

in Halifax after inspection and approval by the city engineer. 700 of these meters were delivered, inspected and approved by the city engineer and accepted by defendants, and should be paid for. The other 1,400 are in a warehouse of the Canada Atlantic and Plant Steamship Co. at Halifax ready for inspection and acceptance by defendants. The 1,400 meters have not been inspected and approved by the city engineer, and for the reason, it is stated, that on the 6th August, 1908, the city council came to the following resolution:—"That the city decline to take delivery of the meters or to pay the bill of the Neptune Meter Co. until directed to do so by a decision of the Court." This repudiation of the contract and refusal to carry it out was communicated to the plaintiff, and has, it is contended, waived and excused the necessity of inspection and approval by the city engineer, and that the plaintiff company is entitled to recover the price of the 1,400, as well as the 700.

"An absolute refusal to perform an agreement or an absolute repudiation of it, communicated to the opposite party, is a waiver and excuse of the performance by him of future conditions precedent." Bullen & Leake, pp. 158, 756, and cases there cited.

A renunciation of the contract, or a total refusal to perform it before the time of performance has arrived, may be acted upon by the other party, and so adopted by him as a rescission of the contract: Leake on Contracts, 620; *Cort v. Abergate Ry. Co.*, 17 Q. B. 127.

The contract is for the sale of goods specified and described to be delivered at Halifax, and I think the property in these "meters" in the warehouse has passed to defendants so as to entitle the plaintiffs to recover the agreed price: *Benjamin on Sales*, 322, 355; *McKay v. Dick*, 6 App. Cas. 251; *Badische Anilin und Soda-Fabrik v. Basle Chem. Works* (1898), A. C. 200 at p. 207.

I am of opinion the plaintiffs should have judgment for \$18,355, or the contract price of the goods delivered and costs of suit.

The evidence taken in New York under commission as to quality of the goods was unnecessary and irrelevant, and the costs of that should not, I think, be allowed.