

Court, three days before the return of the action. Judge Badgley was of opinion that this was not sufficient, and, maintaining the exception, dismissed the plaintiff's action. From this judgment the plaintiff appealed.

DUVAL, C.J. Under cap. 83, sec. 57, the service was sufficient, and the judgment must be reversed.

Meredith, Drummond, and Mondelet, JJ., concurred.*

Day and Day, for Appellant.

T. and C. C. Delorimier, for Respondents.

KELLY (defendant in the Court below), Appellant; and MOREHOUSE (plaintiff in the Court below), Respondent.

Breach of Contract.

The only difficulty in this case arose from an involved account.

This was an appeal from a judgment rendered by *Smith, J.*, in the Superior Court at Montreal, on the 1st of April, 1864. The action was instituted to recover \$1549, for breach of a contract made at Sorel on the 18th of March, 1863, under which the defendant was to deliver 5,000 bushels of oats to the plaintiff, after the opening of the navigation. The plaintiff paid \$1300 on account, and, at the opening of the navigation, sent his boats to Sorel to receive the grain, notified the defendant that he was ready to receive it, and offered the balance of the price. The defendant, however, delivered only 550 bushels, and the plaintiff claimed damages to the extent of 10½ cents per bushel on the balance, making in all, including the amount overpaid, the sum now sued for. The plea admitted that only part of the oats had been delivered, but alleged that the plaintiff had not asked for the balance, and that his claim for damages and monies advanced was set off by a contra account of monies paid, goods sold, &c. The Court below having sustained the plaintiff's pretensions, the defendant appealed.

* This decision supplies the hiatus which certainly existed in the Statute, as to whether in these exceptional cases, it was necessary to allow the ordinary delay between service of declaration and the return of the action.

MEREDITH, J., dissenting. The difficulty is with respect to a payment of \$1600 said to have been made to one Dixon. Should this be imputed as a payment under the Morehouse contract, or under the Dixon contract? I am inclined to believe that it was paid under the present contract.

DUVAL, C.J. I admit that there is some difficulty in the case, but Rounds, the plaintiff's agent, has sworn positively that the \$1600 had nothing to do with the contract in this case. If the man has perjured himself, he must be prepared to take the consequences. We cannot do otherwise than confirm the judgment.

Drummond, and Mondelet, JJ., concurred.

J. Armstrong, for Appellant.

A. and W. Robertson, for Respondent.

DE BEAUJEU (plaintiff in the Court below), Appellant; and DESCHAMPS (defendant in the Court below), Respondent. (2) THE SAME, Appellant; and LALONDE (defendant *par reprise d'instance* in the Court below), Respondent.

Transaction—Discussion.

The plaintiff and defendant were parties to an *acte de transaction*, by which the defendant and other *tiers détenteurs* bound themselves to pay a certain proportion of the balance of a hypothecary debt due to the plaintiff by F., from whom they had purchased lands, after the amount of such balance should have been settled by the discussion of F.'s property, and application of the proceeds in reduction of the debt. The plaintiff having brought an action based on the *transaction*:—*Held*, that the proof of the discussion of F.'s property was insufficient, and that the defendant was not bound to indicate the effects to be discussed.

As these two cases present the same question, with the same proof, it is only necessary to notice the first.

The appeal was instituted from a judgment of the Superior Court, rendered by *Loranger, J.*, on the 30th of April, 1864, dismissing the plaintiff's action. The facts were these:

On the 31st of January, 1821, one Filion made an obligation in favour of J. P. Saveuse de Beaujeu, *père*, for £1880, payable in four years, with a general hypothecation of his property. On the 24th of September, 1829,