

Oulton litter died. Several, if not all, of the Dalton litter survived. The plaintiff was willing to accept a pair of the Dalton foxes, but the defendant refused to supply them, contending, as he now contends in this action, that, upon the true interpretation of the agreement, one of the foxes to be delivered was to be of the Dalton strain, and the other of the Oulton strain, and that, as, by an "unforeseen occurrence or accident"—the loss of the Oulton litter—he was unable to deliver an Oulton cub, the contract with the plaintiff, upon the return (which was made) of the \$1,200, was at an end.

The defendant's original contention, made as early as the 24th May, or within ten days of the date of the agreement, was, that the plaintiff had but the "third option" on the litters of 1913—"the Dalton, also the Oulton" stock—and that, as the female of the pair the plaintiff was to receive—inferentially the third pair—had died, the agreement could not be carried out. That the inference mentioned is correct is shewn by a letter in evidence written by the defendant a few days later, on the 28th May, to J. Walter Jones, of Charlottetown, offering to supply a pair, a male and a female, from the Dalton litter of six puppies. It seems clear that, as the Oulton litter had perished, the defendant at first intended to supply the plaintiff with a pair of cubs from the Dalton litter. This litter must, on the defendant's statement, have contained at least two females—the one mentioned as having died, and the one the defendant was willing to sell to Mr. Jones.

Jones was—unknown to the defendant—interested in the purchase which the plaintiff had made, and informed the plaintiff of the offer of the Dalton pair made to him by the defendant. The plaintiff then claimed to be entitled under the agreement to a pair of the Dalton litter; and the defendant, after assuming a manifestly untenable position as to the order in which the agreement was to be fulfilled—after two other pairs had been set apart—ultimately, on the 9th July, in a letter to the plaintiff, set up the construction on which he now relies.

In my opinion, his contention cannot be upheld. The Dalton and Oulton strains were regarded as the best known to black fox breeders. They were the longest established, and their characteristic melanism was thought to be the most permanently fixed. The defendant was known to have purchased foxes of both strains. Any pair of cubs—a male and a female—from the Dalton or Oulton litters would have satisfied the description in the agreement as well as a pair one of which was of one