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THE KING v. *THE ROYAL BANK.*

The strictures of Mr. J. S. Ewart, K.C., on the decision of the Judicial Committee of the Privy Council in the above case which appeared in a recent number of a legal contemporary do not appear to be well founded.

Where a critic of the decisions of the Highest Court of the Empire feels compelled to confine his criticism to a mere technical view of the case, one may rest assured that it is because he can find no fault with the substantial justice of the decision—such we think is the result of Mr. Ewart's criticism. Technically and as a matter of law he thinks the decision is at fault, but as a matter of substantial justice there is no fault to be found with it. We entirely agree with Mr. Ewart in so far as he finds no fault in the justice of the decision, and as regards his legal and technical objections, we are inclined to think his arguments have the singular merit of shewing that they are without any reasonable foundation.

Looking at the matter from the point of view of abstract justice and right, the merits of the decision are manifest. It is merely the giving effect to a well established principle of the Common Law which we cannot express better than in the Lord Chancellor's own words, viz.:—

"That where money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use."

Let us recall the facts. A company was empowered by the Provincial Legislature of Alberta to build a railway within the province, and, for the purpose of providing funds for the under-

taking, it was authorised to issue bonds which were to be a charge on the undertaking, and were also to be guaranteed by the Provincial Government. The money required was raised by the sale of bonds in England, and the money finally found its way to the Royal Bank, whose head office is in Montreal. This was apparently effected in the usual way such transactions are effected, if not by the transmission of so much gold from England to Montreal, but by the usual method of bankers in one place giving credit to bankers in other places; thus the money appears to have been credited to a New York firm, and then by the New York firm credited to the Royal Bank in Montreal. This bank had a branch in Alberta, and without any money being actually transmitted the branch was authorised by the head office to credit the amount of the deposit to the Provincial Government; to be applied, of course, in accordance with the provisions of the Act, under which the money had been borrowed. This would, in substance, be that, as the work of the building of the road progressed, the money raised by the sale of the bonds would be applied in payment for its construction, and the bondholders would thus have acquired a mortgage on the undertaking as it progressed, together with the guarantee of the Provincial Government as a security for the payment of the bonds.

For some reason or other the railway company was unable to proceed with the undertaking and made default in payment of the interest on the bonds, whereupon an Act of the Provincial Legislature was passed practically confiscating the interest of the railway company in the proceeds of the bonds, and vesting the whole of the money in the province, which assumed full liability for the payment of the bonds.

It must be admitted that the Act in question was a very extraordinary and unusual piece of legislation. It took from the bondholders part of the security on which their money was advanced, namely a constructed railway, and required them to be content with the liability of the province alone; surely a very high handed proceeding, and one hard to be defended on any

ethical principle, and, on the contrary, having the appearance of a flagrant breach of faith, and giving rise as the Judicial Committee of the Privy Council held, to an equitable right to the bondholders to demand back their money. The Judicial Committee have held that this equitable right of the bondholders cannot, in the circumstances of the case, be confiscated by the Provincial Legislature, and in so doing, as must be apparent to every dispassionate observer, substantial justice has been done.

But of course the doing of substantial justice is not technically justifiable if it is done at the expense of a violation of positive law. Where the law requires substantial injustice to be perpetrated the remedy has to be found in legislation and not by judicial decisions, though we are afraid that this rule may sometimes be found to have been evaded.

We will therefore proceed to consider the matter from its strictly legal aspect. Even though the Act was an apparent violation of natural justice, was it nevertheless within the power of the Provincial Legislature?

It is assumed by Mr. Ewart that the property with which the Provincial Legislature dealt was property within the province, because, as we have said, the money was on deposit in a branch of the Royal Bank in Alberta, but Mr. Ewart is too excellent a lawyer not to know that a deposit of money in a bank, does not mean that so much specific money belonging to the depositor is in the vaults of the bank, but, on the contrary, is nothing more than a mere debt or chose in action; and a mere debt or chose in action though a valuable piece of property in its way, is nevertheless something that exists in the realm of fancy, you cannot see a debt, or handle a chose in action; they are legal abstractions, valuable it is true, but having no corporal existence, So far as they have a locus, it must be in the person of the debtor and in the case of a corporation at its head office; though for the purposes of business the corporation may treat it as existing in any of its branch offices if it choose. In the present case the head office of the bank was at Montreal, and that was the locus of the debt, though quite possibly the bank might have been sued

for it within the province, and probably service of a writ upon its local manager would have been effective service sufficient to authorise a recovery of judgment in the Provincial court against the bank; but that circumstance cannot alter the locus of the debt which, as Lord Robson observed in *Rex* v. *Lovitt*, 1912, A.C., p. 218, quoting Lord Field in *Commissioner of Stamps* v. *Hope* (1891), A.C. 476, is the residence of the debt.

In that case, however, the Judicial Committee held that money deposited in a branch of the bank of British North America in New Brunswick, the head office of which bank is in England, was (for the purposes of a Succession Duty Act) properly situate within the province and as such liable to Provincial taxation.

But the case of *Rex* v. *Lovitt*, though apparently an authority for saying that the money in question in this case was within the Province of Alberta is really quite distinguishable. The money, though to the credit of the Provincial Government, was really, until the conditions on which the bonds were bought were carried out, subject to the equitable right of the bondholders. They were no parties to the deposit in Alberta, as far as they were concerned, the Royal Bank at its head office was their debtor, and they were under no obligation to go to Alberta to recover the debt, as far as they were concerned, the locus of the debt to them was unquestionably not Alberta but Montreal, and what the Provincial Legislature in fact purported to do was to confiscate the rights of the bondholders in that debt whose locality was Montreal. This, as Mr. Ewart lucidly shews, is a kind of legislation which no Parliament can effectively indulge in. It is not merely a question of the construction of the B.N.A. Act and of the powers of a local legislature thereunder, it is really a question whether any Parliament could effectively pass such an Act? It might as well be said that if the money for the bonds had been deposited in the Bank of England, it could have been confiscated by the Province of Alberta; but even Mr. Ewart does not pretend that that could be validly

done. The money though nominally in Alberta was not in fact there, what in fact was the true substance of the matter was, that the Royal Bank in Montreal held money to which, in certain conditions, the railway company and the Provincial Government had right, but to which, until those conditions were performed, the bondholders had an equitable claim. The conditions being unperformed, the Provincial Legislature purported to confiscate the rights of the bondholders in the debt, although neither the bondholders nor their property were within the legislative jurisdiction of the province. It would be bad enough for a Provincial Legislature to confiscate the rights of persons subject to its jurisdiction, but to attempt to confiscate the rights of those who are not subject to its jurisdiction, is something which we are glad to find is not legally possible.

If the Province of Alberta desires effectively to confiscate the debt due by the Royal Bank to the bondholders, then the proper legislative forum would appear to be the Legislature of Quebec. It is not as Mr. Ewart suggests to be deduced from the decision in question that there is no legislative power to deal with the matter at all. The proper deduction is merely that the right forum has not dealt with it. Confiscatory legislation, if desired, must be sought in the place where the property to be confiscated is locally situate, and in the case of debts that locality appears to be the residence of the debtor, no legislature is competent to confiscate property situate in another jurisdiction.

So far from this being an unsatisfactory decision from a legal point of view, we think it is one to be highly commended as displaying, as usual, the sound sense and thorough grasp of legal principles by which the decisions of the Judicial Committee are uniformly characterised.

The decision of this case by the Judicial Committee is in fact one of the many evidences of the value of that tribunal to the overseas Dominions and it would be a sorry day for the Empire if they were deprived of it.

TRADE UNIONS IN POLITICS.

Some time ago we called attention to the power which a certain combination of trades unions in England was able to bring to bear upon the means of transportation, upon which depend not only the whole industries of the country, but the very food of those by whom they are carried on. A condition of things was imminent which one can hardly bear to contemplate; fortunately the danger was for the moment averted, but the power for mischief still exists, and may at any time be brought into play for causes as trivial as those which actuated it on the occasion referred to.

Only the other day an engine driver on the Great Northern Railway was suspended for not coming to his work at the proper time. Possibly his delay may have had serious consequences, but that is immaterial so far as he was concerned. He had been guilty of a breach of discipline, for which he was properly punished. But the authorities of the union, having it in their power to suspend the whole operation of the railway and all that depended on it, demanded his reinstatement, and the company yielded. Comment is needless.

In the strike which has been going on in Belgium we have seen such a combination dealing—not with questions of wages, or hours of labour—but with the very foundations of constitutional government. Yielding to the threat of the stoppage of all industry, we have seen a Government throwing down a carefully constructed, and wisely balanced system of representation, and substituting for it, at the bidding of the trades unions, universal suffrage pure and simple, based upon absolute equality of the voters. It may be that universal suffrage is the proper basis on which to rest a system of constitutional government, but that it should be adopted, not as the result of careful consideration by those qualified by education, training and experience to deal with such subjects, but simply at the dictation of a body deficient in all those qualifications, strong only in numbers, and led by men who can only hold their leadership by being ready to carry

out the vagaries of an irresponsible multitude—that such things have come to pass should indeed make every thoughtful man ask whither are we drifting?

It matters little how high or how low is the qualification of the voter, or what the form of government is, if such an irresponsible body as a combination of trades unions can at any time by the threat of paralyzing the industries of the country, which practically means starvation of poor and rich alike, compel the authorities, whoever they may be, to grant any demand which, in the opinion of the trades unions, may seem likely to serve their interests. For a long time trade unions were content to devote themselves to questions of economy, and to a great extent the sympathy of the public was with them. But now the Socialistic element, which has been struggling for a long time to gain the supremacy in the unions, has been gaining ground, and, as in the case in Belgium, has succeeded in bringing the powers of the unions to carry out their own projects, social and political. That they will be satisfied with the success they have so easily gained is not to be expected. Appetite grows with what it feeds upon, and it will not be long before the next victim will have a warning to prepare for demolition. What has been done in Belgium may be done, or at least attempted, elsewhere, so let not those who are concerned—and who are not?—be surprised if they find themselves the object of similar attacks.

The Belgic constitution thus rudely assailed is of a peculiar character, having no counterpart in any of those which have sprung from the parent British ideas. It is based upon the common sense principle that while all should have a voice who are capable of expressing it, those should rule who are capable of ruling, and who must, of course, prove their capacity by their actions. We copy from the *Times* a brief account of this remarkable franchise:—

"Under the constitution of 1831 it was confined to taxpayers, but in 1893-4, after a threatened general strike, it was extended to all males twenty-five years of age resident for one year in the same constituency. With this extension, however,

was combined a system of plural voting. Two votes are allowed to heads of families thirty-five years of age, and to other men possessing a certain property qualification, and three votes to men holding certain diplomas or other proofs of superior education. The electoral system was again revised in 1899, when proportional representation was introduced, but plural voting remained. The Socialists have constantly agitated against it, and in 1902 attempted another general strike, which failed. They demanded universal adult suffrage for all men and women twenty-one years of age."

In the month of June last a general election took place, resulting in a gain for the Centrid party over both Liberals and Socialists. Upon this the present agitation began, for which the most careful preparation had been made.

The issue in this contest is clear. On one side numbers only count; on the other, the elements of possession of property, of education, and the stability of family life, are represented. Some sort of compromise may perhaps be agreed upon, but the victory is with the Socialists, and has been gained by the skilful use of that most potent weapon—the strike.

AN ANCIENT LAWSUIT.

Among the claims against the United States Government which the International Tribunal now in session will be called on to adjudicate, is one that has been pending over a hundred years. It arose prior to the war of 1812, and though the justness of the claim has been on more than one occasion admitted by executive and judicial functionaries of the United States, and Presidential messages have been sent to Congress recommending its payment, yet for some reason or another the necessary appropriation to liquidate the demand has never been made by Congress.

The facts of the case are simple and have also a somewhat farcical element. A certain vessel named the Lord Nelson, belonging to British subjects, was plying her ordinary trade on

Lake Ontario when, on the 5th June, 1812 (before the declaration of war), it was seized by a United States officer and carried into Sackett's Harbour.

On the 26th August, 1812, the vessel was libeled at the suit of the United States Government, in the District Court of the District of New York, and an interim decree was made ordering the vessel to be sold, and the proceeds to be paid into Court, to abide the result of the libel. A sale took place and the vessel was bought by the United States Government, refitted, and subsequently used as a vessel of war against the British in the war of 1812. The price paid for the vessel was $2,999.25, which was duly paid into the District Court; but the Government did not bring the libel to trial until 11th July, 1817, when the seizure was pronounced to have been illegal, and the proceeds of the sale were directed to be paid to the owner of the vessel. During the five years delay in bringing the case to trial, the Clerk of the District Court of New York had absconded and stolen the funds entrusted to his care, and the decree of the Court could not be carried out. Ultimately some of the money embezzled by the Clerk was recovered, of which $183.50 was attributable to the proceeds of the vessel in question. It was well established by a Congressional Committee and judicial investigation, that the sale had been made at an undervalue and that the true value of the vessel at the time of its seizure and sale was $5,000. The claimant now contends that he should be paid the $5,000 with interest from the date of seizure.

Some of the Judges who have investigated the claim have, as we have said, held it to be valid and just, and are of the opinion that it should be paid; some thought with full legal interest, others with interest at 4 per cent., and one thought that all the claimant should get was the $183.50 recovered from the defaulting Clerk.

The claimant's contention is, that as the United States Government was a wrongdoer from the beginning (and that that is so is admitted on all hands), therefore the claimant can in no wise be prejudiced by the legal proceedings which, as the issue

proved, were wholly unfounded, because the original tortious conversion of the claimant's property cannot be made any less tortious by the institution of a suit setting up an unfounded claim. That the loss of the money by the fraud of the Clerk is a loss that can in no sense relieve the original wrongdoer from liability; and the idea that the claimants are in any way responsible or compellable on any principle of justice to bear the loss so occasioned is untenable. That this age-long controversy falls to be settled in the year when we are celebrating a hundred years of peace with our neighbours, seems auspicious and it is to be hoped that though long delayed, justice may at last be done.

WAY OF NECESSITY, HOW ACQUIRED AND HOW LOST.

When we speak of a way of necessity we mean a private way, or an easement over the land of a different person from he who claims the right of way. It is a well recognized principle in law that a man cannot have an easement or right of way over his own land, which is separate and independent from the ownership of the land itself.

Blackstone, in speaking of this kind of an easement,[1] says:—

"A fourth species of incorporeal hereditaments is that of ways; or the right of going over another man's ground. I speak not here of the King's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right; though another be owner of the soil. This may be granted on a special permission; as when the owner of the land grants to another the liberty of passing over his grounds to go to church, to market, or the like; in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company. A way may be also by prescription; as if all the inhabitants of such a ham-

let, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law; for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come to it; and I may cross his land for that purpose without trespass. For when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same."

The following outline is presented by Blackstone. Rights of way have been classified into three kinds.

First: those arising from necessity. Second: those created by grant or by reservation in a grant; and third: those arising by prescription. This classification, however, relates more particularly to the method in which such a way may be created or come into existence, than to the creation or right of a way itself. Because a right of way by necessity, as it is termed, exists by reason of it being necessary to the proper use of the estate to which it attaches: it has been considered, or at least so considered by writers who are not accurate in the use of their terms, as resting alone upon such necessity, and not upon a grant or implied contract. The better doctrine, however, and one which is conceded to be proper, has been announced by Judge Morton, in the case of *Nichols* v. *Luce*,[2] in the following:—

"The three different modes of acquiring and holding rights of way, in their origin, resolve themselves into one. The distinction between them relates more to the mode of proof than to the source of title. They are all derived from the voluntary grant of the proprietor of the fee. Prescription presupposes and is evidence of a previous grant. Necessity is only a circumstance resorted to for the purpose of shewing the intention of the parties and raising an implication of a grant. And the deed of the grantor as much creates the way of necessity as

does the way by grant. The only difference between the two is that one is granted in express words and the other by implication. Quando aliquis aliquid concedit, concedere, videtur et id sine quo res uti non potest. Thus, when a man grants a close inaccessible except over his own land, he impliedly grants a right of passing over that land. The same rule of construction would govern a reservation out of lands granted."

In *Barrett* v. *Taylor*,[3] it is said:—

"The deed of the grantor as much creates the way of necessity as it does the way of grant. The only difference between the two is, that one is granted by express words and the other only by implication. It is not the necessity which creates the right of way, but the fair construction of the acts of the parties."

Waite, J., in *Collins* v. *Prentice*,[4] says:—

"Although called a way by necessity, yet in strictness the necessity does not create the way, but merely furnishes the evidence of the real intention of the parties."

The usual example of the case where a way of necessity arises, is similar to that stated by Blackstone. That is, that where a man grants or sells to another a tract of land which has no method of access thereto, or ingress therefrom, exceptirg over the remaining lands of the grantor, that a way is granted over such remaining lands to the portion conveyed. This implied grant rests upon the theory that a person would not buy a piece of land, that he could not have access thereto, for without such access the land would be useless, and as people do not buy land except that they may have some use of it, the presumption is conclusive that it was bought upon the assumption that there was a way of ingress to such tract from some public highway; as such way could only be acquired through the modern method of condemnation over any of the adjoining lands belonging to other persons, it is proper that such right of way should be placed upon the lands of the person who made the conveyance, and it has been held that the mere fact that there might be a way that exists by virtue of the doctrine announced

by Blackstone and the text writers, as to the creation and existence of a way of necessity.

While the cases are in accord as to the necessary necessity for such right of way where lands are granted without the right of way being reserved to them or having access to a public highway, and that this furnishes a sufficient necessity for a right of way over the remaining lands of the grantor.

The difficulty arises in determining what is a proper necessity in cases where there is some possible way of reaching the lands conveyed, other than over the remaining lands of the grantor. Some courts, or text writers, rather, have laid down the doctrine that it is an indispensable necessity. That is, if it is possible to get out to a highway from the lands conveyed there can be no way of necessity. But generally upon this question the courts realize that it is not possible for them to lay down an absolute rule.

In one case, *Hyde* v. *The Town of Jamaica*,[5] it was said, that "it must be an indispensable necessity which would justify the use of a way of necessity." This case, however, was a case in which the way of necessity was one which was claimed by reason of a bridge being washed away and that there must be shewn in such cases, in order to relieve the public authorities from liability, that it was indispensable for the person to cross the same; however, in a recent case in California, *Casson* v. *Cole*,[6] it is said:—

"A way of necessity arises from the necessity alone, and continues while the necessity exists. Unquestionably appellant had a way of necessity across grantor's ranch until a road was dedicated to his use; but when that was done his right to a way of necessity ceased and it matters not that the old road was more convenient to his purpose, when it ceased to be the right ceased."

As to the necessity required, the following from *Lawton* v. *Rivers*,[7] shews the difficulty which the courts have recognized. Rendering the opinion the judge says:—

"I do not mean to say that there must be an absolute and irresistible necessity; an inconvenience must be so great as to amount to that kind of necessity which the law requires, and it is difficult and perhaps impossible to lay down, with exact precision, the degree of inconvenience which will be required to constitute legal necessity."

In this case there was a convenient way out by water, and the court refused to recognize the way out in another direction over land. It is not shewn in this case, however, that the way out over land at all seasons of the year would have been more valuable or more convenient than that by water way.

In *Nichols* v. *Luce*[8] this language is used:—

"It is not pretended that the bluff across the defendants' lands is impassable, but only that it is exceedingly difficult to pass it and that it would be much more convenient to the defendants to pass over plaintiff's lands; here is no such necessity as would raise an implication of grant of different way upon different parts of defendants' lot. Convenience, even great convenience, is not sufficient."

In *Ogden* v. *Grove*[9] it is said:—

"Convenience is no foundation for the claim, nor is actual detriments to possession of claimant resulting from necessity of a way through his own property, any reason to claim it through that of a neighbour."

In *Screven* v. *Gregorie*[10] it is said:—

"That great convenience is not sufficient."

In *Trask* v. *Patterson*[11] we find this language:—

"No implication of a grant of a right of way can arise from proof that the land could not conveniently be occupied without it; its foundation rests upon necessity."

In *Oroke* v. *Smith*[12] we have:—

"Query, whether the grant of a way existing de facto can be applied except in cases of strict necessity.

Semble, that claimant of such grant must be required to shew that without the way he will be subjected to an expense excessive and disproportioned to the value of his estate, or that

his estate clearly depends for its appropriate enjoyment on the way, or that some conclusive indication of his grantor's intention exists in the circumstances of his estate."

In *Alley* v. *Carollton*[13] it appeared that the lands were surrounded on one side by the Colorado River, and on the other sides by the remaining lands of the grantor. In passing upon this case, the court says:—

"The allegations of the petition, we think, however, may be fairly construed as shewing appellant to have been entitled to an enjoyment of a right of way of necessity appurtenant to his land over that of the appellee (grantor), at and previous to the commencement of this suit, which had been obstructed and interfered with by the appellee."

Here there was the recognition of the doctrine that an absolute necessity was not required, for there was nothing to shew, but what the Colorado River was navigable and access could be reached in that direction.

The case of *Pettinghill* v. *Porter*[14] is a leading case. Here an instruction to the jury, as follows, was approved:—

"That the deed under which the plaintiff claimed, conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in power of the grantor to convey. That it was not enough for plaintiff to prove the way claimed would be convenient and beneficial, but she must also prove that no other way could be conveniently made from the highway to her house, without unreasonable labour and expense. That unreasonable labour and expense means excessive and disapportionate to the value of the property purchased."

It will be observed from the above that the court attempts to lay down a rule as to what may be such inconvenience as will justify the finding of the necessity.

The authorities heretofore cited and quoted from, we believe, represents as near as possible the various opinions upon this proposition as to what will constitute such a necessity, from which it may be presumed that a right of way was intended to be conveyed by the grant of the grantor to the grantee. It is further, we believe, obvious that the courts have not been able

to lay down a definite rule. If we should follow those courts that hold that an indispensable necessity is requisite, then we would destroy the doctrine, or at least very seriously impair it, that the way rests upon a grant.

And it is probable therefore that the rule laid down in the case of *Pettinghill* v. *Porter*, hereinabove quoted from, that a way of necessity would be held to be implied within a grant, where no other way could be conveniently made from the highway to the land in question, without unreasonable labour and expense; and that what would constitute such unreasonable labour and expense would be a labour and expense excessive and disapportionate to the value of the property purchased.

The courts have held that this necessity should be clearly established for the reason that one man's land should not be taken for the benefit of another where the same could not be justified upon the existence of such a condition of facts from which a clear presumption could be implied, that the parties must have intended that some way was to have been included within the original conveyance.

While we think it is clear that the consensus of opinion of the courts is, that the right of way of necessity rests upon grant, yet the courts seem to have drawn a distinction between a right of way of necessity and a right of way by prescription, or express grant, in this: that it is not one of a permanent nature, although it is one running with the land, and will pass as appurtenant to the land so long as the necessity exists from which the grant might have been implied.

If it is shewn that such necessity exists at the time that the conveyance was made, that will conclusively shew a grant; must this strict necessity at all times continue in order that the right of way may not be lost, is a question which seems not to be conclusively settled.

In *Oliver* v. *Hook*,[15] while not strictly required for a decision of the case under consideration, the court says:—

"But this way of necessity is a way of new creation by operation of law and is only provisional, for it is brought into existence from the necessities of the estate granted and continues to

exist only so long as there may be necessity for its use. If, therefore, the grantee acquires a new way to the estate previously reached by way of necessity, the way of necessity is extinguished."

In this case it is only held that a way of necessity would pass under the ordinary provisions of a deed, to wit: that "all and every the rights, privileges, appurtenances and advantages to the same belonging," or that it might pass without such a covenant.

In *Pierce* v. *Selleck*[16] we find this language:—

"It is a fallacy to suppose that a right of way of necessity is a permanent right, and the way a permanent way attached to the land itself, whatever may be its relative condition and which may be conveyed by deed irrespective of the continuing necessity of the grantee."

In this case it was sought to retain the old way of necessity merely because it was more convenient to the use of the owner, than a new highway which was laid out along or through the tract. It was not shewn that the highway would not be as advantageous to the general use of the premises as the old right of way, but merely it was not as convenient to the use of the owner.

In *Holmes* v. *Seeley*[17] this quotation is used:—

"This was strongly exemplified in *Holmes* v. *Goring*, 2 Bing. 76, where it was decided that a way of necessity became extinguished because the party could conveniently reach his lot by means of a close of his own subsequently purchased."

It will be noticed from these quotations that it is generally held that the new way must be as convenient as the old way before it is lost.

Thus we have in *Vail* v. *Carpenter*,[18] where it is said:—

"A right of way of necessity ceases as soon as the owner of it can have a direct and convenient access over his own land to the place to which the way leads."

Then follows a longer quotation from *Holmes* v. *Goring*[19] as follows:—

"A way of necessity when the nature of it is considered will be found to be nothing else than a way by grant but grant of no more than the circumstances which raise the implication required should pass. If it were otherwise this convenience might follow that a party might retain a way over 1,000 yards of another's land when by subsequent purchase might reach his destination by passing over 100 yards of his own. A grant therefore arising out of the implification by necessity cannot be carried further than the necessity of the case requires."

The case of *New York* v. *Milner*[20] is a leading case. Here it is said:—

"Again the right of way of necessity over the lands of the grantor in a conveyance to favour the grantee and those subsequently claiming the dominant tenement under him, is not a perpetual right of way, but only continues so long as the necessity exists, and if the grantee of the dominant tenement, or those claiming under him, should afterwards by purchase or otherwise acquire a convenient way over his own lands to the tenement in favour of which the way of necessity previously existed, the way of necessity over lands of the original grantor of such tenement will cease. So if a convenient way to such tenement is subsequently obtained by the owner thereof by the opening of a highway to or through such tenement, a way of necessity only arises upon the implication of a grant and cannot be extended beyond what the existing necessity of the case requires. Such a right is only commensurate with the existence of the necessity upon which the implied grant is founded. When such necessity ceases the right of way also is terminated."

In *Porter* v. *Shuttlefield*[21] this language is used in the syllabus:—

"Where a party has a way by necessity over the land of another, the easement terminates with the necessity for the same, by reason of the construction of another way affording a reasonably convenient outlet."

We think from the language used by the courts in these various cases, that it may be reasonably inferred that where con-

ditions arise which may make it possible to have an access to a highway in some direction, that this possibility of access would not destroy the right of way unless it be shewn that it is one that is as convenient and valuable to the use of the land as was the way of necessity.

While it seems to be the settled opinion that the way of necessity rests upon grant, and that it will pass as an appurtenant to the lands to which it furnishes a way, yet the courts seem to have engrafted upon it a distinction from all other ways that are founded upon a grant, and that is that it is not a perpetual right, but exists only so long as the necessity which created it exists.

Thus in the leading case of *New York* v. *Millner*[22] it is said:—

"Again the right of way of necessity over the lands of the grantor in a conveyance in favour of the grantee and those subsequently claiming the dominant tenement under him, is not a perpetual right of way, but only continues so long as the necessity exists."

The same language is substantially found in *Palmer* v. *Palmer*,[23] also in *Pierce* v. *Selleck*.[24]

This brings up the analogous situation that a grant presumes a consideration and that although the grantee may have paid for something, yet he cannot exercise full ownership and transfer the right to some one else.

For instance, suppose that A should convey a piece of land to B, which was so situated that B would have a right of way of necessity over the lands of A, and that B should in turn convey his property to C. who owned adjoining lands that touched a public highway. Then C could, by reason of his ownership of other lands, reach the public highway without being compelled to exercise the way of necessity, which B had over the lands of A, and if the doctrine announced by the courts is to be carried out in its fullest extent C would be deprived of this right of way for the lands he had purchased out over the lands of A, notwithstanding the fact that such right of way might be an exceedingly valuable one and furnish a much better access to

the lands he had purchased from B than any way would over his remaining lands.

If such be true, C would not be willing to pay the full and fair value of the lands which he had purchased from B; if B had no right to convey to him the way of necessity which had been granted to him by A. It seems plain here that B would be unjustly deprived of a right of property which then existed in him.

In a careful examination of the various cases, this phase of the question does not appear to have been passed upon. Of course if the public granted him a new road, it would be fair, provided it was as good as the old way of necessity, to hold that it ceased to exist. So, if he chose to acquire a new way, which was as good, but why then require him to give up for nothing that which he bought and paid for? Must his act be held alone to benefit his grantor? Must he alone be punished because the way was not expressly mentioned in the conveyance?

It seems that there is some room for doubt upon the question whether such a holding would be just or whether it would be followed in all instances. And we are again driven to the conclusion that in all such cases it would be fair to require at least before the way of necessity is lost, that the way which displaces the one of necessity be one as convenient or as valuable to the lands, as was the way of necessity so displaced.

It has been held that where a person has a way of necessity and acquires the servient estate, that then the way of necessity is lost, but if he should afterwards sell the two pieces of property separately, the way of necessity would come into existence again. This is illustrated by the quotation in *Wheeler* v. *Gilsey*.[25]

In *Buckley* v. *Combes*[26] it was decided:—

"That if a person owned close A and a passage of necessity to it over close B and he purchased close B and thereby reunited in himself the title to both closes, yet if he after sold close B to one person without reservation and the close A to another person, the purchaser of close A has a right over close B."

Suppose A, the owner of one tract of land, sold to B another tract of land, so situated that B would have a right of way of necessity over the remaining lands of A, and B would sell his lands to C, who by reason of owning adjoining lands which reach to a public highway, and C be deprived of his way of necessity over A's lands, and thereafter C should sell the lands so acquired to D, who had no way to reach said lands except the old way of necessity or a new one over the lands of C: would D have conveyed to him the right to use the way of necessity over the lands of A?

Here the land is in the same condition and the same necessity exists as when B purchased it from A. If it should be held that D did not acquire such way, then it must be held that he would have a right out over the lands of C, and this would be in a certain sense, taking C's lands for the benefit of A, and give back to A lands which he had sold and for which it is presumed he received a consideration, and yet it would seem if the various decisions of the courts are strictly followed out, this would be just what would happen.—*Central Law Journal.*

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1. Volume 2, page 35.
2. 24 Pick. 102.
3. 35 Vt. 52.
4. 15 Conn. 39.
5. 47 Ver. 451.
6. 153 Cal. 677.
7. 2 McCord (S. C.) 445.
8. 43 Mass. 105.
9. 38 Pa. 491.
10. 8 Rich. (S. C.) 158.
11. 29 Me. 502.
12. 11 R. I. 259.
13. 29 Tex. 74.
14. 8 Allen 1.
15. 47 Maryland 379.
16. 18 Conn. 324.
17. 19 Wendell 510.
18. 80 Mass. 126.
19. 2 Bing. 76.
20. 1st Barb. Ch. 1.
21. 146 Iowa 512.
22. 1 Barb. Ch. 1.
23. 150 N. Y. 139.
24. 18 Conn. 321.
25. 35 Howard Pr. N. Y. 145.
26. 5 Taunt. 311.

REVIEW OF CURRENT ENGLISH CASES.

AWARD ACCEPTED AND ACTED ON—SUBSEQUENT APPEAL FROM PART OF AWARD—APPROBATE AND REPROBATE.

Johnson v. *Newton Fire Extinguisher Co.* (1913) 2 K.B. 111. This was a case under the Workmen's Compensation Act, 1906, in which the workman had applied for arbitration to fix the compensation, and an award was made fixing a certain sum per week to be paid. The workman acted on the award and accepted the compensation, but shortly afterwards appealed from the award as to costs. The Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Hamilton, L.JJ.) held that he could not do this; that having accepted and acted on the award, he could not appeal from any part of it—in short, he could not both approbate and reprobate.

CHATTEL MORTGAGE—DAMAGES FOR NEGLIGENT SALE BY MORTGAGEE—RESTRICTION ON CHARGES BY MORTGAGEES—PENALTY FOR EXCESS—BANK ACT (R.S.C. 1906, c. 29), s. 91—VOLUNTARY PAYMENT OF UNAUTHORIZED INTEREST.

McHugh v. *Union Bank* (1913) A.C. 299. This was an appeal from the Supreme Court of Canada. The action was brought by mortgagors against chattel mortgagees for an account in which the plaintiffs claimed credit for damages for negligence on the part of the mortgagees in selling the mortgaged property, consisting of houses, and also for a penalty being treble the amount of an alleged excessive charge by the mortgagees for expenses and commission on the sales. The stipulated rate of interest was 8%, but the defendant bank admitted it could not enforce a higher rate than 7%, while the mortgagors contended that only 5% could be recovered. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Atkinson, and Moulton) allowed the appeal in part, holding first that the findings of the judge at the trial as to the defendants' negligence in making the sales and as to the consequent amount of damages, were not shewn to have been erroneous and ought not therefore to have been varied by the Supreme Court of Alberta. Secondly, that the N. W. Can. Ordinances, c. 34, whereby a chattel mortgagee's charges in respect of seizure

and sale are limited, relate only to certain indispensable acts specified in the schedule thereto, and consequently that the parties were left free to contract in reference to any other expenses of realization which might be shewn to be reasonable and necessary and no ground had been shewn for imposing the penalty which their Lordships held was permissive and not imperative, since the defendants had acted reasonably and prudently. Thirdly, with regard to the question of interest, which the Supreme Court of Canada had allowed at 7%, their Lordships held that the stipulation for payment of 8% was inoperative under the Bank Act, R.S.C. 1906, c. 29, s. 91. and therefore as no rate had been fixed, only the legal rate of 5% was recoverable, but that the plaintiffs were not entitled to recover back the excess which they had voluntarily paid.

RELIEF AGAINST FORFEITURE—CONTRACT FOR SALE OF LAND—FORFEITURE ON DEFAULT OF PAYMENT OF ANY INSTALMENT OF PURCHASE MONEY—SPECIFIC PERFORMANCE—TIME OF ESSENCE OF CONTRACT.

Kilmer v. *British Columbia Orchard Lands* (1913) A.C. 319. This was an appeal from the Court of Appeal of British Columbia. The plaintiffs had entered into an agreement to sell land to the defendant, the purchase money to be paid in instalments, and the contract provided that in case default should be made in payment of any instalment, the agreement and all past payments should be forfeited, and time was declared to be of the essence of the contract. The defendant having made default in the payment of an instalment of purchase money, the plaintiffs brought the action claiming a declaration that their agreement of sale to the defendant was null and void. The defendant counter-claimed for specific performance, and at the trial obtained leave to pay into court the amount due to the company. The judge at the trial dismissed the plaintiff's action and decreed specific performance, but the Court of Appeal of British Columbia set his judgment aside and gave judgment for the plaintiffs. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, and Moulton) have reversed the latter decision and restored the judgment at the trial, holding that the condition of forfeiture was in the nature of a penalty from which the defendant was entitled to be relieved on payment of the purchase money due.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] [May 6.

McGUIRE *v.* OTTAWA WINE VAULT CO.

Fraudulent conveyance—Statute of Elizabeth—Husband and wife—Voluntary settlement—Evidence.

In August, 1908, M. and his brother bought a hotel business in Ottawa for $8,000, paying $6,000 down and securing the balance by notes which were afterwards retired. In November, 1908, M. conveyed a hotel property in Madoc to his wife, subject to a mortgage which she assumed. M. and his brother carried on the Ottawa business until March, 1910, when they assigned for benefit of creditors who brought suit to set aside the conveyance to M.'s wife. On the trial, it was shewn that for some time before November, 1908, M.'s wife had been urging him to transfer to her the Madoc property, which she had helped him to acquire, as a provision for herself and their children; that she had joined in a conveyance of a property in Toronto in which they both believed she had a right of dower, and the proceeds of the sale of which were applied in the purchase of the Ottawa business; and that all of M.'s liabilities at the time of said conveyance had been discharged. M. ascribed his failure in Ottawa to the action of the License Commissioners in compelling him to move his bar to the rear of the premises whereby his receipts fell off and he lost rents that he had theretofore received, and had to make expensive alterations; and to a fire on the premises early in 1910. The trial judge set aside the conveyance to M.'s wife; his judgment was reversed by a Divisional Court (24 Ont. L.R. 591), but restored by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (27 O.L.R. 319), Davies, J., dissenting, that the conveyance by M. to his wife was voluntary; that it denuded him of the greater part of his available assets and was void as against his present creditors.

Appeal dismissed with costs.

Proctor, for appellant. *Hog*, K.C., for respondents.

Ont.] [May 6.

PETERS *v.* SINCLAIR

Trespass—Easement — Public way—Dedication — User—Prescription.

S. brought action against P. for trespass on a lane called Ancroft place which he claimed as his property and asked for damages and an injunction. Said lane was a *cul-de-sac* running from Sherbourne street on the west, and the defence to the action was that it was a public street or, if not, that P. had a right-of-way over it either by grant or user. On the trial it was shewn that the original owners had conveyed the lots to the east and south of Ancroft place to different parties, each deed giving a right-of-way over it to the grantee and to those to whom the owner had conveyed or might thereafter convey the lot to the north (now P.'s land). The deed to P.'s predecessor in title did not give him a similar right-of-way. The deed to the predecessor in title of S. had a plan annexed shewing Ancroft place as a street fifty feet wide and the grantee was given the right to register said plan with the deed. The evidence also established that for several years before the action Ancroft place had not been assessed, and that the city had placed a gas lamp on the end near Sherbourne street; also, that for over twenty years it had been used by the owner of the lot to the north, and by the owners of adjoining lots, as a means of access to, and egress from, their respective properties. In 1909 the fee in the lane was conveyed to S. who had become owner of the lots to the east and south.

Held, 1. Idington, J., dissenting, that the evidence was not sufficient to establish that the lane had been dedicated to the public and accepted by the municipality as a street.

2. Idington, J., and Duff, J., dissenting. The lane was not a "way, easement or appurtenance" to the lot to the north "held, used, occupied and enjoyed, or taken or known, as part and parcel thereof," within the meaning of sec. 12 of the Law and Transfer of Property Act, R.S.O. (1897), ch. 119.

3. That P. had not acquired a right-of-way by a grant implied from the terms of the deeds of the adjoining lots nor by prescription.

Appeal dismissed with costs.

Tilley, and *J. D. Montgomery*, for appellant. *Ludwig*, K.C., for respondent.

Province of Ontario.

SUPREME COURT, APPELLATE DIVISION.

Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J.] [April 22.

McKENZIE *v.* ELLIOTT.

(10 D.L.R. 466.)

Appeal—Findings by referee—Reconsideration on appeal as to inferences from surrounding facts—Evidence—Variation.

Held, 1. While a referee hearing the witnesses has the better opportunity for forming a right judgment upon the credibility of witnesses as affected by their demeanour in giving evidence and his finding where based upon credibility will not ordinarily be disturbed by an appellate court, the rule does not apply to the consideration of the weight to be given the evidence as affected by the surrounding circumstances and attendant facts; an appellate court should draw its own conclusions in regard to the probabilities and inferences to be drawn from such facts and circumstances.

2. In an action upon a building contract where the construction actually proceeded with differed from that contemplated by the written contract between the parties as to size of building and class of materials, the party who claims that the written contract was altogether abrogated and not merely varied in such respects by the verbal arrangement between the parties by which the change was assented to after the contract was made, has the onus cast upon him to prove such claim.

McKenzie v. *Elliott*, 2 D.L.R. 899, affirmed on appeal.

Hellmuth, K.C., and *W. Mulock*, for plaintiff. *Anglin*, K.C., and *J. Shilton*, for defendant.

SUPREME COURT.

Middleton, J.] [April 14.

ROBERTS *v.* BELL TELEPHONE CO. AND WESTERN COUNTIES ELECTRIC CO.

(10 D.L.R. 459.)

Electricity—Injury by wires in streets—Dangerous agency doctrine—Effect of—Statutory authority—Proximate cause.

Held, 1. The effect of conferring statutory authority upon

an electric power company to erect poles and power wires on a highway is that, apart from negligence, the company is absolved from the rule that any one who, for his own purposes, collects or keeps anything likely to do mischief if it escapes, is *primâ facie* answerable for all the damages which are the natural consequences of its escape.

Fletcher v. *Rylands*, L.R. 1 Ex. 265, and *Rylands* v. *Fletcher*, L.R. 3 H.L. 330, considered; *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186, and *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.*, [1902] A.C. 381, referred to.

2. An electric power company stringing its wires by statutory authority upon the public streets at a time when no other wires were there, is under no duty to inspect the wires periodically for the purpose of seeing that no other wires had subsequently been placed in too close proximity to their own wires and so avoiding injuries which might result to persons handling the dead wires of another company should the latter become charged by close contact with the power wires.

3. A telephone company empowered to erect its poles and wires on a street upon which the poles and wires of an electric power line are already strung is under a duty to string the telephone wires at a safe distance from the power wires, and where a telephone lineman is killed by the telephone wires with which he was working becoming charged by contact with an electric wire which had sagged low by the settlement or bending of the electric company's poles not resulting from any negligence on the part of the electric company, the proximate cause of the injury is the negligence of the telephone company and not of the electric company, although the latter had taken no precautions by guy wires or otherwise to obviate the effect of such sagging.

Englehart v. *Farrant*, [1897] 1 Q.B. 240; *McDowell* v. *Great Western R. Co.*, [1902] 1 K.B. 618; *Dominion Natural Gas Co.* v. *Collins*, [1909] A.C. 640, and *Lothian* v. *Richards*, 12 C.L.R. 165, referred to.

G. S. Kerr, K.C., and *G. C. Thomson*, for plaintiff. *M. J. O'Reilly*, K.C., for Western Counties Electric Company.

Middleton, J.] [May 2.

GODSON *v.* MCLEOD.

(10 D.L.R. 519.)

Contracts—Nature and requisites—Sufficiency of acceptance—Adding a term to the offer.

Where a written contract is expressed in such general or ambiguous terms as to admit of different constructions, it is open to either party to allege, consistently with the terms, that he accepted the contract with a different construction to that charged by the other party and to claim that there is no real agreement between them, though the written contract must be applied if possible; so where the offer was made by letter for the sale of machinery "in place," the latter phrase being intended by the seller to indicate that delivery must be taken by the buyer of the machinery where it stood, and this interpretation was consistent with the preliminary negotiations, and the proposed buyer replied by letter purporting to accept, but adding that "in place" was considered to mean on board a railway car and that advice would be sent as to the destination to which it should be shipped, the seller properly treats the added words as an attempt to impose upon him the duty of loading on the car, and may decline to consider the alleged acceptance as any acceptance in fact.

Haverson, K.C., for plaintiffs. *Britton Osler*, for defendants.

Province of Quebec.

COURT OF REVIEW.

McDougall, and Chauvin, JJ.] [May 7.

WONG LING *v.* CITY OF MONTREAL.

(10 D.L.R. 558.)

Municipal law—Highways—Injuries from defects—Defective crossing place.

While a city municipality is not obliged to keep the whole street surface in a condition safe for foot passengers, yet, if it

so deals with a portion of the street adjoining a public building as to invite the public to use that part of the street as a crossing place for foot passengers, the city is under an obligation to make it safe for that purpose, although the place so used is not a continuation of any sidewalk and was not paved in the manner usual for street crossings in that locality.

See also *Breen* v. *City of Toronto*, 2 O.W.N. 690; *Brown* v. *City of Toronto*, 2 O.W.N. 982; *Lowery* v. *Walker*, 27 Times L.R. 83 (H.L.); *City of Vancouver* v. *Cummings*, 2 D.L.R. 253, 45 S.C.R. 194.

R. T. Stackhouse, for plaintiff, appellant. *J. A. Jarry*, K.C., for city, respondent.

Province of British Columbia

SUPREME COURT.

Gregory, J.] [March 14.

BALAGNO v. LEROY.

(10 D.L.R. 601.)

Landlord and tenant—Forfeiture of lease—Waiver—Non-payment of rent—Relief—Usage.

Held, 1. A failure on the part of the lessor to re-enter the demised premises and to declare a forfeiture under the terms of the covenant for non-payment of rent, does not constitute such a waiver of rights as is contemplated by sub-sec. 17 of sec. 2 of the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, to the effect that no relief shall be granted against forfeiture of a lessee's term where a forfeiture under the covenant in respect of which relief is sought "shall have been already waived out of court in favour of the person seeking the relief," so as to preclude the lessee from maintaining a summons for relief against such forfeiture.

2. A lessee of demised premises is entitled to an order for relief against forfeiture on the ground of non-payment of rent, under the Laws Declaratory Act, sec. 2, sub-sec. 14 (B.C.), where it appears that he had been in the habit of paying several months' rent at a time instead of monthly as called for by the lease, with which arrangements the lessor seemed to have been satisfied, that no request for payment was made by the

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.

H. B. Robertson, for plaintiff. *Higgins*, for defendant.

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. 78, 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*

v. *Rees* (1838), 4 Bing. N.C. 384; *Keith* v. *National Telephone Co.*, [1894] 2 Ch. 147; *Roe* v. *Southard* (1861), 10 U.C.C.P. 488, although the landlord protests that such acceptance is without prejudice to his right to insist on the forfeiture: *Davenport* v. *The Queen* (1877), 3 App. Cas. 115; *Croft* v. *Lumley* (1858), 6 H.L.C. 72. So, where the landlord makes an unqualified demand on the tenant for rent due after the forfeiture: *Doe* v. *Birch* (1836), 1 M. & W. 402, 46 R.R. 326, or sues him for such rent: *Dendy* v. *Nicholl* (1858), 4 C.B.N.S. 376, it amounts to a waiver. In like manner, a distress for rent after the forfeiture is incurred, whether such rent became due before or after the forfeiture, operates as a waiver: *Cotesworth* v. *Spokes* (1861), 10 C.B.N.S. 103. But acceptance after forfeiture of rent which became due before the forfeiture, is not sufficient to constitute a waiver: *Price* v. *Worwood* (1859), 4 H. & N. 512; *Dobson* v. *Scotheran* (1888), 15 Ont. R. 15.

Where the landlord credits moneys received on a note given by the tenant for previous arrears of rent, it was held to be no waiver of a forfeiture arising in respect of rent accruing after the note was given: *McDonald* v. *Peck* (1859), 17 U.C.R. 270.

In an action to recover possession on the ground of forfeiture for breach of covenants, and to recover arrears of rent, acceptance by the landlord of the sum paid into Court by the defendant in satisfaction of the rent, is not a waiver of a breach of covenant which took place after the rent became due: *Toogood* v. *Mills* (1896), 23 V.L.R. 106. A reference to arbitration after default operates in the meanwhile as a suspension of the right of re-entry: *Black* v. *Allen* (1867), 17 U.C.C.P. 240.

A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors, six months' rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment which was afterwards done, the lessors executing the assignment as creditors assenting thereto. It was held that the lessors and the company were distinct legal persons and the individual interests of the lessors were not affected by their action as shareholders or directors of the company, and the lessors were not estopped from taking advantage of the forfeiture clause: *Soper* v. *Littlejohn* (1901), 31 Can. S.C.R. 572, following *Salomon* v. *Salomon*, [1897] App. Cas. 22.

Where, however, the act or omission which constitutes the breach of a covenant and occasions the forfeiture, is of a continuing nature, these acts of the landlord operate as a waiver only to a limited extent. Thus, acceptance of rent in the case of a continuing breach is a waiver down to the time such rent is received, but not afterwards: *Doe* v. *Gladwin* (1845), 6 .B. 953. So, a distress is a waiver of a continuing breach down to the time the distress is made: *Thomas* v. *Lulham*, [1895] 2 Q.B. 400.

It has been held that covenants to repair, to insure, to cultivate or use the premises in a particular manner, are continuing covenants, and the

omission to observe them is a continuing breach: *Doe* v. *Jones* (1850), 5 Ex. 498; *Coward* v. *Gregory* (1866), L.R. 2 C.P. 153; *Coatsworth* v. *Johnson* (1886), 54 L.T. 520; *Doe* v. *Woodbridge* (1829), 9 B. & C. 376. Breaches of a covenant in a farm lease to keep the fences in repair, and to keep eighteen acres in meadow during the term, are continuing breaches, and the right to re-enter for them is not waived by acceptance of rent: *Ainley* v. *Baisden* (1857), 14 U.C.R. 535.

A covenant which requires the complete performance of a definite act within a specified time, is not a continuing covenant: *Morris* v. *Kennedy*, [1896] 2 I.R. 247. Thus, a covenant to build within a specified time is not such a covenant: *Jacob* v. *Down*, [1900] 2 Ch. 156. Where the lessee covenanted to build a house within four years and failed to perform it, it was held that the receipt of rent by the lessor after that time was a waiver of the forfeiture: *Roe* v. *Southard* (1861), 10 U.C.C.P. 488. But the forfeiture on a breach of a covenant, the necessary effect of which, although a continuing breach, is to put it out of the lessee's power to remedy it, may be completely waived. Thus, where a landlord accepts or distrains for rent, after and with knowledge of a breach of a covenant against subletting, it operates as a complete waiver during the whole term of such sub-letting, but not afterwards: *Walrond* v. *Hawkins* (1875), L.R. 10 C.P. 342; *Lawrie* v. *Lees* (1881), 14 Ch. D. 249, 7 App. Cas. 19.

A demand of rent falling due after a notice to repair has expired, does not operate as a waiver, if there be subsequent non-repair: *Penton* v. *Barnett*, [1898] 1 Q.B. 276. Acceptance of rent which becomes due pending a notice to repair, is no waiver of a forfeiture on the expiry of the notice. And an agreement to allow further time for the repairs is not a waiver of, but only suspends the right of entry: *Doe* v. *Brindley* (1832), 4 B. & Ad. 84.

Where, however, the landlord elects to claim the forfeiture, and brings an action of ejectment, nothing that he may then do will be construed as a waiver of the forfeiture. Thus, neither acceptance of rent, nor his distraining for it, will operate as a waiver. An election to forfeit once made by bringing action, is irrevocable: *Doe* v. *Mews* (1824), 1 C. & P. 346; *Jones* v. *Carter* (1846), 15 M. & W. 718; *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360. Where the right to re-enter has arisen on the bankruptcy of the lessee, the annulment of the bankruptcy after the issue of the writ in ejectment will not defeat the forfeiture: *Smith* v. *Gronow*, [1891] 2 Q.B. 394.

But if a claim is made in the writ for an injunction to restrain the breach giving rise to the forfeiture, in addition to the claim for possession, or if the lessor in his pleading treats the tenancy as subsisting, it has been held to operate as a waiver: *Evans* v. *Davis* (1878), 10 Ch. D. 747; *Holman* v. *Knox*, 3 D.L.R. 207.

The action of ejectment shews an irrevocable intention on the part of the landlord to avoid the lease. Acceptance of rent, after the issue of the writ, will not operate as a waiver, nor set up the former tenancy, but it may be regarded as evidence of a new tenancy on the same terms from year to year: *Evans* v. *Wyatt* (1880), 43 L.T. 176. Thus, where a landlord, after an action of ejectment was commenced for the forfeiture of the

lease, distrained for and received rent subsequently accruing due, it was held that such course did not, *per se*, set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year: *McMullen* v. *Vannatto* (1893), 24 Ont. R. 625.

In Ontario it is provided by statute that a waiver of the benefit of a covenant or condition in a lease shall not be deemed to extend to any instance or breach thereof, other than that to which it specially relates, unless a contrary intention appears. This is enacted by section 16 of the Landlord and Tenant Act, R.S.O. 1897, ch. 170.

A waiver of a forfeiture made by the beneficial owner of unpatented land under lease, is binding on the purchaser who afterwards obtains a patent with notice of the lease: *Flower* v. *Duncan* (1867), 13 Gr. 242.

It has been held that where the action is against defendant as plaintiff's tenant for a forfeiture, the receiving of rent after the writ of possession has issued, is a waiver of the execution: *Bleecker* v. *Campbell* (1857), 4 C.L.J. (O.S.) 136. There can be no waiver after entry for a forfeiture: *Thompson* v. *Baskerville* (1879), 40 U.C.R. 614.

The landlord's conduct in permitting his tenant's assignee of the term to take possession and in accepting payment of his rent from the latter without claiming any forfeiture and his objection to signing a written consent to the transfer on the ground that it was not necessary, will amount to a waiver of a covenant which requires a written consent to the assignment of a lease: *Minuk* v. *White* (1905), 1 W.L.R. 401 (Man.).

The plaintiff's deceased testator in his lifetime leased to the defendant the Royal Hotel Block, consisting of an hotel, barber shop, stores, offices and stable, for a term of years. The lease contained lessee's covenants not to sell, assign, let or otherwise part with the demised premises without leave in writing and not to alter the premises without leave in writing. The lessor roomed in the hotel and usually took his meals there. During his lifetime certain alterations were made in the premises and other alterations were commenced, without his written consent, but with his knowledge and implied consent and acquiescence, and after his death the alterations were continued, with the knowledge of the plaintiff. One sub-tenant had without leave in writing from the head lessor assigned his lease. In the case of two other sub-leases the rent had been increased without consent, and in respect of another a monthly tenancy on a verbal lease had been changed without consent to a two-years' term, with a lease in writing, at a higher rent. The dining-room of the hotel had been placed under separate management on an agreement that the manager should pay defendant a fixed sum of the income from the dining-room and should be entitled to the balance earned by the dining-room. In an action by the executor of the lessor against the lessee claiming forfeiture of the lease on account of the breach of covenants, the Court held that (1) an assignment without consent by a sub-lessee of his lease which has been granted with consent is no breach of the lessee's covenant in the head lease not to assign without leave. (2) The mere increase in

the monthly rental payable by a sub-lessee is not a termination of one tenancy and the creation of a new tenancy, and will, therefore, not be a breach of the covenant in the head lease not to sub-let, etc., if done without consent. (3) The alteration of a monthly tenancy to a two years' term on a written lease without such consent is a breach of the covenant. (4) The agreement with the dining-room manager was not a lease, sale or assignment, and, therefore, no breach. (5) Under the circumstances the Court should exercise the jurisdiction to relieve against forfeitures on terms. The terms imposed were increased rent to make up the increase obtained from the new tenancy created by the conversion of the monthly tenancy to a two years' tenancy, and the defendant was required to execute a lease covenanting to pay to the plaintiff such increased amount, and was also required to pay the plaintiff's costs as between solicitor and client within one month. *Quære*, whether the plaintiff was estopped from taking advantage of the condition for forfeiture in respect of alterations authorized verbally by the testator in his lifetime, but executed after his death: *Royal Trust Co.* v. *Bell*, 2 Alta. R. 425.

The right of re-entry under the Act respecting Short Forms of Lease applies to the breach of a negative as well as of an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sub-let without leave: *Toronto General Hospital* v. *Denham* (1880), 31 U.C.C.P. 207. The making of an agreement for the assignment of a lease the settlement of the terms thereof and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant; the fact of the document shewing the transfer not having been made until after action brought is immaterial: *McMahon* v. *Coyle*, 5 O.L.R. 618 (Boyd, C.).

Plaintiff, as lessee, and defendant, as lessor, on the 1st of January, 1906, entered into a lease for a term of five years, at a rental of $70 per month, in advance, with a proviso for forfeiture and re-entry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. Plaintiff being absent in December, 1906, and up to the 23rd of January, 1907, inadvertently allowed the rent for January to fall in arrear, but on the latter date, tendered defendant, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. Defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced. No third party interests having intervened, plaintiff was entitled to relief against forfeiture, both as to the term and the option, and that, the case coming within Rule 976 of the B.C. Supreme Court Rules, 1906, plaintiff should also get the costs of the action: *Huntting* v. *McAdam*, 13 B.C.R. 426; *Newbolt* v. *Bingham* (1895), 72 L.T.N.S. 852.

A provision in a lease against sub-letting without the written consent of the lessor is not *de rigueur* so as to prevent the lessor pleading a verbal consent to an action under the Quebec law to resiliate the lease for breach of this provision brought by an assignee of the lessor. Oral evidence by the

lessor of such consent prior to the sale of the immovable to the plaintiff, coupled with the implied consent of the latter to the sub-lease resulting from the fact that he was aware of it for several months without taking action is sufficient: *Vaillancourt* v. *Saint Denis*, Q.R. 34 S.C. 25; *Jilbert* v. *Bowen*, Q.R. 36 S.C. 309.

Where a lease contains a covenant not to assign without lessor's consent and an assignment of the lessee's interest in the lease is made, and thereafter the lessor assigns his title, and the lessor's assignee, subsequently learning of the prior assignment by the lessee, accepts rent from the party in possession under the lessee, and later distrained on his goods for other rent, and makes no re-entry, the breach of the covenant not to assign is waived: *Pigeon* v. *Preston* (No. 3), 8 D.L.R. 126, 22 W.L.R. 894, 49 C.L.J. 76.

A forfeiture for breach of covenant in a lease (except for payment of rent) cannot be enforced by action, or otherwise until after a notice has been served pursuant to sec. 20 (2) of the Ontario Landlord and Tenant Act; this provision is general and applies to both positive and negative covenants: *Harman* v. *Ainslie*, [1904] 1 K.B. 698; *Walters* v. *Wylie*, 1 D.L.R. 203, 3 O.W.N. 567, 20 O.W.R. 9[illegible].

A forfeiture in a lease is waived if the lessor elects not to take advantage of it and shews his election either expressly by a statement to that effect to the lessee or impliedly by acknowledging the continuous tenancy, and if after a cause of forfeiture has come to his knowledge he does anything to recognize the relation of landlord and tenant as still subsisting, he is precluded from saying he did not do the act with the intention of waiving the forfeiture: *Evans* v. *Davis* (1878), 10 Ch. D. 747; *Moore* v. *Ullcoats Mining Co.*, [1908] 1 Ch. 575; *Holman* v. *Knox*, 3 D.L.R. 207, 3 O.W.N. 745, 25 O.L.R. 588, 21 O.W.R. 325.

Province of Alberta.

SUPREME COURT.

Harvey, C.J., Scott, Stuart, Simmons, and Walsh, JJ.] [March 31.

REX *v.* HURD.

(10 D.L.R. 475.)

Criminal law—Evidence—Trial — Confessions — Subordinate fact—Cross-examination of accused.

Held, 1. An acknowledgment of a subordinate fact not directly involving guilt and not essential to the crime charged is

not a "confession" within the rules by which evidence of a statement by way of confession made to a person in authority may be received only where shewn to have been made freely and voluntarily.

Wigmore on Evidence, sec. 821, approved.

2. Where questions are put to the accused by the Crown counsel in cross-examination when the accused becomes a witness on his own behalf and such questions overstep the bounds allowable in cross-examination as making suggestions not warranted by the evidence and from which the jury might draw inferences prejudicial to the accused, the validity of the conviction will not be affected thereby if the trial judge has instructed the jury to disregard those questions and any inferences suggested by them.

R. v. *Long,* 5 Can. Cr. Cas. 493; *R.* v. *Rose,* 18 Cox C.C. 717; *R.* v. *Bridgewater,* [1905] 1 K.B. 131; and *R* v. *Hudson,* [1912] 2 K.B. 464, 7 Cr. App. R. 256, referred to.

F. E. Eaton, for the accused. *L. F. Clarry,* and *G. P. O. Fenwick,* for the Crown.

Book Reviews.

The Canadian Criminal Law Digest. Being a consolidated Digest of the cases under the Criminal Code reported in vols. 1 to 20, inclusive, of CANADIAN CRIMINAL CASES, 1893-1913. Toronto: Canada Law Book Co. 1913.

The above excellent series of reports is so well known to our readers as to need no words of commendation from us. But it would be of little use to a busy practitioner if the law therein contained were not readily obtainable. To meet this requirement and to keep the 20 volumes which have been issued, under one uniform system with a ready key thereto, this digest has been compiled.

In addition to the numerous cases to be found in these 20 volumes, a large number of criminal cases decided in Canada prior to the commencement of the above series of reports, have been carefully selected as being still of value as precedents since the enactment of the Criminal Code of 1892. To these are also added a large number of cases for offences under the liquor

laws and other Provincial statutes. The digest, therefore, is not only an index to the Canadian Criminal Cases, but contains a classified collection of important decisions on criminal and quasi-criminal law, heretofore available only after long research in the other Canadian Reports.

This statement tells its own story as to the great value of this Digest. It may almost be said to be a complete text-book of the Criminal Law of Canada, and we venture to think much more valuable than are some of such text-books.

The titles and arrangement of the matter shews that the compiler is no novice in criminal law and the typographical execution is of the very best.

Mechanics' Lien Laws in Canada. By His Honour WILLIAM BERNARD WALLACE, LL.B., County Judge, Nova Scotia. Toronto: Canada Law Book Co. 1913.

This is a second edition of Judge Wallace's most excellent work on this subject; the most useful of all, in our opinion at least, so far as Canada is concerned.

This second edition gives us the Acts of the various Provinces of the Dominion, including the articles of the Quebec Civil Code dealing with the subject, together with references to numerous judicial decisions, and luminous annotations explanatory of the legislation.

Since the first edition in 1905 many important amendments have been made to the various Mechanics' Lien Acts of the various Provinces of the Dominion, and much judicial discussion has taken place in relation thereto. These are noted in the volume before us. As explained in his first edition, much light is thrown upon this difficult branch of the law by the United States decisions, and the author, as well as others familiar with the subject, recognise that, whilst these authorities are not binding, they should not be ignored.

The author points out the difficulty of grouping the cases according to any logical scheme of classification owing to the difference in the law of the various provinces and the legislation in other countries, all differing in many particulars from the Canadian law.

Special reference is also made to *Ward* v. *Serrell* (1910), 3 Alta. L.R. 141, where Mr. Justice Beck states, that where a statutory provision is adopted from another jurisdiction after having been in force there for some time, he would follow the decisions of that jurisdiction upon its interpretation unless

there were strong reasons to the contrary. This common sense and commendable attitude, if generally followed, would help to secure uniformity in the practical operation of much inconsistent legislation.

We have no hesitation in recommending this book to our readers.

Chitty's Statutes of Practical Utility. With notes and indices. By W. H. Aggs, Barrister-at-law. London: Sweet & Maxwell, 3 Chancery Lane, and Stevens & Sons, 119 Chancery Lane. 1913.

This continuation of this well known and venerable publication brings the Imperial statutes down to March, 1913. In the preface the editor draws special attention to the Trade Union Act, 1913, passed in consequence of the case of *Amalgamated Society of Railway Servants* v. *Osborne*, 1910, A.C. 87, and which gives legislative sanction to certain dealings of Trade Unions. Another interesting statute, also referred to, is the Criminal Law Amendment Act, 1912, which was passed to strengthen the hands of the authorities in dealing with the "White Slave Traffic," and the attempt to lessen certain criminal offences by the application of the lash. Solomon after all is not quite out of date.

Students' Leading Cases and Statutes on International Law. Arranged and edited, with notes, by Norman Bentwich, Barrister-at-law; with an introductory note by Prof. L. Oppenheim. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1913.

The names connected with this book are a sufficient guarantee of its excellence. It does not pretend to be a full text book on this important branch of law, but it is most valuable for students who should become acquainted as early as possible with the way in which questions of International Law are dealt with by the courts, studying not only the results of the cases, but the methods by which the results are reached. Professor Oppenheim, in his introductory note, makes this pertinent observation as to a book of this kind: "The study of practical cases enlivens the abstract rules which are taught in lectures and books. The cases, so to say, supply the flesh for the skeleton offered by lectures and treatises." The selection is made principally from English cases, American cases being used to supplement or fill

gaps in the chain of English authorities. The cases are classified in groups under the various appropriate headings. Part I. deals with the Law of Peace, Part II. with the Law of War, with subdivisions in each.

The Law of Arbitration and Award. By JOSHUA SLATER, Barrister-at-law. 5th edition, by ALBERT CREW, Barrister-at-law. London: Stevens & Haynes, law publishers, Temple Bar. 1913.

This compact summary of the law in relation to arbitrations is primarily intended for the use of commercial men, but has also been found useful for students, to whom it will give an interesting introduction to works of larger volume.

Justice and the Modern Law. By EVERETT V. ABBOTT, of the New York Bar. Boston and New York; Houghton Mifflin & Co 1913.

As the name and size of the volume (300 pages) indicates, this is necessarily a sketch, but an interesting one, setting forth the ethical principles of the law, as it has been, and as it is in modern days, and as now practised and administered; together with a discussion on the rule of stare decisis; the writer concluding with some observations based on his thought that the United States is now able to have an ideal system of justice. A pleasant dream, but not likely to be realised, we fear, until the Millenium.

Bench and Bar

JUDICIAL CHANGES IN ENGLAND.

Although the announcement was not unexpected, the whole Profession will have received with regret the news of the resignation of Lord Justice Farwell in consequence of ill-health, and his retirement from the Bench is a serious loss. It is to be hoped that no time will be lost in filling the vacancy thus created, for the work of the Court of Appeal is badly in arrear, and the services of Sir S. T. Evans or of a King's Bench judge cannot be dispensed with in their respective divisions.

That Mr. J. R. Atkin, K.C., was strongly in the running for the Bench was well known,, and his selection for the appoint-

ment as the additional judge of the King's Bench Division will be unanimously approved. Although young—we believe he is but forty-six years of age—he possesses in a marked degree those attributes which go to make a good judge, and we feel sure that the future will amply justify his promotion.—*Law Times.*

County Judges take Notice!

Mr. A. and Mr. B., two solicitors of one of the county towns of Ontario, having an appointment for a certain day before the Surrogate Court judge, discovered on arriving that the judge was in the middle of another matter which had the appearance of being lengthy.

The proceedings were being carried on in the Judge's Chambers, and the two solicitors took seats at the end of the table. By-and-by Mr. A. leaned over to Mr. B. and remarked, in a whisper, "This seems rather hopeless. It looks to me as though the only thing to do would be to reprimand the judge, and get another day fixed."

Some whispered conversation then took place between the two solicitors, when it was arranged that Mr. B. should see the judge later and have a new day appointed.

At this moment the judge's voice was heard remarking, "I really cannot hear what the witness says while those two gentlemen at the end of the table are talking."

Mr. A. promptly rose to his feet, and bowing to the judge, said: "I am extremely sorry, your honour, to have been a disturbing element. I was only remarking to my learned friend that it was a curious thing that judges should give appointments for a certain hour and then take up and proceed with other business."