sol.-Gen. Davey, Q.C.—Haldane. Agents—Freshfield & Williams, for Morton, Neilson, & Smart, W.S.

Tuesday, June 29.

(Before Lord Chancellor Herschell, Lords Blackburn, Watson, and Fitzgerald.)

LORD ELPHINSTONE *v.* MONKLAND IRON AND COAL COMPANY.

Lease—Landlord and Tenant—Landlord's Consent to Assignation.

Where a landlord has right to refuse to accept assignees of the tenant's it is material evidence of his consent to an assignation that