

of landlord and tenant, there was a duty imposed on the defendants to repair the defect in the drain on receiving notice of it.

III. But as there was no express contract, so it is well settled that none can be implied by law, on the part of the defendants, to keep the leased premises in repair. *Smith's L. & T.* (ed. of 1856) 262; *Taylor's L. & T.* (6th ed.), secs. 327-331; *Woodfall's L. & T.* (10th ed.) 493; *Howard v. Doolittle*, 3 Duer 464; *Alston v. Grant*, 3 Bl. & Bl. 127; *Leavitt v. Fletcher*, 10 Allen 121; *Elliott v. Aiken*, 45 N. H. 36; *Brewster v. DeFremery*, 33 Cal. 341; *Doupe v. Genin*, 45 N. Y. 119.

In *Brewster v. DeFremery*, the plaintiff's intestate was lessee of the defendant: in consequence of excavations by an adjoining owner, a wall upon the leased premises became insecure: the defendant was notified to protect it, but did nothing, and the wall fell and killed the intestate and injured his property. In *Doupe v. Genin*, the roof upon the leased premises was burned: rain came, and ran through the rooms of other tenants of the defendant down to the rooms occupied by the plaintiff, and did damage. In each case it was held that there was no liability on the part of the landlord.

But if a landlord knows of a defect and conceals it from his tenant, he is liable for the consequences. *Taylor's L. & T.* (6th ed.) 294, note; 1 Pars. on Cont. (6th ed.) 501. Ordinarily, the tenant is not exempted from the payment of rent by proof that the premises were or have become unfit for occupation—*Howard v. Doolittle*, 3 Duer 464; but where the lessor was guilty of acts that precluded the lessee from a beneficial enjoyment of the premises, in consequence of which he abandoned the possession before the rent became due, it was held that this was a virtual expulsion, and that the lessor's action for the recovery of the rent was barred. *Dyett v. Pendleton*, 8 Cow. 728; *Edgerton v. Page*, 20 N. Y. 283; *Royce v. Guggenheim*, 106 Mass. 201.

For the purpose previously stated of determining whether the defendants were actually in fault in the construction of the drain, or for not repairing it, there must be

*A new trial.*

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#### STATE v. HUNT.

When a person dies after he has been chosen a county officer, though before the votes are counted, the court has authority to declare the office vacant and to fill the vacancy.

INFORMATION in the nature of a *quo warranto*, filed by the attorney-general at the relation of Daniel W. Lane against Nathan P. Hunt, alleging in substance that the returns of votes given in the several towns in the county of Hillsborough, at the annual election in March,

1874, for the office of county treasurer for the ensuing political year, were made out, signed, certified, sealed, directed, and transmitted to the clerk of the supreme court for said county, as required by law; that the said court, at the next stated term after the second Tuesday of March, 1874, to wit, at the term thereof holden at Amherst on the first Tuesday of May, 1874, examined said returns of votes, and recorded and counted the same, and it appearing that one Nathan Hutchinson had received the highest number of votes for said office, he was declared to have been duly elected county treasurer for the ensuing political year, and it further appearing that the said Hutchinson had deceased after said second Tuesday of March and before said first Tuesday of May, the court declared the office vacant, and appointed the said Lane a commissioner to perform the duties of the office, agreeably to the statute in such case made and provided; that said Lane has duly filed his bond and oath of office; that said bond has been approved by the county commissioners for said county; that said Lane has demanded of Nathan P. Hunt, who was duly elected and qualified as county treasurer for the political year 1873, to deliver over to him the books, papers, and funds in his hands as county treasurer,—but the said Hunt has refused and still refuses so to do, and claims that, by reason of the death of said Hutchinson before the examination of the record and returns of votes by the court, there was no such vacancy in said office as authorized said court to appoint a commissioner, and the said Hunt is entitled to exercise the duties of said office for the ensuing political year; that said Lane is by law alone authorized to perform the duties of said office, and entitled to the sole care, custody, and control of the books, papers, and funds of the said county, all which the said Hunt, during all the time aforesaid, has usurped, and still does usurp, to the great damage and prejudice of the state;—wherefore the attorney-general prays advice of the court in the premises, and due process of law against the said Hunt in this behalf, to be made to answer to the said state by what warrant he claims to have and use the liberties and privileges aforesaid, and to perform the duties of said office. To this information there was a demurrer, which was joined.

*Morrison, Stanley & Hiland*, for the state.

*Hunt, pro se.*

HIBBARD, J. Chapter 23 of the General Statutes provides, in sec. 1, for the choice of county officers; in sec. 5, for the counting of the votes by the supreme court; in sec. 7, that “if any person chosen or appointed to either of said offices declines to accept, removes from the county, resigns, dies, or becomes insane, or when there is manifest hazard to the public interest, said court may declare the office vacant;” and in sec. 8, that “in any case of vacancy the supreme court shall appoint a commissioner to perform the duties of the office, who shall be subject to the requirements and liabilities, and entitled to the privi-

leges and emoluments of such office during the vacancy;" and we are all clearly of the opinion that Mr. Hutchinson was "chosen" county treasurer at the annual election in March, 1874; that, by reason of his death after he was chosen, the court had authority to "declare the office vacant;" that the appointment of Mr. Lane to fill the vacancy was valid; and that he is authorized "to perform the duties" "and entitled to the privileges" of the office.

*Demurrer overruled.*

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PIERCE v. HILLSBOROUGH COUNTY.

A complainant who causes a prosecution for a violation of the law prohibiting the sale of spirituous liquor to be carried on, wholly or partly, on the testimony of witnesses produced at the expense of the county, is not entitled to half of the fine which may be imposed.

ASSUMPSIT, by Henry D. Pierce against the county of Hillsborough, to recover one half of certain fines received by the county of O. P. Greenleaf and J. H. Lovering for violations of the law prohibiting the sale of spirituous liquor. The plaintiff claimed to recover one half of the fines imposed on Greenleaf and Lovering for keeping for sale as hereinafter mentioned. The case was tried upon the general issue. There was no conflict in the evidence so far as it tended to show that, at the January term, 1873, Greenleaf was indicted for selling to one Forsaith, and also for keeping for sale; that Lovering was indicted for keeping for sale (the indictment alleging a conviction for a prior offence); that both pleaded *nolo con.*; that Greenleaf was fined \$50 on each of his two indictments; that Lovering (for second offence) was fined \$100; that the county received the three fines; that the plaintiff received from the county one half of Greenleaf's fine for the sale to Forsaith, but the county refused to pay him one half of the other two fines; that before the January term, 1873, the plaintiff had made complaint to the solicitor against Greenleaf and Lovering, and given him the names of witnesses to be summoned against them before the grand jury; that the solicitor, at the plaintiff's request, caused said witnesses to be summoned in the manner in which witnesses are usually summoned by the public prosecuting officers,—by a subpoena, indorsed by the solicitor; that the plaintiff summoned and paid said Forsaith and other witnesses (not summoned by the solicitor); that the solicitor and the witnesses summoned by him at the plaintiff's request, and the plaintiff and the witnesses summoned by him, went before the grand jury together; that the plaintiff there made complaint against Greenleaf and Lovering; that the solicitor there objected to the plaintiff's being regarded as the complainant entitled to half the fines on indictments that might be found