

ROSE, J.

JUNE 15TH, 1917.

DONER v. WESTERN CANADA FLOUR MILLS CO.
LIMITED.

*Sale of Goods—Credit Sale—Contract—Construction—Non-delivery
—Action for Damages for—Monthly Deliveries—Failure to
Take Stipulated Quantities—Default—Payment “Due” when
Demanded—Waiver—Justifiable Refusal to Ship—Right of
Action—Death of Partner—Damages.*

Action for damages for non-delivery of 3,460 bags of flour in accordance with an agreement made by the firm of William Reynolds & Son with the defendants on the 12th October, 1915. By the agreement, 5,000 bags of flour were to be delivered by the defendants between the day mentioned and the 30th September, 1916. William Reynolds, the active partner of the firm, died on the 14th August, 1916. The action was brought by the plaintiff Doner, the administrator of the estate of William Reynolds, and the plaintiff John Reynolds, the surviving partner.

The action was tried without a jury at Toronto.

D. L. McCarthy, K.C., for the plaintiffs.

J. A. Paterson, K.C., and J. C. Macfarlane, for the defendants.

ROSE, J., in a written judgment, after setting out the facts, said that the meaning of the contract was not doubtful. There was a sale and purchase of 5,000 bags of flour “to be taken in an approximately equal quantity of 410 bags per month;” if the buyers’ account is kept in such condition as will warrant the sellers, in their judgment, extending credit, the buyers are to have credit; failure to meet payments when due gives the sellers the option of shipping with sight-drafts attached to the bills of lading or of refusing to ship at all. There was a failure on the part of the buyers to take 410 bags a month; but the sellers did not complain; in fact, on at least one occasion, they were asked to postpone delivery of a shipment that had been ordered, and did postpone it. They did not treat the contract as terminated by the failure to take the flour as promptly as stipulated for, but treated it as still subsisting up to August, 1916.

The failure to take the stipulated quantity each month did not excuse the sellers from delivering the remaining quantity; it may have entitled them to an extended time for delivery of the