1918
*Dec. 16

1919
*Feb. 17

DAVID DIAMOND (PLAINTIFF).....APPELLANT:

AND

THE WESTERN REALTY COMPANY AND OTHERS (DEFENDANTS)..} RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Sale of land—Right of resale—Sales at stated periods—Power to cancel contract—Waiver—Estoppel.

A land company agreed to sell and D. agreed to buy certain lots of land at a specified price per lot. By clause six of the contract D. had the right to sell said lots, remitting to the company half of every payment by a sub-purchaser until the whole price of his purchase was paid and the balance due on any sale when a deed was demanded by the sub-purchaser; the company to have the right, each month, to examine D.'s books. By clause nine, if D. did not sell fifty lots every six months from December 1st, 1914, the company could cancel the agreement and then neither party would have any recourse against the other except that D. would be liable for the balance due on any of his sales for which a deed was demanded. In the six months ending 31st May, 1916, D. did not sell fifty lots. On 4th July the company wrote him demanding payment of arrears due on sales and threatening to cancel if adjustment was not made by the 15th. On 5th July they wrote saying that by D.'s statement for June, which included sales made in that month, $53 should be added to the amount demanded. On 19th July they gave notice of cancellation.

Held, Davies C.J. and Brodeur J. dissenting, that the notice of cancellation was invalid.

Per Idington and Mignault JJ., Davies C.J. and Brodeur J. *contra* that the company, by demanding in July payment of moneys due knowing that a part of the same was for sales made in June, had elected not to cancel the agreement for default in the six months ending 31st May:

Per Anglin J. The company having in July intentionally demanded payment of monies received in June in the exercise of their rights under clause six, which rights could be exercised only while the contract was in force, that unequivocal act was an election to recognize it as still subsisting which precluded cancellation for default on May 31st.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

1919

DIAMOND v. THE WESTERN REALTY CO.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial by which the action was dismissed.

The facts are fully stated in the above head-note.

C. C. Robinson and *Cohen* for the appellant.

A. C. MacMaster for the respondents.

THE CHIEF JUSTICE (dissenting).—This was an appeal from the judgment of the Appellate Division of Ontario dismissing an appeal from the judgment of the trial judge which dismissed plaintiff's action and directed judgment to be entered on defendant's counterclaim for $400.

The only point upon which I entertained any doubt as to the correctness of the judgment appealed from arose out of the contention by Mr. Robinson for the appellant that there had been an election on the part of the defendant company which destroyed the defendant company's right of cancellation of the agreement made by them with plaintiff for the sale of certain lands to him by the company, to be resold by him to purchasers on the terms and conditions in the agreement specified.

The right to cancel the agreement for default on the part of the plaintiff in reselling a stipulated number of the lots sold to him by the company defendant accrued on the 31st May, 1916. No immediate action was taken by the company regarding cancellation, but at the beginning of July the president of the company made an inspection of the plaintiff's books at Niagara Falls, and on the 4th July wrote plaintiff a letter stating the result of such inspection and demanding payment in accordance with the agreement of the instalments of purchase moneys which had been

1919
DIAMOND
v.
THE WESTERN REALTY CO.
The Chief Justice.

received by the plaintiff from the sub-purchasers and intimating that if a "satisfactory adjustment" was not made with the company by the 15th of the month they would avail themselves of their right of cancellation of the agreement. On the following day, the 5th July, the president of the company again wrote plaintiff saying he had received from the Niagara Falls office a statement for the month of June and found that according to that statement $53 had to be added to the total amount given in his letter of the previous day as due to the company by the plaintiff.

The letter does not state, and there is no evidence shewing, whether $53 which had been received in the month of June were on account of sales made in June or previously.

The contention is now made that this demand made after the date when the company became entitled to cancel (31st May) constituted an election not to cancel. I cannot agree with that. The company had notified the plaintiff on the 4th that they would give him till the 15th to adjust accounts with them and that failure on his part to do so would result in their then cancelling the agreement. That was a reasonable concession, and though accompanied with a demand for payment of the amount which the president's inspection and the Niagara Falls statements shewed as being due to them from plaintiff, that demand in no way could be construed as an election not to cancel. The formal cancellation was made as threatened on the 19th, four days after the date fixed, and I am quite unable to see how the previous demands of the 4th and 5th July can be construed as an election not to cancel or as in any way affecting their right to cancel. Such right to cancel was one dependent entirely upon plaintiff's failure to sell a stipulated number of lots. It had no

reference to the non-payment of moneys he might have received on the lots he did sell, and plaintiff's letters expressly stated that the right of cancellation would be exercised if a satisfactory adjustment of the balance due was not made.

The formal cancellation, the plaintiff having failed to adjust his accounts with the company, was, in pursuance of the notice they had given him, made on the 19th. It took effect then and did not relate back or have any reference to default on plaintiff's part in paying over moneys he had received. No such action in demanding payment of the moneys can be construed as an election to continue the agreement and destroy the company's express right of cancellation.

Under these circumstances I am of opinion that Mr. Robinson's able argument as to election arising out of the demand for payment of the moneys due the company cannot be accepted, nor can the defendant company's express right of cancellation arising out of failure on plaintiff's part to sell a stipulated number of lots within a given time, be affected.

I would dismiss the appeal with costs.

IDINGTON J.—The appellant entered into an agreement, dated 6th November, 1914, to purchase from respondent, the Western Realty Limited, at $65 a lot, a little over four hundred lots in a subdivision known as Lundy Park, in the Township of Stamford, of which said respondent was the owner subject to a mortgage to respondent Davidson and one Huntler who were parties to the agreement. It was a speculative venture based on the expectation that the purchaser would resell said lots at the rate of at least fifty each six months after said date.

1919

DIAMOND v. THE WESTERN REALTY CO.

Idington J.

The appellant bound himself to expend within the first six months from said date, $500 of his own money for advertising and expenses in connection with the said resales and to produce proof thereof to said company.

The company bound itself to spend $500 in other ways preparatory to and for the purpose of promoting such resales, and also to pay taxes on the whole up to and inclusive of the year 1917.

The appellant was not only to have the right to resell to sub-purchasers any or all of said lots, but also to have a conveyance made to any of such sub-purchasers freed from said mortgage so soon as $90 a lot paid said company for any lots in a specified district, and for the rest at the rate of $65 a lot until the total price owing the company was paid.

The company was not to get interest on any part of the price until after three years from said date.

The appellant was to get the first $15 a lot out of the purchase moneys got on his resales, and the company the next $15 a lot thereout, and thenceforward the balance to be divided as specified in the agreement.

To secure due observance of the foregoing terms and others I am about to set forth, the company had expressly given it a right to examine and check the books

and accounts and agreements of the appellant once a month in order to verify the amount payable by the

appellant to the company.

In fact, accounts were rendered to facilitate this.

The appellant engaged respondent Bettel to assist him in carrying out the scheme of resale as designed and he was in charge of said business until the events I am about to advert to.

The agreement contained the following clause:—

9. If the Party of the Second Part does not sell at least fifty Lots of the said Lots during the six months beginning with the 1st of December, 1914, or if commencing with the month of June, 1915, the Party of the Second Part does not sell at least fifty of the said Lots during each and every succeeding six months' period thereafter until the whole of the said Lots are sold by the Party of the Second Part, the Company has the right to cancel this agreement forthwith by notice in writing addressed to the Party of the Second Part at Number 70 Victoria Street, in the City of Toronto. And the Party of the Second Part has the right at any time after the expiration of six months from the date hereof to cancel this agreement by notice in writing to the Company addressed to the Company, c/o Hunter & Hunter, Temple Building, Toronto. Upon the termination of this agreement none of the parties hereto shall have any recourse against the other or others of them, except that the Company shall be entitled to collect from the Party of the Second Part at the time any sub-purchaser is entitled to and demands a conveyance and discharge of the Lot or Lots purchased by him the balance of the amount necessary to discharge the said Lots according to the terms of discharge and conveyance set forth in paragraph Number 7 hereof.

The appellant was so successful that during the first year and a half he had sold a total of over a hundred and fifty lots, but unfortunately fell short a few less than fifty in the last six months of that period, which expired on the 31st May, 1916, though taking the whole period he made that average of fifty lots per each six months.

He had entered on the fourth six-monthly term and made four sales in June, fell ill in July, and was in the hospital when complaint reached him from the company that he was falling behind. Despite his appeal for delay till he had recovered, the company served, on the 19th July, 1916, appellant with a notice claiming under, and by virtue of, the above quoted clause to terminate the agreement.

The respondents proceeded to try and get the fruits of appellant's labour and expenses by forcing or inducing sub-purchasers from him to surrender his agreements and respectively accept agreements from the company in substitution thereof.

1919

DIAMOND v. THE WESTERN REALTY CO.

Idington J.

The company, and Davidson, who was its vice-president, took part in such proceedings and induced respondent Bettel to enter the employment of the company to conduct in the future the business in question.

Hence this action for restraining the respondents from asserting that the agreement has been terminated and pursuing such a course of conduct and for damages.

The objection is now made by counsel for the appellant that the notice served on the appellant was too late to be effective and, in any event, that the respondent company had, before such notice, by the unequivocal act of accepting and crediting appellant with proceeds of sales made in June, 1916, when the fourth six-monthly period had been entered upon, had elected in law to overlook the non-observance of the literal terms nominated in the bond, and hence could not so late as 19th July, 1916, rescind or terminate the agreement.

I think the point is well taken and the notice void.

I have no doubt of respondent company's knowledge of the fact of the sales in June. They had no right to accept a dollar of proceeds of any such sales affirming thereby the continuance of the contract, and then attempt to terminate it by such a notice as now in question.

When we find that a successful effort to do so would deprive appellant of all he earned and would yet be entitled to receive out of the proceeds of his resales, which would amount to $8,000 or over, and for which the rigorous terms of this contract would deprive him of any recourse against respondent company, one cannot see how, as suggested below, this is a one-sided contract giving the advantage only to the appellant.

It seems to me rather a case of diamond cut diamond.

The contract binds the respondent company to observe the rights of the appellant as against his sub-purchasers and all that is implied therein, even though he might have had no recourse against the company in the event of a successful termination under above quoted clause. With those rights it had no right to attempt to interfere.

Each of the sub-purchasers was accountable to appellant and should have been amply protected in claiming from the company such conveyance as the agreement in question entitled them to.

The action is not, as the court below seemed to assume, brought for specific performance.

The appeal should be allowed with costs throughout as against the company and Davidson, and the injunction granted as prayed for against all concerned, with nominal damages against Bettel.

There should be a reference to take accounts as prayed for if the parties cannot agree, and also to fix the damages done the appellant by the acts of the respondent company and Davidson, to be assessed separately as against each of the two lastly named parties if so desired by either.

Further directions should be reserved until the report of the referee.

The judgment entered for $400 against appellant should be set aside.

There was no agreement to return such money to the company.

I think the utmost that can be said as to that is that in the ultimate accounting it might be chargeable against the appellant as intimated in the correspondence, and I would allow it to be set off in taking the

1919
DIAMOND
v.
THE
WESTERN
REALTY CO.
Anglin J.

accounts between the parties which seems to be a necessary result of this appeal.

ANGLIN J.—The facts of this case sufficiently appear in the reports of it in the Supreme Court of Ontario (1).

Mr. Robinson's admirably lucid and concise argument in support of the plaintiff's claim that the attempted cancellation by the defendants of their agreement with him was ineffectual failed to convince me that default had not been made by his client which entitled the defendants, on the 1st June, 1916, or within a reasonable time thereafter, to exercise their option to cancel. I thought he also failed to establish the estoppel which he urged because of lack of evidence of any change of position by the plaintiff induced by the defendants' conduct. But he satisfied me that the letter of their president of the 5th July demanding payment of $53 shewn to be due to them by the plaintiff's statement of the June payment made by his sub-purchasers, as an unequivocal act in affirmance of the continued existence of the agreement, amounted to an election not to exercise the right of cancellation which had accrued to them under its terms on the 1st of June.

The argument that there had been such an election by the letter of 5th July was based on two distinct grounds: (a) the demand of moneys payable in respect of sales made in June; (b) the demand under clause 6 of the agreement of moneys received by the plaintiff in June in respect of sales whenever made.

(a) By knowingly claiming proceeds of sales made by the plaintiff in June, the defendants would have

(1) 12 Ont. W.N. 226; 14 Ont. W.N. 94.

unequivocally recognized his right to act under the agreement notwithstanding his default during the period ending on the 31st May and would have precluded themselves from exercising their right to cancel the agreement for that default.

Mr. Robinson urged that the inference from the documents (the president's letter of 4th July shewing the result of his inspection of the plaintiff's books made on the 24th June, and the plaintiff's statement of June receipts, coupled with the admission of counsel that the McCully sales shewn in it had been made in June) that the defendants' president, when writing the letter of 5th July, had "a conscious appreciation" of the fact that the moneys thereby demanded included proceeds of sales made in June is irresistible. No doubt a powerful case is made in support of that inference. But, although the president was examined as a witness at the trial, he was not confronted with it. While it may be urged that, under the circumstances, the burden was on the defendants to shew that the letter of July 5th was written in ignorance of this vital fact, yet it the appellant intended to rely upon the inference that he now seeks to have drawn, not having pleaded it, it was his duty at least to have directed attention to it at the trial—if not to have cross-examined Mr. Metcalfe in regard to it—in order that an opportunity for explanation might be afforded. Not having done so, he should, in my opinion, not be allowed now to rest a claim of election upon that inference which might, had opportunity been afforded, have been shewn to be unwarranted.

Confronted with this difficulty, Mr. Robinson contended that knowledge of the June sales was not essential—that the right to elect to cancel rested solely on the December-May default, and that knowledge of

1919
DIAMOND
v.
THE
WESTERN
REALTY CO.
Anglin J.

it was indisputable and sufficed to make the letter of 5th July conclusive as an election. In support of this contention he relied on a distinction drawn by Mr. Ewart in his recent work on "Waiver Distributed" (pp. 75-6) between facts giving rise to the right to elect and facts calculated to influence the exercise of that right, and urged (again citing Mr. Ewart's book, pp. 84-88) that if the act relied on as constituting the election be unequivocal, the intention with which it is done is immaterial. *Scarfe* v. *Jardine* (1). But we are here dealing not with what Mr. Ewart terms an "influencing fact," but with a fact which is relied upon to give significance and character to the act set up as an election. It may be that even ignorance of such a fact cannot be invoked to negative an election which would be indubitable and incontrovertible had it been known. I desire to leave this an open question finding it unnecessary now to pass upon it because, in my opinion, the alternative ground on which Mr. Robinson rests his assertion of the election is unanswerable.

(b) There can be no doubt that the demand for payment in the letter of the 5th July was made, and consciously and intentionally made, in the exercise of the defendants' rights under the 6th clause of the agreement. I think it is equally clear that those rights could be exercised only while the agreement was subsisting and in force. Upon cancellation entirely different rights would arise under the 9th clause. Instead of the plaintiff's obligation being from time to time to hand over to the defendant certain portions of payments made to him by sub-purchasers, as it was while the agreement was in force, upon cancellation he would have been obliged to make payment to the

(1) 7 App. Cas. 345, at p. 361.

defendants only when a sub-purchaser should be entitled to a conveyance and then of "the balance of the amount necessary to discharge" the lot or lots to be conveyed. If it was intended that any rights under clause 6 might be preserved after cancellation, not only is that intention not expressed, as it should have been, but the words of clause 9 express the contrary intention,

> upon cancellation none of the parties * * * shall have any recourse against the other or others of them except, etc.

as above indicated.

The defendants were fully aware of the facts entitling them to cancel and of their right to elect to do so. They knew that the moneys demanded by their letter of July 5th were on account of June payments—the fact which gave character and significance as an election to that demand for payment under clause 6. Their president made that demand deliberately. Having done

> an act which would be justifiable if he had elected one way (not to cancel) and would not be justifiable if he had elected the other way (to cancel)—the fact of his having done that unequivocal act to the knowledge of the person concerned is an election. *Per* Lord Blackburn in *Scarfe* v. *Jardine* (1).

Other authorities are cited in Ewart on "Waiver Distributed" *loco cit.*

I am, for these reasons, of the opinion that the attempted cancellation was ineffectual and that the appellant is entitled to judgment declaring the acts of the respondents of which he complains unwarranted and illegal, for an accounting by them in respect of moneys received from his sub-purchasers and for damages sustained by him as a result of their wrongful interference with his rights under subsisting agreements with sub-purchasers and also with his right to

(1) 7 App. Cas. 345 at p. 361.

1919
DIAMOND
v.
THE WESTERN REALTY CO.
Anglin J.

continue the sale of lots until his agreement with them was duly terminated. The last item may involve only a negligible amount.

If any of his agreements with sub-purchaser are still in such a position that they can be enforced he is entitled to have them delivered up to him and to an injunction restraining interference with his enforcement of them.

There is nothing to sustain the defence of abandonment by the plaintiff.

I should, perhaps, add that, if I had been of the opinion that the attempted cancellation was effectual, on the construction of clause 9 I should have held the appellant entitled to the like damages, accounting, etc., in respect of the agreements of sub-sale which were subsisting at the time it took place. There is no provision entitling the respondent company to deprive him of the benefit of these agreements.

For the reasons given in the Appellate Division I think the judgment for the respondents upon their counterclaim for $400 should not be disturbed.

The appellant is entitled to his costs throughout.

BRODEUR J. (dissenting)—One of the questions raised on this appeal is whether or not the respondent company could cancel the agreement of the 6th November, 1914.

That agreement provided for the sale to the appellant Diamond by the Western Realty Company of a subdivision known as *Lundy Park* for the price of $65 a lot. The purchaser was bound to sell at least fifty lots during the six months commencing with the month of June, 1915, and fifty lots during each and every succeeding six months until all the lots would be sold; and if he did not sell that number of lots

during one of those six months' periods the vendor had the right to cancel the agreement.

During the six months from December, 1915, to May, 1916, the purchaser sold only 14 lots, and on the 19th of July, 1916, the vendor cancelled the agreement.

The evidence shews that Diamond had intimated that he could not go on with the carrying out of his contract. He had left Ontario to go and reside in Detroit, and the few sales he had made in the six months' period above mentioned shewed that the sale of those building lots could not be successfully carried out.

The parties went into negotiations to put an end to the agreement of sale; but those negotiations fell through as to the terms on which the sub-purchasers should be dealt with and the money due by Diamond on his purchase price should be paid. Then the company had to exercise the right of cancellation.

It is claimed by the appellant that the company had no right to cancel the agreement because there had been a substantial performance of the contract.

It is true that during the two first six-months' periods Diamond sold a certain number of lots but most of those sales had been cancelled, likely for failure of payment on the part of sub-purchasers. It is also in evidence that during the last period of six months Diamond sold only fourteen lots and was then far from carrying out the obligation which he undertook in the contract to sell during each of these six months' periods at least fifty lots.

I am convinced that if Diamond had made to the company the remittance which he was bound to give under his contract out of each sale of lots which he had made, the company would not have exercised its right to cancel the agreement. But Diamond was in

1919
DIAMOND
v.
THE WESTERN REALTY CO.
Brodeur J.

arrears in his payments, had practically left the province to go and reside in the United States, and had told the company that he was unable to meet his obligations.

There is no doubt that the terms stipulated were of the essence of the contract, as the purchaser had to pay by handing over to the company a part of what he would have received from his sub-purchasers.

It is contended also on the part of the appellant that the company had waived its right to cancel and had elected not to exercise that right.

I am unable to find in the evidence any such waiver or any such election. It is true that the last six months' period expired on the 31st May, 1916, and that the cancellation was made on the 19th July of the same year; but negotiations were pending to bring about a settlement which would be satisfactory to both parties. The appellant should certainly not take advantage of those negotiations to say that there was on the part of the company waiver when this delay occurred just for the purpose of helping him to raise money which he had to pay to the respondent company.

As to the election which is alleged by the appellant, that contention is based upon six sales made in June which sales, according to the appellant, were known to the company. He relies in that respect on a statement of account handed over to the company for the June collections.

It is not clearly and conclusively shewn that the company in making a claim with regard to those payments knew that a small sum of money was coming from sales made after the 31st May, 1916. Of course, if the company had known that such sales had taken place after the 31st May, the situation might

be different; but I am unable to find in the evidence the necessary element to shew that they possessed that knowledge. I am then of opinion that the company had the right to cancel the contract in question; and in that regard the appeal should be dismissed.

But another question comes up with regard to the right of the appellant concerning the contracts made with the sub-purchasers and the moneys paid by the latter. When the contract was cancelled the company obtained, through one of the respondents who was the clerk of Diamond, the agreement covering these sub-purchasers and they started to collect the money due under those agreements or to make some new contracts with those sub-purchasers.

The provisions of the contract between Diamond and the Western Realty Company do not disclose very clearly what should be done with sub-purchasing agreements in case the contract would be cancelled. That right of cancellation was stipulated not only in favour of the vendor but also in favour of the purchaser. Diamond had himself the right, after three months, to cancel the agreement if he did not find it satisfactory. On the other hand, as I have already said, the company had the right to cancel, if the purchasers did not sell so many lots during each of the six months' periods.

It had been provided in the contract that Diamond had the right to sell any of the lots to sub-purchasers and the money collected from those sub-purchasers was practically to be divided between Diamond and the company until the amount of $65 per lot would be paid; and it was stipulated that the amount in excess of $65 per lot should be applied upon the balance of the purchase money payable.

1919
DIAMOND
v.
THE WESTERN REALTY CO.
Brodeur J.

Now the contract having been duly cancelled by the vendor, who has the right to collect the money from the sub-purchaser?

I am of opinion that this money should be collected by Diamond. He is bound to hand over that money to the company until all the lots have been paid for; but if there was enough money due by those purchasers in order to cover the old purchase price which he owed to the company, then that balance would come to him.

In those circumstances, I think that the company had no right to interfere with those sub-purchasers and that it should render an account to Diamond of the money which it had received from those sub-purchasers since the cancellation of the contract.

The appeal should be allowed to that extent, each party paying his own costs.

MIGNAULT J.—I can entertain no doubt that, assuming the respondent had the right to cancel its agreement with the appellant under clause 9, for failure of the appellant to sell at least fifty lots during the six months' period ending on the 31st May, 1916, the respondent could not take possession of the contracts which the appellant had made with persons to whom he had sold lots, and give to the latter notice to pay to the respondent and not to the appellant amounts due the appellant under these contracts. Clause 9 of the agreement provided that:—

> Upon the termination of this agreement none of the parties hereto shall have any recourse against the other or others of them, except that the company (the respondent) shall be entitled to collect from the Party of the Second Part (the appellant) at any time any sub-purchaser is entitled to and demands a conveyance and discharge of the lots or lot purchased by him the balance of the amount necessary to discharge the said lots according to the terms of discharge and conveyance set forth in paragraph number 7 hereof.

In so far, therefore, as the respondent interfered with contracts made by the appellant with sub-purchasers—and it did so interfere—it was clearly wrong and the appellant can demand to have these contracts delivered up to him and is entitled to an injunction to prevent the respondent from interfering with the sub-purchasers.

The question whether the respondent had effectually exercised its right of cancellation under clause 9 of of the agreement is not so free from doubt. I think that the letters of the president of the respondent company, written to the appellant on July 4th and July 5th, 1916, should be read together. It is noticeable that neither of these letters refer to the only ground upon which the respondent could cancel its contract with the appellant, *i.e.*, the failure of the latter to sell, during the six months' period ending on the 31st May, 1916, at least fifty lots. On the contrary, the letter of the 4th July mentions the obligation assumed by the appellant under clause 6 to make remittances to the respondent on sales made by him, and alleges that the appellant is indebted in the sum of $370 for lots sold by him, besides a claim for taxes and amounts received on account of lots resold. It intimates that unless a satisfactory adjustment be made by the 15th July, the respondent will avail itself of its right of cancellation. And the president's letter of the 5th July, based on the appellant's June statement, claims $53 in addition. The June statement mentioned new sales made by the appellant in June, 1916, the respondent's counsel in the court below admitting four new sales in June.

Reading, therefore, together the letters of July 4th and 5th, the respondent is in the position that it demanded from the appellant payment of all moneys

1919
DIAMOND
v.
THE WESTERN REALTY CO.
Mignault J.

received by him to June 30th, including payments received by him on at least four sales of lots made by him in June, and notified him that if he did not make this payment, the contract would be cancelled.

It is obvious that, under the agreement, the right of cancellation could not be exercised by reason of the appellant's failure to make remittances to the respondent of the portion of the moneys due to it out of payments received by him from sub-purchasers. So when the respondent now seeks to justify its notice of cancellation of the 19th July on the ground that the appellant had not made the required number of sales in the six months' period ending the 31st May, 1916—the notice of cancellation of the 19th July made no such complaint—it is, in my opinion, prevented from so doing because, by demanding payments on sales made in June by the appellant and claiming benefit thereunder, it had acquiesced in the continuation of the agreement after the 31st May, notwithstanding that the appellant had not made the required number of sales during the six months' period ending on that date.

The complaint now made by the respondent that the appellant had failed to make the required number of sales seems to me to be an afterthought, probably suggested by counsel, but I cannot think that it was present in the president's mind when he wrote the letters of July 4th and 5th. It does not appear in the correspondence that the respondent ever made such a complaint to the appellant. What seems evident is that the respondent assumed that if the appellant did not make the remittances demanded within the delay specified in the letter of the 4th July, it could on that ground cancel the contract. Unfortunately for its notice of cancellation, it had been preceded by a demand

of payment of moneys received on account of June sales, and in view of this fact, I think that the respondent could not, on the 19th July, cancel the contract because the appellant had not made at least fifty sales between the 1st December, 1915, and the 31st May, 1916.

The appeal should, therefore, be allowed with costs, but I would not disturb the judgment of the trial court on the counterclaim of the respondent.

Appeal allowed in part with costs.

Solicitor for the appellant: *Abraham Cohen.*
Solicitors for the respondents: *Hunter & Hunter.*