

bags, he asked for and received for use in his business only 1,077, leaving 483 undelivered.

In respect of the non-delivery of the 483 bags, the trial Judge assessed the plaintiff's damages at \$1,038.45.

About the middle of October, 1916, which was a year after the contract was made—prices being then much higher—the plaintiff requested the defendant to make delivery of the 483 bags. The defendant took the position that, the plaintiff not having from time to time asked for 30 bags a week, he (the defendant) had considered the plaintiff as abandoning his right to the flour not asked for, and had disposed of it, and was not then able to deliver it, and was not bound to deliver it.

No oral variation of the written contract could be set up: *Plevins v. Downing* (1876), 1 C.P.D. 220, 225; and the parties were left to their right under the written contract. But the circumstances surrounding the making of the contract, the position of the parties, and their subsequent conduct, might be looked at to arrive at a conclusion as to the true intent and meaning of the words used in the contract: *Bowes v. Shand* (1877), 2 App. Cas. 455, 462.

The learned Judge said that he was unable to distinguish *Doner v. Western Canada Flour Mills Co. Limited* (1917), 13 O.W.N. 328, from the case at bar. It was there held that each delivery stipulated for should be treated like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties should be assumed to have contemplated a payment in damages rather than a rescission of the whole contract, and that the buyers, upon whom was the obligation to order, lost their right to require delivery to be made of the instalments which they had not ordered in due time.

Reference also to *Coddington v. Paleologo* (1867), L.R. 2 Ex. 193, 198, and *Bowes v. Shand*, *supra*.

The time fixed for delivery was of the essence of the contract and of the plaintiff's right to require delivery; it was necessary for the plaintiff to make requests for delivery by specifying his requirements before the defendant was called upon to make delivery or tender; the plaintiff lost his right to delivery unless he proved a request within the time or a waiver of the stipulation as to time; and it was conceded that he did not from time to time make such demands.

The plaintiff had failed to make out a right to succeed on the contract, unless there was a subsequent request for a postponement or an agreement to postpone. The trial Judge drew the inference from a conversation between the parties in September, 1916, that