

any of them with reference to a covenant in the lease. But at all events the point was never directly taken, that the action would not lie unless there was such a covenant; and this circumstance, although merely negative and therefore not to be pressed too strongly, may not unreasonably be deemed to indicate that the view commonly held by the profession was that the landlord's right of recovery on this ground was not limited to cases on which the tenant had expressly undertaken to do repairs. In the language of the courts, so far as it has come down to us, there is absolutely no intimation that the existence or absence of a covenant was regarded as a differentiating factor (*b*). A similar conclusion is suggested by the only reported expression of judicial opinion on the point in the eighteenth century (*c*). An additional body of authority on the same side is also obtainable from the dicta of eminent judges during the last hundred years (*d*).

(*b*) In *Coke Litt.* 53, *a*, it is laid down in perfectly general terms that the burning of a house by negligence or mischance is permissive waste, and that the tenant must rebuild. (See comment on *Rook v. Worth* in the next note.)

In *Darcy v. Ashwith* (1618) Hob. 234, it was declared that, if a tenant built a new house and failed to keep it in repair, an action of waste lay against him.

In *Weymouth v. Gilbert*, 2 Roll. Abr. p. 816, l. 40, it was held that waste lies against a tenant for years for allowing a room to fall with decay for lack of plaster.

In 3 Dyer 281, E., a case is cited in which the lease provided that the lessor might re-enter if the lessee *did* any waste on the premises, and it was held that the lessor might re-enter for the permissive waste of the lessee in *suffering* the house to fall for want of repairs.

In *Griffith's Case* (1564) Moore 69, a lessee was held to be liable for waste in allowing the banks of a river to fall into disrepair, so that the waters overflowed the land.

That a tenant is liable for waste in allowing a sea-wall to become ruinous was held in Moore (1564) 62, Case 173; *Ibid* (1564) 73, Case 200; S.C. Owen 206.

See also 22 Vin. Abr. Waste "c" and "d" p. 436-440, 443; 5 Com. Dig. Waste d 2, d 4.

(*c*) In *Rook v. Worth* (1750) 1 Ves. Sr. 460, Lord Hardwicke said, arguendo: "As between landlord and tenant for years, though there is no covenant to repair or rebuild, he is subject to waste in general, and if the house be burnt by fire, he must rebuild." This remark must be taken subject to the limitation, that, if the fire was accidental, the tenant would be saved from liability by the Statute of 6 Anne ch. 31; but, for our present purposes, this circumstance is immaterial.

(*d*) In *Harnett v. Mailland* (1847) 16 M. & W. 257, reference was made (with apparent approval, though no positive opinion was expressed) to the notes to *Greene v. Cole*, 2 Saund. 252, where it is stated that by the Statute of Gloucester, 6 Edw. 1, ch. 5, an action for permissive waste (which did not lie at common law against them) was given against a lessee for life or years or their assignee. That the insertion or omission of a covenant was material was not suggested.

In *Yellowley v. Gower* (1855) 11 Exch. 274, a considered judgment, there was said by Parke, B. (p. 294), to be no doubt of this liability, as tenants for terms of years are clearly put on the same footing as tenants for life, both as to voluntary and permissive waste, by Lord Coke, 1 Inst. 53. There seems to be no warrant for saying that this very eminent judge regarded a covenant as being of any