HOUSE OF LORDS.

Thursday, February 27.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord Robertson, Lord Atkinson, and Lord Collins.)

CAMERONS *v.* YOUNGS.

(*Ante*, January 26, 1907, 44 S.L.R. 344, and 1907 S.C. 475.)

Title to Sue—Landlord and Tenant—Lease — Contract — Action of Damages on Ground of Insanitary Condition of House at the Instance of the Wife and Children of Tenant.

An action of damages against the landlord for the loss and inconvenience suffered by the inhabitants of a house, which is let to a tenant, through its insanitary condition, is based upon the contract of lease, and consequently the wife and children of the tenant, as they are not parties to that contract, have no title to sue such an action. *Cavalier* v. *Pope*, [1906] A.C. 428, *followed; Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, 34 S.L.R. 635, *commented on;* and *Hall* v. *Hubner*, May 29, 1897, 24 R. 875, 34 S.L.R. 653, *reversed.*

This case is reported *ante ut supra.*

The cause so far as at the instance of Robert Cameron, the father and husband, as an individual, to whom an issue had been allowed, had been settled.

William Cameron and others, the sons and wife, the remaining pursuers, who had been held to have no title to sue, now appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—I have had the advantage of reading the opinion about to be delivered by my noble and learned friend Lord Robertson. I agree with it and have nothing to add.

LORD MACNAGHTEN—I have had the same advantage, and I also concur and have nothing to add.

LORD ROBERTSON—The facts giving rise to the important question now before the House are of the simplest. The respondents let to one Robert Cameron, the husband and father of the appellants, a dwelling-house at Crieff. The house was allowed to get out of repair in the matter of drains; disease was generated owing to this neglect, and Cameron and his family, the appellants, suffered accordingly. Cameron's own claim for damages was sued by him in this action, but he has been settled with and is out of the case. The question is whether the appellants, who are not parties to the contract of lease, have a good ground of action against the landlord.

It seems to me perfectly clear that they have not, and I rest my opinion not alone on the authority of *Cavalier* v. *Pope*, but on principle common to the laws of Scotland and of England, which *Cavalier* applied.

These respondents were perfectly entitled to let this house or not to let it, and in either case they were entitled to allow the house to fall to pieces and the drains with it so long as they did not injure any neighbour (by which I of course mean any neighbour in vicinage whether the title of that neighbour was of property or of passage) or violate any existing law of nuisance, the only restraint on their action being obligations of contract with their tenant. Now it happens that in the present instance they were under such obligation to their tenant, by virtue of a condition which the Scotch law implies in leases of urban houses, that the landlord shall not only give the tenant a habitable house but maintain it in that state. It ought to be, but apparently is not, superfluous to say that if the law implies this condition it is because this is the customary arrangement in Scotch towns, and therefore when nothing is said to the contrary parties are taken to have agreed to it. That an obligation to maintain a house habitable is not an essential term or obligation of the tenure of real property in Scotland but a matter of agreement is indeed most strikingly proved by the fact that in the case of farmhouses the contrary is the presumption of liability; for there it is the tenant and not the landlord on whom this duty of maintenance falls. It thus appears that the landlord's liability is conventional and contractual, and not the less so where it is implied by law and not written in the contract.

The argument for the appellants has indeed rested on invoking principles of the law of neighbours which have nothing to do with the rights of inhabitants of the house. Those principles are embodied in a distinct chapter of Scotch law, and are concerned with what may be called the external or foreign relations of the owner of a house. There he is liable, because the maxim *sic utere tuo ut alienum non lædas* necessarily imposes on the proprietor the duty of exercising that measure of care which will avoid injury accruing to his neighbour from his house. He must not allow his house to get into such disrepair that it falls down on his neighbour's house or injures the passer-by in the street. In all those cases the person injured and claiming damages stands on his own rights, and his relation to the offending or negligent proprietor is not constituted or measured by any voluntary contract.

These principles have no application at all to persons who are within the house, for they have and can have no right to be there except by the licence of the owner, given by the owner on certain terms to the person with whom he chooses to contract. Nor can it be omitted from notice that if the appellants' contention were sound the liability of the landlord may be indefinitely increased or diminished according to the domestic or social relations or tastes of the tenant over which the landlord has no control.

I have examined all the cases prior to *Cavalier* which were cited at the Bar, and

with one apparent but not real exception, and one real exception, there is none which conflicts with that decision. All fall within the category of external relations which I have discussed.

The apparent exception is the case of *Shields* v. *Dalziel*, 24 R. 879, in the First Division. There it is quite true that the claim which the Court allowed was that of the wife of the tenant and not of the tenant. I must, however, point out that neither in the written pleadings nor in the oral argument did the landlord question or object to the title or instance of the wife, the defence being rested on totally different grounds. The pleadings were written and the argument was conducted by very able counsel, and presumably they deliberately abstained from stating this plea. Suffice it to say that the present question was not before the Court, and the decision in *Shields* v. *Dalziel* is not a judgment adverse to the doctrine of *Cavalier* v. *Pope*.

The other case which I have called an exception is *Hall* v. *Hubner*, 24 R. 875, decided by the Second Division. There the landlord argued that the pursuer being the tenant's wife was . . . a stranger to the landlord, and must seek her remedy not against him but the tenant. The learned Judges in their reported opinions take no notice of this argument, but their judgment allowing issues to be lodged amounted to its rejection. This decision I therefore think cannot be supported, but this is the only and the slender support of the appellants' case to be found in the Scotch cases prior to *Cavalier* v. *Pope*.

I am of opinion that the appeal ought to be dismissed.

LORD ATKINSON—I concur.

LORD COLLINS—I concur.

Their Lordships dismissed the appeal.

Counsel for the Pursuers (Appellants)—C. D. Murray. Agents—Murray, Lawson, & Darling, S.S.C., Edinburgh—Walter H. Guthrie, London.

Counsel for the Defenders (Respondents)—Macmillan—Beveridge. Agents—Mathie, Macluskie, & Lupton, Stirling—Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—A. & W. Beveridge, Westminster.

COURT OF SESSION.

Friday, February 7.

SECOND DIVISION.

[Lord Johnston, Ordinary.

RUDMAN *v.* JAY & COMPANY.

Reparation—Wrongous Use of Diligence—Decree ad factum præstandum—Alleged Impossibility of Performance—Imprisonment.

A obtained furniture from J. & Co. upon a hire and purchase agreement, and placed it in the house he occupied. Subsequently his landlord sequestrated the furniture in the house for rent. A having failed to pay the stipulated hire, J. & Co. sent to A's house and demanded redelivery of their furniture, but were met by the production of the decree and schedule of sequestration. Shortly afterwards decree of cessio was pronounced against A at the instance of another creditor. J. & Co. raised an action against A, concluding for delivery of the furniture. A did not appear to defend, but the trustee in his cessio, who was sisted, consented to decree. J. & Co. charged A on the decree, and A having failed to implement the charge, obtained a warrant for his imprisonment in ordinary course, and he was imprisoned.

A brought an action of damages against J. & Co. for wrongous arrestment and imprisonment, in which he stated the facts above narrated, and while condescending on no special fact suggesting malice, averred generally that the diligence had been used maliciously, in bad faith, and without probable cause, inasmuch as J. & Co. knew that, owing to the sequestration and cessio, it was impossible for him to implement the decree.

Held (*rev.* Lord Johnston) that the action was irrelevant, J. & Co. having obtained A's imprisonment under a legal warrant regularly obtained and executed, and A having made no relevant averment of malice, or facts from which malice might be inferred.

Trevor Inglis Rudman, civil engineer, Edinburgh, raised an action against Jay & Company, cabinetmakers and furniture dealers, Glasgow, in which he sued for £1500 as damages for wrongous arrestment and imprisonment.

The defenders pleaded, *inter alia*—"(2) The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed. (4) The pursuer having been arrested and imprisoned under a legal warrant regularly obtained and executed, the defenders are entitled to decree of absolvitor."

The facts as averred by the pursuer are stated in the following narrative taken from the opinion of the Lord Ordinary