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Judgment Delivered In Prince Co. Potato Case

The following judgment by Mr. Justice MacGuigan in the action of damages involving the non-delivery of a quantity of potatoes by Bruce MacNaught of Coleman to J. Loring Rayner of Summerside was delivered in chambers recently.

"This is an action of damages for non-delivery of a quantity of potatoes arising out of a contract made between the plaintiff and the defendant on the 19th day of April A.D. 1951. The contract called for the delivery by the defendant to the plaintiff at the Summerside pier from October 25th to December 15th (or on boat arrival) of 2000 bags of Canada No. 1 certified and government inspected seed Sebago potatoes at \$1.20 per 100 lbs. Under the said contract the defendant was also entitled to twenty-four hours' notices of shipment.

"In October 1951, potatoes were selling above the price set out under the contract, and the plaintiff testifies that defendant called to see him and asked for more money on his contract, and the plaintiff says that he was unable to pay more as he had contracted to sell a shipment of potatoes to an American buyer early in the year at a fixed price. He also states that on other occasions the defendant asked him for more money for the potatoes and he refused.

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Defendant's Testimony

"The defendant testifies that he had a conversation with the plaintiff in Best's garage around the middle of October, and on that occasion the plaintiff told him that he would have to deliver the potatoes at his warehouse and afterwards he would have to truck them at his own expense from the warehouse to the pier on arrival of the boat and that the potatoes would have to be re-inspected at the pier. He says that he asked for \$5 additional per bag for the extra work and the plaintiff refused. The plaintiff disputes this testimony. There was, however, a later conversation that took place at the defendant's warehouse, and the defendant's version is given in his evidence:

"He came to where I was working and he asked me how I was getting along grading. He said 'When are you going to start grading for me?' And the answer I gave him was, 'When you come up to Mr. MacFarlane's contract price', as Mr. MacFarlane had raised his contract price. He said 'I have a price to pay today, and I will pay it'. And he turned around and walked out.

"Q. 'What was MacFarlane's raise in price?'
A. 'It would be only hearsay to me; people told me he had raised his price to \$1.00 per bushel which would have meant \$1.96 2-3 a bag.

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"On that occasion you offered to deliver the potatoes at \$1.66 2-3 a bag?
A. 'Correct.'
Q. 'Which he refused?'
A. 'That is right, sir.'
'This evidence is corroborated by the defendant's son and also Rankin Cornish who was helping the defendant to grade the potatoes. The plaintiff, in regard to this conversation at the warehouse, says that the defendant was demanding more money for his potatoes which he refused.
'I therefore find, as a matter of fact, that the defendant refused to deliver the potatoes because the plaintiff would not pay him a higher price than that set out in the contract, and for no other reason.

Letter To Defendant
'After this conversation, and on 27th October, the plaintiff wrote the defendant as follows:
'Mr. Bruce MacNaught,
Coleman, P. E. I.

October 27, 1951.
'Dear Sir: This is to notify you that we must have 3,000 sacks of 100's Canada No. 1 Certified and Government Inspected Seed Potatoes and 200 sacks 100's Small, Canada No. 1 Certified Seed Sebago potatoes, as this is the amount you have contracted with us.
'These potatoes must be delivered within the next 10 days, today included, otherwise we will buy 3,000 sacks 100's as above mentioned and charge the difference between contracted and current market price to your account, on November 6th or as soon thereafter as it is possible for us to procure them.

'Yours truly,
'(sgd.) J. L. RAYNER."
'On November 2nd, he had his solicitor write a letter to the defendant:

'Mr. Bruce MacNaught,
Coleman, P. E. I.
November 2, 1951.
'Dear Sir: Mr. J. L. Rayner of this town has consulted me concerning your contract with him.

Under this contract you have agreed to deliver to him at the Summerside pier a total of 3000 bags of potatoes.
'Mr. Rayner is expecting a boat in at any time now and must have in storage before that time the potatoes necessary for the loading of this boat. He has therefore reserved space for your loading of this boat. He has therefore reserved space for your 3000 bags of potatoes and he demands immediate delivery of same to the Summerside pier.
'This is therefore to inform you that you must make delivery of these potatoes to the Summerside pier on or before Monday, November 5th, 1951. Failure to do this will necessitate Mr. Rayner's buying the potatoes elsewhere and come against you for the price difference between the contract price and the price which Mr. Rayner has to pay for the potatoes.
'I trust that you will save yourself from this expense and that the potatoes will be delivered forthwith.

'Yours very truly,
'W. CHESTER S. MacDONALD."
'These letters demanded delivery of the potatoes on the 5th day of November 1951 according to the contract. The potatoes were not delivered to the plaintiff on that date or at any time.

To Determine Damage
'I have now to determine what damage the plaintiff is entitled by reason of the non-delivery of the potatoes by the defendant, according to the terms of the contract. Section 51 of the Sale of Goods Act reads as follows:

(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
(2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.
(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time of times when they ought to have been delivered, or, if no time was fixed for delivery, then at the time of the refusal to deliver.

'At this time the price of potatoes was uncertain, and as the market was advancing, the producers were inclined to hold for a higher price.

'The only satisfactory evidence on this point was given by Lorne MacFarlane on behalf of the defendant, and it is as follows:
'Q. You live in Summerside? A. Yes.
'Q. You are president of MacFarlane Produce Co., which is a registered partnership of which you are sole proprietor? A. Correct.

'Q. And I believe as such you are engaged in the potato business? A. Yes.
'Q. Were you so engaged during the fall of 1951? A. I was.

'Q. Could you tell us just what the prevailing prices were for potatoes, or what you paid or was being paid to the farmers for potatoes from October 26th and on the subsequent dates? A. October 26 to October 29, \$1.38 per bus. delivered Summerside; October 29 to November 1, \$1.50 per bus. delivered Summerside; November 1 to November 12, \$1.60 per bus. delivered Summerside; November 12 to November 15, \$1.75 i.o.b. farm, that would be about \$1.84 delivered Summerside; November 15, \$2.00 farm, or \$2.09 delivered Summerside. That is about as high as they went. I don't think they dropped below the \$2.00.

'Q. That would be No. 1 Sebago seed? A. Yes.
'Q. Were potatoes moving quite freely at that time? A. Yes.

No Explanation
'No explanation has been given by the plaintiff as to the reason he sent two men to buy potatoes at O'Leary, instructing them to pay as high as \$2.06 per bushel when Mr. MacFarlane was buying at the same time for \$1.60 per bushel. The plaintiff does not give any evidence as to the price of the potatoes at this time at Summerside, nor did he state that he made any effort to buy the potatoes at or near Summerside. The price of potatoes must have been about \$1.60 per bushel at O'Leary on 8th November, as on that date the plaintiff's agents bought a car at \$1.80 from the O'Leary Farmers' Co-operative, and the Co-operative would naturally have a profit on the transaction. From the 8th to the 16th the plaintiff's buyers made no effort to secure any potatoes, and I am unable to understand the delay.

'In the case of Jamal vs. Moola Dawood Sons & Co. (1916) 1 A.C. at page 179, Lord Westbury states:
'It is undoubted law that a plaintiff who sues for damages owes the duty of taking all responsible steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. The loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it.

'In this case, the plaintiff should have made some effort to purchase the potatoes at or in the vicinity of Summerside, but he did not do so.
'In my opinion, however, the plaintiff, owing to the uncertainty of the market and the unwillingness of farmers to sell, was not in a position to purchase the potatoes at Summerside on the 8th day of November or succeeding days at \$1.60 per bushel, and he would have expenses for commission and probably for truckage.

Makes Estimate
'So that, I have to estimate as nearly as possible the probable figure for which the plaintiff could reasonably have bought the potatoes.

In Rodocanachi v. Milburn, (1897) 14 Q.B.D. at p. 78, Lindley, L.J. said:
'It must be remembered that rules as to damages can in the nature of things only be approximately just and that they have to be worked out, not by mathematicians, but by juries. Acting as a jury, I have to award what I consider fair and reasonable under the circumstances.
'Taking all the circumstances into consideration, I have come to the conclusion that the plaintiff should have been able to buy the 2000 sacks of potatoes from 8th November to the 12th at \$1.80 per bushel or \$3.00 per bag. The 20 cents per bushel allowed over and above the price paid by MacFarlane should pay commission (truckage, if any) or any additional expenses or increase in price.

'The cost of the 2000 bags of potatoes would be \$6000.00, from which must be deducted the sum of \$2400.00 which the plaintiff had agreed to pay the defendant under the contract. There is also a sum of \$88.87 being costs of Diathane and D.D.T. Emulsion sold by the plaintiff to the defendant and about which there is no dispute.
'There will be judgment for \$3688.87 against the defendant together with costs of suit including costs of reference on points of law.

Counsel for the plaintiff—D. O. Stewart, Q.C.
Counsel for the defendant—W. E. Darby, Q.C.

'LOVELY TO LOOK AT' OPENS TODAY AT CAPITOL SUMMERSIDE

'Lovely To Look At', M-G-M's glamorous new Technicolor musical, coming to the Capitol screen today, is all that its title implies. Its stars are Kathryn Grayson, Red Skelton, Howard Keel, Marge and Gower Champion and Ann Miller, four of them—Miss Grayson, Keel and the Champions—reunited from their big success in 'Show Boat'.

Its songs are by the immortal Jerome Kern, its gowns, including those worn in a fabulous fashion show finale, are by the famed designer, Adrian. Its director is Mervyn LeRoy, whose last picture was 'Olio Vado'. Its producer is Jack Cummings, whose hits include 'Three Little Words' and 'The Stratton Story'.
'The new offering gives the vivacious Miss Grayson an opportunity to step out of costume musicals and into the sophisticated Adrian clothes of today, and she sings some of Kern's loveliest songs, among them the unforgettable 'Smoke Gets In Your Eyes', 'Yesterdays' and (with Keel) 'You're Devastating' and 'The Touch of Your Hand'.

Skelton returned from a reord-breaking engagement at the London Palladium for his role in 'Lovely To Look At', one in which he once again embellishes his slapstick talent with a straight characterization. His most recent film was 'Texas Carnival'.

Keel, who also starred in 'Texas Carnival' and more recently in 'Callaway Went Thataway', appears as a young American showman who startles Paris with something novel in an extravagant fashion show. His song solos include 'Lovely to Look At' and 'The Most Exciting Night'.

Before the Second World War Burma was the world's largest exporter of rice, shipping more than 3,000,000 tons annually.

ANNUAL MEETING
KENSINGTON DAIRYING CO-OPERATIVE ASSOCIATION LTD.
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TUESDAY, MARCH 17th, AT 2 P. M.
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G. L. Monkley, Secretary.

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KENSINGTON
Monday-Tuesday 7:15-9:15. Rhythm! Lovelles! Glitter! Color! All these and comedy too with a capital C, in Samuel Goldwyn's musical-comedy, 'UP IN ARMS', starring Danny Kaye, Dinah Shore, Dana Andrews and Constance Dowling.

REGENT TO-DAY 3.30-7.15-9.15
Tuesday 7:15-9:15; Wednesday 3:30-7:15-9:15
GARY COOPER AT HIS GREATEST!
IN THE OUTDOOR HIT OF THE YEAR

When the hands point straight up... the excitement starts!
STANLEY KRAMER PRODUCTIONS presents GARY COOPER in 'HIGH NOON'
FLASH: 'HIGH NOON' HAS JUST BEEN VOTED BEST MOTION PICTURE OF 1952 BY 262 OF 334 CRITICS.

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Boys, Look!... Try Your Skill
WIN A BIKE FREE!
Get In On This Big HOLMAN CONTEST RIGHT NOW!
Solve This Easy Problem—
'HOW MANY TIMES DOES A STANDARD 28" BICYCLE WHEEL TURN IN A MILE?'
Easy, Isn't It?
Get Your Entry Forms Today FOLLOW THESE RULES—
1. This Contest is open to Any Boy on Prince Edward Island except children of the employees of R. T. Holman Limited.
2. Solve This Problem: "How Many Times Does A Standard 28" Bicycle Wheel Turn In A Mile?"
3. Visit Holman's Boys' Shop and ask for your Entry Forms. You get one entry for every 50 cents worth that you purchase—fill in your answer and bring or mail to Contest Headquarters, Holman's, Summerside.
4. The more you buy the greater your chances of winning because you get an Entry for every 50 cent purchase—for instance: if you buy \$5.00 worth you get 10 chances and so on.
5. A Sale Slip showing a purchase from Holman's Boys' Shop and dated between March 16th and April 25th MUST be included with your answer or answers.
6. At the End of the Contest, April 25th, the boy having the correct answer or the one nearest correct wins the Free Bike. In the event of more than one correct answer being received, a drawing will be made to determine the winner.
7. Decisions of the Judges are final. The winner will be notified by mail or phone and his name will be published in the local papers as soon as the judging is completed.
Join The Fun — Enter Now — You May Be The Lucky One!
HOLMAN'S Boys Shop

CAPITOL Summerside
Tonight 7:15-9:15; Tuesday 3:30-7:15-9:15
MGM'S NEW GAY-AS-PARIS Technicolor MUSICAL
with the UNFORGETTABLE MELODIES of JEROME KERN
★ TOPS THEM ALL!! IN STARS, IN SONGS, IN DAZZLING DANCES AND FURIOUS FUN! SEE THE ADRIAN Fashion Revue with THE WORLD'S MOST BEAUTIFUL MODELS!
MGM presents
Lovely To Look At
Kathryn GRAYSON ★ Red SKELTON ★ Howard KEEL
★ MARGE and GOWER CHAMPION ★ ANN MILLER
with ZSA ZSA GABOR ★ KURT KASZBAR
Screen Play by GEORGE WELLS & HARRY RUBY ★ ANDREW SOLT
Music by JEROME KERN
Book and Lyrics by OTTO A. HARBACH
Additional Lyrics by DOROTHY FIELDS
DIRECTED BY MERVYN LeROY
Produced by JACK CUMMINGS
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