the action of waste proper can only be brought by him who has the *immediate* reversion or remainder in fee or tail, Co. Litt. 53 a, see Paget's case, 5 Rep. 76 b. Moreover it was found difficult and inconvenient to recover seisin of the land under such an action, and if the term had expired and the lessor obtained possession of the premises, he could only recover damages for the waste, and besides in the action on the case the plaintiff succeeding recovers costs. It is held too that though there be a covenant not to commit waste,[3] the lessor has his election to bring either an action on the case or of covenant against the lessee for waste done by him during the term, Marker v. Kendrick, 13 C. B. 188; Green v. Cole, *supra*, which see for an account of the action.

**Permissive waste.**—The same authority also lays it down, that it has become the usual action for *permissive* as well as *voluntary* waste, and gives a precedent of a declaration for the case of permissive waste against a tenant for years. It has, however, been held in England, that an action on the case for permissive waste cannot be maintained against a tenant for years in the absence of express stipulation, Gibson v. Wells, 1 N. R. 290; Herne v. Benbow, 4 Taunt. 704; Jones v. Hill, 7 Taunt. 392; but these cases were overruled in Yellowly v. Gower, 11 Exch. 274. The doctrine is doubted in 4 Kent Comm. 79, and the above cited decisions are much criticised by Mr. Pinkney in White v. Wagner, 4 H. & J. 373, and Johnson J. in that case delivered his opinion to the contrary. But it seems clear that where a declaration alleges voluntary waste only, the plaintiff cannot recover for permisssive waste, Martin v. Gilham, 7 A. & E. 540.[4]

[3] A covenant by a tenant not to commit waste is not, with regard to the measure of damages for its breach, the same thing as a covenant to deliver up the property at the end of the term in the same state as that in which the tenant received it. Therefore in an action for waste by the reversioner against the tenant the measure of damages is not necessarily the sum which it would cost to restore the property to its condition before the waste; the true measure of damages is the dimunition in value of the reversion less a discount for immediate payment. Whitham v. Kershaw, 16 Q. B. D. 613.

[4] The liability of tenants for permissive waste seems to be still unsettled in England. In Woodhouse v. Walker, 5 Q. B. D. 404, it was held that, where premises were devised for life provided that tenant should keep the same in repair and tenant enjoyed same and at her death left them out of repair, an action for permissive waste would have lain against her in her life time at common law and it survived against her executors under 3 & 4 W. 4 c. 42. The opinion in this case refers to the conflict of decisions on this question and seems to recognize the authority of Yellowly v. Gower, *supra*. Moreover Yellowly v. Gower was followed in Davies v. Davies, 38 Ch. D. 499, which expressly holds that a tenant for years is liable for permissive waste.

But in the case of *In re* Cartwright, 41 Ch. D. 532, it was held that a tenant for life is not liable for permissive waste, the Court (Kay, J.) saying: "At the present day it would require either an Act of Parliament, or a very deliberate decision of a court of great authority to establish the law that a tenant for life is liable to the remainderman in case he should have