

declaration that the contract was at an end, and to cancel Kilmer's application to register it in the Land Titles Office. Kilmer counterclaimed for relief against the forfeiture and also for specific performance of the contract, and this relief was given at the trial and the Judicial Committee of the Privy Council affirmed the judgment. It may be remarked that, by reason of his few days default in payment of the second instalment, Kilmer was, according to the company's contention, liable to lose \$25,000, i.e., judging by the price obtained on the resale by the company. This decision has been thought to have a wider operation than it was intended to have. A condition making time of the essence of a contract is one thing, and a condition creating a forfeiture is another, and though sometimes they are blended they are nevertheless perfectly distinct things. While relief may be given against a forfeiture of money, it does not at all follow that the relief of specific performance should also be given to the defaulter, and it was because both these forms of relief were given in the Kilmer case, that the difficulty has apparently arisen in appreciating the proper effect of the decision. The material point in that case was that the stipulation as to time had been waived by the act of the vendors in extending the time for payment of the second instalment in arrear, and although the payment was not made, even within the extended time, the vendors having waived the condition as to that instalment, were held to be no longer in a position to insist on it as a bar to the claim for specific performance, even *quoad* that instalment. At all events, the contract had to be dealt with, and the equitable rights of the parties had to be adjudicated, as if it did not in fact exist. Putting the decision on that basis it is plain that it does not really conflict with the well settled principles of equity, that where time is made of the essence of the contract, in case of default of fulfilling the terms of the contract within the time limited, specific performance will not be decreed. It affirms a self-evident proposition that a condition as to time being of the essence of the contract may be waived like any other condition which is made a term of a contract, but it perhaps may be said to make new law where it affirms that once waived as by an extension of time it can