

(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 Shrewsbury's Case*, 5 Coke 13, a; Croke. El. 777.