suer in such cases has to prove that the defender acted not only "maliciously," but also "without probable cause."

I think the principles of that case are applicable here. If in the case of giving criminal information a person has reason to believe that a crime has been committed, it is his duty and right to inform the police. Also if in the present case defender having reason to believe that children out of the custody of the parish were being cruelly used, gave information to the Parochial Board, and failing their interference complained to the Board of Supervision. I think a minister of a parish so doing acts most certainly in the exercise of a duty and a right. For my own part, however, I am not prepared to say that I would draw any distinction between the minister of a parish and anybody else. I am not aware of anything in the office of a parish minister to make a valid distinction between his case and the case of a minister of any other denomination, or a neighbour. I put my opinion on the broad ground that there is a duty or a right to give information in such cases. A person giving information must be assumed to be acting *bona fide* for the protection of the children, and if an action of damages is brought against him he is entitled to have both malice and want of probable cause put in issue. If the complaint were made to some other party than the parochial board or the guardian of the children it would be a different matter, but where it is made to the person entitled to interfere protection is to be given to the person who gives the information. I am accordingly for holding that the principles of *Lightbody's* case apply to anyone else giving information as well as to the minister of a parish.

Lord Adam—I think the words "without probable cause" are proper and appropriate words to be inserted in the issues, where the person complained of had a right or duty to do the act complained of, as to give information to the police and to make use of lawful diligence, and in similar cases where there is a right or a duty to do the act complained of. Here the defender, who was the minister of the parish, had not only a right, but a duty was laid upon him, if he saw or had good reason to believe that pauper children were being ill-used to give information to the proper authority. If he had a duty laid upon him, he is entitled to have want of probable cause put in issue.

I agree with your Lordship as to the question with regard to other people that it does not arise. I confess during the discussión I inclined to the opinion now expressed by Lord Shand, but I desire entirely to reserve my opinion upon that point.

Lord Mure was absent at the hearing.

The Court varied the issues by the insertion of the words "without probable cause," approved of them as now adjusted, and remitted to the Lord Ordinary to fix a day for the trial.

Counsel for the Pursuer—M'Kechnie—Hay. Agent—Jas. Skinner, S.S.C.

Counsel for the Defender—C. S. Dickson. Agents—Guild & Shepherd, W.S.

Monday, June 24.

SECOND DIVISION.

(Before Seven Judges.)

M'NEE AND OTHERS *v.* BROWNLIE'S TRUSTEES.

Reparation—Landlord's Liability for Defective Drainage—Relevancy.

In an action of damages against a landlord, a tenant averred that the drainage in a house let to him was defective, as the drains were old and not properly jointed; that he had complained to the defender, who had taken unsuitable or insufficient, or at any rate unsuccessful steps to remedy the nuisance; that his wife and child had suffered in health in consequence; and that he had incurred considerable expense in medical attendance, and by removal to other premises, and in loss of profit on the sale of goods in the premises for the unexpired period of the let. The landlord pleaded that the action was irrelevant. The Sheriff-Substitute allowed a proof before answer.

Held that the Sheriff-Substitute had acted rightly in allowing such a proof.

Question by Lord Young—Whether a landlord is liable to his tenant for loss arising from defective drainage apart from any special averment of fault on his part.

Mrs Jeanie Fowler M'Culloch or M'Nee, 21 Seymour Street, Glasgow, with consent of her husband James M'Nee junior, and James M'Nee junior for himself, and as tutor for his pupil child Jeanie Fowler M'Culloch M'Nee, brought an action in the Sheriff Court at Glasgow against the testamentary trustees of the late William Brownlie, 30 M'Culloch Street, Pollokshields, Glasgow, for £200 damages on account of loss sustained by them owing to the defective condition of the drains of a house rented by them from the defenders.

The following were the material averments of the pursuer:—The premises, consisting of a shop and house behind, No. 78 North Woodside Road, Glasgow, were let by the defenders to James M'Nee for the year from Whitsunday 1886 till Whitsunday 1887. M'Nee and his family entered into possession about the beginning of May 1886, and remained therein until October 1888, the let being renewed from year to year by missive, or otherwise by tacit relocation. In October the pursuers were compelled to remove from said premises owing to the insanitary condition thereof, the same having become dangerous to health, and the defenders' attempts to remedy the evil having proved ineffectual. In March 1888 the pursuers discovered disagreeable smells in said house and shop, arising as they averred from the defective condition of the sewage pipes and the drains, which were old, not properly jointed, and allowed the sewage and sewage gas to escape therefrom, and which were generally insufficient for the purpose for which they were being used. M'Nee in March, and on several occasions between then and October following, and in particular in the months of April, May, and September,

made complaints to the defenders' factor in regard thereto, and the factor by himself or his clerk on such occasions promised to attend to the matter, and have the nuisance complained of removed, and did on certain occasions during said period instruct tradesmen to take steps ostensibly for that purpose, which were, however, unsuitable or insufficient for the purpose in view, or at any rate they were unsuccessful. In August 1888, and while the defenders were still professing to be able to have the evil complained of remedied, and were taking or causing to be taken unsuitable or insufficient steps in connection therewith, Mrs M'Nee was taken suddenly ill, and it was averred had been under medical treatment down to the date of the action. M'Nee and the child had also suffered, and in all cases the illness was produced by the insanitary condition of the house. The illness had caused M'Nee considerable expense. He had incurred a large account for medical attendance on his wife, and for her residence at the coast, and he had been compelled to engage a woman to discharge the duties, previously discharged by her, of attending to the shop. He had further been put to the expense of removing from the premises, and had also lost the profit on the sale of his goods in the shop for the unexpired period of the let.

The defenders denied that complaints had been made until September 1888, when they overhauled the pipes and drains, and put them in order where necessary.

The pursuers pleaded—"(1) It being an implied condition of the let by the defenders' factor to the male pursuer that defenders would keep the premises so let in a habitable and tenantable condition, and the pursuers and their said child having suffered in their health in consequence of their failure so to do, they are entitled to reparation from defenders therefor. (2) The male pursuer having incurred accounts and suffered loss as within condescended on, in respect of the insanitary and uninhabitable condition of the premises let, he is entitled to reimbursement and reparation from defenders therefor."

The defenders pleaded—"(1) The action is irrelevant. (2) The pursuers having remained in the house for months after they believed the house to be in an insanitary condition, and the illness and others of which they complain having supervened after that event, they are not entitled to insist in the action. (3) The defenders, having so soon as possible after complaint was made to them that the house was in an insanitary condition, caused the sewage pipes and drains to be overhauled and put into proper order where necessary, are entitled to be assoilzied, with expenses."

The Sheriff-Substitute (Spens) on 28th February 1889 allowed a proof before answer.

"*Note.*—I was referred to the case of *Munn* v. *Henderson*, 15 R. 859, and specially a *dictum* of Lord Young to the effect that there could be no claim of damages for an insanitary house against a landlord when the tenant had lived on in the knowledge that there was something sanitarily wrong. On the other hand, I have had before me the record in a case which was before the First Division" [*Gourlay* v. *Ferguson*, decided 2nd November 1887], "although it is not reported, when (affirming a judgment of Sheriff Lees) damages were awarded to a tenant for damages caused by living in an insanitary house which the landlord had failed to put in proper order, although apparently all along the tenant was complaining of the house being in an insanitary and improper state. In view of this case I prefer to hear the facts of the case before pronouncing any final judgment."

The defenders appealed to the Second Division of the Court of Session, and argued—There was here no issuable matter. The statements were irrelevant and insufficient to found a claim of damages. There was no fault on the part of the landlord competently alleged here. The pursuers relied on the unreported case of *Gourlay* v. *Ferguson*, but in that case the statements were much more specific, and there was no question of relevancy, and the matter came before the Court after a proof. This case was ruled by the more recent case of *Munn* v. *Henderson*, July 7, 1888, 15 R. 859. The pursuers' proper course was to leave the house, and decline to pay the rent — *Scottish Heritable Security Company (Limited)* v. *Granger*, January 28, 1881, 8 R. 459.

Argued for respondents—The statements were relevant. They were more specific than in the case of *Munn*. The particular defect in the drains complained of was here averred, viz., improper jointing. Notice had been given to the landlord, which was not done in the case of *Munn*. There was no acquiescence here, which Lord Young thought there had been in that case. In the case of *Gourlay* v. *Ferguson*, unreported, but decided upon 2nd November 1887, damages were awarded to a tenant in practically similar circumstances. That case ruled the present. [Lord Young—Is a landlord liable for the sickness or death of his tenants caused by defective drainage in a house let by him, although there is no specific allegation of fault on his part?] He might be, and therefore the Sheriff-Substitute was right in allowing a proof—*Kippen* v. *Oppenheim* (beetles), December 13, 1847, 10 D. 242; *Cleghorn* v. *Spittal's Trustees* (chimney can), February 27, 1856, 18 D. 664; *Reid* v. *Baird* (defective roof), December 13, 1876, 4 R. 234; *Moffat & Company* v. *Park* (bursting of pipe), October 16, 1877, 5 R. 13; *M'Monagle* v. *Baird & Company*, December 17, 1881, 9 R. 364.

The Judges of the Second Division, in respect of the difficulty and importance of the question submitted for determination, appointed the case to be argued before them and three Judges of First Division.

The appellants argued as above.

Counsel for the respondents were not called upon.

At advising—

Lord President—I think there must be a proof here.

Lord Adam and Lord Rutherfurd Clark concurred.

Lord Young—I am content that that course should be taken, but my own impression was that the case came before seven Judges on the general and to my mind interesting question of law whether a landlord, when he lets a house,

insures the health and the lives of the inmates against the consequence of bad drainage in the ordinary case and without any special averment of fault. I can understand that if the drainage is so bad or becomes so bad that the tenant has to leave and seek a residence elsewhere, he may refuse to pay the rent because a well drained house has not been supplied to him. Assume that, but does the liability of the landlord extend to health and life? If it does, it appears to me, at least at first sight, to add a liability and a terror to house-letters of which we have no example in the reports.

We were referred to a case, not reported, in the First Division, and to a case in the Second Division which to a certain extent had been decided differently and adversely to the view that, apart from averment of special *culpa*, the liability of the landlord extended to sickness or death due to defective drainage. We were told that there was no reported instance in the English Courts of such liability having been enforced, and there are certainly no cases in our own reports. The only cases bearing on the point are those I have referred to in the First and Second Division respectively in which the matter was considered differently. I was not anxious that this case should be sent to seven Judges, and I certainly thought the question, and the only question worthy of being argued, was the question of the landlord's liability where there is no special averment of *culpa* but only of a general duty to keep his drains in order. But on the only case now argued before us we may, as your Lordship suggests, send the case back to the Sheriff for proof without deciding anything.

Lord Shand—It has been stated that there is here an absence of any averment of fault, but I am not surprised at that, seeing that it is admitted on record that there was an obligation upon the landlord to keep the house in a sanitary condition.

Lord Justice-Clerk—A good deal was said before us upon the principle of the landlord's liability which has not been pressed to-day. We were told that two previous cases had been differently decided, so we thought the question should be argued before seven Judges. As the case has been presented, I agree with the course suggested by your Lordship.

Lord Lee—I also concur. On the question which was supposed to be sent here, I may say there was a difference of opinion as to the sufficiency of the allegation—the one side maintaining that unless there were averment of special fault, which was not here, there could be no claim of damages against the landlord; the other side arguing the averment was sufficient to support such a claim.

The Court refused the appeal, and sent the case back to the Sheriff-Substitute for proof.

Counsel for the Pursuers—Baxter—A. S. D. Thomson — Anderson. Agent — Wm. Officer, S.S.C.

Counsel for the Defenders—Sir Charles Pearson —Dundas. Agents—Mackenzie & Black, W.S.

Wednesday, April 27.

OUTER HOUSE.

[Lord Kinnear.

THE ASSETS COMPANY (LIMITED) *v.* JACKSON (S. & R. G. MACLEOD'S TRUSTEE).

Bankruptcy—Sale—Personal Bond for Price of Property Unconveyed—Rights of Seller.

The purchasers of a plot of ground arranged with the sellers in September 1887 to pay a portion of the price then, the sellers agreeing to postpone the date of payment of the balance till Whitsunday 1889 upon receiving from the purchasers a personal bond for the amount, with interest. The purchasers' estates were sequestrated in 1888. The subjects had not been conveyed to the bankrupts, and the bond remained unpaid. The sellers claimed in the sequestration upon their bond. The trustee called upon them to deduct from their claim, as a security held by them over the estate of the bankrupt, the value of the property held by them, and upon their refusal rejected the claim. The Sheriff sustained the trustee's deliverance. On an appeal the Lord Ordinary *recalled* the trustee's deliverance, on the ground that the sellers were not creditors of the bankrupts, holding a security for their debt over the bankrupts' estate, but were undivested owners of the property subject to a contract of sale which must be performed according to its terms, and remitted to the trustee to reject the claim, reserving the sellers' right to claim implement of their contract or damages.

In the beginning of 1886 the Assets Company (Limited) sold to S. & R. G. Macleod, manufacturers, Glasgow, a piece of land at Maryhill for £900, payable at Whitsunday 1886. The money not being then forthcoming, the parties agreed in September 1887 that £300, with the interest on the £900 from Whitsunday 1886 to 20th September 1887, should be then paid, and that the sellers should postpone the date of payment of the balance till Whitsunday 1889 on consideration that a personal bond for the amount should be granted by the purchasers, with interest at 5 per cent. The money was paid accordingly, and a bond was granted on 25th October 1887. The subjects were not formally conveyed to Messrs Macleod but were held, as far as titles were concerned, by the company as a security for the balance of the price. By arrangement, however, Messrs Macleod entered into possession of the subjects. On 17th March 1888 the estates of the purchasers were sequestrated, and Thomas Jackson, chartered accountant, Glasgow, was appointed trustee.

The Assets Company (Limited) claimed in the sequestration the amount contained in their bond, £600, *minus* £34, 17s., being interest from the date of sequestration to the due date of their bond, but *plus* £14, 14s. 3d., being interest to the date of sequestration, the amount of their claim being in all £579, 17s. 3d. The trustee called upon them to value the subjects as a security held by them for payment of their debt, and to deduct the value from their claim. They