

The action was tried without a jury at a Toronto sittings.
D. L. McCarthy, K.C., and A. W. Langmuir, for the plaintiffs.
A. J. Thomson, for the defendants.

ROSE, J., in a written judgment, said that the question was, who must bear a loss which would have been avoided if the defendants had answered a certain letter written by the plaintiffs, or if the plaintiffs had not construed the defendants' failure to answer that letter as a refusal of their request to be released from their contract. The plaintiffs were dealers in yarn. During the war they sold quantities of yarn to the defendants. The dispute was in regard to purchase order 1788, dated the 14th August, 1918, for 20,000 lbs. of yarn of a certain kind. There was much correspondence, set out by the learned Judge in his judgment.

After a full statement of the facts, the learned Judge said that the defendants' letter of the 2nd October might be construed either as a request for the cancellation of or as a repudiation of their obligation under the contract. If it was merely a request, in the absence of any intimation that it was granted, it amounted to nothing. If it was a repudiation, the defendants had the option either to accept it as a breach of the contract or to disregard it and insist upon performance. If they did the latter, they kept the contract alive and left the plaintiffs free to perform it, if so advised, notwithstanding the previous repudiation: *Frost v. Knight* (1872), L.R. 7 Ex. 112; *Leake on Contracts*, 6th ed., p. 639. It was suggested that the option was exercised by the defendants when they marked the contract "cancelled" upon their own files; and that their silence—their omission to complain of delay in the making of deliveries—was a communication of their election, if any communication was requisite.

The learned Judge said that he was unable to adopt that argument. It appeared to him that, notwithstanding the fact that the defendants had decided not to insist upon delivery of the yarn, they remained free to change their decision until they notified the plaintiffs of it; and no such time had elapsed and no such change of circumstances had occurred before the shipment of the yarn as amounted to an announcement of their election or as would have precluded them from insisting upon delivery.

A letter from the defendants to the plaintiffs, dated the 5th December, 1918, came too late to be effective to deprive the plaintiffs of the right to be paid for any of the yarn shipped, but effective to defeat their claim in respect of any yarn on hand not shipped. They had contracted for the whole 20,000 lbs., they succeeded in cancelling their orders for so much as they not shipped, except 1,500 lbs., which they had to accept, and