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 Now, without going into details, it is enough to say that the right of relief was asserted, never withdrawn, and, on more occasions than one, expressly mentioned as being reserved.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.

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

of this action it is sufficient that, while pursuers are claiming as the executrices of Mrs Johnston (who had a claim as a beneficiary to the liferent of the rents of Cardowan which she drew through trustees who had been put in charge thereof) that lady, under a letter of 11th December 1878 addressed to the Cardowan trustees, No. 11/2 of process, which is admitted by the pursuers in their answers to 10, 11, and 12 of defender's statements, expressly states:—'With reference to the arrears of rent of Cardowan due by my son John Johnston, I hereby acknowledge that owing to his (the defender's) inability to make payment, it is not my desire to have the same enforced, and I oblige myself, my heirs, executors, and successors to hold you scaithless (1) in respect of your not enforcing payment by action of said arrears, and (2) in respect of your not enforcing payment of the rents yet to become due by my said son, so long as I do not instruct you to enforce payment of the same.' No doubt this is addressed to the Cardowan trustees, the parties who had to collect the rents for her as beneficiary. But it was a clear statement of her desire not to have her claim enforced, and an intimation to them that they were not to enforce payment unless she changed her mind (which she reserved to herself the power to do), and instructed them to do so. But it is not averred that she ever changed her mind, or instructed them to do so. Further, it falls to be remarked that the letter deals not only with the past rents, but the future rents up to the day of her death. Moreover, it is noticeable that she obliges not only herself, but her executrices the pursuers, to hold the trustees scaithless for not enforcing the claim. The trustees, therefore, the nominal landlords of Cardowan, could not have been bound to enforce the present claim.

"It is admitted that no claim was made during Mrs Johnston's lifetime, or till the present action was raised by the executrices.

"In these circumstances it appears to the Sheriff-Substitute that it is manifest that the late Mrs Johnston has passed from and discharged any claim for these arrears up to the day of her death, and that the executrices cannot now insist on fulfilment of an obligation from which the party in primary right to the fulfilment thereof had passed. The defender had a right to believe that his mother had passed from it when she died without ever pressing it against him. It is out of all reason to believe that she meant it to accumulate as an obligation against him, which after her death her executrices were to exact, with interest. In the circumstances, she by dying without making any claim, practically made a gift of any right she had to the defender.

"The Sheriff-Substitute has adopted the above course, because while defender was not only willing but desirous to have a general proof, it is clear, in the view of the Sheriff-Substitute, that this is what it would have come to in the end, and he has a horror of prolonging needlessly the endless litigations which have taken place between the parties.

"Only half expenses have been given, as a good deal of defender's contentions would probably fall to be repelled."

The pursuers appealed to the Court of Session, and argued—(1) The Act 1669 did not apply, because the defender had not *de facto* removed from the lands, but had continued on them, and the fact that the character in which he occupied them had changed made no difference—*Strathern* v. *Cunningham*, 1739, M. 11,059; *Murray* v. *Trotter*, 1709, M. 11,054.

Argued for respondent—He had satisfied the conditions of the statute by ceasing to be a tenant; actual physical removal was unnecessary. The *ratio decidendi* in *Murray* v. *Trotter* was different, for that was not a case of an agricultural tenant at all; while in *Strathern* the tenant had never ceased to be one.

At advising—

The LORD PRESIDENT—Taking first the case of rent, we have two questions at least to consider.

The first is, whether this claim, being one for rent, is struck at by the Act 1669, c. 9. Now, the terms of that Act, so far as it applies to claims of rent, are these:—"And likewayes mails and duties of tenants not being pursued within five years after the tenants shall remove from the lands for which the mails and duties are craved, shall prescribe in all time coming." This statute, of course, has the effect of cutting off what would otherwise be a good and legal claim. That being so, it seems to me that it is not legitimate to extend its terms beyond the case to which it is expressly applied. Now, it postulates the case of a tenant having removed from lands. What is the case of the defender in this action? He has not removed from the lands; on the contrary, he has stayed on them. It is quite true that he has lost the character of tenant, and stays on in the higher quality of liferenter, but the fact that he has acquired that higher right and parted with the lower does not bring about the event which is described in the statute, and that is, his removal from the lands. It appears to me that those words are so clear that they cannot be applied to a case where the tenant does not remove from the lands, but, on the contrary, ceasing to be a tenant, stays on the lands. On that ground I think we are in a position now to repel the plea, because technically put there is no case of removal from the lands stated on record; on the contrary, it appears from the record that there is a case of staying on the lands.

The second question is, whether the Sheriff-Substitute's ground of judgment can stand; and I am of opinion that it cannot. The Sheriff-Substitute, dealing with a case which, as stated on record, is a case of abandonment by the creditor in a claim for rent, has picked out of the productions a letter addressed not to the debtor but to the trustees of the creditor, in which she

says that she binds herself to keep them skaithless from any claim arising from their not demanding the rent. I do not think that it is possible to treat that as a writ instructing a discharge of this claim. It may have a place in the case once the facts are ascertained, and may support or corroborate the other averments made by the defender. But it seems to me, and indeed I think it was only faintly argued to the contrary, that the Sheriff-Substitute has been premature in treating this as a conclusive ground of judgment.

What I have said leads to the first plea being repelled. As regards the second plea, I should like to make this remark. Scientifically speaking, I do not think it is supported by any averments, and I should be inclined to go further and say that the plea is bad in itself. But at the same time I think it would be safer not *hoc statu* to repel it, because that might be misconstrued into meaning that the element of delay should be eliminated from the consideration of the judge in the Court below, to which I propose that the case should revert. Therefore it is perhaps more expedient not now formally to repel the plea, and the considerations which it is intended to embody may have their legitimate weight in combination with the other facts of the case.

LORD ADAM—The first question in the rent case is, whether the quinquennial prescription provided by the 1669 Act applies. I agree that it does not, because the point of time specified by the Act for the prescription beginning to run is the date when the tenant removed from the land. I think that to bring a case under the Act a defender must aver that he is a tenant who has *de facto* removed from the land, and that five years have elapsed since then. There is no such averment on record here, but the tenant is still on the land. It is true that the character in which he is there is different, because formerly he held as a tenant, and now he does so as liferenter; but that is not the question under the Act, which is, whether or not in fact the tenant has removed. As he has done so, I am of opinion the Act has no application. I may observe that it appears from the arguments used in old cases on this point, that one of the reasons for this rule was the liability of a removing tenant to lose his documents of debt after his removal, which consideration does not apply to a tenant who never has removed, but this is not material since the question of fact in the Act is quite clear.

As regards the judgment of the Sheriff-Substitute, it was somewhat faintly supported, but it was suggested that the letter was a link in a chain of circumstances, but if this be so, what are the circumstances, and when were they proved? In point of fact they are neither admitted nor proved, and accordingly I agree with your Lordships that there is no apparent foundation for the summary dismissal of the action. As to the remaining pleas, I think the plea of *mora* might have been dismissed had we been dealing strictly with the case. As I understand, prescription depends merely on the efflux of time, but *mora* not merely on this, which would make it equivalent to prescription, but the party founding on *mora* must show that his position was prejudiced by the delay. But I should have been unwilling to repel the plea, because while it was admitted by Mr Thomson that he was not prejudiced by the delay, it may become an important element hereafter in connection with the subsequent proceedings in the case.

LORD M'LAREN and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Sheriff-Substitute dated 9th December 1896 and repelled the defender's first plea-in-law.

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

Counsel for the Defender—A. S. D. Thomson—Abel. Agents—W. & J. L. Officer, W.S.

Thursday, March 4.

FIRST DIVISION.

TURNER'S TRUSTEES *v.* TURNER.

Succession — Testamentary Provision — "Issue"—Whether Confined to Children.

The term "issue" in a testamentary provision, unless a more restricted signification is imposed by the context, is to be taken in its ordinary sense as including direct descendants of every degree. Accordingly a gift to the issue of the testator's children will take effect in favour of their grandchildren, and a gift over in the event of a child having no issue will not take effect if the child dies leaving grandchildren, although their parents, the testator's immediate children, have died before the succession opens—*Young's Trustees* v. *M'Nab*, July 13, 1883, 10 R. 1165, *commented on.*

By trust-disposition and settlement dated 14th January 1848, Mr James Turner, flesher, Glasgow, conveyed to trustees his whole estate heritable and moveable. After directing his trustees to make payment to his wife of an annuity of £70, and to allow her the liferent of his house, and to pay an annuity of £20 to his second son James Turner, the truster proceeded — "After implementing and fulfilling the foregoing purposes of the trust, I direct my said trustees to hold the residue and remainder of my means and estate in equal proportions, share and share alike, for behoof of the children already born or who may yet be born to me (exclusive always of the foresaid James Turner, whom I hereby debar from any share or interest in said residue), and the survivors and survivor of them, but in liferent only for their respec-