Wednesday, March 20.

SECOND DIVISION.

[Sheriff Court at Glasgow.

KENNEDY *v.* BRUCE.

Reparation — Negligence — Landlord and Tenant — Title to Sue — Action against Landlord for Damages Caused by Fall of Defective Ceiling in House—Title of Occupant other than Lessee to Sue—Contract—Jus quæsitum tertio—Negligence.

A woman who was employed as housekeeper by, and resided with, the tenant under a lease of a house, sued the proprietor of the house for damages in respect of injuries received by her from the fall of part of the ceiling of one of the rooms of the house. She averred that the ceiling was old and rotten, and that she had called the defender's attention to its dangerous condition. *Held* (1) that the pursuer, not being a party to the contract of lease, and not averring any *jus quæsitum* under it, had no title to sue on the contract, and that the action, in so far as it was laid on the contract, was irrelevant, but (2) that the pursuer was entitled to sue the defender on the ground of negligence, and that the action, in so far as it was laid on negligence, was relevant.

Cavalier v. *Pope*, [1906] A.C. 423, and *Camerons* v. *Youngs*, 44 S.L.R. 344, *distinguished.*

Process—Appeal for Jury Trial—Trifling Nature of Cause — Remit — Proof before Answer.

In an action of damages to recover £150, raised in the Sheriff Court by the housekeeper in a house against the proprietor thereof for injuries suffered through the fall of part of the ceiling, the defender averred on record that the pursuer by remaining in the house acted in face of a known danger and accepted the risk of accident; and the pursuer averred that she remained in reliance on a promise made by the defender to repair the ceiling. The Sheriff-Substitute having allowed a proof, and an appeal for jury trial having been taken, the Court, being of opinion that a question of law was raised by the averments, and that it seemed probable that the pursuer's injuries could not have been of a very serious description, *remitted* the cause to the Sheriff-Substitute to allow a proof before answer.

Mrs Sarah M'Donald or Kennedy sued John W. Bruce, accountant and property agent, Glasgow. The pursuer was employed as housekeeper by and resided with James M'Corriston, the tenant of a house at 85 Denmark Street, Possilpark, Glasgow. The defender was the proprietor of the said house.

The pursuer averred that the defender managed the property and that he or one of his clerks called monthly for the rent. She also averred—"(Cond. 3) The ceiling of the said house, particularly in the kitchen is, and at the time of the accident hereinafter condescended on was, old and rotten, and dangerous to the inmates. The defender, or his clerk, on the occasions of his calling for the rent, saw, or ought to have seen, that the ceiling was old, that it was in a dangerous condition, and that it needed to be renewed or at least repaired. The defender, or one of his representatives was continually about the property, and was frequently in both apartments in pursuer's house. Moreover, the attention of the defender's representative was drawn, on more than one occasion, by the pursuer to the condition of the ceiling. (Cond. 4) On the morning of Monday, 28th May 1906, when defender's representative called at the house for the rent, the pursuer pointed out to him that there was a crack in the ceiling of the kitchen in said house above the kitchen sink, that it was widening, that the ceiling was now bulging down, and that it would need to be repaired at once. The defender's representative stated that the matter would be attended to, and pursuer remained on in reliance on that promise, and daily expected to have the ceiling repaired by the defender as promised. (Cond. 5) On the afternoon of the following Thursday, 31st May 1906, a portion of the kitchen ceiling, about 4 feet square, fell and struck the pursuer on the head, neck, and shoulders, and severely injured her. She sustained severe and painful bruises on the head, neck, and shoulders. Further, she suffered from broncho-pneumonia as the result of the accident, and was confined to bed for several weeks. Her speech was also affected as a result of the accident. Since the occurrence of said accident the pursuer has been under medical treatment for the injuries then received, and she has incurred considerable expense in this way. She suffered, and is still suffering, from nervous shock in consequence of the accident. She is unable to perform her duties as a housekeeper, and has lost the wages which, apart from her injuries, she would have earned. She suffers from giddiness and impaired sight, these being due to the accident, and her general health continues poor. She is weak and listless, and, in point of fact, her health generally is not nearly as good as it was prior to the accident. She is easily tired and cannot accomplish the work which she was in the habit of doing before her injuries were sustained. Her present condition is due to the accident aforesaid." She also averred that it was the defender's duty to keep the ceiling in a safe condition, and in particular to have it repaired immediately after its dangerous condition was pointed out to his representative and complaint made as to it, and that the accident to the pursuer was caused by his fault in not keeping the ceiling in a safe condition.

The defender admitted that the pursuer pointed out a crack in the ceiling to his collector on 28th May 1906, but averred that, assuming the ceiling was in the condition alleged by the pursuer, it was the duty of the pursuer and the tenant to have removed from the house, and that by remaining in

the house they acted in face of a known danger and accepted the risk of an accident.

The pursuer pleaded—"(1) The defender, being landlord of the premises, was bound to put and keep the said house in good and tenantable condition, and he having failed to do so, the pursuer is entitled to compensation for the loss, injury, and damage she has thereby sustained. (2) The pursuer having suffered loss, injury, and damage through the fault of the defender, he is bound to compensate her therefor, with expenses."

The defender pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. (2) Assuming said accident did happen the pursuer having acted in face of a known danger took the risk of accident, and is barred from insisting in the present action."

On 8th November 1906 the Sheriff-Substitute (DAVIDSON) repelled the defender's first plea-in-law and allowed a proof.

The pursuer appealed to the Court of Session for a trial by jury.

Argued for the defender and respondent —1. The action was irrelevant, and the pursuer had no title to sue. There was no contract between the pursuer and the defender, and therefore the pursuer could not sue upon the contract; and as the defender was under no obligation to parties other than the tenant to keep the house in a tenantable condition, the pursuer had no title to sue on the ground of fault—*Cavalier* v. *Pope*, [1906] A.C. 428, [1905] 2 K.B. 757; *Camerons* v. *Youngs*, January 26, 1907, 44 S.L.R. 344. The distinction between the law of England and the law of Scotland, if there was any such distinction as contended for by the pursuer, did not affect the authority of *Cavalier* v. *Pope* as to this case; and in *Camerons* v. *Youngs*, where the action was laid upon both breach of contract and fault, the cases of *Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, 34 S.L.R. 635, *Caldwell* v. *M'Callum*, December 18, 1901, 4 F. 371, 39 S.L.R. 257, and *Smith* v. *School Board of Maryculter*, October 20, 1898, 1 F. 5, 36 S.L.R. 8, founded on by the pursuer, were reviewed, and Lord M'Laren noticed the distinction between Scots and English law, and observed that it did not affect the question of title to sue. Further, in *Cavalier* v. *Pope* the landlord made promises at the commencement of the lease that the house would be put in a tenantable condition, thus expressly undertaking the duties implied in the law of Scotland, and it was on this footing that the case was decided, so that the distinction between the two systems of law was immaterial on this point. Accordingly, *Cavalier* v. *Pope* and *Camerons* v. *Youngs* were indistinguishable from the present case, and should be followed. 2. Assuming that the defender was liable to parties other than the tenant, the pursuer here was barred from obtaining damages, seeing that she had remained in the house in face of this known danger, and must therefore be taken to have accepted the risk—*Smith* v. *School Board of Maryculter*, *cit.* 3. In any event, the case should be remitted to the Sheriff. The injuries to the pursuer were not of a grave description, and it was not averred that she had been compelled to give up her situation as housekeeper, nor was it stated what her wages were. Hence, she could not reasonably be entitled to a sum of £40, and the action fell to be remitted—*Sharples* v. *Yuill & Company*, May 23, 1905, 7 F. 657, 42 S.L.R. 538. Moreover, as the averments as to the pursuer's accepting the risk of accident raised a question of law, the case was not proper for a jury, and if the pursuer were entitled to have her claim investigated, a proof should be allowed.

Argued for the pursuer and appellant— 1. Apart from the cases of *Cavalier* v. *Pope* and *Camerons* v. *Youngs*, it was clear on the authorities that the pursuer had a title to sue, and that the action was relevant. In *Shields* v. *Dalziel*, *cit.*, *Hall* v. *Hubner*, May 29, 1897, 24 R. 875, 34 S.L.R. 653, and *M'Kinlay* v. *M'Clymont*, October 28, 1905, 43 S.L.R. 9, actions by the wife of the tenant against the landlord of the house, in respect of injuries, were sustained; and in *M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, 9 S.L.R. 239, and *Fulton* v. *Anderson*, November 18, 1884, 22 S.L.R. 100, actions by other parties who had been injured on the premises were sustained—see also *Caldwell* v. *M'Callum*, *cit.* By the common law of Scotland the duty was imposed on the landlord of keeping the house in tenantable condition, and in the cases cited the decisions were based on his failure to discharge that duty. In *Cavalier* v. *Pope*, *cit.*, the case was treated mainly as laid on the contract, and the decision proceeded on the ground that the plaintiff was not a party to the contract—see Lord Loreburn's opinion [1906], A.C., at p. 429; and in so far as it turned on the English law as to the duties of a landlord it was here inapplicable. By the law of England, contrary to the law of Scotland, no duty, apart from special contract, was cast upon the owner of a house to see that it was in a safe condition at the commencement of the lease, and no action for injuries due to the unsafe condition of the house would lie against the owner—Lord Atkinson's opinion in *Cavalier* v. *Pope*, [1906] A.C., at p. 432; *Lane* v. *Cox*, [1897] 1 Q.B. 415; Woodfall's Law of Landlord and Tenant (17th ed.), p. 793. The distinction between the two laws was illustrated in *Lane* v. *Cox*, *cit.*, and *Fulton* v. *Anderson*, *cit.*, where the facts were the same, but the decisions of the Courts were different. Hence *Cavalier* v. *Pope* did not rule the present case, in so far as it was laid on the landlord's breach of duty; and *Camerons* v. *Youngs* was equally inapplicable, as the case was treated solely as proceeding on contract, and the other ground of action was not considered. 2. The case could not be dismissed on the ground that the pursuer had accepted the risk of accident, seeing that the pursuer averred a promise by the defender to repair the ceiling, in reliance upon which the pursuer remained in the house; and the whole facts must be investigated. 3. The pursuer was entitled to an issue. The case could not be remitted unless an award of £40 was out of the question, which was not the case here. An issue was allowed in *Cooper* v. *Caledonian Railway Company*,

June 14, 1902, 4 F. 880, 39 S.L.R. 660. The case was of a simple nature, and there was no reason for withdrawing it from jury trial.

The opinion of the Court (the LORD JUSTICE-CLERK, LORD STORMONTH DARLING, and LORD ARDWALL) was delivered by

LORD ARDWALL—In this action the pursuer, who is housekeeper to James M'Corriston, labourer, sues John W. Bruce, who is the proprietor of the house No. 85 Denmark Street, Glasgow, of which M'Corriston was tenant, for damages in respect of injuries received by her on 31st May 1906 caused by a portion of the kitchen ceiling falling and striking her on the head and neck. The action is laid, as expressed in the first plea-in-law, upon the defender's obligation as landlord of the premises to keep the house in good and tenantable condition, and alternatively, as expressed in the second plea-in-law for the pursuer, on the fault of the defender for having permitted his property to remain in a state dangerous to the lieges after he had been warned that it was in a dangerous condition and had promised to repair it.

The case of *Camerons* v. *Youngs*, January 26, 1907, 44 S.L.R. 344, was relied on by the defender as an authority for dismissing the action altogether as irrelevant. I am of opinion that that case merely proceeds upon what all along has been undoubted law in Scotland as well as in England, namely, that an action laid upon contract can only be insisted in by the parties to the contract or by a person who has a *jus quæsitum* under it. Now, the person who is entitled to insist upon a dwelling-house being in good and tenantable condition in a question with the owner of that house is the tenant under a contract of lease, and in the present case that would be Mr M'Corriston. The pursuer not being a party to the contract of lease, and not alleging any *jus quæsitum* under the same, is not entitled to sue upon that contract, and this action so far as laid on that contract is irrelevant. I am of opinion accordingly that the first plea-in-law for the pursuer must be repelled.

With regard, however, to the second plea-in-law, which founds the pursuer's claim of reparation upon fault, I cannot hold that that is affected by the decision in *Camerons* v. *Youngs*, for in none of the opinions of the learned Judges who decided that case is there any suggestion to the effect that in deciding the case in the way they did they were calling in question the common law of Scotland, which allows any person who has been injured by premises having been left in a dangerous condition to sue the proprietor, or it may in certain circumstances be the tenant, of such premises on the ground of fault. That such action is competent and relevant was decided by the First Division of the Court in the case of *Shields* v. *Dalziel*, May 14, 1897, 24 R. 849, a case practically on all fours with the present, and the same was held in the case of *Caldwell* v. *M'Callum*, 4 R. 371, in this Division of the Court. Both these cases were referred to in the case of *Camerons* v. *Youngs*, apparently with approbation by Lord M'Laren and the other Judges who agreed with him. There are many other decisions to the same effect as those above quoted, and I cannot believe that the Judges of the First Division meant to establish an opposite doctrine by the decision they gave in the case of *Camerons* v. *Youngs*. I have procured the session papers in the case of *Camerons* v. *Youngs*, and although I see that that action was, *inter alia*, laid upon fault, that ground of action seems either not to have been relied on by the pursuers in the discussion before the First Division or to have dropped out of the case in some other way.

It is quite true that in the English case of *Cavalier* v. *Pope*, A.C. (1906), 423, it was held that a tenant's wife, being a stranger to the contract of lease, had no claim for damages against the owner of a house, but there the action was laid entirely upon contract, and indeed could not have been successfully laid upon fault against the owner, because I understand the law of England to be, as stated in Bevan on Negligence (1889 edition), 1074, 2nd edition, vol. 1, p. 490, thus—"By common law the occupier and not the landlord is bound as between himself and the public so far to keep buildings in repair that they may be safe for the public, and the occupier is therefore *prima facie* liable to third persons for damages arising from any defect."

Now in *Cavalier* v. *Pope*, if the action had been laid upon fault, the defender would have been the plaintiff's own husband, who along with her was suing the landlord in the action which was decided in the House of Lords; but according to Scotch law as expounded in the cases I have already referred to, the owner of the house is in similar circumstances liable to third parties on the ground of fault provided it can be established against him.

In the present case, besides the question just dealt with, the defender pleads that the pursuer was acting in the face of a known danger, to which the answer is made that she did so in consequence of the promise of the landlord to repair the ceiling at once, otherwise she would have left the house. Seeing that these questions of law are raised in this action, and further, that although the action concludes for £150, it seems probable from the averments that the injuries could not have been of a very serious description, in my opinion the proper course is to recal the Sheriff-Substitute's interlocutor of date 8th November 1906, repel the first plea for the pursuer, and *quoad ultra* remit the cause to the Sheriff to allow a proof before answer and to proceed with the cause as shall seem just; reserve all questions of expenses, and grant power to the Sheriff to deal with the expenses of the appeal.

LORD LOW was absent.

The Court pronounced an interlocutor as proposed.

Counsel for the Pursuer (Appellant)—Watt, K.C.—Munro. Agent—D. Maclean, Solicitor.

Counsel for the Defender (Respondent)—M. P. Fraser. Agent—L. M'Intosh, S.S.C.