

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 tenant's 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).