

to the Appellants, the above-mentioned quantity of 112 barrels of *farine entière*, amounting in price to £252. It is for these that a tender in Court was made of that sum, to the Respondents; respecting them therefore no difference exists between these parties. Afterwards, to wit, on the 15th of December, 1817, the Appellants sent to the Respondents' counting-house the following order.

“ Quebec, 15th December, 1817.

“ Messrs. Woolsey, Stewart & Co.

“ Gentlemen,

“ Please to deliver one hundred and eighty-one barrels of fine flour, “ being the quantity purchased of that description, on the 24th November “ last, and oblige

Your obedient servants,

J. JONES, Jr. & Co.”

In consequence of this order, 181 barrels of flour, which the Respondents called *fine flour*, were immediately rolled out of the Respondents' Stores, upon the Queen's Wharf. The Appellants perceiving, that a considerable portion thereof did not answer the description of fine flour, caused the same to be examined by three master Bakers, who reported, that one-sixth of the quantity examined by them, was damaged and unsound. The Appellants accordingly transmitted the report of the Bakers to the Respondents, and refused to receive the flour, unless the Respondents would submit it to a second inspection. The Respondents, well aware that the result of an inspection would be unfavorable to their claims, refused to accede to the demand of the Appellants.

To enable the Court below, duly to appreciate the grounds upon which this refusal proceeded, the Appellants deemed it proper to lay before the Court evidence of the mercantile usage, in Sales like the one in question.

Two merchants, Mr. Patterson and Mr. Munro, were examined. From their testimony, and that of Mr. Finlay, it appears that there is a difference in price of from one to two dollars per barrel, between *fine flour* and *fine sour flour*, and that in commercial language, fine flour, means fine flour which has been inspected, and is merchantable; and that flour which the millers call *fine flour*, is by merchants denominated *rejected flour*, when it ceases to be sound and merchantable. The Appellants apprehend that due weight was not given in the Court below to this evidence. Coupling it with the other evidence, the Appellants conceived that they had completely made out their defence.

The Respondents had engaged to deliver to the Appellants a quantity of fine merchantable flour, and another quantity of fine unmerchantable flour. The latter the Appellants examined, because they were bound to take it such as it was: the former they did not look at, because the engagement of the Respondents could only be fulfilled by the delivery of fine merchantable flour. No delivery was demanded, or offered, until the 15th of December. Injury could not be suffered by either of the parties by the delay from the 24th of November to the 15th of December. The damaged state of the flour arose, no doubt, from hot weather; and in this climate, little apprehensions were to be felt from excessive heat, in those months.

The contract remained then, unfulfilled on the 15th of December; and when the Appellants claimed the fine merchantable flour, which the Respondents