I have come to the conclusion that the Lord Ordinary's judgment is right, and I think that result follows clearly enough when one considers what a bargain of this sort means. In an ordinary case there can be no doubt if A and B enter into a contract for the sale of shares that belong to A, A executes the transfer, and B I have no doubt is bound as part of the bargain not only to accept that transfer, but to get the transfer registered so as to take A off the register. In the case of an unlimited company the interest is too plain, but even in a limited company I have no doubt that A is perfectly entitled as part of the bargain to get his name off the register. But when there is a stipulation in the articles of the company which allows the directors of the company to refuse at their own hand any particular transferee, then A and B, who are contracting, do so with their eyes open, and knowing that it may be the case that B will not be accepted as a transferee. It still becomes the duty of B, if he cannot get the defenders to register him, to find a transferee whom the defenders will register in order to free A; and I think if he is entirely unable to do that A can bring the bargain to an end. But I think he could only do so in the ordinary way by annulling the bargain—that is, giving back the money he had got from B and bringing matters to their entirety. I think all this is really very clearly put in the judgment of Lord Blackburn, than whom of course there is no higher authority, in *Maxted* v. *Paine*, L.R., 6 Ex., and I specially refer to a passage on p. 151 of the report, where he says—"In many companies the articles of association reserve a right to the directors to refuse to register a transfer unless satisfied with the transferee, and as (according to the view I take of the matter) the buyer selects the name into which the shares are to be transferred, he is bound by his contract to select a person with whom the directors will be satisfied, as otherwise he does not fulfil his obligation to relieve the registered owner from all future liability." I think therefore the situation is this—there has been a contract between Mr Stevenson and Mr Wilson by which Mr Stevenson has got a transfer from Mr Wilson. I think Mr Stevenson was bound, and is bound, to get either that transfer registered, or to find somebody who by his registration will take Mr Wilson off the register. But if he cannot do so, the remedy, and the only remedy, of Mr Wilson is to annul the bargain. Now, that is just what Mr Wilson will not do; so far from annulling the bargain he raised an action in the Court of Session and got decree against Stevenson for the money, and he does not propose to give that money back. I am not saying now, and I do not think that in this action we could possibly determine what amount of time ought to be given Mr Stevenson to find a proper transferee. That question does not arise, because the attitude of Mr Wilson in this action is that he proposes to stick to the money, and at the same time not to have the trouble of acting as *quasi*-trustee in giving over the dividends. Now, I think that is an impossible position, and therefore so long as Mr Wilson chooses, as he does still choose, not to try to avoid the bargain but to keep the money in his pocket, so long he must be content to fulfil this obligation of *quasi*-trustee to which the judgment of the Lord Ordinary subjects him. I therefore move that your Lordships should adhere to the interlocutor of the Lord Ordinary.

LORD KINNEAR and LORD PEARSON concurred.

The Court adhered to the Lord Ordinary's interlocutor and refused the reclaiming note, finding Wilson liable both as a trustee and as an individual in the expenses since the said interlocutor.

Counsel for the Defender and Reclaimer Wilson—Scott Dickson, K.C.—Hon. W. Watson. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Pursuer and Respondent Stevenson — Clyde, K.C.—Hunter, K.C.—Macmillan. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders J. M. Smith, Limited — Dean of Faculty (Campbell, K.C.)—Cullen, K.C.—Murray. Agents—J. W. & J. Mackenzie, W.S.

Saturday, January 26.

FIRST DIVISION.

[Sheriff Court at Stirling.

CAMERONS *v.* YOUNGS.

Reparation — Negligence — Landlord and Tenant — Known Danger — Insanitary House—Tenant Remaining in Occupation on Promise by Landlord to Remedy Defects — Relevancy — "Volenti non fit Injuria."

In an action by a tenant against his landlord for damages for loss and injury caused him through illness occasioned by the insanitary state of the house, subsequently proved by inspection, the pursuer averred that he had repeatedly complained of disagreeable smells and dampness in the house to the factors, who promised to have certain repairs executed, and also to have it inspected, but did nothing; that in particular the factors in September 1905 were told the smells complained of were believed to come from the drains, and that the tenant would remove unless immediate steps were taken; and that he thereafter looked for another house, but failed to find one before he was taken ill on November 2nd. The defenders pleaded that the action was irrelevant, the pursuer having stayed on in knowledge of the danger. *Held* that there must be inquiry and an issue ordered. *Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, 34 S.L.R. 635, and *Smith* v. *Mary-*

culter School Board, October 20, 1898, 1 F. 5, 36 S.L.R. 8, *commented on*.

Mere knowledge of the defect by the tenant is not *per se* a good defence to the landlord, on the principle of *volenti non fit injuria*; in addition to knowledge, to satisfy that principle it is necessary to proof that the tenant took upon himself the risk of any harm that might happen. *Smith* v. *Baker*, [1891] A.C. 325, *commented on* and *applied* by Lord Kinnear.

Title to Sue—Husband and Wife—Parent and Child—Landlord and Tenant—Action against Landlord for Damages Caused by Insanitary State of House—Title of Wife and Children as well as Tenant to Sue—Contract—Jus Quæsitum Tertio.

The wife and children of a tenant of a house have no title to sue an action of damages for loss and injury through illness caused by the insanitary state of the house, they not being parties to the contract. *Cavalier* v. *Pope*, [1906] A.C. 428, *followed*.

On May 1, 1906, Robert Cameron, carter, Commissioner Street, Crieff, as an individual; and William Cameron, labourer, his son; Mrs Ann M'Gregor or Cameron, his wife, with his consent; James Cameron, a son in minority, with his consent as curator; and the said Robert Cameron as tutor for his pupil child Neil Cameron, raised an action in the Sheriff Court at Stirling against James Young and Alexander Young, sometime bakers in Stirling and residing there, in which they sought to recover certain sums of money, respectively, as damages for injury and loss sustained through the insanitary state of a house occupied by them and rented from the defenders by the first-named pursuer.

The pursuer Robert Cameron, with whom the others lived, in the month of May 1903 took as tenant, through the defenders' factors Messrs Stothard & Son, a dwelling-house belonging to the defenders at a rent of £9, 10s. per annum, and the family continued to reside in it till November 1905, on the second of which month the father was taken ill with typhoid fever and removed to Perth Infirmary, the mother and the children being taken ill and removed a few days later. On 4th November, on an inspection, the drains of the house were found defective, and three other sons who had not been attacked removed to another house at a rent of £15, where the father and others on recovery returned.

The pursuers, *inter alia*, averred—"(Cond. 4) The pursuers, Robert Cameron and Mrs Ann M'Gregor or Cameron, William Cameron, and Alexander Cameron, another son of the said Robert Cameron, on several occasions, and particularly in or about the month of June 1905, complained of disagreeable smells in the house and also of dampness, to the said factors, who promised to have the walls lined with wood. Nothing, however, was done, and both the pursuers, Robert Cameron and his wife, subsequently made repeated complaints to the said factors but without result, and on or about 23rd August 1905 the pursuer Robert Cameron's youngest son took scarlet fever. The boy was removed to the fever ward at Perth Infirmary and the house disinfected by the sanitary authorities, who, however, apparently did not suspect bad drainage as the cause of the outbreak. Notwithstanding this outbreak of fever, the defenders took no steps to have the source of the bad smells complained of ascertained, and as these continued, pursuers, Robert Cameron and his said wife, and also the said William and Alexander Cameron, again frequently during the months of August and September 1905 complained to the defenders' said factors, who promised to have the premises inspected and the drains examined. Particularly in said month of September the pursuer Mrs Ann M'Gregor or Cameron stated to Mr Stothard senior, as defenders' said factor, that she was sure the smells arose from defects in the drainage, and that unless he had it seen to at once they (the pursuers) would remove from the house. Notwithstanding this and the promises made by the said factors, nothing was done by the defenders or their factors, and the said Robert Cameron immedately thereafter made inquiries regarding another house with a view to removing thereto, but was unable then to get a suitable house to which he could get immediate entry."

The pursuers, *inter alia*, pleaded—"(2) The several pursuers having sustained loss, injury, and damage through the fault or culpable negligence of the defenders, and the several sums claimed by the pursuers respectively being fair and reasonable compensation, decree should be granted as craved."

The defenders, *inter alia*, pleaded—"(1) No title to sue. (2) The pursuers' averments are irrelevant and insufficient in law to support the conclusions of the action. . . . (7) If it be the fact, as condescended on by the pursuers, that they continued to live in said house after they considered it unfit for their habitation, they are barred from suing for damages on account of injury to their health."

On 21st June 1906 the Sheriff-Substitute (DEAN LESLIE) dismissed the action, repelling the defenders' first plea-in-law, but sustaining their second and seventh pleas.

Note.—". . . The pursuers claim damages for injury to their health as well as for personal suffering, and for destruction of furniture and clothing resulting from the insanitary condition of the house.

"The defenders plead that the pursuers other than Robert Cameron, the lessee, have no title to sue. From the record they are all apparently members of the lessee's family. As such they were entitled to be in residence with him in his house, and in my opinion have therefore a valid title to sue for damage they may have suffered through the fault of the defenders. . . .

"The pursuers' contention on the facts comes to this—that on intimating his suspicions to the landlord as to the defective drains, a tenant is entitled to hold himself

relieved of all responsibility for the danger of infection. He is not bound to satisfy himself whether there is a good ground for his suspicion, but merely to state it and sit still. Here the tenant could at any time by complaint to the Burgh Surveyor have ascertained exactly the condition of the drains of his house. He preferred not to do so, but to remain in the house because of the difficulty of finding another suitable.

"In November a house for the family seems in fact to have been found, and at anyrate the pursuers might have submitted to having their family broken up temporarily that separate accommodation might be found for its members if the safety of their health could not otherwise be ensured. While in law a tenant is entitled to a sanitary and habitable house, it would be hard that a landlord should be held liable to a tenant who could disregard ordinary precautions in the way the pursuers did here according to their own showing. The law on the matter is succinctly laid down by the Lord Justice-Clerk in *Smith* v. *School Board of Maryculter*, October 20, 1898, 1 F. 5—'I think that if any person has a contract by which he is entitled to have a house provided for him to live in, whether it be as part of a bargain for emoluments or as by lease, and he finds that the house is in such an insanitary condition that he judges it unsafe to enter or to remain in possession, and he still does occupy it, thereafter he has no claim in law for injury to himself or his family which follows on his continuing to use the house. If he remains, he must be held to do so because he chooses to remain, and so remaining he takes the risk which he knows to exist. His proper course is to quit a house that he holds to be unsafe. If he can prove that it is so, he has his remedy against those who, being under obligation to provide him with a house, have failed to do so, and so compelled him to find accommodation elsewhere. For damage caused by his having to do so he has a claim, but not for consequences following on his knowingly remaining in uninhabitable premises.' This statement of the law seems to me to exactly apply to the present case, and I have therefore dismissed the action."

On 1st August 1906 the Sheriff (LEES), on appeal, recalled his Substitute's interlocutor, and sustained the defenders' first plea-in law in so far as regarded the pursuers William Cameron, Mrs Ann M'Gregor or Cameron, James Cameron, and Robert Cameron *qua* tutor of Neil Cameron, assoilzieing the defenders from the action so far as at their instance, but allowed Robert Cameron as an individual and the defenders a proof before further answer of their respective averments.

Note.—"The pursuer alleges that the drains in the house tenanted by him from the defenders went wrong and caused injury to the health of the inmates; that intimation of the defective state of the drains was given to the defenders or their factor, and that it was promised that they would be inspected and put right if found to be wrong; and that on the faith of this promise he stayed on for a time in the house and took ill, but that as nothing was done to remedy the defects he had ultimately to leave the house, and thereby incurred expense.

"I think these are averments which are relevant to go to probation, and that if proved they may subject the defenders in damages, the greater or less amount of which will depend on whether it is proved that the defenders or their factor induced the pursuer to continue in occupation of the house by promising to make what repairs might be needed. If, however, such promise is not proved, the defenders, if liable at all, will of course only be liable in the expenses connected with the removal. Such at least seems to be the rule of law to which our Courts have ultimately come, greatly to the benefit of negligent landlords.

"The next question is whether the wife and children of the pursuer are also entitled in their own rights respectively to compensation for the injuries their healths are said to have sustained. The defenders contend these pursuers have no title to sue. Their argument is that they had no contract with these pursuers, and that therefore they cannot be sued for breach of contract where no contract was entered into.

"A good deal might perhaps not unreasonably be said for the pursuers' reply, namely, that there was an implied contract between them and the defenders, as Cameron, being a married man resident with his family, was taking the house for them to reside in as well as him. And it certainly does seems an extraordinary position to take, to say the promise to get the house put right was made solely for his sake and not for theirs also. If a man takes a shop, customers are expected to come, and if they get injured from some defect in the structure they have undoubtedly a remedy against the proprietor. The same I fancy would be true in the case of an hotel. It may seem strange therefore that there is an implied contract for the safety of customers and others who may never come, and yet no contract implied—no *jus quæsitum*—for the wife and children who practically must come. It is further said that there is no law to prevent a proprietor expressly letting an unsafe house as unsafe. That is true, but in that event the injured person will have his remedy against the tenant, and I notice that in the English cases the real question at issue often is who is liable—did the proprietor covenant to do the repairs?

"Of course Cameron can claim for the loss he has sustained through the illness of his family; but have they no claim in their own rights? Did they live and remain in the house at their own risk, but he not? That seems a somewhat anomalous state of matters. A somewhat analogous position would be if a man hired a cab to take him and his family to the train, and owing to some defect the cab broke down and all the party were injured; is he the only one who has a remedy?

"The reply of the defenders to all these questions is that in the recent case of

Cavalier v. *Pope*, 22 T.L.R. 648, the House of Lords decided that where a landlord undertook to put a house right and did not do it, and both the husband and wife were injured through this breach of contract, the husband had a remedy but the wife had none. The case, no doubt, is an English one, but it is directly in point, and as I am not aware of any distinction in principle between Scotch and English law on this point, it is my duty I fancy to decide this case in accordance with the decision there pronounced."

The pursuers appealed to the First Division of the Court of Session, the pursuer Robert Cameron as an individual for jury trial, and the remaining pursuers against the interlocutor of the Sheriff, and argued —(1) *Title to Sue.* All the pursuers had a good title to sue. There was a common law obligation on the landlord that the house he let should be, and should be maintained, in a sanitary condition and fit to live in; and he was liable to those rightfully inhabiting the house for a breach thereof though they might not be tenants, *i.e.*, parties to the contract of location—*M'Kinlay* v. *M'Clymont*, October 28, 1905, 43 S.L.R. 9. The rule in England was different, and *Cavalier* v. *Pope*, [1906] A.C. 428, had no bearing since it was laid on contract. Again, the defect having been intimated to the landlord, and he having failed to remedy it, there was *culpa* on his part and liability on that ground. The wife and children of the tenant had therefore a good action. In previous cases a wife had been allowed to sue without objection to title—*Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, 34 S.L.R. 635; *Hall* v. *Hubner*, May 29, 1897, 24 R. 875, 34 S.L.R. 653; and in at least one case in the Outer House the child had been so allowed though objection to title was taken—*Hamilton* v. *Nimmo*, November 25, 1902, 10 S.L.T. 394. (2) *The action was relevant.* The pursuers had not debarred themselves by staying on in the house. They did that relying on the promise of inspection and repair made by the factors. That promise was specifically averred. That was sufficient to nullify the plea that the pursuers had accepted the risk and to prevent the case otherwise relevant becoming irrelevant on that ground—*Shields* v. *Dalziel, cit. sup.*; *Hall* v. *Hubner, cit. sup.*; *Caldwell* v. *MCallum*, December 18, 1901, 4 F. 371, 39 S.L.R. 257, all distinguishing *Webster* v. *Brown*, May 12, 1892, 19 R. 765, 29 S.L.R. 631. Further, the danger here was one which was not likely to be appreciated by the tenant, and to make him responsible he ought to have been warned — *Clark* v. *Army and Navy Co-operative Society, Limited*, [1903] 1 K.B. 155, Mathew, L.J., at p. 168. The cases cited by the defenders were not in point—*Henderson* v. *Munn*, July 7, 1888, 15 R. 859, 25 S.L.R. 619, had been decided purely on the pleadings; in *M'Manus* v. *Armour*, July 10, 1901, 3 F. 1078, 38 S.L.R. 791, the defect was obvious and should have been avoided; in *Russell* v. *Macknight*, November 7, 1896, 24 R. 118, 73 S.L.R. 34, no complaint was ever made; in *Webster* v. *Brown, cit. sup.*, the tenant had accepted the risk by remaining in face of unreasonable delay to repair.

Argued for the defenders and respondents —(1) *Title to sue. Cavalier* v. *Pope, ut supra*, settled that the pursuers, the tenant's wife and children, had no title to sue. That decision applied in Scotland — *Virtue* v. *Commissioners of Police of Alloa*, December 12, 1873, 1 R. 285, 11 S.L.R. 140. (2) *The case was irrelevant.* The averment that the pursuers remained in the house on the promise of repairs by the landlord was insufficient. Their duty was to leave when they came to know of the danger, and they had failed in their duty in not leaving and had accepted any risk —*Henderson* v. *Munn, ut supra*; *Brown* v. *Webster, ut supra*; *Smith* v. *Maryculter School Board*, October 20, 1898, 1 F. 5, 36 S.L.R. 8. The action should be dismissed.

At advising—

LORD M'LAREN—This is an action of damages brought at the instance of a tenant of a dwelling-house, his wife and his children, against the landlords to recover compensation for illness (typhoid fever) caused by defects in the drainage system of the house. According to the pursuers' statements offensive smells had been perceived for some time. These were attributed by him to defective drainage, and he repeatedly called on Mr Stothard (the landlords' factor) to have the drains examined and put into a proper state of repair. In such cases it is sometimes a material element that the landlord or his agent undertook to make necessary repairs, or at least to have the subject inspected and to do what might be found to be necessary. In the present case it is averred (Cond. 4) that the pursuers "during the months of August and September 1905 complained to the defenders' said factors" (that is, as to the drainage smells), "who promised to have the premises inspected and the drains examined." It is added that Mrs Cameron stated to the factor that unless he had this seen to at once the pursuers would remove from the house. Nothing having been done by the factor in fulfilment of his promise, Robert Cameron (the tenant) proceeded, as he says, to look out for another house, but before he had been able to find a house to which he could get immediate entry, viz., on 2nd November 1905, he contracted typhoid fever, and a few days later four members of his family contracted the same illness. After his recovery the pursuer removed to another house.

The Sheriff (differing from the Sheriff-Substitute) has held that the averments are relevant to be admitted to probation, but only (as he afterwards explains in his note) in so far as stated at the instance of Robert Cameron, the tenant. The Sheriff there observes that the amount of the damage will depend on whether it is proved that the defenders or their factor induced the pursuer to continue in occupation of the house by promising to make what repairs might be needed. He adds

that if such promise is not proved the defenders, if liable at all, would only be liable in the expenses connected with the removal.

If the case were going back to the Sheriff Court for proof it might not be necessary at this stage to consider the relevancy of the averments as to the defenders' promise to have the drains examined with a view to repair, because in any event the pursuer must be allowed to prove the damage which as he alleges is consequent on his removal to another house. But the pursuer has appealed to this Court for jury trial, and as we should not be disposed to send the case to a jury merely to assess the expenses of removal or the difference of rental of the two houses, it is necessary to consider whether there is issuable matter in the averments relating to illness resulting from the escape of foul air from drains, and contracted either in consequence of the pursuers having remained in the house for a time in reliance on the defenders' promise to have the drains put into proper repair, or in consequence of his inability to find a house to which he could get immediate entry.

By the law of Scotland it is an implied term of the contract of location that the subject let is to be maintained in tenantable condition, and it follows that where a house occupied by a tenant becomes insanitary or otherwise dangerous and unfit for occupation the tenant may treat the contract as broken, and will be entitled to compensation for the expense to which he has been put in finding another residence. He will not in the ordinary case be entitled to compensation for suffering from disease or accident attributable to the faulty condition of the house if he remains in it in the knowledge that the house is insanitary or insecure. Good reasons can be given for the recognition of this rule of law. One of these is expressed in the maxim *volenti non fit injuria*. Another is that in claims of damage for breach of contract only such damages are allowed as may be taken to be within the reasonable contemplation of the parties when the contract was made. Now it is not to be supposed that an intending lessor would contemplate that his tenant would remain in an insanitary house to the injury of his health, when he had it in his power to treat the contract as broken and to remove to a healthy habitation. There is also the rule, which has many illustrations, especially in mercantile law, that a party who complains of breach of contract must do what is reasonable to minimise the loss and damage chargeable to the other contracting party. These reasons all point to the duty incumbent on a tenant who knows that he is exposed to danger to take immediate measures for protecting himself against the apprehended casualty.

But again there are cases where removal is not necessary as a protective measure. If the ceiling of one of the rooms of a house becomes insecure, a sensible tenant would close the room and arrange with the landlord to have the ceiling renewed as soon as possible. And even in the case of an insanitary house which the tenant is entitled to quit, if the landlord offers to have the faulty pipe or drain instantly repaired, and the tenant agrees to remain in the house, and does remain, and contracts disease in consequence of his continued occupation, one of two questions of fact may arise—First, did the landlord promptly perform his promise to make repairs; secondly, did the landlord induce the tenant to stay on by taking the risk on himself, and waiving his objection that the tenant must act as necessary for his own protection? These are questions which evidently cannot be determined without an inquiry into the facts of the particular case. But there are reported decisions of which I may cite two —*Shields* v. *Dalziel*, 24 R. 849 (First Division); and *Caldwell* v. *M'Callum*, 4 F. 371 (Second Division), where averments that the tenant had remained in occupation in consequence of the landlord's promise to put the house into tenantable condition were held relevant to be remitted to probation.

In other cases, of which *Smith* v. *School Board of Maryculter* is an example (1 F. 5), claims of compensation for illness or death resulting from insanitary conditions have been dismissed although the summons contained allegations pointing to an unfulfilled obligation on the part of the landlord to execute remedial works. Now, as the case of *Caldwell* v. *Dalziel* and the *Maryculter* case are decisions of the same Division of the Court I cannot admit that they proceed on divergent views in principle. The difference in the result of the two cases only represents the different impressions made on the mind of the Court as to the relevancy of the averments in each case. It may be also that our decision in *Shields* v. *Dalziel*, which is discussed by Lord Trayner in *Caldwell's* case, had an influence on the decision of that case, while it is not noticed in the judicial opinions in the *Maryculter* case. If I may be permitted to say so, I think that in the *Maryculter* case the Judges of the Second Division of the Court went further than I should be inclined to follow in excluding inquiry, because, as I read the narrative, a definite promise by the School Board of Maryculter to bring in water from a specified source was averred. In any view a decision on the relevancy of a system of averments cannot be a binding authority as to the relevancy of averments in another action where the facts are dissimilar.

In the present case I am of opinion that the averments as to communications passing between the landlord's factor and the tenant are relevant to raise an issue for trial, and at this stage I abstain from making any comments as to the bearing of the particular averments on the eventual decision of the case.

I have still to consider the question of title, as to which my opinion is, that as this is a claim founded on breach of contract, no one who is not a party to the contract of location has a title to sue for damages. This is the ground of the decision of the House of Lords in the case of *Cavalier* v.

Pope, 1906, Ap. Ca. 428. I do not agree with the learned Sheriff in thinking that the principle of *Cavalier* v. *Pope* is a new discovery by the Court of last resort. I think the principle is as old as the law of contracts, and must at least have come into existence the first time that a contract was broken and a court of law was called on to give redress. There is a difference between the laws of England and Scotland as to the landlords' implied obligation to maintain a building in sound tenantable condition, but this difference does not affect the question of title to sue.

I am therefore of opinion that we should allow the appeal of Robert Cameron for jury trial (which may perhaps be taken most conveniently on the record), and refuse the appeal for William Cameron and others, the wife and children of Robert Cameron.

LORD KINNEAR—I agree with your Lordship and have little to add. I think the Sheriff was quite right in sustaining the relevancy of this action, but I cannot agree with his view as to the question to be tried, because he seems to say that the case really raises a separate issue—whether the defenders or their factor induced the pursuers to remain in the house by promising to carry out alterations or repairs. It is not very clear whether he does or does not agree with the opinion of the Sheriff-Substitute that the case would not be relevant apart from the promise to make repairs.

The Sheriff-Substitute's judgment is expressed in the interlocutor by which he sustains the seventh plea-in-law for the defenders. That plea-in-law is—". . . [*quotes*] . . ." I rather think the Sheriff means to concur in that, and that that is probably the ground on which he allowed a proof.

I cannot assent to that view, although I admit there is some authority for it. The rule of law is that in leases of urban tenements there is an implied obligation on the lessor that they shall be put into tenantable and habitable condition, and that the lessor shall be bound, unless otherwise stipulated, to uphold them in that condition during the currency of the lease. If that is the contract, it follows that if the tenant is injured by the failure of the landlord to fulfil that obligation, he has an action for any damage that can be shown to be a direct consequence of the breach of contract. It is a perfectly good defence to such an action that the pursuer has undertaken to relieve the landlord of that obligation. He may so agree either at the time when he takes over the property or after a danger has arisen which was not foreseen at that time. He may thus take a risk which by the general rule of law is laid on the landlord. The fact of his remaining in a house which is not in tenantable condition may be a fact to be taken into account as an item of evidence in considering whether he has made any such agreement. But that he has so agreed is matter of fact which must be proved, and I am of opinion that it is not proved by proving the averment that he knew the house was in a condition which might cause danger. That may be a fact to be taken into account, but it is not of itself conclusive.

I must agree that there are dicta and decisions which would support the view which I think is erroneous; but in so far as it is supported by decisions I think these decisions have been overruled by *Smith* v. *Baker*, [1891] A.C. 325. In so far as it is supported by dicta subsequent to that case I think we are bound to follow the judgment of the House of Lords. The rule laid down in *Smith* v. *Baker* is expressed most accurately and compendiously by Bowen, L.J., in the case of *Thomas* v. *Quartermaine*, 1887, 18 Q.B.D. 685, which was cited with approval in *Smith* v. *Baker*. Bowen, L.J., pointed out that the question depended on the defence that the plaintiff in that action knew and submitted to the danger, and he says (p. 696)—"The maxim, be it observed, is not *scienti non fit injuria* but *volenti*. It is plain that mere knowledge may not be a conclusive defence. There may be a perception of the existence of the danger without comprehension of the risk, as where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There may again be concurrent facts which justify the inquiry whether the risk though known was really encountered voluntarily." Now I think it is that last part of the sentence which points out the materiality of the promise to make repairs. That is relevant only as it goes to show whether the pursuer was injured through the breach of contract on the part of the landlord or through his own conduct in remaining in a house where he knew he was exposed to danger, and taking upon himself the risk of any harm that might happen. But the doctrine that mere knowledge that the house is out of repair will form a good defence is, I think, excluded by the decision in *Smith* v. *Baker*, which establishes that knowledge of a danger is not in itself conclusive evidence that the party exposed to it has taken the risk upon himself and so relieved those who might otherwise have been responsible by reason of negligence.

We must, however, consider the importance of what was said in *Smith* v. *Maryculter School Board*. I agree that that is not a decision which can rule this case, because no case decided on relevancy can rule another case laid on different averments. But my difficulty is that the Sheriff-Substitute founds upon a dictum in that case which is not in accordance with the view I have expressed, and I can only say with great respect that I do not think it consistent with *Smith* v. *Baker*. It is suggested that *Smith* v. *Baker* is not applicable, because that was a decision in a question between employer and employed, and may not therefore apply to a question between landlord and tenant. It is obvious that the legal relation is not the same between master and servant as between landlord and tenant. But cases which are in other respects different may

be identical in so far as they depend on one particular plea, and the defence embodied in the maxim *volenti non fit injuria* is the same whether stated by a master against his servant or by a landlord against his tenant. Accordingly the Lord Chancellor (Halsbury) in *Smith* v. *Baker*, [1891] App. Ca. 337, considering whether a person who knows there is a risk of injury to himself debars himself from any right of complaint if such injury should happen to him, says—"We have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited, but where it applies it applies equally to a stranger as to anyone else."

As to the question of title to sue, I entirely agree with your Lordship. The case referred to as decided by the House of Lords last year (*Cavalier* v. *Pope*, [1906] A.C., 428) is not an authority for us in so far as it defines the obligations of lessor and lessee. But it is in so far as it deals with matters on which the laws of both countries are the same; and in regard to the question whether a stranger to the contract is in title to sue upon it, I am not aware of any difference between the law of England and our own law, since there is no ground for the plea of *jus quæsitum tertio*.

I therefore agree in the result at which your Lordship has arrived.

LORD PEARSON—I agree in the opinion just delivered. I think that this record contains relevant averments to support a claim of damages for breach of contract at the instance of Robert Cameron. It is an implied condition of such a contract that the premises are in a tenantable condition and will be maintained in that condition. If the tenant complains of a breach of the condition, as it is his duty to do timeously, his course of action must depend very much on the attitude of the landlord. If the landlord disputes the tenant's allegation, then the tenant stays on at his own risk and must himself judge of the necessity for a speedy removal. But if the landlord by himself or his factor acknowledges the defect and undertakes to set it right, then unless the danger is imminent the tenant may without losing his remedy remain for such a time as is reasonable to admit of the landlord fulfilling his obligation. What is a reasonable time is a question which depends on the circumstances of the case, and therefore the facts must be ascertained. But the landlord's liability will really depend, not on his breach of an incidental promise or undertaking to repair, but on his original contract obligation and the alleged breach of it.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff-Substitute and of the Sheriff, dated respectively 21st June 1906 and 1st August 1906: Of new sustain the first plea-in-law stated for the defenders in so far as regards the pursuers William Cameron, Mrs Ann M'Gregor or Cameron, James Cameron, and Robert Cameron *qua* tutor of Neil Cameron, and find that they have no title to sue: Of new assoilzie the defenders from the conclusions of the action so far as at the instance of these pursuers, and decern: *Quoad ultra* repel the second plea-in-law for the defenders in so far as directed against the relevancy of the action at the instance of the pursuer Robert Cameron, and appoint the issue or issues proposed for the trial of the cause in so far as laid at the instance of the said Robert Cameron to be lodged within eight days: Find no expenses due to or by any of the parties in this Court or in the Sheriff Court."

Counsel for the Pursuers and Appellants—C. D. Murray—Dallas. Agents—Murray, Lawson, & Darling, S.S.C.

Counsel for the Defenders and Respondents—The Dean of Faculty (Campbell, K.C.)—Wm. Thomson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Thursday, January 31.

FIRST DIVISION.

[Lord Dundas, Ordinary.

MACKENZIE *v.* STORNOWAY PIER AND HARBOUR COMMISSIONERS.

Reparation — Harbour — Culpa — Ship — Duty of Harbour-Master.

In a harbour used for fishing vessels wintering, a fishing vessel was moored at a place where the bottom fell away quickly. A second fishing vessel, which was waterlogged, was ordered by the harbour-master to be moved to a particular place, but disregarding such order it was brought alongside the first vessel and moored to her. The next day the man in charge of the second vessel came and allowed some of the water out of her, so that subsequently she floated more easily, and doing so did not take the ground at the same time as the first vessel, with the result that straining she capsized and damaged the first vessel. In an action of damages by the owners of the damaged vessel against the Harbour Commissioners, *held* that no fault on the defenders' part was proved and absolvitor granted.

Thomson v. *Greenock Harbour Trustees*, July 20, 1876, 3 R. 1194, 13 S.L.R. 155, *followed*.

On July 3, 1905, Æneas Mackay Mackenzie, salvage contractor, The Slip, Stornoway, raised an action against the Stornoway Pier and Harbour Commissioners to recover the sum of £260 as loss and damage suffered by him through the alleged total loss of his fishing vessel "Flying Venus."

The defenders, *inter alia*, pleaded—"(2) The pursuer not having suffered any loss through any fault of the defenders, the