

of equity would formerly have declined to give any positive assistance towards the enforcement of their rights. Such a principle involves such far-reaching consequences that we may well pause before taking its correctness for granted, even upon the authority of the two very eminent judges by whom it has been thus applied. Another possible objection to their view may also be suggested. For the purposes of their argument, they assume that the right of action existed before the Judicature Act was passed. It seems to follow, therefore, that, as this right was created by the legislature, their decision resolves itself ultimately into the proposition that the earlier statutes have been abrogated *pro tanto* by the general provision regarding the conflict between the rules of law and equity. Supposing this to be a correct statement of the logical situation, it is difficult to admit that the learned judges have not carried the doctrine of repeal by implication further than the analogies of statutory construction will warrant.

In two still more recent cases, also, the position is taken that the existence or absence of an express covenant to repair is a controlling factor (*k*).

In the earlier editions of his treatise on Torts, Sir Frederick Pollock regarded the liability of a termor for permissive waste, in a case where there is no covenant, as being a doubtful point; but in the later editions it is laid down in unqualified language that there is no such liability except where there is an express covenant to repair. This distinguished writer, therefore, considers that the question is virtually settled in this sense; and such also seems to be the prevailing view in Ontario (*l*). In the second of the two cases cited below, Chancellor Boyd deemed it unnecessary to "delve into the ancient law" of the subject with a view to impeaching the opinion of Kay in *Avis v. Newman* (*m*). But,

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(*k*) *Freke v. Calmady* (C.A. 1886) 32 Ch.D. 408; *Avis v. Newman* (1889) 41 Ch.D. 532, per Kay, J. For some remarks on this case see *infra*.

As tending somewhat in the same direction, though not actually in point, we may also refer to *Leigh v. Dickeson* (1884) 15 Q.B.D., (C.A.) 60 affirming 12 Q.B.D. 194, holding that, in the absence of an express contract, one tenant in common of a house who expends money in ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his cotenant for contribution. Such a payment is treated as voluntary.

(*l*) *Wolfe v. Macguire* (1896) 28 Ont. R. 45 [a case of a yearly tenant, but the language of the court is quite general]. *Patterson v. Central &c. L. Co.* (1898) 29 Ont. R. 134.

(*m*) (1889) 41 Ch.D. 532.