

*English & Scottish Life Assce. Co.*, [1909] 1Ch. 291, per Parker, J., at p. 297. It is also significant that it is declared on as a separate, distinct contract made at a later date and not as a change in the original contract.

The other objection is equally formidable. It is admitted that the contract was never carried out and that 1,000,000 feet were not cut during the first year. Hence when the contract was put an end to there had not been effectual compliance with the condition. It is said that a termination by mutual consent is equivalent to performance. But ending a contract by agreement is to discharge it and not to fulfil it. The appellant appears to have given notice of cancellation pursuant to a term in the agreement and then both parties join in a writing, reciting that condition and the notice following upon it, and a subsequent cancellation by consent. If it had been intended to preserve the right to a bonus there should have been mention of it. It was an unusual addition and one generally given only for satisfactory completion. When therefore the parties agree to drop matters it ought to be present to the minds of both that all collateral advantages are abandoned. I think the reservation of the rights in the agreement shews this for it is expressed in this way. "Provided that this (i.e., the cancellation by mutual consent) shall not be deemed to affect the right of the said party of the first part to recover payment of the balance owing to him, if any, for lumber cut and delivered under the said agreement prior to this date." There is no reference in the document of cancellation to any agreement other than that of May 11th, 1910.

It is not shewn that any specific payments were made on the basis of the extra price. Payments seem to have been made generally and not so as to amount to a special payment at the definite increased price for a particular quantity of lumber. In the account, exhibit 11, all the payments are shewn to have been made in even hundreds of dollars. By the contract advances amounting to \$11 per thousand feet are to be given before any measurement is made, except upon the skids, on the basis of log measure, and the other instalments are provided for as follows: \$2 when the logs are hauled to the mills, \$3 when sawn into lumber, and \$2.50 when the lumber is piled at the Grand Trunk siding. It is only when shipped that "the balance, by actual measurement, shall be paid when the lumber is shipped away" as put by the learned