

graph writings, and such writings are valid whether written on erasure or not. A man may if it suits his fancy scrape off writing from a paper, and write his own deed upon the part erased. The part here written on erasure being holograph is of itself probative." And Lord Fullerton says he adopts Lord Mackenzie's opinion as to erasures in the deed. He adds—"Those erasures I do not hold to be fatal."

Now, in the present case there are only two alternatives presented. It must be borne in mind that this will is mostly a printed form. It may have had an erasure on it when the testator purchased it. That is suggested, and I think it a probable enough suggestion, for in my view it has not in any view been proved to be untrue. The other suggestion is a good deal more fanciful. There is no doubt that this is the man's signature, but then it is said that he was very vain about his writing, and afraid of his signature not being sufficiently well written, and that after he had written his signature in presence of the two testamentary witnesses he erased it and wrote it over again. I think that is a very fanciful and improbable proceeding, because a man could hardly expect his second signature written on an erasure to be so good as his first written on plain and smooth paper. I think the balance of proof is against that, and consequently that there is fair reason to believe that the erasure may have been on the paper when the signature was made.

Now, that I think is sufficient for this case, and I am therefore of opinion that the Sheriff's judgment should be recalled.

The Court pronounced this interlocutor—

"Find in fact (1) that the deceased John Duncan signed the disposition and settlement mentioned in the record on 1st January 1876 in presence of two attesting witnesses, and that the deed remained in his custody from that date until his death on 22nd September 1885; (2) That he intended the deed to be effectual: Find in law that the deed is valid and effectual: Therefore sustain the appeal: Recall the judgment of the Sheriff-Substitute appealed against," &c.

Counsel for the Appellant—Asher, Q.C.—R. V. Campbell. Agent—A. Kirk Mackie, S.S.C.

Counsel for the Respondents—Sol.-Gen. Robertson—Wallace. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 9.

FIRST DIVISION.

[Lord M'Laren, Ordinary.]

SMITH & SON v. WAITE, NASH, & COMPANY.

Salē—Turnip Seed—Error in Description—Breach of Contract—Damages.

One firm of wholesale seed merchants sold to another 100 bushels of Old Meldrum green-top yellow turnip seed, under the condition that they "give no warranty, express or

implied, as to description, quality, or productiveness, or any other matter, of the seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned." The seed was re-sold by the purchaser to various persons, and on the crops coming up it was discovered that the 100 bushels had consisted partly of Old Meldrum and partly of tankard turnip seed, in the proportion of three of the former to one of the latter. In consequence of this, claims of damages were made by the persons who had sown the seed against the merchants from whom they had bought, and they in turn brought an action of damages against the original sellers. It was proved that the tankard seed was not suitable for the district where it was sown, and that the two kinds were undistinguishable until the crop had come up.

Held that the conditions of sale above quoted were sufficient to protect the defenders from such a claim of damages.

This was an action by William Smith & Son, seed merchants, Aberdeen, against Waite, Nash, & Company, seed merchants, London, concluding for £2500 damages for breach of contract.

The case arose out of a contract for the sale of turnip seed in the following circumstances:—On 30th October 1885 the defenders wrote a letter to the pursuers containing a list of seeds (among them Old Meldrum green-top yellow turnips), and quotations of the then respective prices.

On 3rd December 1885 the pursuers wrote to the defenders stating that they wanted "100 bushels real true Old Meldrum green-top yellow turnips," and offering 16s. per bushel if assured of the quality, to which the defenders replied—"We can book you 100 bushels Old Meldrum turnips at 18s. per bushel nett."

On 17th December the pursuers again wrote in these terms—"In reply to yours of 11th inst. if the Old Meldrum green-top yellow turnips offered are of a really reliable stock we will take 100 bushels at your original offer, viz., 17s. per bushel. This referred to the quotation sent on 30th October 1885.

On 19th December the defenders acknowledged receipt of the order, adding that it would receive their earliest and best attention.

On all their letter paper, cards, and invoices the defenders had printed the following—"Terms of sale.—Messrs Waite, Nash, & Company give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms they are at once to be returned."

Following upon the letter of 19th December the defenders forwarded to the pursuers early in March of the following year 100 bushels of turnip seed invoiced as "Old Meldrum green-top yellow turnips," of which the pursuers took delivery. The pursuers then re-sold it to various merchants in Aberdeenshire and the north-eastern counties of Scotland, by whom in turn it was retailed to a large number of farmers and others in the same district.

It was proved that the seed which was delivered

by the defenders to the pursuers was accidentally composed of a mixture of Old Meldrum green-top yellow turnip seed, and of another kind called the tankard turnip, in the proportion of three of the former to one of the latter. The two kinds of seed were undistinguishable to the eye, and according to one of the witnesses even when put under a microscope. It further appeared that the Old Meldrum turnip was well suited for growth in a severe climate such as the north of Scotland, while the tankard turnip was not, as it could not stand the weather. According to the experience of several of the witnesses who were practical men, the tankard did not keep after storing.

The seed supplied by the defenders produced a mixed crop of turnips wherever it was sown, and on the nature of the crops becoming apparent, claims of damages for the loss thereby occasioned were made by those who had purchased the seed against the merchants who supplied it, and they in turn made claims of damages against the pursuers.

The pursuers compromised a number of these claims, and a considerable number were at the date of this action outstanding.

The pursuers pleaded—“(1) The defenders having contracted to supply 100 bushels real true Old Meldrum green-top yellow turnip seed of a really reliable stock, and having supplied a different seed as condescended on, and the pursuers having suffered loss and damage in consequence, the defenders are liable to the pursuers for such loss and damage. (2) The defenders having contracted to sell and deliver to the pursuers a specific article, and having failed to do so, and supplied another as the article contracted for, whereby the pursuers have suffered loss, injury, and damage, the pursuers are entitled to decree, with expenses, in terms of the conclusions of the summons.”

The defenders pleaded—“(3) In respect the defenders gave no warranty, and stipulated that they should not be responsible for the crop, the pursuers are not entitled to recover damages.”

By interlocutor of 1st November 1887 the Lord Ordinary (M'LAREN) found that the defenders had failed to perform their contract to supply Old Meldrum green-top yellow turnip seed, and that the clause of indemnity founded on in defence did not protect the defenders against liability for damages, and decerned against the defenders for £600 damages.

“*Opinion.*—This case has been so long before me that with the aid of the argument I have just heard I think I may now dispose of it. The claim is certainly one of general importance to the defenders, because it was pointed out to me that their profit only amounted to £2, 10s. on such a transaction. This summons concludes for damages to the extent of £2500 in respect of breach of contract, but the hardship is really less than it appears, because in the first place damages have not been proved, and could not in such a case be proved, to the amount concluded for; and in the next it is considered that from the precautions that are taken in the trade an occurrence of this kind must be very rare, and it may well be that in the course of a long continued and prosperous business very few claims of this magnitude will really arise. However, I am not so much concerned with the hardship as with the

question of liability, and the first element of consideration is the meaning of the clause on which the defenders found, and which is intended to protect them against responsibility for loss arising through defects of quality, insufficiency, or description. While I agree with the first part of the argument offered for the defenders, that some effect must be given to each of these words, I cannot treat the protecting clause as one applicable merely to quality and sufficiency, because it also makes reference to errors of description. It appears to me that in every case of this nature one must look to the usage of trade, the nature of the transaction, the whole circumstances of the case as brought out in the evidence, to find out what kind of differences between goods ordered and goods supplied would amount to an error of mere description and what will amount to an error in substance, such as the supply of one article in place of another. On both sides reference was made to a case decided by Lord Abinger (*Chanter v. Hopkins*, 4 M. & W. 399) as an illustrative case, and a clear case. In the noble Lord's opinion it was supposed that a seedsman and produce merchant who has contracted to supply peas, and has delivered beans, could not maintain that that was a mere error of description, and Mr M'Kechnie said that in such a case where seed of a different plant had been supplied he could not contend that even this broad clause of indemnity would apply.

“Now, just let us see whether the rule here pointed to is not sufficient for the decision of the present case. In considering whether the goods supplied were specifically different from the goods ordered it is quite evident that the test to be applied is not one that can be furnished by pure logic or by natural history. We are dealing with a mercantile transaction. It might very well be that under such a contract seed might be supplied of a kind that in the opinion of a naturalist was distinct, but which in the opinion of farmers and practical men was the exact equivalent of what was ordered, and in such a case the clause of indemnity might apply; the difference might be treated as a mere difference of description, although from the point of view of the botanist it might be a difference in kind. And conversely, there may be different kinds of seed, and different kinds of produce raised from the seeds, which, according to a natural history classification, are the same plant, but which for commercial and agricultural purposes are widely different—specifically or even generically different. In this case I have to consider upon the evidence whether the seed of the tankard turnip can be held in a fair and reasonable construction of this clause to be identical with the seed of the Scotch green-top yellow, so that the giving of the one seed for the other was nothing more than the giving of the same article under a different description; or whether these two vegetables in the agricultural sense are specifically different, being suited to growth in different climates, used at different periods of the year, and differing to some extent at least in their feeding properties.

“Now, it is useless in a matter of this kind to enter upon a review of the evidence. I have stated the principle on which I think this question is to be determined, and I now say that according to the best opinion I have been able to

form of the evidence the tankard turnip is, from the farmers' point of view, a thing specifically distinct from the Scotch green-top yellow in these particulars that I have named, and that to give the one for the other is not a mere error of description, but a failure to comply with the contract of sale. It is really worse than not delivering the seed at all, because that could be remedied by going into the market, but a seed is supplied which it is impossible by any test to distinguish from that ordered, and which when it is reared turns out to be useless or unavailable in the climate of Aberdeenshire and the neighbourhood, because it will not stand the severity of the winter. It has been proved to my satisfaction that the tankard turnips that came up from the seeds supplied by the defenders were to a large extent perfectly useless. It was a plant not very well known in the district, and was treated in the same way as other turnips with which the farmers were acquainted, and the greater part of them after the winter frosts set in entirely perished. Now, considering the large value of the crop which may be raised from 5000 lbs. of seed, it is to me rather surprising that the claims sent in should not have amounted to a larger sum, and once the question of liability is reached I should not be disposed to be critical in examining those claims.

“But first I ought to say in passing, dealing with another argument of the defenders, that I cannot look upon the claims which have been sent in to the pursuers as being anything different from damages naturally resulting from the breach of contract. Now, the sums actually paid and vouched amount to £193, 2s. The claims made upon the pursuers, but not yet settled, amount to £488, 15s. I presume, with regard to this second sum, that the reason why the claims are not settled is that in the opinion of the pursuers they are immoderate—not perhaps very extravagantly overstated, but still more than the pursuers think, in justice to themselves, and in justice to Messrs Waite, Nash, & Company, they ought to pay. I think it is inevitable that this should be the case, and that the pursuers were not bound to wait before bringing their action until every claim against them had been settled. It does not clearly appear what is the acreage or the proportion of seed represented by £193, and what is represented by the £488. But in dealing with this claim approximately, as one must do, I think I ought to take off 20 per cent. from the £488 of unsettled claims, which would reduce the sum by about £90, and allowing £400 for unsettled claims, and adding £193 of settled claims, we have a total sum of £593. There are some other claims for expenses, time, and trouble which in a strict view of liability might be allowed. I think, in the strict view of liability, law expenses and valuers' fees might be allowed. I am not so clear about loss of time and personal expenses, because I think the time expended by a man of business in settling claims ought to go to profit and loss. But then as to the claim of £1000 for damage to trade and reputation, I shall only say that that claim was not established to my satisfaction. I do not say that such a claim in other circumstances might not have been successfully maintained, but in this case all that was shown was that the profits of the pursuers' business, which had been steadily increasing, had shown, if not a decline, at all events a stationary

aspect during the last twelve months. Considering that there are other causes in operation that have affected the profits of all classes of the mercantile community, and considering further that this was a mistake incident to such a business as the pursuers carry on, that it was not their mistake, and that the circumstances were all explained to the buyers, it seems to me very unlikely that any sensible effect could be produced upon the business or commercial reputation of the pursuers such as I ought to take into account in estimating damages. I think in cases of this kind, where there is no fault, but simply such a mistake as all men, being fallible, are liable to, and where the loss is very large in proportion to the amount of the original contract, that it has always been the practice in fairness to the defending party to estimate damages on the lowest scale possible, and even to allow some share of the loss to fall upon the person whose contract has been broken. In all the circumstances I think justice will be done to the pursuers for the damage which they have sustained, and may yet sustain, if I award as the consequence of this breach of contract the sum of £600 of damages. I shall accordingly give decree for that sum with expenses.”

The defenders reclaimed, and argued—As the pursuers were well aware of the conditions under which the seed was sold, the “terms of sale” were part of the contract. The very circumstances had occurred which the framers of this clause had contemplated, and which it was their object to protect themselves against. It was not suggested that the defenders were acting fraudulently, as the mixing of the seeds was a pure accident. The words “Old Meldrum green-top yellow” were descriptive, and the sending by accident of another kind of turnip seed was just an error in “description.” If another kind of seed—not turnip—had been sent, the protecting clause would not have availed, as it would not then have been an error in “description.” On the word “description” in terms of sale see *Nicholls v. Godts*, June 6, 1854, 23 L.J., Ex. 314; *Taylor v. Bullen*, 5 Welsby, Hurlstone, & Gordon's Excheq. Rep. 799; *Chanter v. Hopkins*, 4 Mees. & Wel. 399; *Carter v. Campbell*, June 12, 1886, 12 R. 1075. This was simply a sale of turnip seed, all else was description and not classification. The defenders were protected by the provisions of their “terms of sale,” and were not liable in damages from failure of the crop raised from the seed in question. See also *Allan v. Lake*, 18 Adol. & Ellis. 560; *Steel & Craig v. State Line Steamship Company*, July 20, 1877, 4 R. (H.L.) 103.

Replied for the respondents—This was not an action on the clause of warranty, but for breach of contract. The words “Old Meldrum green-top yellow” designed a class of turnip seed, and were not merely descriptive. The seed supplied was not what was contracted for; it was a mixture of different seeds, a large part of which were quite unsuited to the district in which they were to be grown. If there was any ambiguity in the language of the protecting clause, such ambiguity fell to be interpreted against the party founding on it. Such a clause as that pleaded here was of no avail in an action for breach of contract, and could not protect the defenders. The defenders were grossly careless in allowing seeds so closely resembling one

another to get mixed, and were liable accordingly. Authorities—*Shepherd v. Kain*, 5 Barnewall & Alderson, 240; *Josling v. Kingsford*, 32 L.J., C.P. 94; *Dickson v. Kincaid*, Dec. 15, 1808, F.C., 1 Bell's Ill. 7; *Jaffe v. Ritchie*, Dec. 21, 1860, 23 D. 242; *Ovington v. M'Vicar*, May 12, 1864, 2 Macph. 1066; *Cott v. Caledonian Railway Company*, August 3, 1860, 3 Macq. 833

At advising—

LORD ADAM—The pursuers are wholesale seed merchants in Aberdeen, and the defenders are wholesale seed merchants in London. In December 1885 the latter contracted to supply the former with 100 bushels of turnip seed. The contract between the parties is to be found in the pursuers' letter of 17th December 1885, and the defenders' answer thereto of the 19th. There had been previous communication between the parties, and replying to a letter of the 11th December the pursuers say—"If the Old Meldrum green-top yellow turnips offered are of a really reliable stock we will take 100 bushels at your original offer, 17s. per bushel." To which the defenders replied—"We are in receipt of your order, for which we are obliged. The same shall have our earliest and best attention." There were, however, prefixed to the defenders' acceptance certain conditions in these words—"Terms of sale.—Messrs Waite, Nash, & Co. give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms they are at once to be returned." It is proved that the pursuers knew of these conditions, and if the defenders can get customers to deal with them on such conditions, which I should scarcely have expected, I see nothing illegal in them. I think therefore that these conditions were terms of the contract of the sale and purchase of the turnip seed in question. The contract accordingly was for 100 bushels of Old Meldrum green-top yellow turnips (meaning thereby turnip seeds) on the conditions above expressed.

On 11th March 1886 the defenders, professedly in implement of their contract, sent to the pursuers 100 bushels of turnip seed. The seed was accompanied by an invoice, which also set forth the above mentioned conditions. It has turned out, however, that the turnip seed so sent was not pure Old Meldrum turnip seed, but a mixture of that seed and of the seed of another kind of turnip called the tankard turnip, in the proportion of about three of the former to one of the latter. If the mixture of the two kinds of seeds could have been detected by sight or otherwise the seed would no doubt have been returned at once as not being conform to contract, in respect that it was not the description of seed ordered. But unfortunately the two seeds could not be distinguished. The seed so sent was accordingly accepted by the pursuers, and sold by them in their turn as being Old Meldrum turnip seed. It was not until the crop had been grown that it became apparent that the seed had been mixed, and hence the loss and damage suffered. That a great deal of loss has been suffered is certain—the question is whether this loss is to fall on the pursuers or the defenders. It is a hard case either way, as it appears to me that neither party is to

blame for the unfortunate occurrence, the fault being that of the original grower.

It appears to me that the turnip seed in question was ordered by description, the description being Old Meldrum green-top yellow turnips, and the objection to the turnip seed sent is, that so far as it was mixed with tankard turnip seed it was not of the description ordered. But the seed was sent to the pursuers, and accepted by them on the condition that the defenders did not warrant it to be of the description ordered—that is, did not warrant it to be Old Meldrum green-top yellow turnip. I think accordingly that the case which has occurred is just the case which the defenders' "terms of sale" were intended to meet, and against which they desired to protect themselves, and I think they have done so successfully.

I cannot follow the reasoning of the Lord Ordinary by which he arrives at an opposite result. It seems to me that if two turnips are identical they must be the same description of turnip, by whatever name they are called; and a clause like the one in question could not be required for such a case. While to say that one turnip is specifically distinct from another appears to me to be just saying in a different form of words that they were not the same description of turnip, which is just the case provided for by the "terms of sale."

Being of opinion, therefore, that the defenders are not liable, it is unnecessary to consider the question of damages dealt with by the Lord Ordinary. On the whole matter I think the interlocutor reclaimed against should be recalled.

LORD KINNEAR—I am of the same opinion. I think the whole argument for the pursuers may be summed up in a sentence. The defenders did not perform their contract, because they delivered turnip seed of a different description from that for which the pursuers had bargained. But for the conditions of sale to which Lord Adam has referred, and which were designed to meet a case like the present, the defenders would, I think, have undoubtedly been liable. By these, however, they refused to warrant the crop or any errors in the description, and I think they have protected themselves effectually by the terms of sale against an action like the present.

LORD PRESIDENT—I am also of the same opinion. If it had not been for the conditions expressed in what are called the "terms of sale" the case would have been very clear in favour of the pursuers, because to a certain extent the defenders delivered a different article from that which they sold. I agree, however, with your Lordships in thinking that effect must be given to this clause, which was undoubtedly framed to protect the defenders from just such a claim as is now made against them.

LORD MURE and **LORD SHAND** were absent from illness.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuers—Sir C. Pearson—C. N. Johnston. Agents—Scott Moncreiff & Trail, W.S.

Counsel for the Defenders—M'Kechnie—Salvesen. Agent—W. G. Roy, S.S.C.