

lessor for about five months, but instead thereof he served his notice of re-entry, at which time the lessee tendered all the rent then due, but the lessor would not accept it, and where the lessee brings into court all arrears of rent due under the lease.

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ANNOTATION ON THE ABOVE CASE AS TO FORFEITURE OF LEASE
AND WAIVER.

Where a forfeiture has been incurred, it is in the option of the landlord whether he will take advantage of it or not, even where, under a proviso, the lease is declared to be wholly void. In such a case the lease does not become void on breach of the covenant or condition, but only voidable, and the landlord may enforce the forfeiture or he may waive it, either expressly or by implication from his acts. Any act by which he recognizes the tenancy as still subsisting after the breach which gives rise to the forfeiture comes to his knowledge, amounts to a waiver, or is evidence from which an intention to waive the forfeiture may be inferred: *Roe v. Harrison* (1788), 2 T.R. 425, 1 R.R. 513; *Evans v. Wyatt* (1880), 43 L.T. 176. But actual knowledge of the breach is necessary before any act can amount to a waiver, and constructive notice, or means of knowledge is insufficient: *Ewart v. Fryer* (1900), 17 Times L.R. 145, 82 L.T. 415.

If, however, the lessor does nothing, and is merely aware that a breach of a covenant has been committed, he is not thereby disentitled to claim a forfeiture, as mere knowledge, without any positive assent, is not sufficient to constitute a waiver: *Doe v. Allen* (1810), 3 Taunt. 7, 12 R.R. 597. Mere knowledge or acquiescence in an act constituting a forfeiture, does not amount to a waiver; there must be some positive act of waiver, such as a receipt of rent: *McLaren v. Kerr* (1878), 39 U.C.R. 507. It would seem to be no waiver of the breach of a covenant not to dig beyond a prescribed depth, that the landlord, though aware of such breach, and threatening to take proceedings in consequence, did not take any steps at the time, but allowed the tenant to remain in possession until his subsequent insolvency: *Kerr v. Hastings* (1875), 25 U.C.C.P. 429.

If a person entitled to the reversion, knowing that a forfeiture has been incurred by breach of the covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at the later period, he thereby waives the forfeiture: *Dendy v. Nicholl* (1858), 27 L.J.C.P. 220, 4 C.B.N.S. 376; *Penton v. Barnett*, [1898] 1 Q.B. 276. A right of entry, for breach of covenant in a lease, is waived by the lessor bringing an action for rent accrued due subsequent to the breach: *Ibid.* A forfeiture is waived where the landlord expressly declares to the tenant that he will not enforce it: *Ward v. Day* (1864), 5 B. & S. 359. So, if he agrees to grant a new lease to the tenant on the expiration of the old one: *Ibid.*; or if he notifies the tenant to do repairs under the lease: *Griffin v. Tomkins* (1880), 42 L.T. 359. So, where the landlord accepts rent from the lessee which became due after the forfeiture was incurred, it amounts to a waiver: *Doe*