The Lord Ordinary (KINCAIRNEY) on 5th November 1901 approved of the following issue:—"Whether between October 1897 and March 1901 the defender seduced the pursuer, and prevailed upon her to permit him to have carnal connection with her, to her loss, injury and damage? Damages laid at £500."

The defender reclaimed, and argued—The pursuer had not set forth a relevant case. The essence of seduction was fraud. It was therefore necessary for the pursuer to aver that she had been induced to surrender her virtue relying upon a promise of marriage, or at least that the defender had professed honourable love towards her leading her to expect marriage—Fraser on Husband and Wife, i. 503; and opinion of Lord President Campbell in *Bennett* v. *Ninian*, *ibid. cit.*; *Linning* v. *Hamilton*, 1748, M. 13,909; *M'Candy* v. *Turpy*, March 3, 1826, 4 S. 520; *Stewart* v. *Menzies*, June 27, 1837, 15 S. 1198; *Kay* v. *Wilson's Trustees*, March 6, 1850, 12 D. 845; *Walker* v. *M'Isaac*, January 29, 1857, 19 D. 340; *Gray* v. *Brown*, June 19, 1878, 5 R. 971, 15 S.L.R. 639. The pursuer's case was that the defender had overcome her resistance partly by solicitation and partly by force. But that was not in law a relevant averment of seduction.

Counsel for the pursuer were not called upon.

LORD JUSTICE-CLERK—I have no doubt that the pursuer is entitled to an issue. I cannot assent to the view that there can be no seduction except under promise of marriage. The defender is charged with having used various arts to overcome the pursuer's chastity—some of them seductive arts, and some of a compulsory nature. But that the averments which she makes constitute a relevant ground of action I entertain no doubt whatever.

LORD YOUNG—I agree.

LORD TRAYNER — I agree. Seduction means, according to our law, that a girl has been induced by various arts to surrender her virtue. Here the girl has been said to have been led away by the ascendancy of the defender over her as her master, by his ascendancy as her senior, by professions of affection towards her on his part, and by threats of violence towards her by him. All these things are just the arts or practices which the defender used to deprive the pursuer of her virtue, and I think the pursuer is entitled to the issue which she asks.

LORD MONCREIFF—I concur.

The Court adhered.

Counsel for the Pursuer and Respondent—Watt, K.C.—Spens. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Appellant Crabb Watt — R. B. Pearson. Agent—William Geddes, Solicitor.

Wednesday, December 18.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CALDWELL *v.* M'CALLUM.

Lease—Damages — Inseeure Condition of Subject—Liability of Landlord—Reparation—Negligence—Known Danger.

In an action brought by the tenant of a house to recover damages from the landlord for injuries sustained by the fall of a portion of the ceiling, the pursuer averred that on re-taking the house in February 1900 the attention of the factor was called to the insecure state of a certain beam, as shown by a crack in the plaster; that the pursuer was afraid the plaster might fall; that he accepted the assurance of the factor that there was no danger; and that in consequence of the landlord's failure to repair the beam, part of the ceiling fell down on 10th August 1900.

Held (*diss.* Lord Young) that the action was relevant.

Hall v. *Hubner*, May 29, 1897, 24 R. 875, 34 S.L.R. 653, *approved and followed*; *Webster* v. *Brown*, May 12, 1892, 19 R. 765, 29 S.L.R. 631, *explained* and *distinguished*.

This was an action raised in the Sheriff Court at Glasgow by William F. Caldwell, clothier, against Robert M'Callum, house factor, Glasgow, in which the pursuer concluded for £25 in name of damages.

The pursuer averred that he had been tenant and occupant of a house in Glasgow, (No. 10 Corunna Street), for which the defender was factor, since February 1899, and that the defender had agreed to accept full responsibility on behalf of the proprietor.

The pursuer averred further—"(Cond. 2) The pursuer re-took the house 10 Corunna Street in February 1900 for the ensuing year from Whitsunday 1900 to Whitsunday 1901. When doing so pursuer stipulated that some repairs and painting and papering should be done. The defender sent one of his assistants to pursuer's house to confer as to what was to be done, who met two of pursuer's daughters. One of the things pointed out to the defender's assistant by them was the apparently insecure condition of one of the beams in the drawing-room. The plaster was cracked, and there was a wide space between the edges of the crack, and pursuer was afraid it might fall. The defender's assistant said that it was all right, and pursuer accepted this assurance that there was no danger. In March the defender painted and papered the room, and painted the said cracked beam without repairing it. (Cond. 3) On 10th August 1900 the plaster-work of the said beam came down without any warning, and the furniture in the room was all more or less damaged by dust or falling pieces of plaster. The fall of said plaster-work, and the consequent damage, was due to the failure of the defender, or those for whom he is

responsible, in not repairing the plaster-work when its dangerous condition was pointed out by pursuer."

The pursuer pleaded—"(1) The pursuer having suffered loss and damage to the amount sued for, in consequence of the fault or failure of the defender, or those for whom he is responsible, decree should be granted, as craved, with expenses."

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

By interlocutor, dated 21st May 1901, the Sheriff-Substitute (BOYD) sustained the first plea-in-law for the defender and dismissed the action.

Note.—"The pursuer claims damages for injury to furniture arising from the fall of plaster from a cracked beam in the ceiling of the drawing-room of the house which he took from the defender. He avers that he pointed out to the defender's clerk, in taking the house, that the plaster was cracked and might fall, but that the clerk replied it was all right. The pursuer did not insist on the crack being repaired. I think he took the risk of the plaster falling, and that the case of *Webster* v. *Brown*, 19 R. 765, applies to this case."

The pursuer appealed to the Sheriff (BERRY), who on 16th October 1901 adhered to the interlocutor of the Sheriff-Substitute.

Note.—"I think with the Sheriff-Substitute that this case falls to be dismissed. When the house, after one year's occupation by the pursuer, was retaken by him in February 1900, it was stipulated that certain ordinary repairs and papering and painting should be done. It is said that the crack in the beam from which plaster subsequently fell was pointed out to the defender's assistant at that time, but while, as stipulated, the room was otherwise painted and repaired, and the cracked beam itself painted, it is said that the beam was not repaired. It is not, however, averred that the defender undertook to repair the beam, and in that respect the case differs from *Shields* v. *Dalziel*, 24 R. 849, where the factor had undertaken to repair the ceiling which was admittedly in an insecure condition. Here I think it must be held that the pursuer undertook the risk, and that he cannot succeed in his claim of damages."

The pursuer appealed to the Court of Session, and argued—The Sheriffs had erred in holding that the case of *Webster* v. *Brown* was applicable to the present case. The judgment in *Webster* proceeded on the ground that the pursuer had continued to occupy the house in face of a known danger, and was therefore barred from claiming damages on the principle of *volenti non fit injuria*. Here it was not obvious to an unskilled person that the defect in the ceiling was a source of danger; and further, the pursuer was entitled to rely on the assurance given him by the factor, who was skilled in such matters, that there was no danger. The circumstances here were indistinguishable from those in *Hall* v. *Hubner*, May 29, 1897, 24 R. 875, 34 S.L.R. 653, where an issue was allowed; see also *Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, 34 S.L.R. 635; Ersk. Inst. ii. 6, 43.

Argued for the defender and respondent—The Sheriffs were right in holding that the case fell within the principle of *Webster* v. *Brown*. The pursuer's averment was that he remained in the house in knowledge of the insecure state of the ceiling. The legal consequence was that he remained at his own risk—*Russell* v. *Macknight*, November 7, 1896, 24 R. 118, 34 S.L.R. 73; *M'Manus* v. *Armour*, July 10, 1901, 38 S.L.R. 791.

LORD JUSTICE-CLERK — This case I think differs from those founded on by Mr M'Lennan and the Sheriffs. These were all cases where the accident happened without any alteration having taken place in the premises—at the time of the accident the house was just in the condition in which it was taken by the tenant. In the case of *Webster* v. *Brown*, where the accident was caused by the worn condition of certain steps, the tenant took the house in the knowledge that the steps were worn, and in the case of *Russell* v. *Macknight* there was again no change of circumstances, the accident arising from the absence of a hand-rail to a stair, which was known to the tenant to be absent when he took the house. In another case, *M'Manus* v. *Armour*, there had been a defective brick in the floor of a wash-house for a considerable time. Now, here the circumstances are different, the accident being due to a change in the condition of the house. No doubt there may be falls of plaster from ceilings due to causes for which a landlord could not be held to be responsible, as, for instance, an overflow of water from a flat above in a tenement or a sudden explosion in the neighbourhood. But the peculiarity here is that the pursuer avers that he applied to the factor about certain repairs, and that the factor sent his assistant to see what required to be done. The pursuer's daughters then pointed out to the assistant a crack in the ceiling which they indicated as being in their opinion a possible source of danger. The assistant, however, assured them that there was no danger and no need to do anything. Now, this was a matter requiring skill, which the pursuer and his daughters could not be expected to have. It may be that the factor was not himself a man skilled in such matters, but it was his duty to find out whether there was danger or not, and if he or his assistant chose to give an assurance of safety without due inquiry, he took the risk of an accident happening. On the whole matter I think the pursuer has stated a relevant case, and that proof should be allowed.

LORD YOUNG—I do not say that this is not a difficult case, but I am of opinion that there is no reason for interfering with the judgments of the Sheriff-Substitute and the Sheriff. A crack in the plaster of a ceiling is a common thing in all houses, and I do not think that such a crack can be regarded as an obvious danger. The

pursuer in February re-took the house on condition that the landlord should execute certain repairs. He does not allege that it occurred to him that the crack was an obvious danger until the defender's assistant came to arrange about the repairs. He did not himself meet the assistant, but his two daughters pointed out the apparently insecure condition of one of the beams. That is his statement as to the time when he first became aware of the dangerous state of the ceiling. But he lived on in the house, although he was afraid that the plaster might fall, until August, when it came down. I think this is not such a case as to make it desirable that we should interfere with the judgment of two Sheriffs in a matter which is very familiar to them.

LORD TRAYNER—I agree with your Lordship in the chair that the pursuer has presented a case for inquiry. I am unable to distinguish this case in principle from that of *Hall*, and I am prepared to follow it, and to hold this action relevant. The Sheriff-Substitute and the Sheriff have dismissed the action upon the authority of the case of *Webster*. I think the case of *Webster* does not apply. The case of *Shield* was very similar to this, but with this distinction, that there was in that case a positive undertaking by the landlord to remedy the defects complained of, while here there is no averment of a positive undertaking by the landlord to do so.

But the pursuer's case may be relevant although he has not averred everything that was averred in the case of *Shield*. The difference between the two cases is this, that in *Shield* the landlord undertook expressly as part of his bargain to repair the defect in the house let—here, if the defender did not expressly undertake such an obligation, the law nevertheless imposed it on him. The obligation, express or implied, is the same, viz., to give a habitable house to the tenant. The pursuer avers that he did not get such a house, and suffered damage in consequence. I therefore agree that proof should be allowed.

LORD MONCREIFF—I agree that there must be inquiry. I think the Sheriffs have thrown out the case upon a misconception of certain decisions, which have been referred to; I am not surprised at this, because certainly the distinctions which have been made in these cases are very fine. But I do not agree with the Sheriffs that the case of *Webster* is in point. The real ground of action is that the house was not habitable in respect that this ceiling was insecure. The defence urged is that which was stated in *Webster*, viz., that the danger was patent to the pursuer. In answer to that defence the pursuer founds upon the assurance given by the defender through his assistant "that it was all right." The whole importance of that is to meet that defence.

I concur in the observations which have been made by Lord Trayner upon the cases cited during the debate. The cases of *Webster* and *M'Manus* were clearly cases of seen danger. The pursuer's averments in the case of *Hall*, that the attention of the defender's factor was drawn to the condition of the ceiling, and that he did nothing to remedy the defect, were not so strong as those stated here, because here the pursuer was led to believe that the ceiling was safe, while in *Hall's* case he remained though he knew of the danger. Those averments were held in *Hall's* case to entitle the pursuer to inquiry, and I think that we should allow proof in this case.

The Court sustained the appeal, recalled the interlocutors appealed against, repelled the first plea-in-law for the defender, and remitted the cause to the Sheriff to allow the parties a proof of their respective averments.

Counsel for the Pursuer and Appellant — M'Clure. Agent — Andrew Gordon, Solicitor.

Counsel for the Defender and Respondent —Guthrie, K.C. — M'Lennan. Agents — Simpson & Marwick, W.S.

Wednesday, December 18.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MALCOLM *v.* MOORE.

(Reported *ante*, p. 26).

Expenses — Tender — Expenses to Date of Tender — Precognitions Taken before Issue Allowed, and also before Date of Tender

Where in respect of a tender which had been rejected by a pursuer, the pursuer was found entitled to expenses only "to 12th June 1901," being the date of the tender, *held* that such an award included only the expenses properly incurred before that date, and consequently did not include the expense of precognitions taken before the adjustment of issues for the trial of the cause, although they had in fact been taken prior to the date up to which expenses had been allowed.

This was an action of damages for slander at the instance of Thomas Malcolm, compositor, Iona Street, Leith, against William Moore, 7 Balfour Street, Leith.

On 12th June 1901 the defender offered an apology, and tendered the sum of £51 and expenses. The tender and apology were not accepted by the pursuer, and the case was tried before a jury. The jury found for the pursuer and assessed the damages at the sum of £50.

On 25th October the Court, being of opinion that the apology offered was ample, and ought to have been accepted by the pursuer, found "the pursuer entitled to expenses to 12th June 1901" (the date of the tender), and found the defender entitled to expenses subsequent to that date.