

The objectionable element in the lease in the Davies case was a compound covenant as to repair, in these words, that the lessee would "at all times during the term keep the premises in good and substantial repair, and the same in good and substantial repair deliver up at the expiration or sooner determination of the term, fair wear and tear and damage by tempest excepted." The Judge read these words of exception in the last clause as referring not only to the later branch of the covenant, but to it as a whole. It was then construed as a provision exempting the tenant during the whole term for repairs rendered necessary by wear and tear or by damage from tempest. It was laid down as law that but for these words the tenant would be liable to replace dilapidations arising from the wearing out of the walls and floors, and also such as would arise from a storm blowing off the chimney-pot or breaking in the roof. In these particulars, therefore, it was said the tenant was rendered unimpeachable for waste: p. 505.

In the present lease, which is made under the statutory short form as found in R. S. O. 1887 ch. 106, the covenants . . . are "to repair," "that lessors may enter and view repair," "that lessee will repair according to notice," and that the lessee will leave the premises in good repair (reasonable wear and tear and damage by fire or tempest only excepted). These occur in the short form as numbered 3, 6, and 8 respectively, with the corresponding expansions of meaning. The written lease goes beyond the statutory exception, which is limited to reasonable wear and tear and damage by fire only excepted. The lease also excludes damage by tempest, which was also the exception in the Davies case. But by the statutory collocation followed in the lease, this exception I do not read as applicable to repairs during the term, but only to what shall occur at the end of the term. Then the premises are to be left, according to the covenant, in as good a condition as they were in at the beginning of it, "subject to the exception of dilapidations caused by the friction of the air, by exposure, and by ordinary use:" see Fawcett, 3rd ed., p. 341. But if the building has at that period been destroyed by fire or tempest—through unavoidable casualty that is—it need not be replaced by a new structure. This exception relieves the tenant from putting up the buildings destroyed by pure accident as a matter of repair to the premises, but it will not save him from liability if the destruction has been caused by his negligent or wilful act.