sion to that effect. In ordinary circumstances an application of this sort, if made to this Court, would have to be refused, and, I think, the attorney would have to pay the costs *de bonis propriis*; but as this case is one of great urgency, and irreparable damage might result if the applicant were made to go to Pretoria with his application, I shall make the order as a Judge of the Transvaal Provincial Division, in Chambers.

Applicant's Attorneys: *Steytler, Grimmer & Murray.*

[P. M.]

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## WEBSTER v. VARLEY.

1915. *October* 7. MASON, J.

*Debtor and creditor.—Right to claim forfeiture.—Waiver.*

A creditor who claims a right to cancel a contract by reason of non-payment of instalments due thereunder is held to have waived his right to cancel if after the right has accrued he takes judgment for the amount due; and it is immaterial that at the date of the issue of summons the right had not yet accrued. The obtaining of judgment is consistent only with the continuance of the contract, in the absence of express stipulation to the contrary.

Application for an order cancelling a deed of sale. The deed provided for the payment of the purchase-price by monthly instalments, and it was stipulated that if the instalments fell three months in arrear the seller had the right to cancel. On the 7th September the instalments had fallen three months in arrear, but on the 13th August, before the right to cancel accrued, the applicant issued summons against the respondent for the sum then owing. Judgment was given against the respondent on the 9th September, and a writ of execution was taken out by the applicant two days later, and a return of *nulla bona* made. Notice of cancellation was only given on September 13th. A tender of the sum due was refused.

*C. T. Blakeway*, for the applicant, moved.

[MASON, J.: On the day you took judgment against the respondent your right to cancel had accrued. There was nothing to compel you to take judgment. If I grant your application now, you

would have a judgment against the respondent and cancellation as well.]

If we cancel we elect not to proceed with our writ under the judgment. Unless the judgment is satisfied, the debt which gives us our right to cancel is still in existence. It is the non-payment of three instalments which gives us our right to cancel.

*H. H. Morris*, for the respondent: After the 9th September, when the applicant took judgment, the debt giving him the right to cancel ceased to exist. He had something infinitely superior, namely, a judgment, under which he could, if necessary, have taken the respondent's rights under this deed in execution. It is quite clear that the applicant has waived his right to cancel.

*Blakeway*, in reply: The judgment did not novate the original debt. See Voet, 2, 1, 26; also *Turnbull's Trustee* v. *Cowley* (23 S.C. 244).

MASON, J.: Apart from the judgment taken by the applicant against the respondent on the 9th September, he would have had a right to cancel the contract on the 7th September. Having a right to cancel, he took judgment; and the question is whether by taking judgment he elected to waive his right to cancel. It is quite true that when summons was issued there was no right to cancel, but the applicant proceeded to take judgment after the right accrued. Now this judgment is inconsistent with the cancellation of the contract. It is only consistent with the continuance of the contract. It seems to me, therefore, that on the 9th September, the applicant elected a remedy which is inconsistent with the remedy he now invokes the assistance of the Court to enforce. I cannot see how an order of cancellation of the contract could operate, as Mr. *Blakeway* argues, to cancel a judgment obtained under the contract. I must hold that the applicant is bound by his election, and dismiss the application with costs.

Applicant's Attorneys: *Webster & Berry*; Respondent's Attorney: *J. Berrange*.

[P. M.]