not have laid much stress on his opinion in regard to the possible effect of working near so large a weight. I do not think the danger was obvious to an ordinary workman such as he really was. On the whole matter I think there has been misadventure and nothing else. No blame can attach to Hamilton, and it has not been proved that any blame can be attributed to Campbell. The result has been unfortunate, and it was unforeseen. I am of opinion that the pursuer has not proved his case.

LORD CRAIGHILL—I agree. I think that the judgment of the Sheriff-Substitute, however, is that which should be affirmed. I say the judgment of the Sheriff-Substitute, because the Sheriff's judgment, though it affirms the Sheriff-Substitute's, proceeds on a view which I think has not met with favour from any of your Lordships, and which was not maintained at the bar. The Sheriff has found that the deceased was not a workman entitled to the benefit of the Employers Liability Act. This point was given up by the defenders as unarguable. If we were to give effect to this finding, we should, I think, be giving effect to a misreading of the statute. I think, then, we should affirm the Sheriff-Substitute's judgment.

LORD FRASER—I concur, and have nothing to add.

The Court reverted to the judgment of the Sheriff-Substitute.

Counsel for Pursuers (Appellants)—Rhind—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh — Macfarlane. Agents — Drummond & Reid, W.S.

Friday, June 12.

FIRST DIVISION.

[Sheriff of Dumfries and Galloway.

CARTER & COMPANY *v.* CAMPBELL.

Sale—Breach of Contract—Sale of Goods by Description—Oats to be Clear of Black Oats and Barley—Timeous Rejection.

A farmer sent an order to a firm of seed merchants for "100 bushels Paris White Cluster oats," and stipulated that they were "to be clear of black oats and barley." He received the seed on 1st April, and immediately began to sow it, without making any proper examination to see whether it was conform to contract. When the crop grew he discovered that there was an admixture of barley, and on 3d August made a claim of damages against the seller. The seller then raised an action against him for the contract price, in which it was *held* (1) that the seed supplied was disconform to contract, as it contained 4 per cent. of barley; but (2) that as there was a duty on the buyer to examine the seed when he received it, there had not been timeous rejection, and that therefore the seller was entitled to decree.

In March 1884 Robert Campbell, a farmer, Craichmore, Stranraer, who had dealt for some time with James Carter & Co., seed merchants, London, gave their agent at Whithorn an order, which as written down and sent by him to Carter & Co. was—"100 bushels Paris Cluster oats at 6s., to be clear of black oats and barley; see that this is good and pure." The agent wrote to Campbell, saying, "I have ordered for you 100 bushels oats, to be pure and good."

On 1st April the oats arrived in sealed bags. The ground was ready prepared for sowing, and on the second day they were taken to the field and sowed by Campbell's son and his men. The son deponed thus in this action:—"Before taking out the seed I opened two of the bags and looked in at the top. I did not see anything wrong with them; I did not see barley. I did not expect to find barley among the seed oats. The seals on the bags were not disturbed till they went to the field."

After the seed came and was used there arrived the invoice, which was for "100 bushels oats, Paris White Cluster," and to which was appended this notice, printed in red—

"SPECIAL NOTICE.

"Our seed corn being thrashed by steam machinery, we cannot undertake any responsibility as to the produce or purity. It is sold on these conditions only, and if the sample is not approved it must be returned to us at once, carriage paid."

Campbell saw this notice. It was similar to others in Carter & Co.'s catalogues, which he admitted receiving, but in which he had not seen it.

When the crop came up it was found to contain a good deal of barley, and was useless for the purpose of producing seed oats, for which Campbell had intended it. The amount of barley in it turned out in this action to be about 4 per cent. Campbell complained of this to Carter & Co., who disputed it, and maintained that even if it were so he had intimation by the notice printed above that it was not guaranteed. Eventually they sued him in the Debts Recovery Court at Wigton for £40, 4s. 9d., part of which, £8, 7s. 3d., was for grass seed, liability for which was admitted, and the rest for the oats in question, which Campbell refused to pay for. They pleaded, *inter alia*, that there had been no warranty, and that in any view Campbell, the defender, had not timeously rejected the oats.

He made a counter claim of damages for the pursuers' breach of contract, restricting his claim to the amount sued for by them.

The pursuers sought to prove that the seed when sent off was pure, and that the admixture of barley in the crop was owing to the seed being sown where there had been barley, or by its being carried by rooks from barley stacks. On this point they failed in their proof. They led evidence also to show that corns of barley, if any, might be detected in oat seed, before sowing, by anyone of experience. On this point the defender deponed, being asked—"When this seed came home, did you examine it?—No. You did not examine it at all?—No. I never saw it. Did anyone else examine it for you?—My son got it. Your son was in charge of it?—Yes. Was it he who sowed it?—It was the 'yearly' man, but it was under my son's direction. Did he examine it?—Yes; I believe he did. He

had opened some sacks of it. If you had examined the seed, could you have seen the mixture of barley in it if there was such?—It is a difficult kind of oat to see barley in. It is an oat something of the same size, and it is difficult to see it unless there is a lot in it. You could see it if you examined it?—But I did not examine it. But I am asking you, as a practical man, if you could see the mixture of barley in the oats if you examined it?—Yes; but I believed I was dealing with respectable parties, the Queen's Seedsmen, and would get a genuine article. But you did not examine it?—No." And his son, besides the passage above quoted, deponed—"When you looked into these two bags did you handle the grain at all?—I just glanced casually into the bag. I did not examine them thoroughly. . . . If there had been a great deal of barley in the two bags you looked at you would have seen it?—The Cluster is long in the pile, and nearly the same as barley. If we had examined it thoroughly we might have seen if there was barley, but I was not looking for that." The defender also led evidence to show that the barley was heavier than the oats, and might have escaped examination by being somewhat down near the bottom of the sack.

The Sheriff-Substitute (NICOLSON) pronounced this judgment:—[*After narrating the facts above detailed*]—"Finds in law that the goods sold were at the risk of the purchaser, and that he is not entitled to refuse payment of the price: Repels the defences.

"*Note.*—This case involves questions of importance, not only to farmers, but to all persons who buy or sell to any considerable extent. The main question between the parties might have been of greater difficulty before the Mercantile Law Amendment Act 1856 passed. But that Act has laid down the law in regard to sale and warranty so distinctly as to make it much more easy now than it was previously for any person engaging in a contract of sale to know what his rights and duties are. Section 5 of that Act ought to be much better known than it is, and should be engrossed in the pocket-book of every man of business. It is in these terms:—

"'Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose.'

"Applying the law thus laid down to the present case, these questions arise—(1) Were the pursuers at the time of the sale without knowledge that the goods sold were defective, or of bad quality? (2) Did they give an express warranty of the quality or sufficiency of the goods? (3) Were the goods expressly sold for a specified and particular purpose?

"(1) The proof for the pursuers is quite distinct on this question. [*His Lordship examined the pursuers' evidence as to the quality of the oats*].

"The pursuers cannot therefore be said to have known, or to have had any reason to believe or suspect, that the goods they were selling to the defender were 'defective or of bad quality.'

"(2) The second question hardly requires an answer. The pursuers not only gave no express warranty of the quality or sufficiency of the goods, but they expressly and repeatedly informed the defender and their other customers that they gave no guarantee as to their 'produce or purity.'

"(3) The defender says, in his third plea, that the pursuers having expressly sold the oats 'for the specified and particular purpose of being used as seed, and the same having turned out unfit for that purpose, the defender is entitled to absolvitor,' &c. The oats were undoubtedly sold for the purpose of being used as seed, which is the only purpose for which the pursuers sell them; but that they were unfit for that purpose has not been proved. That the produce of them was not fit to be sold as seed by the defender is quite another question, though from the proof it appears to be his chief grievance. There is not a word in the proof to show that he wished the seed for the purpose of producing seed to be sold, or that he made that known to the pursuers.

"The circulars issued by the pursuers, and regularly sent to the defender since 1881, imply that samples of the seeds wanted are to be sent by the pursuers for the intending purchasers to judge. The defender, however, did not ask for a sample; nor did he, or anyone for him, make any examination of the seed when it came. His son and his servant, J. Hannah, opened the bags, and sowed the seed with a machine, but never saw anything to complain of. The defender's son says—'Before taking out the seed, I opened two of the bags and looked in at the top. I did not see anything wrong with them. I did not see barley.'

"Round as Paris Cluster oats may be, I cannot doubt that a person of any experience could distinguish barley grains among them if he took the trouble to inspect. But the defender did not do so, nor did his son or his servant. They never discovered that there was barley among the oats till the barley, which shoots earlier, began to show itself in the field, at a date which does not seem to me to be of so much importance as the questions put for the pursuers on the point indicate.

"The defender's explanation of his want of vigilance in this respect is—that he believed he was 'dealing with respectable people, and would get a genuine article.' It is also suggested, on his part, that the barley grains, being heavier than the oats, would sink to the bottom of the sacks, and therefore escape the observation of a person examining the grain only at the mouth of the sack. I am not satisfied that this explanation is physically correct. I rather think that when big and little stones are mixed and shaken, the big ones come to the top. It seems to me also, that if the barley seeds sank to the bottom of the sack, they ought to have been all the more visible when the sacks were emptied. But neither the defender's son nor anyone else engaged in the sowing of the seed saw anything wrong with it.

"The alleged defect in the article sold cannot be called a 'latent' one, which the defender had no means of discovering till the crop grew. It might be so with turnip seed, but the difference in size and shape between oat and barley seed is

such that no person accustomed to see them could fail to observe a mixture of the two if it were to any considerable extent. The defender having specially required that the seed should be pure, and having probably heard from some of his neighbours, witnesses for him in this case, that they had reason to complain of the pursuers' seed, ought to have exercised all the more caution and vigilance, especially as he got no sample, and to have examined the seed before putting it in the ground. If he had found it defective then, he should have immediately returned it, and given the reason for so doing. Instead of that, he neither examined it nor said a word about it from 4th April, when the last of it was sown, till 2d August, when he wrote to the pursuers' agent to say that the crop was miserable, and that he was going to claim damages.

"How the barley got among the oats I do not feel called on to determine. According to the pursuers' evidence, the proportion of barley seeds in the oats sold to the defender was 3 in 700; according to the defender's evidence, the proportion in the crop it produced was about 4 in 100. If the question had arisen in Judæa in the first century, the explanation would be—'An enemy hath done this.' But that practice among neighbours is unknown in Scotland. Among the enemies whom the pursuers' witnesses suggest are 'rooks,' but black as these birds are I cannot regard the charge against them as well founded. The suggestion that the barley seeds were conveyed in farmyard manure or sheep droppings is equally unsatisfactory, as the defender says he laid only artificial manure on the ground where the seed was sown, and had no sheep feeding on it previously.

"But even on the supposition that the barley seeds which have rendered the defender's crop unfit for use, except as meal, were mixed with the seed sold by the pursuers to the defender, the former would still, in terms of the statute above cited, be entitled to prevail.

"Of the authorities cited, the most directly applicable in this case is that of *Hardie* v. *Austin* (25th March 1870, 8 Macph. 798), where a seller of turnip seed as 'first-class E. Lothian stock' was held not to have warranted its productive quality, in respect that it was not sold for the specific purpose of producing saleable seed."

On appeal the Sheriff (Macpherson) found "that the oats furnished by the pursuers to the defender were not merchantable oat seed, nor free from barley, nor pure and good, and that the defender has suffered damage thereby; but that the evidence does not supply sufficient means for assigning the amount thereof: Finds that the pursuers are entitled to decree against the defender for the sum of £8, 7s. 3d., being the amount of the first two items of said account: Finds they are not entitled to the further sum sued for, on the footing of being the contract price of the grain sent to the defender: Therefore sustains the appeal, and recals the interlocutor appealed against; decerns against the defender for payment to the pursuers of the said sum of £8, 7s. 3d.; and *quoad ultra* assoilzies the defender from the conclusions of the summons—reserving to the pursuers their right to sue on the principle of *quantum meruit* for the value of the grain sent by them to and used by the defender; and to the defender his answer thereto: Finds the defender entitled to expenses; modifies the same at £10 sterling, for which decerns against the pursuers; and allows the said sum of £8, 7s. 3d. to be applied *pro tanto* thereto; and decerns.

"*Note.*—It may be doubted whether this case falls under the Mercantile Law Amendment Act. It might perhaps be maintained, on the authority of *Jaffé*, December 21, 1860, 23 D. 248 (which, however, was a stronger case than this), that the mixture of barley made the article furnished quite different from that which was ordered. Where the sale is neither of an ascertained mass nor of a specific amount of an ascertained mass, and the price a full one as here, the article delivered must be merchantable, whether the seller knew of the defect or not—*Jaffé*, *supra*, and *Hutchison*, November 26th, 1867, 6 Macph. 57.

"But if the Mercantile Law Amendment Act does apply, the oats were bought and sold for seed, which is sale for a specific purpose, and therefore the pursuers were bound to supply an article fit for that purpose. See opinion of Lord President in *Hardie* v. *Austin & M'Aslan*, May 25, 1879.

"As to the terms of the sale, the quality was warranted. It is quite unnecessary for the defender to put this part of his case higher than the pursuers' agent had stated it. Their circulars were not referred to when the order was given, and if they had been read by the defender, who swears they were not, that would have accounted for his taking care to transact only in terms implying warranty. The pursuers having failed to produce either their agent's order-book or letter, though asked to do so, cannot repudiate his account of what occurred. They must, therefore, be held to have been informed that the defender had specified that the grain was to be free from barley, and the defender was entitled to rely upon their agent's letter of 24th March, saying that he had ordered his oats to be 'pure and good,' and having received no further communication before or along with the oats, was entitled to expect that the forwarding of them by the pursuers implied unqualified acceptance of an order as for 'pure and good' seed.

"It is beyond dispute that the crop which grew from this seed furnished was a mixture of oats and barley, and attempts at reconciling that fact with the idea that they had sent 'pure and good' seed have been disproved. The pursuer's witnesses say they sold the same oats to others, and had no complaint except from the defender. But several witnesses who bought Paris Cluster oats from the pursuers depone that they had suffered similarly with the defender, and two of them add that they, like him, complained to the pursuers' agent, who does not contradict their statement.

"The pursuers further maintain that if the oats were as bad as the defender alleges, he has lost his remedy by carelessness in failing to discover the fault, and by not timeously rejecting the grain.

"The first of these contentions turns on the question of the latency of the defect. Four other witnesses bought grain which proved similarly tainted, and did not detect it on first examining the grain, though one did when in course of sowing, but the conclusive answer,

assuming the fact, is, that the pursuers did not discover the fault. Indeed, it does not seem quite clear from the evidence that they ever examined the cargo from which the defender was supplied. They did indeed lay aside a sample (which, by the way, did contain barley) without examining it at the time. If they did not examine the cargo, and it was impure, then, unless the fault was latent, they are not entitled to plead ignorance of the defect, the ignorance being due to refusal to use their eyes. If they did examine it, and failed to discover the fault, that is good proof of its latency, and the defender's failure to discover it may be excused.

"As to delay in intimating the fault, and the failure to return, had the pursuers acted upon what they say was their practice, and sent a sample, which the defender did not look at, then they might have cause of complaint. But even the pursuers' notice attached to the invoice, which only reached the defender after the seed was in the ground, did not necessarily imply that the seed was bad, and though the defender did not intimate his claim of damage the first time he saw an ear of barley, he did when he saw the full extent of the mischief, and when it was possible to estimate the amount of damage.

"In such a case the return of the subject of the sale is of course impossible. The reasons why in other cases early rejection and return are important have no application here. The article furnished was beyond the reach either of mischief from the defender or remedy by the pursuers, and equally beyond re-sale; and there could be no immediate estimate of the damage.

"I regret that this case, so full of questions, both of fact and law, had not been sent to the Ordinary Roll.

"The pursuers contended that the defence resolved itself into a claim of damages for breach of contract, and therefore could not competently be entertained in the Debts Recovery Court, and that they were entitled to decree *simpliciter;* but under the case of *Macbride* v. *Hamilton*, 2 R. 778, the question of damages could receive effect, *ope exceptionis*, to the extent of the sum claimed by the pursuers.

"The attention of parties was so concentrated on the question of the quality of the grain, and the question of the pursuers' obligation to furnish grain up to a certain standard, that the pursuers led no proof, and the defender little, as to the amount of damage, and thinking it undesirable to have a new proof in this or another litigation, I had a meeting with the agents to see whether they could agree as to the amount of damages, if any should ultimately be found due. But no agreement was come to.

"In these circumstances I have endeavoured to frame the interlocutor so as to enable the leading questions of fact to be determined in this process, leaving open for discussion in another the amount of damages. According to the view I have taken, the pursuers cannot claim more than the actual value, not the contract price, of the grain they sent, which was used by the defender. But even to a claim so modified the defender may have an answer, or, if he should insist on the amount claimed in his counter claim, he must bring a separate action. But if liability for damages were once admitted, probably the meagre evidence in process may be sufficient to enable the parties themselves to determine the amount with, or even without, the aid of some-one of agricultural experience."

The pursuers appealed to the Court of Session, and argued—The stipulation with regard to the black oats or barley had reference to the quality of the article, not to the particular description of article to be supplied. Upon the evidence the defender had failed to establish that he had not been supplied with the articles for which he had contracted. There was no evidence as to the state of the grain when it arrived, only as to the crop. That was not sufficient evidence—*Dixon* v. *Jones, Heard, & Ingram*, Mar. 19, 1884, 11 R. 737. Moreover, there was no *onus* on pursuer to show where the barley came from—*Wieler* v. *Schiliggi*, 1856, 25 L.J. C.P. 89. Admitting that there was 4 per cent. of barley in the oats, that was not such an adulteration as to constitute breach of contract—*Hardie* v. *Austin & M'Aslan*, May 25, 1870, 42 Jurist 450; *Hardie* v. *Smith and Simons*, May 25, 1870, 42 Jurist 450; *M'Cormick & Co.* v. *Rittmeyer & Co.*, June 3, 1869, 7 Macph. 854. There had not been timeous rejection, as there was an obligation on the buyer to examine the seed when he got it—Bell's Prin. sec. 99; Bell's Com. i. 465; *Baird* v. *Aitken*, M. 14,243; *Smart* v. *Begg*, June 23, 1852, 14 D. 912; *Chapman* v. *Houston, Thomson, & Co.*, Mar. 10, 1871, 9 Macph. 675, *aff.* 10 Macph. (H. of L.) 74.

The defender argued—This case fell within the principle of *Jaffé* v. *Ritchie*, Dec. 21, 1860, 23 D. 248. The defender had ordered oats, and got oats mixed with 4 per cent. of barley, so that what he had received was of a different description from what he had ordered—*Dickson & Co.* v. *Kincaid*, Dec. 15, 1808, F.C. There was no duty on the defender to examine the seed whenever he received it, as only the most critical examination would then have revealed the admixture of barley. The defender had given notice to the pursuers whenever the crop sprang from the ground—*Spencer & Co.* v. *Dobie & Co.*, Dec. 17, 1879, 7 R. 396; *M'Carter* v. *Stewart & Mackenzie*, June 14, 1877, 4 R. 890; *Fleming & Co.* v. *Airdrie Iron Co.*, Jan. 31, 1882, 9 R. 473; *Pearce Brothers* v. *Irons*, Feb. 25, 1869, 7 Macph. 571.

At advising—

LORD PRESIDENT—The pursuers of this action in the Inferior Court were James Carter & Company, seed merchants, London, and the action was brought to recover the price of seed which had been supplied by them to Campbell. With regard to the two first entries in the account there is no dispute, and therefore the question in dispute is confined to the charge which is made under date 28th March 1884, viz., 100 bushels oats, Paris White Cluster.

The Sheriff-Substitute and the Sheriff have taken different views of the case, but although they have taken opposite views I am not disposed to agree with either in the conclusion they have arrived at. The Sheriff-Substitute considered that the case was ruled by section 5 of the Mercantile Law Amendment Act, while the Sheriff rather suggested that the principle to be applied was that of the case of *Jaffé*, though he dealt with both views. The Sheriff-Substitute was of opinion that the pursuers were entitled to

prevail, because they had fulfilled their part of the contract, and therefore decerned for the price. The Sheriff took the opposite view, recalled the interlocutor of the Sheriff-Substitute, and assoilzied the defender from the conclusions of the action as regards the price of the oats entered under date 28th March.

I think that perhaps both the Sheriffs were under a disadvantage in not having before them the precise terms of the contract, or, more correctly speaking, of the order which was given by the defender to the pursuers. We have now the document which is admitted by both parties to contain the precise terms of the order, viz., a note furnished to the pursuers by their traveller Anderson, who took the order, so that the subject of the contract is distinctly ascertained to be "100 bush. Cluster oats at 6s., to be clear of black oats or barley, to be sent off at once;" then below that there is the addendum, "See that this is good and pure."

Now, the pursuers having accepted that order and acted upon it are bound by its terms, and if they did not furnish the article stipulated for, then they are not entitled to recover as for a contract duly implemented. The allegation is that the oats were not clear of black oats or barley, but were to a certain extent mixed with barley so as to render them unsuitable for the purpose for which they were purchased. The extent to which the oats were mixed with barley is of course very material, but without going into the evidence I think I may say it was practically admitted that while there were no black oats there was an admixture of barley to the extent of 4 per cent. Now, the admixture of 4 per cent. of barley in seed oats is of very material importance, and is very objectionable in any view, and more especially when there was an express stipulation that the oats were to be absolutely clear of black oats or barley. One twenty-fifth part of the seed sent did not consist of the oats ordered, but consisted of barley and not of oats. Therefore without any reference to the Mercantile Law Amendment Act, I think that we are entitled to answer the question whether the pursuers furnished the articles ordered in the negative, and to say that they did not furnish oats clear of barley.

I think that the principle laid down in the case of *Jaffé* is applicable to the present case. There the subject ordered was 3 lb. flax-yarns, which was quite a well-known article in the market. After delivery it was found that instead of sending flax-yarn the sellers had sent yarn made of jute mingled with flax, and it was held that that was not fulfilment of the contract. On that ground the Court pronounced as for a breach of contract. It appears to me that that case, or the principle contained in it, rules the present, and I am therefore of opinion that the pursuers are not entitled to recover if the defender availed himself timeously of his right to reject.

That is a question of circumstances, and is one attended with some difficulty. The goods were received by the defender on the 1st of April, and he proceeded immediately to sow the oats. He had been waiting for them, and proceeded immediately to sow them. The sowing continued during the 1st, 2d, and 3d of April, and it is important to notice in connection with this that the invoice did not reach the defender until the 3d. The invoice sent had upon it a special notice, which is very prominent, printed in red ink, and is to this effect:—"SPECIAL NOTICE.—Our seed corn being thrashed by steam machinery, we cannot undertake any responsibility as to the produce or purity. It is sold on these conditions only, and if the sample is not approved it must be returned to us at once, carriage paid." But as the invoice with that notice upon it did not reach the defender until he had sown the oats, it cannot affect the question which I am considering. I do not think it has been proved that the defender had any notice of this special condition which the pursuers say they attach to all their invoices prior to the transactions in question, and that therefore the defender is not really affected by that condition.

The question remains, however, whether the defender acted rightly in putting these oats into the ground without first examining them? It was his own stipulation that they should be clear from barley, and that fixed the nature of the subject he was entitled to expect; so that if the oats came mixed he was entitled to reject them. Now, knowing that, was it not his duty when the oats arrived to take means to ascertain whether the seller had fulfilled his contract, and whether the subject delivered was the subject he had ordered. There has been a good deal of discussion, and a good deal of evidence upon the question, how far it is easy to detect barley amongst oats? But as regards that I have no difficulty, for it does not require a skilled eye to distinguish barley corns from oats. Everybody knows that; of course if the quantity of barley were extremely minute, it might escape anything but a very searching view. But the complaint here is that the admixture of barley is so material as to vitiate the contract.

Now, the legal principle which is applicable to such circumstances is certainly this, that if it is possible for the recipient of goods to see upon receipt whether the contract has been fulfilled or not, he is bound to make an examination of the goods received, and reject them if disconform to contract. What did the defender here do? Nothing—that is to say, nothing in the way of examination. Moreover, by sowing the seed without examination he rendered it impossible for anyone else to examine it. The defender in his evidence upon this point is quite candid. When asked, he says—"When this seed came home did you examine it?—No. You did not examine it at all?—No. I never saw it. Did anyone else examine it for you?—My son got it. Your son was in charge of it?—Yes. Was it he who sowed it?—It was the yearly man, but it was under my son's direction. Did he examine it?—Yes, I believe he did. He had opened some sacks of it. If you had examined the seed could you have seen the mixture of barley in it if there was such?—It is a difficult kind of oat to see barley in. It is an oat something of the same size, and it is difficult to see unless there is a lot in it. You could see it if you examined it?—But I did not examine it. But I am asking you, as a practical man, if you could see the mixture of barley in the oats if you examined it?—Yes, but I believed I was dealing with respectable parties, the Queen's Seedsmen, and would get a genuine article. But you did not examine it?—No."

There we have a distinct admission by the defender that if he had examined the seed when it was delivered he could have detected that the contract had not been fulfilled, and that he was entitled to reject the seed sent.

His son gave this evidence:—"Before taking out the seed I opened two of the bags and looked in at the top. I did not see anything wrong with them; I did not see barley. I did not expect to find barley among the seed oats. The seals on the bags were not disturbed till they went to the field. . . Do you recollect when you first noticed the mixture of barley among the oats?—When they began to shoot. Barley is rather earlier than corn, and shoots earlier, and consequently you can see it at that time best. Was it greatly mixed with barley?—There was a good deal of barley in it." Then in cross-examination he says—"When you looked into these two bags did you handle the grain at all?—I just glanced casually into the bag. I did not examine them thoroughly. . . . If there had been a great deal of barley in the two bags you looked at, you would have seen it?—The Cluster is long in the pile, and nearly the same as barley. If we had examined it thoroughly we might have seen if there was barley, but I was not looking for that." But that was just what he ought to have looked for, and in not doing so he was entirely mistaken in his duty. I think both father and son were mistaken in their duty, because there is a legal obligation upon a person who has ordered particular goods to see whether the goods he receives are conform to contract.

Of course the principles now stated have no application to the case of goods in which there is a latent defect. We have had cases even of seeds in which there was a latent defect. For instance, there was a case in connection with turnip seeds which was very keenly contested, and there it was shown to be impossible to determine from mere examination whether there were impurities or not; that could not be done until the seeds were sown and sprung.

But according to the evidence in this case, and according to the knowledge of everyone who knows anything of such matters, the detection of barley amongst oats is quite easy. The examination may cause trouble, for it may be necessary to turn out the bags and examine what is at the bottom as well as what is at the top, but I do not think that diminishes the legal obligation. It was in the power of the recipient of the goods to examine them, and if he does not take advantage of the opportunity he must just take the consequences, because he has lost the right to reject them as disconform to contract. On that ground I am for decerning for the price of the goods in favour of the pursuers.

There has, however, been a considerable division of success, and the pursuers are held entitled to recover, not because there has not been a breach of contract, but because the defender did not timeously reject the goods delivered. I am therefore of opinion that there should be no expenses to either party.

Lord Mure—I am of the same opinion.

Upon the evidence I think it is clear there was a breach of contract as regards the articles furnished. The goods ordered were to be free of barley, and when the crop grew it was discovered that there was a considerable proportion of barley. That being so, it is clear that the stipulation upon which the seed was sold was not fulfilled, and therefore, without reference to the Mercantile Law Amendment Act, I hold the articles sold were disconform to contract.

The case, I think, falls under the principle of the case of *Jaffé*, and in that state of matters the defender would have been entitled to reject the goods sent if he had made an examination of them upon delivery. That examination, in my opinion, would not have been such a difficult matter as the defender says. According to him it could only have been made by turning out all the sacks. If the defender could have made out that that was the only mode in which his purchase could have been examined, I should have had considerable difficulty in holding that he was bound to make such an examination. But I agree with your Lordship that by opening the sacks he could have satisfied himself as to their contents. Upon the evidence of the defender, who is quite frank on this point, it is clear that he did not do this, but left it to his son, who, in the glance which he gave at the seed, saw no barley.

On the ground, therefore, that there was no examination to test the oats, and no reasonable means taken to ascertain whether there was an admixture of barley, I am of opinion that the pursuers are entitled to decree.

Lord Shand—I am of the same opinion.

In the first place, I do not think that this case raises any question in regard to the law of warranty; secondly, I think that the pursuers did not implement the contract they entered into; and thirdly, I hold that the defender is barred from pleading his defence because of his failure to examine the goods he received.

This was a purchase of goods of a particular description which the defender ordered through Mr Anderson. The subject of the purchase was oats clear of barley, and the order was admittedly forwarded to the pursuers with the addendum that they were to be pure and good. The pursuers undertook to fulfil this order, and sent off oats in implement of the contract. The description of the oats in the order was that they were to be clear of barley, and I am satisfied that they were not clear of barley. Therefore I think the case falls under the class of cases dealt with in Benjamin on Sale (3d ed.) p. 596.—"If the sale is of a described article, the tender of an article answering the description is a condition-precedent to the purchaser's liability, and if this condition be not performed the purchaser is entitled to reject the article, or if he has paid for it, to recover the price, as money had and received for his use." This purchase, then, having been of goods of a certain description, it appears that the pursuers in implement of the contract sent off not the goods ordered but others of a different description. These goods were followed by the invoice, which bore this notandum:—"Special Notice—"Our seed corn being thrashed by steam machinery, we cannot undertake any responsibility as to the produce or purity. It is sold on these conditions only, and if the sample is not approved it must be returned to us at once, carriage paid."

Now, if it had appeared that this invoice had arrived, and had been read by the defender

before the seed was sown, then he would have had notice that the pursuers did not undertake to implement the contract entered into. But it appears that the invoice did not arrive until two days after the seed, and that before its arrival the defender had sown the seed on the assumption the goods were sold as oats free from barley, and therefore the pursuers can take no benefit from what was contained in the invoice. I am accordingly of opinion that this was a sale by description, and that the goods sent were not really oats clear of barley, but were adulterated to the extent of 4 per cent. I may remark upon the other question as to timeous rejection, that the point is very precisely stated in Bell's Principles, sec. 99, as follows—"In order to avail himself of warranty, the buyer must make his challenge instantly, or without unreasonable delay, otherwise he is liable for the full price, (1) where the fault is known or manifest, if the challenge be not immediate, the legal inference is that the buyer is satisfied, (2) where the fault is not manifest at first sight, but easily discoverable by such examination as a merchant skilled in the commodity naturally bestows in buying, he must immediately investigate and determine, and if he break bulk, or make use of the article, he is barred from objecting to it."

The question in this case is whether the defect —the presence of the barley—was easily discoverable. On that point I am of opinion that it was of that nature. The defender made no examination, and his son merely glanced at the oats supplied. If they had made a proper examination the defect would have been discovered. But they have not done so. The goods were plainly disconform to contract, and the buyer had a duty laid upon him to examine what was sent. As he did not do so, I am therefore of opinion that he is barred from now saying that they were not conform to contract.

On the question of expenses I have no doubt. The greater part of the expenses has been incurred on the question whether the goods were disconform to contract, and as the pursuers have been the cause of that, I am of opinion they are not entitled to expenses. On the other hand, the defender failed to reject the goods, and accordingly I agree that there should be no expenses to either party.

Lord Adam—The contract here was that the pursuers should supply the defender with "100 bush. Cluster oats at 6s., to be clear of black oats or barley, to be sent off at once." The pursuers sent to the defender 100 bushels Cluster oats purporting to be free from black oats or barley, but on the evidence I am satisfied that there was barley in the oats to the extent of 4 per cent. It is clear that such an admixture is material, and that the article the defender got was mixed oats and barley, and therefore that the contract was not implemented.

In the second place, I think there was a clear duty on the purchaser to examine the oats and satisfy himself that he had really got the article which he had ordered. The amount of examination is no doubt matter of degree. It may be the defect is latent, as, for example, in the case of turnip seed, where the defect is not visible at first, but becomes patent by use. In such a case the defect would not be detected by mere examination, and therefore the purchaser could not be called upon to reject immediately. But in this case I think that no proper examination was made. The articles were contained in twenty-five bags, and the only examination was by the defender's son, who opened two of them and casually glanced at the seed, but never handled it. Now the defender himself admits that if there had been any proper examination the defect would immediately have been detected.

On the whole case therefore I agree that while the contract was not implemented, yet the defender lost the right to reject by not making a proper examination of the seed when he received it.

On the question of expenses I concur with your Lordships.

The Court pronounced this interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 4th February 1885, and the interlocutor of the Sheriff of 2nd April 1885: Find that on the 24th of March 1884 the defender ordered from pursuers '100 bushels Cluster oats at 6s., to be clear of black oats or barley:' Find that the pursuers undertook to execute the said order and in pursuance thereof made delivery of one hundred bushels on the first of April 1884: Find that the said one hundred bushels consisted of oats, but not of oats clear of barley, and that the grain delivered to the extent of four per cent. consisted of barley: Find that on receipt of the said grain the defender immediately sowed the whole of it on his farm, without examining it or ascertaining that the oats were mixed with barley: Find that the defender did not discover the mixture of barley in the grain delivered till the crop sprang from the ground, and did not reject the grain or state any objection to it till 3rd August 1884: Find in law that the grain delivered was not the grain ordered and contracted for; but Find that the defender did not timeously reject the goods, and is not entitled now to maintain his plea of breach of contract, and therefore remit to the Sheriff to decern in terms of the conclusions of the summons: Find no expenses due to or by either party in this or the Inferior Court."

Counsel for Pursuers—Graham Murray—Dickson. Agent—James Coutts, S.S.C.

Counsel for Defender — Pearson — Shaw. Agents—Martin & M'Glashan, S.S.C.

Friday, June 12.

FIRST DIVISION.

[Lord Fraser, Ordinary.

FERGUSON *v.* M'NAB.

Reparation—Malicious Prosecution—Day Trespass Act (2 and 3 Will. IV. cap. 68)—Title to Sue—Defective Libelling of Title—Summary Procedure Act 1864 (27 and 28 Vict. cap. 53).

The complainer in a complaint under the Day Trespass Act, which was brought under the Summary Procedure Act, libelled his