Canada Law Journal.

VOL. XXXVII. SEPTEMBER 1, 1901. NO. 17.

OBLIGATION OF TENANTS WITH RESPECT TO THE REPAIR OF THE PREMISES DEMISED TO THEM.

I. OBLIGATION OF THE PARTIES IN THE ABSENCE OF AN EXPRESS AGREEMENT.

1. Landlord not bound to repair in the absence of an express agreement to do so.
2. Consequences of this principle.
3. Agreement of landlord to repair, whether tenant entirely relieved from responsibility by.
4. Obligation of tenant to repair in the absence of express stipulations.
5. Liability of tenants for voluntary waste.—(*a*) *Tenants for years.* (*b*) *Tenants from year to year or at will.*
6. Liability of tenants for permissive waste.—(*a*) *Tenants for years.* (*b*) *Tenant from year to year and at will.*

6a. Comparison between the extent of the obligations created by the duty to refrain from waste and by an express agreement to repair.—(*a*) *Where voluntary waste has been committed.* (*b*) *Where the waste is merely permissive.*

6b. Obligation to repair, treated as one arising from an implied contract.

II. CONSTRUCTION AND EFFECT OF THE VARIOUS COVENANTS RELATING TO REPAIRS. GENERALLY.

7. Enumeration of covenants respecting repairs.—(*A*) *Covenants to repair and keep in repair during the term.* (*B*) *Covenants to repair within a certain period after notice from the landlord.* (*C*) *Covenants to deliver up in good repair.* (*D*) *Covenants to put into repair.* (*E*) *Covenants to paint.* (*F*) *Covenants of indemnity.*
8. Obligations created by these covenants are independent.
9. Contemporaneous agreements by lessor and lessee as to repairs, effect of.
10. Covenants to repair considered in relation to the validity of leases given in pursuance of powers.
11. During what period agreements to repair are obligatory.
12. Obligation of covenants as to repair, how far continuous.—(*a*) *General covenant to keep in repair.* (*b*) *Covenant to put in repair.*
13. What covenants respecting repairs are classed among the "usual" covenants of leases.
14. Short Forms Acts.

37. Transferees of the interest of the lessee in the leasehold estate. — (*a*) *Assignees of terms for years.* (*b*) *Assignees of tenants from year to year.* (*d*) *Equitable assignees.* (*e*) *Persons succeeding lessees in possession without an assignment.* (*f*) *Underlessees.*

38. Mortgagees of the term.—(*a*) *Legal mortgagees.* (*b*) *Equitable mortgagees.*

39. Personal representatives of tenants. — (*a*) *Generally.* (*b*) *Liability for dilapidations prior to the death of the lessee.* (*c*) *Liability for dilapidations accruing during the administration of the estate.* (*d*) *Liability of executor of assignee of term.*

40. Legatees of the term.—(*a*) *Legatees taking the term as an absolute gift.* (*b*) *Legatees taking the term as tenant for life.*

41. Beneficiaries of a leasehold held in trust.

42. Guarantor of the performance of the covenant.

VIII. JUDICIAL RELIEF FROM THE CONSEQUENCES OF NON-PERFORMANCE OF THE COVENANTS.

43. In the course of an action on the covenants. — (*a*) *At common law.* (*b*) *Under statutes.*

44. By the intervention of a court of equity. — (*a*) *General rule.* (*b*) *Accident, surprise, mistake, etc.* (*c*) *Notice to quit given by the landlord before his assertion of his rights under the covenant.* (*d*) *Negligence of persons employed to do the repairs.* (*e*) *No person properly qualified to perform the covenant.* (*f*) *Lunacy of landlord.* (*g*) *Breach not wilful.* (*h*) *Assurances leading the tenant to suppose that the repairs need not be proceeded with.* (*i*) *Possibility of compensating the landlord for the breach.* (*j*) *Pendency of negotiations with a third party, looking to the total destruction of the subject-matter.* (*k*) *Judgment in action obtained by default.*

IX. DEFENCES TO ACTIONS FOR A BREACH OF THE COVENANT.

45. Recovery of damages in a previous action.

46. Repairs executed after the commencement of the action.

47. Dilapidations due to lessor's unlawful act.

47a. Transfer of defendant's interest prior to the commencement of the action.

48. Impossibility of performance without the commission of a trespass.

49. Impossibility of performance resulting from the rebuilding of the premises by the tenant.

50. Impossibility of performance arising from the act of the legislature.

51. Vis major as an excuse for non-performance.

52. Destruction of the subject-matter of the covenant by fire.

53. Agreement subsequently modified by the consent of the landlord.

54. Waiver of the right of action by the landlord.—(*a*) *Acceptance of rent after breach.* (*b*) *Effect of notice to repair given prior to action on general covenant.* (*c*) *Eviction.*

55. Landlord's acquiescence in the non-performance of the covenants.

X. MEASURE OF DAMAGES IN ACTIONS BROUGHT PRIOR TO THE EXPIRATION OF THE TERM BY THE SUPERIOR LANDLORD AGAINST HIS IMMEDIATE LESSEE.

56. Substantial damages may always be recovered.

57. Doctrine that the measure of damages is the amount necessary to put the premises in good repair.

58. Doctrine that the measure of damages is the depreciation in the selling value of the reversion caused by the breach.

XI. MEASURE OF DAMAGES IN ACTIONS BROUGHT AFTER THE EXPIRATION OF THE TERM BY A SUPERIOR LANDLORD AGAINST HIS IMMEDIATE LESSEE.

59. Damages usually assessed at the amount required to put the premises in order.

60. Application of this rule is independent of the question whether lessor actually loses by the want of repair.

XII. MEASURE OF DAMAGES IN ACTIONS BROUGHT BY LESSEES AGAINST THEIR SUBLESSEES AND ASSIGNEES.

61. Amount recoverable while the superior lease is still unforfeited.—(*a*) *Generally.* (*b*) *Where there is a contract of indemnity (see also below, sec. 62).* (*c*) *Possible arrangements after expiration of superior lease, not an element to be considered.*

62 Amount recoverable where the superior lessee has been ejected by the superior landlord.

63. Lessee's right to be indemnified by his sublessee or assignee for the costs of defending an action brought by his lessor.—(*a*) *Where there is no connection between the covenants in the original lease and the under lease.* (*b*) *Contract of indemnity implied from the substantial identity of the covenants in the two leases.* (*c*) *Rule where the underlessee enters into an express contract of indemnity.* (*d*) *Liability of an assignee for costs.*

XIII. PLEADING AND PRACTICE.

64. Action upon agreement to repair is transitory.

65. Service of the writ out of the jurisdiction.

66. Bringing in new parties.

67. Declaration.—(*a*) *Sufficiency.* (*b*) *Variance.*

68. Plea.

69. Evidence.—(*a*) *Competency and relevancy.* (*b*) *Burden of proof.*

XIV. LIABILITY OF TENANT TO THIRD PERSONS.

70. Generally.

71. Tenant presumptively liable for injuries caused by defects in the premises.

72. Rights of stranger, how far affected by the absence of an obligation on the tenant's part to repair.

73. Under what circumstances the liability is transferred to the landlord.

74. Landlord's knowledge or ignorance of the dangerous conditions, how far material.

75. Tenant's covenant to repair, how far landlord's liability affected by.

In the following monograph it is proposed to deal only with the obligation to repair which is incurred by a tenant who occupies premises by virtue of an agreement made directly with their owner, either by the tenant himself or by some third person for his use. The responsibility of a tenant for life in this regard will not be discussed, except in so far as the principles by which its nature and extent are determined, may be identical with, or throw light upon, those which are more particularly applicable to the juridical relation which constitutes the proper subject of the article.

Considerations of space have prevented anything more than a very cursory reference to the American authorities; and, as the article is designed to illustrate only the doctrines of the common law, the decisions in such jurisdictions as Scotland, Quebec, and South Africa have not been noticed, except incidentally. But it is hoped that the collection of cases will be found fairly complete so far as regards the reported rulings of the courts in England and Ireland, and in all the British colonies where the common law is administered.

I. OBLIGATION OF THE PARTIES IN THE ABSENCE OF AN EXPRESS AGREEMENT.

1. Landlord not bound to repair in the absence of an express agreement to do so.—The most appropriate starting-point for a discussion of the implied obligations of landlord and tenant as to the preservation of the demised premises is the fundamental principle that the landlord is not bound to keep those premises in repair unless he has expressly agreed to do so (*a*), or unless the

---

(*a*) Many of the cases illustrating this rule deal with injuries to third persons. These are noted in Sub-title XIV., post. Other cases assuming the correctness of the rule are cited in the following notes. See also *Gott* v. *Gandy* (1853) 2 El. & Bl. 845, 23 L.J.Q.B. 1 [tenant from year to year]; *Brown* v. *Trustees* (1893) 23 Ont. R. 599 [monthly tenant]. In the case of a weekly tenancy it has lately been held by Day, J., that, even if there is no express agreement to repair, the tenant, having regard to the usual practice of that class, has a right to expect reasonable repairs to be done. *Broggi* v. *Robins* (1898) 14 Times L.R. 439 [damages given for injuries to a child of the tenant injured by the giving way of the floor]. But the correctness of this decision is extremely questionable. See, however, *Sandford* v. *Clarke* (1888) 21 Q.B. 398, and the comments thereon by Mr. Beven, 1 Negl. 487. For a demurrer case in which it was held that, under the terms of the agreement, the lessor rather than the lessee was bound to pay for half the repairs of a house and all repairs to gates and fences, see *Miller* v. *Kinsley* (1864) 14 U.C.C.P. 188.

Where the lessee is to have "the use of a pump in the yard of the demised premises jointly with the lessor *whilst the same shall remain there*, paying

parties have contracted with reference to some special custom. This second exception, however, is of scarcely any practical importance, and has left very faint traces upon this branch of the law of contracts (*b*).

Another form in which the above principle may be stated is this—that, in the letting of a house, there is no implied warranty as to its condition, and that, in the absence of a promise by the lessee to put the premises into a state of good repair, the lessee takes them as they stand (*c*). Even where the landlord contracts to put the demised premises into "good tenantable repair," he is not bound to put them in such a state of repair as will fit them to any particular or specified purpose. Hence the tenant, if he takes possession without complaining of the insufficiency of the repairs actually executed, and without expressing a desire that more should be done, cannot recover from the landlord the money which he has been obliged to spend to adapt the premises to the requirements of his business (*d*).

This principle, being ultimately referable to the still broader one that the responsibility for the condition of property rests upon the party who has it in his possession and under his control, is not applicable where it is a question of the duty to repair a common staircase in a building divided into apartments, offices, etc., which are leased to different tenants. Under such circumstances there is not a demise of the staircase, but merely a grant of an easement in the use thereof, and, as the control of the subject-matter of the easement remains with the landlord, the case is deemed to be one

---

half the expenses of repair," the lessor has a right to remove the pump whenever he pleases, even without any reasonable cause. *Rhodes* v. *Ballard* (1806) 7 East. 116.

(*b*) In *Whitfield* v. *Weedon* (1772) 2 Chit. R. 685, the declaration in an action against a tenant for years was for not using the premises in a husbandlike manner, contrary to his implied promise to do so. A plea was held bad, which was to the effect that the fences became out of repair by natural decay, and that there was not proper wood, (without specifying it), which defendant had a right to cut for repairing the fences, and that the plaintiff ought to have set out proper wood for the purpose of repairs, which plaintiff neglected to do, but averred no request that plaintiff should do so, nor any custom of the country.

In *Burrell* v. *Harrison* (1691) 2 Vern. 231, where specific performance was granted of an agreement for a lease of lands in a locality where the custom was for the lessors to make repairs, the court, upon its being shewn that the rent reserved was not the full value of the property, adjudged that the tenant should covenant to repair.

(*c*) *Chappell* v. *Gregory* (1863) 34 Beav. 250.

(*d*) *McClure* v. *Little* (1868) 19 L.T. 287.

within the operation of the rule that, although, generally speaking, the person in enjoyment of an easement is bound to do the necessary repairs himself, an undertaking on the grantor's part to do those repairs may be inferred as a matter of necessary implication from the facts in evidence. The implication here is held to be that it was the intention of the parties that the landlord should keep the staircase reasonably safe for the use of the tenants and their families (*e*) and also of any strangers who will necessarily go up and down it in the ordinary course of business with the tenants (*f*). In this class of cases, however, a distinction is made between an easement and a mere licence. The mere fact that the landlord of an apartment house allows the tenants the privilege of using the roof as a drying ground for their clothes imposes no duty on him to keep the fence round it in repair (*g*).

Any arrangements that may be made by the landlord for the collection of the rainwater (*h*) or for the supply of water (*i*) to the upper floors of a building which is leased to several tenants are presumed to be assented to by a tenant of any of the floors below, and, if there is leakage, he cannot hold the landlord liable unless negligence is proved. The implied assent of the tenant is deemed be a sufficient reason for qualifying the stringent rule established by *Rylands* v. *Fletcher* (*j*).

Where the landlord has promised to do repairs, there is no implied agreement that the tenant may quit if the promise is not performed (*k*). But a default of the landlord in this respect is a ground for refusing specific performance of an executory contract. Thus it has been held that, in an agreement for a lease with repairing covenants of a new house, there is implied an under-

---

(*e*) *McMartin* v. *Hannay* (1872) 10 Cot. Sess. Cas. (3rd Ser.) 411 [here the defendant had admitted his retention of control by keeping a man to look after the staircase].

(*f*) *Miller* v. *Hancock* (1893) 2 Q.B. 177, 69 L.T. 214.

(*g*) *Ivay* v. *Hedges* (1882) 9 Q.B.D. 80 [nonsuit held proper].

(*h*) *Carstairs* v. *Taylor* (1871) L.R. 6 Ex. 217 [held that there was no liability where the hole, which allowed waste to escape from a box into which the gutters emptied themselves, was made by a rat].

(*i*) *Blake* v. *Woolf* (1898) 2 Q.B. 426, 79 L.T. 188 [damages not recoverable where the leak was the result of the bad workmanship of an independent contractor].

(*j*) L.R. 3 H.L. 330.

(*k*) *Surplice* v. *Farnsworth* (1844) 7 M. & G. 576, 8 Scott N.R. 307.

taking on the landlord's part to finish and deliver the house in a proper state of repair, the performance of which is a condition precedent to the tenant's liability to accept a lease (*l*).

A covenant by the lessor that, in case the premises are burnt down, he will "rebuild and replace the same in the same state as they were before the fire" does not bind him to re-erect the additions which the lessee may have made to the premises as originally demised (*m*).

2. Subsidiary consequences of this principle.—

(A) Though ,in the absence of an express contract, a tenant from year to year is not bound to do substantial repairs, yet in the absence of an express contract he has no right to compel his landlord to do them" (*a*). Nor is he entitled to treat the disrepair as an eviction and quit the premises (*b*).

(B) Though a tenant is, by force of the statute of 6 Anne, ch. 31, relieved from liability for the destruction of premises if caused by an accidental fire, the landlord is not bound to rebuild the premises (*c*).

(C) No implied responsibility for repairs is cast upon the landlord by the fact that the repairs which were not done came within an exception of fair wear and tear in the lessee's covenant, even though the result of the repairs not being done is that the premises become uninhabitable. Under such circumstances the tenant is not entitled to quit (*d*).

(*l*) *Tildesley* v. *Clarkson* (1882) 31 L.J. Ch. 362, 30 Beav. 419.

(*m*) *Loader* v. *Kemp* (1826) 2 C. & P. 375.

(*a*) *Gott* v. *Gandy* (1853) 2 El. & Bl. 845, 23 L.J.Q.B. 1, per Lord Campbell [declaration alleging duty of landlord to repair held to be demurrable]. The judges viewed the action as one which was in form for a wrong, but in substance for a breach of a duty arising from a contract. See especially the opinion of Erle, J.

(*b*) *Edwards* v. *Etherington* (1825) Ry. & M. 268, is to the contrary effect, but was overruled by *Hart* v. *Windsor*, 12 M. & W. 68; *Sutton* v. *Temple*, 12 M. & W. 52.

(*c*) *Bayne* v. *Walker* (1815) 15 R.R. 53, 3 Dow 233, 247; *Vindar* v. *Ainsley*, cited by Buller, J., in *Belfour* v. *Weston* (1786) 1 T. R. 312; *Brown* v. *Preston* (1825) Newfoundl. Sup. Ct. Dec. 491. According to Lord Eldon, in the first of these cases, the meaning of the maxim, *Res perit domino*, is "that where there is no fault anywhere, the thing perishes to all concerned; that all who are interested constitute the *dominus* for this purpose; and if there is no fault anywhere, then the loss must fall upon all."

(*d*) *Arden* v. *Pullen* (1842) 10 M. & W. 321, 11 L.J. Ex. 359. Defendant's counsel cited a nisi prius case, *Collins* v. *Barrow*, 2 Moo. & Rob. 112; but Alderson, B., said that it could not be supported unless it was put on the ground that

(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 (*i*).

8. 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. 575.

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

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

that, if a need for slight repairs arises, and he fails to make them, he is probably precluded from recovering damages for the personal injury, for the reason that such damages are not deemed to have been within the contemplation of the parties; but that, at all events, if he knew of the dangers caused by the want of such repairs, and failed to have the repairs done himself, his action is barred on the ground that he voluntarily took the risk of using the premises in that condition. Under such circumstances, it was said, the proper course of the tenant is to notify the landlord that the repairs are needed. If the landlord then failed to perform his obligation within a reasonable time, the tenant would be justified in doing the repairs himself and charging it against the landlord or taking it out of the rent (*j*).

It must be admitted, however, that the authorities relied upon for the doctrine in this case scarcely warrant the decision in its full extent. The one upon which most stress is laid merely decides that a monthly tenant may make such repairs as are necessary and deduct the amount expended from the rent (*k*). The doctrine that a tenant, if he makes repairs which the landlord is bound to make, is entitled to be recouped for his expenditure, cannot be said logically to involve the doctrine that the tenant is guilty of a *culpable* non-feasance if he fails to make these repairs. In another of the cases cited (*l*), the point was simply that a lessor who covenants to repair cannot be sued unless he has previously been notified that repairs are necessary, the reason assigned being that it is a trespass for him to enter the premises without leave. It is difficult to see how such a ruling can be regarded as affording any support to the doctrine of the Ontario Court.

Additional doubt is cast upon the correctness of this decision by an English case which, although not directly in point, may at least be said to suggest a different doctrine. The case turned upon the construction of sec. 12 of the Housing of the Working Classes' Act of 1885, providing that "in any contract for letting . . . a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation." It was argued that the word "condition" was to be construed in its strict common law sense, and that the only remedy of the tenant, if the premises were not habitable, was to repudiate the contract and quit. This contention did not prevail, and the landlord was held liable for injuries which a tenant received

---

(*j*) *Brown* v. *Toronto General Hospital* (1893) 23 Ont. R. 599.

(*k*) *Beale* v. *Taylor's Case* (1691) 1 Lev. 237.

(*l*) *Huggall* v. *McKean* (C.A. 1885) 33 W.R. 588, aff'g 1 C. & E. 394.

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 responsibilites 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.

negligent conduct of the lessee." At first sight this might seem to be an explicit authority for declaring upon the wilful or negligent quality of the tenant's acts, wherever the facts would justify it, and certainly there is nothing in the law of real property which would prevent a landlord from thus relying directly upon the general duty of everyone to use due care (*b*). But on referring to the treatise we find that the only authorities cited are those relating to waste. As the right to maintain an action on this ground is dependent merely upon the physical conditions induced by the tenant's acts, and not in any degree upon the moral quality of those acts (*c*), the doctrine enunciated by the learned author does not, it is submitted, correctly state the effect of the decisions on which it is based. The doctrine is, at most, sustainable as a fairly accurate presentment of the practical result of the principles which determine the liability of tenants from year to year, the class to which the defendant, in the case cited, belonged. In fact, that case really proceeds upon the theory of a contract, as, after quoting the passage in question, the court goes on to observe that there is an agreement implied in every lease "so to use the property as not unnecessarily to injure it. . . It is not a covenant to repair generally, but so to use the property as to avoid the necessity for repairs."

Under the older forms of procedure it was held that, where a tenant holds over the landlord may waive the trespass and sue him for waste (*d*).

5. Liability of tenants for voluntary waste.—(*a*) *Tenants for years.*—So far as the writer's researches extend, no question has ever been raised as to the liability of a tenant for years for voluntary waste. Nor, apparently, has it ever been suggested that this liability is dependent on the existence of a specific agreement to repair. That the commission of such waste is actionable was recognized by Parke, B., in a considered judgment (*a*). The right to obtain damages on this ground may be enforced, although the

---

(*b*) That a tenant must rebuild premises destroyed by a fire which was due to his own carelessness was settled at a very early period: Coke on Litt. 53, *a*.

(*c*) The essential words in a covenant of a declaration in an action for permissive waste, as given in 2 Ch. Plead., p. 536, are "wrongfully permitted waste to the said house, by suffering the same to become and be ruinous . . . for the want of needful and necessary reparations." Waste is defined by Blackstone as "any act which occasions a lasting damage to the inheritance." 2 Comm. Ch. 18.

(*d*) *Burchell* v. *Hornsby* (1808) 1 Camp. 360.

(*a*) *Yellowley* v. *Gower* (1855) 11 Exch. 294, citing Coke 1 Inst. 53. See also *Harnett* v. *Maitland*, 16 M. & W. 257, and the cases cited in the next note. A lessee is liable for waste by whomsoever it is done, for it is presumed in law that the lessee may withstand it. *Greene* v. *Cole*, 2 Wm. Saund. 259, *b* (n).

lease contains a covenant upon which an action for the same wrong may be maintained (*b*).

(*b*) *Tenants from year to year or at will.*—These tenants, not being within the Statute of Gloucester, (*c*) are not subject to the statutory action of waste, quite irrespective of the question whether the waste be voluntary or permissive. But under the old forms of pleading, it was held that there was "no doubt that an action on the case might be maintained for wilful waste" against a tenant at will (*d*). The theory was that voluntary waste was a trespass amounting to a "determination of the will" (*e*). His accountability for acts amounting to such waste is equally unquestionable under the modern rules of practice.

6. Liability of tenants for permissive waste.—(*a*) *Tenants for years.*—From the very first, the Statute of Gloucester has been "understood as well of passive as active waste, for he that suffereth a house to decay which he ought to repair, doth the waste" (*a*). But whether the liability of a tenant for years for "passive," or, as it is more commonly termed, "permissive," waste, can be predicated in cases where he has not entered into any express obligation to repair, is a question which, even at this late day, cannot be said to be finally settled.

(A) The authorities which make more or less strongly in favour of the view that the existence or absence of a specific provision is not a differentiating factor will first be reviewed.

The reports of the older cases bearing on the liability of a tenant for years for permissive waste are too meagre to enable us to say with certainty whether or not that liability was discussed in

---

(*b*) *Marker* v. *Kenrick* (1853) 13 C. B. 188, per Jervis, C. J.; *Kinlyside* v. *Thornton* (1776) 2 W. Bl. 1111. These two cases are cited with approval in *Crawford* v. *Bugg* (1886) 12 Ont. R. 8 (p. 15).

(*c*) It seems, however, that the statutes are applicable to a demise for one year or half a year. See Coke Litt. 54, *b*.

(*d*) *Gibson* v. *Wells* (1805) 1 Bos. & P., N.R. 290, per Mansfield, C.J.; *Moore* v. *Townshend* (1869) 33 N.J.L. 284. Compare *United States* v. *Bostwick* (1876) 94 U.S. 53 (see s. 4, ante). See also *Martin* v. *Gilham* (1837) 2 N. & P. 568, 7 A. & E. 540, where the point actually decided was that evidence of permissive waste only would not support a declaration which charged voluntary waste. The allegations were that the defendant cut down trees, "and otherwise used the premises in so untenantlike and improper a manner that they became dilapidated."

(*e*) Coke Litt. 57, *a*; *Countess of Shrewsbury's Case*, 5 Coke 13, *a*.

(*a*) Coke, 2 Inst. 145; 3 Dyer 281, *b*.

any of them with reference to a covenant in the lease. But at all events the point was never directly taken, that the action would not lie unless there was such a covenant; and this circumstance, although merely negative and therefore not to be pressed too strongly, may not unreasonably be deemed to indicate that the view commonly held by the profession was that the landlord's right of recovery on this ground was not limited to cases on which the tenant had expressly undertaken to do repairs. In the language of the courts, so far as it has come down to us, there is absolutely no intimation that the existence or absence of a covenant was regarded as a differentiating factor (*b*). A similar conclusion is suggested by the only reported expression of judicial opinion on the point in the eighteenth century (*c*). An additional body of authority on the same side is also obtainable from the dicta of eminent judges during the last hundred years (*d*).

(*b*) In Coke Litt. 53, *a*, it is laid down in perfectly general terms that the burning of a house by negligence or mischance is permissive waste, and that the tenant must rebuild. (See comment on *Rook* v. *Worth* in the next note.)

In *Darcy* v. *Askwith* (1618) Hob. 234, it was declared that, if a tenant built a new house and failed to keep it in repair, an action of waste lay against him.

In *Weymouth* v. *Gilbert*, 2 Roll. Abr. p. 816, l. 40, it was held that waste lies against a tenant for years for allowing a room to fall with decay for lack of plaster.

In 3 Dyer 281, E., a case is cited in which the lease provided that the lessor might re-enter if the lessee *did* any waste on the premises, and it was held that the lessor might re-enter for the permissive waste of the lessee in *suffering* the house to fall for want of repairs.

In *Griffith's Case* (1564) Moore 69, a lessee was held to be liable for waste in allowing the banks of a river to fall into disrepair, so that the waters overflowed the land.

That a tenant is liable for waste in allowing a sea-wall to become ruinous was held in Moore (1564) 62, Case 173; Ibid (1564) 73, Case 200; S.C. Owen 206.

See also 22 Vin. Abr. Waste "c" and "d" p. 436-440, 443; 5 Com. Dig. Waste d 2, d 4.

(*c*) In *Rook* v. *Worth* (1750) 1 Ves. Sr. 460, Lord Hardwicke said, arguendo: "As between landlord and tenant for years, though there is no covenant to repair or rebuild, he is subject to waste in general, and if the house be burnt by fire, he must rebuild." This remark must be taken subject to the limitation, that, if the fire was accidental, the tenant would be saved from liability by the Statute of 6 Anne ch. 31; but, for our present purposes, this circumstance is immaterial.

(*d*) In *Harnett* v. *Maitland* (1847) 16 M. & W. 257, reference was made (with apparent approval, though no positive opinion was expressed) to the notes to *Greene* v. *Cole*, 2 Saund. 252, where it is stated that by the Statute of Gloucester, 6 Edw. 1, ch. 5, an action for permissive waste (which did not lie at common law against them) was given against a lessee for life or years or their assignee. That the insertion or omission of a covenant was material was not suggested.

In *Yellowley* v. *Gower* (1855) 11 Exch. 274, a considered judgment, there was said by Parke, B. (p. 294), to be no doubt of this liability, as tenants for terms of years are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53. There seems to be no warrant for saying that this very eminent judge regarded a covenant as being of any

(B) Of the cases which have been cited as authorities for the opposite doctrine, the earliest is *Gibson* v. *Wells* (*e*); but this precedent is not really in point, as we shall presently see. A more distinct expression of opinion is found in *Herne* v. *Benbow* (*f*). Only a short per curiam judgment is reported, and, as Parke, B., justly remarked, the report is a bad one (*g*). In fact it is difficult to believe that we have a correct statement of the true purport of the decision. The court is represented as laying it down, that an action on the case for permissive waste cannot be maintained against a tenant for years in the absence of a covenant to repair, but the single authority cited relates to a tenancy at will (*h*). Under these circumstances it would seem that the dilemma of assuming an error either on the part of the court or of the reporter can only be escaped by resorting to the hypothesis that tenants for years were regarded as standing upon precisely the same footing as tenants at will. This hypothesis would be an extremely violent one, for, in view of the fact that tenants at will are not within the scope of the Statute of Gloucester (see secs. 5, 6, ante), it is scarcely conceivable

---

special importance. The actual point decided was merely that a lease which impliedly permitted the lessee to leave certain repairs undone — such implied permission being deduced from the insertion of a covenant by the lessor to do the repairs—allows permissive waste, and is therefore not a good execution of a power which prohibits the making of a lease exempting the lessee from punishment for waste. [Compare *Davies* v. *Davies* (1888) 38 Ch. D. 499].

In *Woodhouse* v. *Walker* (1880) 5 Q.B.D. 404, there was a specific provision as to repairs in the instrument creating the tenancy (here one for life). The court, therefore, was not called upon to pronounce an explicit opinion respecting the question whether, in the absence of such a provision, a tenant for life or years could be made liable as for permissive waste. But, in a judgment concurred in by Lush and Field, JJ., the opinion was strongly intimated that there was such a liability, and a significant comment was passed upon the strange conflict between the "modern authorities—or rather the dicta"—on this question and the more ancient reading of the statutes as to waste.

In *Davies* v. *Davies* (1885) 38 Ch. D. 499, Kekewich, J., placed the same construction as we have done upon the language used in these last two cases, and expressed a decided opinion that, quite apart from a covenant to repair, a tenant for years was responsible for permissive waste.

Several of the above cases are cited by Mr. Foa, and considered by him to have determined that the liability exists, whether there is a covenant to repair or not (Landl. & T. p. 122).

On the same side may be cited *Moore* v. *Townshend*, 4 Vroom. (33 N.J.) 284, where a distinguished American judge reviewed the authorities at great length.

A doubtful case is *Jones* v. *Hill* (1817) 7 Taunt. 392, where Gibbs, C.J. declined to say positively whether the tenant was liable for permissive waste, and decided the case on the ground that the acts in evidence did not constitute such waste.

(*e*) 1 B. & P. N.R. (1805) 290.

(*f*) 4 Taunt. 764.

(*g*) See *Yellowley* v. *Gower* (1855) 11 Exch. 274 (p. 293).

(*h*) *Countess of Shewsbury's Case*, 5 Coke 13, *a*; Croke. El. 777.

that the court, if it had really intended to take such a position, would have done so without explaining more distinctly the rationale of its decision. Upon the whole, it seems probable that the report is incorrect, for the court is certainly entitled to the benefit of the doubt which may well be felt as to its having actually rendered a decision so singularly pointless as one which would restrict the remedy of an action of waste to cases in which, as the tenant could always be sued on his covenant, the right to bring such an action would not be of any advantage.

In spite of the objections to which this case is open, the doctrine which it is supposed to embody has received sufficient recognition in subsequent judgments to render the intervention of a court of error necessary to determine whether it is or is not good law. So far no court of this grade has gone further than to refuse to interfere where an equitable tenant for life is guilty of permissive waste (*h*). In the case cited the legal liability was considered doubtful. After the Judicature Act came into force a Divisional Court, on the authority of *Powys* v. *Blagrave* held an equitable tenant for life liable for damages (*i*). Lopes and Stephen, JJ., inclined to the view that there was no legal liability, but held that, at all events, a case was presented for the application of the general provision of the Judicature Act, that, assuming the rules of equity and common law to be in conflict, effect must be given to the former (*j*). This latter point does not seem to have suggested itself to the judges who decided *Woodhouse* v. *Walker* and *Davies* v. *Davies*, (see above), and the propriety of this application of the statute would seem to be open to dispute. Can it correctly be said that there is a conflict, in the sense adverted to, between the doctrine that a court of equity will not restrain a tenant from permissive waste and the doctrine that a tenant is liable in damages for such waste? The proposed theory of construction virtually requires us to adopt the general principle that, as a result of the provision in question, injured persons are henceforth disabled from maintaining an action for damages in every case in which a court

(*h*) *Powys* v. *Blagrave* (1854) 4 DeG. M. & G. 448, a decision by the Lords Justices.

(*i*) *Barnes* v. *Dowling* (1881) 45 J.P. 635, 44 L.T. 809.

(*j*) In *Patterson* v. *Central &c. L. Co.* (1898) 29 Ont. R. 134, Chancellor Boyd took the same view as to the effect of the Judicature Act of Ontario.

of equity would formerly have declined to give any positive assistance towards the enforcement of their rights. Such a principle involves such far-reaching consequences that we may well pause before taking its correctness for granted, even upon the authority of the two very eminent judges by whom it has been thus applied. Another possible objection to their view may also be suggested. For the purposes of their argument, they assume that the right of action existed before the Judicature Act was passed. It seems to follow, therefore, that, as this right was created by the legislature, their decision resolves itself ultimately into the proposition that the earlier statutes have been abrogated *pro tanto* by the general provision regarding the conflict between the rules of law and equity. Supposing this to be a correct statement of the logical situation, it is difficult to admit that the learned judges have not carried the doctrine of repeal by implication further than the analogies of statutory construction will warrant.

In two still more recent cases, also, the position is taken that the existence or absence of an express covenant to repair is a controlling factor (*k*).

In the earlier editions of his treatise on Torts, Sir Frederick Pollock regarded the liability of a termor for permissive waste, in a case where there is no covenant, as being a doubtful point; but in the later editions it is laid down in unqualified language that there is no such liability except where there is an express covenant to repair. This distinguished writer, therefore, considers that the question is virtually settled in this sense; and such also seems to be the prevailing view in Ontario (*l*). In the second of the two cases cited below, Chancellor Boyd deemed it unnecessary to "delve into the ancient law" of the subject with a view to impeaching the opinion of Kay in *Avis* v. *Newman* (*m*). But,

---

(*k*) *Freke* v. *Calmady* (C.A. 1886) 32 Ch.D. 408; *Avis* v. *Newman* (1889) 41 Ch.D. 532, per Kay, J. For some remarks on this case see infra.

As tending somewhat in the same direction, though not actually in point, we may also refer to *Leigh* v. *Dickeson* (1884) 15 Q.B.D., (C.A.) 60 affirming 12 Q.B.D. 194, holding that, in the absence of an express contract, one tenant in common of a house who expends money in ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. Such a payment is treated as voluntary.

(*l*) *Wolfe* v. *Macguire* (1896) 28 Ont. R. 45 [a case of a yearly tenant, but the language of the court is quite general]. *Patterson* v. *Central &c. L. Co.* (1898) 29 Ont. R. 134.

(*m*) (1889) 41 Ch.D. 532.

with all deference, it is submitted that the opinion of a single English judge on a point so much in dispute as this is not so absolutely conclusive as to absolve a colonial court from the duty of investigating the authorities on its own account. Apart from this consideration, it is perhaps permissible to express a doubt whether, in view of the fact that the conflict of views now under discussion is, so far as the reports shew, less than a century old, the precedents which the learned Chancellor declined to examine can fairly be regarded as fit subjects to commit to the limbo of "ancient law." In the present instance it is particularly unfortunate that he has not exercised an independent judgment on the question; for, if he had looked at the authorities relied upon by Kay, J., he would have seen good reasons for doubting the finality of the decision. The very doubtful value of one of those authorities, *Herne* v. *Benbow*, has already been noticed. Another is *Gibson* v. *Wells* (*n*), in which, according to Kay, J., Sir James Mansfield was clearly of opinion that an action for permissive waste would not be against even a tenant for years. This is certainly too strong a statement, as the case is merely to the effect that an action for permissive waste does not lie against a tenant from year to year, and the general words used are to be construed with reference to the fact. The allusion to the consequences which would follow in the case of a tenant at will, if the action were sustained, shews this very plainly. In another case, *Jones* v. *Hill* (*o*), the court expressly declined to express an opinion either one way or the other as to the question whether an action for permissive waste would lie. See above, note (*d*). The fourth authority cited is *Barnes* v. *Dowling* (*p*), which is undoubtedly in point, but seems to be itself a rather questionable application of *Powys* v. *Blagrave*, (see above). Mr. Justice Kay was also much influenced by his theory, (announced during the argument of counsel), that Lord Coke's words, in 2 Inst. 145, "he that suffereth a house to decay, which he ought to repair, doth the waste," include only permissive waste when there is an obligation to repair. It is respectfully submitted, however, that the passage thus commented upon cannot fairly be made

(*n*) 1 B. & P. N.R. 290.

(*o*) 7 Taunt. 392.

(*p*) 44 L.T.N.S. (1881), 809.

to bear this construction. The case put of a tenant occupying upon condition that the lessor may enter, if the tenant suffers the house to be wasted, seems to be merely illustrative, and not intended to restrict liability to such cases of express stipulations. The learned judge does not refer to the passage in 1 Coke, 53, *a*, the relevancy of which is much more undisputable. There, as already remarked, it is laid down, in the most general terms, that an action for waste lies against a tenant for years, and in the explanations and illustrations which follow, there is not the smallest intimation that permissive waste would raise no right of action in the absence of an express agreement to repair.

The above summary may, we think, fairly be said to shew that, except in so far as the question may be concluded by the very dubious special ground replied upon in *Barnes* v. *Dowling*—a ground which is of no force in jurisdictions where there is no provision like that of the English Judicature Act—the balance of authority is rather in favour of the doctrine that a tenant for years is liable for permissive waste, even where he has not expressly agreed to repair. Such a doctrine is certainly more in conformity than the opposite one with the rationale of the action of waste, the essential purpose of which is the indemnification of the landlord for certain acts of commission or omission by the tenant, regardless of the question whether the tenant may have promised or not to do or abstain from them.

(*b*) *Tenants from year to year and at will.*—That neither tenants from year to year (*p*) nor tenants at will (*q*) are liable for permissive waste is well settled.

The exemption of tenants at will from the process of waste provided by the Statute of Gloucester is supposed to be referable to the consideration that the owner of the inheritance might, at any time, by entry, determine the estate of the tenant, and thus

---

(*p*) *Leach* v. *Thomas* (1835) 7 C. & P. 327; *Torriano* v. *Young* (1883) 6 C. & P. 8. In the latter case Taunton, J., instructed the jury, in a case where permissive waste was proved, to find for or against the defendant, according as they should conclude from the evidence that he was a tenant from year to year, or an assignee of a lease for a term of years containing a covenant to repair.

(*q*) *Panton* v. *Isham* (1693) 3 Lev. 359; *Gibson* v. *Mills* (1805) 1 Bos. & P.N.R. 290; *Harnett* v. *Maitland* (1847) 16 M. & W. 257 [declaration held demurrable in not shewing that the defendant was more than a tenant at will]; see also *Herne* v. *Benbow* (1813) 4 Taunt. 764.

protect the inheritance from injury (*r*) Whether this be so or not, it seems clear that a perfectly rational ground for the exemption may be found in the fact that the uncertain nature of their tenure would make it a hardship to compel them to go to any expense for repairs (*s*). This ground is not so absolutely controlling in the case of a tenant from year to year, but it is undoubtedly sufficient to warrant the imposition of a lighter burden in this respect upon such a tenant than upon one who is to be in possession for a longer term. See the following section.

6a. Comparison between the extent of the obligations created by the duty to refrain from waste and by an express agreement to refrain.—The implied liability of a tenant for a misuse of the premises being almost invariably, as the foregoing summary indicates, referred to the question whether his acts of commission or omission amounted to waste, it is a matter of considerable practical importance to ascertain how far his obligation to repair, as measured by the standard, differs from that which arises out of an express agreement.

(*a*) *Obligations compared where voluntary waste has been committed.*—Where the defaults amount to voluntary waste, the position of a tenant who is bound by a stipulation to repair, is, so far as appears, the same, for all practical purposes, as that of one who is not so bound. Such, at all events, would seem to be a legitimate deduction from two of the cases already cited, in which the acts amounted to waste of this description, and the court, while it referred the tenant's liability to his breach of the covenant to repair contained in the lease, recognized fully that the same evidence would have supported an action of waste (*a*).

(*b*) *Obligations compared where the waste is merely permissive.*—Whether a tenant, when sued for permissive waste, should be

---

(*r*) Depue, J., in *Moore* v. *Townshend* (1869) 33 N.J.L. : 4.

(*s*) *Ibid.*

(*a*) *Marker* v. *Kenrick* (1853) 13 C.B. 188 [removal of a barrier between two mines]; *Kinlyside* v. *Thornton* (1776) 2 W. Bl. 111 [demolition of fixtures].

Compare *Doe* v. *Jones* (1832) 4 B. & Ad. 126, 1 N. & M. 6, where the acts of tenant in turning lower windows into shop windows, and stopping up and opening doorways, were viewed as waste, which would have been actionable but for the fact that these alterations were contemplated by the lessor. See also *Holderness* v. *Lang* (1885) 11 Ont. R. 1, where the judgment proceeds on the theory that any act amounting to voluntary waste at common law would be a breach of a covenant to repair. The erection of new buildings is not waste where the parties, by inserting in the lease a covenant to keep all future buildings in repair, shew that they contemplated that erection. *Jones* v. *Chappell* (1875) L.R. 20, Eq. 539.

judged by the same standards of responsibility as he would be, if the action was brought on a specific general agreement of the character ordinarily found in leases, cannot be affirmed with certainty; but, at all events, the authorities contain nothing which is necessarily inconsistent with the view that the tests applied in each case are, for practical purposes, identical. That the physical conditions which constitute permissive waste are, on the whole, the same as those which amount to a breach of the usual covenants to keep and leave in repair seems to be indubitable (*b*). Nor, when we examine the more particular expressions of opinion as to the circumstances of disrepair which constitute such waste, do we find anything to suggest that the tenant's liability would have been in any essential respect different, if these covenants had been sued on.

If the tenant build a new house, it is waste, and if he suffer it to be wasted, it is a new waste (*c*).

If a house be uncovered by tempest, a tenant for years must repair it, even though there be no timber growing upon the ground, for the tenant must at his peril keep the house from wasting (*d*).

It is waste to suffer a house to be uncovered, so that the timbers decay (*e*).

If a lessee permit the walls to decay for default of daubing or plastering, that is waste (*f*).

It is waste to suffer a park paling to decay, so that the deer are dispersed (*g*).

To suffer a sea-wall to be in decay, so as by flowing and re-flowing of

---

(*b*) Lord Coke speaks of "permissive waste which is waste by reason of omission or not doing, as for want of reparation." 2 Inst. 145. According to Blackstone (2 Comm. Ch. 18), "suffering a house to fall into decay for want of necessary reparations" is permissive waste. See also *Gibson* v. *Wells* (1805) 1 Bos. & P. N.R. 290; *Herne* v. *Benbow* (1813) 4 Taunt. 764; *Doe* v. *Jones* (1832) 4 B. & Ad. 126, per Parke, B.; *Torriano* v. *Young* (1833) 6 C. & P. 8; *Harnett* v. *Maitland* (1847) 16 M. & W. 257; *Powys* v. *Blagrave* (1854) 4 DeG. M. & G. 448; *Woodhouse* v. *Walker* (1880) L.R. 5 Q.B.D. 404; *Avis* v. *Newman* (1889) 41 Ch.D. 532 [the phrase used here was "suffering dilapidations"]. Kekewich, J., recently defined permissive waste as that "which has not come about by the tenant's own acts, but comes about by a revolution, or by wear and tear, or by the action of the elements, or in any other way not being his own act." *Davies* v. *Davies* (1888) 38 Ch.D. 499.

(*c*) 1 Coke Inst. 53, *a*; S.P. *Darcy* v. *Askwith* (1618) Hob. 12.

(*d*) Coke Litt. 53, *a*; Bac. Abr. tit. Waste (*c*, 5).

(*e*) 1 Coke Inst. 53, *a*.

(*f*) *Weymouth* v. *Gilbert*, 2 Roll. Abr. 816. pl. 36, 37.

(*g*) Coke Lit. 53, *b*.

the sea the meadow or marsh be surrounded, whereby it becomes unprofitable, is waste (*h*).

It is waste if the tenant do not repair the bank or walls against rivers or other waters, whereby the meadows or marshes are surrounded and become rushy and unprofitable (*i*).

"If any part of the premises are suffered to be dilapidated, it amounts to permissive waste" (*j*).

"Tenantable repair" extends to permissive as well as commissive waste (*k*).

The scope of these statements will be made still clearer by contrasting them with those which deal with circumstances which are deemed to negative waste.

"A wall uncovered when the tenant cometh in is no waste if it be suffered to decay" (*l*).

The destruction of premises caused by its reasonable use is not waste (*m*).

"A tenant not obliged by covenant to do repairs, is not bound to rebuild or replace" (*n*).

On the whole, therefore, it would seem that little, if any, real difference between the obligations arising under and apart from an express agreement to repair can be predicated except in those rare cases in which the wording of the agreement is such that it cannot be regarded merely as one to keep in good repair. Thus it has been held that an assignee of a lease cannot be held liable, on the ground of waste, for yielding up the premises in a state of dilapidation which amounts to a breach of a covenant "sufficiently to

---

(*h*) Coke Lit. 53, *b*.

(*i*) Coke Litt. 53, *b*.

(*j*) *Gibson* v. *Wells* (1805) 1 Bos. & P. N.R. 290, per Mansfield, C.J.

(*k*) *Proudfoot* v. *Hart* (C.A. 1890) 25 Q.B.D. 42, 63 L.T. 171 [a case where there was a covenant].

(*l*) 1 Coke Inst. 53, *a*.

(*m*) *Manchester &c. Co.* v. *Carr* (1880) 5 C.P.D. 507 [here there was a covenant, but it was not a material factor in this part of the judgment], following *Saner* v. *Bilton* (1876) 7 Ch.D. 815, and holding that any use of the property is reasonable, provided it is for a purpose for which the property was intended to be used, and provided the mode and extent of the user was apparently proper, having regard to the nature of the property, and to what the tenant knew of it, and to what, as an ordinary business man, he ought to have known of it. See also *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J., arguendo.

(*n*) *Wise* v. *Metcalf* (1829) 10 B. & C. 299, per Bayley, J. This remark was made in a case where the obligations of an incumbent of an ecclesiastical benefice were under discussion; but, as tenants for years are in the same footing as life tenants under the statutes as to waste, this principle is presumably so far general as to be applicable to the former.

repair the premises with all necessary reparation, and to yield up the same . . . in as good condition as the same should be in when finished under the direction of J. M." (*o*),

This ruling has apparently not been questioned in any later case, but it is certainly *strictissimi juris* to say the very least. Surely a more reasonable construction of the covenant would have been to have regarded the word "necessary" as equivalent to "good," and to have held that, when the contemplated standard had thus been fixed by an epithet which must unquestionably be attained by the tenant if he is to escape liability for waste, it became quite immaterial that this standard should have been made more definite by a reference to what a third party was to do in order to bring the premises up to that standard. Essentially the covenant seems to be nothing more than a recital that J. M. was to put the premises in good repair, and a stipulation that the tenant was to keep and leave them in that condition.

The foregoing remarks are applicable only to tenants for a term of years. The obligations of a tenant from year to year, or of a tenant at will, are very different, according as he has or has not agreed to repair; but this results simply from the fact that such tenants are not liable at all for permissive waste. See sec. 5 (*b*). It is laid down, therefore, that they are merely bound to use the premises in a "tenant like" (*p*), or, as another case puts it, "husband-like," manner (*q*). The meaning of these rather vague epithets, as we learn from other cases, is that the law merely requires him to keep the premises sound and water-tight (*r*), or to make such fair repairs as may be necessary to prevent actual decay of the premises (*s*). This doctrine necessarily implies that, as

(*o*) *Jones* v. *Hill* (1817) 7 Taunt. 392. "It is impossible," said Gibbs, C.J., "that it should be waste to omit to put the premises into such repair as A. B. had put them into. Waste can only be for that which would be waste if there were no stipulation respecting it; but if there were no stipulation it could not be waste to leave the premises in a worse condition that A. B. had put them into." The case is cited with approval in *Crawford* v. *Bugg* (1886) 12 Ont. R. 8 (p. 15).

(*p*) *White* v. *Nicholson* (1842) 4 M. & G. 95.

(*q*) *Horsefall* v. *Mather* (1815) Holt N.P. 7, 17 R.R. 589, where Gibbs, C.J., nonsuited the landlord, holding that a declaration which was framed on the theory that there was an implied obligation to repair generally, was expressed in terms too broad. "A tenant from year to year," said the learned judge, "is bound to use the premises in a husbandlike manner; the law implies this duty and no more. I am sure it has always been holden that a tenant from year to year is not liable to general repairs."

(*r*) *Leach* v. *Thomas* (1835) 7 C. & P. 327.

(*s*) *Ferguson* v.———— (1798) 2 Esp. 590, where Lord Kenyon, in his charge, remarked that the tenant was bound to put in windows or doors that have been broken by him, but ruled that he was not bound to recoup the landlord for the sum spent in putting a new roof on an old worn-out house.

judges have also said, he is not bound to do "substantial" repairs (*t*), or "substantial or lasting repairs" (*u*). As is shewn by the cases cited, the question whether the tenant has, in any particular instance, fulfilled his duty, as thus defined, is primarily and essentially one for the jury to determine under proper instructions embodying the above principles. Compare the following section.

6b. Obligation to repair, treated as one arising ex contractu.—In a case already cited Coleridge, J., remarked, arguendo, that "the duties between landlord and tenant arise from contract" (*a*). This dictum seems difficult to reconcile with the authorities reviewed in the preceding section, unless waste, which is an act of a distinctly tortious character, is brought within the domain of contract by assuming that an implied agreement to abstain from it may be predicated from the relation of the parties. This conception must, indeed, have been actually present to the mind of the pleader in one of the few reported decisions in which the declaration was distinctly framed on the basis of an assumed contract (*b*). In all the rest the notion of an undertaking to perform positive acts is directly relied upon (*c*).

That it makes no appreciable difference, so far as the extent of the tenant's obligation is concerned, whether the gravamen of the action is contract or tort, is apparent from the points settled by the cases just cited. Thus the conclusion that a declaration is too broad which alleges that a tenant at will undertook to keep the premises in good and tenantable repair, and deliver them up in the

---

(*t*) *Leach* v. *Thomas* (1798) 7 C. & P. 327; *Gott* v. *Gandy* (1853) 2 El. & Bl. 845, 23 L.J.Q.B. 1.

(*u*) *Ferguson* v.————(1798) 2 Esp. 590.

(*a*) *Gott* v. *Gandy* (1853) 2 El. & Bl. 845. A specific agreement not to commit waste is not uncommon. See, for example, *Doe* v. *Bond* (1826) 5 B. & C. 855.

(*b*) *Leach* v. *Thomas* (1835) 7 C. & P. 327 [allegation of an agreement including inter alia a stipulation not to commit waste]. It is remarked by Sir Frederick Pollock (Torts p. 330) that, "since the Judicature Acts, it is impossible to say whether an action alleging misuse of a tenement by a lessee is brought on the contract or as for a tort;" and that "doubtless it would be treated as an action of contract if it became necessary for any purpose to assign it to one or the other class."

(*c*) *Auworth* v. *Johnson* (1832) 5 C. & P. 239 [allegation of an agreement in consideration of allowing occupation]; *Horsefall* v. *Mather* (1815) Holt. N.P. 7, 17 R.R. 589 [action of assumpsit—allegation of an undertaking in consideration of becoming tenant]; *White* v. *Nicholson* (1842) 4 M. & G. 95 [assumpsit—allegation of a promise to use in a tenant-like manner].

same condition in which he had received them (*d*), would at once follow from the rule that such a tenant is not liable for merely permissive waste. Sec. 5, ante. So, although the non-liability of a tenant from year to year for a failure to renew worn-out stairs, sashes, doors, etc. (*e*), or to do "substantial repairs" (*f*), has been affirmed in actions where the court was viewing his obligations under their contractual aspects, it is evident that the omissions alleged would not have constituted actionable waste in such a tenant.

A similar deduction may be drawn from a comparison of the expressions used in sec. 5 (b) to denote the kind of repairs which the tenant must make to escape liability for waste with those used in cases where an implied contract is relied upon. Thus it is laid down that the tenant must use the premises in a "husband-like" manner (*g*), or a "tenant-like" manner (*gg*). Similarly it is held that, as there is an implied duty on the part of a tenant for years, to make fair and tenantable repairs, the allegation of a proviso to that effect in a bill for specific performance of an agreement to take a lease is sustained by proof of an agreement which did not embrace such a proviso. Such an allegation being merely the expression of what the law would imply, the agreement stated is not substantially different from that proved (*h*).

Still more unquestionable, of course, is the identity between the results to be obtained through the two forms of action, where the theory of an agreement not to commit waste is relied upon. Thus if a tenant from year to year is charged with a breach of this agreement in removing fixtures, his liability is determined simply by inquiring whether the fixtures belonged to the removable class (*i*).

(*d*) *Horsefall* v. *Mather*, supra. Here the walls and ceiling had been somewhat damaged by the removal of fixtures.

(*e*) *Auworth* v. *Johnson* (1832) 5 C. & P. 239.

(*f*) *Gott* v. *Gandy* (1853) 2 El. & Bl. 845.

(*g*) *Whitfield* v. *Weedon* (1772) 2 Ch. R. 685 [tenant bound to repair fences]. The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner. *Powley* v. *Walker* (1793) 5 T.R. 373.

(*gg*) *White* v. *Nicholson* (1842) 4 M. & G. 95 [here it was held that the obligation arose, even though the written agreement for the letting contained several express stipulations].

(*h*) *Gregory* v. *Mighell* (1811) 18 Ves. 328 (p. 331).

(*i*) *Leach* v. *Thomas*, (1835) 7 C. & P. 327 [defendant held entitled to remove an ornamental chimney-piece, but not brick pillars built *on* a dairy floor to hold

In the trial of a case in which a breach of an implied contract to keep the premises in a certain condition is relied upon, the judge should explain to the jury in general terms the limit of the obligations of a tenant of the class of the defendant, and tell them, with regard to any acts of which the quality is doubtful, that he is entitled to a verdict, if they think that he did all that a tenant of his class ought to do, considering the state of the premises, when he took them (*j*).

No implied contract to use the premises in a tenantlike manner arises where the tenant holds under an express contract which provides for such repairs (*k*). But the mere fact that a house was let from year to year by a written agreement which contains several express stipulations as to other matters, will not prevent the implication of an implied contract to use the premises in a tenant-like manner (*l*).

II. CONSTRUCTION AND EFFECT OF THE VARIOUS COVENANTS RELATING TO REPAIRS GENERALLY.

7. Enumeration of Covenants Respecting Repairs.—The covenants in leases which are applicable to repairs generally, and do not provide for any particular kind of work, are as follows:

(A) Covenants to repair and keep in repair during the term.

The various principles which determine the extent of the tenant's obligation under these covenants will be discussed at length in the later subtitles.

The obligation of this covenant is not enlarged by the fact that the tenant remained in occupation of the premises for a period considerably longer than the term originally stipulated for. Whatever the covenant meant during the term, it continues to mean during the whole time that the tenant holds over (*a*).

---

milk-pans]. In *Glover* v. *Piper* (1587) Owen 92, it was held that if the condition of a bond given by the lessee of a copyhold estate is that he shall not commit any kind of waste that will involve the forfeiture of the copyhold, the condition is broken if he suffers the house to fall down during the term for want of reparation, even though it was ruinous when the lease was made.

(*j*) *Auworth* v. *Johnson* (1832) 5 C. & P. 239, per Lord Tenterden.

(*k*) *Standen* v. *Chrismas* (1847) 10 Q.B. 135.

(*l*) *White* v. *Nicholson* (1842) 4 M. & G. 95.

(*a*) *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J.

A proviso may be construed as a covenant to repair if it is clearly intended to operate as such (*b*).

(B) Covenants to repair within a certain period after notice from the landlord.

In order to entitle the ground landlord to take advantage of a covenant of this description, the notice provided for must be given to the lessee. It is not sufficient, if merely given to an underlessee (*d*). On the other hand, a sublessee holding under a lease containing a covenant to repair after two months' notice, is not bound by a notice left on the premises by the superior landlord whose rights are defined by the terms of a lease containing a covenant to repair after three months' notice, and the time within which the repairs must be completed only begins to run when the intermediate landlord serves notice in accordance with the terms of the sublease (*e*).

If the lease provides that the notice to repair is to be in writing, an averment of notice which does not state that it was in writing is demurrable (*f*).

So far as the rights of the landlord are concerned, a provision for re-entry if at any time the premises should not be repaired within three months after notice, has apparently the same force and effect as a specific covenant to repair after three months' notice (*g*).

This covenant is deemed to be subject to any exceptions which may qualify the effect to the general covenant to repair (*h*).

As to the notice required by the Conveyancing Act of 1881, see sec. 43, post.

(C) Covenants to deliver up in good repair.

The principles determining the extent of the lessee's obligation

---

(*b*) As where these words were introduced after the usual covenants to repair: "Provided always that nothing herein shall be deemed, etc., in any way to compel the lessee, his executors, etc., to give up the buildings . . . in as good and sound a state as they now are; but such buildings are not to be wilfully or negligently destroyed; necessary repairs, however, for the preservation of the buildings to be done by the lessee at his own cost." *Perry* v. *Bank of Upper Canada* (1866) 16 U.C.C.P. 404.

(*d*) *Swetnam* v. *Cush* (1602) Cro. Jac. 8.

(*e*) *Williams* v. *Williams* L.R. 9 C.P. 659, 43 L.J.C.P. 382.

(*f*) *Wright* v. *Goddard* (1838) 8 Ad. & P. 144.

(*g*) *Doe* v. *Brindley* (1832) 4 B. & Ad. 84.

(*h*) *Thistle* v. *Union &c. R. Co.* (1878) 29 U.C.C.P. 76.

under this covenant are ordinarily the same as those applicable in regard to (A), and will be discussed in later sections.

The liability created by a clause binding the lessee to deliver up at the end of the term, in good and sufficient repair, the houses to be built in pursuance of another clause, is such a flaw in the title of the owner of the leasehold that a purchaser of the term will not be compelled to accept a conveyance, even though the landlord did not take advantage of the lessee's failure to build the whole number of houses within the stipulated period, and continued to accept rent for many years subsequently (*i*).

(D) Covenants to put into repair. (See also sec. 25, post.)

The distinction between the extent of the obligations imposed by this covenant and (A) is not very clear. That the two covenants are by some judges not regarded as identical in effect is apparent from the remark of Erle, C.J., that "to 'repair' is not the same as to 'put in repair,' which may require the building of something new" (*j*). The obligation created by the general covenant to keep in repair is at all events less onerous than that which results, where the tenant agrees to put the premises into "habitable" repair. The implication then is that he is to put them into a better state than he found them, and that, regard being had to the state in which it was at the time of the agreement, and also to the situation and the class of persons who are likely to inhabit it, he is to put it into a condition fit for a tenant to inhabit it (*k*). On the other hand, we have the authority of Sir George Jessel for the doctrine that a covenant to "do necessary repairs" includes putting the property into repair. Indeed the learned judge held that the same result followed, even if the word "necessary" is omitted (*l*).

A covenant of this sort is sometimes made by a prospective tenant prior to the actual execution of the lease. Its effect upon

---

(*i*) *Nouaille* v. *Flight* (1844) 7 Beav. 521, 13 L.J. Ch. 414. Lord Langdale was of opinion that, although the purchaser might have possession of the property during the entire term, he could not be said to "enjoy" it in any reasonable sense of the word, if his possession was constantly attended by a liability enforceable at the end of the term, and not admitting either of indemnity or compensation.

(*j*) *Martyn* v. *Clue* (1852) 18 Q.B. 661, per Erle, J.

(*k*) *Belcher* v. *McIntosh* (1839) 8 C. & P. 720, per Alderson, B. Compare sec. 24, post.

(*l*) *Truscott* v. *Diamond &c. Co.* (C.A. 1882) 20 Ch. D. 251 (p. 256).

the rights and liabilities of the parties will then depend upon the construction of the preliminary agreement as a whole (*m*).

(E) Covenants to paint.

The extent of the duty of the tenant under the general covenant to paint the demised premises has given rise to some embarrassing questions. See 26 (*e*) post. These are in some degree obviated by adding to the above stipulations another, (commonly inserted in English leases), binding the tenant to paint the outside and inside wood and ironwork in a certain manner at stated times (*n*).

(F) Covenants of indemnity.

In cases of sublease or assignment of the terms, the sublessee or assignee sometimes covenants to indemnify his immediate lessor or assignor against the damages which may be recovered by the superior landlord in an action for a breach of the covenants as to repairing. The costs of that action, as well as the other expenses to which the intermediate lessee or assignor may have been subjected, owing to the default of the sublessee or assignee, are not uncommonly provided for also. The effect of the omission or insertion of such a provision, in connection with the measure of damages, is discussed in secs. 60 (*b*) and 62.

Under ordinary circumstances a covenant of this description will not be construed so as to cover acts done before the date of the sublease or assignment (*o*).

Where there is no express provision on this subject, and the right to demand indemnity from transferees of the leasehold interest is left to be determined by general principles, the accepted doctrine is that the liability of the lessee is that of a surety for the performance of the covenants by each successive assignee, and that there is an implied promise on the part of each assignee to indemnify him against liability for breaches of covenant committed while such assignee occupied the premises, and this promise is

---

(*m*) In *Pym* v. *Blackburn* (1796) 3 Ves. 34, a lessee had promised to repair the leased building, and after the completion of the repairs, to accept a lease for a specified term, but the day at which the term was to begin was left blank. The court refused to hold that the tenant was bound by the agreement to surrender the existing term and accept a new lease immediately after the repairs were completed.

(*n*) *Woodf. L. & T.* p. 626.

(*o*) *Lasar* v. *Williamson* (1886) 7 New So. Wales L.R. 98.

implied, although the assignee may have covenanted to indemnify his immediate assignor against those breaches (*p*).

The English Court of Appeal has held that the liability of an assignee of the term under a covenant to indemnify is a future and contingent liability capable of proof under sec. 31 of the Bankruptcy Act of 1869, and that he is therefore released from this liability by a discharge in bankruptcy, obtained prior to the expiration of the term (*q*).

8. Obligations created by these covenants are independent.—(See also sec. 54, post). In several cases it has been held that covenants (A), (B), and (C) create distinct and independent obligations. Hence, where there is a general covenant to repair and a covenant to repair after notice, the absence of a notice is no excuse for a default as regards repairs (*a*). The landlord, therefore, may bring such an action for the disrepair without serving any notice at all (*b*). So if the lease contains covenants that the tenant shall keep and leave in repair, and to repair after notice, the first covenant is not so qualified by the last as to prevent the landlord from maintaining an action for leaving the premises out of repair at the end of the term without shewing that notice to repair was given (*c*).

No rulings with respect to the other covenants seem to be reported; but, in general principles, it is sufficiently obvious that similar doctrines must be applicable.

9. Contemporaneous agreements by lessor and lessee as to repairs, effect of.—The cases in which both the landlord and the tenant bind themselves by stipulations respecting the preservation of the premises fall into two classes.

(*p*) *Moule* v. *Garrett* (1870) L.R. 5 Exch. 132 (dess. Cleasby, B.), adopting a dictum of Lord Denman in the written judgment of the Exchequer Chamber in *Wolveridge* v. *Steward*, 1 C. & M. 644 (p. 659); see also *Close* v. *Wilberforce* (1838), 1 Beav. 112.

(*q*) *Morgan* v. *Hardy* (1887) 35 W.R. 588, per Bowen and Fry, L.JJ. Lord Esher dissented, adopting the opinion of Denman, J., in the lower court (17 Q.B.D. 771).

(*a*) *Gregory* v. *Wilson* (1852) 9 Hare 483.

(*b*) *Baylis* v. *Le Gros* (1858) 4 C.B.N.S. 537. "It would be monstrous," said Cockburn, C.J., "if after giving credit to his tenant that he will duly perform his engagement, the landlord abstains from harassing him with continual inspection, and then should find himself debarred of his remedy for a breach of a positive covenant."

(*c*) *Wood* v. *Day* (1817) 7 Taunt. 646, 1 Moo. 389; *Harflet* v. *Butcher* (1623) Cro. Jac. 644.

In one class of cases the effect of the stipulations is simply to cast upon the landlord the responsibility for certain repairs which would otherwise have to be done by the tenant. Here, if the language of the stipulation clearly shews that the landlord did undertake to do the repairs in question, no difficulty can arise, except in so far as some ulterior consequence of the resulting exemption of the tenant may be in dispute (*a*).

In the other class the question to be determined is whether the landlord's performance of an agreement to put the premises in repair, or to do some act calculated to facilitate the execution of the repairs by the tenant, is a condition precedent to the existence of any liability on the tenant's part, in such a sense that no action can be maintained against him for a default as regards repairs, unless the agreement has been fulfilled, or whether such performance is to be regarded as merely the breach of an independent covenant giving a right to a cross action. The answer to this question is entirely a matter of construction, depending upon the words used by the parties to express their respective obligations. The cases on the subject are collected in the subjoined note (*b*).

(*a*) See *Yellowley* v. *Gower* (1855) 11 Exch. 274 (referred to in the next section), where one of the steps in the argument which led up to the conclusion that the lease was not a valid exercise of the power, was the determination of the point that the agreement of the landlord to do certain repairs relieved the tenant *pro tanto* from liability.

(*b*) *Performance a condition precedent.*

A covenant to keep a house in repair from and after the lessor hath repaired it is conditional; and it cannot be assigned as a breach that it was in good repair at the time of the demise, and that the lessee suffered it to decay, for "although it were in good reparation at the beginning, if it afterwards happen to decay, the plaintiff is first to repair it before the defendant is bound thereto." *Slater* v. *Stone* (1623) Cro. Jac. 645.

In an action on a covenant to repair, which includes the words, "the lessor allowing and assigning timber for the repairs," it is necessary to aver that the lessor did so allow, etc., the timber. *Thomas* v. *Cadwallader* (1744) Willes 496.

Where the tenant's covenant is to keep the premises in repair, the landlord having first put them into complete repair and condition, no liability to repair is cast upon the tenant until the lessor has fulfilled his covenant to put in repair. *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153, approving *Neale* v. *Ratcliffe* (1850) 15 Q.B. 916, 20 L.J.Q.B. 130, where it was held that the landlord's obligation is not divisible so as to enable him to recover for the non-repair of a part of the premises which he has put into repair. Wightman, J., in his opinion delivered for the whole court, said: "Nor will this raise any inconvenience different in kind from that which follows from holding the condition divisible. If it be divisible, still the whole of the part as to which the action is brought must be shewn to have been put in repair; non-repair of a single room would shew the condition not performed as to the house, if that part of the covenant were sued on. Inconvenience of this sort must attend every case of condition precedent. On the other hand, the intentions of parties may be defeated, and great injustice done, by allowing an action to be maintained for non-repair of some part, the previous condition of which might have cast little burthen on the landlord to put in repair,

while he has neglected to do more expensive repairs to another part, the complete repair of which may have been the tenant's principal motive for taking the premises at all."

Where the covenant is to expend a certain sum in improvements and repairs, under the direction of a surveyor to be named by the landlord, the appointment of the surveyor is a condition precedent to the tenant's liability to expend the money, and a declaration alleging a breach of the covenant is bad, unless it avers such appointment. *Coombe* v. *Greene* (1843) 11 M. & W. 480, 2 Dowl. N.S. 1023.

Where the tenant covenants to repair, "being allowed rough timber upon the demised premises," an averment that the landlord was ready and willing to find the timber shews a sufficient performance of the condition precedent relating thereto. *Martyn* v. *Clue* (1852) 18 Q.B. 661.

Where one person, in consideration of another becoming his tenant, agrees to pay the latter a sum of money to repair the house to be let, and the latter subsequently becomes a tenant under a lease in which this agreement is not stated, and does the repairs, after which the lessor promises to remit a portion of the rent in payment for them, this promise may be enforced on the account stated, as an agreement independent of the lease. *Seago* v. *Deane* (1828) 4 Bing. 459, 1 Mo. & Pa. 227, 235.

Where a person agrees to take a house in consideration of certain *conditions* being fulfilled, and among these conditions is one by which the landlord engages to "complete the whole work necessary" by a specified date, the completion of the work is a condition precedent to the landlord's right to sue the intending lessee for not becoming a tenant. *Tidey* v. *Mollett* (1864) 16 C.B.N.S. 298.

In *Bragg* v. *Nightingale*, Styl. 140, the court was divided on the question whether a condition precedent or reciprocal covenants resulted where the lessor covenanted to repair the house demised by a given day, and the lessee covenanted that from that time until the end of the term he would repair and leave in repair.

Performance not a condition precedent.

Where a lessee covenants to put a house in repair before a specified date, "5000 slates being found, allowed and delivered by the lessor towards the repair," and afterwards keep it in repair during the term, the provision as to the slates is rather a covenant than a condition precedent. "Having been," would, it was said, have been more proper than "being" to convey the latter meaning. It was laid down that the lessee should plead specially that he did not put the premises in repair by reason that the plaintiff did not find the slates, and that therefore he was not bound to put them in repair. But at the same time it was intimated, arguendo, that, even supposing that the provision was a condition precedent, the lessee and his representatives would be bound to keep in repair, if the house had been put in repair without the lessor having furnished the materials. *Mucklestone* v. *Thomas* (1739) Willes 146.

Where a covenant to repair in a farming lease was followed by the clause, "the said farmhouse and buildings being previously put in repair and kept in repair" by the landlord, it was held that this clause amounted to an absolute and independent covenant on the landlord's part, and not merely to a condition precedent. *Cannock* v. *Jones* (1849) 3 Exch. 233, affirmed 3 H.L.C. 700, 5 Exch. 713. This particular question, however, was discussed only in the court below; where the actual point decided was that a declaration relying on the landlord's failure to repair, as a breach of contract, was good.

Where a lease contains a provision that "the lessor is to find timber, bricks, and tiles for repairs within five miles of the premises, the lessee to do the drawing and labour, he, the lessee, to give the lessor three months' notice in writing of his requirements," the obligation to repair is not conditional upon the landlord finding materials. Hence, if the lessee sends a notice to supply materials for repairing a barn, and, no attention being paid to the notice by the landlord, the repairs are not made, and the contents of the barn suffer damage, such damage is deemed to be proximately caused not by the landlord's default but by the tenant's non-performance of his own part of the contract. The duty of the tenant under such circumstances is to do the repairs himself, after which he will have a claim against the landlord for all such materials as should have been supplied. *Tucker* v. *Linger* (1883) 21 Ch.D. 18, 8 A.C. 508, 52 L.J. Ch. 941.

Where the tenant covenanted generally to repair, "having or taking in and

In any event a special stipulation is necessary to create an obligation of such a nature that the fact of the landlord's having failed to perform it is an answer to an action against the tenant for not repairing. No such obligation can be implied (*c*).

The stipulation relied upon as constituting a condition precedent may be applicable only as to a part of the term to which the alleged obligation to repair relates. In this case, even if the lessee is not liable for a breach of that obligation in respect to one part of the term, the lessor may still recover damages for a breach in respect to the other part (*d*).

10. Covenant to repair considered in relation to the validity of leases given in pursuance of powers.—It has been held that a lease containing a covenant to expend a specified sum for the purpose

---

upon the said demised premises competent and sufficient houseboot, etc., without committing any waste or spoil," the covenant was held to be absolute, and the provision as to houseboot, etc., was construed as amounting not to a condition precedent, but to a mere license. This construction was founded partially, though not entirely, on the meaning of the last clause, which was thought to be intended to relieve the tenant from liability for waste in cutting timber. *Bristol* v. *Jones* (1859) 1 E. & E. 484.

In an Ontario case the lessee of a farm covenanted "to repair and to keep up fences," and there was also a stipulation by the lessor to "build the line-fence between the premises hereby demised and the farm of D. M., should the same be required during the currency of this lease." One of the line fences was, as a matter of fact, about twenty-four yards off the true boundary line. All the justices of the Court of Appeal held that the lessor was not liable on his covenant to build until something was done to disturb the state of things existing at the time of the demise, as if the adjoining proprietor should refuse to allow entry to be made on his lands for the repair of the fence, or require the line-fence to be built on the true line. *Houston* v *McLaren* (1887) 14 Ont. App. 107.

Upon the trial of an action for breach of a contract in leaving premises in bad repair, it is proper to tell the jury that they are not to take into consideration evidence, which had been received without objection on the plaintiff's part, of a promise made by him before the demise to do some repairs. *Haldane* v. *Newcombe* (1863) 9 L.T. 420, 12 W.R. 135.

Another case involving such contemporaneous agreements is *Snell* v. *Snell* (1825) 7 D. & R. 249, 4 B. & C. 741, where the court considered itself to be precluded by the course which the pleading had taken from discussing the general question of law.

(*c*) *Colebeck* v. *Girdless Co.* (1876) 1 Q.B.D. 234, 45 L.J.Q.B. 225.

(*d*) In an action by the assignee of the reversion against the assignees of the term for not repairing and yielding up repaired, the defendants pleaded that they demised the premises to the plaintiff for a term less by a few days than their own, that he covenanted to repair and yield up in repair, the defendants finding certain iron and lumber work, and that the want of repair complained of was caused by plaintiff's default, and was a breach of his covenant. Held, that the plea was not good at common law for avoiding circuity of action, because there was a period of time to which the defendant's covenant extended and the plaintiff's did not, viz., the thirty days by which their term exceeded his, and was also bad as an equitable plea, because, the defendants being bound to find timber and iron work, the plaintiff's covenant was less onerous and the statement that the damages were identical was not true. *Marshall* v. *Oakes* (1858) 2 H. & N. 793.

of "effectually repairing" the premises to the lessor's satisfaction, and to keep them in repair thereafter during the term, is not a good execution of power to grant leases for the purpose of "new building or effectually repairing" any messuage, etc. (*a*). But a doubt as to the correctness of this decision was recently intimated by the English Court of Appeal in a case where the trustees of a settlement of a house property, acting under a power to demise any of the messuages "to any person who shall improve or repair the same, or covenant to improve or repair the same," agreed to let a house on the terms of a letter by which the tenant undertook "to do necessary repairs." This undertaking, as it covered repairs generally, that is, all such repairs as would be necessary to enable the landlord to hand over the property to a new tenant in substantial and tenantable repair, was deemed to be one which satisfied the terms of the power (*b*).

A power given by a testator to lease the land devised, reserving the "usual covenants," does not justify granting a lease entertaining a covenant that "in case the premises are burnt or blown down the lessor should rebuild, otherwise the rent should cease" (*c*).

If the doctrine that a tenant for years is answerable for permissive waste be adopted (see sec. 6 (*b*), ante), the consequence will be that a lease exempting the lessee from making certain repairs which are to be done by the lessor is void where the power forbids the making the lessee "dispunishable for waste" (*d*). So also a lease by a tenant for life under the Settled Estates Act, of 1877, which allows such tenants to make leases for twenty-one years, provided the demise is not made without impeachment for waste, is void where there is an exemption from liability for "fair wear and tear damage by tempest" (*e*).

(*a*) *Doe* v. *Withers* (1831) 2 B. & Ad. 896. Lord Tenterden considered that the words of the power might be understood to signify repairing those parts which merely needed repair, so that they might stand the remainder of the term, and rebuilding those which were not otherwise reparable, while the words of the lease might imply merely putting the whole into the best state which its then condition allowed of.

(*b*) *Truscott* v. *Diamond &c. Co.* (1881) 20 Ch. D. 251, 51 L.J. Ch. 259, (C.A.)

(*c*) *Doe* v. *Sandham* (1787) 1 T.R. 705. In *Medwin* v. *Sandham* (1789) 3 Swanst 685, it was held that equity would not, as against the reversioner, reform this lease when neither the lessor nor any person capable of exercising the power was any longer alive.

(*d*) *Yellowley* v. *Gower* (1855).

(*e*) *Davies* v. *Davies* (1885) 38 Ch.D. 499

A remainderman cannot take exception to the execution of a power authorizing a life tenant to grant a "repairing lease," where the lease in question contained a covenant that the lessee would, during the term, do repairs when and as often as necessity should require, leave in good repair, and repair three months after notice by the lessor (*f*).

11. During what period agreements to repair are obligatory. As a general rule, no question can arise as to date at which the obligation of the covenant attaches, for the lessee or assignee, as the case may be, must ordinarily have become subject to the burdens of the term at precisely the same moment as he became entitled to its benefits (*a*). But it has been held that a party may be bound by an express covenant to repair before his lease begins in point of interest, as where a lessee first underlet the premises for a portion of the term and afterwards assigned the whole term. Here, although the underlessee refused to attorn, the covenantor was required to repair during the period covered by the underlease (*b*). On the other hand it may be apparent from some other

---

(*f*) *Easton* v. *Pratt* (1864) 33 L.J. Exch. 233, 12 W.R. 805, reversing 33 L.J. Exch. 30. It was considered that, under such a covenant, whatever the state of the premises at the time of the demise, the tenant is bound to put the premises into repair, and keep them in a state of good and sufficient repair. In the Court of Exchequer, Bramwell, B., stated his exception of the meaning of a repairing lease as follows: "I should say, as a matter of reasoning, independently of any of the authorities, that the expression "repairing lease" requires a lease with more than the common covenant, which does not call upon the lessee to make good the defects which time brings about in the substantial fabric of the building." But in the Exchequer Chamber, Erle, C.J., did not think that the term had "any defined meaning as a name of art with the Court of Chancery or among conveyancers."

(*a*) The general rule being that the habendum of a lease can only be considered as marking the duration of his interest, and that its operation in the grant is merely prospective, a lessee cannot, in an action for a breach of a covenant to repair, be made liable for acts done before the time of the execution of the lease, although the habendum states the premises to be held from a date prior to performance of the acts in question. *Shaw* v. *Kay* (1847) 1 Exch. 412. In *Hawkins* v. *Sherman* (1828) 3 C. & P. 459, an action was brought by a lessee against a party to whom he, the residue of the term, subject to the performance of all the covenants in the lease, which from that date, "on the part of the tenants, lessees, or assignees were, or ought, to be performed." Counsel for plaintiff offered to prove that the assignee had bought at a lower price because the premises were in bad repair, and was therefore bound to indemnify his assignor for the entire sum which he had been compelled to pay to the ground landlord for delapidations. But the trial judge declared the evidence to be inadmissible, applying the principle that an assignor can recover only for dilapidations which accrue after the assignment.

(*b*) *Lewyn* v. *Forth* (1673) 1 Vent. 185, 3 Salk. 108.

stipulation in the lease that the obligation does not attach at the beginning of the term (*c*).

As long as a legal term exists the termor is bound by any covenants to repair which he may have entered into, however many assignments of the term may have been executed (*d*); but an assignee who assigns is liable only for his own defaults. See 37 (*a*), *post.*

The bringing of an action of ejectment for a breach of the covenants in a lease containing a stipulation that for any breach it shall "determine and be utterly void," puts an end to the term, and the lessee is not liable for any breaches of covenant (*e*) committed after the service of the declaration. But the tenant is not discharged from the obligation of a covenant to repair by the mere fact that he has been evicted from a part of the premises. Such a case as controlled by the principle that a tenant cannot at the same time exercise the right of a tenant, and yet contend that he was not a tenant (*f*). The results of a compulsory transfer of the term by virtue of proceedings taken in accordance with statutory provisions are the same as those which follow from a forfeiture by the landlord himself. But in such a case the tenant's liability for repairs continues up to the date of the actual transfer and does not cease when the proceedings are begun (*g*).

12. Obligation of covenants as to repair, how far continuous.—(*a*) *General covenant to keep in repair.*—(See also sec. 54, post). It is now well established that a covenant to keep in repair creates a

---

(*c*) Premises were leased for eight years, the lessee covenanting that he would at his own charge place the land and premises in good order; that he would build a new stable, and repair and keep in good repair the fences and gates, then erected or to be erected, and on account of these improvements it was agreed that no rent should be paid for the first nine months of the term. Held, that the lessee was not bound by the covenant to repair during the period for which he was relieved of rent. *Castle* v. *Roban* (1852) 9 U.C.Q.B. 400.

(*d*) *Staines* v. *Morris* (1812) 1 Ves. & B. 8, 13. See also *Barnard* v. *Godscall*, Cro. Jac. 309; *Thursby* v. *Plant*, 1 Win. Saund. 240, for the general doctrine as to the result of an assignment.

(*e*) *Jones* v. *Carter* (1846) 15 M. & W. 718.

(*f*) *Newton* v. *Allen* (1841) 1 Q.B. 519.

(*g*) *Mills* v. *Guardians &c.* (1872) L.R. 8 C.P. 79, where the court declined to accept the tenant's contention that the receipt of a notice from a railway company to treat for his interest under the Land Clauses Consolidation Act of 1845 put an end to his liability.

continuing obligation (*a*). From this principle two important consequences follow.

First, the right of re-entry, if it is reserved in the lease, can be exercised at any moment of the period during which the tenant remains in default (*b*), subject of course to such exceptions as may, under special circumstances, arise from the operation of the doctrines of waiver or estoppel. See secs. 54, 55, post. Secondly, subject to the same exception, damages may be recovered toties quoties for a breach of the obligation until the proper repairs have been executed (*c*), although it is recognized that there must always be considerable difficulty in apportioning the damages where successive actions are brought (*d*). To such an action the Statute of Limitations can clearly be no bar as long as the term is still running (*e*).

(*b*) *Covenant to put in repair.*—That there can be only one

---

(*a*) The remark of Manwood, J., in Anon. 3 Leon. 51, that by the recovery of damages the lessee should be excused for ever after for making of reparations, so as if he suffer the houses for want of reparations to decay, that no action shall thereupon after be brought for the same, "is," according to Willes, J., "contrary to the modern authorities." *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153.

(*b*) *Doe* v. *Durnford* (1832) 2 C. & J. 667; *Chauntler* v. *Robinson* (1849) 4 Exch. 163 [covenant to repair "when and so often as need or occasion should require during all the term"].

(*c*) *Doe* v. *Jackson* (1817) 2 Stark. 293; *Thistle* v. *Union F. & R. Co.* (1878) 29 U.C.C.P. 76; *Perry* v. *Bank &c.* (1806) 16 U.C.C.P. 404, and the case cited in the following note. Using the rooms of a house in a manner prohibited by the lease is a continuing breach. *Ambler* v. *Woodbridge* (1829) 9 B. & C. 376. Compare *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153, in which it was held, in an action against a lessor for breach of a covenant to keep in repair, that the breach being a continuing one, a former recovery of damages was not a bar to another action, but merely went in mitigation of damages. In an action of waste, also, the wrong of not repairing is regarded as a continuing wrong, the cause of action arising de die in diem up to the death of the tenant. *Woodhouse* v. *Walker* (1880) 5 Q.B.D. 404.

(*d*) See the remarks of Le Blanc, J., in *Kingdom* v. *Nottle* (1813) 1 M. & S. 355.

(*e*) *Maddock* v. *Mallett* (Exch. Ch. 1800) Ir. C.L. 173, a case in which the buildings, to which it was intended that the lessee's obligation should be applicable during the term, were pulled down by him and replaced by others of an essentially different character. The fact that these unauthorized alterations had been made more than twenty years before the action was brought on the covenant to repair the original buildings, was held not to prevent the recovery of damages. *Nixon* v. *Denham*, 1 Jebb & S. 416, 1 Ir. L.R. 100, was said by Fitzgerald, B., to be a strong case, and the reports to be unsatisfactory.

Another case in which similar facts were involved and the same conclusion was arrived at as in *Maddock* v. *Mallett*, is *Morrogh* v. *Alleyne* (1873) Ir. Rep. 7 Eq. 487.

breach of a covenant to put in repair is manifest on principle, and it has been so held in an action against the lessor (*f*).

18. What covenants respecting repairs are classed among the usual covenants of leases.—The covenant to keep the demised premises in repair is considered to be a normal part of leases in such a sense that, if an intending lessee has entered under an agreement which provides that the lease to be executed shall contain the usual covenants, particularly the covenants to pay rent and to repair, he is liable to be ejected if he fails to keep the premises in repair (*g*). But in suits for specific performance a covenant to repair is treated as unusual if it contains an exceptive proviso, relieving the tenant from liability in case of damage resulting from fire or tempest (*h*).

The covenant as to indemnity is also considered to be, so far, a usual and proper provision in cases where the original lessee transfers his interest that, in a suit for specific performance of an agreement to purchase leasehold premises, the purchaser, whether his assignee is the original lessee or a subsequent assignee, may be compelled to insert a covenant of indemnity against the performance of the covenant to repair and other covenants (*i*).

14. Short Forms Acts.—The parties to lease are, by various statutes, granted the option of embodying their agreements in certain concise forms declared by the legislature to be the legal equivalents of the inordinately verbose provisions which usually encumber such instruments.

The English Leases Act of 1845, 8 & 9 Vict., ch. 124, is considered to have prescribed a form which is somewhat inaccurate. (Woodfall's Landl. & T. p. 138. For the full text see p. 902.) For this reason, possibly, the Act has not been of much practical

---

(*f*) *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153, 36 L.J.C.P. 1.

(*g*) *Swain* v. *Ayres* (C.A. 188) 21 Q.B.D. 289.

(*h*) A person who agrees to take an assignment of the interest of another in a lease to contain all "usual covenants," cannot resist specific performance on the ground that it ought to contain an exception of his non-liability to make good damage by fire. *Kendall* v. *Hill* (1800) 6 Jur. N.S. 968. A contract for a lease of a mill to contain "all the usual and necessary covenants," and in particular a covenant to keep in good tenantable repair, does not entitle the lessee to have the covenant to repair qualified by the introduction of the words "damages by fire or tempest only excepted." *Sharp* v. *Milligan* (1857) 23 Beav. 419; same case, sub nom., *Thorpe* v. *Milligan*, 5 W.R. 336.

(*i*) *Staines* v. *Morris* (1812) 1 Ves. & B. 13.

utility. Indeed, it has been so rarely taken advantage of, that, so far as the writer has noticed in the preparation of the present article, no reported case construed or even referred to it.

The Canadian statutes, modeled on the English enactment, have been more fortunate in this respect. The earliest is found in ch. 92 of the Consol. Stat. of Upper Canada. The short forms, with which we are concerned in this article, are, in substance, the following:—

Covenant 3.—To repair. Covenant 4.—To keep up fences. Covenant 6.—That lessor may enter and view the premises, and that lessee, if notified, will repair within three months. Covenant 8.—To leave in good repair. Covenant 9.—That lessor may re-enter for breaches of covenant.

This statute has been re-enacted without any very material changes in Ontario, (Rev. Stat., 1877, ch. 103; 1887, ch. 106; 1897, ch. 125); and similar provisions are in force in Manitoba, (Rev. Stat., 1891, ch. 141); and in British Columbia, (Consol. Stat., 1888, ch. 71; 1897, ch. 117).

Longer provisions corresponding to those above stated are set out in these Acts, and it is declared that the use of the short r forms shall have the same effect as if the extended forms were employed. The phraseology of these extended forms is very similar to that which is commonly found in leases drawn without any reference to the statutes. It follows, therefore, that the principles ultimately applicable to the construction of leases in which the shorter forms are inserted are in no respect different from those which determine the rights and liabilities of the parties at common law. For this reason it has been deemed advisable to classify most of the cases involving such leases under the sections in which the questions to be settled are dealt with upon a purely common-law basis. Here it will be sufficient to advert to two special points which have been decided, and are appropriate to the construction of these statutes exclusively. In the first place, the implied addition of the words "executors, administrators and assigns," does not apply to any but the covenants expressly provided for in the Act (*a*). In the second place, the effect of the covenant to repair which is contained in the second column of

(*a*) *Emett* v. *Quinn* (1882) 7 Ont. App. 306 (Patteson J.A., dissented as to the particular instrument under review).

schedule of forms probably cannot be read into a lease in which the words contained in the first column is not found. This latter doctrine cannot be laid down in positive terms as it was stated, arguendo, in the dissenting opinion of the case last cited; but it is not in conflict with anything said by the other justices.

III. WHAT PROPERTY IS COVERED BY AGREEMENT TO REPAIR.

15. Property existing at the time the tenancy begins.- The subjoined rulings indicate the construction which the courts have placed upon various agreements as to a subject-matter in existence when the lease took effect. It is difficult to see what general principle can be extracted from them, except that an over-refinement of interpretation is discountenanced by the courts.

A covenant, in an agreement for the letting of a farm and mill, that the tenant "should keep and leave the messuages and buildings in good repair," renders him liable in damages, where the mill-wheel is not repaired (*a*).

A covenant to repair and keep in repair the *buildings with paling and fencing*, is broken if a pavement is not repaired (*b*).

In an action against a lessor it has been held that a covenant to repair the "external parts of the premises" obliged him to keep in repair any wall which formed part of the enclosure of the house even though it might have become actually exposed to the atmosphere through the pulling down of an adjoining house (*c*). Doubtless a similar ruling would have been made if the covenantor had been a lessee.

Where, at the time of executing a lease of a house, the lessee signed an indorsement on the lease, that he would lease the adjoining house at the same rent, he getting possession as soon as the premises were vacated by the tenants then in occupation, the implication was considered to be that, except as to the time of getting possession, the lessee was to occupy the second house on the same terms as he occupied the house mentioned in the lease itself. The obligation of a covenant to repair contained in the lease was therefore held to extend to the second house also (*d*).

Where the word "erections" follows the word "houses" in the enumeration of the various kinds of property subject to a covenant to repair, it is probably to be construed on the principle of ejusdem

(*a*) *Openshaw* v. *Evans* (1884) 50 L.T. 150.

(*b*) *Pigot* v. *St. John* (1614) Croke Jac. 329.

(*c*) *Green* v. *Eales* (1841) Q.B., 225.

(*d*) *Mehr* v. *McNab* (1894) 24 Ont. R. 653.

generis, and, if so, will not cover fences. At all events the covenant can be applicable only to permanent fences (*e*).

16. Additions to and alterations in the premises after the tenancy begins, generally.—The principle which Channell, B., considered to be established by the authorities for the construction of covenants which do not in terms cover subsequent additions was stated by him as follows in *Cornish* v. *Cleife* (*a*).

"Where there is a general covenant to repair, and keep and leave in repair, the inference is that the lessee undertakes to repair newly erected buildings. On the other hand, where the covenant is to repair, and keep and leave in repair the demised buildings, no such liability arises."

Bramwell, B., laid down the law more guardedly as follows:

"There is no general rule by which it can be determined whether a covenant to repair extends to houses erected on the land after the term has begun running. Each case depends on the particular terms of the covenant into which the parties have entered."

(*e*) *Gange* v. *Lockwood* (1860) 1 F. & F. 11. The words "farming buildings" in a deed creating a trust to keep a mansion-house, etc., in good repair have been held to include farmhouses: *Cooke* v. *Cholmondeley* (1858) 4 Drew. 326.

(*a*) 3 H. & C. (1864) 446. In this case it was held that a covenant in a lease of three dwelling-houses and a field to repair "the said dwelling-houses" does not extend to independent houses subsequently erected in the field, although the covenant goes on: "as well in houses, buildings, walls," etc. The only object of these words is to explain what precedes, that is, that the tenant is to repair not only the houses but also the buildings, etc.

A general covenant to repair and leave in repair, being a continuing covenant, extends to a building erected during the term. *Brown* v. *Blunden* (1684) Skinner 121 (the ground of the decision was that the buildings were "in potential being at the time of the lease.").

Where the lessee covenants to erect three messuages in place of those on the land and also to maintain the messuage agreed to be erected, and also to repair the pavements, etc., and to leave the houses thereafter to be erected in good repair at the end of the term, the latter clause obliges him to leave in good repair any houses which he may erect besides the three which he agreed to erect. *Douse* v. *Earl* (1689) 3 Lev. 264, 2 Ventr. 136, cited in *Bacon Abr.*, Covenant (F).

In an action of which the gravamen was waste it was held that a lessee is not bound to repair a house built by the lessor after the execution of the lease. *Darcy* v. *Askwith* (1618) Hob. 234.

A general covenant to repair all buildings that shall be erected on the land during the term is not rendered inoperative because the demised houses had been erected under a covenant to build, and this covenant, having been fulfilled, created no obligation to rebuild after the houses had been burnt down by fire. The covenant as to repair, therefore, attaches to the houses erected by underlessees in place of those burnt down. *Green* v. *Southcott*, Newfoundl. Rep. 1877-1884, p. 176.

Upon the authority of *Cornish* v. *Cleife*, *supra*, it has been held that any buildings erected on the demised land during the tenancy become part of the demised property, and are therefore subject to the covenant to yield up a good and tenantable repair, under the implied covenant in that regard, contained in sec. 20 of the Conveyancing Ordinance of New Zealand, Session 2, No. 10, *Stephens* v. *Money* (1893) 11 New. Zea. L.R. 775.

Whenever, as is customary in all well-drawn leases, there are clauses dealing with the contingency of subsequent erections, it is clear that the obligation of repairing must be applicable to any additions to the property which satisfy the descriptive words of the provisions so inserted, unless it can be gathered from the rest of the instrument that the obligation is not to attach, unless some specified event occurs (*b*). The obligation of such a covenant attaches to the houses for the erection of which provision is made, even if they are never fully completed (*c*). Moreover, it is clear that a covenant of this scope cannot be fulfilled by the repair of any other kind of structures except those which answer to the description in the lease.

Even so broad a covenant as one that the lessee and his assigns shall at all times keep in repair all buildings which shall be erected is not considered to be performed, if the substantial effect of the lease is that the lessor foregoes half his rent on condition that the lessee erects two dwelling-

---

(*b*) The lessee covenanted to lay out £200 within fifteen years in "erecting and rebuilding messuages or some other buildings, upon the ground and premises, and from time to time to repair all the said messuages, etc, so to be erected," with all such other houses, edifices, etc., as should at any time "thereafter be erected"; and "the said demised premises, with all such other houses, etc., so well repaired," to deliver up at the end of the term. It was held that, as the premises then standing were to be pulled down, under another provision in the lease, it could not have been intended that any of the £200 should be expended on them, and that the covenant to repair was applicable only to the buildings which might be erected with that money or otherwise. *Lant* v. *Norris* (1757) 1 Burr. 287.

The assignee of the term in possession at the end of the term is liable for the non-repair of all the buildings upon the demised land, where the covenant is that the lessee shall from time to time, during the term, well and sufficiently repair, etc., the said messuage or tenement, erections and buildings erected and built, or to be erected and built, upon the said ground hereby demised or any part thereof. *Hudson* v. *Williams* (1879) 39 L.T.N.S. 632, distinguishing *Cornish* v. *Cleife*, *supra*, on the ground that the lease there contained no such words as "built or to be built," and that there was nothing in the case to indicate that the parties contemplated the building of other houses. In a suit to enforce the purchase of a leasehold, the lessee had covenanted to build a certain number of houses within the first five years of the term, to repair the houses then upon the ground, or thereafter to be erected, and to deliver up at the end of the term all the premises thereby demised. A portion of the additional houses were not built within the period stipulated, but the lessor did not take advantage of the default and continued to receive the rent for forty-six years. Lord Langdale declined to enforce the contract, as, although the breach of the covenant to build had been waived, the covenant to deliver up in repair extended to the additional houses which were to be built, as well as to the ones already complete at the date of the demise, and could not be confined to such houses only as should actually be found upon the land at the end of the term. *Nouaille* v. *Flight* (1884) 7 Beav. 521.

(*c*) *Bennett* v. *Herring* (1837) 3 C.B.N.S. 370 [lease of a piece of land with two houses thereon in course of erection, with a covenant by the lessee to complete the houses within two months, and also to keep the houses in repair during the term, and proviso for forfeiture in case of the breach of any of the covenants.

houses, and an assignee of the lessee pulls down the dwelling-houses which had been erected, and puts up and keeps in repair a foundry. The court declined to admit that there was any the less a breach of the covenant, because the foundry was much more valuable than the houses destroyed, the position taken being that any other rule would have the effect of allowing a tenant by his own misfeasance to render the covenant nugatory (*d*).

But in cases where the tenant would derive an unfair advantage from the strict operation of this principle, the landlord may obtain relief in equity (*e*).

17. Covenants to repair considered with reference to the tenant's right to remove fixtures.—In some instances the effect of a covenant as to repairing is simply to exclude from the case the question whether the tenant is entitled to the benefit of the distinction between trade and other fixtures, the result being that his proprietary rights are made to depend upon whether the thing of which the quality is disputed is literally a fixture in the narrowest sense of the word.

On the ground that a covenant to repair, etc., all erections and buildings then erected or afterwards to be erected, and to leave the premises in good repair, is general and not subject to any exception, it has been held to prevent the tenant from removing buildings erected for the purposes of trade. But the court refused to extend the covenant to erections, not let into the soil, but merely supported on blocks of wood (*a*).

Commenting on this decision in a later case, Lord Tenterden said: "This is highly reasonable, because the expectation of buildings to be erected during the term, and left at its expiration, is often one of the inducements to the granting of a lease, and forms a considerable ingredient in the estimate of the rent to be reserved" (*b*).

(*d*) *Maddock* v. *Mallett*, (Exch. Ch. 1860) Ir. C.L. 173.

(*e*) Where a lessee of a farm covenants to keep in repair the buildings, etc., to be erected on the same premises or any part thereof, and subsequently, with the permission of the landlord, builds upon the waste adjoining the farm a house which he continues to hold down to the termination of the lease, the act of the tenant will be treated as an engagement on his part that the house shall be regarded as part of the premises originally demised, and subject to the same conditions, in such a sense that he will be bound to keep it in good repair. *White* v. *Wakley* (1858) 26 Beav. 17, 28 L. J. Ch. 77 [it was conceded that no action at law would lie].

(*a*) *Naylor* v. *Collinge* (1807) 1 Taunt. 19.

(*b*) *Thresher* v. *East London &c Co.* (1824) 2 B. & C. 608. There it was questioned whether any matter capable of having the effect of taking such buildings out of the operation of the covenant can exist debars the deed. The substance of the decision was this: Even if an under-lessee who occupied the premises during the pendency of the previous lease of which the one in question is a continuance had, as between himself and his own immediate lessor, a right to remove buildings erected for the purpose of trade, it is very doubtful whether the superior

A lessee covenanted to keep in repair the premises, with all the walls, *glass-windows*, etc., and yield up the same with all wainscots, *windows*, etc., and other things which then were, or at any time thereafter should be, thereunto affixed, *and together also with all sheds and other erections buildings, and improvements, which should be erected, built, or made upon the said demised premises*, in good repair and condition. It was held that, if a new plate-glass window which had been put in by the tenant in place of an old one was not a "shop"-window within the covenant, it was at all events an improvement, and that it could not be removed, although it had been erected for the purposes of trade (*bb*).

In line with the above decisions is a later one in which it is laid down, in general words, that a covenant to keep in good repair runs with the land, so far as it relates to fixtures, and binds the assignee of the term, although the tenant himself may have the right of removing them at the end of the term (*c*).

In other instances the distinction between trade and other fixtures may, by the express words of the covenant, be made the controlling element in the case.

The tenant, a blacksmith and wheelwright, having covenanted to keep and yield up the premises with all additions and improvements thereto, (trade fixtures *bona fide* made by the lessee only excepted), in good and tenantable repair, erected an addition to the demised building, and made the new and old buildings practically one by pulling down the greater part of the wall between them. It was held that the building so erected was not a trade fixture, and that the lessees' removal of it, after the term was ended, was a breach of the covenant to repair, although he put up again the wall which he had taken down, and left it in good repair (*d*).

But, with respect to many of the cases, it seems difficult to affirm with any certainty that the conclusion arrived at would have been different if the covenant to repair had not been a factor in the discussion. The rulings in favour of it and against the tenant are collected below.

landlord may not rely on the theory that he had nothing to do with any contract between other parties, and treat the removal of the buildings as a breach of the covenant to repair. Certainly he may do so, where the under-lease binds the tenant not only to repair the premises, but to leave, at the end of the term, those premises so repaired, together with all such erections, etc., as then were, or should at any time thereafter, be built upon the premises.

(*bb*) *Haslett* v. *Burt* (1856) 18 C.B. 162, 893.

(*c*) *Williams* v. *Earle* (1868) 9 B. & S. 740, L.R. 3 Q.B. 739.

(*d*) *Weller* v. *Rowett* (1900) 25 Vict. L.R. 683. As the court professed to arrive at this result by rejecting the authority of *Penton* v. *Robart* (1801) 2 East. 88, a case which seems to be still good law in England, it is doubtful whether the decision can be treated as sound outside the jurisdiction in which it was rendered.

(a) *Cases in which the right of removal was conceded.*

A covenant to leave the buildings which then were, or should be erected on the premises during the term, in repair, etc., is not broken by carrying away two sheds which were erected for the benefit of the tenant's trade (*e*).

A covenant to repair does not run with the land, so far as it relates to mere movable chattels, such as the tools and utensils used in a rolling-mill (*f*).

One covenant in a lease of coal and iron works bound the lessees to agree to keep in good repair the "furnaces and other works, houses and other buildings," then standing or thereafter to be erected and built upon the demised lands. Another bound them at the expiration of the term to deliver up the property, inclusive of "ways and roads" upon the land in such good repair that the works may be continued and carried on by the lessor. It was held (1) that the word "works" was not intended to refer to merely temporary works, such as train-plates and sleepers not affixed to the freehold, and laid down by the lessee only for the purpose of more conveniently transporting the iron ore from the mine to the smelting house, but implied permanent and substantial works, similar in the nature to the furnaces, etc., mentioned in connection with them; and (2) that such property was not included under the words "ways and roads." The court accordingly dissolved an injunction restraining the defendant, a judgment-creditor of the lessee, from removing the plates and sleepers (*g*).

A covenant to repair and leave in repair permits the removal of parts of a machine which may be removed without injuring the rest of the machine or the building, and which are usually valued between outgoing and incoming tenants (*h*).

A tenant held under an instrument binding him to maintain "the demised premises, a mill, and all buildings and improvements then erected and thereafter to be made and erected thereon, in good and sufficient tenantable condition," and also to "keep the mills and the works and machinery in working order, repair, and condition; and at the determination of the demise, to yield up the premises, and all buildings and improvements thereon in the like good and sufficient tenantable condition." It was held that the tenant would only be enjoined from removing such machinery as was originally demised or contracted for as essentially and integrally belonging to the demised mill or was substituted during the term for what was originally bound. The injunction was expressly stated

(*e*) *Dean* v. *Allalay* (1802) 3 Esp. 11, per Lord Kenyon who distinguished the case where a tenant builds a substantial addition to the house.

(*f*) *Williams* v. *Earle* (1868) 9 B. & S. 740, L.R. 3 Q.B. 739.

(*g*) *Beaufort* v. *Bates* (1862) 3 De. G. F. & J. 381, 6 L.T. 82.

(*h*) *Davis* v. *Jones* (1818) 2 B. & Ald. 165.

not to restrain the tenant from removing any machinery in the nature of trade fixtures which had since the conversion of the mill to the purposes for which it was then used, been erected in place of any mere trade utensils, or in order to perform any manufacturing process theretofore performed by hand (*i*).

A lease of ironstone mines contained a covenant to repair, excepting the "ironwork castings, railway gins, machines, and movable implements used in and about the said furnaces, fire-engines, ironworks, stove-pits, and premises." It was held that the lessee had a right to remove whatever was in the nature of a machine or part of a machine, as the ironwork castings, etc., but not anything in the nature of buildings, although made of iron, and that he was not bound to restore the brickwork in as perfect a state as if the article it was intended to support were to be left there, but merely to leave it in such a state as would be most useful to the lessors or the next persons who might take the premises (*j*).

(b) Cases in which the right of removal was denied.

Carrying away a shelf, though not stated to be a fixture, is a breach of covenant to leave the premises in the same order (*k*).

A tenant who covenants to keep and yield up in repair the premises and all erections, buildings, and improvements which may be erected thereon during the term, cannot remove a veranda erected during the term, the lower part of which was attached to posts fastened to the ground (*kk*).

A lessee covenanted to keep and yield up in repair a mill and a steam-engine, with the boilers and attached gearing in the mill. During the term he increased the size of the mill both laterally and upwards, and substituted for the existing engine another of greater power. Shadwell, V.C., being of opinion that both the new building and substituted engine were subject to the covenant, enjoined the assignees of the lessee, who had become bankrupt, from removing either the building or the engine. The assignees were offered the privilege of bringing an action to ascertain their legal right, but, as they declined to do so, the injunction was made perpetual (*l*).

A new pair of mill-stones substituted by the lessee for an old pair, has been held to be included in the "*improvements*" which a tenant is to keep and leave in repair (*m*).

(*i*) *Cosby* v. *Shaw* (C.A. 1888) 23 L. R. Ir. 181.

(*j*) *Foley* v. *Addenbrooke* (1844) 13 M. & W. 174.

(*k*) *Pigot* v. *St. John* (1614) Cro. Jac. 320.

(*kk*) *Penry* v. *Brown* (1818) 2 Stark. 403.

(*l*) *Sunderland* v. *Newton* (1830) 3 Sim. 450.

(*m*) *Martyr* v. *Bradley* (1832) 9 Aing. 24, 2 Mo. & Sc. 24.

A covenant to yield up in repair all "buildings, quays, works, edifices and engines" prevents a lessee of salt-works from removing salt-pans resting by their own weight on a frame of bricks (*n*).

A general covenant to yield up in repair prevents a lessee from removing a greenhouse, the framework of which was attached by screws to a piece of timber embedded in mortar on the top of dwarf wall (*o*).

A covenant by which "all things" which at the time of the execution of the lease were, or at any time during the term should be "fixed or fastened or set up on the premises, are to be yielded up at the expiration of the term, together with all fixtures thereto belonging, in as good condition as the same were at the execution of the lease," reasonable use excepted, has been held to extend to a building resting upon blocks of wood, not let into the ground; also to a building resting on stumps; also to a building placed on scantling and old posts just let into the ground, all erected during the term. It was held allowable to qualify the literal meaning of the words "at the execution of the lease" by reference to the other expressions in the covenant (*p*).

The Ontario Act respecting Short Forms in Leases (sec. 14, ante) is not intended to effect any change in the respective rights of landlords and tenants with respect to fixtures. Hence, where a tenant enters into possession of premises under a lease framed in accordance with the provisions of this Act, and "affixes things to the freehold for the purposes of trade, or of domestic convenience, or ornament, or for their temporary or more convenient use," he is not obliged to keep such fixtures in repair and surrender them to the landlord at the end of the term (*q*). On the other hand, under the full text of the statutory covenant to repair, the tenant has the right to affix things permanently to the demised premises, and, if he does so, he is bound to keep them in repair equally with the whole of the demised premises, as he received them. The limits of that right are: that the fixtures and things made or erected

(*n*) *Earl of Mansfield* v. *Blackburne* (1840) 6 Bing. N.C. 426, 8 Scott 720.

(*o*) *West* v. *Blakeway* (1841) 2 M. & G. 729.

(*p*) *Allardice* v. *Disten* (1861) 12 U.C.C.P. 278.

(*q*) *Argles* v. *McMath* (1894) 26 Ont. R. 224, affirmed 23 Ont. App. 44. Maclennan, J.A., stated that the meaning of the covenant in the extended form is that the "buildings, erections, and fixtures thereon" are only such as were thereon at the time of the demise, and which were the property of the landlord. In the court below it was laid down that the term "fixtures," as used in the covenants to repair and to leave the premises in good repair, does not include trade fixtures, but only fixtures of the irremovable class, viz., those things, the property in which passes to the landlord immediately upon being affixed to the freehold.

shall not be such as to diminish the value of the demised premises, nor to increase the burthen upon them as against the landlord, nor to impair the evidence of title (*r*).

Both at common law and under the Short Forms Act a lessee may remove trade fixtures even after the lessor has elected to forfeit the term for a breach of the covenants (*s*).

IV. WHAT CONSTITUTES A SUFFICENT PERFORMANCE OF THE COVENANT TO REPAIR.

18. Covenants not broken by dilapidations due to a reasonable use of the property.—In a former section some cases were cited to the point that the deterioration of premises which is due to their reasonable use in the manner contemplated by the parties is not waste (*a*). On general principles it may also be presumed that such a result would not be regarded as a breach of a covenant to keep in repair.

That damage done by ordinary wear, whether it be due to the use of the premises by the lessee himself or by his family or by his servants, need not be remedied is assumed in all the cases. But it is usual to insert in leases a specific provision that the tenant shall not be liable for the effects of "reasonable wear and tear," or the like.

Such an exception does not cover total destruction by a catastrophe which was never contemplated by either party such as the fall of a building caused by the overloading of a floor by a subtenant (*b*).

Nor is a covenant to deliver up the premises in good repair, "and all the trees now standing in the orchard of the said premises, whole and undefaced, *reasonable use and wear only excepted*," broken by removing trees which are past bearing from parts of the orchard which are too crowded (*c*).

Whether the tenant, allowance being made for the effect of this exception, has sufficiently performed his covenant is a question of fact to be decided in view of all the circumstances (*d*).

(*r*) *Holderness* v. *Lang* (1885) 11 Ont. 1, referring to *Doe d. Grubb* v. *Burlington*, 5 B. & Ad. 507, 517 [this, however, was an action of waste].

(*s*) *Argles* v. *M'Math* (1894) 26 Ont. R. 224, 23 Ont. App. 44.

(*a*) *Manchester &c. Co.* v. *Carr* (1880) 5 C.P.D. 507; *Sauer* v. *Bilton* (1878) 7 Ch. 815

(*b*) *Manchester &c. Co.* v. *Carr* (1880) 5 C.P.D. 507, 43 L.T. 476.

(*c*) *Doe* v. *Crouch* (1810) 2 Camp. 449, per Lord Ellenborough.

(*d*) *Polleykett* v. *Georgeson* (1878) 4 Vict. L.R. (Eq.) 207.

19. Obligation of tenant to make good damage done by casualties beyond his control.—(See also sec. 23, post.) It was recently remarked by Cave, J., arguendo, that a tenant is obliged to make good the damage which is done by such causes as a casual storm, that takes off a slate from the roof, or a stone thrown from outside which breaks a window, and that, if he neglects to do these things, he must also make good any further damage that may be caused to the structure by his non-performance of his covenant (*a*). On the other hand, a covenant to keep and yield up in repair does not mean, in the case of a very old building at all events, that "the consequences of the elements should be averted. . . . . What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which, so far as it results from time and nature, falls upon the landlord" (*b*).

Damage done by violent catastrophes such as fire and tempest is not infrequently the subject of a specific exception (*bb*). Whether the particular castastrophe which is alleged by the tenant to absolve him from the obligation of repairing comes within the excepted cases must be determined as a matter of construction.

In a covenant to repair subject to an exception in case of damages by "fire, storm, tempest, or other inevitable accident," the last words mean some accident ejusdem generis, and do not cover such a use of the property

(*a*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42.

(*b*) *Gutteridge* v. *Maynard* (1834) 7 C. & P. 129, per Tindal, J. This statement was recently approved by Lord Esher in *Lister* v. *Lane* [1893] 2 Q.B. 212; but the difficulties of its practical application have been thus commented upon by Alderson, B.: "The criterion of Tindal, C.J., as to results from time and nature is difficult for a jury. Suppose a house built forty years to have old windows, what is the rule as to repairing them? Or suppose a new house demised for ninety-nine years, if the test be the state in which it was when the tenant first entered, it would be unfair to be compelled to keep it in the same state forever." *Payne* v. *Haine* (1847) 16 M. & W. 541.

(*bb*) Although the point does not seem to have been expressly decided by any court, it seems to be conceded that the statute of 6 Anne, ch. 31, declaring that no suit should be brought against *any person* in whose house or chamber any fire should *accidentally* begin, nor any recompense be made by such person for any damage occasioned thereby, relieves tenants from the consequences of accidental fire. See Hargrave's note, 377, to Coke Litt. lib. 1; IV Kent's Comm. p. 83. Such at all events is the effect of the similar provision in 14 Geo. 3, ch. 78, sec. 86. See *Filliter* v. *Phippard* (1847) 11 Q.B. 355, where it is laid down that, by accidental fire is meant one not traceable to any cause, and does not include wilful fires or those caused by negligence. This provision, it should be observed, although it occurs in a statute which mostly relates to London only, is of general application. *Ex parte Goreley*, 34 L.J. Bkt. 1, 10 Jur. N.S. 355.

by the tenant as an overloading of a floor which causes the fall of the whole building (*c*).

Damage done by the drifting of ice against a wharf in a strong wind does not come within an exception of accident by tempest (*d*).

19a. Non-erection of buildings stipulated to be built.—The non-erection of buildings which the tenant has covenanted to erect within a given time is a continuing breach of a covenant to keep in repair (*e*).

20. Structural alterations, usually deemed to be a breach of the covenant. Pulling down the premises, wholly or partly, is a breach of a covenant to keep and surrender in good repair (*a*). Under ordinary circumstances, therefore, even the covenant is violated by the breaking of a door through a wall, whether it be merely one which divides two adjoining rooms of the same house (*b*), or two court yards belonging to the same house (*c*), or two adjoining houses (*d*). Even a power in a lease to "make alterations and improvements, and, for that purpose, to pull down any walls . . . . such alterations and improvements, when so effected to form part of the demised premises, does not authorize a tenant to break a doorway through the exterior wall separating the house demised from a house not the property of the lessor (·). Even a person to whom premises are leased to be used as a shop, although, as will be seen below, he is considered to have an unusual amount of liberty in adapting his premises to the requirements of his business,

---

(*c*) *Manchester &c. Co* v. *Carr* (1880) 5 C.P.D. 507.

(*d*) *Thistle* v. *Union &c. R. Co.* (1878) 29 U.C.C.P. 76.

(*e*) *Jacob* v. *Down* [1900] 2 Ch. 156, 69 L. J. Ch. 493.

(*a*) *Gauge* v. *Lockwood* (1860) 2 F. & F. 115, per Willes, J. See also *Kinlyside* v. *Thornton* (1776) 2 W. Bl. 1111 [demolition of fixtures by tenant covenanting to yield up in good repair]; [removal of a barrier between two adjoining mines where the lessee had covenanted to work them in a fair and husbandlike manner], following.

(*b*) *Holderness* v. *Lang* (85) 11 Ont. R. 1.

(*c*) *Doe* v. *Bird* (1883) 6 C. & P. 195, per Denman, C.J. Here, however, the liability was rendered more manifest by the express terms of the covenant which was to "repair, uphold, etc.," the "brick-walls," etc., pretaining to the tenement.

(*d*) *Doe* v. *Jackson* (1817) 2 Stark. 293. In one case however Byles, J., seems to have thought it an open question, whether the opening of a door in a garden wall is a breach of a covenant to "repair, uphold, and maintain the demised houses, and the buildings or erections to be erected or being on the land demised, etc." *Borgnis* v. *Edwards* (1860) 1 F. & F. 111.

(*e*) *Barton* v. *Reilly* (1879) 1 New So. Wales S.C. N.S. (C.L.) 125.

has no right to carry out such serious structural alterations as would result from cutting away a brick or stone front support and to put iron pillars as a support, and putting in large glass windows; or from removing the plate glass windows and iron pillars, and building up the front with brick or stone (*f*).

Three Ontario cases with regard to the removal of fences seem very difficult to reconcile without the aid of some very subtle distinctions. In two the court adopted a doctrine which seems to be in full conformity with general principles as well as with the decisions above cited, viz., that the removal of a fence and the use of the materials to repair other fences renders a tenant guilty of a breach of a covenant to repair, unless the removal is made by the command or at the instance of the lessor himself (*g*). Yet at a later date we find the position taken that it cannot be held, as a matter of law, that the removal of a fence is a breach of a covenant in a lease of a farm to keep in repair the fences erected or to be erected on the premises, but that the question is one of fact to be decided with reference to the circumstances of each case (*h*).

Except in so far as this case may be regarded as resting on the acquiescence of the landlord in the removal, this being one of the grounds on which the judgment was based,—(see sec. 55, post),—its correctness seems to be quite disputable. Leaving the element of acquiescence out of account, the simple question presented was whether the transfer of property of a fixed character to a new position, not originally contemplated by the parties, was or was not a wrongful act. Under the authorities already referred to there can be no doubt that such an act was essentially tortious unless there is some special reason for applying a different standard to the situation under discussion. So far as any such reason is suggested by the court, it seems to be that, under the circumstances attending the occupation of farming property in Canada, a tenant may be conceived to have a greater liberty than he ordinarily has in respect to moving fences from one place to another. This agreement, it is submitted, is wholly inadequate to justify trenching upon a definite rule of law. Any tenant who desires to

(*f*) *Holderness* v. *Lang* (1885) 11 Ont. R. 1, per Wilson, C.J.

(*g*) *Pickard* v. *Wixon* (1866) 24 U.C.Q.B. 416 [action by tenant for trespass on his land by landlord's cattle]. In *Wixon* v. *Pickard* (1866) 25 U.C.Q.B. 307, the same landlord sued the same tenant for trespass in taking his cattle. It was held that, if the landlord, in the exercise of the powers reserved in the lease, directed the removal of the fence with the view of repairing other fences, he laid himself under the duty of so using his right of way over it as not to inflict injury upon the tenant. If the landlord's cattle strayed, therefore, the tenant had a right to impound them damage feasant.

(*h*) *Leighton* v. *Medley* (1882) 1 Ont. R. 207.

make alterations of this sort can readily obtain the necessary permission from his landlord, if the alterations are proper, and he is not subjected to any hardship by a rule which would compel him to ask that permission.

In the absence of a negative covenant, a tenant, who is permitted by his lease to put up as many buildings as he thinks fit upon the land demised, the instrument also containing a proviso that he shall repair and maintain present and future erections, is entitled to pull down existing structures and re-erect them (*i*). But the effect of an Irish decision (*j*), referred to in sec. 12, ante, and the rationale of the legal situation created by the covenant, seems, at all events, to require that the lessee who pulls down buildings should replace them by others of essentially the same description, and not of inferior quality.

A more simple case is that of a shop, in respect to which it is held that, as the proprietor gains by having the place made as attractive and convenient as possible, some latitude must be allowed to him under the covenant (*k*). In the case cited, the court refused to hold that a breach had been committed, either by the removal of part of a large shop window-front and the insertion of a door in its place, or by the removal of a partition of a temporary quality, constructed partly of wood and partly of glass, from one position in a shop to another, especially where the object of the alterations was to adapt the premises to the requirements of a statute regulating the business for which the premises were leased. Similar freedom as to structural alterations is allowed where words are used in a covenant which indicate that such alterations were contemplated by the parties, as where the lessee undertook to keep the premises, and all such "improvements" as should be made by the lessee during the term. This stipulation was construed as putting the parties in the same position as if

(*i*) *McIntosh* v. *Pontypridd &c. Co.* (1892) 71 L.J.Q.B. 164, where an underlessee was required by a local improvement company to treat with them for a strip of land on which the existing buildings stood. The authority followed with regard to the effect of the non-insertion of a negative covenant was *Doherty* v. *Allman* (H.L.E.) 3 A.C. 70.

(*j*) *Maddocks* v. *Mallett* (Exch. Ch. 1860) Ir. C. L. 173.

(*k*) *Holderness* v. *Lang* (1885) 11 Ont. R. 1, a case decided under the Ontario Short Forms Act. Wilson, C.J., said: "Converting a flat window into a bow window, or to put a glass into a panel of the door, or a door where there is a window, or to make a door to open at the right hand in place of the left hand, or to divide a door into two parts, in place of being all in one, or to shift a staircase from one part to another, or the like, would not be wrongful acts under a lease, if these were acts of improvement and beneficial to the estate.

they had entered into an express contract for the liberty of making improvements, which, at common law, would have been waste. Such a covenant is not broken, therefore, by turning the lower windows into shop windows and stopping up a doorway, and opening a new one (*l*). But a covenant of similar tenor entered into with regard to a dwelling-house, which was to be kept, with "all improvements made thereon, in good and sufficient tenantable order, repair and condition," was deemed to be broken by the conversion of the house into a store, though the value of the premises was increased. Such alterations, it was said, differ from those which are consistent with the character of a dwelling-house (*m*).

21. Substantial performance of the covenant deemed to be sufficient.—The general result of the cases is that, as was declared by Tindal, C.J., in a nisi prius ruling which has frequently been cited, with approval, a substantial performance of the covenant is sufficient (*a*).

This principle, in most of the instances in which it has been applied, has enured to the benefit of the tenant, but under some circumstances it becomes a decisive factor in the landlord's favour (*b*). Its acceptance involves the corollary that the questions arising in an action for the breach of a covenant to repair are questions of fact for the jury, or the judge sitting as a jury, "to be decided on what are the substantial merits of the case, rather than on strict rights or extreme law" (*c*).

(*l*) *Doe* v. *Jones* (1832) 4 B. & Ad. 126, 1 N. & M. 6.

(*m*) *Elliott* v. *Watkins* (1835) 1 Jones 308, distinguishing *Doe* v. *Jones*, supra, on the grounds that the lease in that case shewed that the parties contemplated the probability of future alterations being made, and that the alterations made were consistent with the terms of the agreement.

(*a*) *Gutteridge* v. *Munyard* (1834) 7 C. & P. 129, per Tindal, C.J.; *Stanley* v. *Towgood* (1836) 3 Bing. U.C. 4, and the cases cited below. Covenants to repair must not be strained, but reasonably construed, on the principle of "give and take." Willes, J., in *Scales* v. *Lawrence* (1860) 2 F. & F. 289.

(*b*) Thus it has been held that, to make dilapidations "wilful" within the scope of a proviso for avoiding the term if the tenant should "wilfully fail to perform" any of the covenants, it is not necessary that he should have received notice to repair, but that the tenant is in default so as to make the proviso applicable, where he knows the premises to be out of repair, and suffers them to remain in that condition. *Doe* v. *Morris* (1842) 11 L.J. Exch. 313.

(*c*) *Scales* v. *Lawrence* (1860) 2 F. & F. 289, per Willes, J. In a recent nisi prius case, Cave, J., refused to hold that, because a person put nails into the wall of a house, he must take them out and fill up the holes or be guilty of a breach of covenant, or that a house is not out of repair, because a dozen or so of cracks, which do not affect the stability of the structure, appear in the plaster-

22. Repairs subject to the approval of the landlord, or his agent.—In the absence of words clearly shewing that this was the intention of the parties, the insertion in a lease of words reserving to the landlord a right of surpervising certain specific repairs to be executed by the tenant, will not be taken to imply that his approval of their quality is a condition precedent to the tenant's being entitled to claim the benefit of what he has actually done towards the performance of his part of the contract (*a*). Even where a lessee is to incur a forfeiture if he does not do certain repairs "to the satisfaction of the surveyor" of the lessor, there will be no forfeiture incurred if the jury are of the opinion that the surveyor ought to have been satisfied, whether he was or was not, as a matter of fact, satisfied (*b*).

---

ing. *Perry* v. *Choxsner* (1893) 9 Times L.R. 488. Leaving the glass in a window cracked was, however, held to be a breach in *Pigot* v. *St. John* (1614) Cro. Jac. 329. Where the covenant is to repair "by all manner of needful and necessary reparations," and to yield up the premises "in good and substantial repair," the last clause will be regarded as giving a clue to the meaning of the general words, and it will be proper to instruct the jury that they are to find whether the particulars of non-repair enumerated by the landlord's witnesses were dilapidations amounting to a substantial breach of the covenant. *Harris* v. *Jones* (1832) 1 Moo. & R. 173. Where a lessee covenants to put the premises into complete repair "forthwith," it is for the jury to say upon a reasonable construction of the covenant, whether he has really done what he reasonably ought in the performance of it. *Doe* v. *Sutton* (1840)Car. & P. 706.

It is held, however, that, where a person under an agreement to take a lease of a house states to an intending assignee of the agreement, who is cognizant of its terms, that he will not be liable for substantial repairs, such a statement is regarded as a misrepresentation of a matter of law and not of a fact, and is therefore not a ground for refusing specific performance of the agreement. *Kendall* v. *Hill* (1860) 6 Jur. N.S. 968. In this case Romilly, M.R., considered that the obligation to do "substantial repairs" was one to which no precise significance could be attached for the purposes of the case, remarking: "It is impossible to say what are 'substantial repairs.' There are no repairs which may not become substantial by neglect. The slightest possible defect, if not attended to at the proper time, may require substantial repair; and is it to be thrown upon the landlord, because it has been neglected by his tenant in the first instance?"

(*a*) A lease provided that the tenant should lay out £200 in "certain erections and alterations, or repairs to be inspected and approved of by the lessor, and to be done in a substantial manner," and that the lessee should be "allowed the sum of £200 towards *such* erections and alterations, and should be at liberty to retain the same out of the first year's rent." The court refused to accept the contention that the word "such" had relation both to the quality of the repairs and to the right of the lessor to decide on their sufficiency. The approval of the lessor, therefore, was held not to be a condition precedent to the tenant's reimbursement, in such a sense that, unless it was given, he would not be entitled to make any deduction from the rent. Such an agreement was said to be in effect a contract that the repairs should be substantially done, and that the lessor shall have the means of ascertaining that fact. *Dallman* v. *King* (1837) 4 Bing. N. C. 105, distinguishing *Morgan* v. *Birnie*, 9 Bing. 672, a case of an architect's certificate.

(*b*) *Doe* v. *Jones* (1848) 2 C. & K. 743, per Pollock, C.B.

28. Extent of the obligation to repair to be estimated with reference to the condition of the premises at the beginning of the term.—A principle which the courts have often had occasion to apply is that, in construing a covenant to repair, even when it is expressed in the largest terms, regard must be had to the general character and condition of the demised property when the tenant entered (*a*). The scope of this principle under its various aspects is clearly indicated by the following utterances of the judges in a leading decision by the Court of Exchequer (*b*):

"A lessee who has contracted to keep demised premises in good repair is entitled to prove what the general state of repair was at the time of the demise, so as to measure the amount of damages for want of repairs by reference to that state." (Per Alderson, B.)

"The cases all shew that the age and class of the premises let, with their general condition as to repair, may be estimated in order to measure the extent of the repairs to be done. Thus a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square." (Per Parke, B.)

"The term 'good repair' is to be construed with reference to the subject-matter, and must differ, as that may be a palace or a cottage; but to 'keep in good repair' presupposes the putting it into, and means that during the whole term the premises shall be in good repair." (Per Rolfe, B.)

The principle was also extensively discussed by the Court of Appeal in a recent case (*bb*), where Lord Esher conceived the result of the earlier decisions to be this:

"The question whether the house was, or was not, in tenantable repair when the tenancy began is immaterial; but the age of the house is very material with respect to the obligation both to keep and to leave it in tenantable repair. It is obvious that the obligation is very different when the house is fifty years older than it was when the tenancy began. The age of the house must be taken into account because nobody could reasonably expect that a house two hundred years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a

(*a*) *Lister* v. *Lane* (1893) 2 Q.B. 212, citing with approval Smiths' Landl. & T. (3rd Ed.) p. 302.

(*b*) *Payne* v. *Haine* (1847) 16 M. & W. 541. See also the charges of Willer, J., in *Scales* v. *Lawrence* (1860) 2 F. & F. 289, and *Woolcock* v. *Dew* (1858) 1 F. & F. 337. A similar rule holds in the case of a sub-lessee under a covenant to repair. He is only bound to put the premises in the same condition as he found them at the time of the lease to him. *Walker* v. *Hatton*, 10 M. & W. 249, per Parke, B., arguendo.

(*bb*) *Proudfoot* v. *Hart* [1890] 25 Q.B.D. 42.

palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for house in a Spitalfields. The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it."

The above principle, it is manifest, not only defines the extreme upward level of the tenant's duty, but also fixes the standard which he must attain in order to satisfy the obligation of the covenant. Thus, in a case where the covenant was to keep and leave in good repair, we find Parke, B., stating the nature of the resulting obligation of the tenant as follows:

"He cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them. He was to keep them in good repair, and in that state with reference to the age and class, he was to deliver them up at the end of the term" (*c*).

From this standpoint the obligation of the tenant, under a covenant to keep and yield up in repair, may also be stated as that of keeping a building, however old, "as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care" (*d*).

Any instruction to a jury which withdraws from their consideration the question whether the demised premises were new or old at the time when the tenant entered is, of course, erroneous (*e*). But after the witnesses have been examined generally as to the condition of the premises when the lease was executed,

(*c*) *Payne* v. *Haine* (1847) 16 M. & W. 541.

(*d*) *Gutteridge* v. *Maynard* (1834) 7 C. & P. 129, per Tindal C.J. A motion was made to set aside the verdict, but no objection was made to the charge of the Chief Justice. In *Woolcock* v. *Dew* (1858) 1 F. & F. 337, Willes, J., ruled that evidence that the premises were ruinous is no answer to a covenant to keep them in repair, for, even if they fall down, such a covenant compels the tenant to rebuild them as nearly as may be in the same state, (provided it was a tenantable state), in which they were demised. Where a hired barge is to be delivered up in "good working order," the words do not mean that it is to be delivered up absolutely in that condition, but in good working order with reference to the purposes for which a barge of such an age and condition was capable of being used--the same sort of order it was in when the hiring took place, fair wear and tear excepted. *Schroder* v. *Ward* (1863) 3 C.B.N.S. 410.

(*e*) *Stanley* v. *Towgood* (1836) 3 Bing. N. C. 4. An application for a new trial was refused, for the reason that the counsel could not agree as to the expressions actually used by the trial judge, and he had reported that no such instruction as that to which exception was taken had in fact been given.

the trial judge is justified in refusing to allow the tenant to go into minute particulars, even though they may bear upon that condition (*f*). Though the age of a house at the time of its demise must be considered in estimating the amount of repair on which the lessor can insist, yet an inquiry into its state of repair at the time of entry would be misplaced" (*g*).

In an action for leaving in bad repair, it is proper to instruct the jury to consider only the state of repairs when the defendant entered, in so far as it went to shew the age, character and class of the premises, and the extent to which the defendant had performed his contract (*h*).

24.—"Good," "tenantable," and "habitable" repair, meaning of.—(*See also under s. 26 (e), post*)—Such epithets as "tenantable," "habitable," "good," or the like, are often prefixed to the word "repair" in covenants of the kind here under review. For practical purposes these expressions seem to be synonymous, so far as the tenant's obligations are concerned (*a*). They all "import such a state as to repair that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied" (*b*).

(*f*) *Young* v. *Mantz* (1838) 6 Scott 277, S.C. sub nom; *Mantz* v. *Goring* (1838) 4 Bing. N.C. 451 [here the question excluded was: "Did not some of the defects complained of exist prior to a specified date?"]; *Woolcock* v. *Dew* (1858) 1 F. & F. 337 [evidence of removal of a paling round a mill excluded].

(*g*) *Payne* v. *Haine* (1847) 16 M. & W. 541, per Alderson, B., who regarded this as the effect of *Stanley* v. *Towgood* (1836) 3 Bing. N.C. 4.

(*h*) *Haldane* v. *Newcomb* (1863) 12 W.R. 135 [action for leaving in bad repair].

(*a*) Alderson, B., in charging a jury, thought it "difficult to suggest any material difference between the term habitable repair," and the more common expression "tenantable repair." *Belcher* v. *Mackintosh* (1839) 2 Moo. & R. 186, 8 C. & P. 720. In *Proudfoot* v. *Hart*, infra, Lord Esher spoke of "good repair" as being much the same thing as "tenantable" repair. In another case the Court of Appeal declined to say what was the meaning of the words "tenantable repair." *Crawford* v. *Newton* (1887) 36 W.R. 54.

(*b*) Alderson, B., in *Belcher* v. *Mackintosh* (1839) 8 C. & P. 720; 2 Moo. & P. 186. In one part of his judgment in *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, Lord Esher remarked that this definition was a good one, so far as it goes; and in another place, he expressed his approval of a definition of the term "tenantable repair" drawn up by Lopes, L.J., viz.: "'Good tenantable repair,' is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it." In another case Alderson, B., remarked: "It is no doubt, in practice, difficult to say what is a putting premises, so old as to be ready to perish, into good repair, or keeping them in it; but a contract to "put" premises in good repair cannot mean to furnish new ones where those

The cases shew clearly enough that a tenant incurs a more onerous obligation where he undertakes to keep the premises in the state of repair designated by these epithets than where he simply agrees to keep them in repair. In the latter case he will merely be bound to prevent them from becoming more dilapitated than they were when he took possession (*c*). In the former he subjects himself to the additional burden of bringing them up to a certain standard of habitability. In a recent case it was laid down by Lord Esher that, under a contract to keep and leave the premises in "good" or "tenantable" repair, "the obligation of the tenant, if the premises are not in tenantable repair, when the tenancy begins, is to put them into, keep them in, and deliver them up in tenantable repair" (*d*). But this principle must be construed with due reference to the more general one that a substantial performance of the covenant is all that is required.

Where the covenant is to keep in "good and tenantable repair," the question is "whether the premises have been kept in substantial repair, as

---

demised were old, but to put and keep them in good tenantable repair, with reference to the purpose for which they are to be used." *Payne* v. *Haine* (1847) 16 M. & W. 541. See also *Mantz* v. *Goring* (1838) 4 Bing. N.C. 451, where it was laid down that a lessee must fulfil a covenant to keep in tenantable repair according to the nature of the premises.

(*c*) See the charge of Tindal, C.J. in *Gutteridge* v. *Maynard* (1834) 7 C. & P. 129.

(*d*) Lord Esher in *Proudfoot* v. *Hart* (1890) 25 Q.B.D. (C.A.) 42, p. 50, following *Payne* v. *Haine* (1847) 16 M. & W. 541, where the ruling was that a contract by which a tenant agrees to "keep" a farm and outbuildings, and at the expiration of the tenancy deliver up the same "in good repair, order, and condition," implies that, even if the premises were old and in bad repair at the time of the demise, the tenant was bound to put them in good repair, as old premises. Rolfe, B., observed that "to 'keep in good repair' presupposes the putting it into, and means that, during the whole term, the premises shall be in good repair.. Similarly it was declared by Parke, B., that the mere fact that the premises were old will not justify the keeping them in bad repair, because they happened to be in that state when the lessee took them."

See also *Belcher* v. *Mackintosh* (1839) 2 Moo. & R. 186, 8 C. & P. 720. Alderson, B., in charging the jury as to a covenant to keep premises in "habitable repair," said: "They were old premises and dilapidated; the agreement was not that the tenant should give the landlord new buildings at the end of his tenancy, but that he should take the premises out of their former dilapidated condition, and deliver them up fit to be occupied for the purposes they were used for."

It has been held that a testamentary trust "out of the rents and profits to keep the mansion-house, and all the buildings, in *good repair*, rebuilding, if necessary, any *farming buildings* that may from time to time require it," does not merely require the trustees to keep the premises in that state of repair in which they were at the testator's death, but to put them in such a state of repair, as will satisfy a respectable tenant using them fairly: *Cooke* v. *Cholmondely* (1858) 4 Drew, 326.

opposed to claims for fancied injuries, such as a mere crack in a pane of glass, or the like" (*e*).

The effect of this principle, it will be observed, is to create an exception to the general rule illustrated in the next section by throwing upon the tenant, in some cases, the obligation to renew worn-out parts of the premises. In the decision of the Court of Appeal just cited (*f*), Lord Esher said with regard to the floor of the house:

"It may have been rotten when the tenancy began. If it was in such a state when the tenancy began that no reasonable man would take the house with a floor in that state, then the tenant's obligation is to put the floor into tenantable repair. The question is, what is the state of the floor when the tenant is called upon to fulfil his covenant? If it has become perfectly rotten he must put down a new floor, but if he can make it good in the sense in which I have spoken of all the other things—the paper, the paint, the whitewashing—he is not bound to put down a new floor. He may satisfy his obligation under the covenant by repairing it" (*g*).

But even a covenant of this tenor will not render the tenant liable to rebuild the entire house after it has fallen down, from causes which do not indicate any culpability on his part (*h*).

25. How far the covenants bind a tenant to restore, renew and improve the premises.—Occasionally leases contain, in addition to the covenant to keep in repair, one which binds the tenant to rebuild in the event of its being necessary (*a*). But it is settled

---

(*e*) *Stanley* v. *Towgood* (1836) 3 Bing. U.C. 4, *per* Tindal, C.J., *arguendo*.

(*f*) It is singular that the Court has not attempted to furnish any explanation of the apparent discrepancy between its opinions in this case and an earlier one in which a covenant to keep in "tenantable" repair was involved, and a judgment of Cave, J., was upheld in which he had declared without any qualification that re-papering was not obligatory. See s. 26 (f), post.

(*g*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, per Lord Esher. This statement qualifies pro tanto the remarks of Cave, J., who in the lower court had laid down without qualification that a lessee under a covenant to keep and leave in "tenantable repair" is bound to patch up parts of the structure, whenever it may be necessary, but not to substitute a new structure in place of a part which has become absolutely worn out and necessary to be replaced.

(*h*) *Manchester, etc. Co.* v. *Carr* (1880) L.R. 5 C.P.D. 507 [covenant was to keep in "good" repair].

(*a*) A lessee covenanted, within the two first years of the term to put the premises in good repair and at all times during the term to repair as often as need should require, and also within the first fifty years of the term to take down the four demised messuages, as occasion might require, and in the place thereof erect four other good and substantial brick messuages. In an action for a breach in not having taken down the old messuages and erected four others within the fifty years, the defendants pleaded that the occasion did not require that

beyond all dispute, by several cases, that a covenant merely to keep and leave in repair cannot, under any circumstances, be given such a construction as to render a tenant liable for damages accruing from a radical defect, the consequences of which can be obviated only by renewing the whole structure or one of its important parts (*b*).

In the first case cited below the facts shewn in an action to recover from the lessee the cost of rebuilding the demised house, which had exhibited signs of weakness during the term, and after the end of the term the house was condemned by the district surveyor as a dangerous structure and pulled down were as follows: The foundation of the house was a timber platform, which rested on boggy soil, below which, at a depth of seventeen feet, was a layer of solid gravel. The house was fully one hundred years old, and the bulging of the walls, which had led to its demolition, was caused by the rotting of the timber platform. The house might have been repaired during the term by means of underpinning. Lord Esher quoted as a correct statement of the law the rule formulated in "Smith's Landl. & T. (3rd Ed.) p. 302, that "a tenant who enters upon an old house is not bound to leave it in the same state as if it were a new one," and remarked that this rule was derived partly from the summing up of Chief Justice Tindal in a case already referred to (*c*). After quoting from this charge, he proceeded thus: "You have then to look at the condition of the house at

---

the messuages should be taken down. Upon demurrer, Gibbs, C.J., intimated his opinion that the covenant would be satisfied, without taking down the old houses, if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, and stated that, if the plaintiff took issue upon the question whether occasion did arise for the re-construction, he would direct the jury to find for the plaintiff unless the repaired house was as completely and substantially to every purpose as good as a new house. The demurrer was then withdrawn, and the issue pleaded to. *Evelyn* v. *Raddish* (1817) 7 Taunt. 412,

(*b*) *Lister* v. *Lane* (1893) 2 Q.B. 212. The principle enunciated in the text is suggested more especially by the language of Kay, L.J., at p. 218.

The following expressions of judicial opinion may also be cited in its support besides those referred to in the arguments of the Lord Justices.

"If a house falls down by mere old age, the tenant is not bound to put up a new one. If it falls down by the fault of the tenant it is otherwise." *Belcher* v. *Mackintosh* (1839) 8 C. & P. 720, per Alderson, B.

"If a tenant "takes an old house, he must not let it tumble down; he must keep it up; but only as an old house. No tenant is bound to leave, for his landlord, a new house; but the house which he took, in a state of fit repair, as such house." *Scales* v. *Lawrence* (1860) 2 F. & F. 289, per Willes, J.

"When a very old building is demised, a covenant to keep and yield up in repair does not mean that it should be restored in an improved state." *Gutteridge* v. *Maynard* (1834) I. & P. 229, per Tindal, C.J.

"When the house can be kept in repair by repairing a piece of a door or anything of that sort, the tenant is bound to do it; but when the whole flooring is rotten, he is not bound to put in a new flooring. *Crawford* v. *Newton* (1887) 36 W. R. 54, per Cave, J.

(*c*) *Gutteridge* v. *Maynard* (1834) 7 C. & P. 129. See sec. 23, ante.

the time of the demise, and, amongst other things, the nature of the house —what kind of a house it is. If it is a timber house, the lessee is not bound to repair it by making a brick or stone house. If it is a house built upon wooden piles in soft ground, the lessee is not bound to take them out and to put in concrete piles" (*d*). . . . "If a tenant takes a house which is of such a kind that by its own inherent nature it will in course of time fall into a particular condition, the effects of that result are not within the tenant's covenant to repair. However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair that thing which he took; he is not obliged to make a new and different thing, and, moreover, the result of the nature and condition of the house itself, the result of time upon that state of things, is not a breach of the covenant to repair. So here the builder placed a platform of timber on this muddy soil, and built the house upon it. That is the nature of this house. Whatever happens by natural causes to such a house in course of time—the effects of natural causes upon such a house in the course of time are 'results from time and nature which fall upon the landlord,' and they are not a breach of the covenant to repair. They are matters which must be taken into account in considering whether the covenant to repair has been broken, and, when they are the results of time and nature operating on such a house, they are not a breach of the covenant, and the tenant is not bound to do anything with regard to them. That, as it seems to me, is the state of things in this case, and therefore the decision of Grantham, J., was quite right. The tenant from time to time did the proper repairs, and now the plaintiffs want him to do something for which he is not liable, and which would be of no avail unless he built a house of an entirely different kind."

Kay, L.J., commenting on the alleged obligation of the tenant to "underpin" the house said: "Here the house was built upon a timber structure laid upon mud, the solid gravel being seventeen feet below the timber structure, and the only way in which the effect of time upon the house could be obviated is, according to the surveyor's evidence, by "underpinning" the house. That was the only way to repair it during the tenancy. "Underpinning," as I understand, means digging down through the mud until you reach the solid gravel, and then building up from that to the

---

(*d*) The case cited in support of this principle by the learned judge was *Soward* v. *Leggatt* (3), in which Lord Abinger, C.B., said (at p. 617): "The surveyor who has been called on the part of the plaintiff has given you an estimate; but it is also proved that, when the repairs came to be done, they amounted to considerably more than the estimate, and that is generally the case, because, when the work is actually done, improvements are made for which the tenant is not liable, of which the improved mode of laying the joists in the kitchen is an example, and if the joists have been now laid in a manner which will make them more durable and last longer before new ones are again wanted, that is a thing for which the tenant is not liable on the covenant to repair."

brickwork of the house. Would that be repairing, or upholding, or maintaining the house. To my mind, it would not; it would be making an entirely new and different house. It might be just as costly to underpin as to pull the house down and rebuild it. No one says, as I judge from the evidence, that you could repair the house by putting in a new timber foundation. The only way, as the surveyor says, to repair it is by this underpinning. That would not be either repairing, or upholding, or maintaining such a house as this was when the lessee took it, and he is not liable under his covenant for damage which accured from such a radical defect in the original structure."

Cases in which the tenant binds himself by a covenant to keep in that state of repair described as "tenantable," etc., stand upon a different footing. See last section.

26. Specific rulings as to various kinds of repairs.—In order to exhibit more clearly the effect of the general principles discussed above, when applied to specific groups of facts, the decisions relating to the duty of tenants with respect to the repair of the different parts of the premises, are here classified under covenient headings.

(*a*) *Foundations of houses.*

See the case of *Lister* v. *Lane* cited in the preceding section.

(*b*) *Roofs.*

A sub-lessee of the assignee of a lease of a theatre covenanted that he would perform the covenant in the original lease, and keep his immediate lessor harmless and indemnified from the same covenant, and would well and sufficiently repair, mend, and keep the premises in good and substantial repair. During the term the roof exhibited signs of weakness, and the Government officials declined to renew the license until the roof was put in proper condition. This could only be done by inserting other beams. The sub-lessee having refused to make the necessary alterations, the administratrix of the assignee of the lease made them at the expense of the estate. The money thus laid out was held not to be recoverable from the sub-lessee, as the covenant did not apply to any alteration or re-construction of the building either in whole or in part (*a*).

(*c*) *External repairs.*

A covenant by the lessor to keep in repair the external parts of a house embraces all those which form the enclosure of the premises and beyond which no part of them extends, and is broken by allowing the partition wall

(*a*) *Lazar* v. *Williamson* (1886) 7 New So. Wales L.R. 98.

between the house and an adjoining one to sink and become ruinous after the latter house had been pulled down (*b*). So a covenant to do external repairs includes the mending of broken windows as "being part of the skin of the house" (*bb*).

(*d*) *Windows.*

Presumably an agreement to keep windows in repair would be construed as embracing skylights (*c*).

(*e*) *Woodwork inside houses.*

For a tenant to allow the boards to decay, or to get broken, or the mantle pieces to get broken, is a breach of the agreement to keep in tenantable repair (*cc*).

"If the tenant leaves the floor out of repair when the tenancy ends, and the landlord comes in, the landlord may do the repairs himself and charge the costs as damages against the tenant; but he is only entitled to charge him with the necessary cost of a floor which would satisfy a reasonable man taking the premises. If the landlord puts down a new floor of a different kind, he cannot charge the tenant with the cost of it. He is entitled to charge the cost of doing what the tenant had to do under his covenant; but he is not entitled to charge according to what he has himself in fact done" (*d*).

(*f*) *Plastering.*

For a tenant to allow the plaster on the walls to come off is a breach of an agreement to keep in tenantable repair (*e*).

(*g*) *Painting and whitewashing.*

The nature of the tenant's obligation in regard to painting is determined by the fact that it is partly for decoration and partly for the protection of the woodwork. So far as it merely subserves the purposes of decoration the tenant is not, it would seem, bound to repaint unless there is some

---

(*b*) *Green* v. *Eales* (1841) 2 Q.B. 225.

(*bb*) *Ball* v. *Plummer* (1879) 23 Sol. J. 666, following *Green* v. *Eales*, supra.

(*c*) See *Harris* v. *Kinloch* (1895) W.N. 60, a suit to restrain the obstruction of ancient lights.

(*cc*) *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J., in a judgment approved by the Court of Appeal.

(*d*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, per Lord Esher.

(*e*) *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J., in a judgment approved by the Court of Appeal.

express agreement to that effect (*f*). Such an agreement ought always to be inserted, if a landlord wishes to avoid controversy on this point (*g*).

On the other hand, if a tenant, who is under a covenant to keep the inside of the house in tenantable repair, "does not paint as an ordinary tenant would do, and under these circumstances the woodwork becomes destroyed, or the painting which was on was left in such a condition as to require more than ordinary repair and expense in renewing it," that is a defect, and is a want of tenantable repair (*h*). But this principle, that it is a breach of such a covenant to neglect to paint where the result is the decay of the structure underneath, is not deemed to involve the converse proposition that any painting which prevents decay is a sufficient performance of the covenant under all circumstances. "If," said Lord Esher in a recent case, "the paint is in such a state that the woodwork will decay unless it is repainted, it is obvious that the tenant must repaint. But I think that his obligation goes further than that. A house in Spitalfields is never painted in the same way as one in Grosvenor Square. If the tenant leaves a house in Grosvenor Square with painting only good enough for a house in Spitalfields, he has not discharged his obligation. He must paint it in such a way as would satisfy a reasonable tenant taking a house in Grosvenor Square. As to whitewashing, one knows it is impossible to keep ceilings in the same condition as when they have just been whitewashed. But if, though the ceilings have become blacker, they are still in such a condition that a reasonable man would not say, 'I will not take this house because of the state of the ceilings,' then I think that the tenant is not bound, under his covenant to leave the house in tenantable repair, to whitewash them" (*i*).

(*f*) See *Crawford* v. *Newton*, and *Proudfoot* v. *Hart*, cited infra. It is not amiss to notice in this connection that the incumbent of an ecclesiastical benefice is bound to maintain the parsonage, and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply anything in the nature of ornament, such as painting (except where necessary to preserve exposed timber from decay), and white-washing and papering. *Wise* v. *Metcalfe* (1829) 10 B. & C. 299, containing an elaborate discussion of the law by Court and counsel.

(*g*) A tenant who covenants to paint a house every seven years cannot be called upon to distemper a wall within the septennial period. *Perry* v. *Chotener* (1893) 9 Times L.R. 488, per Cave, J.

Under a covenant, "so often as need should require, well and sufficiently to repair, etc., paint, etc., cleanse, etc., and leave in such repair, reasonable wear and tear excepted," if the tenant has painted and papered the premises within the usual period, the extent of his obligation before quitting is merely, in addition to the repair of actual dilapidations, to clean the old paint, etc., and not to repaint, etc. *Scales* v. *Lawrence* (1860) 2 F. & F. 289, per Willes, J.

(*h*) *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cave, J., in a judgment approved by the Court of Appeal.

(*i*) *Proudfoot* v. *Hart* (1890) 25 Q.B D. (C.A.) 42, qualifying the broad doctrine laid down by Cave J., in the Court below, that it is not necessary to renew the paint or the whitewash, unless this is required for the preservation of the fabrics themselves.

Under a covenant that the tenant will "substantially repair, uphold and maintain" the house demised, he is bound to keep up the painting of inner doors, inside shutters, etc. (*j*).

(*k*) *Papering.*

The principle which exempts a tenant from the obligation of renewing parts of the demised premises (sec. 25, ante) involves the consequence that, as a general rule, repapering, if not expressly mentioned a covenant, is not comprised within its terms (*k*).

The following resumé of a tenant's duty by Cove, J., had reference to a covenant in a lease for five years which merely bound the tenant to keep the inside of the house in tenantable repair and contained no express stipulation as to papering. It will not be inferred that such a stipulation gave landlord a right to have the house re-papered. The landlord's rights, it was declared, in this respect are not enlarged by the fact that the tenancy actually continued for seventeen years for the covenant as to repairing cannot be extended, but must mean the same as during the original term. Paper is decorative repair. If a man takes a house which is papered new for him for three years, he must return the house with the paper, not stripped off, or torn off, or anything of that kind, but subject only to the fair wear and tear of the paper. But where he takes a house for a term of years, and there is nothing to do but to keep the inside in tenantable repair, and he remains there so long that the paper, in the natural course of things, becomes useless for a future tenant he is not bound to put on a new paper, although he may do it, if he likes, to please himself. In the absence of a covenant that the tenant shall paper and paint, he may, if he thinks fit, strip the paper off the walls, provided his term is not so short that it amounts to an absolute destruction of the paper (*l*). This judgment was approved by the Court of Appeal, where, however, the sole point directly decided was that the tenant was not bound to do the decorative painting and papering which were only required for the purpose of ornamentation, and that he was merely required to paint and paper to such an extent as might be necessary to prevent the house from going to decay.

Moreover, a few years later, the Court of Appeal seems to have modified the views which it presumably held in approving, as a whole, of the judgment of Cave, J. In a case which has already been frequently referred to, that judge again laid it down in unqualified language that a covenant to keep and leave in "tenantable repair" does not bind the lessee to repaper walls, unless it is necessary to do this for the preservation

---

(*j*) *Monk* v. *Noyes* (1824) Can. & P. 265, per Abbott, C.J.

(*k*) *Scales* v. *Lawrence* (1860) 2 F. & F. 289, per Willes, J. [the phrase used in this covenant was "with all needful reparations and cleansings"].

(*l*) *Crawford* v. *Newton* (1887) 36 W.R. 54.

of the walls themselves (*m*). Commenting on this ruling, Lord Esher said: "I agree that he is not bound to repaper simply because the old paper has become worn out, but I do not agree with the view that under a covenant to keep a house in tenantable repair the tenant can never be required to put up new paper. Take a house in Grosvenor Square. If, when the tenancy ends, the paper on the walls is merely in a worse condition than when the tenant went in, I think the mere fact of its being in a worse condition does not impose upon the tenant any obligation to repaper under the covenant, if it is in such a condition that a reasonably-minded tenant of the class who take houses in Grosvenor Square would not think the house unfit for his occupation. But suppose that the damp has caused the paper to peel off the walls, and it is lying upon the floor, so that such a tenant would think it a disgrace, I should say then that the tenant was bound under his covenant to leave the premises in tenantable repair, to put up new paper. He need not put up paper of a similar kind—which I take to mean of equal value—to the paper which was on the walls when his tenancy began. He need not put up a paper of a richer character than would satisfy a reasonable man within the definition."

(*i*) *Drains.*

A covenant to repair and keep in repair all drains, etc., does not create an obligation to make a new drain (*n*).

(*j*) *Ornamental lakes, etc.*

The obligation to keep ornamental bodies of water in proper condition has never, it would seem, been considered by the courts in connection with the liability of tenants of the class with which this article deals, but its nature is to some extent indicated by two cases in the books.

In one it was held that, under an agreement to keep the premises in repair the landlord is not bound to cleanse an ornamental water, so as to prevent its becoming a nuisance (*o*). The obligation of the covenantor was said to be merely to keep the water from bursting its banks, or to keep the sluices in working order. In another case Chitty, J., was asked to say that a direction in a will that a tenant for life should keep the "mansion-house, outbuildings, parks, grounds . . . and appurtenances" in good and substantial repair, bound a life tenant to scour and cleanse an ornamental lake in the park (*p*). The learned judge refused

---

(*m*) *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42.

(*n*) *Lyon* v. *Greenhow* (1892) 8 Times L.R. 457, per Smith, J., who held that the landlord was not entitled to recover from the tenant the money expended in making a new drain in compliance with the requirements of the local Sanitary Authority.

(*o*) *Bird* v. *Elwes* (1868) L.R. 3 Exch. 225 [here the tenant had done the cleansing and sought indemnification from the landlord].

(*p*) *Dashwood* v. *Magniac* (1891) 64 L.T. 99.

to put this construction upon the words, his conclusion being, it would seem, based not upon any general principle which would exclude the existence of the duty contended for, but upon the evidence in the case, which shewed that the water had been in its natural, unimproved condition when the testator died, and had been converted into an ornamental lake by the life tenant. The doctrine thus applied is analogous to that laid down in *Cornish* v. *Cleife* (*q*), (see sec. 16, ante), with regard to buildings afterwards erected on the demised land, and is also sustained by the cases which turn upon the principle that the extent of a tenant's obligation is to be estimated with reference to the condition of the premises at the beginning of the term; see sec. 23, ante.

(*k*) *Fences.*

Under a covenant to keep and maintain an orchard in fair and reasonable condition, a tenant is not necessarily bound to fence it, if it was not fenced at the time of the demise. But his contract is not fulfilled unless, either by fencing or some other expedient, he protects it from the intrusion of animals who would injure the trees (*r*).

For cases as to the removal of fences, see sec. 20, ante.

V. REMEDIES OF THE LANDLORD FOR THE ENFORCEMENT OF COVENANTS TO REPAIR.

27. Right to enter and make repairs neglected by the lessee.—Where a tenant covenants to repair during the term, and the action is brought during the term, the lessor, if he has reserved to himself a sufficient power of entry and has done the repairs, may of course recover the cost (*a*). But unless there is an express stipulation to that effect, the landlord has no right to enter for the purpose of making repairs, unless he is authorized to do so by the tenant (*b*). The reservation of a right of re-entry for breach of the covenants will not prevent an unauthorized entry to make repairs from being a trespass. Under such circumstances he will be enjoined from proceeding with the work, even though he has obtained leave from the sublessees to enter, and he himself holds the premises from a superior landlord, who is entitled to forfeit the term for non-repair of the premises (*c*).

(*q*) 3 H. & C. (1864) 446.

(*r*) *Parker* v. *Sell* (1890) 16 Vict. L.R. 271.

(*a*) Wills, J., in *Joyner* v. *Weeks* (1891) 2 Q.B. 31, p. 35.

(*b*) *Barker* v. *Barker* (1828) 3 C. & P. 557; *Bracebridge* v. *Buckley* (1816) 2 Price Exch. 200 (p. 218); *Neale* v. *Wyllie* (1824) 3 B. & C. 533, 5 D. & R. 442; *Worcester School Trustees* v. *Rowlands* (1841) 9 C. & P. 739; *Colley* v. *Streeton* (1823) 2 B. & C. 273, per Abbott, C.J.O.

(*c*) *Stocker* v. *Planet Building Soc.* (1879) 27 W.R. (C.A.) 877, aff'g S.C.p. 793.

The cases as to the rights of a mesne landlord who, without being actually restrained by his immediate lessee, has gone on and made the repairs necessary to save a forfeiture by the superior landlord, are conflicting. According to a somewhat recent decision the sublessee cannot be held liable for the expenses thus incurred, the proper course of the mesne landlord being to avail himself of his right of forfeiture for a breach of the covenants (*d*). But about fifty years earlier the Court of King's Bench allowed the mesne landlord to recover under similar circumstances (*e*). Both Holroyd, J., and Abbott, C.J., declared that it was in any case immaterial, as regards the right of the lessee to recover the amount spent in saving the term, whether the entry was a trespass or not. If the entry was wrongful, he merely rendered himself liable to an action.

28. Right to re-enter for breach of the covenant.—The landlord is, of course, restricted to an action for damages, where the covenants as to repair are broken by a tenant who holds under a lease in which there is no express proviso for re-entry upon such breach. But formal leases are rarely, if ever, drawn without such a proviso, and, where it is inserted, the landlord may, (at common law), re-enter or maintain ejectment without giving the tenant notice to repair (*a*). In England this rule is now changed by statute. See sec. 43, post.

The forfeiture of the term may be effected not merely by a notification conveyed to the tenant, but by any act which shews unmistakably that the landlord intends to resume control of the premises. There is a sufficient entry to put an end to the lease when the landlord, finding the premises in a dilapidated state, enters into an agreement with an underlessee in possession to become his tenant (*b*).

(*d*) *Williams* v. *William* (1874) L.R. 9 C.P. 659.

(*e*) *Colley* v. *Streeton* (1823) 2 B. & C. 273. Holroyd, J., laid down the broad rule that a lessee who holds under a lease which gives a right of re-entry if the premises are not kept in tenantable repair, and subleases on the same terms, has a right to enter for the purpose of making repairs when, in consequence of the refusal of the sublessee to repair, there is a danger that the lease superior may be forfeited by the landlord.

(*a*) *Baylis* v. *Le Gros* (1858) 4 C.B.N.S. 537. The same principle of course applies where the tenant entered under an agreement for a lease which, when executed, is to contain such a proviso. See sec. 36 (b) post.

(*b*) *Baylis* v. *Le Gros* (1858) 4 C.B.N.S. 537.

A re-entry by the superior landlord for the lessee's breach of the covenants to repair and pay rent is not a breach of the lessee's covenant with an underlessee that the latter shall "peaceably enjoy the demised premises without any *interruption from or by him*, his executors, etc., or *any person claiming by, through, or under him*" (*c*).

29. Action for damages.—(*a*) *On general covenants to repair.*—In *Main's Case* (*a*) it was laid down that an action on the covenant to keep in repair could not be brought before the end of the term, unless the dilapidations were of such a nature that it was a physical impossibility to remedy them during the residue of the term—as where trees have been cut down. But this doctrine was never universally held, and has long been abandoned (*b*). In all the modern cases it has been taken for granted that the landlord may assert his rights while the term is still running (*c*). It should be observed, however, that something more than the mere fact of the premises having fallen into disrepair is necessary to render the tenant liable as for a breach of the covenant. There is deemed to be an actionable breach only when they are left in that condition for an unreasonable time (*d*). Especially is this principle applicable where the occurrence which creates the abnormal conditions

---

(*c*) *Kelly* v. *Rogers* (1892) 1 Q.B. (C.A.) 910, following *Stanley* v. *Hayes*, 3 Q.B. 105, and explaining the remarks of Bowen, L.J., in *Harrison* v. *Muncaster* (1891) 2 Q.B. 680.

(*a*) 5 Coke 21, *a*, 1st resolution; *Sheph. Touch.*, 173.

(*b*) See *Luxmore* v. *Robson* (1818) 1 B. & Ald. 584 [covenant here was to "keep in proper repair the buildings, etc., during the continuance of the term"] disapproving of a passage to the contrary in F.N.B. 145 K, and 12 (13) E. 3, Fit. Covenant, 2, which had also been denied by Doddridge, J., to be law. See 2 Roll. Rep. 347.

(*c*) This rule is so axiomatic that very few late decisions can be found in which the court has formally stated it. See, however, *Perry* v. *Bank*, etc. (1866) 16 U.C.C.P. 404; *Green* v. *Southcott*, Newfoundland Rep. 1874-1884, p. 176

(*d*) *Job* v. *Banister* (1857) 26 L.J. ch. 125; *Chauntler* v. *Robinson* (1849) 4 Exch. 163 [covenant binding the tenant to repair "when and so often as need or occasion shall require during all the term]. In *Baylis* v. *Le Gros* (1858) 4 C.B. N.S. 537, it seems to have been conceded by the court, during the argument of counsel, (p. 552) that the want of repair must have lasted a reasonable time before the right of action is complete for the breach of a general covenant to repair. It was remarked by Cockburn, C.J., that, at all events, an allegation that the premises were in a state of delapidation justified the inference that they had been out of repair a considerable time.

These authorities indicate that the court used too strong an expression in *Perry* v. *Bank* (1856) 17 U.C.C.P. 404, when it said that *the moment the necessity for repairs* exists, and the tenant fails to make them, the covenant is broken.

which the lessee is bound to remedy is one which is due to causes entirely beyond his control.

A covenant to repair houses or to sustain houses on sea banks "is not broken simply because the houses are burnt, or thrown down by tempest, or the banks be overthrown by a sudden flood, or the like accident; but if the covenantor doth not repair and make up these things again in time convenient, the covenant will be broken" (*e*).

When the period which the tenant is allowed for making the necessary repairs has once begun to run, the landlord's acceptance of rent does not operate so as to extend that period for repairing, and so prevent the landlord from exercising his right of re-entry until a reasonable time has elapsed after the receipt of the rent (*f*).

If the covenant is to make repairs on or before a certain day, the fact that the landlord has made no requisition for the performance of the covenant is immaterial, the general rule being that no demand is necessary where there is a covenant to do an act within a certain time, and a neglect of performance is tantamount to a refusal in law (*g*).

(*b*) *On covenants to repair after notice.*—So far as regards proceedings upon these covenants themselves, they manifestly imply that the landlord is precluded from taking steps to enforce his rights until the period provided for has elapsed. No damages, therefore, are recoverable where the action for a breach is brought before the specified period has expired (*gg*). The time when that period begins is fixed by the service of what the law regards as a sufficient notice on the party whom it is intended to hold responsible for the repairs. See sec. 7 (B), ante. In cases where the running of the period has been suspended, the circumstances attending the suspension will determine when the lessor has a right to begin proceedings.

On the one hand, if a lessee upon whom notice to repair has been served makes a proposition for the purchase of the term, and negotiations are thereupon commenced which lead the lessee to suppose that the strict legal rights of the lessor will not be enforced, and thus induce him to postpone making the repairs, the running of the period of notice is sus-

(*e*) *Sheph. Touch.* 173.

(*f*) *Chauntler* v. *Robinson* (1849) 4 Exch. 163.

(*g*) *Bracebridge* v. *Buckley* (1816) 2 Price 200.

(*gg*) *Williams* v. *Williams* (1874) L.R. 9 C.P. 659.

pended until the negotiations have been definitely broken off, unless the lessor expressly stipulates that they are to be without prejudice to the notice. After the negotiations are closed, and the notice again becomes operative, the lessee still has the whole of the period specified in the notice within which to complete the repairs, that being in the eye of a court of equity a reasonable period according to the understanding of the parties themselves, whether it is more or less than actually required for the purpose (*h*).

On the other hand, where notice to repair within a specified period has been served, and an action of ejectment brought before that period has elapsed, is discontinued by consent of the landlord upon the tenants undertaking to put the premises in repair on or before a specified day subsequent to the expiration of the period allowed by the notice, the order of court which embodies this arrangement does not supersede the notice, but merely enlarges and suspends the right of re-entry, and a new action may be instituted after the date fixed by the order without the service of any fresh notice (*i*).

(*c*) *Statute of Limitations as a bar to the action.*—The rule that an action for damages for a breach of the covenant to keep in repair is not barred by the Statute of Limitations as long as the term is still running, has been noticed in a former section (12).

(*d*) *Measure of damages.*—See x., xi., xii. post.

30. To what extent equity will aid the enforcement of the landlord's rights.—In one of his judgments, Lord Hardwicke remarked, arguendo, that specific performance of a covenant to repair would not be decreed, such a case being different from one where there was a covenant to rebuild (*a*). This doctrine is applied or assumed to be correct in several later cases (*b*). But even at the period to which those cases belong, the courts did not hesitate to issue injunctions which were avowedly intended to compel defendants to perform contracts as to repairs (*c*). And possibly the inference

(*h*) *Hughes* v. *Metropolitan R. Co.*, H.L.E. (1877) 2 App. Cas. 439, 36 L.T. 932.

(*i*) *Doe* v. *Brindley* (1832) 4 B. & Ad. 84.

(*a*) *City of London* v. *Nash* (1747) 3 Atk. 512.

(*b*) *Rayner* v. *Stone* (1761) 2 Eden 128; *Lucas* v. *Comerford* (1790) 3 Br. C. C. 166, 1 Ves. 235; *Pym* v. *Blackburn* (1796) 3 Ves. 34; *Hill* v. *Barclay* (1809) 16 Ves. 402; *Doherty* v. *Allman* (1876) Ir. Rep. 10 Eq. 460.

(*c*) Lord Eldon, in a case frequently referred to, refused to direct a lessor to repair the stop-gates, etc., of a canal, the water of which the lessee was entitled to use, but issued an injunction which would "create the necessity" of doing the repairs required, the order pronounced being, substantially, that the lessor should be restrained from impeding the lessee's employment of the demised premises by keeping the said stop-gates out of good repair; *Lane* v. *Newdigate* (1804) 10 Ves. 192.

from more recent decisions is that the original doctrine is virtually abrogated by the present practice of issuing mandatory injunctions, wherever a restraining order would be merely a circuitous expedient for attaining the same result (*d*).

It is to be observed, moreover, that the jurisdiction of a court of equity to enjoin waste will sometimes be exercised under such circumstances, that the result is pro tanto an enforcement of the covenant. Thus a covenant to repair, and at the end of the term surrender buildings in good condition, does not preclude the granting of an injunction against pulling them down and carrying away the materials, just before the end of the term (*e*).

VI. WHAT PERSONS MAY SUE ON THE COVENANTS.

31. Reversioner himself.—The right of the reversioner himself to sue on the covenants calls for no particular comment, except in so far as the situation may have been complicated by contracts which the various parties interested in the premises have entered into after the lease was executed (*a*). One such case arises where there is a partial merger of a lease resulting from one of several co-lessors having assigned his reversion to one of the lessees. This circumstance, it has been held, does not deprive the other co-lessors of

---

(*d*) A landlord has been ordered to restore a staircase to the use of which the lessee was entitled; *Allport* v. *Securities Co.* (1895) 72 L.T. 533, 64 L. J. Ch. 491. In a case where an injunction was asked for by the owner of one plot of land to restrain the lessee of an adjoining plot, occupied under the Inclosure Act of 41 Geo. 3, ch. 109, from permitting to remain broken down or removed a boundary fence which such lessee was, by the award the Commissioners who had allotted the two adjoining plots, bound to keep in repair, North, J., on the ground that the defendant was a woman in a humble position in life, thought it best to avoid the danger of misprehension on her part, and made a positive order that she should do the repairs, instead of issuing the injunction in the negative form applied for; *Bidwell* v. *Holden* (1890) 63 L.T. 104. Compare the cases in which defendants have been specifically ordered to pull down buildings which they had no right to erect; *Rankin* v. *Huskisson*, 4 Sim. 13; *Morris* v. *Grant*, 24 W.R. 55; *Jackson* v. *Normanby Brick Co.* (1899) 80 L.T. 482.

(*e*) *Mayor &c.* v. *Hedger* (1810) 18 Ves. 355. In *Sunderland* v. *Newton* (1830) 3 Sim. 450, the court enjoined the tenant from removing certain fixtures until his right to do had been determined in an action at law. On the other hand, in *Doherty* v. *Allan* (1876) Ir. Rep. 10 Eq. 460, the lease was one of a store for nine hundred and ninety-nine years, and contained the ordinary covenants as to repair. The court refused to enjoin the lessee from converting the store into dwelling-houses, and left the lessor to his legal remedies. It was held that the circumstances were not such as to justify granting relief on the ground of waste.

(*a*) It may be noted in passing that damages recovered by the trustees of a life tenant, during his lifetime, for breach of a covenant to repair contained in a lease granted by the creator of the trust, belong to the life tenant and fall into his personal estate after his decease. *Noble* v. *Cass* (1828) 2 Sim. 343. Presumably the same doctrine would be applied in the case of tenancy under a lease.

their remedy for a breach, but merely affects the amount of damages recoverable by them (*b*). Another special case is presented where an underlessee of part of the demised premises purchases the reversionary interest of the superior landlord. Here, if the mesne landlord fails to keep in repair the part of the premises not embraced by the underlease, the underlessee may maintain ejectment as to that part, and is not obliged to bring the action as to the whole of the premises (*c*).

Whether one of several joint lessors can or cannot sue on a covenant with all to repair, it is at all events certain that they may all join in a suit (*d*).

Where tenants in common give a joint lease to a tenant who covenants with their respective heirs and assigns to repair, all the tenants of the reversion at the time of the breach of this covenant must join as the plaintiffs in an action upon it (*e*). Tenants in common may mantain an action for breach of the covenant to repair against a lessee of a part of their property who, subsequently to the demise, but before the alleged breach, became a co-tenant of the plaintiffs in the same piece of property (*f*).

32. Assignee of the reversion.—At common law the covenant to repair did not run with the reversion; but this rule was changed by the statute, 32 Hen. VIII., ch. 34 (*a*), the provisions of which, so far as they are material in the present connection, are that the grantees of any reversion "shall have the same remedies, by action only, for not performing of . . . covenants contained . . ,

---

(*b*) *Baddeley* v. *Vigurs* (1854) 4 El. & El. 71.

(*c*) *Doe* v. *Morris* (1842) 11 L.J. Exch. 313.

(*d*) *Wakefield* v. *Brown* (1846) 9 Q.B. 209.

(*e*) *Thompson* v. *Hakewell* (1865) 19 C.B.N.S. 713, 13 L.T. 989.

(*f*) *Gates* v. *Cole* (1821) 2 Brod. & B. 660, 23 R.R. 524.

(*a*) Bacon's Abr. Cov. (E. 5) citing Cro. Eliz. 617; *Brett* v. *Cumberland* (1619) Cro. Jac. 521; *Bennett* v. *Herring* (1857) 3 C.B.N.S. 370; *Martyn* v. *Williams* (1857) 1 H. & N. 817, citing 1 Saund. 240, a, note (a); 1 Sm. L.C. 42, and holding that the interest created by a license for a term of years to dig, work, and search for china clay upon the licensor's estate, and dispose of the same to the licensee's own use is an incorporeal hereditament; that a conveyance of the land during the existence of the term in such hereditament is an assignment of the reversion within the statute; that a covenant in the indenture to deliver up the works in repair would run with the interest of the owner of the fee expectant upon the determination of the license, and that an alienee of the land who owns it at that time may sue for a breach.

in their leases, demises, or grants, against the lessees, as the lessors or grantors themselves might have had at any time."

From the fact that the statute was made applicable only to demises by deed, an assignee's rights of action under it are in some respects limited. In the first place, wherever the older forms of procedure are still in use, the assignee is unable to sue in assumpsit on the unsealed contract of a tenant to repair entered into with the assignor (*b*). In the second place, where the demise is not by deed, the right to sue for a breach of an agreement to repair is not transferred to the assignee of the reversion, by force of the statute, and the lessor is, therefore, not disabled from suing for a breach of an agreement to repair after he has parted with his interest in the reversion (*c*).

The mere fact that the premises were in a ruinous condition, and that the assignor had therefore a complete cause of action before the reversion was assigned, is obviously not sufficient to preclude the assignee from suing for the tenant's failure to repair after a notice duly given by the assignee, in accordance with the ordinary stipulation in that regard (see 7, B. ante), after the reversion was transferred to him. Here the action is not founded upon the time when the premises became ruinous, but upon the failure to repair at the time appointed (*d*). And probably the assignee has a right of action on the general covenant also upon the principle that the omission to repair constitutes a continuing breach, and that the cause of action still exists after as before the reversion (*e*). It is true that in an old case it was laid down that the grantee of the reversion should not recover damages but from the time of the grant, and not for any time before (*f*). But there the covenant to repair was apparently not treated as one which creates a continuous obligation. If this was the standpoint of the Court, the ruling was

(*b*) *Standen* v. *Chrismas* (1847) 10 Q.B. 135.

(*c*) *Bickford* v. *Parson* (1848) 5 C.B. 92, 17 L.J.C.P. 192, holding that a plea that, before the breach alleged, the plaintiff had assigned his reversion is no answer to a declaration, stating that the defendant had promised during his tenancy to keep the premises in repair, and had failed to do so. [Quære, does the same principle apply to the case of an heir?]

(*d*) Bacon's Abr. Cov. (E. 5); *Maschall's Case* (1587) 1 Leon. 61, S.C. Moore 242.

(*e*) *Thistle* v. *Union* F. & R. Co. (1878) 29 U.C.C.P. 76.

(*f*) Anon (1573) 3 Lem. 51.

based on a hypothesis which is inconsistent with the current of modern authority. See sec. 12, ante.

A different principle prevails where the tenant is in default at the end of the term as to the performance of a covenant to keep and leave in repair. Here, if he holds over without a fresh lease and the reversion is afterwards sold, the alienee cannot sue for the breach of the covenant. Since the lessee remains liable to the original lessor on the breach of covenant, it is regarded as unjust not to confine the remedy to that lessor. The presumption is that he has either sold the premises for a lower price on account of the breach of the covenant, or has received the full price on the supposition that the damage is to be made good. In the former case he may sue on his own account; in the latter as trustee for his vendee (*g*).

The right of an assignee of the reversion to sue for a breach of the general covenant to repair which occurred during the period of his ownership, still survives after his estate is determined when the action is brought (*h*).

The assignee of a part only of the reversion of demised premises may maintain an action for a breach of a covenant to repair contained in the original lease, provided the breach relates to that part of the premises of which the reversion has been assigned to the plaintiff (*i*), and the breach occurred after the reversion was granted (*j*).

In all cases where the assignee of the reversion may maintain ejectment for breach of a covenant to repair, he may institute proceedings without giving the tenant notice of the assignment (*k*).

The English Judicature Act of 1873, sec. 25, sub-sec. 5, has not changed the rule that the mortgagee, and not the mortgagor in possession, is the party entitled to take advantage of a breach of the covenants in a lease of the property (*l*).

(*g*) *Johnson* v. *St. Peter* (1836) 4 A. & E. 520.

(*h*) Bacon's Abr. Cov. (D), (E. 5), citing Roll. Rep. 80, Owen 152, 1 Bulst. 281, Cro. Eliz. 617.

(*i*) *Twynam* v. *Pickard* (1818) 2 B & Ald. 105, distinguishing between the application of the statute to covenants and to conditions which are in their nature entire, and therefore necessarily confined to the assignees of the reversion of the whole of the premises.

(*j*) Sheph. Touch. p. 176.

(*k*) *Scaltock* v. *Harston* (1875) 1 C.P.D. 106, distinguishing the cases where it is sought to forfeit the term for non-payment of rent.

(*l*) *Matthews* v. *Usher* [1900] 2 Q.B. (C.A. 535.

33. Heir of the reversioner.—That the lessor's heir may sue for a breach of the covenants committed after his ancestor's death to repair follows directly from the doctrine that the benefit of these covenants runs with the land under the statute referred in the preceding section (*a*).

This doctrine prevails, although the lessee has covenanted only with the lessor, his executors and administrators. In such a case the inference from the naming of the executors is considered to be that the covenant was intended to continue after the lessor's death (*b*). Nor does the heir lose his right of action because the premises were already out of repair in the lifetime of the ancestor "If the lessee suffers them to continue out of repair in the time of the heir, that is a damage to the heir, and he shall have an action" (*c*).

34. Personal representative of lessor.—That an executor of the lessor is the proper party to sue for a breach of the covenants to repair, committed during the lifetime of the lessor, follows from the nature of his office (*d*). Such an action may be maintained by h[illegible] without an averment of special damages to the estate (*e*).

35. Husband of a woman for whom the demised premises are held in trust.—A husband who has joined his wife in executing a lease of premises, devised to trustees for her separate use, cannot maintain an action for a breach of the covenant to repair after her death. But in such an action the lessee cannot plead in bar that the lessor had only an equitable estate in the premises, for that is tantamount to a plea that no estate or interest passed by the indenture of lease (*f*).

VII. WHO ARE BOUND BY THE COVENANTS.

36. Lessees and persons treated as lessees.—(*a*) *Generally.*—Far the larger number of the cases with which this article deals have to do with the liability incurred by persons who obtain possession

---

(*a*) See Com. Dig. tit. Covenant (B. 3); Woodf. Landl. & T. 303.

(*b*) Bacon's Abr. Cov. (E. 2), citing *Lougher* v. *Williams* (1674) 2 Lev. 92.

(*c*) *Vivian* v. *Champion* (1705) 2 Ld. Raym. 1125, per Lord Holt.

(*d*) *Wyatt* v. *Cole* (1877) 36 L.T. 613; *Brett* v. *Cumberland* (1619) Cro. Jac. 521.

(*e*) *Ricketts* v. *Weaver* (1844) 12 M. & W. 718, 13 L.J. Ex. 195, holding that the heir is not the proper party plaintiff.

(*f*) *Blake* v. *Foster* (1800) 5 R.R. 419, 8 T.R. 487.

of and continue to occupy certain premises by virtue of a formal lease which defines his rights and fixes the duration of his tenancy. The responsibility for a breach of any stipulation as to repairs which is contained in the lease is a necessary result of its execution, and the legal consequences of the breach, if established, can be escaped only on one of the grounds stated in ix., post. The situation created by an agreement of this sort, therefore, requires no special comment in the present connection.

But there are also cases in which, although the occupation of the premises is not directly referable to a subsisting lease, the lease may nevertheless be treated as the criterion of the liability which the occupant incurs in respect to repairs. Such cases relate to persons who belong to one or other of the following classes.

(*b*) *Persons entering into possession under an agreement for a lease.*—At law a person who occupies premises under a valid agreement for a lease, is regarded as having taken possession subject to an implied contract to perform the covenants respecting repairs which the contemplated lease is to contain (*a*). These covenants are also binding upon one who occupies premises after signing a written agreement which is not valid as a lease, for the reason that some formal requirement was not duly complied with. But in this instance his liability seems to be referred not so much to the theory of an implied contract as that of his voluntary renunciation of a right and acceptance of certain benefits which carry with them corresponding burdens. Thus the language used by the court in one case involving the effect of a failure to satisfy the formalities prescribed by the Statute of Frauds and the Stamp Acts, was that if the intending lessee chooses, after signing the informal agreement, to waive a lease, and rely on being let into possession, he is bound by a stipulation in the agreement providing that he is to keep the premises in repair during the whole time they shall be in his occupation (*b*).

(*a*) *Thomson* v. *Aarey* (1840) 12 A. & E. 475; *Pistor* v. *Cator* (1842) 9 M. & W. 315 [here the decision is limited to the case of a person occupying during the whole of the term specified in the agreement, but the other decisions bearing on the subject indicate that this circumstance could not have been referred to as being indicative of the limits of the rule]; *Ponsford* v. *Abbott* (1884) 1 Cab. & E. 225, per Lopes, J.

(*b*) *Richardson* v. *Gifford* (1834) 1 A. & E. 52. There the court refused to hold that there was error in admitting evidence of a document by which the defendant engaged to take the premises for a term of three years, and to keep them

According to the last cited case, the situation which resulted from the signing of the informal agreement by the defendant, and his entry upon and occupation of the premises, was held to be this —that he did not legally agree for a term of three years, but that in point of law he was tenant at will for the first year, subject to the terms of the agreement, and afterwards tenant from year to year, still subject to that agreement which bound him to keep the premises in good repair as long as he should occupy (see opinion of Patteson, J., p. 56). The change in the character of the tenancy after the first year, under the circumstances mentioned, seems to be a consequence deduced from the entire invalidity of the agreement. In cases where this element has not been present, the tenancy is, in common law courts, regarded during its entire course as being one from year to year (*b*). The tenant, under such circumstances, is presumed to hold subject to the terms of a lease embracing the stipulations contemplated by the agreement therefor, so far as those terms may be applicable to a tenancy from year to year (*c*). In one case, however, turning largely on the words of the agreement for the lease, the theory of a tenancy from year to year was wholly repudiated (*d*).

---

in good repair during the whole of the time they were in his occupation. The contention of defendant's counsel was that the document was inadmissable as a lease, because not properly stamped, and that it could not operate as an agreement for a term of more than three years (the period for which the premises had actually been occupied), because it was not signed by both parties, as required by 29 Car. 2, ch. 3, secs. 1, 2.

(*b*) See *Walsh* v. *Londsdale* (C.A. 1882) 21 Ch. D. 9; *Swain* v. *Ayres* (C.A. 1888) 21 Q.B.D. 289.

(*c*) *Bennett* v. *Ireland* (1858) E.B. & E. 326, and the cases cited in the last note. In an Irish nisi prius case it was ruled by Brady, C.B., that a person entering under a *verbal* agreement for a lease of a term of more than three years becomes a tenant from year to year only, but is bound by the covenant to repair, as that term is understood in relation to that species of covenant. *Fisher* v. *Maguire* (1840) Arm. Mac. & Og. 51. Such a doctrine, if literally construed, is tantamount to denying to the covenants any binding force, and seems to be inconsistent with the decisions already noted as to the position of a tenant under analogous circumstances. But the precise meaning of the learned judge in the case cited is not entirely clear. Possibly he merely intends to lay down that the incidents of the tenancy are, as a whole, those of one from year to year, but that the covenants which the parties had in mind are the measure of his obligation as to repairs. This is, at all events, what the writer conceives to be, both on principle and authority, the true doctrine on the subject.

(*d*) *Hayne* v. *Cnmmings* (1864) 16 C.B.N.S. 421. There a landowner entered into an agreement, not under seal, to lease premises to another party, the agreement being expressed to be made "in consideration of the rents and covenants to be reserved and contained in the lease agreed to be granted, and the lease to be granted upon the second party's completing certain repairs,

Wherever the executory agreement for the lease is enforceable, a court of equity arrives at the same result as a court of law, so far as the tenant's liability on the covenants is concerned, by applying the familiar principle that, in equity, such an agreement is to be treated as one already executed. Under the English Judicature Act, and those modeled upon it, this is the rationale of the tenant's position in every court, and he is regarded for all purposes as holding on the terms of the agreement and not merely from year to year (*e*). If the agreement is not one which is immediately enforceable, as where the lease is to be executed after certain conditions have been complied with, the situation is not affected by that Act, and legal principles being still controlling, the intending lessee, if he goes into possession before the stipulated conditions have been performed, is regarded as a tenant from year to year on the terms of a lease embracing the covenants as to repair which were to be inserted in the lease (*f*).

(*c*) *Persons continuing in possession under a lease which the lessor had no authority to grant.*—A tenant who holds premises and continues to pay rent under a lease which is void, as not having being made pursuant to a power in a will, is deemed to hold upon the terms of the lease, and therefore to be bound by any covenant to repair which may be contained therein, in the same way as a tenant who holds over upon the expiration of a

---

and to contain all the usual and proper covenants, and especially a proviso for the re-entry for non-payment of rent or non-preformance of covenants. It was further agreed that, until the lease should be granted, the landowner, his executors, etc., should have the same powers and remedies for enforcing performance of the covenants as fully as if the lease had actually been granted." Then followed a proviso that, if the default should be made by the second party in the observance of "the *covenants and conditions* on his part *herein* contained," it should be lawful for the landlord to enter. The second party was let into the premises, but the repairs were not done by the time agreed on. In an action of agreement it was contended in his behalf that the clause of re-entry applied only to a breach of any of the covenants to be contained in the contemplated lease, and that the tenant, having entered and paid rent, became a tenant from year to year upon the terms of the agreement, so far as they were applicable to that description of tenancy, and consequently was entitled to six months' notice to quit. This contention did not prevail, the judges being of opinion that the intention of the parties would be effectually carried out by construing the words "covenants and conditions" as referring to the stipulations in the agreement itself, though it was not under seal. Otherwise as the covenants to be contained for in the lease had been provided for in another part of the agreement, to affirm that the words could not apply to those stipulations would be tantamount to affirming that they could not have any sense at all.

(*e*) *Walsh* v. *Lonsdale* (1882) 21 Ch.D. (C.A.) 9.

(*f*) *Swain* v. *Ayres* (C.A. 1888) 21 Q.B.D. 289.

valid lease (*g*). See below. A similar principle is controlling where a tenant for lives executes a lease for a term longer than those lives can possibly last. Here, whether the lessee after taking possession of the premises, is to be deemed an equitable assignee, (as the Court preferred to hold), or a tenant from year to year, he is bound by any covenant to repair the original lease contains (*h*).

(*d*) *Cestui que trust continuing an occupation begun under a lease taken by his trustee.*—Although neither the mere occupation by a female cestui que trust of premises leased for her by her trust nor even such occupation coupled with the payment of rent, will render her liable in equity on a covenant to repair contained in the lease, (see sec. 41, post), she may possibly be held liable in law, if, after the death of her trustee, she made several payments of rent, and those payments were made and accepted under circumstances justifying the inference that she herself had become tenant-at-law on the terms of the lease, or, if she paid the rent or dealt with or occupied under the lease in such a way as to justify the inference that she became executrix de son tort (*i*).

(*e*) *Lessees for years holding over.*—It is well settled that a lessee who holds over after the expiration of his lease is still bound by the covenants as to repair in that lease (*j*). That is to say, there is an implied contract on the part of the tenant to hold the premises under a tenancy from year to year, subject to those covenants (*k*). The mere fact that a verbal agreement for an

---

(*g*) *Beale* v. *Sanders* (1837) 3 Bing. N.C. 850.

(*h*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481.

(*i*) *Ramage* v. *Womack* (1900) 1 Q.B. 116, per Wright, J.

(*j*) *Crawford* v. *Newton* (1887) 36 W.R. 54, per Cane, J.; *Beavan* v. *Delahay* (1788) 1 H. Bl. 8; *Hett* v. *Jansen* (1892) 22 Ont. R. 414, and cases cited below. Compare also as to the general rule — though the covenants involved had no relation to repairs. *Doe* v. *Bell* (1797) 5 T.R. 471. Evidence that the tenant held over, after the assignment of the reversion, that he paid the same rent at the same periods, and that he gave the notice provided for in the agreement with regard to the determination of the tenancy, is evidence from which it may be inferred that he held over upon the terms of that agreement, and was therefore bound by a covenant to repair contained therein. *Wyatt* v. *Cole* (1877) 36 L.T.N.S. 613. The liability of a tenant in this position is sometimes put beyond question by the insertion of some express stipulation in the lease—as, for example, a proviso that, if notice should not be given to determine the lease at the end of that period, it should be considered a lease upon the same covenants from year to year until notice to determine it. *Brown* v. *Trumper* (1858) 26 Beav. 11.

(*k*) *Morrogh* v. *Alleyne* (1873) Ir. Rep. 7 Eq. 487 [there the lease expired by reason of the death of the lessor, who had merely a life estate, and the termor's wife continued to occupy the premises and pay rent]. *Digby* v. *Atkinson* (1815) 4

additional rent is made after the expiration of the term will not prevent the operation of this rule (*l*). Nor can the tenant escape liability on the ground that the lease under which he was in possession was void, as not being pursuant to a power in the instrument of gift (*m*); nor on the ground that the title of the person from whom he held the premises was merely equitable (*n*).

(*f*) ***Person entering as undertenant of one to whom a lease is subsequently granted.***—Where one person has gone into occupation of premises as undertenant of another before the latter has obtained a lease, and a lease is subsequently granted to the mesne landlord, it is for the jury to say whether the undertenant thenceforth holds under the lease, and so liable for the performance of the covenants as to repairs which it contains (*o*).

37. Transferees of the interest of the lessee in the leasehold estate.—(*a*) *Assignees of terms for years.*—Where the lessee covenants for himself and his assigns to repair, and an assignee fails to repair, the lessor may, of course, sue either his lessee or the lessee's assignee (*a*). So, also, if the lessee covenants to discharge the lessor *de omnibus oneribus ordinariis et extraordinariis* and to repair the houses, an action lies against the assignee (*b*). But this right of action is not confined to cases in which there is an express stipulation casting the burden of repairing upon the assignee. It is well-settled that, as respects property in esse at the time of the demise, the effect of the Stat. 32 Hen. 8, ch. 34, (*c*), is that the

---

Camp. 275; *Torriano* v. *Young* (1833) 6 C. & P. 8. The general principle applicable under such circumstances is that a tenant holding over after the end of a term of years is deemed to do so on such terms as may be incident to a tenancy for years, and not merely on such terms as are necessarily incident to such a tenancy. *Hyatt* v. *Griffiths* (1851) 17 Q.B. 505 [not a covenant to repair in this case]. That the tenant's obligation is referable to the covenant and not an implied contract arising out of a new tenancy from year to year is clearly indicated by the rule which prevailed under the old forms of procedure, that a tenant who held over after allowing the premises to fall into disrepair could not be sued in assumpsit. *Johnson* v. *St. Peters* (1836) 4 A. & E. 520, 4 N. & M. 186.

(*l*) *Digby* v. *Atkinson* (1815) 4 Camp. 275, 16 R.R. 792.

(*m*) *Beale* v. *Sanders* (1837) 3 Bing. N. C. 850.

(*n*) *Morrogh* v. *Alleyne* (1873) Ir. R. 7 Eq. 487.

(*o*) *Torriano* v. *Young* (1833) 6 C. & P. 8.

(*a*) Bacon Abr. Covenant (E. 4).

(*b*) *Dean of Windsor's Case*, 5 Coke, 24, *a*.

(*c*) See s. 32, ante.

covenants as to repairing run with the land in such a sense that the assignee of the term is liable for a breach of the covenant committed after the assignment, even though assigns are not named in the instrument of demise (*d*), and though in the part of the deed relating to the repairs, the lessee covenants only for himself and his executors and administrators (*e*). A rational foundation for this doctrine is found in the principle embodied in the maxim: *Qui sentit commodum, sentire debet et onus* (*f*). The covenant being one of this nature, the objection that there is no privity of estate between the assignee of an underlessee and the original lessor cannot be made in an action brought by him against the underlessee, especially where the immediate lessor of the defendant is a party plaintiff (*g*). The lessor's right of action against the lessee still continues, but only one satisfaction can be obtained for the breach (*h*).

The general rule has been held not to be changed by the fact that the lessor has paid a sum of money to the lessee to put the premises in repair. Such a payment is, on the contrary, deemed to

---

(*d*) Bacon's Abr. Cov. (E, 3); Sheph Touchst p. 179, citing *Spencer's Case*, where the rule is laid down as follows: "If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land in whose hands solve the term shall come, as well those who come to it by act of law, as by the act of the party, for all is one having regard to the lessor." See also *Dean of Windsor's Case*, 5 Coke, 24, *a*; *Brett* v. *Cumberland* (1619) Cro. Jac. 521; *Torriano* v. *Young* (1833) 6 C. & P. 8; *Wakefield* v. *Brown* (1846) 9 Q.B. 209; *Perry* v. *Bank &c.* (1866) 16 U.C.C.P. 404; *Crawford* v. *Bugg* (1886) 12 Ont. R. 8 [Short Forms Act]. The rule is the same in the case of feu-contracts in Scotch law. See *Clarke* v. *Glasgow Ass. Co.* (1854) 1 Macq. H. L. C. 668 A prima facie case of privity sufficient to render a defendant in possession liable, as assignee of a lease, for forfeiture on account of a breach of a covenant to repair is established, where the defendant was in possession of the premises, and was in the habit of paying the rent reserved in the original lease, of which he is proved to have been cognizant. *Doe* v. *Durnford* (1832) 2 C. & J. 667. The burden of a covenant to repair a road dedicated to the use of the public does not run with the land. *Austerbery* v. *Oldham* (C.A. 1885) 29 Ch. D. 750, 53 L.T. 543.

(*e*) *Martyn* v. *Clue* (1852) 18 Q.B. 661.

(*f*) *Smith* v. *Arnold* (1704) 3 Salk. 4. "In respect the lessee hath taken upon him to bear the charges of the reparations, the yearly rent was the loss, which goes to the benefit of the assignee, etc." *Dean of Windsor's Case*, 5 Coke, 24, *a*. "Reason requires that they who shall take benefit of such covenant when the lessor makes it with the lessee should, on the other side, be bound by the like covenants when the lessee makes it with the lessor." *Spencer's Case*, 5 Coke, 17, *b*.

(*g*) *Wakefield* v *Brown* (1846) 9 Q.B. 209.

(*h*) *Brett* v. *Cumberland* (1619) Cro. Jac. 521.

be notice to him to require the application of the money by the assignee unless he intends to be himself responsible to the lessor (*i*).

An assignee of the term cannot, by assigning over, get rid of his liability for breaches of covenant committed during the period of his own occupation (*j*); but he is responsible for these alone (*k*), even though the landlord has not been notified of, nor given his assent to, the re-assignment (*l*).

The re-assignment—in the case cited the term was equitable—is not rendered fraudulent by the fact that the new assignee is a mere beggar. The motives of the first and second assignees in parting with and receiving the term are not enough to make it fradulent, if the act done be a real act, intended really to operate as it appears to do. Fraud may be inferred, however, where the assignment is nominal only, and the assignor retains the beneficial possession, because he assumes to do one thing and really does another. But if he assigns, really getting rid of the burthen and giving up really the benefit also, if any, to his assignee, the act is not fraudulent (*m*).

In an action against an assignee by a party entitled to take advantage of a breach of the covenant to repair, the plaintiff, if there has been a re-assignment, has the onus of proving that the breach alleged was committed while the defendant was in possession (*n*).

(*i*) *Martyn* v. *Clue* (1852) 18 Q.B. 661.

(*j*) *Hickling* v. *Boyer* (1851) 3 Mac. & G. 635, (p. 645) per Lord Truro, approving 2 Platt on Leases, p. 417; *Smith* v. *Peat* (1853) 9 Exch. 161. In the case of an equitable term also, relief will be granted as to breaches of the covenant committed before the assignment. *Fagg* v. *Dobie* (1839) 3 Y. & C. Exch. 96. As to effect of a re-assignment, generally, see Woodf. Landl. & T., p. 273; Foa Landl. & T., p. 327; Redman Landl. & T. p. 522, 523.

(*k*) *Marnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481; *Perry* v. *Bank &c.* (1866) 16 C.P. 404; *Beardman* v. *Wilson* (1864) L.R. 4 C.P. 57.

(*l*) *Crawford* v. *Bugg* (1886) 12 Ont. R. 8.

(*m*) *Fagg* v. *Dobie* (1839) 3 Y. & C. Exch. 96. See generally the text books cited in note (j), supra.

(*n*) *Crawford* v. *Bugg* (1886) 12 Ont. R. 8. From this principle it follows that it is not error to instruct a jury that, where the demised premises had been in the possession of several persons after the defendant, one of the assignees in the series of those, occupied them, and it is on the evidence a reasonable inference that the dilapidations complained of took place during the time he held the lease, the landlord is entitled to substantial damages. *Smith* v. *Kent* (1853) 9 Exch. 161. Here it was held justifiable to find the defendant responsible for the want of repairs, where it was proved that the demised premises were out of repair when they were held by the party to whom the immediate assignee of the defendant had assigned them, and that party had testified that he put them in no better condition than when he received them, and there was no rebutting testimony.

If the distinction recognized in *Spencer's Case* (*o*) as to the effect of covenants regarding things in esse and not in esse at the time of the demise is to be upheld in all its strictness, the assignee, unless he was named, would not be bound by the covenant in respect to additions to the demised premises made during the term. But in an English case it has been held that, for the purpose of affecting him with liability, things which have a potential existence, contemplated by the parties to the lease at the time it was executed, stand in the same category as things actually in existence (*p*).

A covenant to repair is considered to be devisible, and an action for its breach is therefore maintainable against the assignee of a part of the demised premises, wherever it would be maintainable against the assignee of the lessee's entire interest (*q*).

(*b*) *Assignees of tenants from year to year.*—Where a new party comes into possession as assignee of a lessee holding under a demise which is to continue from year to year, and the landlord gives the assignee no notice to quit, the implication is that the assignee becomes a tenant on the same terms as the original lessee, and is therefore liable for the performance of any covenants to repair which such lessee may have entered into. In such a case it is not

---

(*o*) 5 Coke, 17, *b*.

(*p*) *Minshull* v. *Oakes* (1859) 2 H. & N. 793, 27 L.J. Ex. 194, where the covenant was that the lessee, "his executors, or administrators, would repair the messuage, etc., and all other erections and buildings which should or might be thereafter erected, etc., and the same being so repaired, the lessee, his executors, administrators, and assigns, at the end of the term would yield up." It was contended that the assignee of the lessee, not being named in the covenant to repair, was not liable for the non-repair of certain buildings erected during the term. This argument did not prevail. "In the present case," said Pollock, C.B., "we think it sufficient to say, that, as the covenant is not a covenant absolutely to do a new thing, but to do something conditionally, viz., if there are new buildings, to repair them; as when built they will be part of the thing demised, and subsequently the covenant extends to its support, and as the covenant clearly binds the assignee to repair things in esse at the time of the lease, so does it also those in posse, and consequently the assignee is bound. There is only one covenant to repair; if the assignee is included as to part, why not as to all?" In *Emmett* v. *Quinn* (1882) 7 Ont. App. 306, Burton, J.A., expressed a doubt as to the correctness of this decision, and quoted (p. 320) with approval a passage from an article in the *London Law Times*, vol. 67, p. 76, in which it was strongly criticised. But it has not, so far as the writer is aware, been judicially discredited in England itself.

(*q*) *Congham* v. *Taylor* (1645) Cro. Car. 22, declaring the rule to be the same both at common law and under the Statute of 32 H.S. ch. 37. This case was cited as good law by Lord Ellenborough in *Stevenson* v. *Lambard* (1802) 2 East. 575. See also Bacon's Abr. Cov. (E. 3).

necessary to prove that the assignee expressly agreed to hold the premises on the terms of the lease. He may be charged as tenant by virtue of an agreement implied from the situation of the parties (*r*).

(*d*) *Equitable assignees.*—A person who takes possession of leasehold premises after signing an agreement for an assignment is, in equity, deemed to be in possession, subject to the obligation to perform a covenant to repair contained in the lease (*s*). The mere fact that, in the particulars which were prepared with a view to the sale and referred in the executory agreement, it was expressly stipulated that the purchaser should not be entitled to an assignment, does not render the agreement one merely for the right of occupation, so as to put the party contracting to purchase in the position of a tenant holding from year to year, and, therefore, only bound to do the repairs which are obligatory on such tenants (*t*). Nor will a party to an agreement of this sort be relieved of the obligation of the covenants because the lessee was not a party to it (*u*). The same principle is, of course, applied where the term transferred is itself merely equitable—as where the assignor was not to have a lease until a certain condition is fulfilled (*v*), or where he originally took possession under a demise for a longer period than his lessor had a right to grant (*w*).

The equitable assignee of an underlessee is charged with the obligation to perform the covenants in that underlease, though he is himself the original lessor (*x*).

(*e*) *Persons succeeding lessees in possession without an assignment.*—A party who has succeeded the lessee in possession of the premises, without an assignment from the latter, cannot be made liable on the covenants to repair contained in the lease, unless he has estopped himself from denying that he was assignee of the

---

(*r*) *Buckworth* v. *Simpson* (1835) 1 C. M. & R. 834, 7 Tyr. 344 [rule here applied to executors].

(*s*) *Wilson* v. *Leonard* (1840) 3 Beav. 373.

(*t*) *Close* v. *Wilberforce* (1839) 1 Beav. 112.

(*u*) *Close* v. *Wilberforce*, supra.

(*v*) *Fagg* v. *Dobie* (1838) 3 Y. & C. 96.

(*w*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. 481.

(*x*) *Jenkins* v. *Portman* (1836) 1 Keen. 435.

term. In the case cited, Bowen, L.J., remarked that "if a man pays rent to the landlord on the footing of accepting a term and the liabilities under it, and the landlord accepts the rent on those conditions, then such a person may be estopped from denying that he has become tenant to the landlord on those conditions" (*y*). See further as to this case under sec. 38 (b), post.

(*f*) *Underlessees*,—The sub-lessee of a person who has covenanted to repair is not liable in law on the covenant, nor is he liable in equity, unless the original lessee is insolvent (*z*).

38. Mortgagees of the term.—(*a*) *Legal mortgagees.*—Like all other assignees, a legal mortgagee of a term is liable on the covenants in the lease, whether he takes possession or not (*a*). If he wishes to avoid this liability, his proper course is to take a derivative lease of all but a small portion of the term (*b*). The liability in law is the same irrespective of whether he has or has not actually gone into possession, and equity will grant him no relief (*c*). But, on the other hand, where he has never been in possession, a court of chancery will not assist the landlord by a decree of specific performance, and he will be left to his legal remedies—at all events, where he has never been in possession (*d*).

(*b*) *Equitable mortgagees.* — The question whether a mere depositary of a lease by way of mortgage may be compelled to take an actual assignment, and thus rendered liable for the performance of the covenants, is one with respect to which the authorities are in conflict (*e*).

On principle it would certainly seem to be the better opinion that this form of equitable mortgage does not subject the depositary to the responsi-

---

(*y*) *Tichborne* v. *Weir* (C.A. 1892) 67 L.T.N.S. 735.

(*z*) *Goddard* v. *Keate* (1682) 1 Vern. 87 [distinguishing a derivative lease from an assignment of the term]. *Sparks* v. *Smith* (1692) 2 Vern. 275.

(*a*) *Pilkington* v. *Shaller* (1700) 2 Vern. 374.

(*b*) *Sparks* v. *Smith* (1692) 2 Vern. 275.

(*c*) *Pilkington* v. *Shaller*, ubi supra.

(*d*) *Sparks* v. *Smith* (1692), ubi supra. What the effect of his having gone into possession would have been, the court did not determine.

(*e*) In *Flight* v. *Bentley* (1835) 7 Sim. 149, it was held that such a depositary was liable on the covenant to pay rent. But a few years afterwards Shadwell, V.C., refused to follow this decision, expressing, in terms as strong as judicial courtesy permits, his surprise at its ever being rendered. *Moores* v. *Choat* (1839) 8 Sim. 508. See also the case cited in the next note.

bility of an assignee. The deposit simply confers on the depositary an inchoate right to demand that, if the debt thus secured is not paid, the estate or interest which was granted by the instrument shall be sold to satisfy his claim. Whether he will ever invoke the aid of a court of chancery to perfect this inchoate right rests entirely with himself. The theory that a purely optional right, which by its very nature is to be exercised at some indefinite time in the future, to be fixed by the holder himself, may be converted, against his will, and in the absence of any special equity, into an obligation which shall take effect immediately, seems to be contrary to analogy and extremely unjust.

That a mortgagee of this description is not, in the absence of some special consideration, liable for the performance of the covenants in the lease with him seems to be taken for granted in a recent case by the English Court of Appeal, where the depositary of the lease had, without any acknowledgment to the lessee who had departed from and remained out of the country, entered into and retained possession of the demised premises for forty years, paying the amount of rent reserved in the lease. Neither in the arguments of counsel nor in the opinions of the Lord Justices was any reference to the conflict of opinions in the earlier decisions in regard to the general question whether a person who takes a deposit of a lease by way of mortgage can be compelled to assume a liability for the covenants therein. But it may, perhaps, be assumed that the landlord's counsel did not present his client's case under this aspect for the reason that he believed it impossible to hold the defendant under the doctrine of *Flight* v. *Bentley*. One special point made was that the statute, 3 & 4 Will. 4, ch. 27, secs. 1, 34, operated in such a manner that the lessee's estate had been transferred to the occupant of the premises, as a result of the forty years adverse possession by himself and his successors in interest. It was also argued that the fact of the mortgagees having, while he remained in possession, paid the rent specified in the original lease, estopped him from denying that he accepted the term with all the liabilities incidental thereto. Neither of these contentions prevailed, the court holding that there was merely an extinguishment of the lessee's right after the expiration of the statutory period, and that neither an equitable mortgagee nor an assignee of his interest in the residue of the term is, under such circumstances, bound by a covenant to repair on the original lease (*x*). It is somewhat strange that no attempt was made in this case to hold the mortgagee liable on the broad principle that a party who accepts the benefits of a disposition of property is deemed to accept its burdens also. This principle is one of much broader scope than that of estoppel, and its application would, it seems, have been abundantly justified by the reliance placed upon it in the analogous cases of persons holding even after the expiration of their terms, and entering into possession under agreements for leases.

(*x*) *Tichborne* v. *Weir* (1892) 4 R. 26, 67 L.T. 735 (C.A.).

39. Personal representatives of tenants.—(*a*) *Generally.*—At one time it seems to have been the prevailing opinion that an action on the covenant to repair could be maintained against executors and administrators only when they were expressly mentioned as being bound, or when the covenant was to repair "during the term" (*a*). But the rule has been otherwise for at least a century (*b*).

The executors of a testator who has subleased the property demised to him, being liable, as between themselves and the lessor, are entitled to retain a sufficient portion of the trust fund to indemnify themselves against liability for dilapidations which accrued before the death of the testator, although there is a possibility that the under-lessees may remove that liability by doing the repairs and so fulfilling the covenants, as soon as a demand is made upon them by the lessor (*c*).

(*b*) *Liability for dilapidations prior to the death of the lessee.*—Where leased premises are out of repair at the death of the lessee, it is the executor's duty to apply his general assets to put them in repair, as well as to pay any rent then due (*d*). Those assets are liable in his hands to make good all the breaches of the covenants to repair that have occurred, or may occur, during the term (*e*), and, as custodian of the assets, he may be sued by the lessor, or his successor in interest (see VI., ante), and compelled to apply the funds which he holds in satisfaction of the plaintiff's claims (*f*). So far as regards his obligation to indemnify the reversioner out of the trust fund, it is of course immaterial whether the dilapidations accrued during the lifetime of the deceased, or while the property was being administered (*g*).

(*a*) See *Sheph. Touchst.* p. 178.

(*b*) See *Wentworth Off. Ex.* p. 250, 14th ed.

(*c*) *Hickling* v. *Boyer* (1851) 3 Macn. & G. 635.

(*d*) *Read* v. *Tenterden* (1833) 4 Tyr. 111.

(*e*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481.

(*f*) Bacon's Abr. (D. 4); Sheph. Touchst. p. 172; *Brett* v. *Cumberland* (1619) Cro. Jac. 521; *Hickling* v. *Boyer* (1851) 3 Macn. & G. 635. As to the statutory liability of personal representatives of life tenants for *permissive waste* committed before the tenant's death, see *Woodhouse* v. *Walker* (1880) 5 Q.B.D. 404; *Crawfurd* v. *Bugg* (1886) 12 Ont. R. 8.

(*g*) Anon (1573) 3 Leon. 51, pt. 72.

The rule stated above in sec. 36 (e), ante, that a tenant who holds over after the expiration of a term of years is presumed to be still subject to the obligation of any covenants as to repairs which the lease may contain, involves the corollary that the assets of the tenant so holding over are liable in the hands of his personal representative for the due performance of those covenants (*h*).

The executors of one of two joint tenants who dies during the term are not liable for breaches of the covenant to repair committed after his death (*i*).

(*c*) *Liability for dilapidations accruing during the administration of the estate.*—(See also 36 (d), supra). The liability which an executor incurs as to breaches of the covenant committed while he is in control of the demised premises is of a much more extensive nature than that explained in the last subdivision.

"The law, as it applies to personal representatives with respect to non-payment of rent and taxes, does not stand on the same footing as the law which binds them to repairs" (*j*).

During the period of his administration he is treated as assignee of the leasehold interest, and his liability in the covenants is assimilated to his liability in actions for waste committed during his own time, and after he has gone into possession. He is therefore personally liable for his failure to repair according to the covenants in the lease (*k*). He cannot resist an action for damages caused by his breach of those covenants, either on the ground that he has derived

---

(*h*) *Morrogh* v. *Alleyne* (1873) Ir. Rep. 7 Eq. 487, a case in which the assets were applied to the rebuilding of the premises after a fire, there being no exception of fire in the lease.

(*i*) *Whyte* v. *Tyndall* (H.L.E. 1888) 13 App. Cas. 263, 58 L.T. 741, rev'g 20 L.R. Ir. (C.A.) 517, and restoring the decision in 18 L.R. Ir. 263. Applying the principle that a declaration in the habendum of a lease that two lessees are to hold as tenants in common, and not as joint tenants, creates an interest which is just as consistent with a joint as with a several liability to pay one undivided rent, and to execute all necessary repairs, the House of Lords here held that the covenants were joint, in a case where premises were demised to G. & A., "their executors, administrators, and assignees, habendum to" the said G. & A., their executors, etc., as tenants in common, and not as joint tenants, at a single yearly rent, and G. & A. covenanted "for themselves, etc., that they, the said G. & A., or some or one of their executors, etc.," would pay the yearly rent and keep the premises in repair.

(*j*) *Tremeere* v. *Morrison* (1834) 1 Bing. N.C. 89.

(*k*) *Tremeere* v. *Morrison* (1834) 1 Bing. N.C. 89; *Buckley* v. *Peck* (1711) 1 Salk. 316; *Hornidge* v. *Wilson* (1839) 11 A. & E. 645; *Tilney* v. *Norris* (1701) Ld. Raym. 553, Salk. 309; *Buckworth* v. *Simpson* (1835) 1 C.M. & R. 834.

no profit from the premises (*l*), or on the ground that he had offered to surrender the term (*m*)—except, possibly, as regards breaches committed after the offer (*n*). Moreover, although it is recognized that the executor or administrator of a lessee who has fully administered, and is chargeable with no default or laches, may discharge himself from liability for rent to a greater extent than the real value of the demised premises, yet, for the purposes of this rule, the real value, as against the reversioner, or one claiming under him, must be taken to be that which the premises would have been worth, but for his own act. He cannot take advantage of his own wrong by availing himself of a reduction of value occasioned solely by his failure to keep the premises in repair during the period of his possession (*o*).

An executor who has assented unconditionally to a specific bequest out of the testator's personal estate is not entitled to an indemnity out of the testator's general estate in respect of covenants contained in the lease (*p*); otherwise if no such assent is given (*q*).

Being responsible for the condition of the premises the executor is entitled to enter on the property, and see that the repairs are executed (*r*).

If the executors plead plene administravit, the remedy is against the legatees to recover for a breach of the covenant (*s*).

(*d*) *Liability of executor of assignee of term.*—An assignee of a leasehold being equally liable with the original lessee on the covenant to repair (see 37 ante), the executor of such assignee is accountable under the same circumstances and to the same extent as the executor of the lessee (*t*), even though there is no express

---

(*l*) *Tremeere* v. *Morrison* (1834) 1 Bing. N.S. 89, 4 M. & Sc 607.

(*m*) *Sleaf* v. *Newman* (1862) 12 C.B.N.S. 116, following the last cited case.

(*n*) *Read* v. *Tenterden* (1833) 4 Tyr. 111.

(*o*) *Hornidge* v. *Wilson* (1840) 11 A. & E. 643, 3 P. & D. 641, following *Tremeere* v. *Morrison*, supra.

(*p*) *Shaabolt* v. *Woodfall* (1845) 2 Coll. 30.

(*q*) *Hickling* v. *Boyer* (1851) 2 Coll. 30.

(*r*) Kekewich, J., in *Tomlinson* v. *Andrew* [1898] 1 Ch. 232.

(*s*) Kekewich, J., arguendo, in *Tomlinson* v. *Andrew* [1899] 1 Ch. 232.

(*t*) Bacon's Abr. Cov. (E. 3).

mention of assigns in the lease (*u*). If the executor re-assigns the term, the personal estate of the first assignee is liable for breaches of the covenant to repair, which occurred between the date of the first and second assignments (*v*).

40. Legatees of the term.—(*a*) *Legatees taking the term as an absolute gift.*—It is sufficiently obvious, and there is an express ruling to the effect, that a legatee of leasehold property under a will which states that the bequest is "subject to the payment of the rent and the performance of the covenants contained in the lease," takes them subject to the burden of putting them in repair (*a*). But the question whether, in the absence of a provision of this sort the legatee must pay for the repairs, is one upon which there has been some conflict of opinion. In the case just cited, Lord Truro thought that this burden went with the legacy, independently of the directions in the will. In the following year Kindersley, V.-C., expressed his disapproval of this doctrine, though he considered that he would have been bound by it if the will under review had been of the same tenor. He felt himself at liberty, however, to decide in favour of the legatee, distinguishing the case before him on the ground that the question was not, as in *Hickling* v. *Boyer*, one between the specific legatee of a separate leasehold and the residuary legatee of general personal estate, but between the tenant for life and the remainderman or the reversioner of an aggregate mass of property, all constituting the residuary real and personal estate, of which the leaseholds in question formed only a component part (*b*). But this distinction can scarcely be sustained in face of the broad statement of Jessel, M.R., in a still later case that a specific legatee takes leasehold property cum onere, and that the rule is the same where the legatee receives such property as part of the residuary estate (*c*).

(*u*) *Keeling* v. *Morrice* (1701) 12 Mod. 371.

(*v*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481.

(*a*) *Hickling* v. *Boyer* (1851) 3 Macn. & G. 635.

(*b*) *Harris* v. *Boyer* (1852) 1 Drew. 174.

(*c*) *Hawkins* v. *Hawkins* (1880) 13 Ch. D. (C.A.) 470. There is was held that the damages which a testator's estate is liable to pay for dilapidations in a leasehold property are not "debts" within the meaning of a clause in a will which specifically bequeathed to one person certain personal estate upon trusts, after payment therefrom of his "debts and funeral expenses," and gave the residuary estate to another person who was also appointed executor. The residuary legatee, therefore, was declared not to be entitled to have the sums which he paid to the landlord for dilapidations, subsequent to the testator's death, paid out of the specifically bequeathed property.

(*b*) *Legatees taking the term as tenants for life.*—In this sub-division it is proposed merely to review the obligations of life tenants of leaseholds. The question how far life tenants are liable for the repairs of freehold estates does not fall within the scope of the present monograph.

No difficulty is presented by the cases in which the life tenant is held liable, for the simple reason that, in neglecting to repair, he has defaulted in a duty imposed by an express provision in the will under which he takes (*d*). Nor is it disputed that, where the obligation of a covenant is not a factor, and the extent of the tenant's responsibility is considered with reference to his duty to prevent waste, a tenant for life under a will is not subject to an implied trust to keep the property in repair (*e*). But even at this late date the precise extent of the tenant's responsibility as regards the performance of the covenants, in the absence of some express provision embodying the testator's wishes, can scarcely be said to have been finally determined.

That the general assets of a testator, and not the specific legatee of a leasehold forming part of the estate, is chargeable with the expenses of the repairs necessary at the death of the testator, is not disputed.

In a case already referred to in the preceding sub-division of this section, it was laid down that where there is a tenant for life and a remainderman or reversioner under the same will of a large mass of property, consisting partly of leasehold property, and the testator at the time of his death was liable to the landlord for a breach of the covenants to repair contained in the lease, the residue of the estate is to be applied to discharge the sum necessary to make good the dilapidations (*f*).

The same theory is adopted in a recent Irish decision, while it was denied that, as between the tenant for life of a leasehold, specifically bequeathed, and the general assets of the testator, there is any equity in favour of the general assets, to throw upon the former the obligation of

---

(*d*) See, for example, *Dingle* v. *Copper* (1899) 1 ch. 726 [a case of an equitable tenant for life].

(*e*) *Powys* v. *Blagrave* (1854) Kay 495, aff'd 4 D. M. & G. 418, *In re Cartwright* (1889) 41 Ch. D. 532.

(*f*) *Harris* v. *Boyer* (1852) 1 Dr. 174. Here the tenant for life and the remainderman had already arranged that the demands of the landlord should be satisfied out of the estate, and the decree of Kindersley, V.C., was in accordance with the principle stated in the text.

putting the leaseholds which were dilapidated at the time of his death in the state of repair demanded by the covenant in the lease (*g*).

That the same principle prevails where the party seeking to fix the obligation for such repairs is the remainderman is also settled by a much discussed case in the Court of Appeal (*h*), where it was held that the life-tenant was not bound to put the leasehold property into a better state of repair than that in which it was when the testator died, although the dilapitations which had then accrued constituted a breach of the covenant in the lease. If considered with reference to the particular facts involved, the scope of this decision is, it will be observed, merely that the life-tenant is not compellable to remedy any breaches of the covenant to repair which were already complete when his estate first vested in possession. But some of the language used by the Lords Justices is so general and unqualified that it is at least possible to suppose them to have intended to enunciate the much wider doctrine that, irrespective of the time when the dilapidations accrue, a tenant for life of an estate consisting of leasehold interests is—at all events, as between himself and the remainderman,—not bound to keep the leased premises in such a state of repair as to prevent for-

---

(*g*) *Brereton* v. *Day* (1895) 1 Ir. Rep. 519. Porter, M. R., said: "In cases where it is sought to apply the maxim, '*Qui sentit commodum, idem sentire debet et onus*,' there is always a preliminary question—what is the *commodum* . . . In this case the *commodum* was meant to be the house in that state in which the testator was, as between himself and the landlord, legally bound to leave it. If so, the legatee does not receive the commodum until the repairs are effected, and the onus which attaches to it is that which is expressed—namely, the payment of the rent and other outgoings, including, no doubt, the maintenance of the place in tenantable repair."

(*h*) *Coles* v. *Courtier* (C.A. 1886) 34 Ch. D. 136. Counsel for the remainderman relied upon a decision by Fry, J., which seemingly looked in the opposite direction. *Fowler* v. *Odell* (1881) 16 Ch. D. 723, holding that, in the interests of the remaindermen the trustees of leasehold property are bound to keep it free from the risk of forfeiture by seeing that the covenant to repair is duly performed. It was declared that the trustees are not bound to be content with the setting apart of a sum of money in the joint names of themselves and of the tenant for life as an indemnity against the consequences of a breach, but are entitled to require the covenants to be specifically performed. A receiver of rents was accordingly appointed. But the learned judge who had in the meantime been elevated to the Court of Appeal, explained in *Coles* v. *Courtier* that he had proceeded upon the ground that, under the provisions of the will, it was the duty of the trustees to have the property forthcoming at the death of the tenant for life, and that, as they had nothing but rents and profits in their hands, and their trust could only be performed by applying these rents to the repairs, they were bound to do so. He expressly disclaimed intention of deciding any general principle as to the rights of tenants for life and remaindermen. Both Cotton and Bowen, L.JJ., expressed the opinion that, if Mr. Justice Fry's decision had been one between tenant for life and remaindermen, there would have been some difficulty in following it.

feiture for a breach of the covenant in that regard. In two cases Kekewich considered that this was really the effect of their remarks, and, although with much reluctance, he held that the expenses of making such repairs as will satisfy the covenants should be charged upon the residuary estate, whether the tenancy for life is equitable (*i*), or legal (*j*), and whether the premises fell into disrepair before or after the death of the testator. In the second of these cases, the learned judge was invited, but refused to follow the judgment of Stirling, J., in *Thompson* v. *Redding* (*k*). But when the question next came before him, this judgment had, as we shall presently see, been reinforced by the opinions of North, J., and the Irish Master of the Rolls. To this array of adverse authority he felt bound to defer, and decided that, as against a remainderman, a tenant for life of leaseholds specifically bequeathed is bound, during the continuance of his interest, to perform the covenants contained in the leases (*l*).

The cases which it was thus deemed proper to follow proceed upon the ground that the general principle applicable to specific legacies is that the legatee takes them *cum onere*, and that the Court of Appeal ought not, in the absence of a categorical statement to that effect, to be credited with the intention of enunciating a doctrine which would relieve the tenant of a burden so closely connected with the legacy as a duty the omission of which may, and in most instances actually does, render the subject matter liable to forfeiture. Accordingly it has been held by the judges mentioned in the subjoined note that the life-tenant of a leasehold estate is responsible for the due performance of any covenants to repair which the lease may contain (*m*), whether the adverse interests are those of the general estate or those of the remainderman.

(*i*) *Jeune* v. *Baring* [1893] 1 Ch. 61 [originating summons taken out by trustees of will to obtain a construction].

(*j*) *Tomlinson* v. *Andrews* [1898] 1 Ch. 232 [remainderman was adverse party here].

(*k*) [1897] 1 Ch. 876. See note (*m*) infra.

(*l*) *Cooper* v. *Gjers* [1899] 2 Ch. 54 [the covenant here was as to insurance].

(*m*) Stirling, J., in *Thompson* v. *Redding* [1897] 1 Ch. 876 [remainderman was here interested, and the particular point decided was that the income derived from certain leaseholds which trustees were directed to pay to testator's widow for her life should be construed as meaning net income, and that the expenses for

But another element of uncertainty has quite recently been introduced into the controversy by a decision of North, J., which proceeds upon the theory that a different doctrine is to be applied according as the parties seeking to fasten responsibility upon the tenant for life are the persons who represent the residuary estate or the remaindermen. The latter, he held, cannot make the estate of the tenant liable for repairs which he has been obliged to make owing to the fact that during the life-tenant's possession, the covenants as to repair were not performed (*n*). So far as is apparent from the cases cited in this section, the distinction thus taken does not seem to have suggested itself to any other judge, and further discussion is necessary before its validity can be conceded. If it is once granted that the obligation to perform the covenants rests on the life-tenant, it is difficult to understand why the very person who, if the covenants are not performed, will receive a depreciated estate, or, it may be, no estate at all, should not be entitled to recover the money which he has expended in doing the repairs which the life-tenant has wrongfully neglected. The only authority cited by the learned judge is one in which the question was merely whether the life-tenant was liable for permissive waste (*o*) and is an application of the much disputed doctrine that there is no such liability unless the tenant is under an express obligation to repair. (See sec. 6, ante). Clearly a case decided on this ground makes against rather than for the conclusion adopted.

41. Beneficiaries of a leasehold held in trust.—In a recent case Wright, J., laid it down as a general rule that "the covenants of a trustee or assignor ordinarily bind the beneficiary or equitable assignee, so as to render him liable in an action on the covenants only when there is a privity of contract between him and the original lessor," and decided that, where the cestui que trust of a trustee who takes a lease with a covenant to repair occupies the demised premises, as it is intended that she should do, and pays

---

current repairs were to be borne by her]; North J., in *In re Betty* [1899] 1 Ch. 821 [tenant for life bound to indemnify the testator's estate for delapidations accruing after the testator's death, and for those alone]; Irish Master of the Rolls in *Kingham* v. *Kingham* [1897] 1 Ir. Rep. 170 [remainderman adverse party here].

(*n*) *In re Parry* [1900] 1 Ch. 160.

(*o*) *In re Cartwright* (1889) 41 Ch. D. 532.

the rent, no equitable liability to repair could be predicated from the fact that she holds the beneficial interest in the lease, nor from that fact coupled with her occupation of the premises (*p*).

42. Guarantor of the performance of the covenant.—If it is apparent, upon an examination of the whole deed, that the lease was intended to make a third person jointly liable with the lessee for the performance of the covenant to repair, as well as the other covenants, he will be charged as guarantor, even though a strict grammatical construction would point to a different result (*q*).

VIII. JUDICIAL RELIEF FROM THE CONSEQUENCES OF NON-PERFORMANCE OF THE COVENANTS.

43. In the course of an action on the covenants.—(*a*) *At common law.*—Under the old procedure it was held that, in an action of ejectment after breach of the covenant to repair, the court has no power to stay proceedings upon terms, unless the landlord consents (*q*).

(*b*) *Under statutes.*—The general Judicature Acts, it would seem, only effect the operation of the above rule indirectly by enabling the tenant to raise in such an action one of the equitable defences of which he could not previously have availed himself without the assistance of the Court of Chancery (*b*). But the legal rights of the tenant have been considerably altered by sec. 14, sub-sec. 1 of the Conveyancing Act, which runs as follows :—

(*p*) *Ramage* v. *Womack* (1900) 1 Q.B. 116.

(*q*) *Copland* v. *Laporte* (1835) 3 A. & E. 517. Liability predicted, where the words of the indenture were, in effect, that L & R covenanted to C that L would pay the rent, and *further*, that L, his executors, etc., would keep the premises in repair.

(*a*) *Doe* v. *Ashby* (1839) 10 A. & E. 71. For an instance in which proceedings were stayed by consent, see *Doe* v. *Brindley* (1832) 4 B. & Ad. 84.

(*b*) In their annotation of sec. 57 (3) of the Ontario Judicature Act Messrs. Holmsted and Langton state that it has not yet been settled whether the general power here conferred upon the High Court to relieve against all forfeitures should be construed as authorizing relief against a forfeiture in a case where no relief would formerly have been granted by a court of equity. If a conjecture based upon a merely negative inference may be hazarded, the present writer ventures to suggest that the similar power bestowed by the English statute could scarcely have been regarded as being of wider scope than that which had previously been exercised by courts of equity. Otherwise the provision noticed below would not have been inserted in the Conveyancing Act passed several years after the general statute. This circumstance affords some slight ground at all events for the view that the Ontario Judicature Act should be construed as being merely declaratory, and not as investing the courts with more extensive powers.

"A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor, for the breach."

This provision was intended to place the tenant in a better position than he was before the Act was passed (*c*). The principle which it is assumed to embody is that the power of enforcing a forfeiture should be treated as a mere security for the performance of the covenants—a theory which has very recently been carried to its logical conclusion in the decision that even if the order relieving against forfeiture directs that the necessary repairs shall be made within a specified period, and also, in general terms, permits the plaintiff to proceed on his judgment and recover possession if the defendant makes default in any of the conditions mentioned, it is still within the discretion of the court to enlarge the time given for making the repairs (*d*). The relief provided for may be granted though it is not claimed in the plaintiff's pleadings (*e*). But the words of the Act are construed strictly in this respect, they do not enable an underlessee to obtain relief against a forfeiture for breach of the covenant to repair (*f*).

The decisions respecting the sufficiency of the notice are already quite numerous. Their effect, so far as they bear upon the subject of the present article, is stated below.

The notice must be such as to give the tenant precise information of what is alleged against him and what is demanded of him (*g*).

"The notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them" (*h*).

(*c*) *Fletcher* v. *Nokes* [1897] 1 Ch. 271.

(*d*) *Gaze* v. *London, etc., Stores* (1900) 44 Sol. Jour. 722, 109 L.T. Journ. 443.

(*e*) *Mitchison* v. *Thompson* (1883) 1 Cab. & E. 72.

(*f*) *Burt* v. *Gray* (1891) 2 Q.B. 98.

(*g*) *Horsey Estate* v. *Steyn* (1899) 2 Q.B. (C.A.) 79.

(*h*) *Fletcher* v. *Nokes* (1897) 1 Ch. 274, holding that a notice to the lessee that "you have broken the covenant for repairing the inside and outside of the house" (describing them), contained in a specified lease, was sufficient to satisfy the statute.

Hence, where there has been a breach both of a covenant to build and of a covenant to keep in good repair, a notice is not sufficient which does not mention the latter breach (*i*).

Nor is the notice good if it is insufficient as to one of the breaches complained of, even though it sufficiently specifies other breaches (*j*).

On the other hand, the notice is not invalidated, as a whole, by the fact that one out of several breaches of the covenant to repair which are specified had never really been committed (*k*). So, where the physical condition of the demised premises is the same at the time when the action was commenced as it was at the time when the notice was given, the tenant is held to have had sufficient notice when more than three months prior to the bringing of the action due notice had been served on him, although by demanding rent up to a later date, and so treating the lessee as tenant, the landlord is obliged to rely upon the right of action created by the state of the premises between that date and the date of the bringing of the action (*l*). Nor need the landlord go through every room in a house and point out every defect (*m*).

A month is a reasonable time to allow for remedying the breach, although there is a covenant in the lease that the tenant will repair three months after notice (*n*). But two days' notice is not a reasonable notice where the tenant is required to make extensive repairs (*o*).

A good notice to repair may be given under the general covenant of the lease, although the landlord has previously served notice to repair within three months, in accordance with the terms of the special covenant, and the three months have not yet expired (*p*).

The clause in this section of the statute as to the requisition for compensation merely means that the landlord, if he wants compensation, shall inform the lessee that it is wanted, and not that the notice is bad unless the compensation is asked for (*q*).

Where a statement of claim seeks relief on the ground of forfeiture, and nothing else, and the notice is thus found to be insufficient, the court will dismiss the action, and not proceed to

---

(*i*) *Jacob* v. *Down* (1900) 2 Ch. 156.

(*j*) *Gregory* v. *Serle* (1898) 1 Ch. 652.

(*k*) *Pannell* v. *City of London, etc., Co.* (1900) 1 Ch. 496.

(*l*) *Penton* v. *Barnett* (1897) 67 L.J.Q.B. 11.

(*m*) *Fletcher* v. *Nokes* (1897) 1 Ch. 271.

(*n*) *Gregory* v. *Serle* (1898) 46 W.R. 440; (1898) 1 Ch. 652.

(*o*) *Horsey Estate* v. *Steyn* (1899) 2 Q.B. 79.

(*p*) *Cove* v. *Smith* (1886) 2 Times L.R. 778.

(*q*) *Lock* v. *Pearce* (1893) 2 Ch. 271.

try the case for the purpose of determining the amount of damages which should be awarded for the dilapidations (*r*).

In a recent case the English Court of Appeal refused to apply this provision for the benefit of a person who was seeking relief against forfeiture, after having entered into possession under an agreement for a lease.

Lord Esher considered that the provision was applicable not only in cases where there is an actual tangible lease in existence, but also where there is an agreement for a lease of which specific performance would be decreed, and the case before the court was not one in which the agreement could be enforced, inasmuch as the covenant to repair had been already broken when proceedings for forfeiture were taken. Lindley, J., declined to express any definite opinion upon the general question whether the statute was applicable whenever there was a right to specific performance. But it was unanimously held that this ground of relief, not having been relied upon at the trial nor put forward by the pleadings, was no longer open to the defendant (*s*). Compare sec. 44, note (d), post.

44. By the intervention of a court of equity.—(*a*) *The general rule* is that equity will not relieve against a breach of any covenant as to repairing, a distinction being taken between such covenants and that for the payment of rent (*a*). As regards the application of this rule it makes no difference whether the action was brought for a breach of the general covenant to repair or the special covenant to repair within a certain period after notice (*b*), or to lay out a sum of money in repairs within a given time (*c*). Nor will a Court

---

(*r*) *Fletcher* v. *Nokes* (1897) 1 Ch. 271.

(*s*) *Swain* v. *Ayres* (1888) 21 Q.B.D. 289, affi'g 20 Q.B.D. 585.

(*a*) *Hill* v. *Barclay* (1811) 18 Ves. 56; *Wadman* v. *Calcraft* (1804) 10 Ves. 67; *White* v. *Wamer* (1817) 2 Mer. 459.

Where a lessee for years under covenants to pay rent and repair, made a hundred underleases, and the original lease was avoided for non-payment of rent, it was held, in a suit brought by six of the underlessees to be relieved against the forfeiture, that equity would not apportion the rent, and would only grant relief on condition that the petitioners paid the whole rent in arrear, and made such repairs as would satisfy the covenant in that regard. Having done this they might compel the rest of the undertenants to contribute. *Webber* v. *Smith* (1690) 2 Vern. 103. Richards, C B., in *Bracebridge* v. *Buckley* (1816) 2 Price Exch. 200, said he did not understand the case.

(*b*) See cases just mentioned. In *Hill* v. *Barclay*, ubi cit., Lord Eldon said that, in the case of a notice to repair, a Court will not speculate as to whether the repairs will be equally or more beneficial, if postponed to a time later than the period appointed.

(*c*) *Bracebridge* v. *Buckley* (1816) 2 Price 200, (diss. Wood, B.). The ground assigned for this decision was that the Court had no effectual means of ascertaining the amount of compensation, nor of seeing that it was applied to the perfor-

interfere for the enforcement of rights, the existence of which is dependent upon the performance of that covenant (*d*).

The special circumstances relied upon, as creating exceptions to this rule, will now be noticed separately.

(*b*) *Accident, surprise, mistake, etc.*—These ordinary reasons for equitable relief are, of course, no less applicable to covenants to repair than in other cases (*e*).

(*c*) *Notice to quit given by the landlord before his assertion of his rights under the covenant.*—In a suit for specific performance of an agreement to give a lease, upon which possession has been taken, Vice-Chancellor Turner held that the liability of a lessee extends to defaults occuring after, as well as before, a notice to quit which he does not comply with, and that such a notice, so far from being a dispensation by the landlord of the obligations incumbent on the lessee, is rather to be regarded as a notice to the tenant to be more vigilant in the performance of his duties (*f*).

(*d*) *Negligence of persons employed to do the repairs.*—A lessee is responsible for the acts or omissions of the persons he employs to do the work required by a covenant to repair. That those persons may have neglected their duty, furnishes no equitable ground for relieving the lessee against the legal consequences of the breach of covenant (*g*).

---

mance of the covenant. In an old case, in which a lessee for a long term covenanted to lay out £200 upon the premises within ten years, and after thirty years the lessor brought an action of covenant and recovered £150, the covenantor being only able to prove that £30 had been laid out, the Lord Keeper, though admitting the case to be a hard one, would neither give relief on the ground of excessive damages, nor decree that the money received should be laid out on the premises. *Barker* v. *Holden* (1685) 1 Vern. 316.

(*d*) In *Job* v. *Banister* (1857) 26 L. J. Ch. 125, Lord Cranworth held that specific performance of a covenant to renew a lease at the expiration of term would not be decreed, where the premises were out of repair, and the covenant for renewal was subject to a proviso that all the covenants should have been performed. The condition as to the performance of the covenants was here regarded as still binding the lessee and his assigns, although the original lease had been once renewed, and in the instrument granting the renewal the provision as to such performance had not been inserted. In *Gregory* v. *Wilson* (1851) 9 Hare 683, Sir George Turner applied the principle that a court of equity will not enforce specifically an agreement for a lease under which possession has been taken and rent paid, where the evidence clearly shews that there has been such a breach of the covenant to repair, which was to have been inserted in the lease, that, if the lease had been executed, the landlord would have had a right to enter and avoid it. Compare *Swain* v. *Ayers*, referred to in the last section (note s).

(*e*) See *Hill* v. *Barclay* (1811) 18 Ves. 56; *Reynolds* v. *Fitt* (1812) 19 Ves. 134.

(*f*) *Gregory* v. *Wilson* (1852) 9 Hare 583.

(*g*) *Nokes* v. *Gibbon* (1856) 3 Drew. 681, 26 L. J. Ch. 433.

(*e*) ***No person properly qualified to perform the covenant.***—The fact of there having been no personal representative of the lessee to perform the covenant to repair is not an equitable ground of relief against the consequences of a breach (*h*).

(*f*) *Lunacy of landlord.*—In one case Lord Eldon enjoined an action of ejectment brought by the committee of a lunatic's estate against a tenant who had rendered the term liable to forfeiture by his failure to repair within three months after notice. The principle adopted was that a court of equity would give relief wherever it seemed reasonable to suppose that a judicious landlord, acting for himself, would not have taken advantage of the forfeiture, and it was remarked that care must be taken not to get rid of a good tenant by being too strict (*i*).

(*g*) *Breach not wilful.*—In one case Vice-Chancellor Turner declined to accept the contention of counsel that a court of equity would relieve tenants against the consequences of a breach of the covenant to repair, unless such breaches were wilful and obstinate (*j*) Some remarks of Lord Eldon (*k*) in which reliance was placed were explained as being meant to distinguish between such cases and cases of neglect arising from mistake or accident. The learned judge was of opinion that, at all events, where a man who knows that he is charged with a legal obligation, neglects to perform it, his neglect to do so must be deemed to be wilful, and, if he persists in it, to be obstinate.

(*h*) *Assurances leading the tenant to suppose that the repairs need not be proceeded with* will be treated by a Court as a ground for relieving him against the consequences of a failure to complete the repairs within the period fixed by a notice from the landlord. To raise an equity which will justify interference on this ground, the assurances must be given by the landlord himself or his authorized agent. Remarks made by the agent of a party with whom the lessor is negotiating for a sale of the premises, which, if

---

(*h*) *Gregory* v. *Wilson* (1852) 9 Hare 583.

(*i*) *Ex parte Vaughan* (1823) Turn. & R. 434. Here the proceedings were stayed upon the completion of the repairs, and the tenant's payment of the expenses of the legal proceedings, survey of the premises, etc., which the committee incurred by reason of the tenant's default.

(*j*) *Gregory* v. *Wilson* (1852) 9 Hare 683.

(*k*) *Hill* v. *Barclay* (1811) 18 Ves. 56; *Reynolds* v. *Pitt* (1812) 19 Ves. 134.

it is carried out, will result in the demolition of the buildings, cannot be relied on for this purpose (*l*).

(*i*) *Possibility of compensating the landlord for the breach.*—In a much discussed case Lord Erskine enjoined a landlord from forfeiting the term for non-performance of a covenant to expend £200 in five years upon the demised premises (*m*). The money to be thus laid out was considered to be in effect a substitute for a certain amount of rent, and the case was really decided upon the analogy of those which permit relief against forfeiture for non-payment of rent (*n*), and upon the principle that relief is in the discretion of the Court, and that, where there is a covenant specifying a liquidated sum to be laid out in repairs to be a given time, the landlord could not be injured by the expenditure of that sum (*o*). Special emphasis was laid upon the fact that the suit was not in relation to a mere covenant to repair, and an ejectment brought under the clause of re-entry. The ruling, therefore, was not intended to break in upon the general rule stated at the beginning of this section. But, making every allowance for the circumstances which differentiate it from other decisions of this type, it seems impossible to regard it as good law, especially as it has been treated with very scant respect in later cases (*p*).

(*j*) *Pendency of negotiations with a third party, looking to the total destruction of the subject-matter.*—In one case Lord Eldon said that he was strongly of the opinion that a Court of Equity should interfere where the lessor is insisting that the lessee should repair the demised premises, pending a treaty with a third party,

---

(*l*) *Hannam* v. *South London Waterworks* (1816) 2 Mer. 65, per Lord Eldon, p. 67.

(*m*) *Sanders* v. *Pope* (1806) 12 Ves. 282. The only other case in which a similar decree was rendered seems to be *Hack* v. *Leonard* (1723) 9 Mod. 91, where, upon the broad ground that compensation could be made, the tenant was, upon payment of damages, relieved against a breach of a general covenant to repair. This case was referred to with disapproval by Lord Eldon in *Hill* v. *Barclay* (1811) 18 Ves. 56 (p. 61), and regarded as having been decided on the ground that, if the repairs of the premises are done at the close of the term, the landlord would have his premises in excellent condition from them not having been done sooner. The report was described as a "loose note." In *Bracebridge* v. *Buckley* (1816) 2 Price 200, Richards, C.B., declared himself unable to understand the precise ground of the decision in *Hack* v. *Leonard*.

(*n*) See ante, note (*a*).

(*o*) See the remarks of Lord Eldon in *Hill* v. *Barclay*.

(*p*) See *Bracebridge* v. *Buckley* (1816) 2 Price 200; *Hill* v. *Barclay* (1811) 18 Ves. 56. The latter case, however, did not categorically overrule the decision.

the result of which, if it is completed, is that the premises will be immediately afterwards pulled down. But no direct ruling upon the point was made (*q*).

As the rule that such negotiations cannot be considered in assessing the amount of damages recoverable by the lessor has been recently applied under the Judicature Act of 1873, which declares that equitable shall prevail over legal principles where there is a conflict between the two (*r*), it is, perhaps, permissible to infer that this doctrine of the learned Chancellor would not now meet with approval if it became necessary to decide as to its soundness.

(*k*) *Judgment in action obtained by default.*—Where a default judgment has been obtained by the lessor in an action of ejectment under such circumstances that it cannot be considered either as a confession by the lessee of the breach of the covenant to repair or an adjudication upon evidence that there has been a breach, a Court of Equity will not refuse relief against the judgment, unless it is clearly proved that there has been a breach (*s*).

IX. DEFENCES TO ACTIONS FOR A BREACH OF THE COVENANT.

(As to the Statute of Limitations as a bar to the action, see sec. 12, ante.)

45. Recovery of damages in a previous action.—In an action by a *lessee* against a *lessor* it has been held that, as a covenant to keep in repair is one of such a nature that there is a continuing breach as long as it remains unperformed, the former recovery of damages is not a complete defence, but only goes in mitigation of damages, and that the position of the defendant in this respect is not strengthened by the fact that the lessor has not expended upon

(*q*) *Hannam* v. *South London, etc., Co.*, 2 Mer. 65 (p. 67).

(*r*) *Conquest* v. *Ebbetts* [H.L.E. 1896] A.C. 490. See sec. 60, post.

(*s*) *Banford* v. *Creasy* (1862) 3 Giff. 675. In this case the lessee was restored to possession, having accepted the offer of the lessor to waive all objection to the relief asked, if all his costs of suit, both at law and equity, rent, and expenses for repairs, were paid. Kindersley, V.C., distinguished the cases of *Hill* v. *Barclay*, 18 Ves. 56; *Reynolds* v. *Pitt*, 19 Ves. 134; *Gregory* v. *Wilson*, 9 Hare 683, on the ground that these were cases in which the plaintiff in equity came seeking an injunction to restrain proceedings at law, confessing a breach of covenant, and asking for relief to restrain his landlord from trying the question upon his strict legal right. It was pointed out that Lord Eldon in the first of these cases had by no means enunciated the broad principle that the Court would not under any circumstances grant relief for a breach.

repairs the sum awarded him as damages in the former action (*a*) A similar rule doubtless prevails in cases where the lessee is defendant. (See sec. 12, ante). It is, in fact, logically involved in the principle by which the right of the lessor, as covenantee, to substantial damages is qualified to the extent that any damages which may previously have been recovered must be taken into account in any subsequent action. (See sec. 56, post).

46. Repairs executed after the commencement of the action.—Repairs made while the suit is pending are not a ground for abating it, but, at most, a ground for qualifying the damages (*b*). Accordingly, upon proof being given that the lessee has expended money in repairs after the commencement of the action, the lessor is, at all events, entitled to nominal damages (*c*).

47. Dilapidations due to lessor's unlawful act.—A lessee covenanted to repair, and that, if he should fail to do it, the lessor might execute the repairs and sue for the sum expended. In an action for non-payment of money thus spent, the lessee pleaded that the dilapidations so repaired were caused by the wilful trespass of the lessor. On demurrer this was held not to be a defence, but only the subject of a cross action (*a*).

47a. Transfer of defendant's interest prior to the commencement of the action.—In an action by a lessee against a sublessee to recover the sum spent by the former in doing repairs to prevent the forfeiture of the term by the supreme landlord, it is no defence that the defendant had, before the commencement of the action, transferred his interest in the premises to another person who had rebuilt them entirely (*b*). Compare the rule that an assignee of the term cannot, by assigning over, get rid of his liability. Sec. 37 (*a*), ante.

48. Impossibility of performance without the commission of a trespass.—On general principles it is clear that the landlord cannot

---

(*a*) *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153, 36 L.J.C.P. 1.

(*b*) Anon (1573) 3 Leon. 51.

(*c*) *Morony* v. *Ferguson* (1874) 8 Ir. R.C.L. 551 [new trial directed for the reason that the jury gave the lessee the benefit of the payment, not for the purpose of reducing damages, but of rendering a verdict in his favour].

(*a*) *Kelly* v. *Moulds* (1863) 22 U.C.R. 467.

(*b*) *Colley* v. *Streeton* (1823) 3 D. & R. 522, 2 B. & C. 275.

obtain any satisfaction for the non-performance of a covenant as to repairs in any case where the circumstances are such that the repairs cannot be lawfully made unless the permission of the landlord is first obtained, and that permission is withheld. But a plea that the plaintiff prevented the defendant from entering so as to do the repairs covenanted for is bad, where the facts, as stated, shew that, prior to the commencement of the action, the defendant's reversionary estate, succeeding on the determination of an underlease which was relied upon as preventing the entry, had already vested in possession, and that there was accordingly nothing to prevent his entering for the residue of the term and making the repairs in question (*a*).

The position of a tenant who cannot repair without committing a trespass against some third party depends upon the terms of his covenant. In a case in the Ontario Court of Appeal, Hagarty, C.J.O., considered that, under a general covenant by the tenant to keep fences in repair, it was no defence to an action for a breach, that the line fence, for the non-repair of which the action was brought, was on the land of the adjoining proprietor—at all events, so long as that proprietor raised no objection to its position. Patteson, J.A., declined to express a decided opinion on this point; Osler, J.A., did not notice it at all (*b*).

The question is certainly one which needs further discussion before the opinion of the learned Chief Justice can be accepted as sound. Clearly the repairs could not be done under such circumstances without committing a trespass on the adjoining proprietor's land, and it is far from being self-evident that this is one of the cases in which a person is obliged to elect between the consequences of a breach of contract, or of the trespass without which it is physically impossible to avoid that breach. Only a covenant couched in unqualified terms and clearly covering the fence in question can place the tenant in such a dilemma. It is difficult to admit that this effect can be justifiably attributed to a covenant like the one under discussion. Primâ facie, at all events, such a stipulation is applicable only to the fences which were, as a matter of fact, on the demised premises. It is a rather startling proposition that a tenant may be regarded as bringing himself within the purview of the rigorous doctrine as to unconditional stipulations, where, so far as the words of the covenant are concerned, he cannot be charged with any agreement at all in respect to the subject

(*a*) *Baddeley* v. *Vigars* (1854) 4 El. & Bl. 71.

(*b*) *Houston* v. *McLaren* (1887) 14 Ont. App. 107.

matter of the alleged breach. The result of predicating liability under such circumstances would be, it is submitted, to carry that doctrine to a length which is not warranted either by principle or authority.

49. Impossibility of performance resulting from the rebuilding of the premises by the tenant.—In a case where the tenant's performance of the covenant has been rendered impossible by his own act in taking down, without the landlord's permission, the buildings demised, and re-erecting others not satisfying the description contained in the lease, his inability to escape the consequences of the non-performance results immediately from the general principle that no one can reap any advantage from his own misfeasance (*a*). According to an old decision the tenant must be held liable, even where his reason for rebuilding the premises was that they were so dilapidated that they could not be kept in repair.

"Where he hath by his own act tied himself to an inconvenience, he ought at his peril to provide for it" (*b*).

Such a doctrine, however, is hard to reconcile from a logical standpoint, with that which declares the covenant to be adequately performed if the demised buildings are re-erected by the tenant after their destruction by some cause for which the tenant is not responsible. (Sec. 19, ante, and secs. 51, 52, post) Supposing the impossibility of keeping the old premises in repair to be established by the evidence, and the new ones to be substantially the same as those which they replace, the common sense view of the situation rather seems to be that the action must fail at the outset from want of proof of any legal injury.

50. Impossibility of performance arising from the act of the legislature.—This is, of course, a valid defence. Hence a railway com-

(*a*) *Maddock* v. *Mallett* (Exch. Ch. 1860) Ir. C.L. 173, see sec. 12, ante, for the facts. In *Sinclair* v. *Gordon* (1821) 3 Bligh. 21, the tenant was bound to keep the demised house in tenantable condition, and leave them so at his removal, but there was no provision in the lease authorizing him to pull down the old buildings without rebuilding the same, or substituting other buildings instead thereof, but he was authorized to build a certain addition. The tenant pulled down the old buildings and erected new ones with an addition thereto. *Held*, that he was entitled only to the value of so much of the new buildings as ought to be considered an addition under the terms of the lease, and not a substitute for the old buildings.

(*b*) *Wood* v. *Avery* (1600) 2 Leon. 189, distinguishing cases in which the action is one for waste [plea that the premises were so rebuilt and afterwards kept in repair, held not to be an answer to an action on a bond conditioned to be void, if the lessee should maintain and repair the demised premises].

pany, to which the legislature has compelled a person to sell his land, is not an assignee for whose breach of a covenant binding himself and his assigns he must answer (*a*).

51. Vis major as an excuse for non-performance.—According to Sheph. Touchst. (p. 174), a covenant to repair a house before a certain day is excused where the plague is in the house before and until the day; but the obligation must be performed within a convenient time after the plague ceases. Considerable doubt, however, is thrown upon the correctness of this doctrine by later decisions in which a more stringent effect is ascribed to express covenants of a similar tenor (*a*). But a stipulation to repair before a certain day is quite unusual. The form in which the question, whether this or a similar kind of practical impossibily is a defence most commonly arises is merely this: how far is the tenant entitled to rely on vis major as an excuse for a temporary default in respect to performance? In cases turning upon this question the law is presumably still what was indicated by one of the older authorities in which a lessee who had covenanted on pain of forfeiting a certain sum of money, to sustain and repair the banks of a river, so as to prevent it from overflowing a meadow, was held to be excused from the penalty if the banks were destroyed by a great, outrageous and sudden flood, but to be still bound to repair the banks within a convenient time (*b*). The following passage is the locus classicus on the subject and is still frequently quoted:

"Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; as in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract" (*c*).

See also the following section.

(*a*) *Baily* v. *DeCrespigny* (1869) L.R. 4 Q.B. 180.

(*a*) See *Shubrick* v. *Salmond* (1765) 3 Burr. 1637 [bad weather no excuse for breach of absolute agreement to freight a ship at a certain place by a certain day]; *Baker* v. *Hodgson* (1814) 3 M. & S. 267 [prohibition of intercourse by authorities on account of the prevalence of infectious disorder, not a sufficient excuse for failure to send a cargo on board a ship].

(*b*) Dyer, 33, *a*, 10. That an overflow of land by a tempestuous sea is not waste, see (1) *Griffith's Case* (1564) Moore 69, 187; (2) Ibid (1564) 73, 200; S.C. Keilway, 206.

(*c*) *Paradine* v. *Jane* (1647) Aleyne 26, p. 27, Dy. 33.

52. Destruction of the subject-matter of the covenant by fire.—It has been settled by a large number of decisions extending over a period of three hundred years that, unless the covenant is expressly made subject to an exception in case of fire or other inevitable accident, the tenant still remains bound by his agreement to repair, even when the house, or other thing to be repaired, has ceased to exist in specie, owing to some event for which he is not responsible, whether such destruction be due to an accidental fire (*a*), or lightning (*b*), or the operation of the waves of the sea (*c*), or to the act of a public enemy (*d*). The rule is the same both in law and equity (*e*). Performance of the covenant under such circumstances can, it is clear, only be attained by replacing its subject-matter, a conception which finds a more distinct expression in the form in which the rule is not uncommonly stated, viz., that the tenant must rebuild after the destruction of the leased premises by fire (*f*).

(*a*) *Poole* v. *Archer* (1685) 2 Show. 401, Skinn. 210, and cases cited note (f), infra. Whether the general words of the statute of 6 Anne, ch. 31, relieving occupiers of premises from all responsibility for accidental fires should be regarded as having the effect of abrogating this rule of the common law is a question which does not appear to have been considered. On general principles, it seems not unreasonable to contend that the parties may be assumed to have contracted with reference to the special rule of liability declared by the legislature to be thenceforth applicable to all persons of a class which includes tenants.

(*b*) *Paradine* v. *Jane* (1647) Aleyne 26.

(*c*) *Meath* v. *Cuthbert* (1876) Ir. Rep. 10 C.L. 395. In this case the Court was not obliged to go further than to hold that a lessee is not exonerated from a covenant to repair, as long as the subject-matter of the demise continues to exist, though some of the land has been swept away by the sea, and the residue rendered quite valueless. But the other cases cited in this section shew that the tenant could not have escaped liability, even if the whole of the land demised had been swept away. Compare also *Brecknock* v. *Pritchard* (1796) 6 T.R. 750, where it was held that, under an unqualified covenant to build a bridge and keep it in repair, the covenantor is bound to rebuild, even though the bridge is carried away by an extraordinary flood.

(*d*) *Paradine* v. *Jane* (1647) Dy. 33, Aleyne 26.

(*e*) *Meath* v. *Cuthbert* (1876) Ir. Rep. 10 C.L. 395.

(*f*) *Walton* v. *Waterhouse* (1773) 2 Saund. 420, 3 Keb. 40; *Bullock* v. *Dommitt* (1796) 6 T.R. 650; *Digby* v. *Atkinson* (1815) 4 Camp. 275; *Torriano* v. *Young* (1833) 6 C. & P.; *Pym* v. *Blackburn* (1796) 3 Ves. 34; *Morrogh* v. *Alleyne* (1873) Ir. Rep. 7 Eq. 487; *Hoy* v. *Holt* (1879) 91 Pa. 88; *McIntosh* v. *Lown* (1867) 49 Barb. 550. "When the lessee covenants that he will repair and keep in good and sufficient reparation, without any exception, this imparts that he should in all events repair it; and in case it be burnt or fall down, he must rebuild it, otherwise he doth not keep it in good and sufficient reparation." *Chesterfield* v. *Bolton* (1739) 2 Com. 627. A similar principle is controlling in cases of what are known in Scotch law as feu-contracts. *Clarke* v. *Glasgow Ass. Co.* (1854) 1 Macq. H.L.C. 668, citing English decisions as to lessees. Here the feuar's liability was declared not to be so limited that he was merely compellable to apply to the re-erection of

The effect of this principle is also to render a tenant still liable on his covenant to pay rent, even though the premises are destroyed by any of the causes above mentioned (*g*); and the obligation of this covenant, being distinct from, and independent of, that which is created by the covenant to repair, remains unaffected by any qualification which may be introduced, for the benefit of the tenant, into the covenant to repair. Hence even where the covenant to repair is expressly made subject to an exception of casualties by fire, the tenant remains liable for the stipulated rent, even though the premises have been burnt down, and not rebuilt by the lessor (*h*). Under such circumstances a court of equity will not enjoin an action for the rent (*i*).

As to the rule that the covenant to repair ceases to be "usual," in the sense in which that word is used in suits for specific performance of agreements for leases, if there is a proviso as to non-liability in case of the destruction of the premises by fire or tempest, see s. 13, ante.

53. Agreement subsequently modified by the consent of the landlord.—If the tenant seeks to bar the action on the theory of a subsequent accord based upon mutual promises on his part to

---

the destroyed building, the sum for which he had bound himself to insure the premises. The House of Lords approved the doctrine of Lord Ellenborough in *Digby* v. *Atkinson*, supra, 278, that such a stipulation as to insurance is introduced merely that the tenant may have the means of performing his covenant.

In *Davis* v. *Underwood* (1857) 2 H. & N. 570, the case was suggested of a man being under a covenant to repair a house, but not to rebuild it if it should be burnt down. Bramwell, B., thought that no action could be maintained by the lessor on the covenant to repair, because he would have sustained no damage. The equitable principle that a person taking the benefit of a bequest must perform the conditions upon which it is made, sometimes creates a responsibility similar in character and extent to that which tenant incurs by his express contract. Thus, if a testator directs his trustees to allow a designated person to occupy a mill, etc., so long as he shall think proper to do so, "he nevertheless keeping the premises in good and tenantable condition," and pay a certain rent, that person, if he accepts the gift, must reinstate the premises if they are destroyed by an accidental fire, and pay the rent in the meantime, cannot escape the liability by declining any longer to retain them. *Gregg* v. *Coates* (1856) 23 Beav. 33, relying on *In re Spingley*, 3 Mac. & G. 221, a case of a devisee for life with a condition for keeping the premises in repair.

(*g*) *Paradine* v. *Jane* (1647) Aleyne 26; Dy. 33; *Monk* v. *Cooper* (1740) 2 Str. 763, 2 Ld. Raym. 147; *Baker* v. *Holtpzaffell* (1811) 4 Taunt. 45; *Izon* v. *Gorton* (1839) 5 Bing. N. C. 501.

(*h*) *Belfour* v. *Weston* (1786) 1 T.R. 310; *Brown* v. *Preston* (1825) Sup. Ct. Dec. Newfoundland 491.

(*i*) *Holtzapfel* v. *Baker* (1811) 18 Ves. 115; *Hare* v. *Groves* (1796) 3 Anstr. 696, per Macdonald, C.B.

repair and on the landlord's part to forbear to sue, he cannot succeed if the contract set out in his plea is merely executory, and no good consideration is shewn for the promises (*a*).

If the agreement to repair is, as is customary, under seal, it cannot be discharged by a parol license (*b*).

54 Waiver of the right of action by the landlord.—(*a*) *Acceptance of rent after breach.*—The receipt of rent up to a date subsequent to that at which the premises have been put into good repair is a waiver of the right of forfeiture for such dilapidations as may have previously existed (*c*). But the doctrine that the tenant's failure to repair constitutes a continuing breach of a covenant to keep in repair, (sec. 12, ante), obviously involves the corollary that, if the dilapidations which existed before the rent was paid remain unremedied after the payment, the right of action, whether for damages or in ejectment, still remains intact. In other words, the right of action under such circumstances is not waived by the landlord's acceptance of rent, such acceptance being construed merely as an admission by him that the tenancy subsisted up to the end of the period for which the rent was paid (*d*). Still less is

---

(*a*) *Bayley* v. *Homan* (1837) 3 Bing. N.C. 915, 5 Scott 94, holding an action not to be barred by a plea stating that, after covenant broken, an agreement was entered into between the plaintiff and the defendant to the effect that, in consideration that the defendant at the request of the plaintiff had become tenant of the premises from year to year at a certain rent, and had at request of plaintiff, promised to repair the premises before a specified date, plaintiff would give time till such date for the reparation without bringing an action, and that, in case the premises should be repaired by that date would relinquish all claim in respect to the breach.

(*b*) *Rawlinson* v. *Clarke* (1845) 14 M. & W. 187.

(*c*) *Pellatt* v. *Boosey* (1862) 31 L.J.C.P. 281 [Byles, J., while agreeing with the rest of the court as to this general principle, pointed out that another special ground for refusing to allow the action to be maintained was afforded by the fact that the plaintiff by describing in his declaration the breach as one which occurred "during the existence of the term" had acknowledged that the term had existed down to the end of the period during which the premises had been in a state of disrepair].

(*d*) *Chauntler* v. *Robinson* (1849) 4 Exch. 163 [covenant here was to repair "when and so often as need or occasion should require during all the term]; *Ainley* v. *Balsden* (1857) 14 U.C.Q.B. 535; *Thompson* v. *Baskerville* (1877) 40 U.C.Q.B. 614.

Where the premises continue in the same state of disrepair between the date up to which rent is claimed and the date at which an action of ejectment for breach of covenant is brought, the demand for rent is not inconsistent with the right to maintain the action. *Penton* v. *Barnett* (1897) L.J.Q.B. 11.

Where an action is brought for non-repair after notice, and an order of court is made by the consent of the parties, enlarging the time for the completion of the repairs, the landlord's subsequent acceptance of the rent for the current quarter is merely an admission that the lessee was tenant up to the end of the

the lessor's right of action for a breach by the lessee lost by his acceptance of rent from the lessee's assignee (*b*).

The rule is different where the covenant broken is of such a nature that the breach is not a continuing one. For example, where the tenant has broken a covenant against underletting, the landlord, if he accepts rent or brings an action for it, even after he has instituted proceedings in ejectment, is deemed to have waived his right of re-entry (*c*). This distinction constitutes one of the grounds upon which two Ontario decisions are based. In one of these it was held that the removal of a fence cannot be set up as a ground of forfeiture if the landlord, with knowledge of the facts, accepts rent from the tenant (*d*). The position was distinctly taken that the removal of the fence, even if it was a breach of a covenant to repair fences, was not a continuing breach. In the other case a precisely similar conclusion, and on the same ground, was arrived at with regard to the breaking of a doorway into an adjoining room (*e*).

Except in so far as these rulings may be sustained on the essentially equitable ground of acquiescence, (see next section), the writer ventures to think that they are contrary both to principle and authority. From a logical standpoint, the quality of the act of removing a fence is plainly quite immaterial in an action the gravamen of which is that the fence was suffered to remain out of repair. The only question to be decided is whether the tenant had or had not put it in the condition contemplated by the covenant. The fact that he had removed the fence necessarily implies that he had not put it in that condition, and that it was still out of repair.

---

quarter and does not operate as a waiver of the right of forfeiture if the repairs are not completed at the date fixed. *Doe* v. *Brindley* (1832) 4 B. & Ad. 84; *Doe* v. *Jones* (1850) 5 Exch. 498. The breach of a contract to repair within a reasonable time being a continuing breach is not waived by the landlord's acceptance of rent in such a sense that the reasonable time which the tenant has for the repairs shall be deemed to run from the date of the acceptance and not from the date when the premises fell into disrepair. *Doe* v. *Baker* (1850) 5 Exch. 498. Where the landlord has given the tenant notice to repair, an acceptance of rent after the expiration of the period within which the tenant is required to make the repairs is not a waiver of the forfeiture which the tenant incurs by failing to complete the repairs before the period is expired. *Cronin* v. *Rogers* (1884) 1 Cab. & E. 348, per Denman, J. *Fryett* v. *Jeffreys* (1795) 1 Esp. 393 [apparently the action is here conceived of as being brought on the general covenant though the report is not clear upon this point].

(*b*) *Bacon's Abr.* (D. 4).

(*c*) *Dendy* v. *Nicholl* (1858) 4 C.B.N.S. 376.

(*d*) *Leighton* v. *Medley* (1882) 1 Ont. R. 20.

(*e*) *Holderness* v. *Lang* (1886) 11 Ont. R. 1.

Such being the situation, there was obviously a breach of the covenant, and a breach which had continued up to the time when the action was brought. The authorities above cited are, therefore, decisive of the landlord's retention of his right to forfeit the term in spite of his acceptance of the rent. To hold otherwise would, under the supposed circumstances, involve the preposterous result that a tenant can, by annihilating the subject-matter of the covenant, place the landlord in the dilemma of losing his rights of action if he continues to recognize the lease as an existing obligation at any time after he has ascertained that the restoration of the subject-matter must be effected before it is physically possible to restore the covenant. The bare statement of such a doctrine is sufficient to expose its unsoundness.

(*b*) *Effect of notice to repair given prior to action on general covenant.*—The principle that the general covenant to repair and the covenant to repair after notice are independent obligations, (sec. 8, ante), clearly involves the corollary that the landlord does not, by giving notice to repair, waive his right to bring an action for damages on the general covenant (*e*).

His position, after giving such notice, with respect to his right to forfeit the term, depends upon the actual terms in which the notice is couched. Even though the lease contains both a general covenant to repair and a covenant to repair after three months' notice, the service of the notice will not preclude him from subsequently maintaining ejectment on the general covenant before the expiration of the three months, if the phraseology of the notice is such as to render it applicable to the general rather than to the special covenant—as where the tenant was required *forthwith* to put the premises in repair, agreeably to the covenant in that regard (*f*); or applicable to both covenants—as where he was notified to repair in accordance with the *covenants* of the lease (*g*). On the other hand, by serving an unequivocal notice to repair within the period provided for by the special covenant, the landlord is deemed to have waived his right to forfeit the term under the general covenant until the expiration of the conventional period. The notice, it is said, amounts to a declaration that the landlord will be satisfied if the premises are repaired within three months, or as Holroyd, J., preferred to put it, operates as an

(*e*) *Doe* v. *Meux* (1825) 4 B. & C. 606.

(*f*) *Roe* v. *Paine* (1810) 2 Camp. 520.

(*g*) *Few* v. *Perkins* (1867) L.R. 2 Exch. 92.

admission that the tenancy would continue for three months. If this were not the rule, the landlord might be able to bring ejectment after the tenant had put the premises into complete repair pursuant to the notice (*h*).

(*c*) *Eviction.*—(See also sec. 11, ad finem). Any act of the landlord amounting to an eviction, although it may not deprive him of his right to recover damages for a breach of the covenant to repair, is regarded as a waiver by the landlord of his right to take advantage of the condition of re-entry (*i*).

55. Landlord's acquiescence in the non-performance of the covenants.—Under appropriate circumstances, the equitable plea that the landlord acquiesced in the non-performance of the covenant to repair, will constitute an effective defence (*a*). Such a plea is not made good unless the tenant establishes not merely the landlord's previous knowledge of, but his assent to the changed conditions (*b*). Whether this assent shall be implied must be determined from the evidence introduced. In an Ontario case referred to in the last section, the landlord was held to be precluded from taking advantage of a breach of the covenant where he had at first raised objections to the alteration of the premises, but, after a single conversation on the subject, had made no further complaint (*c*).

(*h*) *Doe* v. *Meux* (1825) 4 B. & C. 606, 7 D. & R. 98, 1 C. & P. 346. In another case it was held that the principle which prevents the pursuit of inconsistent remedies operates so that a lessor who gives the lessee notice to repair within two months, under a clause in one of the covenants providing that, if the repairs should not be executed within the period specified, the landlord might execute them himself and distrain upon the tenant for the expenses, is thereby deemed to have waived his right to proceed under the general power of re-entry, as for condition broken. According to Patteson, J., the situation, after the notice had been given, was this: "The landlord says, I shall take advantage of the proviso enabling me to compel you to repair, or, if you do not repair within the two months, to perform the repairs myself, and, on so doing, to distrain, not to re-enter. The tenant thus had the option given him, and exercised it by not repairing." Lord Denman considered that a notice given after the expiration of the original period of notice that, if the lessee did not agree to certain terms in three days, he would be held to his covenant was not a reasonable notice such as would revive the right of action in the general covenant. *Doe* v. *Lewis* (1836) 5 A. & E. 277.

(*i*) *Pellatt* v. *Boosey* (1862) 31 L.J.C.P. 281.

(*a*) *Hill* v. *Barclay* (1811) 18 Ves. 56. Evidence that a tenant neglected to repair in a reasonable time, merely because he is uncertain whether a new lease will be granted him, negatives any inference of acquiescence on the landlord's part in the property remaining out of repair. *Job* v. *Banister* (1857) 26 L.J. Ch. 125.

(*b*) *Gange* v. *Lockwood* (1860) 2 F. & F. 115.

(*c*) *Holderness* v. *Lang* (1886) 11 Ont. Rep. 1.

There the whole consideration for the term had been paid in advance, so that the case was not complicated by questions arising out of the acceptance of rent. The mere fact that the tenant has been allowed to remain in possession for three years after the breach of the covenant is not a sufficient ground for the interference of a court of equity to restrain the landlord from forfeiting the term where no rent has been received during that period, nor the subsistence of the tenancy otherwise recognized (*d*). Still less can the principle of acquiescence be applied with the result of creating an implied promise on the landlord's part to pay for the alterations on the premises where a tenant, instead of repairing, as his covenant requires him to do, rebuilds (*e*).

X. MEASURE OF DAMAGES IN ACTIONS BROUGHT PRIOR TO THE EXPIRATION OF THE TERM BY THE GROUND LANDLORD AGAINST HIS IMMEDIATE LESSEE.

56. Substantial damages may always be recovered. — In a nisi prius case, it was ruled by Rolfe, B., that where a tenant for years agrees to repair, and the premises are destroyed by fire without his fault, the landlord cannot, in an action brought before the expiration of the term, recover more than nominal damages for a breach of this agreement (*a*).

"Otherwise he might put the sum awarded in his pocket and then bring another action against the defendant for non-repair, in which action he would, on the principle contended for, be entitled again to recover substantial damages."

But this case is quite contrary to the general current of authority. The objection adduced by the learned judge, as being conclusive against the allowance of more than nominal damages, manifestly does not carry the decisive weight ascribed to it, for although the lessor would not be debarred from commencing a second action the next day after he had received the damages awarded in the first, he could not recover substantial damages unless he could prove that some substantial injury had been received since that for which he had been recompensed in the first

(*d*) *Bracebridge* v. *Buckley* (1816) 2 Price 200.

(*e*) *Sinclair* v. *Gordon* (1821) 3 Bligh 21.

(*a*) *Marriott* v. *Cotton* (1848) 2 C. & K. 553.

action (*b*). The case has, accordingly, been often questioned, and may be regarded as having been virtually, if not actually, overruled (*c*). If it is to be upheld at all, it must be regarded as only sustainable on its own peculiar circumstances—the injury being accidental, and no actual damage received owing to the fact that the premises were insured (*d*). Even this slender support can only be claimed for the decision, in so far as it is an individual expression of opinion by an able judge, for during the discussion of an Irish case in which it was cited as an authority (*e*), Serjeant, afterwards Justice, O'Brien, ascertained from an examination of official copies of the orders made in *Marriott* v. *Cotton*, that the verdict for nominal damages had at the trial was set aside by the court above and substantial damages awarded (*f*).

The accepted doctrine, therefore, is that in an action brought on the covenant to repair during the currency of the term, substantial damages may be recovered (*g*). The amount recoverable is not limited to nominal damages, even when the length of the term unexpired is so great that no real damage can be proved, as the accumulated proceeds of investment of a nominal sum would at the end of the term provide more than a sufficient fund (*h*).

(*b*) See the remarks of Lefroy, C.J., in *Bell* v. *Hayden* (1859) 9 Ir. C.L. 301. "A jury, where successive actions are brought, may think the former action an important element for their consideration; but it cannot be said that damages recovered at one period for one thing affords an answer to an action at another period for another thing." Monahan, C.J., in *Maddock* v. *Mallet* (1860) 12 Ir. C.L. 173 (p. 211).

(*c*) *Joyner* v. *Weeks* (1891) 2 Q.B. 31 (Wills, J.); *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. 481 (Lord Chancellor Brady).

(*d*) See the argument of counsel in *Coward* v. *Gregory* (1866) L.R. 2 C.P. 153; also Mayne on Dam., p. 250, whose criticism is adopted by Richards, C.J., in *Perry* v. *Bank, etc.* (1866) 16 U.C.C.P. 404.

(*e*) *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. R. 481.

(*f*) See the remarks of the learned judge himself in *Bell* v. *Hayden*, 9 Ir. C.L. 301 (p. 303).

(*g*) *Doe* v. *Rowlands* (1841) 9 C. & P. 734; *Turner* v. *Lamb* (1845) 14 M. & W. 412; *Smith* v. *Peat* (1853) 9 Ex. 161; *Mills* v. *East London Union* (1872) L.R. 8 C.P. 79; *Beatty* v. *Quirey* (1876) Ir. Rep., 10 C.S. 516; *Melge* v. *Kavanagh* (1877) Ir. Rep. 11 C.L. 431; *Joyner* v. *Weeks* (1891) 2 Q.B. 31; *Macnamara* v. *Vincent* (1852) 2 Ir. Ch. 481; *Perry* v. *Bank, etc.* (1866) 16 C.P. 404. A judge is, of course, justified in refusing to direct a jury to find only nominal damages. *Bell* v. *Hayden* (1859) 9 Ir. C.L. 301.

(*h*) Wills, J., in *Joyner* v. *Weeks* (1893) 2 Q.B. 31; *Atkinson* v. *Beard* (1861) 11 U.C.C.P. 245.

A court will usually refuse to interfere with a verdict awarding substantial damages where some want of repair is shewn (*i*). On the other hand, where the jury have given merely nominal damages for a breach of a covenant to deliver up in "good and tenantable repair," a new trial will be granted where there has been a substantial breach of the covenant, and the evidence of the lessee's own witnesses shews that the damages awarded are insufficient to put the premises in a state of proper repair (*j*).

The cases in which the sublessee is sued by a mesne landlord stand, to some extent, upon different footing from those in which the head landlord is suing, and the plaintiff is sometimes restricted to nominal damages as a result of the fact that the head landlord is the party to whom the obligation to repair is ultimately owed by all the parties concerned. (See xii. post.)

57. Doctrine that the measure of damages is the amount necessary to put the premises in good repair.—The rule which prevailed two centuries ago in the English courts is expressed in the following passage of Lord Holt's judgment in an oft-cited case:

"We always enquire in these cases what it will cost to put the premises in repair, and give so much damages" (*a*).

This rule was largely superseded about the middle of the nineteenth by the alternative rule stated in the next section. Indeed, some expressions of judicial opinion at and since that time can scarcely be construed otherwise than as indicating an adoption of the view that the damages ought never to be computed with reference to the standard indicated by Lord Holt's doctrine (*b*).

(*i*) *Payne* v. *Haine* (1847) 16 M. & W. 541. Where the defendant's own witnesses admit that there was some want of repair, a verdict for so small an amount as £14 10s. will not be set aside on the ground that the damages are excessive. *Stanley* v. *Towgood* (1836) 3 Bing. N.C. 4. Unless the award of an arbitrator is impeached, it is conclusive as to the amount of damages, not merely in an action on the award, but in an action for a breach of the covenant to repair. *Whitehead* v. *Tattersall* (1834) 1 Ad. & Ell. 491. Where a plaintiff declares as the survivor of two co-heiresses, and lays the breach after the death of the other co-heiress, the consideration of the jury, in their estimate of damages for non-repair, is not limited to the period subsequent to the death of that co-heiress. *Nixon* v. *Denham* (1839) 1 J. & S. (Ir.) 416.

(*j*) *Macandrew* v. *Napier* (1883) 2 New Zeal. L.R. 24. But it should be remembered that the amount necessary to put the premises in repair is not the invariable measure of damages. See the following sections.

(*a*) *Vivian* v. *Champion* (1705) 2 Ld. Raym. 1125.

(*b*) "The damage by non-repair may surely be very different, if the reversion comes to the landlord in six months or in nine hundred years. Lord Holt's

But the propriety of employing either method of assessment, according as one or other seems most convenient or best adapted to do justice under circumstances, still continued to receive occasional recognition (*c*). This trend of opinion, it is true, is chiefly apparent in Ireland, but any doubts which the practice of the English judges and the language used by some of them, may have raised in regard to the question whether Lord Holt's doctrine had not been entirely repudiated have been banished by a recent case in the House of Lords, which determines that there are really two alternative rules for estimating the amount recoverable by the lessor. In an opinion concurred in by Lord Morris and Lord Macnaghten, Lord Herschel said:

"I do not think any hard and fast rule can be laid down as to the damages which may be recovered by the covenantee during the currency of a lease in respect of a breach of a covenant to keep the demised premises in repair. All the circumstances of the case must be taken into

---

doctrine would startle any man to whom the proposition was stated." *Turner* v. *Lamb* (1845) 14 M. & W. 412, per Alderson, B. So late as 1893 Wills, J., declared it to be clear law that the true measure of damages is not the sum required to put the premises into repair, but the loss to the landlord measured by the depreciation in the saleable value of the reversion. *Henderson* v. *Thorn* [1893] 2 Q.B. 164, 62 L.J.Q.B. 586.

(*c*) In 1839 it was held that, in an action on a covenant to keep premises in repair, contained in a lease for three lives with a covenant for perpetual renewal on the part of the landlord, two of these lives having fallen when the action is brought, the measure of damages is the sum necessary to put the premises into repair, and not merely the sum representing the diminution of the landlord's security for rent. *Nixon* v. *Denham* 1 J. & S. (Ir.) 416. About twenty years after Baron Alderson's strong expression of disapproval already quoted, we find reported the following remarks of a judge of the same court: "The damages recovered are usually such as are sufficient to put the premises in repair. As a matter of fact, it is never proved in evidence to what extent the reversion is damaged." . . . . "The great object of a covenant of this sort is not to put money in the pockets of a lessor, but to enforce the performance of the acts stipulated for." *Davies* v. *Underwood* (1857) 2 H. & N. 570, per Watson, B. In 1877 the law was laid down in an Irish case by Palles, C. B. "Where the action is brought pending the lease, the damages may be, but need not necessarily be, the present value of a sum equal to the cost of repair, that sum being payable at the end of the term. . . . . The damages may, but need not necessarily be, the injury caused by the want of repair to the saleable value of the reversion." The learned judge, in upholding an instruction, allowing the jury to estimate the damages in either way, as they thought proper, said: "Who is to decide in any particular case the most appropriate mode [of arriving at the damages]? I think that, save probably in very extreme cases, such, for instance, as where, on the one side the lessor has actually sold his interest, or on the other where the breach complained of has subjected him to a liability to a head landlord, or other third party, to a fixed amount, this is the province of the jury. They can best appreciate the circumstances of each case, best consider the reasonable uses to which the premises can be applied, and determine whether their application to such cases will involve a reconstruction of that which was permitted to fall into disrepair, or a total destruction of the subject matter of the covenant. *Melge* v.

consideration, and the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant. . . . I quite agree with the criticism to which Lord Holt's view has been subjected, if that learned judge intended to lay down that, whatever the circumstances, and however long the term had to run, the damages must necessarily be what it would cost to put the premises into repair. On the other hand, I think it would be equally wrong to hold that this could never be the measure of damages, whatever the circumstances, and however nearly the term had expired" (*d*).

In the case cited it was shewn that, under the circumstances, the application of either test yielded the same results.

58. Doctrine that the measure of damages is the depreciation in the selling value of the reversion caused by the breach.—The doctrine which, for at least fifty years, was applied by the English courts nearly, if not quite to the exclusion of that noticed in the last section, is that the amount of damages recoverable for a breach of the covenant to repair is measured by the extent to which the reversion has been injured by the failure to repair. In other words, "the criter-

---

Kavanagh (1877) 11 Ir. Rep. C.L. 431. In this case it was considered "the most accurate way of making an allowance to the lessee, for the expenditure necessary to make repairs is by deducting the value of the interest, during the lease, of the sum representing the value of the necessary repairs; or, in other words, by reducing the actual cost of the repairs to the present value of that sum payable at the end of the lease."

In the case of a fee-farm grant, where there is no reversion, and the only right the grantor has is to preserve the security for his fee-rent, and to have the premises kept in such repair as shall not impair this security, or so endanger the recovery of the premises in fair tenantable condition, if there is an eviction for non-payment of rent, the principle of ascertaining the sum required to restore the premises to good tenantable repair, and reducing this sum to its present value as a reversionary interest which will come into possession at the termination of the grant, is not deemed to be properly applicable. In such a case it was directed that the damages should be assessed at the sum by which the interest of the grantor in the premises comprised in the fee-farm grant had been depreciated by the alleged breaches and that regard should be had to any diminution in the security of the fee-farm rent, or in the selling value of the grantor's interest in the premises in their existing condition, as compared with their condition if duly kept in repair. *Lombard* v. *Kennedy* (1868) 23 L.R. (Ir.) 1.

(*d*) *Conquest* v. *Ebbetts* [1896] A.C. 490. See further, as to this case, sec. 61, post. This expression of opinion seems to throw considerable doubt upon, if it does not actually overrule the decision in *Henderson* v. *Thorn* [1893] 2 Q.B. 164, which proceeds upon the theory that the doctrine which declares the depreciation in the selling value of the reversion to be the measure of damages is so far rigid and invariable, that a sum paid by the lessee as damages for a breach of the covenant to repair in an action brought during the currency of the term will be presumed to have been paid by him with a knowledge that his liability was computed on this basis. See sec. 58, post.

ion of damage is the loss which the landlord would sustain by the non-repair, if he went into the market to sell the reversion" (*a*). In a recent case in the Court of Appeal Rigby, L.J., said:—

"The rule is that on a covenant to keep in repair you are to take the effect upon the value of the reversion, treating it as though it were carried into the market for sale under such circumstances that the purchaser might do whatever he liked with the property, and then turn it to the best advantage" (*b*).

The remarks of Lopes, L.J., in the same case are to the same effect:

"The measure of damages for the breach of a covenant to keep in repair during the currency of the term is the loss which is occasioned by the lessor's reversion—a loss which will be greater or less, according as the term of the tenant at the time of the breach has a less or greater time to run." He said that he would have left the case to the jury in these words: "What you have to consider is what is the loss occasioned to the plaintiff's reversion. In order to arrive at that you must in your own mind determine what is the value of this reversion with this covenant observed, and what is the value of this reversion with the covenant not observed; and the difference between the two sums will be the loss which the plaintiffs have sustained in respect to their reversion."

For the purpose of the above doctrine it is of course immaterial whether the action is brought against the original lessor or an assignee of the term (*c*).

(*a*) *Smith* v. *Peat* (1853) 9 Exch. 161, per Martin, B. See also *Conquest* v. *Ebbetts* (1896) A.C. 490; *Henderson* v. *Thorn* [1893] 2 Q.B. 164; *Doe* v. *Rowlands* (1841) 9 C. & P. 734, per Coleridge, J.; *Lombard* v. *Kennedy* (1888) 23 L.S. Ir. 1; *Perry* v. *Bank, etc.* (1886) 16 L.C.C.P. 404. The same rule is applied where the action is brought for waste. *Whetham* v. *Kershaw* (1885) 16 Q.B.D. 613, 34 W.R. 340, per Bowen, L.J. Where a lessee covenants to maintain the premises in as good a condition as they would be when repaired by him according to an agreement, and the premises are destroyed by fire, the measure of damages for which he is liable is the cost of rebuilding less the sum by which they will be increased in value as a result of the rebuilding. *Yates* v. *Dunster* (1855) 11 Exch. 15. Supposing the injury to the reversion to be taken as the measure of the damages in a case where a tenant has received notice from a public body to treat for the sale of his interest under the compulsory provisions of a statute like the English Lands Clauses Consolidation Act of 1845, the lessor, in an action brought for breach of the covenant before the actual assignment under the statute, is entitled to have the damages assessed with reference to the determination in the value of the reversion up to the date of the assignment, and not merely up to the date when the notice to treat was received. *Mills* v. *Guardians, etc.* (1872) L.R. 8 C.P. 79.

(*b*) *Ebbetts* v. *Conquest* [1895] 2 Ch. 277. So far as the opinions of the Lords Justices embody the view that the method of the assessment here explained is the only correct one, they have been overruled by the House of Lords. See last section. But their remarks stand as an authoratative exposition of the particular doctrine applied.

(*c*) *Smith* v. *Peat* (1853) 9 Exch. 161.

The special reason which is supposed to render this the only fair rule for estimating the damages in cases where the lease has a long time to run, is supposed to be that, "when the damages are awarded to the landlord, he is not bound to expend them in repairs, neither can he do so without the tenant's permission to enter on the premises" (*d*). But this consideration does not seem very conclusive, since, whatever the footing on which the damages are computed, the amount recovered will be credited to the tenant in any subsequent litigation, whether it was actually expended by the landlord or not. See sec. 56, ante.

XI. MEASURE OF DAMAGES IN ACTIONS BROUGHT AFTER THE EXPIRATION OF THE TERM BY A GROUND LANDLORD AGAINST HIS IMMEDIATE LESSEE.

59. Damages usually assessed at the amount required to put the premises in repair.—The rule ordinarily applied in the assessment of damages was thus stated by Lopes, L.J., in a recent case:

"Where the term has come to an end, and the action is on the covenant to leave in repair, the measure of damages is the sum it will take to put the premises into the state of repair in which the tenant ought to leave them according to his covenant" (*a*).

There has been some controversy as to whether the method of computation specified in this passage is not the only correct one Discussing this question lately in the English Court of Appeal (*b*) Lord Esher said . .

"A great many cases have been cited, of which only one was directly in point, though another was as nearly as possible in point; and a series of dicta of learned judges have been referred to, which seem to me to shew

---

(*d*) Coleridge, J., in *Doe* v. *Rowland* (1841) 9 C. & P. 734. In this case the learned judge also pointed out that, if a lease for 100 years has 99 years to run, it cannot make much difference in the value of the reversion whether the premises are now in repair or not.

(*a*) *Ebbetts* v. *Conquest* [1895] 2 Ch. (C.A.) 377. See also *Joyner* v. *Weeks* [1891] 2 Q.B. 31; *Henderson* v. *Thorn* [1893] 2 Q.B. 164; *Inderwick* v. *Leech* (1884) C. & E. 412, 1 Times L.R. 95, aff'd 1 Times L.R. 484; Mayne on Dam. (4th Ed.) p. 253, quoted with approval by Denman, J., in *Morgan* v. *Hardy* (1886) 17 Q.B.D. 770 (p. 779). Where a tenant remains in possession under a void lease until the term specified therein has expired, the damages should, of course, be assessed with reference to the state of premises at the end of the term. *Beale* v. *Sanders* (1837) 3 Bing. N.C. 850.

As to the desirability of the appointment of a surveyor to estimate on behalf of both parties the amount due for dilapidations when the expiration of the term is approaching, see Woodfall L. & T. (15th Ed.) 683.

(*b*) *Joyner* v. *Weeks* [1891] 2 Q.B. 31.

that for a very long time there has been a constant practice as to the measure of damages in such cases. Such an inveterate practice amounts, in my opinion, to a rule of law. That rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left. It is not necessary in this case to say that that is an absolute rule applicable under all circumstances; but I confess that I strongly incline to think that it is so. It is a highly convenient rule. It avoids all the subtle refinements with which we have been indulged to-day, and the extensive and costly inquiries which they would involve. It appears to me to be a simple and businesslike rule; and if I were obliged to decide that point, I am very much inclined to think that I should come to the conclusion that it is an absolute rule. But it is not necessary to determine that point in the present case. The rule that the measure of damages in such cases is the cost of repair, is, I think, at all events, the ordinary rule, which must apply, unless there is something which affects the condition of the property in such a manner as to affect the relation between the lessor and the lessee in respect to it."

The language of Fry, L.J., is somewhat less decided:

"I cannot help observing that the rule so laid down is one of great practical convenience. It is more simple than the inquiry to what extent the reversion is damaged, which appears to me to involve many matters in respect to which the lessor has nothing to say to the lessee. It is much more simple than the rule suggested by the judgment of the Court below, viz., that the measure of damages is the amount of the diminution in value of the reversion not exceeding the cost of the repairs. That involves the ascertainment of two amounts in order to take the smaller of the two. However exact such a measure of damages may be, there is, as it seems to me, a complexity about it which unfits it for determining affairs as between man and man in a court of law."

These utterances shew, at all events, that the Court of Appeal regarded the method of computation which they applied as being pre-eminently "the workable one" (*c*). But the practical importance of the question is greatly diminished by the fact that, as Denman, J., recently remarked, in most instances the amount required to place the premises in the state in which they ought to have been left is the same amount as that by which the selling value of the premises falls short of what it would have been if the tenant had done his duty (*d*).

(*c*) See opinion of Wills, J., in *Henderson* v. *Thorn* [1893] 2 Q.B. 164.

(*d*) Denman, J., in *Morgan* v. *Hardy* (1886) 17 Q.B.D. 770, 779.

In cases where the premises are delivered up in such bad repair that they cannot be occupied at once by another tenant, the landlord is entitled to recover not only the amount necessary to put the premises in repair, but an additional sum for the time during which the premises will be useless owing to the repairs not having been done (*e*).

If we adopt the view that the damages awarded in an action brought on the covenant during the currency of the term shall be conclusively presumed to have been assessed with reference to the selling value of the reversion, (see sec. 57, ante), the consequence obviously follows that, when the landlord brings an action at the end of the term, the lessee is not entitled to have the damages computed on the theory that the sum paid in the first action represented the sum necessary to put the premises in repair (*f*). But whether any such rigid presumption can be indulged, independently of direct evidence, is, to say the least, extremely doubtful since the decision of the House of Lords in *Conquest* v. *Ebbetts* See sec. 56, ante.

60. Application of this rule independent of the question whether lessor actually loses by the want of repair.—The rule stated in the last section has been described by Rigby, L.J., as an "arbitrary" one, "laid down upon grounds of convenience" (*g*). "Arbitrary," it may well be called, for it is held to govern the amount of damages recoverable, whether or not the lessor in fact loses by the want of repair. It frequently happens that, at the expiration of a lease, it is more to the interest of the landlord to have the demised buildings altered or even destroyed than to have them put in repair. But in the

(*e*) *Birch* v. *Clifford* (1891) 8 Times L.R. 103. See also *Woods* v. *Pope* (1835) 1 Scott 536, 1 Bing. N.C. 467 [no covenant, however, mentioned on the report], where the court refused to disturb a verdict giving damages for the inability of the landlord to let the premises for six weeks after the tenant had quitted them.

(*f*) *Henderson* v. *Thorn* (1893) 2 Q.B. 164, per Wills, J., who said: "It is impossible for us in this case to treat the first set of damages as the equivalent of putting the premises in repair; we can only say that, when the end of the term comes and the landlord is entitled to put the premises in repair at the expense of the tenant who has broken his contract, he shall not have the money twice over, but shall, subject to an allowance for such depreciation as would have accrued, had the covenant been performed on the first occasion, between that date and the end of the term, subtract what was paid to him before from the amount that he now recovers." It was held that the official referee had correctly assessed the damages by determining the sum required at the end of the lease to put the premises in repair and deducting therefrom the amount paid into court in the first action together with sum for depreciation.

(*g*) *Ebbetts* v. *Conquest* (1895) 2 Ch. (C.A.) 377.

assessment of the damages, this circumstance does not enure to the benefit of the tenant (*h*). The principal reason why evidence of this sort is excluded to assessing the damages is that it brings in a consideration which "depends upon the arrangements which the lessor has made with other persons, with which the lessee has nothing to do, as to which in general he will have no information, and as to which at the time he enters into the bargain he can have none" (*i*). In cases of this type there is commonly in evidence some definite arrangement, made before the expiration of the lease, for re-demise of the premises to some third person, who is to pull down or change the buildings, and, it may be, pay an increased rental. Both these elements were present in *Joyner* v. *Weeks* (*j*), where it was argued, on behalf of the lessor, that the breach of the covenant to leave in repair did him no harm, inasmuch as the plaintiff had re-demised the premises on terms that were not affected by the want of repair; and that, at any rate, with regard to the part of the premises that was pulled down, the want of repair did no harm. This contention did not prevail in the Court of Appeal.

(*h*) *Inderwick* v. *Leech* (1884) C. & E. 412, 1 Times L. R. 95, aff'd 1 Times L. R. 484; *Joyner* v. *Weeks* [1891] 2 Q.B. (C. A.) 31 (see infra). "It is true," said Wills, J., in a recent case, "that the sum paid by the tenant is often a sum preposterous in relation to the real damage to the landlord; as, where he is going to pull down the premises and is, therefore, not the loser by a penny because they are returned on his hands out of repair. In such a case, the rule of law may amount to putting into the landlord's pocket money far beyond the damage which he has actually suffered; but it must be remembered that there are difficulties on the other side, and that, but for this rule of law, a tenant who has broken his contract might come off better than if he had kept it; a result not to be lightly encourged." *Henderson* v. *Thorn* [1893] 2 Q.B. 164.

(*i*) Rigby, L.J., in *Conquest* v. *Ebbetts* (1895) 2 Ch. 277. See also *Joyner* v. *Weeks*, infra.

(*j*) [1891] 2 Q.B. 31. An earlier case to the same effect is *Rawlings* v. *Morgon* (1865) 18 C.B.N.S. 776. There, before the end of the lessee's term, his lessor had verbally agreed to give a building lease to a new tenant, who in fact entered on the expiration of the first term and pulled down the premises, and afterwards (but apparently before the action) obtained a building lease in conformity with the verbal agreement. The dilapidations were £221; but the terms of the building lease were not effected by the exisience of the dilapidations. The lessor sued the first lessee for the £221, and was allowed to recover the full amount. The argument was the same as in *Joyner* v. *Weeks*, that the plaintiff had in fact sustained no loss. Erle, C.J., and Keating, J., declined to say what their opinion would have been if during the defendant's term the plaintiff had made a binding agreement with the tenant; Byles, J., relied exclusively on the fact that before any binding agreement had been made with a new tenant, a cause of action for the £221 had accrued. Montague Smith, J., doubted whether such a binding agreement would have in any way affected the plaintiff's right as against the defendant.

"The circumstances relied upon by the defendant," said Lord Esher, "did not affect the property as regards the relation between the lessor and the lessee in respect to it. They arose from a relation, the result of a contract between the plaintiff and a third person, to which the defendant was no party, and with which he had nothing to do. It was said that this contract passed an estate in the premises to such third person. If it had done so, I think it would have made no difference; but it did not; it only gave an interesse termini during the continuance of the defendant's term, and could not take effect to give an estate as between the plaintiff and the third person until the relation between the plaintiff and the defendant was at an end. At the moment of the determination of the lease between the plaintiff and the defendant, the premises were out of repair. And, if we cannot look at the contract between the plaintiff and the third person, or anything that took place under it, there was nothing but the ordinary case of the breach of a covenant to leave the premises in repair. In my opinion the contract between the plaintiff and the third person cannot be taken into account; it is something to which the defendant is a stranger. So, also, anything that may happen between the plaintiff and the third person under that contract after the breach of covenant is equally matter with which the defendant has nothing to do, and which cannot be taken into account. These are matters which might or might not have happened, and, so far as the defendant is concerned, are mere accidents. The result is that there is nothing to prevent the application of the ordinary rule as to the measure of damages in such a case. . . . . If anything could prevent the application of the ordinary rule that the measure of damages is the cost of such repairs as were contemplated by the covenant, it could only be something in the condition of the premises which affected the relation between the lessor and lessee in respect of them, and that contracts made between the lessor and a third person must be disregarded. The rule I have mentioned is a good working rule, and I believe it to be the legal rule."

"In what way," said Fry, L.J., "can that lease affect the question between the plaintiff and the defendant? It may be regarded in three points of view. The first involves the question whether any estate passed by it. It was contended for the defendant that, the lessor having parted with his reversionary estate for a term of twenty-one years, his right was confined to the right to such damages as the owner of a reversion expectant upon the determination of that second lease would have sustained by reason of a breach of the covenant in the first lease. I see no ground for that contention. The second lease passed no estate until possession was taken under it. It only gave an interesse termini which would, on possession being taken, become an estate. The lessor had a right of entry on the determination of the first lease. Directly that happened, a right of action for damages accrued in respect of the breach of the covenant to yield up in repair. Therefore the lessor's right of action for these damages vested before any estate vested in the grantee of the subsequent lease. Consequently that

lease cannot affect the case so far as the passing of any estate under it is concerned. Then, secondly, with regard to the covenants as to alterations, etc., contained in that lease, how can such covenants, which are unperformed at the date of the vesting of a plaintiff's right of action, take away or modify the right of action which so vested? I will assume that there is a covenant in the second lease to put the premises into the same state of repair as was required by the first lease. But, even so, how can it affect the case any more than an agreement with a builder to do the repairs? It appears to me that it is res inter alios acta, with which the lessee has nothing to do and which he is not entitled to set up. Then, thirdly, how can subsequent performance by the second lessee of the covenants which he has entered into abridge or take away the cause of action that vested in the lessor before the second lease took effect? I can see no ground for thinking that I can do so. As a general rule, I conceive that, where a cause of action exists, the damages must be estimated with regard to the time when the cause of action comes into existence. I can find nothing in the existence of this reversionary lease, whether I regard its operation before or after the vesting of the plaintiff's cause of action, to interfere with the application of the general rule as to the measure of damages in such cases."

Upon an analogus principle the lessee is not allowed to claim any deduction from the damages on the ground that the premises have so altered in value by reason of the deterioration of the neighbourhood, that they might be equally valuable for letting purposes, if some of the repairs were omitted, or done more cheaply, than if everything requiring to be replaced or repaired were replaced or repaired according to the ordinary rules applicable to covenants to repair (*k*).

XII. MEASURE OF DAMAGES IN ACTIONS BROUGHT BY LESSEES AGAINST THEIR SUBLESSEES AND ASSIGNEES.

61. Amount recoverable while the superior lease is still unforfeited.—(*a*) *Generally.*—The question of the proper measure of damages in actions brought by mesne landlords against undertenants was recently discussed very fully in a case which was finally carried up to the House of Lords. It was determined that, although the general principle that the damages are measured by the depreciation in the value of the reversion is no less applicable in such a case than in one where a reversioner in fee is suing his immediate lessee, the mesne landlord's liability over to the superior landlord,

(*k*) *Morgan* v. *Hardy* (1886) 17 Q.B.D. 770, aff'd by the Court of Appeal (1887) 35 W.R. 558, and approved in *Joyner* v. *Weeks*, supra.

and the undertenant's knowledge of that liability, introduce special elements which it is necessary to take into account in applying the general principle under these particular circumstances.

The lease there under review bound the lessee by the usual covenants to keep and leave the demised premises in repair. Subsequently a party, with notice of the original lease, was granted a sublease at an improved rent, containing similar covenants, for the whole term less ten days. The action was brought by the lessee three and a half years before the expiration of the term against the sublessee for a breach of his covenant to keep in repair. The Court of Appeal proceeded upon the broad ground that this sum must be regarded as the damages which a sublessee who was informed of the obligations under which the mesne landlord lay to the original lessor must be taken to have contemplated as the result of the breach of the covenant (*a*). It was argued that the computation of damages on such a basis would in effect introduce a stipulation for indemnity unto the underlease; but this contention did not prevail. A special point also made by Rigby, L.J., was that a sufficient reason for applying a standard different from that which was appropiate in the case of a reversioner in fee was furnished by the fact that a reversioner of ten days of a term cannot take his reversion into the market and sell it to a purchaser to be dealt with as building ground. "If," said the learned judge, "the supposed general rule of the diminution of the reversion were to apply to a case of this kind, the result would seem to follow that, in a case of ten days reversion, or three days reversion, nothing but nominal damages could be recovered during the term upon the covenant to keep in repair." The damages for which the defendant was accordingly held to be liable was the sum represented by the difference in value between the reversion with the covenant performed as it ought to be, and the value of that reversion with the covenant unperformed.

The House of Lords took the same view as the Court below, though the test of contemplation was not so directly relied upon. "If," said Lord Herschell, "the premises were now in good repair, the reversion of the respondents would secure them the improved rent to the end of the term, without any liability on their part, unless it were to the extent to which repairs subsequently became necessary. As matters stand they can only receive this rent, subject to the liability of restoring the premises in good repair so that they may in that condition deliver them to their lessor. The difference between these positions represents the diminution in the value of their reversion owing to the breach of covenant" (*b*).

As no substantial damages can be recovered for a breach of a general covenant to repair, unless some injury has been done to

(*a*) Citing *Hadley* v. *Baxendale*, 9 Exch. 341.

(*b*) *Conquest* v. *Ebbetts* [1896] A.C. 490, aff'g [1895] 2 Ch. (C.A.) 377.

the reversion, nothing but nominal damages are recoverable by a lessee from a sublessee, where the lessee has himself entered the premises and made all necessary repairs prior to the bringing of the action (*c*).

(*b*) *Where there is a contract of indemnity* (*see also below, s. 62*). —Where the contract of an assignee of a lease is substantially one of indemnity, the Court will adjust the rights and liabilities of the parties on a corresponding basis, treating the assignee as principal and the original lessee as surety in respect to the liability under the covenant, and will refuse to allow the original lessee to recover more than nomial damages from the assignee, unless an action on the covenant has previously been brought against him by the superior landlord, and he has already paid, or been adjudged liable to pay, damages assessed in that action. Otherwise, the assignee, being still liable to the landlord on his covenant, would be without defence if a second action should be brought on that covenant (*d*)

(*c*) *Possible arrangements after expiration of superior lease, not an element to be considered.*—(See also 44 (*j*), supra).—Where a sublessee is sued for a breach of the covenant to repair, he "has no right to demand that, in the assessment of the damages, a speculative inquiry should be entered upon as to what may possibly happen, and what arrangements may possibly be come to, under the special circumstances of the case, when the superior lease expires by effluxion of time." No weight, therefore, can be legitimately ascribed to the consideration that, owing to the nature of the premises, and the changed circumstances of the neighbourhood it is extremely probable that the ground landlord will make an entirely different use of the site when the term came to an end, the consequence being that he will not desire to have the buildings then on the land put into good repair, and will arrange with the lessee to accept from him a sum less than the cost of making the repairs (*e*).

(*c*) *Williams* v. *Williams* (1874) L.R. 9 C.P. 659.

(*d*) *Beattie* v. *Quirey* (1876) 10 Ir. R.C.L. 516, where one who had taken a lease containing a covenant to repair had assigned it to a person who covenanted to perform the covenants in the the original lease and to indemnify his assignor against all actions, suits, expenses and claims, on account of the breach of such covenants, of certain houses on the land demised, and subsequently, upon the destruction by fire of a portion of the premises, the superior landlord has commenced an action against the original lessee for a breach of his covenant.

(*e*) *Conquest* v. *Ebbetts* [H.L.E. 1896] A.C. 490. Compare the similar rule applied in actions brought after the end of the term. Sec. 60, ante.

62. Amount recoverable where the original lessee has been ejected by the superior landlord.—In cases where the original lessee and his sublessee have been both ejected by the superior landlord for the failure of the lessee himself to pay the rent of the premises, the lessee may recover substantial damages from his sublessee for a breach of the covenant committed while the lessee was still owner of the reversion, even though the superior landlord has not yet demanded or recovered damages on his own account (*a*). A fortiori may the amount of the dilapidations existing at the time the ejectment was brought be recovered by a mesne landlord from a sublessee who committed the breach of covenant for which the superior landlord forfeited the term (*b*). But under such circumstances he cannot recover the value of his reversionary interest. The loss of that interest is deemed to be the result, not of the undertenant's breach of covenant, but of the breach by the plaintiff himself of the covenants entered into by him with his lessor (*c*). An additional and independent reason for refusing to allow the value of the interest to be taken into account exists, if it is shewn that one of the covenants upon which the ejectment was founded was contained in the superior lease, but not in the sub-lease, and there is nothing to shew that the landlord might not have recovered possession of the property for a breach of that covenant (*d*).

63. Lessee's right to be indemnified by his sublessee or assignee for the costs of defending an action brought by his lessor.—(*a*) *Where there is no connection between the covenants in the original lease and the under lease.*—Where there is no express agreement by a sublessee to indemnify his lessor against a breach of the covenants as to repair, such an agreement will be implied only under the circumstances noticed in sub-sec. (*b*) infra. If the independence of the obligations assumed by the superior lessee and the sublessee is a reasonable inference—as where the sublessee has merely covenanted to keep the premises in repair (*e*), or has entered into covenants

---

(*a*) *Davis* v. *Underwood* (1857) 2 H. & N. 570.

(*b*) *Clow* v. *Brogden* (1840) 2 M. & G. 39.

(*c*) *Logan* v. *Hall* (1847) 4 C.B. 598.

(*d*) *Clow* v. *Brogden* (1840) 2 M. & G. 39.

(*e*) See *Walker* v. *Hatton* (1842) 10 M. & W. 249.

which are so materially different from the lessee's that a perfo nance of the one would not necessarily be a performance of the other (*b*)—the liability of such sublessee to reimburse the lessee for the damages which he has been compelled to pay in an action brought by the superior landlord for a breach of the covenants as to repair, extends only to that portion of the damages which was necessarily incurred by the lessee, viz., the amount required for the purpose of putting the premises in repair. As a general rule, therefore, the costs of defending the superior landlord's action are not recoverable from the sublessee. Such costs are deemed to have been incurred by the lessee in his own wrong, for the reason that he can put an end to the controversy between him and the lessor by paying over or depositing in court the sum required for repairs. They are, therefore, not a necessary consequence of the breach of the covenants (*c*).

(*b*) *Contract of indemnity implied from the substantial identity of the covenants in the two leases.*—"An implied contract of indemnity arises whenever two contracts are made, and the second contract contains a stipulation to do the very thing which was undertaken to be done by the first." On this principle a clause in a sublease that "letting shall be subject in all respects to the terms of the existing lease and the covenants and stipulations therein,'

(*b*) *Penley* v. *Watts* (1841) 7 M. & W. 601. Although the covenants contained in a sublease may be the same in language, with a single important exception, as those in the original lease, yet they must be regarded as differing in substance, when the sublease was granted two years after the lease, for, as the sublessee is only bound to put the premises in the same condition as he found them at the time of the lease to himself, the covenants would necessarily not have the same effect. *Walker* v. *Hatton* (1842) 10 M. & W. 249. A sublease which contains the same covenants as the original lease, but which is eight years' later in date, and contains no reference to the original lease, does not give the lessee a right to "contribution or indemnity" within the meaning of Order XVI., Rule 48 of the (English) Rules of the Supreme Court. *Pontifex* v. *Ford* (1884) 53 L.J.Q.B. 321 [Pollock, B., distinguished, *Hornby* v. *Caldwell* (1881) 8 Q.B.D. 329 (see infra) on the ground that the original lease was referred to in the sublease, and also on the general principle that even where covenants are similarly worded, their actual effect is different as regards old and new houses].

(*c*) *Walker* v. *Hatton* (1842) 10 M. & W. 249, following *Penley* v. *Watts* (1841) 7 M. & W. 601. See also *Ebbetts* v. *Conquest* (1895) 2 Ch. D. (C.A.) 377 (per Lindley, L.J.); *Logan* v. *Hall* (1847) 4 C.B. 598; *Smith* v. *Howell* (1851) 6 Exch. 730; *Taylor* v. *Strachan* (1858) 16 U.C.R. 76. These cases outweigh the authority of *Neale* v. *Wyllie* (1824) 3 B. & C. 533, 5 D. & R. 442, holding the sublessee liable for the costs of defending the superior landlord's action, on the ground that the original lessee had no right to enter for the purpose of repairing. This reason is plainly inadequate to support the conclusion based upon it, as the lessee has open to him the two courses mentioned in the text.

renders the sublessee liable for such costs as the lessee reasonably incurs in defending an action brought by the lessor for breach of the covenant to repair (*d*).

(*c*) *Rule where the underlessee enters into an express contract of indemnity.*—In one of the cases already cited (*e*), it was laid down in broad terms by Parke, B., that an underlessee who enters into a contract to indemnify the mesne landlord against a breach of the covenant in the original lease to keep the premises in repair, is responsible for the costs of an action by the superior landlord to recover damages for such a breach. But apparently this doctrine is to be read as subject to the implied exception that the lessee, if he defends an action by the superior landlord with full knowledge that the proper repairs have not been made, cannot recover the costs from the sublessee. Lord Abinger expressed the opinion that under such circumstances, the rule limiting the recovery of costs to those necessarily incurred, probably prevented recovery (*f*).

(*d*) *Liability of an assignee for costs.*—It is well settled that the implied duty of each successive assignee of a term to indemnify any of his predecessors in interest who may have been compelled to pay damages for a breach of the covenant does not, (see sec. 7, ante), extend to the reimbursement of the costs which may have been incurred in resisting a claim which was known to have been well founded. "No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend" (*g*). Especially inexcusable is it for an assignee to "inflame his account" in this manner, where the proper amount of the damages has already been settled by a previous suit. Even an

---

(*d*) *Hornby* v. *Caldwell* (1881) 8 Q.B.D. (C.A.) 329. The plaintiff's knowledge of the fact that he was at all events liable for some damages, and that the action was, therefore, indefensible to that extent, was not adverted to by the court. The case is, therefore, a negative authority for the doctrine that a lessee who admits the breach is not always bound on pain of losing his right to costs, to suffer a judgment by default. See (*c*, *d*,) infra, note. The facts upon which stress was laid were that the sublessee had declined to pay the amount claimed or to take any responsibility of a defence to the action. Lord Esher said that under such circumstances the lessee was not bound to submit and run the risk of the sublessee saying he had paid too much.

(*e*) *Penley* v. *Watts* (1841) 7 M. & W. 601.

(*f*) *Walker* v. *Hatton* (1842) 10 M. & W. 249.

(*g*) Lord Denman in *Short* v. *Halloway* (1839) 11 A. & S. 28.

express contract of indemnity couched in the most comprehensive terms will not then enable him in recover the costs of defending a second suit (*i*).

XIII. PLEADING AND PRACTICE.

In the present subtitle it is proposed to bring together some miscellaneous rulings which will be found useful in the conduct of litigation involving the obligations of tenants with respect to repairs. The decisions upon points of technical pleading have been inserted for the reason that they are still living precedents in those jurisdictions where the older system of procedure is still in force, and will be suggestive even to lawyers who practice under statutes framed upon the same lines as the English Judicature Act.

64. Action upon agreement to repair is transitory.—The action of assumpsit on an agreement to repair contained in a lease from year to year, terminable at six months' notice, is transitory, not local (*j*).

65. Service of the writ out of the jurisdiction.—An action against the assignee of a lease for breach of a covenant to repair contained in the lease is an action for the enforcement of a liability affecting land or hereditaments within the meaning of Order XI, r. 1, (b) of the Supreme Court of Judicature. Service of the writ of summons out of the jurisdiction is therefore allowable in such an action where the land is situated within the jurisdiction (*k*).

66. Bringing in new parties.—Order XVI., rules 48, 52, providing that where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, the judge may, on notice being given to such last-mentioned person, make such order as may be proper for having the question determined, does not cover a case where a lessee claims relief against an under-lessee holding by a deed containing a covenant to repair precisely similar to that in the original lease. The

(*i*) *Smith* v. *Howell* (1851) 6 Exch. 730 [covenant was to "save harmless and indemnify" the assignor against the covenants in the original lease, and "all costs, damages, and expenses which may be incurred by reason of any delay, breach, default in payment or performance thereof"]. In this case there had been successive assignments, and the second assignee was seeking to recover from the third assignee the costs of an action brought against him by the first assignee to recover the sum for which judgment had been rendered against such first assignee in an action by the lessee. Alderson, B., expressed the opinion that the best mode of ascertaining the actual amount due for dilapidations in such a case is for the first assignee to suffer a judgment by default, so that the parties may have the matter properly settled by a competent tribunal.

(*j*) *Buckworth* v. *Simpson* (1835) 5 Tyr. 344, 1 C.M. & R. 834.

(*k*) *Tassell* v. *Hallen* [1892] 1 Q.B. 321.

covenant in the underlease cannot be construed as a covenant to indemnify the defendant against or to perform the covenant in the original lease, for the reason that the terms of the covenant to repair must in each case be construed with reference to the ages and character of the premises at the time of the demise (*l*). See sec. 23, ante.

Under Rule 11 of the same Order, a person occupying the demised premises under a contract for an assignment from the lessee which contained a stipulation to indemnify such lessee, but which was never executed, may be brought in as a third party in an action against the executors of the lessee for breach of the covenant to repair (*m*).

67. **Declaration.**—(*a*) *Sufficiency.*—It seems that, in an action for not repairing, the declaration ought to state the term for which the premises were demised, at all events where the quantum of damage may depend upon the length of the term (*a*).

Where a lessee covenants to keep in good repair a house, outhouses, and stables, and the breach assigned is that he permitted the racks in the stable to be in decay, a verdict should not be set aside on the ground that the plaintiff did not specifically set forth that the racks were fixed, and so part of the freehold. To give the declaration any other construction would be very remote (*b*).

A covenant to repair at all times, when, where, and as often as occasion shall require during the term, and at furthest within three months after notice of want of reparation is one covenant, and it cannot be stated as an absolute covenant to repair at all times, when, where, and as often as occasion shall require during the term (*c*).

Where the covenants as to repair are subject to an exception of reasonable use and wear, a declaration which, in assigning a breach, takes no notice of this exception is bad on demurrer, but probably good after verdict (*d*).

A declaration which is so worded that the damages claimed for a breach of the general covenant to repair are not distinguished from those claimed for a breach of the covenant to repair after notice, is bad on special demurrer, but cannot be objected to after verdict (*e*).

(*l*) *Pontifex* v. *Foord* (1884) L.R. 12 Q.B.D. 152. This theory of the significance of the verbal identity of the covenants in the lease and underlease seems to be different from that entertained in the case cited in sec. 63 (*b*), ante.

(*m*) *Byrne* v. *Browne* (1889) 22 Q.B.D. 657.

(*a*) *Turner* v. *Lamb* (1845) 14 M. & W. 412 [the declaration was amended upon the recommendation of the court].

(*b*) *Anon* (1891) 2 Ventr. 214.

(*c*) *Horsfall* v. *Testar* (1817) 1 Moore 89, 7 Taunt. 385.

(*d*) *Wright* v. *Goddard* (1838) 8 Ad. & E. 144. Compare cases cited in notes (*l*) and (*m*), infra.

(*e*) *Wright* v. *Goddard* (1838) 8 Ad. & E. 144.

(*b*) *Variance.*—Under an allegation that a tenant who had covenanted to keep and leave the premises in repair "suffered and permitted the premises to be and continue ruinous," the landlord cannot recover for voluntary waste, as by removing windows, etc. (*f*). On the other hand a verdict for the landlord will be set aside where he alleges voluntary waste and only permissive waste is proved (*g*).

A contract to insure and rebuild in case of fire will not support a declaration alleging an agreement to let and take a farm, with mutual promises to repair (*h*).

A declaration stating that the defendant promised to use the messuage let to him in a tenant-like manner, and take due care of the furniture, etc., during the tenancy, and at the expiration thereof, to leave the said furniture, etc., *cleaned*, is sufficiently supported by proof that the house and furniture were in a clean state, and that defendant verbally agreed to leave them as he found them (*i*).

An allegation of a promise to deliver up the premises in the same state as they were at the commencement of the tenancy is supported by the following memorandum appended to an agreement of letting: "A. agrees to take the fixtures again at the expiration of the tenancy, provided they are in as good condition then as they *now* are; and B. agrees to leave the premises in the same state as they *now* are" (*j*).

Where one of the breaches assigned is that the tenant did not, according to his agreement, leave the premises in as good condition as he found them, and on the trial it is proved that the agreement was that he should leave the premises in as good condition as he found them, and that he found them in tenantable repair, a verdict for the plaintiff will not be set aside, since the agreement, as laid, is substantially proved (*k*).

In an action on a covenant for not repairing, which contains an exception of "casualties by fire," to state it in the declaration as a general covenant to repair, omitting the exception, is a fatal variance of which advantage may be taken on "non est factum" (*l*).

Where the declaration alleges that the plaintiff demised certain premises (*except as therein* is excepted), to hold (*except* as therein is excepted) for the term of twelve years (except the last day thereof), and the lease in point of fact contains no exception applying to the premises,

(*f*) *Edge* v. *Pemberton* (1843) 12 M. & W. 187, 1 D. & L. 467.

(*g*) *Martin* v. *Gilham* (1837) 2 N. & P. 568, 7 A. & E. 540.

(*h*) *Beech* v. *White* (1840) 12 A. & E. 668, 7 P. & D. 309.

(*i*) *Stanley* v. *Agnew* (1844) 12 M. & W. 827.

(*j*) *White* v. *Nicholson* (1842) 4 M. & G. 95.

(*k*) *Winn* v. *White* (1773) 2 W. Bl. 840.

(*l*) *Brown* v. *Knill* (1821) 5 Moore 164; *Tempany* v. *Barnard* (1814) 4 Camp. 20. Compare note (*d*), *supra*.

the exceptions in that regard will either be rejected as surplusage, o merely regarded as an exception of nothing. There is therefore no variance (*m*).

68. Plea.—A plea of "not guilty of breaking the covenant" to repair is bad in demurrer, since two negatives do not make an issue (*a*).

A plea that the house was rebuilt and repaired before the action is bad, unless it shews by whom it was built and repaired (*b*).

The doctrine that the payment of money into court admits everything which the plaintiff would be obliged to prove in order to recover, that money involves the consequence that, where two breaches are assigned in one count of a declaration, viz. (1) the failure to repair, and (2) the non-payment of rent, and the defendant pays money into court on the second breach, the whole contract set out in that count is deemed to be admitted (*c*). Similarly it has been held that, after verdict, some damage upon every part of the breach of covenant in the declaration must be taken as admitted where the defendant pleads that he has paid a certain sum into court, and that the plaintiff had not sustained damages greater than the said sum in respect of the causes mentioned in the declaration (*d*).

69. Evidence.—(*a*) *Competency and relevancy.*—Evidence that the premises were in reasonably good repair when the lease was assigned, and were in disrepair afterwards, is evidence to go to the jury as to the breach by the assignee (*a*).

Where, in an action on a promise to keep the premises in repair, the defendant pleads that he has paid a certain sum into court, and that no greater damages have been sustained, evidence as to the state of the premises at the time of the demise is "material both to the event of the suit and to the amount of the damages," and therefore should not be excluded (*b*).

(*b*) *Burden of proof.*—The plaintiff begins where the plea is that the defendant lessee did repair and did not suffer the premises to become ruinous, as alleged (*c*); or where to a declaration for not repairing premises in a

---

(*m*) *Williams* v. *Hayes* (1821) 9 Price 642.

(*a*) *Taylor* v. *Needham* (1810) 2 Taunt. 278.

(*b*) *Walton* v. *Waterhouse* (1675) 2 Williams' Saund. 420.

(*c*) *Dyer* v. *Ashton*, 2 D. & R. 19, 1 B. & C. 3.

(*d*) *Wright* v. *Goddard* (1838) 8 Ad. & E. 144.

(*a*) *Perry* v. *Bank, etc.*, (1866) 16 U.C.C.P. 404.

(*b*) *Burdett* v. *Withers* (1837) 7 Ad. & E. 136.

(*c*) *Saward* v. *Leggatt* (1836) 7 C. & P. 613. As to the proof of the particulars of the dilapidations for which recovery is sought in an English County Court from a tenant from year to year, see *Smith* v. *Douglas* (1855) 16 C.B. 31.

reasonable time, the defendant pleads that he did repair within a reasonable time (*d*).

Evidence that the premises were out of repair a few days before the demise to the defendant, who came in as assignee of the original lessee, casts on the defendant the burden of proving that the premises had been put to repair after that time. The plaintiff need not prove that the premises were out of repair on the very day of the demise (*e*). Express evidence of the actual state of the premises at the time the lease was first made need not be produced in an action against an assignee of the lease. If it be shewn that they were in good repair up to the time they came into the defendant's possession, and he omitted to make necessary repairs, that constitutes a prima facie case for the landlord (*f*).

The fact that the landlord did not prove any contract at the trial is no ground for setting aside a verdict for the damages awarded for the non-repair (*g*).

In assessing the damages for a breach of a covenant to repair, a judge sitting as a jury is warranted in adopting the opinion of the only expert witness who has inspected the premises with reference to the covenant, that a certain amount is required to put them in tenantable repair (*h*).

Art. 1629 of the Quebec Civil Code operates so as to create a presumption that a loss by fire on the demised premises was caused by the lessee or of the persons for whom he is responsible. The effect of introducing into a covenant to deliver up the premises in good repair an exception of "accidents by fire" is to deprive the lessor of the benefit of this presumption, and by throwing the parties upon their rights and liabilities under Art. 1053, which gives a general remedy for damage caused by negligence, to bring into operation the ordinary principles of evidence as to the onus of proof (*i*). To rebut the presumption created by this Article, it is not necessary for the lessee to prove the exact or probable origin of the fire, or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the leased premises as a prudent administrator (*en bon père de famille*), and that the fire occured without any fault that could be attributed to him or to persons for whose acts he should be held responsible (*j*).

(*d*) *Belcher* v. *McIntosh* (1839) 8 C. & P. 720, per Alderson, B.

(*e*) *Doe* v. *Durnford* (1832) 2 C. & J. 667.

(*f*) *Perry* v. *Bank, &c.* (1866) 16 U.C.C.P. 404.

(*g*) *Dyer* v. *Ashton* (1822) 1 B. & C. 3, 2 D. & R. 19.

(*h*) *Moxon* v. *Townshend* (1886) 2 Times L.R. 717, aff'd (1887) 3 Times L.R. (C.A. 392.)

(*i*) *Evans* v. *Skelton* (1889) 16 Can. S.C. 637, diss. Ritchie, C.J., and Taschereau, J.

(*j*) *Murphy* v. *Labbe* (1896) 27 Can. S.C. 126 (diss., Strong, C.J.). In *Klock* v. *Lindsay* (1898) 28 Can. S.C. 453, the law as laid down in this case was followed, but the presumption was held not to have been overcome by the evidence introduced.

XIV. LIABILITY OF TENANT TO THIRD PERSONS.

70. Generally.—A review of the cases dealing with the responsibility of a tenant to strangers for injuries caused by the dilapidated condition of the premises will form an appropriate conclusion to our article.

Members of a tenant's household are not, it should be observed, strangers within the scope of the principles to be discussed below. The rights of such persons are co-extensive with those of the tenant himself, and therefore more restricted than those of members of the general public (*k*). See sec. 3, ante.

71. Tenant presumptively liable for injuries caused by defects in the premises.—Starting from the fundamental conception that, in cases where it becomes necessary to determine whether the landlord or the tenant is the proper party to sue for injuries caused by defects in the demised premises, the essential question is simply whether the dangerous conditions were produced by the wrongful act of the landlord or of the tenant (*a*), we observe that, in the absence of positive evidence, the landlord's freedom from liability follows, as a matter of legal inference, from the general principle which attaches responsibility to the exercise of control (*b*). Hence the well-settled rule that it is the tenant and not the landlord who is prima facie liable to strangers for injuries caused by the defective condition of the demised premises (*c*). We also find the responsi-

---

(*k*) *Mehr* v. *McNab* (1894) 24 Ont. R. 653, where it was held that the daughter of a lessee who has covenanted to repair, cannot maintain an action against the lessor for personal injuries caused by defective repairs.

(*a*) *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401, per Bovill, C.J. The enquiry as between the landlord and the tenant is, who is blameworthy in regard to the want of repair. *Hett* v. *Jansen* (1892) 22 Ont. R. 414.

(*b*) The hardship of holding him liable for conditions which he has neither the right nor the power to prevent is sometimes adverted to explicitly by judges. "It certainly seems hard that, if a man lets his premises, and so divests himself of all power of control over them, he should be made liable for the default of the tenant. The owner ought not to be made liable for subsequent nuisances which did not originate with himself; for these, so long as the tenant is in possession, the owner is irresponsible." Crompton, J., in *Gandy* v. *Jubber* (1864) 5 B. & S. 78 (p. 87). "Deplorable, indeed, would be the situation of landlords if they were liable to be harassed with actions for the culpaple neglect of their tenants." Ld. Kenyon in *Cheetham* v. *Hampson* (1791) 4 T.R. 318, 2 R.R. 397.

(*c*) *Payne* v. *Rogers* (1794) 2 H. Bl. 349 (plaintiff fell through a grating in a footpath); *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401. In *Russell* v. *Shenton* (1842) 3 Q.B. 449, a demurrer was sustained to a declaration on the ground that it sought to impose liability for the non-repair of drains upon a landlord, merely as "owner and proprietor," and did not shew how the prima facie liability of the tenant was transferred to the landlord. In *Cheetham* v. *Hampson* (1791) 4 T.R. 318, it was held that no action could be maintained against the landlord of a tenant from year to year for injuries caused by the non-repair of fences.

bility of the tenant affirmed in a direct, doctrinal form (*d*). But this mode of expression is to be taken with due reference to the circumstances, and is not really inconsistent with the rest of the cases, which indicate that the true conception of the juridical situation is to view it as involving a rebuttable presumption of fact which, in the first instance, throws the liability upon the tenant. This presumption is of course replaced by a peremptory conclusion of law where it is proved that the defective conditions complained of were due to the non-feasance or misfeasance of the tenant (*e*), especially where the tenant has expressly stipulated to do the repairs, the omission of which produced the defects which caused the damage (*f*). See, however, secs. 74, 75, post.

It should be observed that the combined effect of the above rule and of the principle established by *Fletcher* v. *Rylands* (*g*) will sometimes be to render a tenant liable for want of repairs even when he has not been guilty of any negligence. Thus it has been held that the tenant of a house is absolutely bound, as between himself and the occupier of an adjoining house, to keep a drain passing through his premises in such a state of repair that the sewage will not escape and cause injury to the neighbours (*h*).

(*d*) "A landlord who lets a house in a dangerous state is no liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy, if any, is on his contract. In this case there was none, not that that circumstance makes any difference in my opinion." *Robbins* v. *Jones* (1863) 15 C.B.N.S. 221 (p. 240).

(*e*) "If a man demises with no nuisance upon the land, and the tenant commits a new nuisance, the landlord is not liable." Littledale, J., *Rex* v. *Pedley* (1834) 1 Ad. & E. 822, 3 N. & M. 627; *Gandy* v. *Jubber* (1864) 5 B. & S. 78, 87, per Crompton, J., arg. [defective grating]. See note (*b*), supra.

(*f*) *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401 [coal-shoot in footpath became defective while the tenant was in possession]; *Nelson* v. *Liverpool, &c., Co.* (1877) 2 C.P.D. 311 [defective grating]; *Gwinnell* v. *Eamer* (1875) L.R. 10 C.P. 658 [defective grating]; *Bishop* v. *Trustees &c.* (1859) 1 E. & E. 697; 28 L.J.Q.B. 215 [verdict set aside on the ground that the lease was still in force]. *Tarry* v. *Ashton* (1876) 1 Q.B.D. 314 [tenant liable for injuries caused to a foot-passenger by the fall of a lamp which he knew to be in a defective condition, and failed to repair]. In *Firth* v. *Bowling I. Co.* (1878) 3 C.P.D. 254, the successor in interest of a lessee who had agreed to fence the land occupied by him for the benefit of the lessor and his other tenants, was held answerable where the wire rope used for the fencing fell into decay, and the cattle of an adjoining tenant died from swallowing the fragments which dropped into the grass upon a field leased by their owner.

(*g*) 3 H. & C. 774, L.R. 1 Ex. 263; L.R. 3 H.L. 330.

(*h*) *Humphries* v. *Cousins* (1877) 2 C.P.D. 239 [negligence negatived by jury].

72. Rights of stranger, how far affected by the absence of an obligation on the tenant's part to repair.—In the only case in which the point has been directly raised, the fact that the tenant could not be compelled by the landlord to repair was denied to be a valid defence (*a*). This conclusion, it is true, was arrived at in a criminal action, but, in view of the general principle that, so far as respects the liability of occupiers, the law puts public and private nuisances on the same footing (*b*), it seems difficult to contend that this circumstance should be treated as a differentiating factor if the same question were presented in a civil suit. The decision already cited, that the landlord of a tenant from year to year cannot be sued for injuries caused by the non-repair of fences on the demised property, may also be regarded as looking in the same direction (*c*). Such a tenant would not have been accountable to the landlord, (see sec. 6*b*, ante), and the court, by its exoneration of the landlord, clearly holds by implication that the tenant was the proper party to sue.

A different theory, however, seems to have been entertained by Honeyman, J., when he intimated, arguendo, that the landlord is liable to a stranger, in any case where the tenant is under no obligation to repair (*d*). Such a situation is precisely that which was presented in the case last cited, and the learned judge appears to be of opinion that the proper method of escaping from the dilemma of an injuria sine remedio is to hold the landlord responsible. A similar doctrine seems to be involved in the decision in *Gandy* v. *Jubber* (*e*), where even the landlord's ignorance of the existence of a defect in the premises held under a yearly tenancy did not protect him. See sec. 74, post.

(*a*) In *Reg.* v. *Watson* (1697) 2 Ld. Raym. 856, 1 Salk. 357, also cited sub. nom. *Reg.* v. *Watts*, where a house was maintained in a ruinous condition so that passers-by were endangered, it was argued that, as the defendant was a tenant at will, and therefore not responsible to the landlord for failing to remedy the defects in question, he could not be indicted for the nuisance created by these defects. This contention did not prevail, the court saying that "as the danger is the matter that concerns the public, the public are to look to the occupier, not to the estate, which is not material in such case to the public." This case was cited with approval by Blackburn and Crompton, JJ., in *Gandy* v. *Jubber* (1864) 5 B. & S. 78.

(*b*) See the opinion in *Chauntler* v. *Robinson* (1849) 4 Exch. 163.

(*c*) *Cheetham* v. *Hampson* (1791) 4 T.R. 318.

(*d*) *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401.

(*e*) (1854) 5 B. & S. 78.

Upon the whole, therefore, it may be regarded as a question still open to discussion, whether the absence of an obligation on the tenant's part to repair shall, ex necessitate rei, and to prevent the plaintiff from being left remediless, be regarded as casting the responsibility upon the landlord, or whether the position shall be taken that the tenant is liable on the broad ground that he is the person in occupation of the premises, and that the contractual arrangements between him and the landlord are a matter with which a stranger has no concern. One consideration which makes strongly in favour of the latter of these alternatives is that it is more in consonance with the doctrine noticed in sec. 2, ante, that the landlord of the tenant from year to year cannot, in the absence of an express stipulation, be compelled by the tenant to do repairs which the latter is not bound to execute. The manifest effec. of this doctrine is that, as between themselves, neither the landlord nor the tenant is subject to any obligation respecting repairs in a case where the tenant is not bound to do them and the landlord has not entered into any agreement with regard to them. (Compare the doctrine laid down at the beginning of the next section.) To declare the reciprocal rights of the parties to the demise to be the criterion and gauge of the rights of a stranger would, therefore, result in leaving him altogether without a remedy. Thus the simple question which finally emerges is whether in order to avoid this unreasonable result, the landlord or the tenant shall be held liable, and the only principle available for determining this question seems to be that which declares that in the absence of some countervailing consideration, responsibility is an inseparable incident of the power of control.

73. Under what circumstances the liability is transferred to the landlord.—According to a recent case (*a*), there are only two ways in which the landlord can be made liable, first, by shewing that he has made such a contract to do repairs as will enable the tenant to sue him for not repairing (*b*), and secondly, that he has been guilty of a misfeasance, as, for instance, where he lets the premises in a

(*a*) *Nelson* v. *Liverpool, etc., Co.* (1877) 2 C.P.D. 311.

(*b*) This exception to the general rule is recognized by Buller, J., in *Payne* v. *Rogers* (1794) 2 H. Bl. 349, where the court refused to set aside a verdict against the landlord, the record shewing that evidence had been given on the trial that repairs had actually been done by the landlord. It was pointed out that to hold the tenant liable in such a case would give rise to a circuity of action, as the tenant would have his remedy over against the landlord. "The meaning of the case is that the party injured may either have his remedy against the tenant for not repairing, or the landlord, if he has undertaken to repair:" Parke, B., in *Chauntler* v. *Robinson* (1849) 4 Exch. 163 (p. 167). See also, to the same effect, *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401. A landlord who agrees to execute repairs and superintends them while the tenant has temporarily vacated it to allow the work to be done is of course liable for the negligence of the persons making the repairs. *Leslie* v. *Pounds* (1812) 4 Taunt. 649 [cellar-flap left open].

ruinous condition (*c*). But to be strictly correct the second branch of the statement should, it seems, be extended so as to cover non-feasance as well as mis-feasance (*d*).

The liability which arises from the letting of premises on which there is a dangerous nuisance is also incurred by a person who, while such a nuisance exists, purchases the reversion (*e*), or re-lets the property (*f*). But there is not a re-letting which will render the landlord liable, where a yearly tenant continues his occupation after the end of a year. Such a tenancy is regarded

---

(*c*) This statement finds support in the following cases: *Gandy* v. *Jubber* (1856) 5 B. & S. 15 (reversed, but not on this point, 9 B. & S. 15); *Todd* v. *Flight* (1860) 9 C.B.N.S. 377; *Bowen* v. *Anderson* [1894] 1 Q.B. 164; *Sandford* v. *Clarke* (1888) 21 Q.B.D. 398; *Rosewell* v. *Prior* (1702) 1 Ld. Raym. 713, 2 Salk. 460, 12 Mod. 635; *Rich* v. *Basterfield* (1847) 16 L.J.C.P. 273, 4 C.B. 783; *Mehr* v. *McNab* (1894) 24 Ont. R. 653. In *Rosewell* v. *Prior*, supra, the court took the position that the erector of the nuisance, before the assignment, was liable for all consequential damages; that it was not in his power to discharge himself by the assignment; that he continues the nuisance by granting it over in this manner and reserving rent; and that putting it out of one's power to abate a nuisance is as great a tort as not to abate it when one has the power to do it. In *Gandy* v. *Jubber*, supra, Crompton, J., said: "It is a sound principle of law that the owner of property receiving rent shall be liable for a nuisance existing on the premises at the date of the demise" (p. 88). This remark was approved by the Exchequer Chamber, (see 9 B. & S. p. 16), where Erle, C.J., remarked: "If the landlord lets the premises with a nuisance on them, all parties agree that he is responsible." See 5 B. & S. 485. The Court of Error also expressed its approval of another statement by Crompton. J., that, "to bring liability home to the owner, the nuisance must be one which is in its very essence and nature a nuisance at the time of letting, and not merely something which is capable of being thereafter rendered a nuisance by the tenant." In *Todd* v. *Flight*, supra, an additional reason was suggested by Erle, J., for the conclusion arrived at, viz., that the chimneys had apparently fallen by the operation of the laws of nature, and from no fault on the tenant's part. But the element thus introduced seems to be purely suppositious It is not adverted to in the declaration, nor treated in the judgment as an essential factor. Moreover it is difficult to reconcile the statement that the tenant was without fault with other parts of the opinion which seem to recognize the existence of a concurrent liability on the tenant's part. See sec. 75, post.

(*d*) *Todd* v. *Flight* (1860) 9 C.B.N.S. 377, 30 L.J.C.P. 21, Erle, C.J., after stating the effect of three earlier cases, said: "These are authorities for saying that if the wrong causing the damage arises from the non-feasance or the mis-feasance of the lessor, the party suffering damage from the wrong may sue him." The learned judge considered that this was the principle which reconciled the various decisions.

(*e*) "If a man devises land with a nuisance upon it, and during the continuance of the term, and whilst the landlord was unable to remove the nuisance another chooses to buy the reversion of the land with the nuisance upon it, he is answerable." Littledale, J., in *Rex* v. *Pedley* (1834) 1 Ad. & E. 822, 3 N. & M. 627.

(*f*) The cases cited in the following notes all recognize the correctness of this doctrine.

as subsisting until it is determined by notice (*g*). For a similar reason a weekly tenant's continuance of his occupation on the expiration of each week does not render the defendant liable for defects then existing (*h*). Nor, it would seem, is there any re-letting within the purview of the rule, where the tenant who entered under a lease holds over at the end of the term (*i*).

A point of view which, logically speaking, is somewhat different from that noticed at the beginning of the section, but which involves precisely the same conclusions, is evidenced by the statement that "in all the cases where the landlord has been held responsible, it will be found that he has done some act authorizing the continuance of the dangerous state of the premises" (*j*). In the first of the cases cited below it was held that the necessary authorization may be inferred from the fact that he has retained the obligation to repair the premises.

The question whether the defect was structural or one of management is for the jury whenever that point is left in doubt by the evidence (*k*).

(*g*) *Gandy* v. *Jubber* (Exch. Ch. 1865) 9 B. & S. 15, reversing on this ground, 5 B. & S. 78. This ruling qualifies the statement of Littledale, J., that "if there is a tenancy from year to year, and the tenant commits a nuisance, the landlord is liable. He has no business to do so; and by doing so, he continues the nuisance." *Rex* v. *Pedley* (1834) 1 Ad. & E. 822, 3 N. & M. 627.

(*h*) *Bowen* v. *Anderson* [1894] 1 Q.B. 164, disapproving *Sandford* v. *Clarke*, 21 Q.B.D. 398, so far as it depended on the theory that it assumed, (contrary to the ruling in *Jones* v. *Mills*, 10 C.B.N.S. 788), that a weekly tenancy comes to an end at the end of each week.

(*i*) See *Hett* v. *Janzen* (1892) 22 Ont. R. 414.

(*j*) *Pretty* v. *Bickmore* (1873) L.R. 8 C.P. 401, per Bovill, C.J. If it is a natural consequence of the use of a portion of the premises by the tenants in the manner contemplated that they may become a nuisance to the neighbours, it is the duty of the landlord either to exact from his tenants an engagement to prevent the conditions which would cause the nuisance, or to reserve to himself a right to enter for that purpose. *Rex* v. *Pedley* (1834) 1 Ad. and E. 822, 3 N. & M. 627.

(*k*) *Bowen* v. *Anderson* [1894] 1 Q.B. 164, holding it to be error to take the case from the jury where the evidence was conflicting as to whether the fall of the plaintiff through a coal-plate was owing to the neglect of the tenant to secure it properly, or to the defective state of the flagstone, or to the presence of clay which prevented the plate from fitting.

Evidence that the same tenant had been in possession for about two years before the accident, and that the coal-plate which caused the accident was out of repair about a fortnight after the tenant had entered is sufficient to take to the jury the question whether there was a structural defect existing when the tenancy began. *Sandford* v. *Clarke* (1888) 21 Q.B. 398, as explained in *Bowen* v. *Anderson*, supra.

Under the General Health Act of 38 & 39 Vict. cn. 55, secs. 94, 164, where premises are or become subject to a structural defect which may give rise to a nuisance, or become dangerous or injurious to health, the tenant may, in the absence of any agreement imposing the payment for its repair upon him, throw the liability for its repair upon the landlord. See *Gebhardt* v. *Saunders* [1892] 2 Q.B. 452.

Under some circumstances, an additional reason for holding the landlord liable may be furnished by the fact that it would be waste for the tenant to abate the nuisance in question, as where it could not be abated without structural alterations (*l*).

The theory that the landlord must necessarily be liable to a stranger whenever the tenant is under no obligation to repair, has already been discussed. See sec. 72, ante.

74. Landlord's knowledge or ignorance of the dangerous conditions how far material.—That the landlord cannot be held liable to a stranger for injuries caused by defects in the demised premises unless he knew of these defects, is a doctrine which seems to be reasonably deducible from, though not categorically enunciated in, a case already cited (*a*). But, as the decision proceeded upon the broad ground that such a declaration shewed the landlord to have been guilty of the non-repair which eventuated in disaster, and the landlord's cognizance of the conditions was not adverted to as a distinctive element, all that can be affirmed with certainty is that, on general principles, the conclusion of the court must apparently have been in favour of the landlord if the action had gone before a jury and his want of knowledge established (*b*).

Not long afterwards the landlord of a tenant from year to year was held liable by the same court, although it was proved that he had no notice that the nuisance which caused the injury existed at the time of the re-letting (*c*). It was explicitly declared by Crompton, J., that under such circumstances, the landlord is liable whether he has notice of the conditions or not; and it is clear that the other judges, although they do not advert to this element, must have been of the same opinion, or they would not have allowed the plaintiff to recover.

(*l*) See *Rosewell* v. *Prior* (1702) 12 Mod. 635 (p. 640).

(*a*) *Todd* v. *Flight* (1860) 9 C.B.N.S. 377, 30 L.J.C.P. 21, where a declaration was held not to be demurrable which alleged that the defendant let the house in question when the chimneys were known by him to be ruinous and in danger of falling, and that he maintained them in that state.

(*b*) As to the evidential significance of knowledge of the conditions in actions for negligence, see a note by the present writer in 41 L.R.A., pp. 33-153, especially pp. 35-38.

(*c*) *Gandy* v. *Jubber* (1865) 5 B. & S. 78, 485 [grating over area was improperly constructed]. The reversal of this decision by the Exchequer Chamber (9 B. & S. 15) does not affect the judgment of the lower court so far as this point is concerned.

Yet, a few years later, the same court refused to allow a stranger to recover against the landlord in a case where the defect was one of the same character as that in the case last cited, and based their decision upon the fact that he did not know of the defect, and was not negligent in being ignorant of it (*d*).

Precisely upon what ground these two cases are to be reconciled is not very apparent. The only available differentiating factor seems to consist in the fact that in the earlier one the tenant was under no obligation to repair, while in the later one the tenant was bound by an express stipulation in that regard (*e*). This conception, supposing it to be that which underlies the later decision, is certainly not free from difficulties. It involves the acceptance of the doctrine that a landlord is, as respects strangers, a warrantor of the safety of the premises in cases where the tenant is not bound to repair, but that in cases where the tenant is bound to repair, the landlord cannot be held liable unless he is proved to have been negligent. Such a doctrine seems to require for its support the assumption that the imputation to the landlord of a duty to insure safety under the supposed circumstances is necessary to prevent the injured person from being left remediless, and it is clear that, as long as the authorities cited in sec. 72 remain unimpeached, this assumption cannot be justifiably made. Moreover, if evidence of an agreement by the tenant to repair renders it necessary for the plaintiff, if he would succeed, to establish negligence on the landlord's part, the action manifestly fails at the outset where the landlord is excusably ignorant of the conditions. Under such circumstances the case never reaches the stage at which it becomes material to consider whether the tenant's agreement does or does not absolve the landlord (*f*). The result is a somewhat singular logical situation, for the existence or absence of the agreement is first treated as a test to determine whether the standard of the responsibility imputed to the landlord shall be a warranty or merely the conduct of a prudent man, and then ceases altogether to be an operative element in the investigation (*g*).

(*d*) *Gwinnell* v. *Eamer* (1875) L.R. 10 C.P. 658 [defective grating in footpath].

(*e*) The actual scope of *Gwinnell* v. *Eamer* is indicated by the following question which, during the argument was asked by Brett, J., and conceded by plaintiff's counsel to require a negative answer: "Assuming that the grating was unsafe at the time of the letting, but without the knowledge of the landlord, and without blame to him for not knowing it, and the tenant is under the covenant to repair—is the landlord liable?"

(*f*) In *Gwinnell* v. *Eamer* the plaintiff had been nonsuited at the trial simply on the ground that the landlord had no knowledge of the unsafe state of the grating at the time of the demise.

(*g*) In *Hett* v. *Janzen* (1892) 22 Ont. R. 414, where a landlord was held not liable for an injury caused by a defective grating on the ground of ignorance, Boyd, Ch., and Robertson, J., thought that the weight of authority shewed that the landlord must know of the ruinous or dangerous condition of his premises so as to be guilty of the wrongful non-repair which led to the damage. This seems also to be tacitly assumed in *Bishop* v. *Trustees, &c.* (1859), 1 E. & E. 697.

75. Tenant's covenant to repair, how far landlord's liability affected by.—It has been decided in several cases that a tenant who fails to remedy a continuing nuisance which existed at the time when he took a lease of the premises, must respond in damages to anyone who may be injured by it (*a*). In none of the cases cited was the point directly raised that the effect of an express agreement by the tenant to repair was to absolve the landlord entirely from accountability for accidents occurring subsequently to the demise; but one of the most distinguished of modern judges was strongly inclined to think that this was the result of such a contract (*b*). This expression of opinion, however, was merely obiter, fault on the landlord's part being negatived by the evidence, and was not sustained by the citation of any authorities. A remark made by Keating, J., during the argument in a still earlier case also seems to look in the same direction (*c*). But to attach a definite doctrinal significance to words which, as the subjoined note shews, were nothing more in effect than an intimation that a point made by counsel was not open to discussion, as the pleadings stood, would scarcely be justifiable. It is to be observed, moreover, that in the opinion delivered by Erle, C.J., for the whole court, it seems to be assumed that, under the circumstances set out in the declaration, had the option of suing either the lessor or the lessee. (See pp. 388, 389 of the report.) It is submitted that this is the true doctrine, for there is no apparent reason why a contract, with which the injured person had nothing to do, should prevent the operation

(*a*) *Cuupland* v. *Hardingham* (1813) 3 Camp. 398 [area not fenced]; *Rex* v. *Watts* (1697) 1 Salk. 357, 2 Ld. Raym. 856 [ruinous house], cited with approval in *Chauntler* v. *Robinson* (1849) 4 Exch. 163. For illustrations of the application of the same rule to cases of nuisances other than those due to defective repair, see *Brodon* v. *Saillard* (1876) 2 Ch.D. 692; *Bull* v. *Ray* (1873) 8 Ch. 407; *Brent* v. *Haddon* (1620) Cro. Jac. 555.

(*b*) In *Gwinnell* v. *Eamer* (1875) L.R. 10 C.P. 658, Brett, J., while not definitively rejecting the doctrine that if the landlord at the time of the demise knows of the defect and does nothing to cause it to be remedied, he, as well as a tenant who has covenanted to repair, may be liable, very much doubted whether, if the burthen of repair is cast upon the tenant, the duty of the landlord does not altogether cease.

(*c*) In *Todd* v. *Flight* (1860) 9 C.B.N.S. 377, 30 L.J.C.P. 21, counsel for defendant said: "The present defendant has done no act to identify himself with the nuisance complained of. He let premises subject to an obligation on the part of the lessee to repair them." The learned judge interposed with the question: "If the obligation on the lessee to repair is to exonerate the lessor, should not the latter have pleaded it."

of the general principle that joint tort-feasors are severally liable for the consequences of their breaches of duty (*d*).

In view of the doubtful state of the authorities on this point, the practical inference is clearly that, in any case where there is a covenant to repair, both the landlord and tenant should be made parties to the action, if such a joinder is permitted in the jurisdiction where the action is brought.

C. B. LABATT.

(*d*) In *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47, a case where the landlord was held liable, Holmes, J., remarked that the tenant may be liable *also* when he continues the nuisance. In *Ahern* v. *Steele* (1889) 115 N.Y. 203, the court expressed its disapproval of what it considered to be the result of the later English cases that an owner may demise premises so defective and out of repair as to be a nuisance, and yet avoid responsibility if he binds his tenant to make the repairs.

PRACTICE.

WINDING-UP ORDER—APPOINTMENT OF LIQUIDATOR.

At a meeting of the Judges of the High Court, held on 22nd June last, the below-recited form of Order of Reference in Winding-up proceedings was approved as the one hereafter to be used :—

"In the High Court of Justice :

The Honourable } , the day of , A.D. 190 .

In the matter of the Company Limited, and of the Winding-up Act, being Chapter 129 of the Revised Statutes of Canada, and Amending Acts.

Upon motion made unto this Court this day by Mr. , of Counsel for , the petitioning creditor herein, in presence of Counsel for creditors of the said Company (no one appearing for the said Company, although duly notified, as appears by petition, notice of presentation thereof, and admission of service), upon hearing read the order made this day for the winding-up of the said Company, and the papers and documents read and referred to on the application for the said order ; and upon hearing what was alleged by Counsel aforesaid :

1. This Court doth Order that be, and he is hereby appointed, Provisional Liquidator of the estate and effects of the above-named Company upon his giving security to the satisfaction of for the due performance of his duties.

2. And This Court doth further Order that it be referred to the (Master-in-Ordinary) to appoint a Permanent Liquidator or Liquidators of

the estate and effects of the said above-named Company, and to take all necessary proceedings for and in connection with the winding-up of the said Company and the remuneration to be paid to the Liquidator or Liquidators.

3. And This Court doth in pursuance and by virtue of the Statute in that behalf hereby delegate to the said (Master) all such powers as are conferred upon the Court by the Winding-up Act, and Amending Acts, as may be necessary for the said winding-up of the said Company.

4. And This Court doth further Order that the costs of the said petition and order for winding-up and of this motion be taxed and be paid by the said Permanent Liquidator out of the assets of the said Company which shall come to hands."

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Trial of Action.]
Street, J.] HOPKINS *v.* HAMILTON ELECTRIC LIGHT CO. [July 9.

Nuisance—Electric Light Company—Vibration—Injunction—Damages.

An electric light company by the working of their engines caused so much vibration in the land adjoining that on which the plaintiff's house was built as to render it at times almost uninhabitable, and interfere materially with the comfort and health of its inmates, though no actual structural injury was shewn to have taken place. The company was incorporated under the Ontario Joint Stock Companies' Act for the purpose of manufacturing, etc., electric power, and to purchase and hold lands to be used in the business, with authority under the statute (R.S.O. c. 200, s. 3) to construct, maintain, complete and operate works for the production, etc., of electricity. But the company had no compulsory powers to take lands; and no opportunity had been afforded the plaintiff, as there would have been in such case, of objecting to the location of its works, etc. Moreover, the defendants were under no compulsion to exercise their powers, nor was any compensation provided, under the statutes relating to them, for any injury done by such exercise of the character in question.

Held, that the company was entitled only to exercise its powers in such a way as not to create a nuisance, and the plaintiff was entitled to an injunction and a reference as to damages.

D'Arcy Tate, for plaintiff. *Lynch Staunton*, K.C., and *Osborne*, for defendants.

Meredith, C.J., MacMahon, J., Lount, J.] [July 19.

REX *v.* DUNGEY.

Conviction—Certiorari—Selling unwholesome meat—Indictable offences—Summary trial—Jurisdiction.

A charge was laid against the defendant of exposing and offering for sale on the public market of the town of Mitchell a quantity of meat unfit for food for man. The charge was so worded as to leave it doubtful whether it was intended for one under s. 122 of the Public Health Act or one under s. 194 of the Criminal Code, the offences created by the two Acts, though in pari materia, differing essentially from one another. Under the former the penalty is recoverable by summary proceedings before the magistrate; under the latter, not so, unless by consent of the defendant. The magistrates treated the case at first as one of an offence against the Code, and, the defendant electing against a summary trial, took evidence, and adjourned for a week. They then announced that a case had been made out under the provisions of the Public Health Act, but not such as to warrant sending for trial under the Code, and adjourned for some days to enable the accused to put in a defence under the new conditions if he so decided. The defendant objected to the case being proceeded with under the Public Health Act, and offered no defence, and the magistrates then convicted the defendant.

Held, that the conviction must be quashed. It is not competent for magistrates, where the information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it, on the original information.

W. M. Douglas, K.C., for the appellant. *J. H. Moss*, for the respondent.

Meredith, C.J., Lount, J.] [July 20.

TAYLOR *v.* GRAND TRUNK R.W. CO.

Particulars—Defence—"Not guilty by statute."

A railway company cannot be required to give particulars of the defence of "not guilty by statute." The right to plead such a defence being expressly preserved by Rule 286, the application of Rule 299 is excluded. *Jennings* v. *Grand Trunk R.W. Co.*, 11 P.R. 300 overruled.

D. L. McCarthy, for defendants. *H. T. Beck*, for plaintiff.

Meredith, C.J., MacMahon, J., Lount, J.] [July 22.

IN RE GEDDES AND COCHRANE.

Courts—Divisional Court—Single judge—Proper forum—Special case—Arbitration Act—"Opinion"—"Final decision."

A single judge has no jurisdiction to pronounce the opinion of the court upon a special case stated by arbitrators pursuant to s. 41 of the Arbitration Act, R.S.O. 1897, c. 62. The effect of cl. (a) of s.-s. 1 of s. 67 of the Judicature Act, R.S.O. 1897, c. 51, and of Rule 117, is to require that such a case be heard before a Divisional Court, as being a proceeding directed by statute to be taken before the court, and in which the decision of the court is final. "The opinion of the court" is a "decision," though not a binding adjudication as to the rights of parties, or a decision amounting to a judgment or order; and it is a "final decision" because it is the end of the proceeding and cannot be reviewed by an appellate court.

John MacGregor, for Cochrane. *H. D. Gamble*, for Geddes.

Trial of Action.]
Meredith, C.J.] [July 24.

PROVIDENT CHEMICAL WORKS *v.* CANADA CHEMICAL MFG. CO.

Trade-mark—Descriptive letters — Registration — Secondary meaning—Proof of acquisition of—Fraud—Deception.

The letters C.A.P., standing for the words "Cream Acid Phosphates," being descriptive merely, are not the proper subject of a trade-mark, and registration of them as a trade-mark under the Trade-mark and Design Act will not give a right to the exclusive use of them.

Partlo v. *Todd*, 17 S.C.R. 196, followed.

Words or letters which are primarily merely descriptive may come to have in the trade a secondary meaning, signifying to persons dealing in the articles described that when branded with such words or letters the articles are of the manufacture of a particular person.

But where the plaintiffs used the letters C.A.P., standing for "Cream Acid Phosphates," in connection with acid phosphates manufactured by them, and the defendants used the same letters, signifying "Calcium Acid Phosphates," in connection with acid phosphates manufactured by them, and prominently stated thereon to be manufactured by them, and the evidence did not shew that there was on the part of the defendants any fraud, or any intention of appropriating any part of the plaintiffs' trade, or that any purchaser or person invited to purchase was deceived or misled, or that the letters had come to mean in the trade acid phosphates of the plaintiffs' manufacture;—

Held, that the plaintiffs could not complain of the use of the letters by the defendants. *Reddaway* v. *Banham* [1896], A.C. 196, applied.

W. Cassels, K.C., and *H. Cronyn*, for plaintiffs. *Shepley*, K.C., and *E. W. M. Flock*, for defendants.

Province of Nova Scotia.

IN THE COUNTY COURT FOR DISTRICT NO. 1.

ETTER *v.* GRAHAM.

N. S. Collection Act—Wilful and malicious tort—Imprisonment.

This was an action brought by the plaintiff against the defendant for assault. Defendant with a defence denying liability paid money into court. Plaintiff took money out of court and entered judgment under order XXII, r. 7. Upon an examination of the defendant before a Commissioner under the Collection Act plaintiff made application to have defendant committed to jail under sec. 27 (f) of the Act. The section is as follows:

27—"At the conclusion of the evidence, or after an adjournment for deliberation, the examiner may, by warrant, commit the debtor to the county jail for any term not exceeding twelve months, if it appears to the examiner, —(f) in cases of tort, that such tort was wilful and malicious.

The Commissioner refused the application on the ground that the evidence that the tort was wilful and malicious was not receivable as there had not been an adjudication of a tort by the court.

Plaintiff appealed to the judge of the County Court.

J. R. Johnston, for appellant. *J. B. Kenny*, for respondent.

June 13th, 1901. His Honour W. B. Wallace, after reserving the case for consideration, delivered judgment as follows:

This was an application before an examiner under the Collection Act to have the defendant committed to jail on the ground that the tort on which action was commenced was wilful and malicious under sec. 27 of the Collection Act, sub-section (f). Plaintiff brought an action for damages for an assault. Defendant with a defence denying liability paid money into court and plaintiff took the money out of court and entered up judgment for costs. Section 27, sub-section (f) empowers the examiner to commit to jail, if it appears to the examiner in cases of tort that such tort was wilful and malicious. The examiner held that before he could receive evidence that the tort was wilful and malicious there must be an adjudication by the court with or without damages that a tort had actually been committed. I think that the Commissioner is in error in assuming that it is necessary to have a formal adjudication by the magistrate that a tort has been actually committed. The expression in this sub-section—"cases of tort"—does not mean in cases where a judgment has been given expressly finding a tort, but

is merely intended to deal with all actions in tort in the same manner as preceding sections cover actions upon contracts.

I have read over the evidence taken before the Commissioner and am of the opinion that the tort shewn to have been committed was wilful and malicious, and an order will be granted the applicant accordingly."

Province of New Brunswick.

SUPREME COURT.

In Equity, Barker, J.] [Aug. 13.

GALLAGHER *v.* CITY OF MONCTON.

Referee's fees—When payable.

In the absence of special circumstances a referee taking accounts is not entitled to demand payment of his fees from day to day, but must wait until the conclusion of his inquiry, when his costs are taxed by the clerk.

M. G. Teed, K.C., for plaintiff. *W. B. Chandler*, K.C., for defendant. *E. R. Chapman*, for referee.

Province of Manitoba.

KING'S BENCH.

Full Court.] CADVILLE *v.* PEARCE. [July 5.

Exemptions—Homestead—Judgments Act, R.S.M. c. 80, s. 12.

Judgment of RICHARDS, J., noted ante p. 322, affirmed with costs.

Howell, K.C., and *Mathers*, for plaintiff. *Crawford*, K.C., and *Grundy*, for defendant.

Allan, C.J.] FAIRCLOUGH *v.* SMITH ET AL. [July 6.

Mechanic's lien—One lien against owners of different properties.

Action to enforce mechanic's lien. Two of the defendants were husband and wife owning separate adjoining lots of land. The husband employed the plaintiff in the erection of two houses, one on each lot, and the plaintiff, not being paid for his work, registered a claim of lien upon the estate or interest of Mr. and Mrs. Smith in the two lots for an amount

claimed to be due him for work on the two houses, without apportioning the amount as between the two.

Held, that the registered claim was not sufficient to bind both lots and that effect could not be given to it against one of the lots only for the proper amount, and that the action must be dismissed with costs as against the defendant Lister who was a mortgagee. *Currier* v. *Friedrich*, 22 Gr. 243; *Oldfield* v. *Barber*, 12 P.R. 554, and *Rathbun* v. *Nayfield*, 87 Mass. 406, followed.

Held, also, that if plaintiff desired it, or the defendants, the Smiths, consented, there might be judgment declaring a lien in plaintiff's favour against them for amounts claimed and costs and sale on default in the usual terms.

Leech, for plaintiff. *Howard* and *Johnson*, for defendant Lister. *F. S. Andrews*, for the Smiths.

Bain, J.] CADVILLE *v.* FRASER. [July 11.

Fraudulent preference—Assignments Act, R.S.M. c. 7, ss. 33, 34—63 & 64 Vict. (M.), c. 3, s. 1—Following proceeds of property sold by fraudulent transferee—Pressure.

Under s. 33 of "The Assignments Act," R.S.M. c. 7, as amended by 63 & 64 Vict., c. 3, s. 1, a chattel mortgage taken from an insolvent debtor within sixty days before an action is brought to set it aside may be declared null and void as against an execution creditor although it was obtained by pressure on the part of the mortgagee and given by the mortgagor without any intent to prefer the mortgagee to his other creditors: *Webster* v. *Crickmore*, 25 A.R. 97, followed.

The mortgagee in this case had sold the mortgaged chattels and realized the proceeds before the commencement of the action.

Held, that, under s. 34 of the Act, such proceeds might be followed and realized upon by an execution creditor to the same extent as the mortgaged goods might have been had they not been sold, and the defendant was ordered to pay the proceeds into court for distribution amongst execution creditors in accordance with Rule 695 of "The King's Bench Act."

Union Bank v. *Barbour*, 12 M.R. 166, not followed, as the attention of Taylor, C.J., who decided that case, had evidently not been called to the provisions of s. 34.

Further directions and subsequent costs resumed. Defendant to pay the costs of the action.

Howell, K.C., and *Mathers*, for plaintiff. *Macdonald*, K.C., and *Haggart*, K.C., for defendant.

Province of British Columbia.

SUPREME COURT.

Drake, J.] OSLER *v.* MOORE. [May 30.

Broker—Introduction of purchaser—Subsequent sale through other agent—Commission.

Action for commission on sale of mineral claims. Defendant instructed plaintiff, a broker, to find a purchaser for defendant's mineral claims. Plaintiff introduced a purchaser who took an option, paid deposit, but failed to complete purchase. Subsequently same purchaser renewed negotiations through another agent and the sale was completed on a different basis, the defendant giving credit for the deposit previously paid and the remainder of the purchase money was paid in shares. *Held*, that plaintiff was entitled to his commission and according to the custom (proved at the trial) where purchase consideration is paid partly in cash and partly in shares or entirely in shares, the broker takes his commission in shares and cash, as the case might be, at the rate of ten per cent.

R. M. Macdonald, for plaintiff. *W. A. Macdonald*, K. C., for defendant.

Martin, J.] [June 1.

CENTRE STAR MINING CO., *et al v.* B. C. SOUTHERN RAILWAY CO., *et al.*

Water Clauses Consolidation Act—Water record—Joint application for—Whether good—Purposes for which water required—Duty of Gold Commissioner.

Mine owners in their notice of application to the Gold Commissioner for wat[illegible]rds included in their notice among the purposes for which the water was required, a purpose not authorized by sec. 10 of the Act, *i.e.*, "domestic and fire purposes." At the hearing before the Gold Commissioner applicants requested him to deal with the application as one for mining purposes only, but he refused the request and dismissed the application.

On appeal MARTIN, J., held that the Gold Commissioner was not justified merely on this ground in refusing to exercise his powers, and he referred the matter back for re-hearing. *Held*, also, that water records under Part II., of the Water Clauses Consolidation Act, may be held jointly.

Quaere, whether a supply of water for fire purposes would be necessary as being directly connected with the working of a mine or incidental thereto.

Galt, for the appellants. *Davis*, K.C., (*W. S. Deacon*, with him), for respondents. *Abbott*, for the City of Rossland, the holder of a prior record.

Full Court.] HICKINGBOTTOM *v.* JORDAN. [June 19.

County Court—Practice—Notice of trial—Power of judge to abridge.

Appeal from the order of P. McL. FORIN, Deputy Judge of the County Court of Kootenay, whereby he changed the day for the trial of the action from June 20th (the day fixed by the registrar of the court and notice whereof was duly given to the appellant), and appointed June 1st.

Held, allowing the appeal, that a County Court Judge has no jurisdiction to abridge the six clear days' notice of trial required to be given by section 92 of the County Courts Act.

Duff, K.C., for the appeal. *A. E. McPhillips*, K.C., contra.

Martin, J.] COOKSLEY *v.* NAKASHIBA. July 17.

Summary Convictions Act—Appeal—Case stated—Transmitting case to district registry.

Appeal by way of case stated under the Summary Convictions Act. The appellant had not filed the case in the proper district registry (New Westminister) as provided by sec. 86 of the Act, but he did, according to leave obtained from MARTIN, J., file the case in the Vancouver Registry.

Held, by MARTIN, J., when the appeal came on for hearing, that the transmission of the case to the proper registry as required by sec. 86 is a condition precedent to the jurisdiction conferred by secs. 90 and 92, and since that provision of sec. 86 had not been complied with, he could not entertain the appeal. *Morgan* v. *Edwards* (1860), 29 L. J., M. C. 108, followed.

Russell, for the appeal. *Wilson*, K.C., and *Bloomfield*, for respondent.

Martin, J.] BENTLEY, *et al v.* BOTSFORD AND MACQUILLAN. [July 30.

Mining law—Certificate of improvements—Application for by co-owner.

This was an action purporting to be brought as an adverse action under sec. 37 of the Mineral Act. The plaintiffs were the owner of three-eighths of the claim in question, and the defendants, the owners of the remaining five-eighths thereof, were applying for a certificate of improvements, and the plaintiffs contended that the general effect of secs. 36 and 37 of the Mineral Act was that all the interests must be represented in the application for a certificate of improvements.

Held, by MARTIN, J., giving judgment in favour of the defendants that a part owner of a mineral claim might apply for a certificate of improvements under sec. 36 of the Mineral Act.

Martin, K.C., and *E. J. Deacon*, for plaintiffs. *Sir C. H. Tupper*, K.C., *Peters*, K.C., and *Duncan*, for defendants.

Book Reviews.

Canadian Company Law: A Treatise on the Law of Joint Stock Companies in Canada. By C. A. MASTEN, B. A., assisted by W. R. P. PARKER, B.A., LL.B., of Osgoode Hall, Barristers-at-law. Toronto: Canada Law Book Co. 1901. 840 pages.

This work gives the text of the Dominion, Ontario, Quebec and British Columbia Companies and Winding-up Acts, with annotations and references to the Acts of Nova Scotia, Manitoba, New Brunswick, Prince Edward Island, and the Ordinances of the North-West Territories and of the Imperial Companies Acts.

The desire of the author was to endeavour to group together the law of the Dominion and the various provinces so as to give a bird's-eye-view of the whole, taking the Ontario Act as the basis. The annotations are almost entirely confined to that Act and to the Dominion Winding-up Act.

The task which the author set himself was such a difficult one that we can scarcely say that he has been entirely successful. Complete success was not, perhaps, to be expected. The construction of the book is not scientific, and there is a want of clearness in the arrangement of the material. It is nevertheless a valuable addition to the lawyer's library, and a good index overcomes much that is defective in construction and arrangement. Its value largely consists in giving to the reader a collection of the Canadian authorities on company law, with appropriate references to English cases. This collection seems to be accurate and complete. Procedure for incorporation is dealt with at considerable length, and the necessary information to that end is given separately for each of the various Provinces.

Another useful feature of the book is the multitudinous forms contained therein, and a full and separate index to them makes them easily accessible. The printing and type are excellent.

Flotsam and Local Items.

The following Judges have been appointed to the Superior Court of the Province of Quebec: Albert Rochon, of the City of Hull, K.C., with residence at Ottawa; Norman William Trenholme, of the City of Montreal, K.C., with residence in Montreal; Odilon Desmarais, of the City of Montreal, K.C., with residence at Three Rivers.

CUMULATIVE ARGUMENTS.—A story is told of an Illinois attorney who argued to the Court one after another of a series of very weak points, none of which seemed to the Court to have any merit, until the Court finally said: "Mr. ———, do you think there is anything in these points?" to which the attorney answered: "Well, Judge, perhaps there isn't much in any one of them alone, but I didn't know but Your Honor would kind of bunch 'em."—*Ex.*

UNITED STATES DECISIONS.

LABOR UNIONS.—An injunction against threats by a labor union upon employers for the purpose of making them induce employees who had withdrawn from the union and become members of another to rejoin the former is upheld in *Plant* v. *Woods* (Mass.) 51 L.R.A. 339, although no actual violence was shewn.

PHYSICIAN AND PATIENT.—The right of a physician to determine in the first instance how often he ought to visit a patient and to his compensation for visits, if the party accepts his services without telling him to come less frequently, is sustained in *Ebner* v. *Mackey* (Ill.) 51 L.R.A. 298, and there is a note to the case on the question of a physician's right to determine the frequency of such visits.

SUNDAY OBSERVANCE.—The work of a barber is held, in *Ex parte Kennedy* (Tex.) 51 L.R.A. 270, not to be a work of necessity within the meaning of an exception to the Penal Code forbidding Sunday labour.

WATERCOURSE.—Water intermingling with the ground or flowing through it by filtration or percolation or by chemical attraction, being but a component part of the earth, is held, in *Willow Creek Irrigation Co.* v. *Michaelsen* (Utah) 51 L.R.A. 280, to have no characteristic of ownership distinct from the land itself and to be excluded from rules of law applying to the appropriation of surface waters.

ALIMONY.—A decree for alimony is held, in *Barclay* v. *Barclay* (Ill.) 51 L.R.A. 351, to be a penalty for failure to perform a duty, and not a debt which can be proved and discharged in bankruptcy proceedings.

RAILWAY NEGLIGENCE.—The killing at a railway station of a man awaiting the arrival of a relative by train, in consequence of the negligence of the railroad company in leaving a baggage truck where it turned a little as the train passed and was struck by one of the cars, which hurled it against the man standing there, is held, in *Denver & R. G. R. Co.* v. *Spencer* (Colo.) 51 L.R.A. 121, to make the railroad company liable for his death.

COMPENSATION.—The establishment of a smallpox hospital, depreciating the value of neighboring real estate, is held, in *Frazer* v. *Chicago* (Ill.) 51 L.R.A. 306, not to constitute a taking or damaging of such property within the constitutional provision requiring compensation.

NEGLIGENCE.—The mere presumption of negligence arising from the infliction of a personal injury by dropping a brick from a building in the course of construction is held, in *Wolf* v. *Downey* (N.Y.) 51 L.R.A. 241, not to be sufficient to charge the contractor for either the carpenter or the mason work, in the absence of proof to shew from what part of the building

the brick came or who set it in motion, where numerous employees of several other independent contractors were at the time at work upon the building.

COPYRIGHT.—The common-law right of an author to his unpublished manuscript was held in *Press Pub. Co.* v. *Monroe* (C. C. App. 2d C.) 51 L.R.A. 353, not to be abrogated by the copyright acts of Congress. This case has an extensive note on common-law rights of authors and others in intellectual productions.

NEGLIGENCE.—The roadmaster of a railroad company directing the work of tearing away a portion of a bridge is held in *O'Neil* v. *Great Northern R. Co.* (Minn.) 51 L.R.A. 532, not to be the vice principal of the employer to the extent that his omission to give a particular warning of a detail thereof which portends danger would render the master liable for his omission in that respect.

ACCRETIONS.—The re-formation of land that has been washed away by subsequent accretions which extend to the shore line, past the boundary line of the tract as originally granted, which was separated by intervening land from the water, is held in *Ocean City Asso.* v. *Shriver* (N.J.) 51 L.R.A. 425, to give the newly made land to those who would have been the owners if it had not been washed away. There is a note to this case on the right to follow accretions across division lines previously submerged by the action of the water.

WILL.—An attestation and subscription of a will in the presence of the testator is held in *Re Cunningham* (Minn.) 51 L.R.A. 642, to be made where the witnesses stepped through a doorway into the adjoining room, affixed their signatures at a table about ten feet from the testator, though just out of his sight, but while he was seated on the side of his bed and could have seen them by stepping forward two or three feet.

BILLS AND NOTES.—The addition by the payee, after delivery of a note to him of a name of another person as co-maker, is held in *Brown* v. *Johnson* (Ala.) 51 L.R.A. 403, to constitute such an alteration of the instrument as will relieve the maker.

STREET CARS.—A person seeking passage on an electric street car, who signals the car to stop, and then attempts to cross the track to get on the proper side for boarding the car, and is struck by it, is held in *Walker* v. *St. Paul City R. Co.* (Minn.) 51 L.R.A. 632, not to be guilty of negligence as matter of law, but to have a right to assume that proper signals will be regarded.

COMMON CARRIER.—A common carrier after acceptance of freight for shipment from a place within the state to a place without is held in *Baldwin* v. *Great Northern R. Co.* (Minn.) 51 L.R.A. 640, to be entitled to transport the property, without interference by garnishment in a suit by a third person against the owner of the goods.