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

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

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

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

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

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

On the question of expenses I concur with your Lordships.

The Court pronounced this interlocutor:—

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

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

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

Friday, June 12.

FIRST DIVISION.

[Lord Fraser, Ordinary.

FERGUSON *v.* M'NAB.

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

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

title as tenant of D, and did not set forth also, as was the fact, that he was tenant of the shootings as well. He was afterwards sued in damages for malicious prosecution. *Held*, without determining whether the title as libelled was bad, that having in fact a good title to prosecute, he was entitled to plead the protecting clauses of the Day Trespass Act, providing that such actions must be brought within six months of the fact committed, and of the Summary Procedure Act 1864, providing that actions in respect of proceedings thereunder shall be brought within two months after the cause of action shall have arisen, and that the action not having been brought within the statutory period must be *dismissed*.

Ground Game Act 1880 (43 *and* 44 *Vict. c.* 47, *sec.* 7).

Observed that the title to prosecute was also good under the Ground Game Act of 1880, sec. 7.

James M'Nab, tenant of the lands of Dumyat, in the county of Perth, brought a complaint before the Sheriff-Substitute of Perthshire in November 1883, in which Alexander Ferguson, weaver, Alloa, Stirlingshire, and four other persons, were charged with a contravention of the Day Trespass Act (2 and 3 William IV. cap. 68), by entering upon the complainer's farm, "tenanted under the Right Honourable Alexander Hugh Bruce, Lord Balfour of Burleigh, the proprietor thereof, in search or pursuit of game."

On 14th November 1883 the Sheriff-Substitute pronounced an interlocutor convicting Ferguson in respect of the evidence adduced, and appointed him to pay the modified penalty of 10s. with 21s. 9d. of expenses, or in default thereof to be imprisoned for fourteen days.

Ferguson was incarcerated for a week in the prison of Dunblane, and thereafter presented to the Lords of Justiciary on the 19th November 1883 a bill of suspension and liberation in which he pleaded, *inter alia*, (1) that M'Nab had no title to prosecute as he was only tenant of the lands; (2) and that the whole proceedings were null as he had not been duly cited, and further (3) that he had been oppressively refused by the Sheriff an opportunity of proving the defence of *alibi*.

On 19th November 1883 Ferguson was liberated (by Lord Mure) on his finding caution for £5 that he would return to prison in the event of the bill being ultimately refused.

When the bill of suspension and liberation came before the High Court of Justiciary on 22nd February 1884, M'Nab again alleged and offered to prove an *alibi*, and the Court remitted to the Sheriff-Substitute of Perthshire to investigate into the allegations concerning the alleged *alibi*, and to report *quam primum*. After various proceedings the Lords Commissioners of Justiciary on 19th July 1884, in respect the defence of *alibi* proponed for Ferguson had been established, passed the bill, and suspended the conviction and sentence complained of *simpliciter*.

In December 1884 Ferguson raised the present action of damages against M'Nab concluding for payment of £500 as damages.

He averred that the defender could easily have discovered if he had taken any trouble that at the time when he was charged under the Day Trespass Act he was not within thirty miles of the place set forth in the complaint. He averred also that he was not properly cited, and that the whole proceedings were malicious and oppressive, and that the defender being only tenant of the lands had no title to bring the complaint. He further alleged that he had suffered considerable loss and damage in his reputation from the proceedings which had been taken against him.

The defender stated that the proceedings were instituted under the Summary Procedure Act of 1864, section 35 of which provides that all actions on "account of anything done in any case instituted under this Act shall be commenced within two months after the cause of action shall have arisen, . . . and not otherwise;" and that the present action, which had been brought on account of the proceedings instituted by the defender under the Summary Procedure Act, had not been brought within two months after the cause of action had arisen; further, he set forth that the 17th section of the Day Trespass Act (2 and 3 Will. IV. c. 68) provided that "all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act must be commenced within six months after the fact committed, and not otherwise, and that notice in writing of such action, and of cause thereof, be given to the defender one month at least before the commencement of the action." More than six months had elapsed before the action was commenced, and no written notice had been sent as required. The defender also averred, and it was not denied, that besides being tenant of the lands he was also tenant of the shootings, and he maintained that therefore he was entitled to bring the complaint — that he acted upon reasonable information and without malice.

The pursuer pleaded that the defender was liable in damages (1) because the proceedings were malicious and without probable cause; and (2) because the defender had no title to bring or insist in the proceedings complained of.

The defender pleaded — "(1) The present action not having been brought within two months after the cause of action arose, it is excluded by section 35 of the Summary Procedure Act 1864. (2) This action not having been commenced within six months after the fact committed, and no notice thereof in writing having been given, all as required by the Act 2 and 3 Will. IV. c. 68, it is incompetent, and the defender is entitled to absolvitor."

On 17th January 1885 the Lord Ordinary sustained these pleas for the defender and dismissed the action.

"*Opinion.*—The pursuer of this action claims damages against the defender on the ground that he was unjustly prosecuted under the Day Trespass Act (2 and 3 Will. IV. c. 68), and was convicted, and for a few days imprisoned under the warrant of the Sheriff-Substitute, who convicted him. The accusation against the pursuer was that he along with other persons committed a trespass by entering or being upon or within 'the hill or part of the complainer's farm of Dumyat, commonly called or known as the Blairhill, and on a part thereof about 300 yards to the north-west of Blair Logie Castle, occupied by James Marshall, joiner, and which hill,

or part of the complainer's farm of Dumyat is situated in the parish of Logie and county of Perth, and is tenanted by the complainer under the Right Honourable Alexander Hugh Bruce, Lord Balfour of Burleigh, the proprietor thereof, in search or pursuit of game, . . . and that without the leave of the complainer or the said proprietor.' Evidence was led in support of this charge, and on the 14th of November 1883 the Sheriff-Substitute found it proved, and adjudged the pursuer to pay a penalty of 10s., with 21s. 9d. of expenses, and in default of payment adjudged him to be imprisoned for the space of fourteen days.

"The pursuer presented a bill of suspension and liberation to the High Court of Justiciary, and on the 19th November 1883 Lord Mure granted warrant for his liberation on caution that he would return to prison in the event of the bill being ultimately refused. Suspension was asked upon various grounds, the first being that the defender, at whose instance the complaint had been made, had no title to prosecute, and he also averred and offered to prove an *alibi*. The Court of Justiciary allowed a proof of the *alibi*, and on 19th July 1884 they suspended the conviction and sentence on the ground that the *alibi* had been established.

"It is in these circumstances that the pursuer now claims damages, and is met by the defence that the action has not been brought within the time appointed by law.

"The complaint was instituted under the Summary Procedure Act 1864 (27 and 28 Vict. c. 53). The 35th section of this statute runs as follows:—'Every action or prosecution against any sheriff, judge, or magistrate, or against any clerk of court, procurator-fiscal, or other person, on account of anything done in any case instituted under this Act, shall be commenced within two months after the cause of action shall have arisen, unless a shorter period is fixed by the Special Act, and not afterwards.' Now, if this section applies to the present case the action must be dismissed, because it has not been brought within two months after the cause of action had arisen. That cause of action arose when the pursuer was incarcerated on the 14th of November 1883. But even taking it that it did not arise until the judgment of the Court of Justiciary was pronounced (19th July 1884), the same result must follow, for the summons was not signeted till 20th October 1884.

"Then there is the further protection conferred by section 17 of the Day Trespass Act in the following terms:— 'And for the protection of persons acting in the execution of this Act, be it enacted that all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be commenced within six calendar months after the fact committed, and not otherwise, and notice in writing of such action, and of cause thereof, shall be given to the defender one calendar month at least before the commencement of the action.' The action was not raised within six months 'after the fact committed.' It is maintained by the pursuer that these clauses are inapplicable to the present case. First, as regards the Summary Procedure Act, it is contended that it was only meant to protect official persons such as those specifically named, and that the words 'or other person' must be interpreted as being officials, like the sheriff, judge, clerk of court, and fiscal. No doubt it is a rule of construction that when you find general words following a specific enumeration they are to be held as including only persons *ejusdem generis* with the enumeration. But this rule is modified according to the subject-matter of the enactment; and in a case like the present, where the object is to impose a limitation upon actions of damages instituted on account of some flaw in putting the machinery of the law in motion, a more liberal construction must be given to the general words. Unless a construction were given to 'other person' so as to include a private prosecutor, it is not easy to see what meaning they could have. It is not to be supposed that they were intended for the protection of the policeman who carried the warrant into execution, or of the gaoler who received the prisoner in virtue of that warrant.

"Then, next, in regard to the enactment in the Day Trespass Act itself, the pursuer contends that it cannot be invoked in the defender's aid, because it is said that the prosecution was not instituted 'in pursuance of this Act,' and this because it is alleged that the defender had no title to prosecute under the Day Trespass Act. The trespass complained of took place on the farm of Dumyat, of which it is admitted the defender is the tenant, and it is also admitted that he has the lease of the game from the proprietor, Lord Balfour of Burleigh. If interest would give a title to sue, therefore, the defender undoubtedly possessed it. But it is maintained that interest alone is not sufficient, and that the Procurator-Fiscal alone has a title to sue. Now, the 1st section of the Day Trespass Act does not specify at whose instance a complaint shall be made. It simply says, 'that if any person whatsoever shall commit any trespass by entering or being in the day-time upon any land without leave of the proprietor in search or pursuit of game,' such person on being convicted incurs the penalties thereby provided. The 2nd section, however, is more distinct upon this point, for it enacts, that 'Where any person shall be trespassing upon any land in the day-time in search or pursuit of game . . . it shall be lawful for any person having the right of killing the game upon such land, or for the occupier of the land, or for any gamekeeper or servant, or either of them, or for any person authorised by either of them to require the person so trespassing forthwith to quit the land whereon he shall be so trespassing, and also to tell his christian name, surname, and place of abode,' and if the trespasser refuse to give his name, or refuse to quit the land, any one of the persons specified may apprehend him and take him before a Justice of the Peace. Now, if this section be read along with section 1, there can be no doubt as to the title of the defender to prosecute, seeing that he, and he alone, has the right to kill the game upon the land. It would be very odd to allow him to apprehend the trespasser who refuses to quit the land, and yet to deny to him the right and title to present a complaint to the magistrate against the trespasser. This plea of no title to sue was stated in the case of *Russel* v. *Colquhoun* (24th November 1845, 2 Broun's Just. Rep. 572), where the proprietor who had not let the game, but kept it in his own hands, presented a complaint

against a trespasser, and a conviction followed. In a suspension it was pleaded that the petition to the Justices was incompetent without the concourse of the procurator-fiscal, but this ground of suspension was held to be unfounded, and the bill was refused. Now, this seems to be a judgment directly in point, because there is no express authority given under the 1st section of the statute to the proprietor to lay a complaint against a trespasser, any more than to the game tenant or the procurator-fiscal himself.

"But even supposing that the case were otherwise, and that only the procurator-fiscal or the proprietor of the lands could prosecute, still the case is within the protection granted by the statute. It is difficult no doubt to draw the line between the cases where the protection cannot be granted, and those where it is granted. The latter class are not limited to proceedings which are regular, for these need no protection. They include cases of mistake either in libelling the complaint, or in the procedure, or in allowing incompetent evidence, or drawing erroneous inferences from the evidence. It is only in cases where the proceedings are entirely without warrant of law that the Court would refuse the protection, while it is extended to those cases where all that can be said is that the law has not been accurately carried out. Now, what is the case here? The whole procedure that took place was perfectly regular on the assumption that the defender had a title to sue, and if he had not, his mistake in regard to that was justifiable, seeing that it has been determined that a proprietor can prosecute, and he had all the rights in the game which the proprietor had, and might very reasonably have supposed that he had the same mode open to him of protecting the game that the proprietor had. The proceeding, therefore, was instituted in the execution of and in pursuance of the Act.

"These protecting clauses have been fully considered and commented upon in various cases under different statutes in recent years, of which the following are the more important:—*Murray* v. *Allan and Others* (29th November 1872, 11 Macph. 147); *Russell* v. *Lang* (25th June 1845, 7 D. 919); *Mackay* v. *Chalmers and Others* (5th Feb. 1859, 21 D. 443); *Dudgeon* v. *Roberton* (28th Jan. 1859, 21 D. 351); *Melvin* v. *Wilson and Others* (22nd May 1847, 9 D. 1129). In expressing the opinion which he has now done, the Lord Ordinary has endeavoured to give effect to the principles sanctioned by these decisions."

The pursuer reclaimed, and argued—That in instituting the complaint under the Day Trespass Act the complainer only libelled himself as tenant of the lands, and made no claim to being the game tenant. He must stand or fall by the title he libelled himself. As tenant of the lands he was not entitled to the benefit of the Day Trespass Act, which was reserved for landlords only. The complainer's title was *ab initio* bad, and when a title was *ab initio* bad *bona fides* could not be pleaded.

Authorities—*Russel* v. *Lang*, June 25, 1845, 7 D. 924; *Murray* v. *Allan*, Nov. 29, 1872, 11 Macph. 147; *Wellwood* v. *Husband*, Feb. 11, 1874, 1 R. 507; *M'Kenzie* v. *Maberly*, Nov. 21, 1859, 3 Irv. 459; *Smellie* v. *Lockhart*, 2 Broun Just. Cas. 194; *Lister* v. *Borron*, 9 Adol. & Ell. 654.

Replied for defender—No doubt a mistake had been made in libelling the complainer's title, and if proceedings had been commenced in due time some redress might have been obtained. Under the protecting clauses founded on, a defender was entitled to three things—(1) a month's notice in writing before any action was brought; (2) that no action should be brought after two months; (3) the right to exclude any action brought outwith the six months. All these were essentials seen awanting here. The defender was entitled to the benefit of the protecting clauses, as his only offence was a failure to libel his full title.

Authorities cited by Lord Ordinary, and *Russel*, 2 Broun 572, and *Murray* v. *Allan*, Nov. 29, 1872, 11 Macph. 147.

Section 7 of the Ground Game Act 1880 was also quoted at the debate. That section is quoted in the opinion of the Lord President.

At advising—

LORD PRESIDENT—The complainer in the prosecution in respect of which this action is brought described himself as tenant of the farm of Dumyat, in the county of Perth, under Lord Balfour of Burleigh, by which I understand that he is the tenant in occupation of the lands in the sense in which this word tenant is understood in Scotland when nothing to the contrary is expressed.

But this complainer appears also in another and a different character—that is, as game tenant in right of the shootings of the lands which he holds by an arrangement with the proprietor, whether by lease or otherwise is a matter of no importance in the present inquiry.

Now I think that it is quite clear that the combination of these two characters gives him the right to prosecute under section 1 of the Day Trespass Act of 2 and 3 Will. IV.

Under section 7 of the Ground Game Act of 1880 it is enacted that "Where a person who is not in occupation of land has the sole right of killing game thereon (with the exception of such right of killing and taking ground game as is by this Act conferred upon the occupier as incident to and inseparable from his occupation), such person shall for the purpose of any Act authorising the institution of legal proceedings by the owner of an exclusive right to game, have the same authority to institute such proceedings as if he were such exclusive owner, without prejudice nevertheless to the right of the occupier conferred by this Act." It was suggested as the true construction of this section that the persons who under it would have right to prosecute excluded the tenant in occupation of the lands to the effect of depriving him of his right to prosecute if he should at the same time happen to be the game tenant. Now, I cannot so read this section, for the result of such an interpretation would be that he who had the fullest right to the game and to the land, as being at once game and land tenant, would be the only person who would not have the right to prosecute. But the Act provides in the section I have just quoted that a person who is not in occupation of the lands, and yet has the right of killing game, is to have the same authority to institute proceedings as if he were the exclusive owner—that is to say, the right to prosecute is extended to one who, as far as killing game is concerned, comes in place of the proprietor. If, then, in addition to the right

to kill game, anyone in the position of the complainer here is at the same time tenant in occupation of the lands, such a one has the fullest rights contemplated by the statute.

Such, then, being the complainer's true position under the Ground Game Act of 1880, the objection taken to his title by the appellant really comes to this, that having a good and sufficient title the complainer did not libel that title rightly.

I do not think it necessary for the disposal of the present case to determine whether the title libelled be a good title or not, because even if the title which the complainer has libelled be bad, yet in point of fact he has a good and sufficient title, and one that brings him within the provisions of the protecting clauses of the Day Trespass Act and the Summary Procedure Act of 1864.

This complaint was brought under the Summary Procedure Act of 1864, the 35th section of which provides that prosecutions against any person on account of anything done in any case instituted under the Act shall be commenced within two months after the cause of action has arisen; and the 17th section of the Day Trespass Act declares that such prosecutions are to be commenced within six months "after the fact committed." Now, it appears that the date of the appellant's incarceration was 14th November 1883, while the summons in the present action was not signeted until 20th October 1884. It may be necessary to say that a prosecution may be so extravagant that it may not be brought under any statute at all—it may in fact be more of the nature of a bad joke than anything else—in which case, of course, no benefit would be derived from the protecting clauses I have just referred to. Nothing, however, of that kind has occurred in the present case; this was a *bona fide* prosecution under 2 and 3 Will. IV., and under the protecting clauses I have referred to the present action must be held to be excluded.

Lord Mure—This is a prosecution instituted under the Summary Procedure Act of 1864, and it comes under the provisions of sec. 35, which section declares that such actions shall be commenced within two months after the cause of action has arisen. Now, it appears that the present complaint was not instituted until more than two months had elapsed, and the Lord Ordinary has held that if this 35th section is applicable the present action falls to be dismissed. One of the objections which the defender took was that the title of the complainer was bad, and that inasmuch as he only designed himself as tenant of the lands he was not entitled to sue the action. I agree with your Lordship in thinking that this objection cannot be sustained, because it has been shown that in addition to being tenant of the land the complainer is also tenant of the game, and such being his title he was warranted in bringing these proceedings under the Summary Procedure Act. He appears not to have set forth his whole title in the complaint, as he seems only to have designed himself as tenant of the lands, but seeing that he was in point of fact tenant of the game also, I agree with your Lordship in thinking that the present action is excluded under the protecting clauses of the statute.

Lord Shand—It was conceded, and if it had not been it was made more than clear, that "the cause" of this action of damages arose more than two months before these proceedings were commenced. Now, the Summary Procedure Act of 1864 is imperative in its terms, and excludes all actions such as the present unless they be instituted within the time specified. It was the intention of this statute to make procedure uniform in character as well as expeditious. Thus the 4th section provides that proceedings under the Act are to be instituted by a complaint in the form given in Schedule A appended to the Act, and when we turn to that schedule we see that the mark by which it is to be recognised that the proceedings are being taken "under this Act" is, that at the head of the complaint there are the words "Under the Summary Procedure Act 1864." Now, on referring to the complaint in this case, I see that it bears these words, and it is therefore a complaint "under this Act," and the proceedings we are now dealing with are on account of something done in a case instituted under this Act. That being so, the provisions of sec. 35 are clearly applicable, which section declares that such action must be commenced within two months after the cause of action has arisen, and that has not been done in the present case. Upon the other matter which has been referred to, namely, the complainer's title, I think it is clear that being tenant both of the game and of the lands he had a good title to sue. The mistake he made lay in his libelling himself only as tenant of the lands, but seeing that he is also game tenant, and that his title to prosecute this complaint was good, I do not think that he should be deprived by this mistake of the benefit of the protecting clauses of the statute.

Lord Adam—I think that this action is excluded both by the Ground Game Act of 1880 and also by the Summary Procedure Act of 1864, and have nothing further to add to what has been already said by your Lordships.

The Court adhered.

Counsel for Pursuer — M'Kechnie — Nicoll. Agent—James M'Caul, S.S.C.

Counsel for Defender—Brand—Lang. Agent—John Gill, S.S.C.

Friday, June 12.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MACLACHLAN *v.* STUART.

Teinds—Res Judicata.

In a process of augmentation, &c., raised by the minister of the united parishes of Ardchattan and Muckairn in 1816, the lands of Dalness, situated in the parish, were entered at £300 in the proven rental. None of the heritors stated any objection to the rental, and the heritors were held confessed thereon. Thereafter the Lords having advised the scheme of the rental and prepared state, modified a stipend to the minister.