

KELLY, J.

AUGUST 23RD, 1917.

## SIERICHs v. HUGHES.

*Contract—Sale of Flour—Failure to Deliver Full Quantity—Monthly Deliveries—Delivery “as Required”—Postponement of Time for Delivery—Acquiescence—Breach of Contract—Damages—Rise in Price of Flour.*

Action for damages for non-delivery of flour by the defendant, a flour-dealer, to the plaintiff, a baker.

The action was tried without a jury at Belleville.

E. G. Porter, K.C., and W. B. Northrup, K.C., for the plaintiff.  
W. N. Tilley, K.C., and E. J. Butler, for the defendant.

KELLY, J., in a written judgment, said that the written contract was of the 14th October, 1915, for sale by the defendant to the plaintiff of “1,560 bags of Harvest Queen flour, delivery as required, 30 bags week, to be taken out by the 1st November, 1916.” Delivery was made from time to time until the 18th or 19th October, 1916, when there was a substantial amount not delivered. Had delivery been made of 30 bags per week for the time of the contract, the whole amount would then have been delivered. The plaintiff then demanded delivery of the undelivered part of the amount contracted for, and this was refused, the defendant saying that he could not deliver—that he had not the flour. It was admitted that 1,077 bags had been delivered.

The only evidence as to what happened in relation to making deliveries was to the effect that the plaintiff stated what he wanted from time to time, and the amount named by him was delivered by the defendant.

In September, 1916, the plaintiff, who was then contemplating the giving up of his business, discussed the suggestion with the defendant. The latter did not then, or at any other time until his refusal in October to deliver, raise any question of the plaintiff's right to delivery of the whole undelivered portion of the amount contracted for. What happened was nothing more than a request for postponement of the time for delivery of the undelivered portion of the 30 bags which in any week the plaintiff did not then ask for, and an acquiescence by the defendant in that mode of delivery. That being so, it was the privilege of the defendant from the time the plaintiff demanded the whole undelivered balance to have required the plaintiff to take deliveries, if not in