L.J., said: "If that question had been before us I should have had very great misgivings whether the plaintiffs were entitled to recover, because if they knew the danger and chose to risk it, it is their own fault; they are volunteers, and in my opinion the defendants ought not to have been made liable to them in that case."

Although this was obiter, yet it touches the point upon which I have the chief difficulty in the present case. The plaintiff had paid for the right of selling her produce in the market. She was entitled, I think, to have the stall in a reasonably fit and sanitary condition for that purpose. This I find it was not, and upon the evidence the strong probability is, and I find as a fact, that her sickness was caused by this unsanitary condition. The question then remains, ought the plaintiff to recover, inasmuch as she knew of this condition and remained there? Her answer to this question in her evidence was that she gave notice of the unsanitary conditions to the defendants, who promised from time to time to repair them, and this she fully expected they would do and so remained on, not realizing her danger.

In the present case the principal trouble arose from the fact that a gutter and down-pipe was clogged, causing an over-flow of the water, and also tending to destroy the roof. Under the facts in this case, it was, I think, clearly the duty of the defendants to make repairs, including this gutter. This, indeed, was admitted by the officer in charge of the market place. There was no inspection, and apparently no repairs made until they did receive notice.

[Reference to Hargroves v. Hartopp, [1905] 1 K.B. 472.]

In the present case whether the plaintiff was lessee or licensee it is quite clear from the evidence that the control of the gutter and down-pipe did not pass to the plaintiff and that the duty to see that it was kept in repair devolves exclusively upon the defendants. The defendants neglected to discharge this duty which they owed to the plaintiff, and the injuries complained of resulted from such neglect. The action does not arise out of the relation of landlord and tenant, or any covenant, express or implied, to repair, but it arises by reason of the duty raised from the defendants to the plaintiff by the license and payment for the right to occupy the stall. In this regard, I think, the case is distinguished from the Brown case, and I find that the plaintiff, under the circumstances, was not guilty of any contributory negligence in respect of the neglect which caused the injury. She had no right as licensee to make the repairs. Even