The defendant's real defence must be that in doing as he did he took reasonable care. He is not in the position of an insurer, liable at all hazards. . . .

[Reference to Hughes v. Percival, 8 App. Cas. 443, 445.]

That case was after Dalton v. Angus, 6 App. Cas. 740, and in its facts more nearly approaches this than does either Dalton v. Angus or Bower v. Peate, 1 Q.B.D. 321 . . . ; although in all of them the invasion of a right of property, in other words, a trespass, was an element, and in the first two a prominent element, which suggests that caution must be exercised in applying them to cases where no similar right is involved, a point referred to by Lord Blackburn, at pp. 446, 447, in Hughes v. Percival. Negligence is not an element in trespass; the only question is, was the wrongful or illegal act committed? See Sadler v. South Staffordshire, etc., Tramway Co., 23 Q.B.D. 17.

The result is, that the question here appears to be one of fact —did the defendant, by employing an independent contractor and by adopting and acting upon a plan prepared by an architect, do all that a reasonable man, in such circumstances, should have done? That was a question for the jury, to whom, in my opinion, with deference, it was not clearly submitted in the learned Judge's remarks. . . .

For these reasons, I very reluctantly have come to the conclusion that the only thing we can do is, if the defendant Reid desires it, to send the case back for another trial; the costs of the last trial to be costs in the cause to the finally successful party, the costs of this appeal having been provided for by the order granting leave to appeal. And in reaching this conclusion I am influenced to some extent by the circumstance that the jury may have been misled by the learned Judge's remarks, not, I think, warranted by the evidence, concerning the arches.

If the defendant does not, within one month, elect to accept a new trial, the appeal should be dismissed with costs.

MACLAREN, J.A.:—I am unable to find any principle upon which the defendant can be held liable in this case. It has long been well-settled law that, in such a case as this, it is the tenant or occupier, and not the landlord, who is responsible to third persons: Woodfall on Landlord and Tenant, 17th ed., p. 797; Cheetham v. Hampson, 4 T.R. 318; Bishop v. Trustees, 1 E. & E. 697. . . .

My opinion would be, that the plaintiff did not make out such a case as would entitle her to a verdict. But, inasmuch as a majority of my colleagues are of opinion that the case was not