and no specific or particular five tons of hops had been set apart or distinguished from the bulk, no property in any of the hops passed to him, and therefore he was not liable to an action for the full contract price; and further, that in point of law, the true measure of damages, if he was liable at all in the action, was the difference between the contract price and the market price at the time of the alleged breach; and that, as the plts. in the action had adduced no evidence of such market price, and had gone only for the whole contract price as for a debt, there was no evidence of any damage, and consequently, no sufficient materials before the court upon which they could give a judgment in favor of the plts.; he also contended that the weight of the evidence was in his favour, as showing that the hops were not according to the contract.

The court of Q. B., on the 14th December, 1858, gave judgment in the said appeal, and after reversing and annulling the said judgment of the said Superior Court, proceeded to give the judgment which they considered the court below ought to have rendered, and thereby they adjudged that the present app., the deft. in the action, should pay to the the present resps. the plts. in the action, the sum of 560*l.* of current money of the province, being the full contract price of the hops, together with interest on the said sum from the 3rd of January, 1857, and costs of suit as well in that court as in the court below; and they further adjudged that, upon such payment, the deft. should give to the plts. a delivery order for five tons of the said hops. The grounds upon which the said judgment proceeded, were as follows: That, as the plts. had sent to the deft's brewery eight tons of hops, and then tendered the same to him for his acceptance of five tons; and that as the deft. had refused to accept them on the ground that they were unmerchantable, when he ought to have accepted them, it appearing to the court, by the evidence, that they were according to the contract; and that as the plts., upon the deft.'s refusal to accept the hops, had stored the whole in bulk; and as the plts. had done all they were bound to do; and as it was by the deft.'s own act that the specific five tons were not set apart and distinguished from the bulk; and as he had neglected to set five tons apart when it was in his power to have done so—the five tons, although not distinguished from the bulk, were, when so stored by the plts, at the deft.'s risk, and the property therein had passed to the deft.; and that as the plts. were entitled to specific performance of the contract; and that no objection had been made by the deft. to the form of the declaration; and that the only defence taken by him was as to the quality of the hops; and that as there was, in the opinion of that court, no necessity for further allegations of tender in the declaration than those contained therein; and that it was the duty of the deft. to have gone to the store, and have claimed the hops; they considered the judgment of the court below erroneous, and proceeded to reverse the same as aforesaid.

From this judgment the plts. now appealed.

M. Smith, *Q. C.*, and *W. Williams*, for the app., contended that as the contract sued on was an executory contract, and no specific hops were bought or sold, and no property passed to the app., it followed that he could only be liable to pay damages, and not the full price, and the damages consisted of the difference between the contract price and the market price at the time the contract was broken: (*Bush* v. *Davis*, 2 M. & S. 403; *Cunliffe* v. *Harrison*, 6 Ex. 903; Pothier, Contrat de Vente; Dalloz Repertoire de Legislation, c. 3, sect. 1.)

Manistry Q. C. and *Holland* for the respondents.

Judgment was delivered by

Lord Chelmsford.—This is an appeal from the judgment of the Court of Q. B. of Lower Canada, reversing a judgment of the Superior Court of that province given in favour of the apps. 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, 6th March, 1855. Messrs. Kilborn and Murrell sell, and Joseph K. Boswell contracts for delivery to them for the following three years, viz. 1855, 1856, and 1857, five tons weight of 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 plts. for the hops deliverable in 1856, proceeded to aver that the plts. 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 deft. to accept and pay for the same, yet that the deft. refused to accept of or pay for the said hops, whereby the plts. 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 the damage of 600*l.* currency, for which sum they prayed judgment, together with interest and costs. The deft. pleaded that the hops tendered by the plts. in fulfilment of the contract were bad and unmerchantable, and unfit to be used in his business; and as 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 deft. 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 deft.'s brewery, the plts. agreeing to take the hops away again if the deft. 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 plts. to distinguish that quantity from the rest of the bales, the deft. refused to accept the hops, and they were conveyed away by the plts. and deposited by them in a storehouse 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 plts. again offered to deliver five tons of hops to the deft., 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 storehouse. A great number of witnessess 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 pay the price; and as the plts. did not by their declaration offer to deliver to the deft. 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 plts. the right of appeal. This judgment, however, was reversed by the Court of Q. B, 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 deft. should, within fifteen days from the service upon him of a copy of the judgment, pay to the plts. the sum of 560*l.* currency (being the contract price of the hops) with interest, and that upon payment the plts. should give to the deft. a delivery note upon the occupier of the store where the hops were deposited for the delivery to the deft. 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 deft. 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 deft. is adjudged to pay within fifteen days after service of a copy of the judgment; if he does not, the plts., by merely depositing with the officer of the court the delivery order in duplicate, would be entitled to sue out execution. And, supposing the deft. should pay the money and obtain the delivery