set aside the proceedings, even although it were admitted that the jury had arrived at a right verdict. The absolute disqualification of one of the jurymen might possibly vitiate the whole proceedings; and I should be disposed to think that if a juryman had such an interest in the case as to bring him within the rule stated by Lord Stormonth Darling in *Blaik* v. *Anderson* (7 Scots L.T. No. 302) that no man can be judge in his own cause, or if he had an interest essentially the same as that which he was trying, as in the case of *Bailey* (19 L.J. Q.B. 73), it may be that such cases would fall within the same rule. But it is not said, and could not be said, that there is any statutory enactment, or any fixed rule of law, to exclude one out of a body of 18,000 persons in the employment of a railway company from sitting on a jury in a case to which the company is a party. That is not even suggested; and therefore the pursuer has to fall back on the provision of the statute whereby a new trial may be granted if it is essential to the justice of the case. Now, in considering a motion on that ground we are in a totally different position, because the first thing the unsuccessful party has to do is to show that it is essential to the justice of the case that there should be a new trial. Now, on that point there is a difficulty to begin with, because it is not disputed, and it is stated by your Lordship as the judge who presided at the trial, that the verdict was perfectly just. By that I understand, not merely that the verdict was one which we would not have upset as contrary to evidence, but that your Lordship concurred in it as the only verdict at which the jury could reasonably have arrived. I share the difficulty expressed by your Lordships in seeing how it can be essential to the justice of any case to set aside a just verdict and order a new trial which may possibly result in an unjust verdict. But I am not disposed to rest my judgment exclusively upon that. It is quite right that we should consider the general question raised. I have no doubt that an interest less than that of a party to the cause, or one essentially the same, might be sufficient to induce the Court to set aside the verdict if it were shown that that interest was such as would be likely to bias the mind of the juryman. But it is out of the question to say that in this case there is any interest of that kind. The juryman was one of 18,000 servants of the defenders. He was a clerk whose duties had nothing to do with the workings which led to this accident, or the place at which it happened. I am quite unable to see that his relation to the defenders was such as necessarily or even probably to bias his mind. In all the cases in which the question has been considered whether interest in the cause disqualified persons in a judicial position, it has been held that there must be a real and substantial interest, and that a merely technical and nominal interest will not disqualify. All the authorities on that point are considered in a case to which I referred in the course of the argument (*Wildridge* v. *Anderson*, 2 Adam 399). It was there held that a nominal interest—that of an *ex officio* trustee—was not sufficient to disqualify a magistrate from trying a case of malicious destruction of the trust property. A question of a similar kind was raised in a case between the Lord Advocate and the Commissioners of Supply of Mid-Lothian, in which one of the judges proposed declinature on the ground that he was himself a commissioner, and there the court held that the interest alleged had no real substance, could not possibly affect the judicial mind, and declined to sustain the declinature.

On the whole question I agree with your Lordships that there is no technical reason, and there cannot be any just or equitable reason, for setting aside a just verdict.

LORD M'LAREN was absent.

The Court discharged the rule and applied the verdict.

Counsel for the Pursuers—M'Lennan—A. M. Anderson. Agents—Donaldson & Nisbet, S.S.C

Counsel for the Defenders—Salvesen, Q.C.—Grierson. Agent—James Watson, S.S.C.

Tuesday, January 15.

SECOND DIVISION.

[Sheriff of Perth.

LIEBOW *v.* HOWAT'S TRUSTEES.

Reparation — Negligence — Landlord and Tenant—Defective Drainage.

The proprietor of a house, which was let on a yearly tenancy from Whitsunday to Whitsunday, died in September 1899, and his trustees sold the house, the purchaser taking entry at Martinmas 1899. In March 1900 the tenant raised an action of damages against the trustees, in which he averred that from 1897 he and his family had suffered in health, and that the drainage of the house was in an insanitary condition; that he had made repeated complaints to the deceased proprietor, who assured him that the drainage was in good order and promised to remedy any defects, but had failed to do so; that the pursuer relying on these assurances and promises had continued to occupy the house in the belief that there was no danger arising from the condition of the drains; that in January 1900 three of the pursuer's children fell ill, and two died of diphtheria in consequence of the insanitary condition of the house. *Held* that the action was irrelevant.

Hugh Liebow, hairdresser, Perth, brought an action in the Sheriff Court at Perth against Robert Keay and others, the testamentary trustees of the late George

Howat, merchant, Perth, in which he concluded for £250 as damages.

The pursuer averred that he was tenant of certain premises, consisting of shop and first floor dwelling-house, forming part of block of houses situated at the corner of Princes Street and South Street, Perth, of which the late George Howat was proprietor. The pursuer's tenancy was from Whitsunday to Whitsunday, and was renewed yearly by tacit relocation. The said George Howat died in September 1899, and the subjects let to the pursuer were on 26t hOctober sold by Mr Howat's trustees to Mr A. D. Clyne, who entered into possession at Martinmas 1899.

The pursuer also averred that from 1897 he and his wife and family had suffered intermittently in their general health, and had to call in medical aid; that in consequence of questions put to him by his medical adviser about the drainage from the water-closet and kitchen sink the pursuer spoke to Mr Howat, who assured him that the drainage was in good order, but promised that he would get a practical man to look over it.

The pursuer further averred—"(Cond. 6) In or about April 1899 pursuer again spoke to Mr Howat about the drainage, and complained of smells from the water-closet and kitchen sink which might be injurious to health. He explained to Mr Howat that although his family had not been seriously ill there had been illness amongst them pretty frequently necessitating the attendance of a doctor. Mr Howat again assured him the drainage was all right; that he had himself lived in the house and had never had cause to complain, but he would see to it and satisfy himself. On another occasion, when pursuer's rent was raised, pursuer, in the presence of the defender Mr R. Keay, who acted as Mr Howat's factor, complained of the condition of the house from smells and from dampness in the lobby. On several other occasions pursuer spoke to Mr Howat regarding the unsatisfactory state of the house, but was always met with promises of repairs, &c. Both Mr Keay and Mr Howat on one occasion called on pursuer at his shop and asked if they could see the house. Pursuer took them to his house after they had been at the flat above. Pursuer directed their attention to the whole house, which was getting out of order, and particularly to the lobby and the water-closet, as the water had been percolating through the ceiling from above. Mr Howat then said he would put everything right, but failed to do so. Pursuer thus reassured remained in the house, but at no time did he know or believe that the condition of the house was dangerous to life. Pursuer thus reassured continued to occupy said house in the full belief that there was no danger from the drains, nor risk from any cause connected with the sanitation of the house. One of the walls of the lobby was at times very damp, and pursuer attributed any smell to this source, to which he also attributed any illness, if such illness were to be attributed to anything connected with said house. (Cond. 7) About the end of January 1900 three of pursuer's children, viz., Mary Adelhaide Liebow, John Charles Keicher Liebow, and William Hugo Liebow, fell seriously ill" of diphtheria. "The said Mary Adelhaide Liebow, aged five years, died from said disease on 26th January 1900. The said John Charles Keicher Liebow, aged three years, died on 30th January 1900, also from said disease. The said William Hugo Liebow, aged seven years, was discharged convalescent from" Perth "infirmary on or about 25th February 1900. In consequence of said deaths and illness pursuer and his wife and the surviving children suffered in their health and feelings, and suffered loss and damage to the extent of the sum stated in the prayer hereof." The pursuer further averred that the drains in question were subsequently examined by the Burgh Surveyor, and found to be in an extremely bad condition. "(Cond. 9) . . . The water-closets were of an old type and very dirty. None of the drains or soil-pipes were trapped, and the property was generally insanitary, and the sewer gas freely entered pursuer's house, and caused the deaths and illness in pursuer's family condescended on. Said drains were allowed to get into the condition above described through the culpable neglect of the said George Howat. (Cond. 10) The said late George Howat, by his assurance that the drainage was all right when spoken to, and his promises to have the same looked into, allayed pursuer's fears, and induced him to remain as his tenant. By neglecting to take any steps upon the complaints made to him by the pursuer to ascertain the true condition of the drainage he failed in his duty as pursuer's landlord, and in consequence of his culpable neglect to have said house put in a good sanitary state pursuer's children died from the disease stated, and his family suffered in health as condescended on."

The pursuer pleaded—"(2) The said George Howat having had his attention directed by pursuer and others to the drainage of said house as a probable and likely cause of the frequent illnesses in pursuer's family, was thereby put on his guard, and having culpably and wrongously neglected to have said drainage overhauled and tested, and any defects remedied, he and his estate is liable in reparation to pursuer for the loss, injury, and damage he has sustained."

The defenders pleaded—"(1) The action is irrelevant."

The Sheriff-Substitute (SYM) on 8th June 1900 found that the pursuer's averments were not sufficiently relevant and specific to infer the liability of the defenders for the deaths of the pursuer's children, or the alleged injury to the health and feelings of the pursuer and his wife and children, and dismissed the action.

The pursuer appealed to the Sheriff (JAMESON), who on 28th July 1900 adhered to the interlocutor of the Sheriff-Substitute.

Note.—"I am of opinion that the pursuer has not set forth a relevant case. There is not, it is true, a want of specification of the same description as existed in the record

in *Henderson* v. *Munn*, 15 R. 859, because in the present record both the nature of the complaints made and the defects in the drain are set forth. But the pursuer's case is irrelevant in other respects. In the first place there is no liability here *ex contractu* arising from the obligation on a landlord to keep his property in a sanitary state, the pursuer's landlord, in the end of January 1900, when the pursuer's children contracted the disease of which they died, not being the defenders' author, but Mr Clyne, who bought the house in question with entry at Martinmas 1899.

"But the pursuer apparently also lays his case on delict or *quasi* delict. The first ground of fault alleged is that on which plea 2 is founded, viz., the failure of the defenders' author to put the drains in order during his life. This is too remote in every sense of the word. *Non constat* that if the late George Howat had lived till now, and remained proprietor of the house, he would not have put the drains in order. Another ground of fault is that the late George Howat lulled the pursuer into false security by his assurances, and thus led him to remain in the house, which otherwise, it is suggested, he would not have done. I cannot treat this as a good ground of action. In certain cases, though not I think in the present, it might form a good answer to a plea on the part of the landlord that the tenant should have left the house (*Shields* v. *Dalziel*, 24 R. 849), but in the present case, where the tenant had a far better knowledge of the insanitary condition of the house than the landlord, I think the observations of Lord Young in *Henderson* v. *Munn*, and the principle on which the decision in *Smith* v. *School Board of Maryculter*, 1 F. p. 5, proceeded, are applicable. I accordingly am of opinion that, after the pursuer's experiences prior to January 1900, as described in the condescendence, he should have left the house, and that he took the risk of staying there longer upon himself. On these latter grounds alone I should have been prepared to dismiss the action."

The pursuer appealed to the Court of Session, and argued—The pursuer had set forth a relevant ground of action, viz., fault on the part of Howat. His averment was that if Howat had performed his duty as landlord, and put the drains in order, the pursuer's children would not have been infected with the disease of which they died. For that failure of duty his trustees were liable. The case was distinguished from those cited by the Sheriff, and also from *Hall* v. *Hubner*, May 29, 1897, 24 R. 875, in respect that the pursuer did not remain in the house in knowledge of the defects, or at least in knowledge that they were the cause of his children's illness.

Counsel for the respondents was not called upon.

LORD YOUNG—I think it is unnecessary to call for a reply. There are here two judgments against the relevancy of the action. The Sheriff-Substitute has held the action to be irrelevant, and to that judgment the Sheriff has adhered. After the best consideration I have been able to give to the case, and to the arguments addressed to us by the pursuer's counsel, I am of opinion that the action is not relevant in any view.

If the pursuer, finding in the house certain foul smells, which he attributes to defective drains, complains to the landlord, who says that he will see to it and put it right—if in these circumstances the pursuer remains in the house, he will not have a ground of action against the landlord in consequence of illness arising from the defects of which he was aware. But there is in the present case another ground which is sufficient for its decision—a ground noticed by the Sheriff. The landlord died in September, and the house was sold by his trustees to a new proprietor, who entered into possession at Martinmas, *i.e.*, in November. The tenant knowing that the drains were in the condition of which he had complained, remained in the house, and in January following this calamity happened to his children. I do not think that in these circumstances, he has any ground of action against the deceased proprietor, or against his trustees, who could only be liable because the proprietor was. If the pursuer had made any application to the trustees to remedy the defects in the drains, they would have said, "We are out of it now, and if you want them put right, you must apply to the new proprietor." I think that is sufficient to dispose of the pursuer's case, and I therefore propose that we should affirm the judgments appealed against.

LORD TRAYNER—I am of the same opinion. No person can have an action of damages against another except on the ground of fault; generally speaking, there must be a wrong done or a duty neglected, which results in damage. In the present case that element is excluded. There was neither duty nor right on the part of Howat or his trustees to interfere with this house after Martinmas 1899. Although up to that time the pursuer had made frequent complaints of bad smells, and of the unhealthy condition of the house, no harm came of it; there was no illness, for which damages are claimed in the present action. It was not till January 1900 that the pursuer's children were seized with diphtheria, and it is not suggested that they were infected with that disease in November. Therefore if they contracted the disease after November, it was after either Howat or his trustees had either duty or power to remedy the alleged defects. These considerations seem to me sufficient to lead to the conclusion that the action is irrelevant.

LORD MONCREIFF—I am of opinion that the pursuer is not in a position to state a relevant case against the defenders, because he was tenant under Clyne at the time when his children fell ill, and since the preceding Martinmas; and it is admitted that

their illness was not contracted before Martinmas.

The pursuer might perhaps have had a case if his children had died soon after Martinmas, for it might have been said that they contracted the germs of the disease through the fault of Howat or of his trustees before the new owner acquired the property. Here it is admitted that the illness was not due to the condition of the house before Martinmas, and on that ground I agree with your Lordships that the judgments appealed against should be affirmed.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the appeal and affirmed the interlocutors appealed against.

Counsel for the Pursuer and Appellant—A. M. Anderson. Agents — Emslie & Guthrie, S.S.C.

Counsel for the Defenders and Respondents—Graham Stewart. Agents—J. & J. Galletly, S.S.C.

Tuesday, January 15.

FIRST DIVISION.

PORTEOUS *v.* HAIG.

Servitude—Thirlage—Statutory Commutation—Dry Multures—Discontinuance of Mill—Thirlage Act (39 *Geo. III. cap.* 55).

The statutory commutation of the servitude of thirlage under the Thirlage Act 1799 has the effect of extinguishing the servitude and substituting a payment therefor, and accordingly the right to demand annual payments fixed by decree under the Act is not extinguished by the discontinuance of the mill in favour of which the servitude originally existed.

Dry multures still continue to be exigible notwithstanding the discontinuance of the thirl mill.

Spottiswoode v. *Pringle*, July 14, 1849, Hope Collection, vol. 359 (11.); Rankine, Landownership (3rd ed.), 400, note, *followed.*

Forbes' Trustees v. *Davidson*, July 14, 1892, 19 R. 1022, *distinguished.*

This was a special case presented for the opinion and judgment of the Court, in which the questions for decision were whether (1) payments for multures commuted under the Thirlage Act 1799 (39 Geo. III. c. 55), and (2) dry multures, were still exigible notwithstanding that the thirl mill had ceased to exist.

The parties to the case were (1) James Porteous, of Tufthills, Kinross, and (2) Alexander Price Haig of Blairhill.

The following facts were stated in the case:—"The first party is heritable proprietor of the lands of Tufthills, in the county of Kinross, conform to disposition in his favour, dated 10th and recorded 12th November 1892. Included in the said disposition there is a conveyance of Kinross Mill, which, however, at the date thereof was no longer in existence. The said mill was formerly a thirl mill, and the lands of Carsegour, Middle Tillyochie, and East Tillyochie, of which the second party is proprietor, were formerly astricted thereto. In 1806 and 1809 petitions were presented under the said Act (39 Geo. III. c. 55) by, *inter alios*, the proprietors of the lands of Carsegour and the Tillyochies for commutation of their thirlage. The rights of thirlage stated by the applicants consisted principally of multures and knaveships, but also included services in assisting in building and repairing certain parts of the mill-house, maintaining the roof, casting the dam, upholding certain parts of the troughs, and driving mill-stones, which services the applicants had been in the practice of rendering. The whole of these were found by the Sheriff in terms of the statute relevant to pass to the knowledge of the juries. After certain procedure verdicts were finally pronounced by the juries on 23rd November 1807 and 9th January 1810 respectively, commuting the thirlage of, *inter alia*, the said lands of Carsegour, Middle Tillyochie, and East Tillyochie, and the verdicts were registered as directed by the statute in the Particular Register of Sasines, &c., for Kinross on 3rd December 1807 and 11th January 1810 respectively. After the commutation had been made as aforesaid the owners of the said mill, which came to be held along with the estate of Tufthills, received payment from the predecessors of the second party, proprietors of the astricted lands, of the value of the commuted multures in lieu of the old multures, sequels, and services. In or about the year 1884 Kinross Mill was burnt down. In 1890 part of the site thereof was sold by the author of the first party under reservation of all thirlage rights. In 1892 the remainder of the site, along with adjoining mill lands, passed to the first party under the disposition above referred to. The first party has sufficient space on the remaining part of the old site and the adjoining mill lands on which to erect a new mill, but he has at present no intention of doing so. Payment of the commuted multures and services continued to be made by the second party and his predecessors to the owners of the mill and the site thereof up till 1897. Since that time the second party has refused to make the said payments, on the ground that they are no longer due. The second party has also since the said date refused to make payment of the sum which was previously paid by the proprietors of Carsegour to the proprietors of Kinross Mill as dry multure. The said dry multure was paid for bear growing on the lands of Carsegour, which were free from ordinary thirlage in regard to the said crop. In respect of the 14th section of the Act 39 Geo. III. c. 55, the said dry multure was not referred to the juries in 1807 and 1810. It consisted of three firlots of oats and two firlots of bear, and had been paid from time immemorial."

The first party contended that he and his assignees and successors in the said commuted payments and dry multures