

through the fall of plaster from the ceiling (*m*). In this case the evidence shewed that the tenant knew the ceiling to be in a dangerous state, as the plaster had fallen several times before the injury was inflicted. Yet it was not suggested either by the court or by counsel that this circumstance precluded him from recovery. It may be said that a distinction between this and the Ontario case is predicable on the ground that in the former the duty violated was statutory, and, in the latter, merely conventional; but this argument can scarcely prevail in view of the series of judgments which have settled that the maxim, *Volenti non fit injuria*, is an available defence, under appropriate circumstances, to actions for a breach of the duties imposed by the Employers' Liability Act (*n*). Indeed another objection to the case under discussion is also suggested by the decision of the House of Lords cited below. That decision has finally settled that the consent of a plaintiff to take a risk must be found by the jury as a fact, and cannot be inferred merely from his knowledge of the conditions to which he continued to expose himself. This doctrine the Ontario court has plainly disregarded in holding, as matter of law, that the tenant took the risk.

4. **Obligation of tenant to repair in the absence of express stipulations.**—Owing to the fact that the responsibilities of tenants are almost invariably defined by written instruments, which contain specific provisions with respect to the repairing of the premises, the cases bearing upon the extent of the obligation to repair in the absence of express stipulations on the subject are by no means numerous; and even the few which the books contain are far from being harmonious.

The tenants' responsibility has been ordinarily referred to one of two theories:

- (1) That his failure to repair produced certain physical conditions which amounted to waste.
- (2) That he was under an implied agreement to do the repairs which were neglected.

Besides these there is, theoretically, a third conception available as a basis of a declaration, viz., that suggested by the following passage from *Com. Landl. & T.*, (p. 188), which has been quoted with approval by the Supreme Court of the United States (*a*). "By the very relation of landlord and tenant the law imposes an obligation on the lessee to treat the premises demised in such manner that no injury be done to the inheritance, but that the estate may revert to the lessor undeteriorated by the wilful or

(*m*) *Walker v. Hobbs* (1889) Q.B.D. 458.

(*n*) The last of these is *Smith v. Baker* (H.L.E. 1891) A.C. 325.

(*a*) *United States v. Bostwick* (1876) 94 U.S. 53. The argument in this case was adopted in *Wolfe v. McGuire* (1896) 28 Ont. R. 45.