*Thursday, May 4.*

(Before the Lord Chancellor (Halsbury) and Lords Watson, Shand, and Davey.)

## JACOBS *v.* JAMES SCOTT & COMPANY.

*Sale—Implied Condition as to Quantity—Knowledge of Market for which Goods Required—Sale of Goods Act* 1893 (56 *and* 57 *Vict.* 71), *sec.* 14.

A, a dealer in Canada, agreed by contract in writing to supply the Glasgow Tramway Company with 2100 tons of hay. The hay was described in the contract as "best Canadian Timothy hay," subject to the qualification that "small quantities of clover mixed in hay not to be objected to."

To carry out part of this contract A contracted with B, also a dealer in Canada, for the supply of 900 tons of hay. In terms of this latter contract, which was in writing, the hay was to be delivered in Glasgow, and was described as "good sound Canadian hay," with the addition of this explanation, "good sound Canadian hay is understood to mean No. 1 export hay of fair average quality."

In an action between A and B arising out of the rejection of part of the hay tendered as disconform to contract, it was held to be proved (1) that B knew that the hay contracted for was required by A in order to carry out his contract with the Glasgow Tramway Company, (2) that "No. 1 export hay" in the Glasgow Market meant hay not in any case containing more than 20 per cent. of clover, all the rest being pure "Timothy" hay (*i.e.*, hay not containing clover or natural grasses); and (3) that the hay tendered and rejected was not of this quality.

*Held* (*reversing* the judgment of the Second Division) that it was an implied condition of the contract between A and B that the "No. 1 export hay" to be supplied should be of the standard required to answer that description in the Glasgow market, and that the hay tendered not being of that standard, A was entitled to reject it as not conform to contract.

On 24th November 1893 Joseph Jacobs, horse dealer, Montreal, Canada, then residing in Glasgow, entered into a contract with the Glasgow Tramway and Omnibus Company, Limited, for the sale to the latter of 2100 tons of Canadian hay. The contract was contained in the following writing:—"Sold to the Glasgow Tramway and Omnibus Company, Limited, two thousand one hundred tons best Canadian Timothy hay, price 92s. 6d., say ninety-two shillings and sixpence, per ton c.i.f. Glasgow, for first thousand tons, and 90s., say ninety shillings, per ton c.i.f. Glasgow, for remainder of eleven hundred tons; hay to be delivered in good order and condition from 1st January till 31st July 1894, at the rate of three hundred tons per month. Terms cash after delivery. Glasgow Corporation weights to be accepted. Each shipment to be about one hundred and fifty tons. Small quantities of clover mixed in hay not to be objected to. 24/11/93.

"JOSEPH JACOBS.

"*Glasgow, 24th November* 1893.

"We accept the above offer.

THE GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED.

"JOHN DUNCAN, Secy. and Manager."

For the purpose of carrying out this contract with the Tramway Company, Jacobs on 12th January 1894 contracted with James Scott & Company, grain merchants, 132 St Antoine Street, Montreal, Canada, for a shipment to Glasgow of 200 tons of hay. This contract was also in writing and was in the following terms:—"Dear Sir—We beg to confirm to you the purchase from our firm of about (200) two hundred tons gross good sound Canadian hay, *ex* ship Glasgow, for (90s.) ninety shillings per ton. This hay to leave Portland about the 21st inst. That is No. 1 export hay. Terms to be cash against bills of lading payable in Montreal. We are to allow you one per cent. on wgts. on bills here, and guarantee wgts. in Glasgow. No insurance to be paid by us unless you give us the benefit of premium on bills of exchange. It is further understood that you are to have the first chance on a 300 ton lot that we are now trying to secure for above port, Glasgow.—Yours truly, JAMES SCOTT & COY.

"Wgts. guaranteed in Glasgow.—J.S."

Thereafter, Jacobs arranged for a further shipment of 900 tons of hay to be delivered in Glasgow. This contract was dated 26th January 1894, and was as follows:—"Dear Sir—We beg to confirm to you the purchase from our firm of about (900) nine hundred tons gross good sound Canadian hay, *ex* ship Glasgow, for (90s.) ninety shillings per ton, about (400) four hundred tons of this hay to leave Portland about the 5th February next, and balance as soon as frgt. can be obtained from steamships. Good sound Canadian hay is understood to mean No. 1 export hay of fair average quality. Terms to be cash against bills of lading payable in Montreal. One per cent. to be allowed you, and out-turn guaranteed. Our firm are to pay insurance on this shipment.—Yours truly, JAMES SCOTT & COY.

"It is understood balance of hay must go before 1st May 1894.—J.S."

Shipments of hay were consigned by Messrs Scott to Glasgow under the contracts of 12th and 26th January, and delivery was, on the instructions of Jacobs, made or tendered to the Glasgow Tramway Company. The lot shipped under the first contract was accepted by the Tramway Company on behalf of Jacobs, but of the lots shipped under the second contract only 243 tons were accepted, the balance being rejected as disconform to contract.

Thereafter on 13th September 1894 Jacobs raised an action against Scott & Company, the conclusions of which, as restricted, were for (1) the sum of £774,

representing a claim for repetition of the price of hay that had been rejected, and of freight; and (2) a sum of £83, 11s., representing the profit which Jacobs would have made by the re-sale of the hay to the Tramway Company had all the hay contracted for by Scott & Company been accepted.

Defences were lodged to this action by Messrs Scott, who also raised a second action against Jacobs on 27th February 1895, concluding, as restricted, for the sum of £600, being the difference between the contract price of the hay tendered for delivery, and the price which on rejection it realised on sale in Glasgow, with certain outlays connected with the storage and sale of the hay. Defences were lodged to this action, and thereafter on 4th June the Lord Ordinary (STORMONTH DARLING) conjoined the two actions and allowed a proof.

A proof was led, including the examination of witnesses in Canada on commission, and at the close of the proof the parties lodged the following joint minute:—"Brown, for Jacobs, and Sandeman, for Scott & Company, concurred in stating (1) that the over-payment made by Jacobs to Scott amounted to £550; (2) that in the event of the Lord Ordinary finding that Jacobs was in breach of his contract, set forth in condescendence No. 6 of the action at Scott's instance, and also liable in damages, the parties consent to decree being pronounced in that action for the sum of £180 as damages, and Scott & Company being assoilzied from the conclusions of the action at the instance of Jacobs; (3) that in the event of the Lord Ordinary finding that Jacobs was not in breach of his said contract and not liable in damages, the parties consent to decree being pronounced in the action at Jacobs' instance for the said sum of £550, and Jacobs being assoilzied from the conclusions of the action at the instance of Scott & Company."

The result of the evidence as found by the Lord Ordinary, with whose findings the House of Lords concurred, was (1) that Messrs Scott knew that the hay was required for the purpose of carrying out Jacobs' contract with the Glasgow Tramway Company; (2) that "No. 1 export hay of fair average quality" as understood in the Glasgow market meant hay which had not more than 20 per cent. of clover mixed with it, the rest being pure "Timothy hay," *i.e.*, not containing clover or natural grasses; and (3) that the hay tendered for delivery under the contract of 26th January and rejected by the Tramway Company on behalf of Jacobs did not answer this description.

On 21st January 1898 the Lord Ordinary pronounced the following interlocutor:—"Decerns against the said James Scott & Company for payment to the said Joseph Jacobs of the sum of £550 sterling in full of the sums sued for in the said action, and interest thereon: In the action at the instance of the said James Scott & Company against the said Joseph Jacobs, assoilzies the said Joseph Jacobs from the conclusions of the summons in the last-mentioned action, and decerns," &c.

His Lordship's note was as follows:—"By joint-minute, put in at the close of the proof, the parties have reduced the questions raised on record to one, viz., Whether Jacobs was in breach of his contract with Scott, and liable in damages? All other questions are out of the case, and the parties have agreed as to the manner in which I am to dispose of each of the two actions according as I answer the only question left to me.

"My answer to that question is in the negative, *i.e.*, in favour of Jacobs.

"When I speak of the contract between Jacobs and Scott, I refer exclusively to that of 26th January 1894, for the earlier one of 12th January had been fully performed by the deliveries under it being accepted. I admit that the description of the hay sold under the contract with Scott differs from the description in the contract with the Tramway Company. The latter called for the 'best Canadian Timothy hay,' qualified only by the words 'small quantities of clover mixed in hay not to be objected to.' The former called for 'good sound Canadian hay,' and that was defined in the contract as meaning 'No. 1 export hay of fair average quality.' Accordingly, it is by no means conclusive of the question which I have to decide that the Tramway Company rejected, and that everybody admits they were entitled to reject, 660 out of the 1100 tons which they had purchased from Jacobs.

"The expression 'No. 1 export hay' has an air of great precision about it, as if there could be very little doubt in the trade what class of hay was meant to be indicated. But, strangely enough, it appears from the report of the Canadian commission—which I may observe in passing is a specimen of the intolerable results of taking down every irrelevant word which falls from counsel and witnesses—that the expression is not a term of certainty at all, and that there is considerable difference of opinion about its meaning. There is a class of hay known in Canada as No. 1, and another class known as No. 2, the difference being that No. 1 is almost pure Timothy, and No. 2 admits of an admixture of clover and natural grasses. But 'No. 1 export hay' is rather a puzzle to most of the witnesses. One interpretation of it, for which Jacobs' counsel contended, and for which there is considerable foundation in the Canadian evidence, is that it simply means the best class of hay exported from Canada (see among Scott's own witnesses Poulin, John Scott, and James Scott himself.) If that were the true interpretation of the term, Scott's claim of damages would undoubtedly fail, because the hay which he supplied was very decidedly inferior to the best which comes from Canada to Glasgow. But I rather think that the weight of the Canadian evidence goes to show that a contract for 'No. 1 export hay,' intended for the Glasgow market, would be fulfilled by sending something between No. 1 and No. 2 as known in Canada, but not in any case containing more than 20 per cent. of clover, all the rest being pure Timothy.

I refer particularly to the evidence of Esdaile, Wight (both witnesses for Scott), and Crowe (a witness for Jacobs). I lay stress on the hay having been intended for the Glasgow market, because Scott knew its destination, and all the witnesses are agreed that Glasgow is more exacting than other markets in allowing only a small proportion of clover.

"If that be a true representation of the class of hay which Scott agreed to supply, the next question is, whether what he did supply was up to the mark? Now, it is significant that Roy, one of the dealers from whom he bought a considerable proportion of the hay, admits that his lot was not what he would understand as No. 1 export hay for the Glasgow market. It is also significant that Allan, the representative of the Tramway Company, describes the greater proportion of the hay delivered to them as 'soft uncultivated hay.' He also adopts the description given in the letter of his company, dated 3rd March 1894, to the effect that the consignments were largely composed of 'soft grassy meadow or upland hay.' No doubt he assents to a suggestion in cross-examination that if their contract had been for good sound Canadian hay of fair average quality, they could not have rejected what was tendered to them. But that suggestion omits altogether the important words 'No. 1 export hay.' These words determined the class of hay, and the succeeding words merely meant that it was to be a fair average of that class. It is plain, I think, that the rejection by the Tramway Company was due not so much to the stuff containing too large an admixture of clover, as to its containing far too much natural or meadow hay, of which, according to the Canadian evidence, there ought to have been little or none. It seems to me not unworthy of remark that Scott & Company in a letter addressed to Messrs Dowie & Company, their Glasgow agents, dated 22nd December 1893, described the hay which they intended to send by fortnightly consignments, and which they asked him to dispose of, as likely to run half Timothy, quarter clover, and quarter natural grasses. No doubt that was a few weeks before the contract with Jacobs, but it referred to hay which they intended to send, and which I presume they had already secured.

"The hay rejected by the Tramway Company was sold by Messrs Dowie as best they could. Two of the purchasers, Mr Gilchrist and Mr Thomson, were examined in this Court. Mr Gilchrist says of what he saw, 'a proportion of it was good Timothy hay, but much the larger portion of it was soft natural grass, and could not be called Timothy hay. I would not have called it fair average quality; it appeared to be natural or prairie grass.' And Mr Thomson says, 'I found the hay to be mixed. A good deal of it was soft natural grass or meadow hay; there was very little Timothy in it.' It is apparent, both from the letters of Messrs Dowie & Company to Scott and from the evidence of Mr Dowie, that they did not think much of the hay, and that they had considerable difficulty in selling it, although the prices which they got in a falling market were fairly good. The hay was in good condition for its class, but the class was not high.

"I therefore come to the conclusion that Jacobs was justified in rejecting it as disconform to contract. That being so, I do not require to consider the question whether Scott & Company, when they instructed Dowie to sell the hay on its rejection by the Tramway Company, relieved Jacobs of his contract. There is a good deal in Scott's letters to Dowie, and in their mode of dealing with the hay, to favour that view, and there is a good deal in Jacobs' letters and in his pleadings against it. But I must be allowed to observe that Scott's long delay in making the claim of damages, and their silence with respect to it in the defences to Jacobs' action, look very like a consciousness either that they had relieved Jacobs of his contract, or that they had failed duly to perform their own part of it."

James Scott & Company reclaimed, and on 18th March 1898 the Second Division pronounced an interlocutor reversing the judgment of the Lord Ordinary. This interlocutor was as follows:—"Recal the interlocutor reclaimed against; and in the action at the instance of Joseph Jacobs against the said James Scott & Company, assoilzie the said James Scott & Company from the conclusions of the action, and decern; and in the action at the instance of the said James Scott & Company, ordain the said Joseph Jacobs to make payment to the said James Scott & Company of the sum of £180 sterling, and decern."

The following opinion was delivered by LORD TRAYNER on the advising of the case:—There are here two actions arising out of the same contract, each party to it charging the other with breach of contract, and claiming damages in consequence thereof. The parties have very sensibly agreed on what the award should be in the event of one or other being found liable, and the only thing therefore to be decided is, was either party in breach of their contract, and if so, which. The contract between the parties is in writing, and is dated 26th January 1894. Under it the pursuers Scott & Company sold to the defender Jacobs a certain quantity of "good sound Canadian hay, *ex* ship, Glasgow, for 90s. per ton." . . . "Good sound Canadian hay is understood to mean No. 1 export hay of fair average quality." The pursuers delivered or tendered for delivery the contract quantity at Glasgow, but delivery was not taken on the ground that the hay was not conform to contract, being, as was alleged, of a quality inferior to that specified. I cannot say that the hay was rejected by the defender at Glasgow, but it was rejected by others, whose action in that respect the defender adopts. It may tend to clearness, if I notice here that the defender had bought the hay in question from the pursuers in order to enable him to fulfil a contract for the supply of hay into which he had entered with the Glasgow

Tramway Company. The contract between the defender and the Tramway Company (the terms of which I shall afterwards notice) was one with which the pursuers had no connection, and it is to my mind more than doubtful whether that contract or its terms were within the knowledge of the pursuers at the time when the contract between them and the defender was made. Whether it was or not does not appear to me to be material to this case, because the pursuers and defender made their own contract, without reference to the Tramway Company or their contract, and it is on the terms of the contract between the pursuers and defender that the questions now at issue must be determined. The hay furnished by the pursuers was shipped to Glasgow, and the bills of lading therefor forwarded to the Tramway Company either by the defender or by the pursuers at his request. It was partly accepted by the Tramway Company, but to a considerable extent rejected as disconform to the contract between them and the defender. The defender apparently acquiesced in this rejection, and fell back upon the pursuers, his position being that if the hay did not fulfil the conditions of the Tramway Company's contract, it did not fulfil the conditions of the contract between him and the pursuers, which he regarded, or at all events now represents, as being practically the same. The position thus taken by the defender I regard as untenable. His contract with the Tramway Company was to supply them with the "best Canadian Timothy hay." What he contracted for with the pursuers was certainly not that, and there is not a single witness who thinks that the two contracts are the same or refer to the same kind of hay. The description of the article sold is different in the two contracts, but there is more than a difference of language or expression between them; the thing sold under the one contract was a different thing from that sold under the other. What was sold to the Tramway Company was Timothy hay, and nothing else. Whereas it is not pretended that the pursuers under their contract were bound to supply the defender with a hay that was all Timothy without the admixture of other grasses. Accordingly, I agree with the Lord Ordinary in thinking that the rejection of the pursuers' hay by the Tramway Company was not conclusive that the hay so rejected was disconform to the contract with the defender. I go further, and think that the rejection by the Tramway Company, although quite warranted by the terms of their contract with the defender, did not even raise a presumption that the pursuers' hay was not such as the defender was bound to accept under the contract between them.

Any difficulty there is in this case arises from the introduction into the contract founded on of the gloss or interpretation of the words "good sound Canadian hay," which is understood to mean No. 1 export hay of fair average quality. The evidence taken on commission in Canada shows that the term "No. 1 export hay" is not a phrase or description about which everyone takes the same view exactly. But there is a large body of evidence to this effect—(1) that No. 1 hay is a hay kept for home consumption, and not exported except on special contract—it appears to be unmixed Timothy of the best quality; (2) that No. 1 export hay is a hay composed partly of Timothy and partly of other grasses, the exact proportions of each not being precisely defined by the trade; and (3) that "No. 1 export" hay corresponds to the grade known in Canada as No. 2. The great preponderance of the evidence supports the view that delivery of No. 2 (as known in Canada) would fulfil a contract for "No. 1 export hay." The witness Cunningham, for example (a witness examined for the defender), being asked whether "carefully selected No. 2 hay, as known to the Canadian trade, would fill a contract in 1894 for good sound Canadian hay, understood to mean No. 1 export hay of fair average quality," says "I believe it would." The witness Crowe (also for defender) says practically the same thing. For the pursuers, five or six witnesses, all unconnected with the pursuers (for I leave out of view the evidence of the pursuers and their clerks), give evidence to the same effect. Taking it to be established that No. 2 Canada grade is the same or equivalent to "No. 1 export," I think it equally established that the pursuers fulfilled their contract by the delivery of hay of the character specified therein. The evidence of every witness in Canada who saw the hay before it was shipped is to the effect that the hay furnished by the pursuers was carefully selected No. 2. It is admitted that the hay was the same, and in as good condition when tendered as when shipped. It had not suffered any deterioration in transit. But if the term "No. 1 export hay" is not a well-known trade term, universally accepted in the trade as descriptive of a particular kind or quality of hay, then we must fall back upon the description of "good, sound Canadian hay,' and I think it is proved beyond dispute that the hay supplied by the pursuers was of that character. If the pursuers' witnesses are believed, the hay was not only good sound hay, but selected (in compliance with the pursuers' instructions) with great care. The defender, however, cannot object to the evidence on this subject of his own witnesses. Mr Dowie, who sold the hay after it had been rejected in Glasgow, says—"It could be described quite fairly as good sound Canadian hay of fair average quality," and Mr Allan (of the Tramway Company) gives this evidence—"Was the hay that was delivered good sound Canadian hay? The hay was in good enough condition, but it was not the quality that we bought. Suppose your contract was only for delivery of sound Canadian hay? I could not have refused it on that account. . . . Your refusal arose from the special terms of the contract? Yes, there was no question about the condition of the hay." The price which the rejected hay realised, under what may be called a forced

sale, and in a rapidly falling market, corroborates the opinion of all the witnesses who saw the hay that it was good sound Canadian hay of fair average quality.

I ought perhaps to notice in a single word the defender's contention that the pursuers sold the hay in question specially for the Glasgow market, and were bound therefore to supply hay according to the Glasgow, not the Canadian or any other standard. This is not supported by the contract. It mentions Glasgow as the place of delivery, but it does nothing more. If it had been intended to contract that the hay should meet the requirements of any particular market, or any particular purchaser, that should have been stipulated. The evidence in the case being as I have stated, I am unable to agree with the judgment of the Lord Ordinary. I think the pursuers are shown to have fulfilled their contract, and that the defender was in breach by refusing to take delivery of the hay tendered to him, and is liable in damages on account of such breach. I think the Lord Ordinary's interlocutor should be recalled, that Scott & Company should be assoilzied in Jacob's action against them, and that in the action at Scott's instance decree should be pronounced against Jacobs for the agreed-on sum of £180.

The Lord Justice-Clerk and Lord Young concurred.

Lord Moncreiff was absent.

Against this judgment Jacobs appealed to the House of Lords.

At delivering judgment—

Lord Chancellor—In this case I think, with all respect to the learned Judges of the Inner House, the judgment of the Lord Ordinary is the more satisfactory judgment, and the one which I think your Lordships should adhere to.

The question in dispute really is a very simple one, namely, whether the contract was properly fulfilled or not by the hay which was supplied by Messrs Scott to the appellant here. I rather deprecate having to enter into such questions. I cannot help thinking that it would have been very much better if this question had been tried before a jury, and then I think it would have been tried very shortly, and an absolutely conclusive judgment would have been arrived at one way or the other from which neither party would have been able to appeal; because it being a simple question of fact, if it had been presented to a jury, and the jury properly directed, there would have been no possibility of any appeal or further litigation. Certainly I should have thought that a case of this kind was peculiarly one which a jury was the best possible tribunal to try. However, here the case is, and we must do the best we can to deal with it.

There is no doubt that what has been urged upon us by the learned counsel who has just addressed your Lordships is perfectly true; if the appellant instead of making what in words are two different contracts, had simply repeated with the respondents the contract he had made with the Tramway Company, and the question had arisen in that form, the great source of confusion arising from the difference of language which exists in the two contracts would undoubtedly have been got rid of, and a great deal of the evidence would have been unnecessary; but that was not done, and the result is that we have to find out from the contract actually made what was the contract obligation of the Messrs Scott.

The contract was for "200 tons gross good sound Canadian hay" at 90s. a ton, and that is expounded to mean "No. 1 export hay of fair average quality." I quite agree with the Lord Ordinary that those words seem to suggest a degree of precision which, when we come to look at the evidence afterwards, it certainly does not represent as existing, because every word of that definition or explanation of the contract terms has been the subject of debate and controversy; but the first question is whether or not we are at liberty to see what the meaning of the parties was, from the usage of the trade in which they were engaged. I suppose there can be no doubt that this contract, like every other contract, is susceptible of exposition in respect of the use of technical words which, though not ordinarily invested with such a meaning, may by the usage of trade become perfectly well known as having a certain acceptation. Whether the words here used mean actually the same thing or not, I will not at present discuss. All I will say is this, that until a very late period of this dispute everybody seems to have assumed, and indeed the course of dealing shows that it appears to have been assumed, that to the knowledge of both the parties in order to fulfil the Tramway Company's contract, and with the express object of doing that, the hay instead of being delivered to the appellant was in fact to be delivered to the Tramway Company, and was so delivered and accepted for some period of the transaction without demur.

Of course in order to give that a powerful influence upon the decision it becomes necessary to show that Messrs Scott knew what the Tramway Company's contract was. Now, it appears to me that the balance of probability is that the contract would be shown. I do not see any evidence to suggest that the parties were endeavouring to take each other in. The appellant in terms proved that he showed the contract to the respondents, and the Lord Ordinary who heard and saw him believed what he said. I quite admit that that observation is not so forcible a one as it would be in some cases, because the Lord Ordinary had not the opportunity of hearing and judging of the demeanour of the gentlemen who contradicted that evidence. That is a misfortune—the one side having a living witness to be examined and seen and heard, and the other side having only the comparatively cold and lifeless evidence obtained upon commission. That is the misfortune of the parties. I cannot say that the Lord Ordinary was wrong in believing the appel-

lant because he had not sufficient opportunity of judging of the counter evidence of the respondents, and accordingly I should hesitate very much before differing from the Lord Ordinary when he says he believed the appellant. Now the appellant, according to his statement, expressly and in terms showed what the object of the contract was, and that the contract with the Tramway Company was to be fulfilled by the hay that he was then buying. If that is true, it seems to me impossible to doubt that there was that collateral representation which makes it part of the obligation of the contract that the hay should be reasonably fit for the purpose for which both parties knew it to be intended.

I confess I entertain no doubt, both from the conduct of the parties, and indeed from the evidence that they both give, that there was a known distinction between the hay which would satisfy the ordinary market of Glasgow and that which would satisfy the ordinary market of London or Bristol. That seems to be in fact hardly denied by the evidence on all sides. Then, if that is true, I think there was a contract obligation to fulfil the contract in this respect, that the hay should be reasonably fit for the purpose for which both parties knew it was intended, and further, that there being a known distinction between those markets, it was part of the contract obligation to supply hay reasonably fit for the Glasgow market.

I am not quite certain whether the learned Judge, Lord Trayner, had in his mind the point which appears to me to be decisive of this question, because his Lordship says at the end of his judgment—"I ought perhaps to notice in a single word the defender's contention that the pursuers sold the hay in question specially for the Glasgow market, and were bound therefore to supply hay according to the Glasgow not the Canadian or any other standard. This is not supported by the contract. It mentions Glasgow as the place of delivery, but it does nothing more. If it had been intended to contract that the hay should meet the requirements of any particular market, or any particular purchaser, that should have been stipulated." Now, if the learned Judge means that that contract obligation would not exist unless it was to be found within the language of the written contract, I am bound to say that I think that is contrary to the law. That is not the law. The written contract is only intended to codify and state in plain terms the bargain between the parties. You may by the operation of statements and representations made at the time so clothe the rest of your contract with an additional contract obligation that, whether it is represented as an interpretation of the language of the contract or represented as something collateral to the contract, is perhaps immaterial, but undoubtedly you can make a contract obligation of that character part of your contract although the exact language in which it is expressed is not to be found within the four corners of the written contract itself. His Lordship seems to have suggested that if you are to have such a contract obligation at all it must be found in the language of the written contract itself; but that is not the law, therefore I am unable to agree with the learned Judge on that point.

The Lord Ordinary has satisfactorily pointed out what, according to the evidence on both sides, the real understanding of both the parties was at the time this contract was entered into, and if that was so, it is hardly now denied that the contract was not fulfilled by the delivery of the hay in question. That is the sole question, as the parties have agreed, upon which the relative rights of the parties must be determined. That is the one question upon which your Lordships are now called upon for a judgment—and although I feel great difficulty in this House disposing of such questions, and hope this will not be an example that questions of this sort should be remitted here for ultimate decision, when they are really questions of fact, yet as we are called upon to form a judgment upon the subject, all I can say is, that having read the Lord Ordinary's judgment, and having read the evidence, I entirely concur with the inference he has drawn from the evidence—and I have the less hesitation in overruling the judgment of the Inner House, because I think the error in the passage I have just read from Lord Trayner's judgment runs through the whole of it, and his mind has never been applied to what I may call that collateral qualification of the contract which rendered a particular hay necessary by reason of the knowledge of both the parties, and the utterance of one of them, that it was intended for the Glasgow market.

Under those circumstances I move your Lordships that the judgment of the Lord Ordinary should be restored and the judgment of the Inner House reversed.

Lord Watson—I also prefer the judgment of the Lord Ordinary to that of Lord Trayner, which was concurred in by his brethren the Lord Justice-Clerk and Lord Young. After the elaborate way in which this case has already been discussed by the Lord Chancellor, I need not enter into the details of the case, but I may intimate at once that my judgment is founded entirely upon this ground, that according to my reading of the evidence, there was an implied term of the contract between Mr Jacobs and the Scotts that the hay supplied by the Scotts was to be answerable to the description "No. 1 export hay," as that term or description is understood in the Glasgow market. Now, I do not think there is any doubt that when tried by that test the hay supplied by the respondents in this appeal was not conform to contract.

The Lord Ordinary does not precisely deal with the question which has appeared to this House to be be of importance—the only important question I should say that is raised by this appeal. A jury would have answered it very shortly, and certainly although it has cost the Court below very little trouble, it has occasioned a good deal

of anxiety to the members of this House, and has been the subject of very exhaustive discussion. The Lord Ordinary does not altogether pass the subject by, although he does not treat it in a manner which is to my mind very satisfactory. His Lordship says, however—"I lay stress on the hay having been intended for the Glasgow market, because Scott knew its destination, and all the witnesses are agreed that Glasgow is more exacting than other markets in allowing only a small proportion of clover." Now, I do not quite understand why the Lord Ordinary or any other Judge should have laid any particular stress upon the fact that the hay was intended for the Glasgow market, unless it was introduced into the contract as a condition or as a collateral warranty. I can understand it on that ground, because in that case the person bound by the warranty was bound to fulfil it, but I cannot understand how, if it was not so connected with the contract, it could materially affect the contract or the quality of the hay that Scott was bound to supply. On the other hand, Lord Trayner, and, I take it, the other members of the Second Division who concurred with him, declined to determine that question at all or to discuss it. I should not have adverted to the circumstance that they declined to discuss it had it not been for the ground upon which Lord Trayner excused himself from entering into the controversy. His Lordship says, after fairly stating the question to be tried—"This is not supported by the contract. It mentions Glasgow as the place of delivery, but it does nothing more." Then his Lordship adds—"If it had been intended to contract that the hay should meet the requirements of any particular market or any particular purchaser, that should have been stipulated." I apprehend those words to mean that it should not only have been stipulated, but that the stipulation should have appeared upon the face of the contract. No doubt the doctrine exists that you cannot contradict a contract, but it is out of the question to say, since the passing of the Sale of Goods Act 1893, that you cannot go outside the terms of a contract and consider what was *actum et tractatum* at the time it was entered into. I think when the circumstances are fully considered in this case the result is that which the noble Lord on the woolsack has arrived at, and I therefore agree with him that the interlocutor appealed from ought to be reversed.

Lord Shand—The decision of this case is in my opinion not altogether unattended with difficulty, but I think the only difficulty which arises is one of fact and not of law. There has been a considerable conflict of evidence on the question whether the hay that was supplied in Canada and sent to Glasgow was conform to contract. That is a matter upon which I think there is room for difference of opinion, but I have come without difficulty to the same conclusion as your Lordships, namely, that the hay supplied was disconform to the contract, and that the buyer was entitled to reject it as he did in Glasgow.

The preliminary question arises, however, what was the contract? What was the particular quality of goods which the seller was bound to supply to the buyer? As the first step in a case of this class you must ascertain what is the standard of goods that must be supplied. I agree with your Lordships in thinking that the Lord Ordinary took the sound view of the true nature of the contract and of the standard of goods which the seller was bound to supply. What has to be ascertained is the meaning of the words "No. 1 export hay of fair average quality." But I am of opinion with your Lordships that something is to be added to those words, either as an addition to the contract or by way of collateral contract, which is equally binding upon the seller as the original contract. I think we must add these words after "No. 1 export hay of fair average quality," "according to the Glasgow market." It is plain that both parties understood that the goods were to be sent to the Glasgow market, not only to Glasgow, but to be sent for use in Glasgow. I need only refer to a very few words which we have in the evidence of Mr Scott himself upon that subject. At page 75 of the evidence he is asked—"At the time these contracts were made with Joseph Jacobs, did he explain to you what disposition he was making of this hay, and if so, what did he say? (A) We understood that he had a contract with the Glasgow Tramway Company for a large quantity of hay, and that he was buying this hay from us to fulfil that contract in part." A great deal has been said, and I do not wonder that it was made the subject of strong pleading, to the effect that there was a separate contract, containing a different expression, between the purchaser of this hay and the Tramway Company. The learned counsel for the appellants have very properly drawn the attention of the House to the different terms of those two contracts, and pressed upon the House the consideration that the one contract was so expressed as to be of a rather more severe character, requiring a higher quality of hay than the other. I confess I think the obligation under which Jacobs undertook to supply the "best Timothy hay" was a somewhat stronger obligation than that which he took from the respondents, the sellers to him. And accordingly I think the test that must be here applied is not to be found in the Tramway Company's contract at all, but the contract, the words of which I have read, with the addition of words referring to the Glasgow market.

Now, what did these words imply? I think they amounted to this, that the purchaser was entitled to have, I will not say the best Timothy hay, for I do not think he was, but he was entitled to have something between No. 1 and No. 2; and I think that practically amounted to this, that he was entitled to have a fine No. 2—a very carefully selected No. 2 hay. The hay to be supplied was not No. 2 as known in Canada generally but No. 2 "export," and in addition to "No. 2 export" it was stipulated and agreed that it should be No. 2

export for the Glasgow market, which, as the Lord Chancellor has already observed, meant something of a finer quality than the No. 2 which would have satisfied Bristol or would have satisfied London.

That being so, I have further come clearly to the conclusion that the hay supplied was not up to that quality. I do not mean to go into the evidence in this matter. We have had days of discussion upon it, we are sitting here as a jury on that question, and my verdict, as discharging the functions of a juror, is that the hay was not up to contract, and that the appellant must fail upon that ground.

There is, as has been pointed out, a direct difference between the judgment of the Lord Ordinary in which I concur, and that of the Second Division as delivered by Lord Trayner. With every respect for that learned Judge and the Judges of that Division I must observe that I find enough in the terms of the judgment to show that if the view of the contract taken by your Lordships had been also taken by the Second Division of the Court their judgment would have been different. It seems to me that the Second Division disregarded the evidence showing that the hay was bought for use in the Glasgow market. I can understand that if they were right in doing so their judgment might be sound; but if they were in error in laying aside that element to which they attach no weight, I think it follows that the decision of the case must be in accordance with what the Lord Ordinary has held.

On these grounds I am of opinion that the interlocutor appealed from should be reversed.

Lord Davey—I agree with your Lordships in preferring the judgment of the Lord Ordinary to that of the Inner House delivered by Lord Trayner. Indeed, I do not hesitate to say that I dissent from the reasons for his judgment given by Lord Trayner, both in the matter of law and in his inference of fact which he draws from the evidence in the case. I think the passage read by the noble and learned Lord on the Woolsack is, as I understand it, an erroneous statement of the law, for I think it plain from the context that when Lord Trayner said "If it had been intended to contract that the hay should meet the requirements of any particular market or any particular purchaser, that should have been stipulated," he meant that it should have been expressly stipulated.

Now, the evidence in this case satisfies me that it was within the contemplation of the parties, and indeed that the parties contracted on the basis, that the hay which was the subject of the contract was for the special purpose of implementing the contract which had been entered into already by Jacobs with the Tramway Company. Jacobs says that he showed the contract to Scott; that is denied; and it does not appear to me to be necessary to decide that difference of evidence between Jacobs and Scott, because I find quite sufficient in the evidence of John Scott and James Scott to show that the special purpose for which the hay was purchased from the Scotts was the purpose which I have named. John Scott is asked—"But at the time the contract was made did not Jacobs say to your brother that he had a contract for hay with the Glasgow Tramway Company, and that he wanted hay to fill that contract from it? —(A) Yes." And that is confirmed largely by James Scott himself when he is asked—"Then some way or other you had an idea of the kind of hay he had contracted for when you entered into this contract with him. (A) All we knew was that he wanted a good sound feeding, composed principally of Timothy. (Q) For the Glasgow market?" and he answers "Yes."

That being so, I conceive that under the 14th section of the Sale of Goods Act, which indeed only consolidates the law as established in numerous decisions, certainly in this part of the kingdom, and I believe in Scotland also, to the same effect, there undoubtedly was a stipulation—whether you call it a warranty, a collateral agreement, or in whatever way you like to describe the stipulation which became part of the contract between these parties—that the hay should be fit to fulfil the special purpose for which it was purchased.

I also disagree in the conclusions of fact to which Lord Trayner comes, that "No. 1 export hay is a hay composed partly of Timothy and partly of other grasses, the exact proportions of each not being precisely defined by the trade; and (3) that 'No. 1 export' hay corresponds to the grade known in Canada as No. 2." I have given the best attention I could to the evidence which has been read and commented upon before us, and I prefer the inference which is drawn by the Lord Ordinary, who says that "The weight of the Canadian evidence goes to show that a contract for 'No. 1 export hay' intended for the Glasgow market would be fulfilled by sending something between No. 1 and No. 2 as known in Canada, but not in any case containing more than twenty per cent. of clover, all the rest being pure Timothy." I need not discuss the evidence as to whether the hay supplied under this contract did come up to the contract so interpreted. The evidence to my mind is conclusive that it did not; and if you once arrive at the standard by which the hay is to be judged, there can, according to the evidence, be no question upon the subject.

I therefore concur in the judgment which your Lordships propose, namely, to restore the judgment of the Lord Ordinary.

Judgment appealed from *reversed*, and that of the Lord Ordinary *restored*.

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