and that in the suit in which, or with reference to which, the misconduct occurred. With regard to the litigations referred to in this record, which were before this Court, it is not suggested that the Court censured the factor for pursuing the one or defending the other, or expressed any disapprobation of his conduct. This is not conclusive, and I accordingly put it to the counsel for the respondents whether misconduct disentitling the complainer to the indemnity he would otherwise have been entitled to from the estate was alleged, and inquiry desired? The answer was in the negative, and that the respondents' case was rested entirely on the legal view on which the Lord Ordinary had proceeded, viz., that the factor was not entitled to payment or credit for the expenses decerned for against him, to the effect of rendering the estate insufficient to meet their debt of £220, and that without reference to the propriety or impropriety of his conduct as factor.

I assume for the purpose of this case that a judicial factor is personally liable to his adversary in a lawsuit for expenses decerned for against him, though I desire to say that I perceive no distinction between this liability and any other incurred by a judicial factor in the course of the factory with respect to his right of relief out of the factory estate. The general rule is that the factor is personally liable for every debt which he incurs in the course of his office—it being for him, and not for the party with whom he contracts, to see to the sufficiency of the factory funds to meet the liability. He is thus personally liable to every professional man and tradesman whom he employs, and for the price of all commodities he orders, however clearly he acted according to his duty in incurring the obligations. But his right to pay with the factory funds, or to be relieved out of the estate, depends precisely on whether or not he acted according to his duty, and therespondents' third plea-in-law, which the Lord Ordinary in effect sustains, is in my opinion untenable. If the factor's proper costs and charges reduce the estate so that it is insufficient to meet the liabilities, this is a misfortune, but affords no reason for disallowing them, contrary to the rule that the factor if guilty of no misconduct is entitled to be indemnified. I have already pointed out that there is here no question of misbehaviour disentitling the complainer to the indemnity which in the absence of misbehaviour is his legal right. The respondents, with respect to their debt charged for, are in no different position from any other creditor or claimant on the estate, and suffer no more than all others interested in it, *i.e.*, having claims on it, from the fact that it is reduced in amount by the costs of unsuccessful litigation, though the circumstance may be more provoking to them than to others.

The case of a trustee in bankruptcy who spends in litigation a dividend set aside under the Bankrupt Act to meet a contingent claim is not in point, for reasons obvious enough, and which were expressed in the course of the argument. In that case the result would be the same in whatever way the dividend so set aside was spent, instead of being reserved and made forthcoming, as under the statute it ought to be. The trustee spending would be personally liable to make it good to the party disappointed, by his violation of the statute.

Lord Justice-Clerk—I entirely concur in the opinion of Lord Young, and have only this remark to make, that the analogy derived from the position of a trustee in a sequestration is, in my opinion, entirely inapplicable in deciding a question of this kind relating to a judicial factor. The trustee is a representative of creditors, and acts under their superintendence and on their instructions. The judicial factor is an officer of this Court, and responsible to the Court. In that view the grounds of Lord Young's opinion seem to me to be perfectly sound.

Lord Craighill not having been present at the discussion, gave no opinion.

The Court recalled the interlocutor of the Lord Ordinary and suspended the charge, with expenses.

Counsel for Suspender — Lord Advocate (M'Laren, Q.C.) — Campbell Smith — Millie. Agents—M'Caskie & Brown, S.S.C.

Counsel for Respondents—Asher—J. A. Reid. Agent—Thomas White, S.S.C.

Thursday, January 27.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

LAWSON *v.* CALEDONIAN RAILWAY COMPANY.

Railway — Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 33), *secs.* 17, 18, *and* 19—*Railway Clauses Act* 1845 (8 *and* 9 *Vict. c.* 32), *sec.* 6—*Whether a Person whose Property has been Injured by the Operations of a Railway Company under Powers contained in a Private Act has Right of Action at Common Law.*

A railway company having by virtue of a private Act of Parliament acquired a piece of vacant ground across which a road ran forming an access to a house built at the boundary of the piece of ground, and having executed certain operations upon the road by which its value as an access was said to have been diminished—*held* that the proprietor of the house was not entitled to an action at common law against the company, but must proceed in the manner provided by sec. 6 of the Railway Clauses Consolidation (Scotland) Act.

By feu-contract recorded 4th July 1870 James Steel disponed to John Cameron, builder in Leith, All and Whole the area or piece of ground situated on the west side of George Street, North Leith, and bounded on the north by a new street about to be formed on the south side of the Caledonian Railway. By the feu-contract Steel bound himself and his heirs and successors to form the carriageway of the new street as far as the piece of ground thereby feued extended, and that by levelling the same, putting in a water-channel, and laying on a coat of broken stones blended with ashes. Cameron erected on the piece of ground thus feued by him a tenement consisting of a shop and dwelling-houses, intended to form the corner house of George Street and the pro-

posed new street, which proposed street formed the northern boundary of the property. The access to the tenement was thus partly by George Street and partly by a piece of vacant ground on which the street was to be formed. In 1872, no street having been yet formed, Cameron sold these subjects to Thomas Lawson, S.S.C., Leith, the pursuer of the present action.

In 1874 the Caledonian Railway Company applied to Parliament for an Act to extend their works, and in the schedules of lands proposed to be taken were included the pursuer's house, certain other houses in George Street, and the piece of vacant ground retained by Steel as above narrated.

In 1875 the proposed street along the north side of the pursuer's property was made. In the month of July of that year the bill promoted by the company was passed into an Act, called the Caledonian Railway (Additional Powers) Act 1875, with which was incorporated, *inter alia*, the Lands Clauses Consolidation Act 1845. This Act, by sub-section 4 of section 5, authorised the company to enter upon, take, hold, and use for the purposes of station, siding, and other accommodation in connection with the existing undertaking, certain lands, including the piece of vacant ground belonging to Steel above referred to.

In November 1877 Steel sold and disponed to the railway company this vacant ground. The sale was by voluntary agreement, and the price was not therefore settled by the means provided by the Lands Clauses Act in cases where the value of the ground taken is disputed.

In February 1879 the railway company began certain operations upon the vacant ground. In so doing it was alleged by Mr Lawson that they narrowed the road and lowered the level of it, and thereby injured the access to his property. Section 17 of the Lands Clauses Consolidation (Scotland) Act 1845 is in these terms:—"When the promoters of the undertaking shall require to purchase any of the lands which by this or the Special Act, or any Act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this or the Special Act to sell and convey or re-lease the same, or their rights and interest therein, or such of the said parties as shall after diligent inquiry be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works." Section 18 is as follows:—"All notices required to be served by the promoters of the undertaking upon the parties interested in or entitled to sell any such lands shall either be served personally on such parties, or left at their last usual place of abode, if any such can after diligent inquiry be found," &c.

In August of the same year Mr Lawson petitioned the Sheriff for interdict against the operations, but the petition was dismissed by the Sheriff and the Court of Session, whither it had been carried on appeal, "reserving all claims competent to the appellant (Lawson) in any action that may be raised by him against the respondents (the company) relative" to the damage alleged to have been suffered from the operations complained of.

In September 1880 Lawson raised this action against the company in the Court of Session, concluding for £1000 damages for the injury done to his property by the operations of the company.

He pleaded—"(1) The pursuer having suffered loss and damage through the unwarrantable, wrongful, and illegal operations of the defenders, they are liable to him in compensation. (2) The defenders not having observed the provisions of the Lands Clauses Act, and the Railway Clauses Consolidation Act, are not entitled to plead them to any effect."

The defenders maintained their right to make the use they had done of the vacant ground, including the road, as being a use of their own property, and denied that the pursuer had suffered damage as alleged.

They pleaded, *inter alia*—"(2) Even on the assumption that the pursuer's property has been injuriously affected by the operations of the defenders, these operations having been authorised by the Caledonian Railway (Additional Powers) Act 1875, the action is incompetent, and the pursuer's only remedy is under the sixth section of the Railway Clauses Consolidation (Scotland) Act 1845, which is incorporated with said Special Act."

On 1st December 1880 the Lord Ordinary (CURRIEHILL) pronounced this interlocutor:—"Finds that the pursuer has not made any averments relevant or sufficient to support his second plea-in-law; therefore repels the same: Finds that, in virtue of the powers conferred upon the defenders by 'The Caledonian Railway (Additional Powers) Act 1875,' the defenders were entitled to construct roads and approaches on the ground in question, which bounds the pursuer's property on the north; therefore sustains the second plea-in-law for the defenders, dismisses the action, and decerns."

He added this note:—"The pursuer is proprietor of a tenement at the corner of George Street, in Leith, which he acquired from John Cameron in May 1872, who again had acquired the property from James Steel by a feu-disposition dated in 1870. The property was bounded on the north by a piece of vacant ground belonging to Steel, and lying between the said property and the then existing line of the Caledonian Railway. It was a narrow piece of ground, intended for a street, and by the feu-contract between Steel and Cameron, Steel became bound to form the carriageway of the street in so far as it bounded the pursuer's property, by levelling the same, putting in a water-channel, and laying on a coat of broken stones blended with ashes. A tenement of houses was built on the pursuer's property, the access to which was partly by George Street and partly by the vacant ground in question; but, as was stated by the pursuer's counsel at the bar, no regular road or street was formed on the ground till 1875.

"In 1874 the Caledonian Railway Company applied for an Act of Parliament to extend their works, and with reference to their bill they scheduled a considerable quantity of ground in

the neighbourhood, including not only the house belonging to the pursuer, and three or four houses adjacent thereto in George Street, but also the piece of vacant ground in question, and the ground to the west thereof. The Parliamentary plans show this ground quite distinctly. Under their Act, which was passed on 19th July 1875, the company obtained various additional powers. By section 4 they were authorised 'to make and maintain, in the lines and according to the levels shown in the deposited plans and sections, the railways and roads hereinafter described, and all proper stations, sidings, approaches, and other works and conveniences in connection therewith respectively, and may enter upon, take, and use such of the lands delineated on the said plans, and described in the deposited books of reference, as may be required for these purposes.' They apparently did not require to make and extend their lines in the parish of Leith, because the railways which they were authorised to make appear to have been only in the county of Lanark, and in the counties of Forfar and Perth. But by section 5 they were authorised 'to enter upon, take, hold, and use, for the purposes of station, siding, and other accommodation, in connection with the existing undertaking, the lands hereinafter described, which are delineated on the deposited plans and described in the deposited books of reference, or such parts thereof as they may find necessary.' And in sub-section 4 of that section the lands in the parish of North Leith and St Cuthbert's, burgh of Leith and county of Edinburgh, including the ground in question, are distinctly specified.

"It was stated by the pursuer's counsel at the bar, though not in the record, that during the time the defenders were in the course of obtaining these powers, but after the ground in question had been scheduled, the pursuer, who was not proprietor of the vacant ground, was called upon by the Police Authorities of Leith to form, and did form, a road upon the vacant ground, so that when the company actually obtained their Act there was a road in existence on the ground, forming the north boundary of the pursuer's property. But, on the other hand, under their statutory powers, the defenders acquired that ground from Steel, who was the proprietor, and they proceeded with the execution of their works, and amongst other accommodations for their existing undertaking they constructed a road over this vacant ground along the north side of the pursuer's property. In doing so they altered the level, excavating it some two or three feet, and it is also said they narrowed it. Now, it is stated by the pursuer that they had no right whatever to alter the level or to diminish the width of this road. But I can see nothing in the Act of Parliament to support that contention. It is not stated on the record that the railway company were restricted to any particular level in regard to any accommodation road which they might form over this ground. Indeed, the plans and sections show nothing of the kind, and the company were entitled to make the road or approach in any way which they might find convenient for the purposes of their works.

"It is in these circumstances that the pursuer claims that he is entitled to damages at common law against the defenders for having injured his property by lowering the level and diminishing the width of this road, because, as he avers, 'The defenders had no authority of any kind to interfere with the pursuer's property, and with the street forming the access to it, as they did. They did not proceed according to the Lands Clauses Consolidation Act, or any other Act.' Now, I confess I do not see in what way the defenders exceeded their powers. The pursuer says that they had no authority to interfere with his property or with the street. But under the Act they are apparently entitled to interfere with the street—at all events with the ground on which the street had been formed—and the pursuer's statement of want of authority is far too vague and general to support his claim. It is certain they have not touched or interfered with the pursuer's property, or the site on which it stands, although by lowering the road which served as an access they may have diminished its value. But then, if I rightly read their Act of Parliament, they are thereby empowered to make approaches over that ground, and I desiderate any statement by the pursuer showing in what respect these powers were exceeded. He says that the company did not proceed under the provisions of the Lands Clauses Act. I do not quite know what he means by that statement, but from the argument at the bar I gathered that he means that the company acquired the ground from Steel by voluntary agreement, and not compulsorily. The fact, however, remains that it was under the statutory powers that they acquired the ground, although they settled the price by voluntary agreement with Steel. They might have compelled Steel to sell the property to them, but instead of doing so they took it, as they were authorised to do, by voluntary agreement. I am quite satisfied, therefore, not only that the pursuer has failed to make any relevant averments in support of his second plea, that the defenders not having observed the provisions of the Lands Clauses and Railway Clauses Consolidation Acts, is not entitled to found upon that statute to any effect, but also that the company had full statutory authority to perform the operations complained of.

"Such being the case, the next question is, whether the pursuer's claim for compensation in respect of injury done to his property may be vindicated by an action at common law, or whether such an action is not excluded by the Railway Clauses Consolidation Act? It is, in my opinion, very clear that it was for the purpose of meeting such claims as the present that section 6 of the Railway Clauses Consolidation Act was enacted. Its object was to prevent actions being raised in the ordinary Courts for damages done by a railway company in the execution of their statutory works, and to substitute therefor a reference to arbiters or a trial before a Sheriff and jury.

"I think, therefore, that the action should be dismissed with expenses."

The pursuer reclaimed, and argued—Pursuer was interested in this road which the Company had injured as an access in the sense of section 17 of the Lands Clauses Consolidation (Scotland) Act 1845. Admitting that, the mere right to a servitude over land taken under statutory powers did not give right to notice under the Lands Clauses Acts—*Clark* v. *London School Board*, January 15, 1874, 9 L.R. Ch. App. 120. The

interest of the pursuer in this road was of this kind, that it was "necessary to the enjoyment of his property," and therefore to be treated in this question as if part of his property—*Mason* v. *London, Chatham, & Dover Railway Company*, May 1, 1868, 37 L.J. Ch. 483. *Clark's* case referred to servitude of light, and was wholly different from the present. Such a servitude could not be "entered upon." The pursuer had a common interest with the defenders in the road —*Anderson*, 1799, M. 12,031.

Additional authorities—*Campbell* v. *Edinburgh & Glasgow Railway Company*, March 7, 1855, 17 D. 613; *Crawford* v. *Field*, Oct. 15, 1874, 2 Ret. 20; *Macey* v. *Metropolitan Board of Works*, 33 L.J. Ch. 337.

At advising—

LORD JUSTICE-CLERK—I am not sorry that we have had the points involved in this case elucidated. In the end I am clearly of the opinion that the Lord Ordinary has arrived at. I am glad to have been furnished with all the authority that is quotable on this matter, which merely on the words of the statute is not without certain difficulties, as those English cases sufficiently show. But the result, as I have indicated, at which I have arrived is, that there is no ground whatever why the pursuer should be indulged in an action at common law against the railway company for doing that which I think it has been shown they were entitled to do under their statutes. The only reason why the pursuer says the railway company were not entitled to do as they have done under their statutes was that they had given no notice to him; and he says that he has an interest in this road in front of his house, of the nature referred to in the 17th and 18th sections of the Lands Clauses Act, which say —(§ 17) "When the promoters of the undertaking shall require to purchase any of the lands which by this or the Special Act, or any Act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this or the Special Act to sell and convey or re-lease the same or their rights and interest therein, or such of the said parties as shall after diligent inquiry be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works." (§ 18) "All notices required to be served by the promoters of the undertaking upon the parties interested in or entitled to sell any such lands, shall either be served personally on such parties or left at their last usual place of abode, if any such can after diligent inquiry be found," &c.

Now, the real question we have to consider is, whether that clause applies to interests of the nature of that set up by the pursuer, or whether the clause is not limited to these minor or restricted rights of property in land with which we are all familiar?

The cases that have been quoted are not very absolute. The case of a servitude, probably, is of a more definite kind. It is probably difficult to distinguish this right—of which I shall say a word immediately—from the right of servitude; but it may be called a case of servitude with some peculiar characteristics.

In regard to the English cases that were mentioned, it was said that the servitudes were servitudes of light, that they were not in the land at all, and could not have been entered upon in any reasonable sense. And that is quite true. Here unquestionably the railway company did enter upon the surface of this right, just as much as upon any other property; and the question is, whether there was an interest in the surface of the road requiring notice under the 18th section of the statute?

As I have said, it is difficult to distinguish this right from that of servitude. At the same time, there are some matters that are bound up in it that create some amount of peculiarity. I am assuming for the present that this is a private street, and not one of the public thoroughfares of the burgh. On that matter, it is true, we are left very bare of information. But if it is one of the public thoroughfares of the burgh, then the case is beyond even stating.

If, on the other hand, there are private rights reserved to the feuars who are named under these obligations, that, I think, creates a different kind of case; for not only has the feuar a right to use this road as an access, but he has the administration of the road absolutely under the provisions of his right, unless a public authority—the Road Trust or the Police Committee of the Town Council—have a higher right. How that stands we are not informed. But the conclusion I have come to is that this is not an interest of such a nature as that referred to in the clause of the Lands Clauses Consolidation Act. That the pursuer may be deeply injured by the operations of the railway company is perfectly possible; but that they will injure what is wholly and exclusively his is plainly not so. The road is not an access solely to his house. The street is an access to all the houses there; and that is quite enough to bring it under the category of cases depending on that view. There may be an injury done to him for which he is entitled to have compensation, because the company's operations injuriously affect that which beyond all question is his property, namely, his house; but that he is entitled to proceed for compensation at common law is what I fail to see.

On these grounds, very shortly stated, I am inclined to adhere.

LORD YOUNG—I am of the same opinion, and I think the case is remarkably clear, and remarkably idle in this respect, that the pursuer has no interest in it whatever. The whole facts are capable of being stated in a sentence. The pursuer is proprietor of a corner house in this sense, that the front of it is to a street called George Street—whether a public or a private street, I do not know; that depends probably on its age. To the side of the house there is a bit of vacant ground, on which, according to his title, another street at right angles to George Street was to be formed and be extended. In that piece of

ground he had no property whatever any more than in George Street. But he had a right, in a question with his author, to have that street formed—he on his part undertaking that to the extent of the frontage or sideage of his house he would maintain it. The railway company scheduled this piece of ground, and took it under their Act of Parliament, and thereby—that is to say, by their works thereon—injuriously affected this access to the pursuer's property.

The railway company admit that if by taking this ground, which was an access to the pursuer's property, they injuriously affected it, they must pay compensation, to be estimated under the Lands Clauses Consolidation Act. The pursuer says, "No, you must pay me compensation, to be estimated by a common-law jury in a common-law action." Why? Because this ground is not taken under the statute; but if it was not taken under the statute, it was not taken at all; for a railway company cannot take ground except under their statute; and the remedy is to put them out, or rather their servants, who are in possession.

But I put it to the pursuer's counsel at an early period—"What interest have you in asking that notice should have been given to you?" "Oh this," he says, "that then he would have been obliged to take my property, and regarding the ground as my property, then it is part of my house, and taking part of my house, you must take the whole house, and so pay for it." But I think that argument falls at once—the argument that this is the party's house, and as his property the railway company must take the whole house; and it falls on the statement of it, for it is too heavy to stand on its legs. It will not bear its weight for an instant. Then what is the ground for preferring a common-law jury to any jury empannelled under the Lands Clauses Consolidation Act? Surely a jury chosen or cited by authority of the Sheriff under the Lands Clauses Act is as good a jury as a common-law jury in the Court of Session. Both would very probably be composed of the very same men. There is surely no interest in insisting on such a preference at all.

Again, if we should decide upon that matter that he had an interest in this ground of a nature requiring that notice should be given to him, and that it should be taken by the railway company—that while the railway company have taken the land and paid the proprietor, they have omitted to take this particular interest—I say if we decided that that was an omission, it was merely a formal omission; and the statute provides that within six months of a decision being given that such an omission has been made, the railway company are not to be allowed to take advantage of any accident of that sort. They shall not be put out of possession, but they shall pay compensation for what they have possessed at a valuation under the statute. There, again, the result of the most complete success that could be looked for is just what might have been seen from the beginning—the value of the interest in the ground—that is, the damage done to the pursuer by the destruction of that interest shall be determined by a valuation jury.

But the pursuer insists in having a common-law jury. It is the most obstinate, wrong-headed perseverance in an erroneous course of procedure, simply without any interest in the world, that I ever experienced. It is according to the practice which we have known something about since the beginning of railways down to this year 1881 in Scotland, that such interests in the ground are not taken by railways or compensated for otherwise than the railway company offer to do here. That was the answer given, as I expected it would be given, to another question put from the bench at a very early period.

With respect to all analogous instances, the course of dealing has been that which has been proposed, namely, that damage done by the destruction of any interest shall be settled by the valuation of the jury.

Now, we had a case very like this before us the other day. I do not suppose anything turns upon the question whether the streets by which the proprietors there had a right of access to their property, and which were interrupted and interfered with by the railway company, were public or private streets. The distinction never was suggested for a moment. Indeed, it would make no difference. If I have a house in George Street or Princes Street, and if George Street or Princes Street is interfered with *ex adverso* of my premises, what does it signify that the street is public or private? The more public the street is, as in the case of Princes Street, the more valuable is the property by reason of its being upon that street; and interference with the street is interference with its most valuable adjunct. Princes Street might be private from one end to the other—that is to say, that the proprietors in Princes Street might have excluded the public—and the railway company would have been liable, if they had taken the street, to compensate those injured by the street being so occupied. But public or private signifies, indeed imports, nothing except to the greater multitude who are entitled to use it as a street. But as far as my opinion is affected by this matter, it matters not whether they are many or few, except perhaps as to the amount of damage. The degree of injury is the same, and the degree of injury may be greater where those entitled to use it are many—that is to say, where it is a great thoroughfare you are interfering with—and this circumstance gives value to the property; but where it is a comparatively limited thoroughfare, as in the case of those streets that are called private, I do not know that the injury could be called greater or less.

But, indeed, "public" or "private" are hardly very applicable to such matters as those which we are dealing with here. The genesis—the origin—of all modern streets, which are made by parties feuing out their land for building, is that they are private streets to begin with, the proprietors being only too anxious that they shall be public as rapidly as possible, the value that they expect from their property being that the streets shall become great thoroughfares. That is the value they expect. The public take possession of such thoroughfares at their convenience, and after a season the public could not be stopped, but within a season they could be stopped, for those having the right—a limited right it might be—might agree to stop them. But, as I have said, I do not think these considerations have any bearing here.

I agree with the Lord Ordinary, but I have thought it right to make these observations upon the idle character of this action, which is brought

upon erroneous grounds, insisting that a jury should be selected in one manner in preference to a jury selected in another, while the fact is that in both cases the jury would be returned by the Sheriff to determine the amount of compensation which should be awarded.

LORD CRAIGHILL—I am entirely of the same opinion, and the reasons which have been given by your Lordship and Lord Young are so much my own reasons that it is entirely unnecessary for me to repeat anything which has already been presented. If I were to explain my views, it would be merely, perhaps in language a little different, to say that which has in whole or in part been ably presented by your Lordship and Lord Young.

LORD JUSTICE-CLERK—In regard to the case we had before us the other day, the main plea of the party was that the streets were public streets. No doubt they were, but the argument was that the public had as good a right to compensation as the party who claimed it. I do not say whether the argument would have been the same if they had been private streets; but that was the ground, and the main ground, on which the judgment in that case was rested. I think it right to make that addition to what I said before.

The Court adhered.

Counsel for Pursuer—J. C. Smith. Agents—J. & A. Hastie, S.S.C.

Counsel for Defenders—R. Johnstone—Keir. Agents—Hope, Mann, & Kirk, W.S.

Friday, January 28.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

GRANGER *v.* SCOTTISH HERITABLE SECURITY COMPANY (LIMITED).

Landlord and Tenant—Lease—Right of Tenant to Abandon Lease of a House found not to be in Habitable Condition, and which cannot be made Habitable by Repairs capable of being Completed within a Reasonable Time.

A tenant possessed a house under a lease to expire at Whitsunday, and had agreed to enter into a new lease at a decreased rent at that term. In the preceding February he was obliged to relinquish possession and remove from the house owing to the defective state of the drainage, which was not completely remedied till April. *Held* that he was not then bound to return to the house and complete the lease which was to expire at Whitsunday, and that therefore the landlord could not recover from him the amount of rent due for the period after the house had been made habitable.

Opinions per curiam that in the circumstances he was also entitled to resile from the new lease which was to begin at Whitsunday.

In October 1876 Messrs Gilchrist & Gardner, builders, Glasgow, let to John R. Granger, M.D., Glasgow, the house No. 1 Sutherland Terrace there, under a lease terminating at Whitsunday 1882, at a yearly rent of £80, with a break in the option of the tenant at Whitsunday 1880. In September 1878 the Scottish Heritable Security Co. (Limited), who were heritable creditors of Gilchrist & Gardner, entered into possession of the property under their bond. During his occupancy of the house Dr Granger and his family were frequently annoyed with bad smells coming from the drains, and causing sickness and discomfort. The company several times, in response to complaints made by him, had the nuisance complained of attended to. On 23d January 1880 Dr Granger wrote to the manager of the company this letter referring to his option to give up the lease at Whitsunday 1880—"Dear Sir,—As I have already informed your factor here (Mr Archd. Stewart), I now inform you, that it is in my option to break my lease at May first. We have been occupying at much too high a rental (£80), and to induce us to remain Mr Stewart has offered to reduce that to £67, 10s., but I still think further reduction necessary, and I hope for the following reasons you will see it your interest to recommend Mr S. to make further deduction. Our house is not by any means what it should be in regard to drainage, by which in the past we were put to so much trouble and you to expenses, for occasionally still we are like to be driven from the house by sewage smells. . . . I think I have said quite enough to show that I am at least entitled to a reduction of 20 per cent. from our present rental." At that time the rents of some of the neighbouring houses, which also belonged to the company, were being reduced, and it was arranged with Dr Granger by the company's factor that his rent also should be reduced. On 31st January Dr Granger wrote this letter to Mr Stewart, the factor. In reply he received from Mr Stewart a letter dated 4th February, which was not produced in process. In that letter Mr Stewart said—"I understood you took the house. If you did not mean that, let me know by return. It is now for you to say if you take the house for two years." To this Dr Granger answered on 6th February—"I am in receipt of yours, and become a yearly tenant at £67, 10s. for two years." When this letter was written several of Dr Granger's children were unwell, but their illness was not serious. On 16th February the illness of the children, which was proved to be such as is caused by the emanations from defective drains, had much increased, and Dr Granger wrote to Mr Stewart as follows—"Dear Sir,—I beg to withdraw my offer entirely for a lease of this house beyond the two years already stipulated for. My eldest girl is at present laid up with typhoid fever, and as soon as she is able to be removed, or if the worst should happen (for in the meantime we have to look the worst in the face), I will insist on the house being examined by an outside party, and any repairs on the drains thought necessary put into execution without delay." Mr Stewart replied that he had no objections to an examination of the drains as proposed, and that he would have all cause of complaint removed. Dr Granger had an examination of the drainage made, with the result stated in the following letter (dated 21st February) from his agents to Mr Stewart—