Counsel for Respondents—C. A. Russell, K.C.—Gilbert Beyfus. Agents—Beyfus & Beyfus, Solicitors.

HOUSE OF LORDS.

Friday, May 5, 1911.

(Before the Lord Chancellor (Loreburn), Lords Ashbourne, Alverstone, and Shaw.)

WALLIS, SON, & WELLS *v.* PRATT & HAYNES.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Sale—Condition—Warranty—Description of Goods—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11, 53.

The appellants bought seed from the respondents as "common English sainfoin" under the proviso that "sellers give no warranty, expressed or implied, as to growth, description, or any other matters." The seed turned out to be a different kind, and the appellants, who had re-sold the seed to third parties as common English sainfoin, were obliged to pay damages. They sought to recover the amount from the respondents.

Held that the respondents' failure to supply common English sainfoin amounted to a breach of condition, which notwithstanding the terms of the contract entitled the appellants to recover the amount of their loss from the respondents.

The buyers in a contract of sale of seed claimed damages in the circumstances stated *supra* in rubric and in their Lordships' judgments.

A judgment in their favour was reversed by the Court of Appeal (VAUGHAN WILLIAMS and FARWELL, L.JJ., *diss.* FLETCHER MOULTON, L.J.)

The buyers appealed.

At the conclusion of the arguments their Lordships gave judgment as follows:—

LORD CHANCELLOR (LOREBURN)—In this case two Judges have been in favour of the appellants and two in favour of the respondents, and therefore it is impossible to doubt that there must be room for controversy in regard to the meaning of the important clause of this contract. It is agreed that this was a sale both parties to which intended that common English sainfoin was to be delivered. It is agreed that it was a condition of the contract that that stuff should be delivered, but it is said that the defendants were absolved from the liability arising from the fact that something different from common English sainfoin was delivered by virtue of a particular clause in the contract. The clause, so far as relevant, is to this effect—"Sellers give no warranty, express or implied, as to growth, description, or any other matters." Now this sainfoin which was delivered turned out to be a different kind of goods; and when that was found out an action was brought against the defendants as sellers, to which they pleaded the clause which I have read. The law on this subject is to be found in the statute, and I do not wish to obscure the statute by offering any additional commentaries of my own; but I wish to apply it, as I understand the law, to this case. If a man agrees to sell something of a particular description he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it were a breach of warranty—that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty. I forbear from further observations, because the whole of the law has been, if I may say so with respect, admirably expressed in the judgment of Fletcher Moulton, L.J. There is no doubt that when you are dealing in a commodity the inspection of which does not enable you to distinguish its exact nature, there are risks both on the buyer and on the seller if they think fit to sell by description. But if it is desired by a seller to throw the risk of any honest mistake on to the buyer, then he must use apt language, and I should have thought that the clearer he tries to make the language the better. I do not think that he has done so in the clause to which I have referred, and therefore I agree with Fletcher Moulton, L.J., and Bray, J. I think that judgment ought to be entered for the plaintiffs.

LORD ASHBOURNE—I concur. I have read most carefully the judgment of Fletcher Moulton, L.J., and I entirely agree with and am willing to adopt it.

LORD ALVERSTONE—I entirely concur with the judgments delivered by the Lord Chancellor and Lord Ashbourne. I only wish to add a few words, because it is very important that on this, which I think is the first occasion on which your Lordships' House has had to consider it, the real effect of the Sale of Goods Act should be pointed out. Prior to that Act there had been a very great deal of litigation and of discussion as to matters which formed only ground of a breach of warranty and matters which amounted to a condition, and the remedies in the one case and in the other were the subject of a great deal of discussion. I think it de-

sirable to point out, at any rate upon the facts of this case, that there is a clear distinction which has been recognised by the statute, and when that distinction is borne in mind I agree entirely with the opinion of Fletcher Moulton, L.J., that this case does not admit of serious argument. I will very briefly call attention to what I mean in the statute. I think that every section shows that the distinction between "condition" and "warranty" is clearly understood and recognised, and that different remedies are intended to be given in the one case and in the other. For that reason I submit that it is impossible for the respondents to contend that when the sellers said that they gave no warranty they meant to say that they would not be responsible for any breaches of condition. The definition of "warranty" in the statute is in itself clear upon the point. It says—Section 62 —"'Warranty,' as regards England and Ireland, means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."* As the Lord Chancellor put it in the course of the argument, could it be fairly suggested that a claim to deliver goods which were not in accordance with the contract could be treated as "collateral to the main purpose of such contract," upon the ground that there was no liability for warranty under the contract? I turn now to sec. 11 (1), and again I find the distinction clearly maintained there—"In England or Ireland† (*a*) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or may elect to treat the breach of such condition as a breach of warranty." Again the two matters are put in opposition the one to the other. Then sub-sec. (*b*) says—"Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract." And the words that follow are very remarkable—"A stipulation may be a condition though called a warranty in the contract." Therefore the different position of a "condition" and a "warranty" appears upon the face of the section. Finally, clause (*c*) of the same section says—"Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods"—showing that, for the purpose of the remedy, that which gave different rights up to a certain point is only to be "treated as a breach of warranty" when this state of things has arisen. I turn for a moment to sec. 13, and I find again there that that which might have been described as a "warranty," if it was so intended is described as a "condition." This refers to the very point which has been so much argued by counsel for the respondents in his able argument at your Lordship's bar—"Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description"—not an implied warranty, but "there is an implied condition." The reason is because, if there is a breach of a condition there follows the right to reject; if the goods tendered to you are not in accordance with the description, then you have the right which flows from its being a condition of the contract as distinguished from being only a warranty.

Then, finally, section 53 says—"Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods." I believe that there are no other sections in the Act of Parliament to which it is necessary to refer. These sections have been all very clearly dealt with by the learned counsel at the bar, and, as has been pointed out, in each and all of those sections there is the distinction between "warranty" and "condition" and the different consequences flowing from the one stipulation and the other. All I can say is that I think it quite impossible to suggest that in the year 1906, when these parties made a contract whereby they required that the goods should be common English sainfoin, and the sellers put in a stipulation that they would not give any warranty, express or implied, it was intended that it was always to be understood that they were not making themselves liable in regard to any condition as to the goods or for the consequences of a breach of the condition. I thought it right to add these few words, because I think it is very important to bear in mind that the rights of people in regard to these matters depend now upon statute. To a large extent the old law I will not say has been swept away, but it has become unnecessary to refer to it. Within the four corners of this statute applicable to this contract we see this plain distinction between "condition" and "warranty," which has I venture to think been rather overlooked in this case by the majority of the judges in the Court of Appeal. I concur respectfully in the motion which has been made by my noble and learned friend on the Woolsack.

LORD SHAW—The judgment of Fletcher Moulton, L.J., appears to me, had I not had the pleasure of listening to the judgments which your Lordships have pronounced, to cover this case, and I feel

* Section 62 enacts further—"As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract."

† Section 11 (2) applies to Scotland.

hesitation in adding any words of my own. But I will make reference only to sec. 13 of the statute. Sec. 13 applies to the case of goods sold by sample plus description. In the present case the goods were sold by sample, but the sample was not considered sufficient, and a description had to be added. When the bargain was made samples were shown and relied upon, but the description of the goods was not embraced in the contract when it was put in writing. Thereupon the vendee insisted that the description of the goods should be entered upon the contract, and this was done, the goods being described as "common English sainfoin." That description could by no circumstance have been more clearly certiorated as entering into the very essence of this contract and being one of its conditions. What has been delivered has been "giant sainfoin"—a thing as distinct in agricultural knowledge from common English sainfoin as in ordinary commerce a silver watch would be distinct from a gold watch. It is now said, however, that these two merchants, contracting with each other, when they used the word "warranty," used it in ambulatory sense. "Warranty" was, according to the argument so ably presented to us by counsel for the respondents, to mean one thing in certain events and another thing in other contingencies. I do not think that these two English commercial men meant "warranty" in a sense of any greater refinement than the breadth of the definition in the Sale of Goods Act; and under the Sale of Goods Act it is as plain as language can make it that there are two things that are dealt with under different categories. The one is "warranty" and the other is "condition"; and it is only when you have to approach the question of finding the remedy which the statute prescribes that in the option of the person injured a condition may be converted into, or rather for remedial purposes be regarded as equivalent to, a warranty. The only other observation which I desire to make is that I view with some suspicion, if not with repugnance, any system of construing a contract *ex post facto*. In the case of *Ellen* v. *Topp* (6 Ex. 424) that very learned Judge, Pollock, C.B., observed—"It is remarkable" (and indeed it would be most remarkable) "that according to this rule the construction of the instrument may be varied by matter *ex post facto*." Whoever heard in a commercial contract of construing the meaning of two business men by a principle of that kind? I cannot agree with the opinion in *Ellen* v. *Topp;* that opinion, in my judgment, is no part of English law. I think it a safer thing to construe this document as it was originally meant to be construed —that is to say, according to the evident intention of the contracting parties at the time when the bargain was made. I find that the language of the statute equates with that intention; and the judgment pronounced by Fletcher Moulton, L.J., is, in my opinion, in accord not only with the justice of the matter but with the actual meaning of seller and of buyer.

Judgment appealed from reversed.

Counsel for Appellants—Shearman, K.C. —Herbert Smith. Agents—Rooke & Sons, Solicitors.

Counsel for Respondents—Atkin, K.C.— Cecil Walsh. Agents—Andrew Walsh, Gray, & Rose, Solicitors.

HOUSE OF LORDS.

Friday, May 12, 1911.

(Before the Lord Chancellor (Loreburn), Lords Ashbourne, Alverstone, C.J., Atkinson, and Shaw.)

MURPHY *v.* THE KING.

(ON APPEAL FROM THE COURT OF APPEAL IN IRELAND.)

Local Government—Old Age Pension—Old Age Pensions Act 1908 (8 *Edw. VII., cap.* 40), *sec.* 7 (2)—*Decision of Local Pension Committee—"Final and Conclusive"—Jurisdiction—Question Reopened.*

A person who was in fact below seventy years of age was awarded an old age pension by a local pension committee; no appeal against the award was brought in the manner prescribed by the Act. The pension officer afterwards obtained new information as to the pensioner's age, and he then raised a "question," in the manner provided by the Act, to the effect that the pensioner was not of the statutory age and was therefore not entitled to a pension. The local pension committee decided to continue the pension. The pension officer appealed in terms of the Act to the Local Government Board (the central pension authority), which deprived the pensioner of the pension.

Held that the Local Government Board had jurisdiction to declare the pensioner disentitled to the pension notwithstanding section 7 (2) which provides that "the decision of the local pension committee on any claim or question which is not referred to the central pension authority . . . shall be final and conclusive."

In the circumstances stated *supra* in rubric, a person who had been found entitled to an old age pension by a local pension committee was deprived of it by the Local Government Board and ordered to refund the amount already paid. Upon a petition of right by the pensioner it was held by the King's Bench Division in Ireland that the Board had jurisdiction so to do. This was affirmed by the Court of Appeal (SIR S. WALKER, L.-C., HOLMES and CHERRY, L.JJ.).

The pensioner's personal representative appealed.

At the conclusion of the argument for the appellant their Lordships gave judgment as follows:—