

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. Blagrove*, (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.