the Crown thinks it worth while to say, that there must be some moderation of the costs, I submit to your Lordships that it will be right to give to the respondents a moiety only of the costs of the appeal. If the Crown assents to that, we will limit the costs on the dismissal of the appeal of the Crown, to one half only of the costs of the respondents. The order then that I shall suggest to your Lordships will be to dismiss the appeal on the part of the Crown, and to direct the Crown to pay one half the costs of the respondents.

LORD CAIRNS.—Does the Crown desire that?

Lord Advocate.—I should desire to place the matter entirely in the hands of the House with respect to costs. I should not like to ask any costs which the House thought ought not to be asked. Substantially, the judgment of the Lord Ordinary, except with respect to costs, is the right judgment.

LORD COLONSAY.—My Lords, with respect to the merits of the case itself, I have not the least doubt, that this must, under the Statute, be regarded as a debt. I think that is very clear, and as there does not arise before us any question between this class of debt and other classes of onerous debts competing, as might happen in the case of a bankrupt estate, we are relieved from the difficulty of deciding what might be a large question. With reference to the claim of the Crown arising under these Statutes, I have no doubt at all that this is a debt, which ought to be deducted.

LORD CAIRNS.—My lords, I quite concur in the opinions which have been expressed by my noble and learned friends, and I do not propose to add anything on the merits of the case. On the subject of costs, I think your Lordships understand from the Lord Advocate, that the Crown brought this matter before your Lordships for the purpose of having the principal questions decided. It is a question which obviously would arise in many cases, and if that were not so, the Crown would hardly have brought a case involving only £150 for consideration before your Lordships. Under these circumstances, the Lord Advocate saying very properly that he puts the question of costs into your Lordships' hands, I venture to think that it would be more satisfactory that the appeal should be dismissed in the usual way with costs, without making any distinction in consequence of the minor, I might almost say the accidental, part of the case, which seems to have arisen more from an error in calculation than anything else.

Lord Advocate.—I merely wish to say, with reference to the carrying out of your Lordships' judgment, that the interlocutor of the Lord Ordinary, except only upon the matter of costs, is the correct judgment, and I apprehend, that the judgment of the House would be to affirm the interlocutor of the Lord Ordinary.

LORD CAIRNS.—I think your Lordships probably would not alter the interlocutor of the Lord Ordinary as to costs. It was very proper in the case before him to divide the costs as he has done.

Lord Advocate.—An affirmance of the interlocutor of the Lord Ordinary would be the form the judgment of this House would take, disposing of the costs otherwise as your Lordships may think fit.

LORD WESTBURY.—In reality we shall be altering the interlocutors of the Court below to the extent of £150. I propose, therefore, to put the question to your Lordships in this form—to declare, that the respondents are entitled to a return of £150 of surplus duty paid by them; reverse as much of the interlocutor of the Court below as is inconsistent with that finding, and direct that the costs of the respondents in the present appeal be paid to them by the appellant.

Reversal in part, and in part affirmance, with declaration and direction as to payment of respondents' costs of appeal by appellant.

Appellant's Agent, W. H. Melvill.—*Respondents' Agents*, H. G. and S. Dickson, W.S.; Loch and Maclaurin, Westminster.

JULY 19, 1872.

COUSTON, THOMSON, and CO., *Appellants*, *v.* THOMAS CHAPMAN, *Respondent.*

Sale—Auction—Rejection of some lots as disconform to sample—*At an auction of wines, C. bought from B. several lots, one of the conditions being payment on or before delivery. C. did not pay on delivery, but removed his lots some days after the sale, and made no objection at that time, but five weeks later objected that some of the wines were disconform to lot. C. made no offer to return the lots till after action for the price, and the wines still remained in C.'s custody.*

HELD (affirming judgment), *That it was incumbent on C. to prove, that he had offered to return the wines in reasonable time, and having failed to do so, B. was entitled to full payment.*
SEMBLE, *The contract as to each lot being entire, C. was not entitled to keep part of the lot which was good, and return the rest, but was entitled to rescind the whole contract as to such lot*—Per *Lord Chelmsford.*[1]

This was an appeal from a decision of the First Division of the Court of Session in an action for the price of wine sold by auction. Mr. Thomas Chapman exposed for sale by auction various lots of wine, and the stipulation in the conditions of sale was payment before or on delivery. Messrs. Couston, Thomson, and Co., wine merchants, Leith, were the highest bidders, at £761 19*s.* 1*d.* An action was brought for the price, and the pursuer alleged, that he allowed the defenders to obtain delivery on the understanding, that they would pay immediately after delivery. The defenders did not take delivery till ten days after the sale, and they made no objection to the wines as faulty till five weeks after delivery, when they objected, that the wines were disconform to lot, and claimed a deduction from the price on that ground. The pursuer would not admit the wines were faulty, but offered to take the whole lot back, and cancel the bargain, which offer was refused.

The defenders, in their statement of facts, alleged, that the wines were sold by sample, and that part of them were bad and unmarketable, and claimed deduction of £446 2*s.* 6*d.* from the purchase money on that account, and that they timeously rejected the said part of the wine. The defenders therefore contended in their pleas in law, that either the sale was illegal and the action was incompetent, or that the sale of each lot was a separate transaction, and that they offered to pay for the sound part of the wines, and timeously rejected the unsound part.

The Lord Ordinary (Gifford), after allowing a proof, held, that the defenders, having not returned any of the disputed lots, but having retained them in their possession, were barred from withholding payment of the price, and decided in favour of the pursuer for the whole amount. On reclaiming note, the First Division recalled this interlocutor, but, with slight alterations, decided to the same effect. The defenders now appealed against both interlocutors.

Manisty Q.C., and *J. Campbell Smith*, for the appellants.—The point relied on by the respondent, that no rejection was made in time, was not included in his pleas in law, and was not proved. On the contrary, there was ample evidence that the appellant gave notice that the wine was disconform to sample. The burden of proving that there was delay in offering to return the lots lay on the respondent, and no such proof was given. The buyer had a right to return the goods, on finding they were not according to sample, and he did in effect do so. *Jaffe* v. *Ritchie*, 23 D. 242. He was not bound to put the goods in neutral custody. The respondent had all along contended, that the whole of the lots or none must be returned, but it is now admitted that there was a distinct contract as to each lot. All that could be reasonably done to test the wine had been done, and there was no unnecessary delay.

The *Lord Advocate* and the *Solicitor General*, for the respondent, were not called upon.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case it is much to be regretted, that a dispute of this character, for an amount small compared to that at stake in many cases which are brought to your Lordships' House, should have gone through so long a course of litigation. However, the matter which comes before us to be determined is this, whether or not the interlocutors of the Court of Session, upon a summons which was brought on the part of the pursuer, the present respondent, against the defenders, the present appellants, are erroneous. The summons was in an action for recovering the price of certain wines sold by auction in Edinburgh. The wines were sold in lots, and with regard to three of the lots which were purchased by the defenders, the present appellants, questions arose. With regard to certain other lots of the same purchase four or five in number, no question arose.

The first point for consideration which appears to have suggested itself in the course of the argument in the Court below, was as to how far there was or was not a distinct contract with respect to each lot. Upon that there can be no doubt or dispute whatever, and it cannot be said now to be involved in the case brought before your Lordships' bar. There can be no question whatever, that the purchase of each lot was a separate and distinct contract, and that it was perfectly competent to the defenders to object to the completion of the purchase with respect to the three lots they object to, if they had good grounds for so doing, irrespectively wholly of the view which they might take of the other purchase which they made, and with which they are content.

One singular circumstance in the case (although it has no special weight upon the conclusion which ought properly to be come to) is this: that the defenders, insisting as they have a right, I think, to insist, that the contracts were several, nevertheless did not pay for the lots they had bought, and which were good; nor does it appear, from what is said by the learned Judges in

[1] See previous reports 9 Macph. 675; 43 Sc. Jur. 326. S. C. L. R. 2 Sc. Ap. 230; 10 Macph. H. L. 74: 44 Sc. Jur. 402.

the Court below, that up to the time of the action (it is true they did so in the course of the action) they had paid for the lots to which they did not object. The reason may not be difficult to discover, but with regard to three of the lots, namely, Nos. 19, 24, and 51, an objection arose. No. 19 may be passed by, because that question is now disposed of, and no argument has arisen upon it, either in the Court below or in your Lordships' House. The question therefore is reduced to lots 24 and 51.

The contest raised by the defenders, when pressed to pay for these lots, was, that the sale was a sale by sample, and that these lots were not in all their parts conformable to the sample. The sale of these wines took place on the 19th March, and the delivery was to have been immediate, but some little discussion and dispute arose about it, and by some arrangement (which it is unnecessary to enter into) between the parties, the lots were not delivered until early in April. When they were so delivered in April, the lots in question being lots that were sold as claret of fine quality, and sufficiently high prices, and being sold by sample, it occurred to these gentlemen, the appellants, that they might send some samples of the wine to England for sale, and they accordingly sent them to a Mr. Cooper of Reading, who upon examining the sample sent him, (which appears as far as we can see, to have been one of the actual bottles purchased, and not a sample produced by being decanted or poured out from some other sample, but the actual thing itself,) returned it with the statement, that the wine was wholly unfit to be offered to customers. This seems to have led to inquiry, and we may take it as an established point of time in the case, that the 6th May is a time at which certainly the defenders were perfectly well informed, that there was a serious variation in the several parts of the lots they had purchased—lots 24 and 51. In a portion of each of those lots there was a considerable difference between the wine which had been delivered to them in April, and the wine of which a sample had been produced in order to lead to the sale.

Accordingly, this having been discovered on the 6th May, certain correspondence takes place, in which questions are raised about the wine not being conformable to the sample, and there is some discrepancy in the evidence as to whether or not the objections which were raised pointed distinctly to these two lots, or pointed in general terms to the clarets which had been purchased. I do not think that anything material will turn upon that point, and it is not necessary to notice it further ; although it was dealt with at considerable length by the learned counsel in his argument. The learned counsel for the appellants in their argument stated, that there was a distinct objection raised to these particular lots, and not a general objection to the wine as being inferior to the sample. They say that they dispensed altogether with giving any proof of that, because in one of the condescendences in the course of the proceedings, it is distinctly stated by the present pursuer in the action that the 19th of May was the time when the objections were made to lots 19, 24, and 51, and the condescendence goes on to state, that what was done by the appellants was simply to make an offer to retain that which was pursuant to sample and to pay only for that, not paying for the part which was not conformable to sample.

But, as I have said, all this I think seems to come to nothing with reference to the course of proceeding between the parties, because the ultimate course of proceeding between the parties is perfectly clear. There was no offer whatever to return the lots at any period throughout the whole of this correspondence which has been opened to your Lordships on the part of the defenders before the 14th June, which was the day after the matter was brought into litigation, the proceedings having commenced on the 13th. But the question does not rest here, upon whether or not there was that offer, because it seems to me beyond dispute, as far as any of the authorities which have been cited before us go ; and the question has been very fully and ably discussed by the learned counsel, but that discussion had not thrown any new light upon that part of the case which was considered by the Court of Session in Scotland.

There is no reason for questioning the law of Scotland at least to be this, that it is not competent to a person, on receiving articles which he has purchased and which are not found to be conformable to the description or the sample which he received of them in the course of the sale—I say it is not competent to him to retain the article, and at the same time to raise any question about the payment of the money. According to the law of Scotland, he appears to have only two courses open to him—the one is that of retaining the article and paying for it subject to any question which may arise hereafter, and it is not necessary for your Lordships at the present moment to determine as to what his position and rights may be with reference to any difference between that which had been sold to him and the actual value of the article purchased by him. He has either to retain it and pay for it or at once—not necessarily to return it, but at least to notify immediately, or at all events within a reasonable time, to the person from whom he has purchased the article, that he rejects it, that the contract is at an end between him and the vendor in respect of that article, and that the article itself is at the disposal of the vendor and at the risk of the vendor, that he, the purchaser, not only will have no more to do with it, but declines in any way retaining possession of it.

A great deal of argument has arisen on the part of counsel with reference to this point. A correspondence took place beginning on the 6th May, and it went on at considerable length

nearly down to the 14th June, the date which I before referred to as that, at which the purchaser offered to return the wine. On the other hand, both parties (as the learned Judges said in the Court below) were uncertain as to their rights, or were willing to treat independently of their strict rights, whatever the true view of their strict legal rights in the case might be, because the vendor said—Retur i us all the lots you bought ; we are quite willing to take them all back again —conceiving, I suppose, that some lots might have been bought very cheap, although there might have been some miscarriage as regards the particular lots that were complained of. And the purchaser says from time to time, "I am willing to keep that which is worth keeping, and which is answerable to the sample, which is a considerable quantity of each lot, and I am willing to pay for that, but with respect to the rest I will not pay for it." That was clearly not, according to the law of Scotland, the right on either side to which either party was entitled, and in the pleas in law which are raised between the parties the matter seems to be put in its true light, because the pleas in law raise these questions:—"*First*, was there a sale? *Secondly*, was there a delivery? Both these points are undisputed. Then the question is raised by a plea in law of the pursuer in the action (intending to meet thereby, no doubt, an objection upon the part of the defender) in which he says, that there was not a *timeous* objection raised to the quality of the lots. There may be a question as to whether the objection was *timeous* or not, but, as at present advised, I think there was no loss of time in making the objection. The objection was made as soon as it was known through the objection of Mr. Cooper what the quality of the wine was ; there was no great delay in making the objection. On the other hand the defender raises this point, that he timeously offered to return the lots in question. Those were the three questions which were raised.

Now, as regards those three questions, there was no doubt that the wine was delivered, and there is no doubt that the wine was not according to sample. We have not heard the counsel for the respondent, but it seems to me, (and I rather differ from what the learned Judges say upon this point,) that there is scarcely any reasonable doubt that a portion of the wine was not according to sample. But there is one matter which it was undoubtedly thrown upon the defender to prove, namely, the timeous rejection and return of the thing bought. The question is, whether that has been clearly made out and established to your Lordships' satisfaction. However unfortunate it may be for those gentlemen, I apprehend, that the only conclusion to which we can properly come is, that this was not done. The defender really very much trusted to what is stated in the condescendence with respect to the 6th May. Now if you take that at all, you must take it as there stated ; and if all that is there stated is true, it does not amount to any defence to the action, because there is nothing there said about any return or notice or statement of intention to return the lots complained of to the vendor. Therefore, you must go on from the 6th May, and look at the correspondence, and the correspondence is deeper than the averments in the condescendence, and therefore I think it need not be further commented upon. Then you come to the letter of the 31st May, which, coupled with the postscript, the appellants insist upon as a virtual notice. They call it an offer to return the lots. But, as I said before, the question will more properly be, whether it was a notice that the lots were rejected, and were held at the disposal of the vendor. But, if you look at the letter of the 31st May, including the postscript, it only comes to another link in the series of negotiations or disputes, (whether they are viewed in the one light or the other is not very material,) the series of discussions between the two parties, in which they discussed their various rights, neither of them appearing to hit upon that which was the precise point of law to be determined between the parties, and the postscript only coming to an offer on the part of these gentlemen with reference to all the clarets which had been purchased, there being another lot purchased besides the lots as to which there was a dispute, they make a proposal about the whole of the clarets which had been purchased. It is clear, that you cannot regard that as any definite proposition with regard to the lots in dispute, lots 24 and 51. It is only a portion of a correspondence which was going on between the parties, without their ever coming to any clear or distinct view of the legal position of either party. And that state of things continued until after the 31st of May. Now it is to be observed, that these gentlemen had really only one thing to do on the 6th of May, or rather one of two things to do, namely, either to take the lots and pay for them, trusting to what they might recover in a subsequent action, or to reject them at once and notify to the vendor, that they held them at the risk and the disposition of the vendor, and that they utterly abnegated all liability and all responsibility in respect of those wines. I say on the 6th of May they might have done that, but nothing whatever is done until the 13th of June, when the action is brought.

Now, in that state of things, regard being had to the nature and condition of the article which had been bought—regard being had to the full notice, which had been arrived at so long ago as the 6th of May, of what the condition of the article was, and what the right and the position of the defenders was, one can understand why it is, that the Lord Advocate, in the course of the argument of the learned counsel for the appellant, stated that he was willing to waive all question of nicety as to what seemed to be a very nice point indeed, namely, the exact *punctum temporis* at which two letters were written, the one being an offer to return the wines, and the other a letter

which was either enclosed in the same envelope or written about the same time, on the same day on which the service of the process was accepted, which alone constituted the origination of the suit. I say without reference to that nice point, the Court is safe in coming to the same conclusion, which, if the case had been before a jury, I apprehend the Court would have been entitled to come to, namely, that there had not been such a clear and distinct notification of the breaking off the contract up to at least the 13th of June, (whatever there may have been on the 14th of June,) as would justify these gentlemen in retaining, as they did, the goods which had been sold to them without paying the price for them.

The findings of the Court below may possibly be open to some cavil or dispute as regards the finding, that nothing was done up to the 13th of May, looking to the statements in the condescendence about the 6th of May. But I apprehend the reasonable construction of these findings would be, that nothing was done which the law required to be done by which a person could say, that he was absolved from the contract, and that he had put an end to it, and had thus put himself in a position in which he was entitled to say, that he is not any longer liable for the price under the contract. Whatever that may be, I apprehend, that it is not necessary for your Lordships to enter minutely into the finding, which is itself only a step in the progress of the evidence as to what was or was not done by those gentlemen at any point of time with regard to the proposals which they did make ; and that in substance they had not, up to that time, (which was a very considerable interval of time, regard being had to the subject matter,) namely, up to the 13th of June from the 6th of May, done that which it was incumbent upon them to do, if they wished to escape from the payment of the price. Therefore, without its being necessary to say, (as I think it is not necessary to say,) with reference to the expression of one of the learned Judges, that the door was finally closed by the letter of the 14th of June accepting the service of process and constituting, therefore, the institution of the suit, I apprehend that your Lordships will be of opinion, that the finding of the learned Judges below was right in which they found that, as there was not a return made of the goods, but the goods remained up to that very time (as they did) in the possession of the defenders, the defenders have not put themselves in a position in which they can claim a right to be excused from the payment of the money, whatever their rights may be (with respect to which it is not necessary to express any opinion) in respect of the quality of goods furnished to them. I do not think that in substance that point has ever been much pressed upon us. It was suggested in argument, and it ought to be noticed, although the point could hardly be pressed with any reasonable hope of success, that in effect there was no contract between the parties as to the quality of the articles. A case was cited to support that proposition. If a case had not been cited, I should not have noticed this point at all. That was a case in which a person engaged not to sell a definite thing *in esse*, but to supply certain quantities of yarn according to sample. He might supply the yarn from whencesoever he pleased ; there might not be a single hank of it *in esse* at the time beyond the sample of it ; and he furnished some jute instead of flax. There the very contract was for flax, not for jute, a thing different *in rerum naturâ*. But here the contract is for certain specified wines, sent over by a certain firm, Gordon and Co., and lying in certain specified cellars ; the parties are both of them acting *bonâ fide*. Both the vendor and the vendee thought that it was wine of the quality represented by the sample. Both thought so up to the very moment of the return of the goods from Mr. Cooper and the complaint that was then made. Of course, it is impossible to say, that a contract is not made because each and every individual article in the things sold is not equal to the sample produced. If that were so, I apprehend, that nine-tenths of the bargains which are taking place from time to time in a vast mercantile community like this, might be set aside, because by a mere accident there might be three or four of the articles not conformable to the sample. A contract was made and entered into. These gentlemen found, that when they received the goods, the articles supplied were not what they conceived they ought to be. They had it in their power either to accept them and pay for them, reserving all their rights, or to reject them and notify the rejection. It appears to me, that they have not done either the one or the other, and the consequence is, that they are now liable for the price which they have contracted to pay for these articles.

I think, therefore, my Lords, that all we can do is to affirm the interlocutors of the Court of Session, and to dismiss the appeal with costs.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend on the woolsack as to this case. There can be no doubt, that the purchases of the lots in question constituted a separate contract as to each lot. The sale was by sample. It turned out that very large quantities of the wine in both of the lots did not correspond with the sample, and undoubtedly the purchaser had a right without delay to return the wine and rescind or abandon the contract.

Reference has been made to the difference between the law of England and the law of Scotland, and as to the right of a purchaser to rescind a contract, and therefore I will say a few words upon that difference. In England, if goods are sold by sample, and they are delivered and accepted by the purchaser, the purchaser cannot return them ; but if he has not completely accepted them, that is, if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and then if they are found not to correspond with

the sample he is entitled to return them. As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he finds that they do not correspond with the sample, he has an absolute right to return them.

Now let us take the case of goods sold upon a warranty, and by way of illustration I will take the case of a sale of a horse, with a warranty of soundness. Some of the cases which have been referred to apply to that subject. If a horse is sold with a warranty of soundness, and it turns out to be unsound, in England the purchaser cannot return the horse unless there is a stipulation in the agreement, that if the horse does not answer to the warranty he shall be at liberty to return it, but that all he can do is to offer to return the horse to the seller, and if the seller refuses to receive it back, then he may sell the horse and recover from the seller the difference in price between a sound and an unsound horse, that is to say, the difference between the price which the horse realized upon the sale and the price which he had paid. In Scotland, as I understand, there is an absolute right to return the horse upon the discovery of its unsoundness, without there being any stipulation to that effect in the agreement between the parties.

In this case the action being brought for the price of the wines in these different lots, the defenders, (the appellants,) by way of defence, state in their pleas in law, that the wine was not conform to contract, and that they rejected the lots and timeously offered to return them. I was rather astonished to hear it stated at the bar, that upon these pleas in law it was incumbent upon the pursuer to shew that there had not been an offer to return the wines without delay, that is, that it was the incumbent duty of the pursuer to prove that which it would have been almost impossible for him to prove, namely, a negative in this case, that there had not been an offer to return. We were also warned, that if we decided otherwise we should change the law of Scotland in this respect. I do not think that the law of Scotland is so unreasonable as to require a party to prove a negative by way of anticipation to an affirmative defence. The defenders assumed, and as it appears to me properly assumed, the defence by their plea in law; and by the Act of 6th Geo. IV. cap. 120, their plea in law is to be held to be the sole ground of their defence, and therefore I apprehend, that the *onus* of proving that the goods had been returned, or that there had been an offer to return them, lay upon the defenders.

Now the questions which arose between the parties upon the pleas in law were these:—1*st*, Did the wine correspond with the sample? 2*dly*, Was there any improper delay in discovering the defective quality of the wine? and 3*dly*, Was there any improper delay in the offer to return them?

Now, with regard to the wine not corresponding to the sample, there can be no doubt whatever, that large quantities of the wine in both lots were utterly bad, and could in no way whatever be said to conform to the sample. And therefore, upon the discovery of that fact, there is no doubt whatever, that the defenders had a right, not, as appeared to be contended in the course of the argument, to retain the good wine and return the bad, but to rescind the contract for those lots altogether. The contract being entire for each lot, the only way in which the defenders could discharge themselves from their obligation to pay for the wine was by returning or offering to return the whole of the lots.

Now, was there delay in ascertaining the defective quality of the wine? I think upon that subject there can be no doubt. It appears upon the evidence, that at least the muddy unpleasant state of the wine which has been described in very strong terms might have been discovered in the course of a week—perhaps at the most, merely by holding it up to a gas light or other light, and therefore I think that the time which was taken by the defenders before they discovered these defects in the quality of the wine was an unnecessary delay, and therefore upon that point probably they might be considered to be without defence.

But with regard to the offer to return, I think the case is so perfectly clear against the defenders that I should be content to rest my opinion in this case entirely upon that question. I apprehend, that where a party desires to rescind a purchase upon the ground, that the quality of the article sold does not correspond with that article which it professes to be, or with the sample upon which it was sold, it is his duty to make a clear and distinct offer to return, or in fact to return the goods by stating to the vendor, that the goods are at his risk, that they no longer belong to the purchaser, that he rejects them, that he throws them back upon the vendor's hands, and that the contract is thereby rescinded.

Now was there any such distinct offer made on the part of the defenders in this case. It is quite clear, that until the 14th of June 1870 it is hardly possible for the defenders to contend successfully that there was any such offer. Stress has been laid upon the letter of the 31st of May. It appears to me, that that letter is anything but a distinct offer, or any offer at all, to return these goods, because the only important part of it is this: that, with the exception of part of lot 19 and the whole of lots 24 and 51, they are "agreeable to retain the rest of the goods purchased at the sale and pay for them, and also to pay for the above lots provided you supply them with the goods which they bought according to the sample and description. Failing your being able to do this, they think that they are entitled to the difference between the price at which they purchased them and the price at which they can be bought in the market." That was

anything but an offer to return the goods; it was an offer to retain them and to receive the difference in price.

But then it is said, that the postscript to that letter is most important here, and that it shews that there was an offer to return the goods. Now what is that postscript? "If you wish, Messrs. C. T. and Co. would prefer to return the whole of the fine clarets, as, looking to the condition of a portion of them, they would prefer not to offer them to their customers." This is merely a suggestion, that if the seller wish they would prefer to return the whole of the fine clarets, that is, when they have ascertained what the seller's wishes are upon the subject, then they would prefer to return them. That is not an offer to return them. But besides that, it is not an offer to return these particular lots and to rescind the contract, but a statement, that they would prefer to return the whole of the fine clarets, there being other lots of clarets besides these particular lots, Nos. 19, 24, and 51.

Then the only other possible way, in which the defenders can say that they made an offer to return these wines, is in the letter of the 14th June 1870. Now that letter was sent after the summons had been sent to the agent of the appellants by a letter of the 13th June 1870, and a copy of the summons was sent in that letter. There were two letters written on the 14th June, and sent by hand at the same time, one of them beginning thus:—"I have received yours of yesterday, with the signeted summons and copy therein referred to." The other being,—"I return principal summons with certificate appended thereto, holding it served against my clients." Now there was a question whether the offer to return, which is said to be contained in this letter of the 14th June, was sent before the summons had been accepted, until which, it is said the suit was not commenced. Really I do not trouble myself to consider whether that is correct or not. It seems to me to be perfectly immaterial, because I am sure that, upon considering this letter of the 14th June, it never can be regarded as such an offer to return the wines as is necessary in order to abandon or throw up or rescind the contract—whatever word you choose to apply to it.

Now it is to be observed, that the parties had been in negotiation for an arrangement of this dispute which had arisen between them, and that there had been an offer to refer the matter, which offer was declined on the 13th June, on which day the summons was sent. Then in the letter of the 14th June, the agent for the purchaser says:—"I have now seen my clients, and, without prejudice to the question between them and Mr. Chapman, I have to state, that they are agreeable to pay for the whole of their purchases, with the exception of lots 24 and 51, which they are willing to return without any claim for deterioration or value." Now I confess it appears to me it is impossible to say that that was a distinct offer to return, or a notice that the wines were in the possession of the appellants, but at the risk and as the property of the sellers. It appears to me more like a continuation of the negotiation between the parties with the hope that still there might be a settlement between them upon these terms which are suggested in the letter. But whatever construction may be put upon it in the way I have suggested, I am quite clear, that there never has been, from first to last, any such distinct notice or offer to return the goods as was required to enable the purchaser to throw up the contract and so to relieve himself from the liability of paying the price of these goods, and, therefore, I think with my noble and learned friend that the interlocutors ought to be affirmed.

LORD COLONSAY.—My Lords, I have come to the same conclusion in this case. A question was raised in the beginning of the argument submitted by Mr. Smith, in which he contended, that it was not a case made by the pursuer upon the record, that the goods had not been returned in due time, and that the *onus* was upon the pursuer to make out that part of the case. I think the matter is fully raised upon this record. In the first place, the plea of the pursuer is, that the defenders, not having objected to the state and the quality of the wines purchased by them, were debarred from objecting to the same now; and then the defenders plead, that they having rejected the lots Nos. 19, 24, and 51, and timeously offered to return the goods comprised in those lots, are not liable to pay for them. Therefore, the parties were brought face to face upon that point, and it appears from the evidence, that both parties have joined issue upon that, and questions were asked upon it, and both parties put in correspondence in order to support their case.

Therefore the whole question was raised, and the point we now have to determine is, whether the defenders did in due time, "timeously," as it is expressed here, offer to return the goods, or rather I would say did reject the goods, because rejection implies all that was necessary upon their part as purchasers of the goods when they found that they did not accord with the samples. Rejection implies notice that they were not good, and the statement that they were returned, or that they offered to return them, or that they were lying at the risk of the sellers in a place stated. Now, I think it appears pretty clear upon the evidence that is before us, and from the documents, that neither was there a timeous notice, I would say, of the goods being disconform to sample, nor was there throughout until the 14th of June, (and I doubt if even then,) an offer or a proposal to return them, or a doing of that which was necessary to the rejection of the goods.

It appears to me that, very soon after the sale, the defenders obtained samples of the goods, and it appears that early in April they obtained additional samples of the goods with a view, as

one of the defenders says, to testing them and seeing whether they were according to sample. They got six bottles of each kind. They called in a skilled person to assist in examining them, and being satisfied they sent for and obtained the goods. So far there was a fair opportunity of examining the goods. A month elapsed before they did anything. According to any statement we have here, even by the defenders themselves, it was not till the 6th of May that any positive objection was made to the particular lots. Now I do think, that after the defenders had had an opportunity of examining the goods, had taken persons to assist them in examining them after they had had several samples opened, it being then a month after the sale, it was then too late for them to make objection.

But the case does not end there. The matter went on in this way: Certain objections were taken; a correspondence went on *pro* and *con;* but never at any stage, certainly not until the 14th of June, does it appear that they rejected, in the proper and legal mode of doing so, those particular parcels of goods. They did not state that they returned them, or that they were at the risk of the seller, and in short they did not fulfil that which by law is incumbent upon a purchaser to do, if he does not choose to retain the goods. They retained the goods and refused to pay the price for them. They contested the quality of the goods, and now after the lapse of so much time they propose, in bringing this question here, to return the goods, and they refuse to pay the price. It does appear, that in some respects both parties were wrong in their views of the law in the early part of these proceedings. It appears that the pursuer was of opinion, that all the purchases made at that sale were to be regarded as one transaction, and that it was not competent to the defenders to take an objection to any particular lot of the purchase. It appears, that the defenders were under that impression too, because in their letters in the correspondence they seem to deal with the matter upon that footing, but, when the parties came into Court, and after the matter came to be discussed, at the first step of the proceedings, the first judgment pronounced by the Lord Ordinary, at an early stage of the case, was, that that contention of the pursuer was wrong, and that each lot was to be dealt with as a separate purchase. We find that there was no rejection of the goods—no proposal to send them back—in short, nothing was done which satisfied the requirements of the law.

As to the matter of the particular *punctum temporis* we have to deal with, I am not at all of opinion, that the true date is the date of the service of the summons. However long the serving of the summons and the raising of the action may be delayed, it is not always up to that date open to a purchaser to return the goods. That would be a very strange thing, and quite contrary to the law. He must do it forthwith when he has had an opportunity of seeing and examining the goods, especially if he has availed himself of that opportunity and examined the goods. But you find that that was not done here. The service of the summons has no solemnity in this matter at all. Some of the Judges used the expression that after the service of the summons it was too late. As one of them stated, the door was closed. No doubt it was, and the letter from the one agent to the other agent shews it. The sending of the summons to the agent of the defender requesting him to accept the service for his client, and his acceptance, is the strongest possible intimation, that he no longer considered that he had any right to rescind the contract.

Therefore I see here nothing that can support the case of the defenders. They have all along retained the wines, they have retained the goods, and they are now just trying, upon an action of this kind, to maintain, that if they had sent the goods back in time and paid the price demanded, they might have had redress by bringing an action for damages. But that is not the case we have to deal with here. The case we have to deal with here is as to the payment for the wines. We are told that there is an action for damages in dependence raised by the defenders. I shall say nothing with regard to the actual *punctum temporis* or the right to claim damages. I will say nothing that can be supposed to have a bearing upon the other case that may be in dependence. I will only say, that the cases which have been referred to as impeaching the doctrine laid down by the Judges in this case are not at all in point; particularly the case of *Jaffe* v. *Ritchie* is wholly away from this. There there was a purchase of flax yarn, and it turned out, when the bleacher came to examine the goods, that a large portion of this flax yarn which the contractor had been bound to supply was not flax but jute. It was held there, that the party was not bound to take jute instead of flax. It is a different article, and therefore it is not the same case at all as this. It was only bleaching that brought out the quality, but certainly it is not the same case as this upon two grounds, 1*st*, it was not a contract for specific goods; 2*dly*, it was a different article that was delivered. The cases are all of them away from the present. Upon the whole, I am afraid that this gentleman has a very bad bargain, although the wine was bought at a cheap rate —not an unusual state of things, perhaps—and he must suffer the consequences.

LORD CAIRNS.—My Lords, I entirely agree with the judgment now proposed to be pronounced.

Interlocutors of the First Division of the Court of Session appealed from affirmed, and appeal dismissed with costs.

Appellants' Agents, Leburn, Henderson, and Wilson, W.S.; R. M. Gloag, Westminster. —*Respondent's Agents*, Millar, Allardice, and Robson, W.S.; Simson and Wakeford, Westminster.