very strongly to my mind was this—The title in imposing this prohibition seems to make a direct appeal to the state of possession by William Thorburn in 1866, and to apply the prohibition solely to what, according to William Thorburn's occupation, was vacant ground or back green. Now, in point of fact in 1866 I think it is proved that this was not vacant ground, because it was covered by a building of stone not of a temporary character, and the same reason makes it extremely difficult for me, as it does for Lord M'Laren, to apply the words vacant ground or back-green to the inside of a stone building. But Lord M'Laren has, I think, satisfactorily met that difficulty by reasoning in which your Lordships concur, and I accordingly assent to the judgment proposed.

LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer—Dundas—Cook. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defender — Guthrie — Salvesen. Agents — Boyd, Jameson, & Kelly, W.S.

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*Thursday, March* 4.

## FIRST DIVISION.

[Lord Kyllachy, Ordinary.

## GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED *v.* GLASGOW CORPORATION.

*Tramway — Lease — Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 91), *sec.* 6—*Tenant's Right of Relief from Landlord.*

The Corporation of Glasgow, in consideration of certain payments, let to a tramway company for a period of twenty-three years the sole right to use carriages with wheels specially adapted to run on a grooved rail on the whole tramways authorised to be made by them. Among the conditions of the contract it was stipulated that "the company shall pay to the Corporation the expenses of borrowing, management, &c., and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways."

*Held* (*aff.* judgment of Lord Kyllachy) that the Corporation was bound to relieve the company of the landlords' share of rates and taxes, local and imperial, on the ground (1) that the contract between the parties was one of lease, and (2) that the condition cited did not cover the landlords' share of rates and taxes.

*Lease—Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 91), *sec.* 6—*Tenant's Right of Relief from Landlord—Whether such Right Effectual only by means of Deduction from Rent.*

The Valuation of Lands (Scotland) Act 1854, sec. 6, provides "That if lands are let upon a lease of more than twenty-one years' duration, the lessee shall be deemed to be also the proprietor of such lands under the Act, but shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor" of a certain proportion of all assessments laid on upon the valuations of such lands made under the Act.

*Held* (*aff.* judgment of Lord Kyllachy) that the right of relief conferred by the statute was not limited to the method of deduction from the rent of each year, but might be enforced in an action of repetition.

*Acquiescence — Implied Abandonment of Claim—Right of Tenant to Relief from Landlord in respect of Owner's Share of Rates and Taxes.*

In 1882 a tenant who had previously made a claim against his landlord for repetition of the landlord's proportion of rates and taxes, wrote to the landlord—"It is understood that our rights in connection with landlord's taxes are in no way prejudiced." Till the end of the lease in 1894 nothing more was said of the claim, but thereafter the tenant raised an action to enforce it.

*Held* (*aff.* judgment of Lord Kyllachy) that the tenant had not discharged or abandoned the claim in question.

By lease dated 16th and 17th November 1871 the Corporation of Glasgow let to the Glasgow Tramway and Omnibus Company, Limited, "the sole right to use for the sole purposes of the Glasgow Street Tramways Act 1870, carriages with flange wheels or other wheels specially adapted to run on a grooved rail on the whole tramways authorised to be formed by the said Act, and that for the space of twenty-three years" from 1st July 1871, under certain conditions and provisions:—"(*First*) The Corporation shall make the said tramways out of moneys to be raised or borrowed by them. (*Second*) The company shall pay half-yearly, at Whitsunday and Martinmas, to the Corporation the amount of the interest actually paid or payable by them on (1) the total money from time to time borrowed by them and expended on the tramways and in connection therewith on capital account, and (2) on the expenses of the Glasgow Street Tramways Act 1870, and the expenses incurred by the Corporation and the Board of Police of Glasgow in reference thereto, and others foresaid, or incident to the execution of these presents, which sums shall also be held as expenditure on capital account, declaring the amount on which such interest shall be payable shall not be affected by any payment made to the Corporation through the operation of the sinking fund hereinafter provided for; and

the company shall also pay to the Corporation the expenses of borrowing, management, &c.; and this provision shall be so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways . . . (*Third*) The company shall also pay half-yearly, at Whitsunday and Martinmas, to the Corporation, 3 per cent. per annum, as after provided, on the gross sum at the time, and from time to time expended by the Corporation as aforesaid on capital account, and which 3 per cent. shall be set aside and accumulated as a sinking fund to be applied by the Corporation ultimately towards the reduction and extinction of the cost of constructing the tramways . . . (*Fifth*) The company shall maintain, repair, and, so far as necessary, renew the roadway between and within the tramways, and so much of the roadway as extends 18 inches beyond the outside of the rails; and they shall also maintain, repair, and, so far as necessary, renew the tramways during the lease, and shall hand over the same to the Corporation at the end of this lease in as good working condition as when given over to them . . . (*Sixth*) The company shall have the right of user of the tramways for the sole purposes of the Glasgow Street Tramways Act 1870, during the currency of this lease . . . (*Ninth*) In addition to the foresaid sums, the company shall pay to the Corporation a sum equal to the sum of £150 sterling per annum for every mile of street in which the tramways shall have been opened for traffic, and proportionally for any portion of a mile, except in so far as such streets are for the time being turnpike roads . . . (*Fifteenth*) Should the company at any time fail to make the foresaid stipulated payments, or any of them, or any part thereof, the Corporation shall be entitled, in addition to the ordinary legal remedies, on a certificate by the City Chamberlain that such payments or parts thereof have not been made for a period of six weeks after the same have become due, forthwith, and at their own hand, and without the necessity of any judicial authority, to seize and sell by public sale or private bargain so many of the horses and carriages employed in the working of the said tramways or other property belonging to the company, or the heritable property to be conveyed to the Corporation as aforesaid as may be necessary to meet the said payments, and the Corporation shall not be liable for damages in the exercise of the said power unless it be proved that the same has been exercised maliciously and without probable cause."

During the currency of this lease, from 1st July 1871 to 1st July 1894, the Glasgow Tramway and Omnibus Company, Limited, paid the landlord's assessments, rates, and taxes, both local and imperial, in respect of the tramways leased by them from the Corporation.

In 1895 the Tramway Company raised an action against the Corporation, concluding, *inter alia*, for payment of £14,246, being the amount of the landlord's rates and taxes so paid by them.

The pursuers founded upon the lease of 1871, and averred that "they repeatedly called upon the defenders, as the actual proprietors of the said tramways, to repay to them the sums so paid, or the proportion thereof of which the defenders were bound to free and relieve the pursuers in terms of the said Act, but the defenders refused to do so, alleging that under the said lease the pursuers were liable in a question with the defenders to pay the said assessments, rates, and taxes. The pursuers all along protested against this refusal and contention on the part of the defenders, but they were not in safety to deduct the said payments from the rent payable under the said lease in view of the terms of article 15 thereof above quoted." They further founded upon sec. 6 of the Lands Valuation (Scotland) Act 1854, and averred that in 1880 the parties attempted to settle the question by presenting to the Court a special case, which was ultimately not proceeded with.

The defenders referred to the terms of the lease, and further answered—"Admitted that the pursuers paid the landlords' or owners' assessments, rates, and taxes in respect of the tramways leased by them from the defenders. Admitted that in 1879 they called upon the defenders to repay the sums so paid, and that the defenders refused to do so, on the ground that under the lease the company were bound to relieve the Corporation of these taxes, and of all expenses whatever in connection with the tramways. Admitted that in that year a special case was presented to the Court of Session, in which the question of the defenders' liability to pay the pursuers the amount of said taxes, rates, and assessments was *inter alia* raised. Reference is made to the proceedings in said special case. *Quoad ultra* no admission is made. Explained that the pursuers continued thereafter to pay the whole assessments, rates, and taxes in respect of the tramways in question, and that no reservation has at any time been made of their right to claim repetition of any part thereof. On the contrary, the pursuers' claim has never since been revived, or even referred to in the annual statement of the assets of the company, and all the negotiations between the Corporation and the company during the last fourteen years have proceeded on the belief and assumption that the company's claim to be repaid had been departed from."

The pursuers pleaded, *inter alia*—"(1) The defenders being bound to free and relieve the pursuers of the proportion of the landlord's taxes paid by them in respect of the defenders' tramways, which corresponds to the rent paid by the pursuers, the pursuers are entitled to decree in terms of the first conclusion of the summons with expenses."

The defenders pleaded—"(2) The pursuers are barred from insisting in the present action by *mora* and acquiescence, and by the actings of parties, and in respect the whole payments were made by them in full knowledge of the facts. (3) The pursuers' claims being unfounded in fact and in law,

the defenders are entitled to be assoilzied with expenses."

From the proof allowed by the Lord Ordinary of the defenders' averments of *mora* and acquiescence the following facts appeared:—At a meeting of the Tramways Committee of the Glasgow Corporation on 26th November 1881, "The Town-Clerk reported that it having been found impossible to adjust with the Tramway Company a statement of the information desired by the Court of Session in connection with the special case for them and the Corporation in reference to the liability for landlords' taxes, the case had been withdrawn. He also reported that the company had suggested that the question at issue might be decided under a reference. After some conversation, consideration of the matter was delayed."

On 18th April 1882 the Secretary of the Tramway Company wrote to the City Chamberlain—"It is understood that although we pay the sinking fund without deducting-income-tax, our case for landlords' taxes is in no way prejudiced thereby. . . . [With regard to another claim]—This question will also fall to be discussed without prejudice to our claim when the proper time arrives." On 22nd April he wrote to the Town Clerk—"It is also understood that our rights in connection with landlords' taxes are in no way prejudiced,"

The secretary of the Tramway Company deponed in cross-examination—"I have been acquainted with the whole business of the company from its beginning. We made a claim for repayment of landlords' taxes when the first account was rendered by the Corporation. I personally sent in a statement of the landlords' taxes to the City Chamberlain. . . . (Q) Did you wish the Corporation to understand that the claim was an outstanding one or an abandoned one?—(A) We led them to understand nothing, except that under these protests we reserved our claim for landlords' taxes. They knew of the claim perfectly. (Q) They knew of the claim you had made in 1880, but between 1882 and 1894 did you intend the Corporation to understand that the claim for landlords' taxes was an outstanding claim at your instance against them?—(A) The letter of April 1882 shows that we protested against the payments being made, and that the claim was undoubtedly an outstanding one. I was present at the meetings of the directors, and was fully acquainted with the views and intentions of the Company in regard to this matter, and the directors never for a moment intended that the claim should be abandoned. (Q) What did you intend the Corporation to understand?—(A) That we would raise an action against them if they did not pay. (Q) What communication did you make to them which was calculated to lead them to think that?—(A) The letters that I wrote in 1882. (Q) If you intended the Corporation to understand that, why did you delay pressing the claim?—(A) Because we were afraid that the Corporation might include these landlords' taxes in any negotiations we might have in connection with leasing the lines in 1884 and 1886, and make it a part of the condition that we should abandon them. (Q) Was it of set purpose that the company abstained from renewing the claim between 1882 and the end of the lease?—(A) Well we did not renew it. (Q) Did you intentionally abstain from renewing it?—(A) Yes, we did. (Q) And for the purpose of affecting the Corporation's mind in business communications between you and them during that period?—(A) We did not intend to affect the Corporation's mind one way or another. . . . We desired that the negotiations in connection with these matters should not be complicated with this landlords' taxes question at all, which was a thing entirely apart from them."

The Valuation of Lands (Scotland) Act 1854 (17 and 18 Vict. cap. 91), sec. 6, enacts "that in estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year. . . . Provided always that if such lands and heritages be let upon a lease, the stipulated duration of which is more than twenty-one years from the date of entry under the same, . . . the rent payable under such lease shall not necessarily be assessed as the yearly rent or value of such lands and heritages, but such yearly rent or value shall be ascertained in terms of this Act irrespective of the amount of rent payable under such lease, and the lessee under such lease shall be deemed and taken to be also the proprietor of such lands and heritages in the sense of this Act, but shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor of such proportion of all assessments laid on upon the valuations of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act, as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation."

On 2nd December 1896 the Lord Ordinary (KYLLACHY) pronounced an interlocutor finding with respect to the first conclusion of the action (1) that "the defenders are bound to relieve the pursuers of the landlords' or owners' assessments, rates and taxes, whether local or imperial, paid by the pursuers in respect of the tramways leased by the defenders to the pursuers" from 1st July 1871 to 1st July 1894; "but that only to the extent of such proportion of the said assessments, rates, and taxes as corresponds to the rent payable by the pursuers to the defenders in respect of the said tramways, as compared with the amount of valuation of the said tramways under the Valuation Acts; (2) that the rent payable to the defenders in the sense of the Valuation Acts, and particularly the 6th section of the Valuation (Scotland) Act of 1854, and therefore the rent to be considered for the purposes of the preceding

finding, includes the whole payments made by the pursuers to the defenders as the consideration for the use of the said tramways;" and appointing the cause to be enrolled for further procedure.

*Opinion.*—"This is an action in which the Glasgow Tramways Company are pursuers and the Corporation of Glasgow are defenders, and it is brought to settle certain outstanding questions between the company and the Corporation arising out of the lease of the tramways by the Corporation to the company which was granted in 1871 and expired in July 1894.

"The first question relates to the landlords' or owners' taxes or assessments payable in respect of the tramways during the currency of the lease. These taxes were levied upon and paid by the company as being—by reason of the length of their lease—owners of the tramways sytem for the purposes of the Valuation Acts; and the question is whether and how far the company can now claim relief from the Corporation under the 6th section of the Valuation Act of 1854, which in effect provides that when a lessee is assessed as owner by reason of the length of his lease, he shall be entitled to relief from the actual owner, and to a deduction from the rent payable by him to such actual owner of such proportion of the assessments paid by him as shall correspond to the rent payable by him to such actual owner.

"The defenders' case is—(1) that the lease of 1871, although so titled and called, was not really a lease, but a nondescript agreement under which there was no rent in the proper sense, and no constitution in the proper sense of the relation of landlord and tenant—lessor and lessee; (2) that, supposing this to be otherwise, the statutory right of relief was excluded by a stipulation in the lease that the Tramway Company should pay to the Corporation 'the expenses of borrowing, management, &c.,' and that this provision should 'be so construed as to keep the Corporation free from all expenses whatever in connection with said tramways;' (3) that in any event the claim now made is barred, because the sum claimed ought to have been deducted annually from the rent paid to the Corporation. What I have to decide is, whether any and which of those defences is well founded.

"1. I am of opinion that the contract of 1871 was not only in name, but in reality, a contract of lease, and that the relation which it constituted between the parties was truly and properly the relation of landlord and tenant. I do not, I confess, see why this should be doubted. The subject of the contract was a heritable structure built into and forming part of the streets of Glasgow, and specially adapted for a certain valuable use. The Corporation were owners of this structure, and for payment annually of certain sums of money they conferred on the Tramway Company the sole right to use the structure—that is to say, the sole right to use it in the only way in which such use was valuable. The right thus conferred was, moreover, for a definite term of years; and the annual payments (which were all, if not of specified, yet of ascertainable amount) were none the less rent because not called by that name, or because broken up into several portions, ear-marked as applicable to different purposes of the lessors. Altogether, I am unable to doubt that, if the arrangement had been for less than twenty-one years, the Tramway Company must have appeared in the valuation roll as tenants and occupiers, and the Corporation as owners; and also that the annual value of the subject must have been taken as the sum of the different annual payments, which sum must have been held to be, for the purposes of the Valuation Acts, the stipulated rent.

"2. In the next place, I am of opinion that the pursuers' claim as lessees to relief of owners' taxes is not excluded by the stipulation in the lease on which the defenders found. The taxes—local or imperial—paid by the owner of property in respect of his ownership are not, I think, identical or *ejusdem generis* with expenses of borrowing or expenses of management. They are not properly expenses in connection with the owner's property, although the income from that property may form their measure. They are rather personal burdens imposed upon the owner as a citizen, the amount of which is estimated in a particular way. If a tenant taking a house binds himself in general terms to keep his landlord free of 'all expenses connected with it,' he would not, I think, be held to undertake to pay the property or income-tax which the landlord has to pay in respect of his rent. Still less would he be held to do so if the general obligation was subjoined to an obligation with reference to specific expenses of a quite different character. In the present case the question would, I suppose, have been the same had the lease of the tramways been a short instead of a long lease, and had the owner's assessments been laid on the owner direct. I do not say that even in such a case an obligation of the kind suggested might not be lawfully undertaken, but it would, at least in my opinion, require very special and unequivocal words to impose upon a tenant liability to pay his landlord's taxes, whether imperial or local.

"3. Lastly, with respect to the non-deduction of the taxes from each year's rent as it fell due, it is certainly unfortunate that this and other disputed questions under the lease were not brought to an issue when they first arose. They appear to have formed the subject of a special case presented to the Court in 1880; but that case having been partly heard and allowed to stand over for some amendment, a reference appears to have been then proposed, and then, as appears from the Corporation minutes of the 24th November 1881 (the last on the subject), 'consideration of the matter was delayed.' And certainly the delay thus initiated has extended over a long period. It cannot, however, be said that anything then or afterwards passed between the parties which can be construed into a discharge or

abandonment by the company of the present claim. It may be that that claim is of a nature which did not admit of being effectually reserved. I shall consider that immediately. But that it was in fact reserved is, I think, sufficiently apparent from the terms of the minute I have just quoted, and from the letters by the company's secretary to the City Chamberlain and Town Clerk of 18th and 22nd April 1882. The minute and the letters are in the jointprint. In the absence of any repudiation by the defenders of the understanding therein expressed, it is, I think, difficult to hold otherwise than that they (the defenders) acquiesced in the reservation.

"But the question remains, whether the pursuers' claim—depending as it does on the words of the Valuation Statute—admitted of being made good otherwise than by way of deduction from the rent of each year. The argument of the defenders is, that but for the express provision contained in the sixth section, no claim of relief would have existed; and that it was an express condition of the right of relief conferred by the statute that it should be made good in a particular way, viz., by deducting and retaining from each year's rent the statutory proportion of the landlord's taxes paid by the tenant for the particular year. That is the argument, and it was supported by reference to certain English cases, and particularly the cases of *Denby* v. *Moore*, 1 B. & A. 23, 18 R.R. 444; *Andrew* v. *Handcock*, 3 Moore, 278, 21 R.R. 569; *Spragg*, 4 Moore, 431; *Cumming*, 15 M. & W. 438. See also Dowell on Income Tax, notes page 67, 4th edition.

"Now, had the language of the statute here to be construed been identical with or similar to the language of the Acts (viz., the Property and Income Tax and Land Tax Acts) which were under construction in those English cases, there would, I think, have been force in this part of the defenders' case. It is perhaps difficult to say how far the decisions referred to proceeded on the peculiarities of the old system of English pleading. But unless explained on that ground, they do seem to affirm what seems in itself a quite reasonable proposition, viz., that when a tenant is charged under the Revenue Statute—say with property tax—and the statute provides that he may and shall deduct the tax so paid from his rent, that means that he shall deduct it from the rent of the year, and does not mean that the payments made may be set off against subsequent rents, or may be recovered in a subsequent action, brought as for repetition of rent overpaid, on the principle (as we should put it) of *condictio indebiti*. Had, therefore, the pursuers here been confined to the remedy of deduction from the rent, there would, as I have said, been strong grounds for holding that the principle of those English cases applied. The only question would then have been whether the reservation expressed by the pursuers in 1882 had been so accepted by the defenders as to constitute in effect an agreement between the parties that the claim in question should remain open for after adjustment.

"But I am not able to read the sixth section of the Valuation Act as the defenders read it. It certainly does not—like, *e.g.*, the Property Tax Acts—require the deduction to be made from the rent—a requirement no doubt designed to prevent agreements between landlord and tenant involving practically under-statement of the true rent. But, apart from that, the scheme of the enactment seems to me to be this—There is first provided in quite absolute terms a right of relief, and then there is superadded a further and special right, not necessarily implied in the other, to retain the amount due from the rent payable under the lease. That is, I think, the fair reading of the enactment. Nor can it, I think, be said that this superadded right was meaningless or unnecessary. It is not, as we know, every claim which can be set off against rent; and it may very well have been desired to exclude difficulties of that description with reference to these claims of relief—claims not necessarily or always liquid, but quite possibly involving, as in the present case, points of controversy or points requiring adjustment. In any case, the statute does not say in words what the defenders suggest, and I should have expected it to do so if it were so meant. It would, for example, have been easy to say—'The lessee shall be entitled to relief from the actual proprietor by way of deduction from the rent payable to such actual proprietor of such proportion, &c. of the assessments which he (the lessee) has paid.' But that is not what the statute says.

"On the whole, therefore, I am of opinion that as regards this first head of their claim the pursuers are entitled to decree in terms of the summons."

The defenders reclaimed, and argued—(1) The agreement between the Corporation and the Tramway Company though bearing to be a lease, was not a lease in reality. All that it gave to the Tramway Company was a right to use certain rails, running powers in fact, though doubtless exclusive running powers, and the Tramway Company could not therefore properly be said to be in occupation of lands and heritages—*Midland Railway Company*, 34 L.J. (M.C.) 25. (2) But, lease or no lease, there was an express stipulation in the agreement that the company should "pay to the Corporation the expenses of borrowing, management, &c.," and that that provision should be "so construed as to keep the Corporation free from all expenses whatever in connection with the said tramways." This stipulation was as sweeping as possible. Every species of expense was comprehended in it, and the "&c." could not be taken to cover merely heads of expenditure *ejusdem generis* with borrowing and management. (3) Assuming that the defenders might have been liable each year for the landlord's rates and taxes of that year, the pursuers had no claim against them in respect of previous years, if they had failed to insist upon the defenders

paying their share as each year came round. The statute provided one method of relief to the tenant and one only, viz., deduction from the rent of each year. This was clear from a comparison of the original English Acts, viz., 38 Geo. III. cap. 5, sec. 17, and 46 Geo. III. cap. 65, Schedule A IV., Rule 9, and from a consideration of two English decisions thereon—*Denby* v. *Moore*, 18 R.R. 444, and *Andrew* v. *Hancock*, 21 R.R. 569. The payments made by the pursuers had been made in full knowledge of their right to relief by way of deduction, and they could not consequently recover them now —*Dalmellington Iron Company, Limited* v. *Glasgow and South Western Railway Company*, February 26, 1889, 16 R. 523, *per* Lord Rutherfurd Clark, 534. (4) In any event, the pursuers had abandoned their claim by failing to take steps to enforce it since 1882. There could be no stronger proof of waiver than the fact that after expressly reserving their claim they had done nothing to press it.

Argued for the pursuers—(1) The lease was a lease in fact as well as in name. It had all the notes of a lease—a term, a lessee, a subject, viz., the exclusive right to use certain rails, and a rent, though no doubt the rent was not one definite sum but was distributed under certain heads. The right granted by the lease was the creature of statute, a private right carved out of public property. But that did not prevent the Corporation and the Tramway Company from occupying the positions of landlord and tenant. There was no question of exclusive right in the *Midland Railway* case (*ut sup.*) The ground of decision there was that two railways could not be rated for the same subject. That a tramway was a subject capable of being rated had been decided in *Craig* v. *Edinburgh Street Tramways Company*, May 27, 1874, 1 R. 947, and in the *Pimlico Tramways Company*, 1873, 9 Q.B. 9. *Hay* v. *Edinburgh Water Company*, July 13, 1850, 12 D. 1240, also referred to. (2) The contract between the parties being one of lease, there was nothing in the agreement to exempt the lessor from his obligation to relieve the lessee of the landlord's assessment. It would require some very specific stipulation indeed to alter the incidence of taxation as fixed by statute, and here all that could be pointed to was a clause referring to outlays actually made by the Corporation in payment of interest on borrowed money, expenses of management, and the like. The landlords' assessment was not in contemplation by parties when the clause relied on by the defenders was inserted in the agreement. (3) The principle of relief to the tenant was introduced into the law of Scotland by the Poor Law Act 1845 (8 and 9 Vict. cap. 83), sec. 43, which stated plainly that tenants should "be entitled to recover from the owners, or to retain out of their rents" the landlord's assessment. There was nothing in the phraseology of the Act of 1854 to indicate that deduction from the rent year by year was the sole method by which the tenant could obtain relief. On the contrary, its language was quite different from the Act of 46 Geo. III. (*ut sup.*) which said—"the tenant shall deduct." The English decisions had therefore no bearing on the present case. (4) A gratuitous acquittance of a liquid money debt was not to be lightly presumed. It was admitted that the pursuers' claim had been well reserved till 1882, and there was absolutely nothing since that date to indicate that the claim had been abandoned.

At advising—

LORD PRESIDENT—Although each of the several questions involved in this case has been very carefully argued before us, I am not only satisfied of the soundness of the Lord Ordinary's judgment, but I think his Lordship's opinion contains a remarkably complete statement of the true result of the argument. What I shall add is intended to be in confirmation of, and not at all in substitution for, the views there explained.

(1) The right enjoyed by a company or individual, entitled to the sole use for a term of years, by tramway cars, of a tramway line under the Tramway Acts, is a singular one, and it is not surprising that the return rendered by the occupant to the owner should also be calculated on unusual lines. These peculiarities have, not unnaturally, given rise to the argument that the contract is not a lease at all, but they are not sufficiently essential to support it.

The company have the sole right to use, in the appropriate way, a structure with which certain of the streets are fitted. They occupy the tramway, and the fact that other people use in a different way the road on which the tramway is fitted, and actually pass over the tramway, does not make the company's use of the tramway the less a mode of occupation peculiar to themselves.

On the other hand, the right of occupation being for a term of years, and there being a yearly return in money rendered by the company, it seems to me that the mode or principle according to which the amount of that return is calculated does not make it the less rent.

(2) In my opinion the word expenses in the agreement cannot be held to cover the liability of the Corporation to relieve the company of the landlords' share of taxes. In the first place, the Corporation have not in fact expended anything. By the statute the whole taxes are paid by the tenant. But even when the nature of the ultimate liability of the Corporation is considered, it is seen how remote it is from that of expenses in the sense of the agreement. A landlord is charged with taxes by reason of his property in heritage, and as a contribution to the revenue of the State, in respect of his ostensible wealth. I agree with the Lord Ordinary in thinking that reading the word "expenses" in the context in which it stands, those taxes are outside its scope.

(3) The next question is, whether a tenant is limited to deduction as the only mode of effectuating his right of relief? On this

point, again, I entirely adopt the Lord Ordinary's reasoning. The statute gives the right of relief in general terms, *plus* this, and as a mode, but not the only mode, of making it good, the tenant gets the right at his own hand to deduct the taxes from the rent.

(4) If, then, the tenant, by abstaining from making the deduction, did not, under the statute, *eo ipso* lose his right of relief, has he deprived himself of it? Now, without going into details, it is enough to say that the right of relief was asserted, never withdrawn, and, on more occasions than one, expressly mentioned as being reserved. This being so, it does not seem to me that the periodical payment of rent imported an abandonment of this claim. The case is distinguished by the nature of the claim from the cases in which claims of damages as between landlord and tenant have been held to be waived by the payment of rent. This is not a claim of damages, but a claim of debt created by statute, and of precisely ascertained amount. It does not depend on circumstances, nor is it dependent on evidence of a fugitive character, as is the case with most of the claims between landlord and tenant. Accordingly, it is in the region of claims of debt which fall under the negative prescription only, unless in circumstances in which by special conduct a direct implication of abandonment is raised.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—Balfour, Q.C. —W. Campbell. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—D.-F. Asher, Q.C.—Salvesen. Agents—Simpson & Marwick, W.S.

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*Thursday, March 4.*

## FIRST DIVISION.

[Sheriff Court of Lanarkshire.

## JOHNSTON *v.* JOHNSTON.

*Prescription—Quinquennial Prescription —Act* 1669, *cap.* 6—*Arrears of Rent.*

The Act 1669, cap. 5, provides that "mails and duties of tenents not being pursued within five years after the tenents shall remove from the lands" . . shall prescribe.

*Held* that the prescription did not apply to a claim for arrears of rent made against a tenant who, having become liferenter of the farm which he rented, had ceased to be a tenant, but had not removed therefrom, having stayed on in the capacity of liferenter.

The executrices of the late Mrs Johnston, widow of William Johnston, farmer, South Balgray, Glasgow, raised an action against John Johnston, farmer, Blackfaulds, Lanarkshire, concluding for payment of £402 as balance of rent with interest due in respect of his occupation of the farm of Blackfaulds. The farm had been held by Mr and Mrs William Johnston in liferent, the fee being in the defender, who was their son, but it was conveyed by them and by the defender to trustees, who were directed to allow the parents the liferent, and after their death, to allow the defender the alimentary liferent thereof. William Johnston died in 1867. In 1876 the trustees, of whom the defender was one, gave him a lease of the farm for seven years, and the defender possessed it under the lease, and under a continuation by tacit relocation down to the death of his mother in May 1884. He continued to occupy the farm as liferenter from that date up to the present time.

The pursuers having in July 1895 received from the trustees an assignation of the rents payable under the lease, raised the present action.

In an action at the instance of the defender dated July 20th 1875 (reported 2 R. 986) it was decided that he was entitled to certain equitable compensation, for which accordingly the pursuers gave him credit in estimating the amount which they alleged him to be resting-owing.

The pursuers averred that the defender had paid no part of the stipulated rent.

The defender averred that it had been agreed that the rent and the compensation due to him should be accepted the one for the other. He averred further—"Stat. 12. The said Mrs Marion Waddell or Johnston refused to take proceedings, and intimated to the said Cardowan trustees, of whom the defender was one, that she did not make any claim against them in respect of their not having pressed the claim for the alleged difference between the said compensation and the rents alleged to be due."

He pleaded—"(1) The sums sued for are prescribed, and the action should be dismissed, with expenses. (2) In respect of *mora* the action should be dismissed with expenses. (7) Pursuers or their mother having agreed to hold the sums sued for as discharged, the defender should be assoilzied."

The Sheriff-Substitute (ERSKINE MURRAY) on 9th December 1896 issued an interlocutor, by which he sustained the defender's 7th plea "so far as it is to the effect that the late Mrs Johnston, the defender's mother, having agreed to hold the sums sued for as discharged, the defender should be assoilzied."

*Note.*— . . . "But as regards the main point, the present action is for arrears of the rent of the farm of Easter Cardowan, said to have been due to pursuers' mother Mrs Johnston. The questions involved are many and entangled, and a study of a former litigation between the parties *Johnston v. Johnston and Others* in 1875, 2 R. 986, is necessary. But for the purpose