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—

"Sir,—Dr Granger, the tenant of the house 1 Sutherland Terrace, informs us that in consequence of his children being laid down with gastric fever, he has had the drains of the house lifted and thoroughly examined, and the result is that they are so thoroughly and radically deficient that he has been ordered by Drs Fergus and Finlayson at once to leave the house. He has already removed his children, and he will himself remove so soon as he can get accommodation elsewhere. We have advised Dr Granger, and now intimate to you, that he will not be responsible for rent after this date. He will further hold the landlord liable in whatever damage he has sustained or may yet sustain from the insufficiency of the house. That you may satisfy yourself as to the drains, we refer you to Drs Fergus and Finlayson, Messrs Lindsay & Benzie, Mr Reid, the plumber, and the sanitary inspector for Partick, who have already inspected the drains, and Dr Russell, the Glasgow officer of health, who is to make an inspection to-day. Of course you will understand this intimation as applying both to next year and what remains of this." The agents for the company replied, declining to admit responsibility for the illness in Dr Granger's family and for any other damage he might sustain, and intimating that they would hold Dr Granger liable for the rent till the expiry of his lease. Dr Granger's youngest child died on 24th February, in the opinion of the medical man who attended it, from the emanations from the drains. The other children recovered after their removal from the house. The operations necessary to put the drains into proper working order occupied a period of two months. Dr Granger declined at the end of that period to return to the house, but offered to pay a quarter's rent on condition of being relieved of all further claims. The company declined to release him from the lease of the house, but were willing to make an abatement of their rent in respect of the period during which the operations on the drainage were being carried out. An agreement not having been come to, the company in August 1880 raised an action against Dr Granger in the Sheriff Court of Lanarkshire, concluding for £40, being the amount of the rent for the half-year from Martinmas 1879 to Whitsunday 1880. Dr Granger raised a counter action concluding for £400 as loss and damage sustained by him in consequence of the defective drainage of the house.

The actions were conjoined, and on 30th November 1880 the Sheriff-Substitute (Spens) issued this interlocutor, after sundry findings as to the facts narrated above—"Finds, under reference to note, that the party Granger was not entitled to repudiate the lease in question: Finds that the party Granger is entitled to a deduction from the half-year's rent for non-occupation of the premises, in respect in the circumstances above set forth he was entitled to leave the premises in question until the drains of the house were put in a proper state: Finds that he is also entitled to a deduction for the expense he was put to in connection with such removing, and fixes said deduction at £25, except, however, as regards the said deduction hereby allowed: Repels the whole claims for damage advanced by the said party Granger, and decerns against him, in favour of the parties The Scottish Heritable Security Company (Limited), for the sum of £15, with interest on said sum as craved," &c.

He added this note— . . . . "With his family ill, and examination having revealed that there was a hole in the drain pipe under the floor, and a bad smell coming from the stuff lying about this pipe (whether it was soap waste or excreta), I am clear that Dr Granger was entitled to leave the house until at least matters were put right. The result of the investigation made by the Heritable Company was that the conclusion was arrived at, that to make a thoroughly satisfactory job of the drains it was advisable that the drain in question should be removed to the outside, and the position of a W.C. shifted, &c., and this has been done at a very considerable expense, between £40 and £50 I think. To get that work done seems to have taken about two months. For that period I think there is no claim against Dr Granger for rent; but I do not think that Dr Granger was entitled to repudiate the lease. He knew or ought to have known just as much about the drains as the Heritable Company, and on the 6th of February, having a break in the existing lease at Whitsunday 1880, he agreed to take on the house for two years from that last-mentioned date—nay, more, just about this very time he wrote to the Heritable Company wanting a still further deduction from rent than that obtained from the factor on the ground of the drainage not being what it ought to be. It is impossible, therefore, to hold that the state of the house was not present to his mind at the date of the renewal of the lease of 6th February, which lease he repudiated before the end of the month. The position which I am of opinion Dr Granger should have taken up was to call upon the landlords to put matters right. Probably it would have been better for him to have got the assistance of a skilled person as to what was necessary, and called upon the landlords to carry out the alterations suggested. If the landlords refused to do what was necessary, then I think Dr Granger would have been entitled to repudiate the lease, or he would have been entitled to have carried out the alterations at his own hands, and deducted the cost from the rent. It is, I think, necessary to determine in this case whether the lease is or is not binding, because unless Dr Granger had established (which I take it he has not done on the proof) that he could only get a house temporarily by taking it on to the Whitsunday term, then I think rent must run against him as from the period when the drains had been put in proper order and the house was fit for occupation, which seems to have been about the 20th of April. For the inconvenience caused by removal, and the non-occupation of the premises in question for a couple of months, I think £25 a fair sum to award as a deduction from rent, and decree accordingly for £15 is pronounced in the action against the party Granger."

Granger appealed to the Court of Session, and he did not insist in the action for damage at his instance. In that for rent, at the instance of the company, he argued—The house was uninhabitable owing to a serious inherent defect, which could not be put right in a reasonable time. In point of fact, it took two months to remedy the defect, and a tenant when the subject let to him proved to have such a serious defect was entitled to abandon the lease. No doubt it was to some

extent a question of degree whether he could abandon the subject as had been here done, but in the circumstances of this case that course was reasonable and proper. The appellant was not barred by reason of his knowledge of the premises, since he did not know the real state of the house till the full examination, made immediately before his agent's letter of 21st February.

Authorities—*Walker* v. *Baine*, July 3, 1815, 3 Dow. Ap. 233; *Clark* v. *Glasgow Assurance Company*, August 8, 1854, 1 Macq. 868; *Kippen* v. *Oppenheim*, December 13, 1847, 10 D. 242; *Drummond* v. *Hunter*, January 12, 1869, 7 Macph. 347; *Duff* v. *Fleming*, May 18, 1870, 8 Macph. 769.

Argued for the respondents—Admitting that the appellant had a right to remove till the house was put into a proper state, it did not follow that he might renounce the lease. A temporary inconvenience will not justify a tenant in giving up his lease. By the correspondence relating to the new lease the appellant was effectually bound to take the house, and all cause of complaint had been removed.

At advising—

Lord Young—If we take this case as it is presented to us on the record, and without going beyond what is there presented, it is a small matter. Dr Granger, the appellant, was the tenant of a house under a written lease for the period from October 1876 till Whitsunday 1882, a period of six years, with a break at Whitsunday 1880. The action for rent is for payment of a half-year's rent of £40 for possession of the house under this lease from Martinmas 1879 till Whitsunday 1880. The Sheriff-Substitute explains that the landlords—the Heritable Company—offered before the raising of this action a deduction from the rent in respect of the period of non-occupancy, and we are told that they now assent to the sum which the Sheriff-Substitute found to be a reasonable amount for that deduction, the sum, namely, of £25; and so taking the case on the record the pecuniary stake in the action is £15, and the question is whether Dr Granger is liable in the sum of £15. But the Sheriff-Substitute indicates that there is besides that a larger and ulterior question between the parties, and that when the deduction I have referred to was offered, Dr Granger refused to accede to it unless the lease should be also considered to be at an end—that is, the parties desire to use this action for the purpose of trying a question as to the effect of the letter of 6th February 1880, with regard to the extension of the lease after Whitsunday (that is, an agreement for a new lease on other terms), and therefore when Mr Alison was asked the pecuniary value of the dispute he stated it to be the half-year's rent and also the amount of the two years' rent from Whitsunday 1880. In this case we can determine nothing beyond the conclusions of the summons and the record, though I am very willing, so far as any expression of my opinion can do it, to aid the parties in having the whole dispute between them settled. Now, first, as to the half-year's rent, the amount of which is reduced, as I have already stated, to £15. The facts are shortly these—that the drainage of this house was at least strongly suspected to be very unsatisfactory. It was not a sweet smelling house. That was intimated to the landlord, and such ordinary attention was given by him to the drains as a landlord usually gives when a complaint is made by his tenant. In the end of January 1879 Dr Granger, having regard to his option to terminate the lease at Whitsunday 1880, entered into communings with the landlords' agent with a view to a prolongation of its tenancy after that period, on the terms that he was to pay a reduced rent after Whitsunday, and thereafter on 6th February he wrote a letter bargaining for a new lease. Some of his family had by that time sickened, and this sickness spread until by 16th February some were laid up by serious illness. By the 21st one had died and others were seriously ill. This induced Dr Granger to make a more careful examination than he had yet done, and with the result that he was satisfied, on reasonable grounds as the Sheriff-Substitute thinks (and I concur with him) that the illness of the children—an illness which led to the death of one of them—was the result of the bad drainage of the house. I think, further, in common with the Sheriff-Substitute, that Dr Granger was not only warranted in removing from the house, but that in the interests of his family he was bound to remove, and the family did in fact remove, as soon as possible. This was owing to the state of the drains. Then the Sheriff-Substitute says, and the pursuers agree, that the defender Dr Granger shall not be liable for the whole rent of the half-year, but that he ought only to be liable under deduction of £25, since he had to pay for accommodation elsewhere during a period of two months. On this nice question, then, when a father removed with his sick family to another house, whether he was bound to return when the disturbing cause was removed, a question of £15 depends. My own opinion is that a tenant so disturbed in his possession by his family having been thus attacked by sickness is not bound to return as soon as the drains (or other disturbing cause) have been put in order, if he has nothing to oblige him to remain beyond two or three weeks after such return is possible. I think the disturbance of the possession under those circumstances, although it may not amount to *culpa* or personal fault on the part of the landlord—giving a claim of damages against the landlord,—is a sufficient answer to a claim for half-a-year's rent, and it is not enough for the company to say "We will abate from the rent for the half-year what you paid for the two months of your necessary absence." I think the failure of the landlord, not through *culpa* but in fact, to implement his part of the lease, will disentitle him to sue for a half-year's rent, and entitle the tenant to the defence which is stated here, and which I humbly recommend your Lordships to sustain.

I have indicated the feature of the case which enables me to express an opinion on the ulterior question whether there is any obligation on this tenant to return to the house and pay rent after Whitsunday 1880. I think that though he was *prima facie* bound to remain as tenant under a new lease for two years by his letter of 6th February, yet on the 16th or 21st, when that letter was still *nudum pactum* in the sense that nothing had followed on it, he was entitled in the circumstances of his family, owing to the state of the drainage, absolutely to withdraw that letter and to resile. If that be going too far, I am

further of opinion that if he was bound by that letter, we, in the exercise of the undoubted discretion of the Court, would not be warranted in enforcing specific implement of the contract, but would leave the other party to this remedy in the shape of damages, and in such circumstances, nothing having followed upon the letter agreeing to take the house before the letter intimating the intention to resile from the bargain, the damages awarded would doubtless be infinitesimal. I only indicate that view for the consideration of the parties, for it is not the question raised on record. On that question my opinion is that the Sheriff-Substitute's judgment should be recalled and the defender Dr Granger assoilzied.

Lord Craighill—I concur in the result. [*After narrating the facts*]—The only question to be determined is, whether the landlord is to have more than the £15 allowed by the Sheriff-Substitute, or whether he is to have less than that sum, on the ground urged by the appellant, that that is a greater sum than is reasonable for the period of occupation of the house? The condition on which a landlord is entitled to recover his rent is that he fulfil his obligation under the contract of providing a house safe to live in, and if he does not provide a house safe to live in, or a house that can be made in a reasonable time safe to live in, then the question arises whether he is entitled to say—"Though I cannot fulfil the contract, the lease is not to come to an end, but the moment the house is put into a habitable state you must return to live in it." Of course such a question must always be to a great extent a question of degree. In the circumstances of this case there is no doubt whatever that the tenant was entitled, and indeed it was his duty, to remove. There is nothing more important in a dwelling-house than the condition of the drainage, and for a great part of the period from 1876 to the end of 1879 there had been complaint made as to the condition of the drains, which were causing offensive smells and much discomfort. I am far from saying that the landlord showed remissness in attending to these complaints. Indeed, I think the contrary is the case. But this only renders it the more apparent that there must have been some deep-seated defect, and accordingly in February 1881 things were worse than ever, for not only were there disagreeable smells, but there were several members of the family ill, and that went on till in the same month one member of the family died. In the opinion of the Sheriff-Substitute (in which I concur) there were probable grounds for connecting the state of the drainage with the sickness and death in the defender's family. It is not necessary to do more, however, than the Sheriff-Substitute did, which was to hold that in the circumstances it was reasonable and proper that the tenant should connect these things, and it was not only his right but his duty to his family to leave that house. If the defect in the drainage had been such as could be remedied in a short time—say in a day—it is not necessary to determine whether the defender would have been then bound to return, but I should think that any defect resulting in such consequences as are disclosed here would probably be found to justify the tenant in terminating the lease. The facts here proved, however, show that the tenant could not have returned for two months, because it took all that time to make the house habitable. That being so, was Dr Granger bound to return when he received intimation that the house was now habitable, and that he must return, or at anyrate mustpay the rent? Now, there was a failure on the part of the landlord to fulfil the obligation on which the obligation to pay the rent rested, and so the appellant was not bound to return, he having left for a good cause. His occupation of the house was interrupted by that cause for two months, and he was not bound to return, because the landlord's right to insist on his obligation was at an end. That is the result if we do not look beyond Whitsunday 1880. Further, if the appellant was not bound to return when the house was put in order, neither was he bound to return at Whitsunday. It is said that in February 1880 a new lease was contracted, and that as to that new lease the tenant is bound. Now, it is not usual to give opinions on points not actually coming up for decision, but it may be for the benefit of the parties that we should do so here, and I adopt the view that has been stated by Lord Young. It appears to me to be plain that this offer never would have been made if there had been any idea in the mind of the appellant that the house was in the condition in which it has since been proved that it was. Nor would it have been made if it had been thought possible that for two months he would have to provide himself with a house elsewhere. Holding these views, I am of opinion that from this claim for rent the defender ought to be assoilzied.

Lord Justice-Clerk—I entirely concur. I think this an important case, because the sanitary condition of such houses is a question of the deepest importance. I think (1) that on 16th February the condition of the drainage was dangerous to health; (2) that the appellant's family suffered from this cause; (3) that he was entitled to remove when he did; (4) that he was not bound to return at Whitsunday, or indeed to return at all. The circumstances were such as to annul any inchoate bargain, and to entitle him to resile.

The Court sustained the appeal and recalled the interlocutor appealed against so far as it decerned against the appellant for the sum of £15 and assoilzied him from the conclusions of the action.

Counsel for Appellant (Granger)—Kinnear—Alison. Agent—R. Ainslie Brown, S.S.C.

Counsel for Respondents (Scottish Heritable Security Company)—Asher—Keir. Agents—Stuart & Cheyne, W.S.