RICHARD CHURCH .....APPELLANT;

AND

JOHN ABELL .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of goods—Damages for breach of warranty—Evidence.

C. wishing to procure a water wheel which, with the existing water power, would be sufficient to drive the machinery in his mill, A. undertook to put in a "Four-Foot Sampson Turbine Wheel," which he warranted would be sufficient for the purpose. The wheel was afterwards put in, but proved not to be fit for the purpose for which it was wanted. The time for payment of the agreed price of the article having elapsed, C. sued A. for breach of the warranty and recovered $438 damages.

A. subsequently sued C. for the price, and C. offered to give evidence in mitigation of damages that the wheel was worthless and of no value to him. Objection was taken that it was not competent to C. to give any evidence in reduction of damages by reason of the breach of warranty, or on the ground of the wheel not answering the purpose for which it was intended, and the learned Judge presiding at the trial declared the evidence inadmissible.

Held:—On appeal, reversing the judgment of the Court of Appeal for Ontario, that as the time for payment of the agreed price of the article had elapsed when the first action was brought, and only *special* damages for breach of warranty had been recovered, the evidence tendered by C. in this case of the worthlessness or inferiority of the article was admissible.

[Strong, J., dissenting.]

The suit in which this appeal arose was brought by the Respondent against the Appellant in the Court of Common Pleas for Ontario, to recover from him $550.

PRESENT: The Chief Justice, and Ritchie, Strong, Taschereau, and Fournier, J. J.

The declaration was on the common counts. The pleas were: never indebted and payment. The case was tried before a jury and the Hon. Mr. Justice *Burton*, at the Fall Assizes of 1874, for the County of York, in the Province of Ontario.

There was conflicting evidence as to the bargain under which the wheel sued for by the Plaintiff had been delivered and put up in the Defendant's mill.

The particulars of the Plaintiff's claim were:

1872, Sept. 30. To 4 feet Sampson's Turbine Water Wheel.....$550.

There were certain papers produced, which, it was stated, shewed the claims of the now Defendant in his cross suit previously brought against Abell for breach of warranty, and that his claim in that suit was only for the special damage he had sustained by the delaying of the working of his mill, the cost and expense of taking out the useless wheel, the timber furnished for putting it in, the freight, loading and unloading, &c., and the expense incurred in repairing the wheel, trying to make it work, &c., and that there was no claim directly or indirectly for the value of the wheel, or the difference in value between the one he agreed to deliver and the one he did deliver. The record in the suit of *Church* v. *Abell* was also produced.

In it there are three counts in the Plaintiff's declaration, on a warranty.

The first, on a warranty that the wheel would give the largest percentage of power for the quantity of water used, and would yield a larger percentage of power than any other description of water wheel in use. The Plaintiff averred that the wheel did not do this, and thereby Plaintiff incurred expense in having the wheel removed, and in putting in another wheel, and incurred loss and damage in the stoppage of the

mill while doing so, being for a long time unable to work the mill.

The second, that the wheel would give perfect satisfaction, yet it did not give satisfaction but was useless to Plaintiff, and unfit for his mill. Averment of damages as in first count.

The third, that the wheel would be reasonably fit for the purpose when put up in Plaintiff's mill, yet it was not reasonably fit for the purpose. Damages as in previous counts. There were also the common counts.

The Defendant's pleas denied all the material averments in the declaration. All the issues raised were substantially found for the Plaintiff, and the damages were assessed at $438. Judgment was entered for the amount of the verdict and costs, and satisfaction was acknowledged on 22nd August, 1874.

At the trial of this action the Defendant proposed to give evidence to shew that the wheel was not according to the warranty, and consequently that the Plaintiff could not recover the agreed price in full for it.

The following is the note of the learned Judge as to his ruling on that point:

"It is now objected that it is not competent to the "Defendant to give any evidence in reduction of dam- "ages, by reason of the breach of warranty, or on the "ground of its not answering the purpose for which it "was intended. Mr. *Osler* proposes to confine the "evidence strictly to show the article was valueless, or "of less value than the agreed price, by reason of such "defect or breach of warranty; but, as I think those "damages were recoverable in the cross action, I exclude "any evidence of this nature. It was optional with the "Defendant to set up the defective quality as a defence, "or, in a cross action, to go for both that and for special

"or consequential damages; but, as he has already "brought a cross action, in which the damages now "sought by way of abatement might, and may have "been recovered, I think I ought not to receive the "evidence."

The case then went on, the evidence proposed to be offered by Defendant being excluded, and the jury found a verdict for the Plaintiff for $550, the amount the Plaintiff claimed was the agreed price.

A Rule was obtained on the 17th November, 1874, to set aside the verdict for the rejection of the evidence tendered to shew that the article, the price of which was sued for in the action, was worthless and of no use to the Defendant, and on the ground of the misdirection and improper ruling of the learned Judge in ruling, that as the Defendant had already recovered damages in a former action for breach of warranty of the said article, he was now bound to pay the full contract price of it, although such price did not form any element in the computation of damages in such former action.

In Hilary Term following, on 10th February, 1875, the Court of Common Pleas ordered that the verdict should be set aside and a new trial had between the parties, without costs.

That judgment was appealed from to the Court of Appeals of the Province of Ontario, and, on the 23rd of January, that Court (Mr. Justice *Moss* dissenting) ordered that the said appeal be allowed and that the Rule *nisi* in the Court below for a new trial should be discharged, with costs to be paid by the Respondent to the Appellant, and that judgment should be entered for Appellant upon the verdict, and that the Respondent

should pay to the Appellant the sum of $227.89 for his costs of the appeal (1).

From that judgment there was an appeal to this Court, which was brought down for a hearing in the month of June, 1876.

JUNE 7th, 1876.

Mr. *J. Bethune*, Q. C., for the Appellant:

The whole question is whether the sale was of a specific chattel or of an ordinary article. The sale here was not one of a specific chattel, and the value of the article was a question which should have been left to the jury to decide. All that the Appellant could recover when suing Respondent was special damages, because he had not then paid the price, and in the present action he had the right of giving evidence of the inferiority of the article.

The case should be sent back to the Common Pleas, in order to ascertain what the contract was.

By the judgment of the Court of Error and Appeal the Defendant is deprived of the right of proving to the jury the worthlessness or inferiority of value of the article, in order to have the contract price reduced. It was a question of fact for the jury, and not for the Judge to decide. By section 34 of the *Administration of Justice Act*, 1874, *Ontario*, the Common Pleas had, in their discretion, the power to send the same back to the jury, and thus get over the difficulty with reference to misdirection. It was competent for the Defendant not to set off by a proceeding in the nature of a cross action, the amount of damages sustained by the breach of the contract, but simply to defend

(1) See case as reported in 26 U. C. C. P., 338.

himself by showing how much less the article was worth by reason of the breach of contract.

Basten v. *Butter* (1); *King* v. *Boston* (2); *Allen* v. *Cameron* (3); *Thornton* v. *Place* (4); *Poulton* v. *Lattimore* (5); *Lucy* v. *Moufet* (6); *Grimoldby* v. *Wells* (7); *Benjamin* on Sales (8).

Further, the Defendant had a right to prove that no recovery with respect to the inferiority of the article was had in the former action, his only claim being then for special damages sustained by breach of warranty. When he sued for special damages, Defendant might reasonably suppose that the Plaintiff would only claim the actual value, or that knowing that the wheel was worthless, he would never sue at all. The Plaintiff could not sue on a special contract, because the contract was broken; he could only recover, if at all, upon a *quantum meruit*. If Appellant was entitled originally to set up inferiority by way of defence to an action for the price, and also to bring an action for his special damage, he cannot be condemned to pay the full contract price simply because he brought his action for damages first. The decisions in *Mondel* v. *Steel* (9) and *Davis* v. *Hedges* (10) are those which seem applicable to the present case. *Barker* v. *Cleveland* (11) is not in conflict with *Mondel* v. *Steel*. All that is affirmed in that case is, that there was a contract made, not that it was performed or that the purchaser is liable for the whole contract price. If a contract is broken you cannot recover on a special contract, and this was a question of fact for the jury to decide. There is also a plain

(1) 7 East, 479; (2) 7 East, 481, note; (3) 1 C. & M., 832; (4) 1 Moo. & R., 218; (5) 9 B. & C., 259; (6) 5 H. & N., 229; (7) L. R. 1 C. P., 391; (8) 2nd Edn., 752; (9) 8 M. & W., 858; (10) L. R. 6 Q. B., 687; (11) 19 Mich., 230.

distinction between suing for a claim and using it to mitigate damages.

Mr. *Mowat*, Q. C., Attorney General of Ontario, and Mr. *John S. Ewart* for the Respondent:

It is argued that the fact of the sale being the sale of a specific article should have been left to the jury to decide, but at the trial no such point was raised, and the language of the Appellant's declaration shows that in suing for breach of warranty, it was for breach of warranty of a specific chattel.

The words "*a certain water wheel*" used in the declaration prove beyond a doubt that it was for a specific chattel that the contract was made. An order such as given in the present case is equivalent to the purchase of a specific chattel. *Ollivant* v. *Bayley* (1); *Prideaux* v. *Bunnett* (2). It was never intended that this question should be left to the jury.

The Defendant could not bring two separate actions for the recovery of two sets of damages. A breach of warranty does not entitle the purchaser to rescind the contract and return the chattel, but only to sue for damages. In the suit that was brought, he was entitled, notwithstanding non-payment of the contract price, to damages arising out of the inferiority of the article. See *Marzetti* v. *Williams* (3); *Doan* v. *Warren* (4); *McLeod* v. *Boulton* (5); *Mayne* on Damages (6).

As to the argument that the Appellant could not in the former action claim these damages because he did not know if ever he would be called upon to pay the contract price, it cannot be entertained, because the respondent when sued, could, by a pleading, have declar-

(1) 5 Q. B., 288; (2) 1 C. B., N. S., 613.; (3) 1 B. & Ad., 415; (4) 11 U. C. C. P., 423; (5) 3 U. C. Q. B., 84; (6) 2nd Edn., 420.

ed his intention of not asking for the price of the article. The mere fact of adding the words "special damage" in the declaration, did not limit the finding of the jury. It cannot exclude the right to recover damages which do not require to be specially alleged. The appellant seems to have based his whole case upon the assumption that damages for inferiority of the article could not have been recovered until the respondent had sued appellant for the contract price. Now, in an action on the warranty, special and general damages were recoverable, and Appellant in his action must have recovered at least nominal damages. *Taylor* on Evidence (1); *Hitchin* v. *Campbell* (2); *Smith* v. *Thomas* (3); *Lord Bagot* v. *Williams* (4); *Smith* v. *Johnson* (5); *Dunn* v. *Murray* (6); *Henderson* v. *Henderson* (7); *Davis* v. *Hedges* (8); *Newington* v. *Levy* (9).

In any event the Appellant should have recovered all his damages in that action and *nemo debet bis vexari, pro unâ et eadem causâ*; *Trask* v. *Hartford* (10); *Bennett* v. *Hood* (11); *Farrington* v. *Payne* (12); *Greathead* v. *Bromley* (13).

Neither can you treat a contract as rescinded because of breach of warranty. If there has been a breach of warranty, the law does not declare, as contended by the Appellant, that the only remedy left is in an action for the *quantum meruit;* on the contrary, the vendor is entitled to the whole contract price. The case of *Barker* v. *Cleveland* (14) is clearly in point and shews that the evidence is inadmissible.

(1) P. 1,456; (2) 2 W. Bl., 827; (3) 2 Bing., N. C., 372; (4) 3 B. & C., 235; (5) 15 East, 213; (6) 9 B. & C., 780; (7) 3 Hare, 100; (8) L. R. 6 Q. B. 687; (9) L. R. 6 C. P., 180; (10) 2 Allen, 331; (11) 1 Allen, 47; (12) 15 Johns., 431; (13) 7 Term R., 455; (14) 19 Mich., 230.

Mr. *J. Bethune*, Q. C., in reply :—

In appeal, as a question of law, the right of arguing that it was not the sale of a specific chattel cannot be denied. It is a matter of evidence that no inspection was ever made, and to make it the purchase of a specific article, inspection must be made.

January 15th, 1877.

THE CHIEF JUSTICE:—

[His Lordship, after reviewing the facts of the case, proceeded as follows :—]

I have considered the cases on either side, and will make lengthy abstracts from two of them, which I think sufficiently shew the law applicable to this case.

The first case is *Mondel* v. *Steel* (1). Steel, the Defendant, had agreed to build a ship for Mondel, the Plaintiff, according to a certain specification. Mondel contended that he had not built the ship with certain scantlings, fastenings and planking, according to the specification. Steel had sued Mondel for the price of the ship and certain extra work, and in the declaration Mondel set up that Steel did not build the ship of the very best materials, in conformity with the specification, and did not build the same with the scantlings, fastenings, and planking as required, and gave evidence thereof; and contended that his damages in consequence thereof exceeded or equalled the amount of the balance due Steel for building the ship, and the additional work done thereon, and that he Mondel was

(1) 8 M. & W., 858.

entitled to have a verdict found for him. And the jury found a verdict for Steel, after allowing Mondel for the damages he had sustained by Steel not completing the ship according to contract, and found a verdict for Steel for the balance, £120.

In the action brought by Mondel, it was alleged: That by reason of the breach assigned, the ship in a certain voyage was so much strained that it became necessary to re-fasten and repair her, and thereby Mondel lost the use of her during the time she was undergoing such repairs. The plea setting up the defence was demurred to, on the ground that the action was brought to recover special damage resulting from the breach of contract.

In the argument *Parke*, B., said: This is not the *case of a warranty*. It is an agreement to build a ship of a given description, and if it is not built according to the agreement, the vendee is not bound to receive it; but if he does receive the ship, is he not bound on a new contract on a *quantum meruit* to pay for it.

Cleasby, B., in argument said: "Avoiding circuity of action means that the party should not be compelled to pay the whole sum specified in the agreement, and then be driven to a cross action." He further argued: "No claim was made in respect of the breach of contract, but the Defendant merely insisted on the breach of contract as shewing that the Plaintiff in that action was not entitled to recover the sum agreed upon, but only on a *quantum meruit*.

Parke, B., in giving judgment, cites cases previously decided and refers to the principles governing the action according to the then existing practice.

The Defendant contended that in an action brought for the stipulated price of a chattel *which the Plaintiff*

had contracted to make for the Defendant of a particular quality, or of a specific chattel sold with a warranty and delivered, the Defendant had the option of setting up a counter claim for breach of the contract in the one instance or the warranty in the other, in the nature of a *cross action ;* and that if he exercised that option, he was in the same situation as if *he had brought such an action*, and consequently, could not, after judgment in one action, bring another ; and the case was likened to a set-off under the statutes. *Parke*, B., said that was not the proper view meant in *Street* v. *Blay* (1) that the sum to be recovered for the price of the article might be reduced by so much as the article was diminished in value, by reason of the non-compliance with the warranty ; and that this abatement was allowed in order to save the necessity of a cross-action. He said : "Formerly, it was the practice, where an action was brought for an *agreed price* of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the Plaintiff to recover the stipulated sum, leaving the Defendant to a cross action for breach of the warranty or contract ; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered ; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the Defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back ; he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it,

(1) 2 B. & Ald., 462.

and seek his remedy on the Plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price * * * ; and therefore the Defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten* v. *Butter* (1) a different practice * * * began to prevail * * * ; and the Defendant is now permitted to shew that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value * * * where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for ; for in these cases the acceptance or non-return affords evidence of a new contract on a *quantum valebat* ; whereas, in a case of delivery with a warranty of a specific chattel, there is no power of returning, and consequently no ground to imply a new contract, and in some cases of work performed there is a difficulty in finding a reason for such presumption. It must, however, be considered, that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established ; and that it is competent for the Defendant, in all of those, not to set-off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject-matter of the action was worth, by reason of the

(1) 7 East, 479.

breach of contract; and to the extent that he obtains or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more. * * * All the Plaintiff could by law be allowed in diminution of damages, on the former trial, was a deduction from the agreed price, according to the difference, at the time of the delivery, between the ship as she was, and what she ought to have been according to the contract; but all claim for damages beyond that, on account of the subsequent necessity for more extensive repairs, could not have been allowed in the former action, and may now be recovered."

The practice before *Basten* v. *Butter*, then, was that where there was an express warranty, the party damaged by its breach could only be indemnified by bringing an action on the warranty, in which he recovered his whole damages, both on account of the inferiority or no value of the article delivered, and the special damages arising out of the warranty; and the person who sold the article, though there was a breach of the warranty, and it might be of little or no value to the purchaser, yet recovered from him the full amount of the agreed price. The reason why the change took place was, that it seemed absurd to allow a party, who had probably been in default, to recover from his opponent a sum of money for an article delivered which did not answer the warranty, and was of less value; when, in fact, the party condemned to pay the money, could immediately recover the difference in value back from the party who received it from him, by bringing another action. And so, to avoid circuity of action, it was held that whatever evidence tended

to reduce the value of the article sued for, could be shewn in the action for its value. And in this way, though the contract price was reduced and there were no special damages, complete justice was done and the multiplying of law suits avoided. *Mondel* v. *Steel* carried the law further, and decided that, although the party had reduced the claim of his opponent to the value of the article actually delivered, he still had the right to recover for any special damages he could shew he had sustained.

In *Davis* v. *Hedges* (1) the action was to recover £42 19s. 6d., damages for the improper performance of certain work, agreed to be done by Defendant for the Plaintiff, at his house, under a building contract, and for not performing the work according to certain specifications, and also for removing certain partitions and appropriating certain materials.

For the Defendant it was stated that he had brought an action in the Court of Common Pleas for the price of the work under the contract, and had recovered the whole of the amount. The present Plaintiff having paid the money would not be allowed to bring an action for the defective performance of the agreement, as he might have set up such defect in the action brought against himself.

Hannen, J., in giving the judgment of *Blackburn*, J., and himself, reviewed the cases at considerable length, and quoted largely from *Mondel* v. *Steel*, and the conclusion at which the Court arrived, the argument of convenience largely entering into the discussion, was that the better rule is, that the Defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case, as *Parke*, B.,

(1) L. R. 6 Q. B., 687.

says, he is concluded to the extent to which he obtains, or was *capable of obtaining*, a reduction ; or he may, as in the present case, claim no reduction at all, and afterwards sue for his entire cause of action. (There he had paid the full amount of the plaintiff's claim in that action.)

In a previous part of his judgment, he said " It is clear that before any action is brought for the price of an article sold with a warranty, or of work to be performed according to contract, the person to whom the article is sold, or for whom the work is done, *may pay the full price* without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken."

Could he recover this amount without paying the full price ? That is the question which we must decide. The argument in this last case went to shew that if the Defendant when sued for the article was bound to set up the deficiency of its value, he might, when bringing his own action, be embarrassed. When he was ready to bring his own action it might be more apparent what was the value or the amount to which the article or work was diminished by Plaintiff's default. *Hannen*, J., adds : "Surely the right to redress for the diminution of value, when discovered, ought not to depend on the accident whether the contracting party in the wrong had or had not issued a writ for the price. He also argued that if the inferiority of the article *must* be set up in an action for its price, instead of avoiding circuity of action, it would in many cases increase litigation, for the party injured would bring an action for the damages he was not allowed for in the first action.

Looking at dates, it appears that the wheel in question was delivered in September, 1872, and it was probably taken out of Defendant's mill in February, 1873. Church did not commence his action against Abell until August of that year.

If, in the mean time, the present Plaintiff had commenced his action, no doubt the Defendant could have shewn the wheel to be of little or no value, and could have then brought his action for his special damages, which appear to have been substantial from the amount recovered was $438.

The Defendant says what he has done and what he wishes to do is exactly the same thing: he wishes to show the wheel was worthless, and he has recovered his special damage. So in *Davis* v. *Hedges*, the Plaintiff might have been allowed for the diminished value of the work in the action against him, but the Court held he could exercise his option by paying in full for the work and then recovering the whole of his damages in the action which he brought.

The argument of convenience is then invoked, but no question is there raised as to what his position would have been had he not paid the agreed price of the work.

Let us look at the practical application of the rule where the buyer, who has not paid for the article (and who has given no note or other security for it, and the time for payment, if any given, has expired), brings his action to recover damages for a breach of the warranty. Take an extreme case, for it is by putting an extreme case that you test the rule. The article sold, say, is a steam boiler, worth, if properly made and of the best materials, and put up on the premises of the purchaser, $1,000. The seller warrants it to be well made and of the best materials, and the price is $1,000. The seller

puts it up on the buyer's premises ; the buyer purchases the steam engine which is to drive his mill from some other person ; the mill is finished, quite ready to work as soon as the engine is fitted up ; a few days after the boiler is completed, and put in its place outside of the mill, and the seller and his workmen have left, considering he has performed his contract. The engine is finished and attached to the boiler ; the first time the steam is raised the boiler explodes, in consequence of defective workmanship and bad materials, and it is such a total wreck it is not worth anything, not even the cost of removing it to sell for old iron. In consequence of this accident the purchaser is delayed in getting another boiler made and placed on the ground for six months, and he claims damages for the loss of time in working his mill. He sues the boiler maker. Must he claim from him $1,000 for the value or agreed value of the worthless boiler, in addition to the other damages, although he has not paid anything for it ; and then, having recovered this sum from the boiler maker, must the latter bring an action against him to recover the same sum back again, as the price agreed to be paid for the boiler ? Does not this rule compel circuity of action, and compel a Plaintiff, under such circumstances, to recover what in *æquo et bono* he is not entitled to ? Whereas, if he merely recovered the damages he had actually sustained, there would be no necessity for another action.

Then what is a Plaintiff to do under such circumstances ; as an honest man he does not desire to recover more than he ought to receive, but if the rule is laid down that in a cross action the agreed price can be recovered against him, he must recover it as part of his damages in his own action.

The argument is based on what is said to be the

established rule as to damages for the breach of the guaranty. This rule is not the difference in the value of the article delivered and the contract price, but the difference in the value of the article delivered and of the article agreed to be delivered, and it is said that the contract price has nothing to do with it. As a general rule, in practice, when the contract price has been paid, it is considered as really indicating the value of the article, and damages are given accordingly.

Another objection urged is, that this is a splitting of the demand, and this though the special damage has been recovered and what is intended to be done is to set up the diminished or want of value of the article delivered against the agreed price. This is not a splitting of the demand for the purpose of suing again; he could not, as a Plaintiff, sue again for this diminished or want of value of the article. He can only shew, that by reason of non-compliance with the warranty, the value of the article was diminished, and that a corresponding abatement should be allowed in the price. And this is done to save the necessity of a cross action.

But if this diminished value had been recovered in the former action, and it had been equal to the agreed price, a cross action would be necessary to recover it back. To force this state of things by a technical rule seems to be inconsistent with the general views which now prevail in the administration of the law. The tendency of modern decisions is to have the rights of parties settled, if possible, in one action rather than by a multiplicity of suits. The absurdity of regulating the rights of parties by the accidental circumstance as to which party may first commence his action, is referred to in the judgment of Mr. Justice *Hannen* in *Davis* v. *Hedges*. Mr. Justice *Moss* in his judgment in the Court

below, supposes actions by both of the parties pending at the same time, though that by the purchaser had not reached issue at the trial of the other; in that case the inferiority in value of the article delivered could be given in evidence in reduction of the price, and the purchaser could afterwards go on with his action and recover special damages, or, at all events, discontinue that action and bring another to recover special damages.

Suppose both suits were brought down to trial at the same Assizes, would it not seem absurd that the rights of the parties should depend on the question of which of the suits should be tried first?

The fact of one or other of the parties becoming bankrupt after having recovered money which could be recovered back from him, if he were solvent, is a consideration not to be overlooked. Supposing the Appellant in his action had satisfied the Jury that the article delivered was valueless and he had recovered as damages, on that account the $550 said to be the price of it, and after receiving the money had become insolvent; the Respondent after paying his money, would then be compelled to depend on the chances of getting the amount back from the estate of the bankrupt, and he would be forced into this position by the rule of law contended for by the Plaintiff in this action. Take the further case, where the purchaser has become insolvent, perhaps from the injury to his business and loss occasioned by the article purchased not being according to the warranty; no action has been brought on either side, but an action is brought by the assignee of the bankrupt purchaser who has all the rights of the insolvent. Can he recover for the sum which the delivered article is less in value than the one guaranteed, say the agreed price of the article sold; and compel the

seller to rank on the estate for the agreed price? Such alternatives as these shew the unreasonableness of the hard and fast rule of law contended for by the Plaintiff in this action.

Assuming the Defendant in this action to be able to shew that the wheel was worthless, the following language of Mr. Justice *Moss*, in the Court of Appeal of Ontario, seems to me very appropriate, as shewing the application of the rule contended for, to the circumstances connected with the transaction.

"That rule would constrain him to recover for this sum, and as a consequence would drive Abell into commencing an action against him for precisely the same sum, even if the parties really agreed in the position that the machinery was of no value, and neither desired any litigation upon that point. Church could not omit to claim this sum, because he would then be exposed to a suit, in which he would be compelled, according to that rule, to pay the full contract price for the worthless article.

"Abell must then, to protect himself, commence an action for the whole price, although if no such claim had been made, he might have been content to resume possession of the machine and make no demand for the contract price.

"In my judgment no arguments founded upon mere technicality should suffice for the establishment of a rule leading to consequences so inconvenient and unjust.

"I cannot perceive that it involved any violation of the rule against splitting up a cause of action, to permit Church to say in his action, that he only claimed for the special damages, and that it was time enough to discuss the question of inferiority or worthlessness, if

Abell prosecuted him. Why should Church have been then compelled to advance any claim in respect of a matter which he was content to let rest?

"It seems to me that in harmony with the decisions of *Mondel* v. *Steel*, and *Davis* v. *Hedges*, it is a reasonable rule to lay down for the ascertainment of damages, where a purchaser with a warranty brings an action before he has paid the contract price, or at least, rendered himself absolutely liable to pay it, as by giving a bill of exchange or a promissory note, that he shall only recover the amount of his special damage, and that he shall be left to use the inferiority of value as a weapon of defence, if the vendor claims from him the full contract price.

"It was merely pressed in argument that his liability to pay the full contract price entitled him to recover to the same extent, as if he had actually paid; but if the correct rule be that I have just stated, the patent objection to this argument is that it assumes a degree of liability which did not exist. He was only *liable* to pay what the Appellant could by law compel him to pay.

"This, according to *Mondel* v. *Steel*, was not the contract price, but the difference between it and the inferiority of value: for the amount equivalent to representing an inferiority of value he was not liable.

"Before any action was brought by either party, the ultimate right of the Appellant was to receive from the Respondent the contract price, diminished by the inferiority of value; the ultimate right of the Respondent was to receive from the Appellant compensation for his special damage. As it is, the Respondent, while only recovering his special damage, is condemned to pay the full contract price, for no better reason, so far as I can perceive, than that he brought his action first."

The fitting deduction from the language used and principles laid down in the cases of *Mondel* v. *Steel* and *Davis* v. *Hedges*, to quote again from the judgment of Mr. Justice Moss, is to hold that when the purchaser brings his action upon the warranty before making payment, and I should add to this when the payment is due, he shall be restricted to the recovery of any special damages he has sustained and shall not be permitted to recover for inferiority of value, for the simple reason that if he is afterwards sued for the price, the law affords him full protection by enabling him to assert this inferiority as a ground of defence.

The only decided case to which we have been referred, that is against this view, is that of *Barker* v. *Cleveland* reported in 19 Michigan Reports 237-8. We are not bound by that decision, though pronounced by a distinguished Judge, but I think, looking at the decided cases in the English Courts and the reasons for the same, the conclusion at which we have arrived is the correct one.

The acting on it, will be more convenient and more likely to do justice between the parties than any other. The leading principles were settled when the right to shew the diminished value of the article in diminution of the price and having done so to sue for the special damage was established. The only objection to extending the same rule when the action is first brought by the purchaser of the article instead of the seller, is the technical one that you must recover all your damages in that action and not separate them. The argument of convenience was allowed in *Mondel* v. *Steel* to prevail to establish the rule that the damages having been separated by the diminished value being set up in the first action, the rest of the damages, viz: the special damages, could be recovered in the last. Our decision

is merely the converse of that, and based on the same principles of convenience and justice, viz: that not having paid the price, the same being due, the purchaser should only recover his special damages if his be the first action, and shew the diminished value when called on to pay the price.

Our judgment therefore is, that this appeal be allowed. That the order and judgment of the Court of Error and Appeal for the Province of Ontario, be reversed and set aside with costs. That the rule absolute in the Court below, the Common Pleas, setting aside the verdict and granting a new trial between the parties without costs, shall stand; and that the Plaintiff in the said suit, do pay the costs of the appeal to the said Court of Error and Appeal and to this Court.

RITCHIE, J. :—

The question to be decided in this case is of very considerable practical importance, viz: whether we are constrained by general principles or the weight of authority to enunciate a technical rule fraught with consequences so inconvenient and unreasonable as those so clearly and forcibly pointed out in this Court by the Chief Justice, and by Mr. Justice *Moss* in the Appeal Court of Ontario; or whether we can recognize and promulgate as law, a rule, which, while doing full and ample justice to all parties, is calculated to prevent unnecessary litigation, and that circuity of action which it is always the policy of the law as far as possible to avoid. I am happy to say that, in view of the principles established and acted on in *Mondel* v. *Steel* and *Davis* v. *Hedges*, I have been able, satisfactorily to myself, to come to the same conclusion at which the

Chief Justice has arrived, and, after the elaborate judgment he has delivered, I do not feel it necessary to occupy more time.

STRONG, J. :—

The decision of this Appeal depends altogether on the proper answer to the question whether the Appellant, a vendee of chattels purchased with a warranty for cash, who had not paid the price, could, in an action formerly brought by him for breach of the warranty, have recovered general as distinguished from special and consequential damages.

If the Appellant could have recovered his general damages, the measure of which consisted of the difference between the actual value of the article sold and what would have been its value if it had been equal to the warranty, then it is not disputed but that the former judgment estopped the Appellant from insisting in the present action on recoupment or reduction of the price on the ground of breach of warranty. That a judgment constitutes *res judicata* as to anything which might have been recovered in the action is, if any authority is wanted for so elementary a proposition, clearly stated to be the law in the three cases of *Gibbs* v. *Crookshank* (1), *Henderson* v. *Henderson* (2), and *Davis* v. *Hedges* (3); which may be selected from a great number of authorities as clearly and succintly defining this well-known rule. The extent to which this defence prevails is only limited by the maxim : *Tantum judicatum quantum litigatum;* and everything is considered to have been in litigation which could have been made the subject

(1) L. R. 8 C. P., 454; (2) 3 Hare, 100; (3) L. R. 6 Q. B., 687.

of a claim under the Plaintiff's declaration. It is, however, said, and it forms the principle of decision in the present appeal, that the general ordinary damages, which a purchaser is entitled to recover in respect of a breach of warranty as to quality, which are measured according to a well-settled rule, and with the calculation of which the contract price has nothing whatever to do (1), are not recoverable so long as the price is due and remains unpaid, and that, consequently, the judgment recovered is only an estoppel as regards the recovery of the special damages, though it is conceded, that if the price had been paid, or if, though unpaid, payment had been deferred for an unexpired term of credit, a contrary rule must have prevailed and the former judgment would have been a bar to the reduction of damages which the Appellant claimed at the trial.

As all depends on the fact of the purchase money having been due at the date of the former action, I would call attention to the absence of any evidence shewing that the Appellant was in default for non-payment at the time the action was brought. Granting, however, that the Appellant is now entitled to say that his own default is to be presumed in his favour and against the Respondent, and that the sale must be assumed to have been for cash, although there is no evidence on that point, I am still of opinion, that the law is in the Respondent's favour, and that it was correctly enunciated in the ruling at *nisi prius*, and in the judgments of Mr. Justice *Burton* and Mr. Justice *Patterson*, in the Court below.

There is no direct English authority to be found on the question involved, at which I cannot express

(1) Mayne on damages, p. 130 and cases there cited.

surprise, but an American case (1), decided by Judges of very high professional reputation, is a decision on similar facts exactly coinciding with the opinions of the majority of the Judges of the Court below. All question as to the conclusiveness of the former judgment in the action on the warranty, as regards both general and special damages, would, if the purchaser had then been in no default in payment, be, in effect, precluded by the case of *Davis* v. *Hedges* (2).

The law is also stated in the same way in a text book of established repute (3).

The rule of law, which is now for the first time propounded, and which is to govern the decision of this appeal, must, therefore, in the absence of any reported case directly establishing it, be derived by inference and analogy from cases which are supposed to warrant its deduction. I have been unable to draw any but an opposite conclusion from those authorities.

The warranty, being a contract entirely collateral to the principal contract of sale, the remedy of the vendee for a breach of it was originally restricted to an action, the right to bring which was in no way dependent on the payment of the price; and a recovery in such an action must, on general principles already referred to, have been held to include all the damages, as well general as special, arising from the same cause of action.

After the case of *Basten* v. *Butter* (4), however, a practice was sanctioned, by which the Defendant, in an action for the price, was permitted to set up the breach of warranty in mitigation of damages, and

(1) *Barker* v. *Cleveland*, 10 Mich., 230; (2) L. R. 6 Q. B., 687; (3) Mayne on damages, p. 131; (4) 7 East, 479.

obtain a reduction corresponding with what are called the general, ordinary or immediate damages arising from non-compliance with the warranty, namely, the difference between the actual value of the goods sold and that which would have been their value if they had answered the warranty.

In the case of *Mondel* v. *Steel* (1), it was determined, that a vendee, who had set up the inferiority to the warranted value by way of reduction of damages in an action for the price, was not barred from maintaining an action on the warranty in respect of the special damages incurred, since these damages could not have been recouped to him in the vendor's action.

In *Davis* v. *Hedges* (2), the Court of Queen's Bench held, that the purchaser, when sued for the price, was not bound to set up the defects in the chattel in reduction of damages, but that he might let judgment go for the price and then sue for the breach of the contract of warranty.

It is to be extracted from these authorities, that the vendee, at his election, can either sue for his general damages or use them, as a means of reduction of the vendor's demand, in an action for the price, but that, as to special damages, he can only recover those in his own action, and that, as a necessary consequence, the recoupment of the general damages can be no bar to an action on the warranty, though its effect is to limit the purchaser to a recovery of his special damages in the second action. The cause of action, however, being one and indivisible, although the damages are, to a certain extent, for practical convenience, made divisible, no second action can be brought on the warranty, on the pretence that the recovery in the first action was confined to

(1) 8 M & W, 858; (2) L. R. 6 Q. B., 687.

special damages; and, for the same reason, no recoupment can be had under like conditions, unless the non-payment of the overdue price disentitled the vendee to recover his general damages in the first action, which is the point in dispute in the present appeal. This is all the cases prove. It is now, as I understand the judgments of the majority of the Court, intended to add to these propositions another, namely: that a purchaser is not to be permitted in an action on a warranty to recover his ordinary general damages, consisting of the difference between the actual and the warranted value, so long as he has not fulfilled his own liability under the contract, by the payment of the price. Neither in the reports nor in the books of text writers can any such rule of law be found, and, if it exists, it must be derived by a process of analogical reasoning, from the cases which embody the rules I have already stated.

There cannot be a doubt, and it is not disputed, that the purchaser originally had, irrespective of payment, a right of action on the warranty, which was then considered as an independent contract collateral altogether to the principal contract of sale. Then, so far as I can discover, nothing, which has hitherto been judicially decided, has assumed to take away from that right or made its diminution a necessary consequence. The case of *Basten* v. *Butter* (1), merely authorized the vendee to set up, by way of deduction from the vendor's damages, that which, beyond all doubt, would have been recovered in a cross action; it took no right away from the purchaser, but gave him a remedy by way of reduction, and which was to be alternative with his remedy by way of action. The law now applied in this case goes far beyond this, for it entirely suspends

(1) 7 East, 479.

the remedy on the warranty, so far as regards the general damages, until the price is paid. Thus, in other words, it makes a contract, which, beyond all question, the law, as hitherto settled, has treated as independent and collateral, dependent and conditional. It is easy to understand how, in settling the principles of such a branch of the law as that relating to the measure of damages, and which is even yet far from complete, as very recent cases shew, a new rule, giving a party a convenient and additional remedy like that providing for recoupment or deduction of damages, a sort of set off, though not strictly and technically a set-off, might well be laid down. It is, however, difficult to comprehend, how an absolute vested right to sue on a contract can, without legislation, by the decision of a Court of Justice, be converted into a right merely conditional and dependent on the precedent performance of an act, which the party for whose benefit it is to be performed, as the law interprets the contract, has never stipulated for.

In the case of goods sold to be delivered at a future day, and to be paid for at the expiration of a term of credit more remote than the time fixed for delivery, the obligations of the vendor to deliver and of the purchaser to pay, are, undoubtedly, independent of each other, and, although the day fixed for payment may have passed, the purchaser may maintain his action for non-delivery without having first paid or tendered the price.

This proposition is too elementary to require any authority, for it forms the first of the celebrated rules laid down by Sergeant Williams in his note to the leading case of *Pordage v. Cole* (1).

(1) 1 Williams Notes to Sanders, 551; and see 2 Smith's L. C. (Ed. 7) p. 14.

It would scarcely be acknowledged that the decision in the present case is to have the effect of altering the law on this head.

Then, if it is to remain unaltered, it is surely inconsistent with a rule which requires the purchaser, who has obtained delivery, to pay the price before suing on a warranty. In my opinion, it can equally be said in the one case as in the other, that to require payment as a condition precedent to suing is to interfere, not merely with the remedies of the parties, but with the mutual rights and obligations which they have chosen to contract. If it were expressed in a contract of sale, that the vendee's right to sue on an accompanying warranty should be absolute and not conditional on the payment of the price, I suppose no Court would venture to relieve the vendor from the consequence of his own express contract. Then, is it not necessarily implied in every sale with warranty, that the purchaser may sue for breach of warranty irrespective of payment? In the present appeal, we have the case of a sale of a chattel for cash (as the majority of the Court consider) with a warranty as to quality. Now the law had, at least previously to the promulgation of the modern doctrine introduced by *Basten* v. *Butter*, settled the meaning of such a contract to be, that the vendee should be at liberty to sue on the contract of warranty independently of the payment of the price, just as if that meaning had been expressed by the parties themselves, in so many words, on the face of a written agreement.

It never could have been intended, by the addition to the vendee's remedies of the simple right to deduct his damages when sued for the price, to alter a principle for the legal construction of contracts which, for upwards

of a century (1), had been settled by decisions never questioned. The right to sue for breach of warranty, irrespective of payment of the price, is altogether dependent on the construction to be placed on the contract, whether verbal or written, and I am of opinion, in the absence of all authority to the contrary, that a contract of sale is to be construed precisely in the same manner now as it was before *Basten* v. *Butter* was decided, and no one can deny that prior to that decision the purchaser's rights in respect of the warranty were in no way subject to any condition of prior payment.

To say, therefore, that a vendee shall not be permitted to recover general damages in an action on a warranty so long as the price remains due and unpaid is, in my judgment, to interfere with the substantial and vested rights of parties, by arbitrarily reversing a long established rule of construction, and it is not merely to order remedies and regulate procedure by moulding the very plastic rules which, in modern times, have been laid down for measuring damages, and which, it is plain, is all that was done, or was ever intended to be done, by the decision in 7 East, and the cases which have followed it.

Moreover, it is conceded, that in the case of a sale on credit the right of action on the warranty must, in its inception, be independent; then, if so, upon what principle or authority can a right of action on a contract, originally absolute and independent, be rendered conditional and dependent by matter *ex post facto*? The law, as far as I can discover, affords no analogy, and the case already referred to of the right to sue for non-delivery after a term of credit expired, leads to the opposite conclusion.

(1) *Pordage* v. *Cole, supra,* was decided in 1672.

Again, it is admitted, that the vendee may, at any time, sue for his special or consequential damages, though he may be in default for the price, and this, as I understand it, because he has no other remedy. Will it not, then, be an anomaly that two distinct actions may be maintained for different classes of damages, resulting from the same cause of action—an action for special damages before payment, and an action for general damages after payment—the same warranty being treated in the first action as an absolute and independent contract, and in the latter as dependent and conditional.

I am further of opinion, that the restriction of the right to sue on the warranty in the manner now proposed is shown to be a most inconvenient rule by this consideration. The measure of damages in such an action is now settled to be the difference between the actual value of the goods sold, and their value, if free from defects warranted against. The price is no element in the calculation of such damages. Now, if the vendee, who has not paid his purchase money, is to be confined to a right to set-off or recoup his general damages for breach of warranty in an action for the price, he must be limited to the amount of the price; consequently, if the damages, as may well happen, should exceed the amount of the price, the vendee's only course will be first to pay off the vendor, and then sue for his general damages in a third action, should he, in conformity with the new doctrine, have happened to have already brought one for his special damages, thus rendering three actions instead of two essential for the adjustment of the rights of the parties.

This, it seems to me, would be a result tending

much more to circuity of litigation and splitting of causes of action than the maintenance of the decision now appealed from.

For these reasons, which coincide with those given in *Barker* v. *Cleveland* (1), and *Davis* v. *Hedges* (2), I have come to the same conclusion as the Court below.

There is a view of this case which I was at one time disposed to regard as favourable to the Appellant. I do not consider the contract, as it now appears in evidence, aside from the estoppel of the former judgment, to have been one for the sale of an ascertained chattel; and in this respect, which is, however, unimportant as regards that part of the case on which the decision turns, I differ from Mr. Justice *Patterson.* There being, then, an executory contract for the sale of an unascertained chattel with a warranty as to quality, the cases of *Street* v. *Blay* (3), and *Heilbuth* v. *Hickson* (4), establish that, in such a case, the purchaser may, after a reasonable time for trial, return the article, on the ground of its not answering the description contracted for, which description is to be collected from the whole agreement between the parties, including the collateral contract of warranty. Had the Appellant been in a position to dispute the execution of the contract, by shewing the return of the wheel, the evidence he tendered ought not to have been rejected. The answer to this argument, however, seems to be very clear. The Appellant has estopped himself from treating the contract as one for the sale of an unascertained chattel, never executed, and insisting that he rejected the article tendered as not answering the requirements of the contract, by bringing an action on the warranty, in which he has expressly

(1) 19 Mich., 230; (2) L. R. 6 Q. B., 687; (3) 2 B. & A., 456; (4) L. R. 7 C. P., 438.

averred that the contract was one for the sale of a "certain water-wheel" which the Respondent had "sold" to the Appellant. In the face of a judgment recovered on a count so framed, I think it impossible to hold that the contract can now be considered as one still executory in its character for the sale of an unspecific chattel. The case of *Barker* v. *Cleveland*, already referred to, is also in point here. I considered, in this connection, whether it was possible to hold the previous recovery to have been in an action for non-delivery, treating the allegation of the warranty as having been introduced, in an informal style of pleading, for the purpose of setting forth the whole contract, shewing the description of the wheel and the vendee's consequent right to reject it. I came, however, to the conclusion that the language of the declaration made it impossible so to construe the record, more especially as it appears the contract was not in writing; and, therefore, if the wheel was returned as not complying with the condition as to description, there would have been no acceptance, and the Statute of Frauds would have been an answer to any action brought by the vendee as on a contract still open and unexecuted.

I am of opinion that the judgment of the Court of Error and Appeal of Ontario should be affirmed with costs.

TASCHEREAU, J.:—

The question in this case is whether the Appellant, the purchaser of the wheel which forms the subject-matter of the present appeal, has a right to set up its worthlessness in an action for its price by Respondent Abell; Church (the Appellant), hav-

ing recovered certain special damages in a former action against his vendor? A great amount of learning and many precedents have been brought to bear on the case on both sides, and this circumstance had the effect of throwing great doubt in the minds of the members of this Court, as it did in the Court appealed from.

I shall not enter into the minute details of the case, beyond saying that the sale of the wheel in question was not that of a specific ascertained article; but that, on the contrary, the transaction was purely and simply a bargain for the future construction of a wheel, which the Respondent guaranteed to be of sufficient power to suit the Appellant's wants; no mention of the size of the wheel was made except by an accidental allusion to a four feet wheel, and the price was agreed to be $400 without the gates, or $430 with the gates.

The wheel, when made, was brought to Appellant's mill and proved to be insufficient. Thereupon the Appellant sued the Respondent in damages, claiming $1,000 as per bill of particulars. The jury awarded $438, declaring that the wheel was not reasonably fit for the purposes mentioned in the Appellant's declaration, and costs were also granted, the whole, principal and costs, being paid to Appellant Church. Now Abell sues Appellant Church for the price of the wheel, and he being awarded $550, the question comes whether the ruling of Mr. Justice *Burton*, excluding evidence offered by Appellant Church in reduction of damages in an action for the price, on account of the insufficiency of the wheel, was bad or good in law?

It is contended by the Respondent that the Appellant, having chosen to take an action on warranty, in which he might have recovered both general and special

damages, was prevented from setting them up again in the action against him by Abell.

I do not adopt the view which the Respondent takes of his position. How could Appellant claim in his action damages on account of the worthlessness of the wheel, when he had not accepted it, nor paid for it, and had undertaken to return it, and did, in fact, return it to Respondent? What other damages could he be awarded than those mentioned and claimed in his bill of particulars, and *cui bono* claim damages for the difference of value or worthlessness of an article which he had not accepted, which he did not intend to accept, and which he did not keep? He claimed nothing but his special damages arising from the expenses, trouble and loss of time incurred in trying the wheel and conveying it from place to place.

I fail to see anything in the Respondent's authorities which can convince me that the Appellant's omission to claim damages in his action should preclude him from meeting an action of Respondent for the price of the wheel by a plea and proof of the worthlessness of the article.

I do not see how he could have lost his right by keeping it in suspense till the respondent would make up his mind to attack him. I go further, and say that it was incumbent on the Respondent Abell, to show clearly that the damages which the Appellant is now setting up in diminution of price were actually included in his first action. Nothing in that sense appears, and the Respondent's only argument seems to be derived from that implication.

Mr. Justice *Moss*, who differed from the majority of the Court of Appeals has put the case in a very clear and forcible manner at page 29 of the printed case, and

I confess that he has illustrated, in a very happy manner, the relative position of the parties.

I do not see that the authorities cited in Respondent's factum bear him out in his contentions, and, therefore, I conclude that the ruling at the jury trial by Mr. Justice *Burton* excluded material evidence offered by the Appellant for the jury's consideration, and was contrary to law; consequently, the appeal should be maintained and the record sent back to the Court below, there to be adopted such further proceeding as the Appellant may be advised to take, granting the Appellant all his costs.

FOURNIER, J.---Concurred.

Appeal allowed with costs.

Attorneys for Appellant:—*Bethune, Osler and Moss.*

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