

(D) It would also seem that, where a covenant to repair is subject to an exception of casualties by fire and tempest, the landlord cannot be called on to do repairs rendered necessary by such casualties. But the authorities, as they stand, scarcely warrant a statement of this doctrine in an unqualified form. Under the old forms of procedure, it was held that a tenant who had laid out his own money in repairing the damage done by the excepted casualties, could not set off that sum in an action for the rent, as it represented uncertain damages which must be assessed by a jury (e). Lord Kenyon suggested that relief might be obtained in equity. Probably as a result of this suggestion, the parties did make application for such relief; but the application was refused, the Court being of opinion that, if the tenant had a right to be recouped, he had a sufficient remedy at law, since he could set off the sum spent when he was sued for the rent (f). These decisions, it will be observed, are not conclusive against the existence of a right of recoupment under a more liberal system of procedure. There is some authority for the doctrine that, where the lessee's covenant is subject to the exception of fire, and the premises which were burnt down were insured by the landlord, equity will enjoin the collection of rent, until the premises have been rebuilt (g). But apparently, in view of later decisions this doctrine, if sound, must rest entirely upon the fact that the lease embraced the exception as to fire, for it is now settled, as to cases in which the tenant's covenant to repair is not subject to this exception, that the landlord cannot be compelled to apply the proceeds of an insurance policy to the reconstruction of the premises after they have been destroyed by fire (h).

3. Agreement of landlord to repair, whether tenant entirely relieved from responsibility by.—Even where the landlord has expressly agreed to do repairs, the tenant is possibly not wholly absolved from responsibility. The doctrine of an Ontario case is

the premises were made uninhabitable by the wrongful act or default of the landlord himself. He was of opinion that this was really the theory of the decision, and that the statement of facts in the report was imperfect.

(e) *Weigall v. Waters* (1795) 6 T.R. 488.

(f) *Waters v. Weigall* (1795) 2 Anstr. 515.

(g) *Brown v. Quilter* (1764) Amb. 621; *Campden v. Moreton*, 2 Platt on Leases 192; both decisions by Lord Northington.

(h) *Leeds v. Cheatham* (1827) 1 Sim. 146; *Lofft v. Dennis* (1859) 1 E. & E. 474, 28 L.J. Q.B. 168.