Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Boswell v. *Kilborn* et al., *from the Court of Queen's Bench of Lower Canada; delivered 5th March,* 1862.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.
SIR JOHN TAYLOR COLERIDGE.

THIS is an Appeal from the Judgment of the Court of Queen's Bench of Lower Canada reversing a Judgment of the Superior Court of that Province given in favour of the Appellants in an action for not accepting and paying for a parcel of five tons of hops under the following contract, signed by the respective parties:—

"Quebec, March 6, 1855.

"Messrs. Kilborn and Morrell sell, and Joseph K. Boswell contracts for delivery with them for the following three years, viz., 1855, 1856, and 1857, five tons weight of hops for every of the said years, the hops to be good and merchantable and of the growth of each respective year, to be paid for at the rate of 1*s.* Halifax currency per lb. on delivery. Hops to be delivered free in Quebec."

The declaration in the action after stating the terms of the contract, and the amount due to the Plaintiffs for the hops deliverable in 1856, proceeded to aver that the Plaintiffs were ready and willing, and tendered, and offered to deliver five tons weight of good and merchantable hops, the growth of 1856, and requested the Defendant to accept and pay for the same, yet that the Defendant refused to accept of or pay for the said hops, whereby the Plaintiffs

not only lost the benefit of the sale, but were put to great expense and trouble in carting away and stowing the hops in a warehouse, and in other respects, the whole to their damage of 600*l.* currency, for which sum they prayed Judgment together with interest and costs.

The Defendant pleaded that the hops tendered by the Plaintiffs in fulfilment of the contract were bad and unmerchantable, and unfit to be used in his business; and he also pleaded what is called a defence " au fonds en fait," the effect of which was to put in issue all the material averments in the declaration.

It appeared in evidence that the Plaintiffs having in their possession a quantity of hops of the growth of 1856, sent to the Defendant's brewery a portion of them, consisting of eighty-two bales, which greatly exceeded the weight of five tons. The Defendant desired that the hops should be unloaded from the sleighs in which they were brought, in order that he might inspect them, and the hops were accordingly taken out of the sleighs and placed in the Defendant's brewery, the Plaintiffs agreeing to take the hopsaway again if the Defendant should not accept them. After the examination of a few of the bales, and a tender of the hops in two separate lots, one containing fifty-three bales and one twenty-nine bales, but without any tender of the specific quantity of five tons, and without anything having been done by the Plaintiffs to distinguish that quantity from the rest of the bales, the Defendant refused to accept the hops, and they were conveyed away by the Plaintiffs and deposited by them in a store-house in the town of Quebec. There the hops were examined by persons on behalf of the respective parties for the purpose of ascertaining their quality, and the Plaintiffs again offered to deliver five tons of hops to the Defendant, but down to the time of the commencement of the action they had never weighed or set apart five tons of hops, so as to separate and distinguish them from the larger quantity deposited in the store-house.

A great number of witnesses were called on both sides to prove that the hops were or were not of the quality stipulated for by the contract. But, unfortunately, this very long and expensive inquiry has become entirely fruitless from the course which

the cause afterwards took. The learned Judge of the Superior Court treated the action as one brought to enforce the performance of the contract by compelling the Defendant to take to the hops and to pay the price, and as the Plaintiffs did not by their declaration offer to deliver to the Defendant the quantity of hops in pursuance of the agreement, and as the tenders alleged in the declaration were not followed by a request that they might be judicially declared to have been good and valid, he dismissed the action with costs, reserving to the Plaintiffs the right of appeal.

This Judgment, however, was reversed by the Court of Queeu's Bench, the Chief Justice dissenting from the reasons on which it was founded, and the other Judges declining to enter into them, considering them as objections which the Judge had no right to raise, the parties themselves having waived them. The Court, therefore, proceeded to pronounce its own Judgment, that the Defendant should, within fifteen days from the service upon him of a copy of the Judgment, pay to the Plaintiffs the sum of 560*l.* currency (being the contract price of the hops), with interest, and that upon payment the Plaintiffs should give to the Defendant a delivery note upon the occupier of the store where the hops were deposited for the delivery to the Defendant of five tons weight, to wit, fifty bales, of the hops which had been tendered and stored, and that upon default of payment within fifteen days, and upon leaving with the Prothonotary of the Court the delivery order or duplicate, one for the Defendant and the other to remain of record, execution should issue against the Defendant.

Even if this Judgment were properly adapted to the form of action chosen by the Plaintiffs, it would be open to great objection. By the contract, delivery is to precede payment. By the Judgment, payment is to be made, not merely before, but without any delivery. The Defendant is adjudged to pay within fifteen days after service of a copy of the Judgment; if he does not, the Plaintiffs by merely depositing with the officer of the Court the delivery order in duplicate, would be entitled to sue out execution. And supposing the Defendant should pay the money and obtain the delivery order, the Plaintiffs would have discharged themselves of every

duty imposed upon them by the Judgment, and yet the Defendant might be unable to obtain the hops in accordance with the contract in consequence of the store-keeper having a lien upon them, or by the loss or deterioration of the hops while they were at the risk of the vendor. But the Appellant contends that, looking to the form of action, the Judgment is one which it was not competent to the Court to pronounce. He says that the action is brought, not to compel the performance of the contract, but for damages for breach of the contract by the Defendant in not accepting the hops, and that the proper measure of damages in such an action is the difference between the contract price and the market price at the time of the refusal to perform the contract. If this question were to be decided by English law, there could be no doubt as to the extent of the Defendant's liability under the circumstances of the case. Where there is a sale by weight or measure, and (to use Lord Ellenborough's language in Bush *v.* Davis, 2 M. and S. 403) "any acts are to be done to regulate the identity and individuality of the thing to be delivered, it is not in a state fit for immediate delivery;" and no action for goods bargained and sold can be maintained to recover the price. The only remedy open to the vendor (if the circumstances of the case give him a right to complain of a breach of contract) is by an action for non-acceptance. The necessity of separating and distinguishing the article sold from a larger quantity in order to constitute a complete delivery cannot be more strongly exemplified than in the case of Cunliffe and Harrison (6 Exch. 903), which was cited in the course of the argument for the Appellant. But the Respondents contend that whatever may be the law of England on this subject, the case is to be tried by the old French law, in which the principles to be applied are different; and that by that law a vendor in some cases may recover the full price agreed upon, where there has been no complete delivery of the subject according to the terms of the contract. Their Lordships have been referred in support of this view to the Civil Law, and also to the writings of various Jurists, and particularly to the Treatise of Pothier, "Du Contrat de Vente," which contains all the learning upon the subject. A very few passages from this Treatise will show that

there is no material difference between the English law and the old French law, with respect to the completion of contracts. Pothier, in his Treatise, partie iv, fol. 309, states, with his usual clearness when a contract is to be regarded as perfect, and when it is imperfect. He says: "Ordinairement le contrat de vente est censé avoir reçu sa perfection aussitôt que les parties sont convenues du prix pour lequel la chose serait vendue. Cette règle a lieu lorsque la vente est d'un corps certain, et qu'elle est pure et simple. Si la vente est de ces choses qui consistent *in quantitate* et qui se vendent au poids, au nombre, ou à la mesure, comme si l'on a vendu dix muids de blé de celui qui est dans un tel grenier, dix milliers pesant de sucre, un cent de carpes, &c., la vente n'est point parfaite que le blé n'ait été mesuré, le sucre pesé, les carpes comptées, car jusqu'à ce temps *nondum apparet quid venierit.*" So far the law is tolerably clear, but upon the question whether when goods are sold by number, weight, or measure, the property is transferred to the buyer immediately or only after the goods have been counted, weighed, or measured, there is some difference of opinion.

Dalloz, in his "Repertoire de Législation de Doctrine et de Jurisprudence," titre "Vente," chapter 3, section 1, ranges the Jurists upon the opposite sides of the question, and suggests a distinction to reconcile the difference between them. He puts a case where the seller says to the buyer, "I agree to sell you so many gallons of wine in such a cellar at so much a gallon;" here (he says) is not only a sale by measure, but also a sale of an indeterminate thing, therefore such a sale does not operate an immediate transfer of the property. And he adds, "Tout le monde est d'accord sur ce point." But where the vendor says, "I agree to sell you all the wine in this cellar at so much a gallon," here the doubt arises. In this latter case the thing is ascertained, and it may be said there is no reason why the property should not pass immediately to the buyer. But even in such a case Dalloz states his concurrence with the opinion of Troplong that until the measurement the wine remains at the risk of the seller. It is true (he says) the thing is ascertained, but the price is not; but the price is like the thing itself, an essential element of the sale, and the ascertainment of the price is not less necessary than the identifica-

tion of the thing to the completion of the contract. The delivery of the thing, and its being at the risk of the buyer, appear to be convertible terms, and it seems clear from all the authorities that upon a sale by weight or measure, until the thing is ascertained by weighing or measuring, it remains at the risk of the seller. Pothier, in the same section (309), which has been already referred to, says, "It is only after measuring, &c., that the thing sold is at the risk of the buyer;" "car les risques ne peuvent tomber que sur quelque chose de déterminé."

It is difficult to understand how the vendor can have any claim to receive the price of the thing contracted for until he has separated it for the use of the buyer. Until it is ascertained and identified, it may be properly said to have no existence. And yet there is one short passage in Pothier, sec. 309, which is opposed to all his reasoning in the same section upon which the Respondents rely as establishing the propriety of the Judgment in their favour. The passage is this: "Il est vrai que dès avant la mesure, le poids, le compte, et dès l'instant du contrat, les engagements qui en naissent existent. L'acheteur a dès lors action contre le vendeur, pour se faire livrer la chose vendue, comme le vendeur a action pour le paiement du fruit en offrant de *le* livrer." One may fairly ask, To deliver what? The contract does not give the thing existence; it depends upon the vendor himself whether it shall ever exist. When there is a condition precedent to his right to the price unperformed by him, it is difficult to understand how he can recover the price upon a mere offer to perform.

The Chief Justice treats the present case as one where the vendor has executed his contract, and has done all that depends upon him to entitle him to an action *ex vendito* against the vendee, and he goes on to say that from the moment the vendor has offered to deliver the thing sold, and has put the vendee in a position to receive it, the thing is at the risk of the vendee. But how was the vendee in a position to receive the hops in this case? He could not go to the store and help himself out of the bulk to the proper quantity. And as to the hops being at the risk of the vendee, the Chief Justice is here directly opposed to the authority of

Pothier, in the passage which has just been mentioned. It must always be borne in mind that, by the terms of the contract, the delivery in this case was to be made by the vendors, and therefore that an actual delivery by them, or acts done by them which were equivalent to a delivery, were a necessary preliminary to their being entitled to the price. This the Court appears to have overlooked, for in their Judgment they say that "it was fully in the Appellants' power to have set apart, distinguished, and taken away five tons weight of good and merchantable hops from among the said bales," thereby attributing to the Appellant the performance of acts which by the contract belonged to the Respondents.

The Judgment therefore proceeds upon false grounds, even if it was competent to the Court to give a different kind of relief to that which the Plaintiffs claimed in their Declaration. The Plaintiffs demand damages for breach of the contract on the refusal of the Defendant to accept the hops tendered to him. The Court has converted the proceeding into a suit to enforce the performance of the contract, which they order or intend to order by their Judgment to be carried out. This the Respondents contend they had a right to do, and they referred to a passage in 4 Guyot's "Repertoire," *verbe* "Conclusions," p. 351, which the Court was said to have acted upon in a former case, that "le Juge peut rejeter, accorder, ou modifier les conclusions prises par les parties." Whether the power thus described can be pushed to the extent of enabling the Court to change the nature of the action, and to administer relief entirely different from that which is sought by the Plaintiffs, may be extremely questionable. But if such a power exists, it can hardly be exercised with propriety in a case where a party has the choice between two remedies. Assuming that the Plaintiffs might have instituted a suit to enforce the performance of the contract, it cannot be doubted that they were at liberty to waive this form of proceeding, and to bring their action to recover damages for breach of contract. And when they have deliberately preferred the latter remedy, it ought not to be in the power of the Court to force upon them the other, to which they made no claim. Their action is in form and in substance a demand for damages merely for the breach of the contract

in not accepting the hops. In such an action it was not disputed that the Plaintiffs could not recover the price of the hops, but only the difference between the contract price and the market price at the time of the breach of the agreement. Their Lordships, therefore, are of opinion that the Judgment of the Court of Queen's Bench is erroneous, and ought to be reversed. This, if nothing more were said, would have the effect of setting up the Judgment of the Superior Court. But this Judgment cannot be supported. They will, therefore, recommend to Her Majesty that both the Judgment of the Court of Queen's Bench and of the Superior Court should be set aside, and that a new trial should be had between the parties. If under the defence "au fonds en fait" the Plaintiffs will be compelled to prove their averment that they tendered and offered to deliver the hops, and will not be at liberty to show that the Defendant waived a perfect tender, their Lordships think that before the next trial the Plaintiffs ought to be permitted to amend their declaration, by averring an offer by them to deliver the hops, and a waiver by the Defendant, which it is probable a Jury will have no difficulty in finding in their favour, and this will clear the way to the determination of the real question at issue between the parties, viz., the merchantable quality of the hops. Their Lordships think that the costs of the Appeal ought to be paid by the Respondents, and that the costs of the Rule in the Courts below should abide the event of the new trial.