

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*.