of the Commissioners and allowed the abatement claimed.

Counsel for the Surveyor of Taxes—Dean of Faculty (Sir Charles Pearson, Q.C.)—A. J. Young. Agent—The Solicitor to the Board of Inland Revenue.

Counsel for Mr Sutherland—Jameson—Guthrie. Agents—Cowan & Dalmahoy, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Sheriff of Berwickshire.

WILSON *v.* CARMICHAEL & SONS.

Sale—Disconformity to Contract—Loss of Profit—Consequential Damages—Duty of Timeous Inspection by Purchaser.

In June 1891 a nursery gardener purchased from a firm of agricultural seedsmen 30 lbs. of what purported to be "Enfield Market Cabbage Seed," being so described on the invoice sent by the sellers and on the parcel of seed itself. This kind of seed ought to produce an early variety of cabbage. The seed was sown in July 1891 by the purchaser in his own garden, and the plants which came up were for the most part retailed by him to various customers during the months of March, April, and May 1892. After disposing of most of the plants he discovered that the seed in question had not been "Enfield Market Cabbage," but that of a late common cabbage. The evidence led showed that it should have been possible to see the disconformity of the seed to contract as early as September or October of the previous year. The purchaser claimed damages from the sellers, on the grounds (1) that claims for damages had been made against him by the purchasers of the plants; (2) that he had lost business owing to the disappointment of his customers; (3) that he had lost the profit which he would have made by retailing early cabbages; and (4) that even before September 1891 he had, through having sown the wrong kind of seed, lost the profitable occupation of his ground.

Held that as the purchaser ought to have discovered the mistake in the autumn of 1891, and the first three grounds of damage depended primarily and directly on this failure of duty on his part, he was not entitled to damages on these heads, but that on the fourth head he was entitled to damages, his loss being due directly to the breach of contract on the part of the sellers.

This was an action by John Wilson, gardener, Crailing Orchard, near Jedburgh, against Messrs R. Carmichael & Sons, agricultural seedsmen, Coldstream, concluding for £200 for breach of contract.

On the 4th of June 1891 the defenders, in compliance with an order given the previous month, forwarded to the pursuer a parcel of cabbage seed marked "Enfield Market Cabbage." This seed had been procured by the defenders, in order to complete the order, from an Edinburgh firm of seedsmen. The seeds were planted by the pursuer in his own garden in the month of July without any suspicion that they were not the kind which he had ordered. During September and the autumn months the pursuer, owing to illness, did not go near his fields, which were looked after by his son, who had not so great a knowledge of gardening as the pursuer. A certain number of the plants were retailed to farmers as early cabbages in September 1891. In April and May 1892 large quantities were sold to various customers by the pursuer, still under the notion that they were the early variety of cabbage, and in all some 200,000 plants were sold. About the middle of May a number of plants were transplanted to part of the pursuer's garden for the purpose of selling them as grown cabbages. He became suspicious at this time as to the nature of the plants, and on discovering that they were really a late common variety, ceased to sell them as "earlies," and ploughed down the remainder of the crop—from 70,000 to 100,000 plants.

Complaints as to the character of the cabbages supplied to them were made to the pursuer by many of his customers, and various claims for damages were lodged with him.

In December 1892 he raised an action in the Sheriff Court of Berwickshire against the defenders for breach of contract in having supplied the wrong seed, and averred that owing to his having through the fault of the defenders sold late in the place of early cabbages, he had suffered much loss to his business, that claims for damages had been made against him, that he had lost the profits upon the plants which he could not sell, and that he had lost the profitable occupation of his ground for the season.

He pleaded, *inter alia*—"(2) The defenders having delivered a late variety of cabbage seeds in the place of the variety contracted for, they have caused loss and damage to the pursuer as condescended on, and he is entitled to the amount of damages sued for, with expenses."

The defenders averred that they had carried out the order in good faith, having specially procured the seed from another firm of seedsmen. They maintained that any practical gardener should have found out the mistake when the plants were quite small.

They pleaded, *inter alia*—"(2) The pursuer having known that the plants sold by him were of a late variety of cabbage, is barred from claiming damages. (3) The amount claimed is excessive."

Proof was led at considerable length on both sides. For the pursuer it was principally directed to establishing the amount of damage suffered by him owing to the mistake. The defenders succeeded in proving that any skilled gardener should

have detected the mistake in September 1891. The pursuer showed that his failure to do so was caused by his illness, and the comparative inexperience of his son, who was in charge of the garden during that time.

The Sheriff-Substitute on 31st March 1893 pronounced the following interlocutor—"Finds that in May 1891 the pursuer ordered from the defenders 30 lbs. Enfield Market Early, and 30 lbs. Glendwarf Drumhead late cabbage seed; that the seed was delivered in the following month, and was sowed by the pursuer in July, and came up in due course, when it all turned out to be late cabbage, with a slight admixture, about 5 per cent. of early plants in one of the lots: Finds that the pursuer, during the spring of 1892, sold a large number of late plants in the belief that they were early plants such as he had ordered: Finds that the pursuer might easily have satisfied himself, long before he began to sell the young plants, that he had not got what he ordered: Therefore finds in law that there was no timeous rejection by the pursuer, and that he is not entitled now to plead breach of contract on the part of the defenders: Sustains the defences and assoilzies the defenders from the whole conclusions of the action: Finds them entitled to expenses," &c.

The pursuer appealed to the Sheriff, who on 13th July 1893 and 27th October 1893 respectively pronounced the following interlocutors—"Adheres to the first three findings in fact in the interlocutor appealed against: *Quoad ultra* recals said interlocutor: Finds further in fact that the pursuer has suffered damage on account of the defenders' failure to supply him with Enfield Market cabbage seed as ordered by him, but that there is not material in the process for determining the amount of damage sustained: Finds in law that the defenders having committed a breach of contract, are liable in damages to the pursuer: Therefore repels the first and second pleas for the defenders, sustains the first plea for the pursuer, and, before further judgment, allows to the pursuer an additional proof as to the amount of damage sustained by him, and to the defenders a conjunct probation: Appoints the proof to be taken before himself within the Sheriff Court-House, Duns, on a day to be afterwards fixed, and in the meantime reserves the question of expenses.

"*Note.*—Although the defenders deny on record that the seed furnished by them to the pursuer produced late cabbage plants, and have led much evidence to try to prove that they furnished the seed that was ordered, Mr R. Carmichael says that he has no reason to believe that the seed sent by his firm was not that which was sown by the pursuer. It must be held as clearly proved that by mistake late cabbage seed was sent instead of a particular kind of early. It is not necessary to inquire whether the mistake was made by the defenders or by the wholesale merchants from whom they say the seed was bought. It is the defenders who are liable for any damage which the pursuer has sustained, and the question whether Peter Lawson & Son are liable in their turn to them does not arise in this case.

"The Sheriff-Substitute thinks that the case is ruled by the decision in *Carter & Company* v. *Campbell*, June 12, 1885, 12 R. 1073, but I do not think that either that case or any of the others which were quoted is at all in point. The rubric is—'When a buyer orders goods of a specified kind or quality it is his duty to examine them on delivery, to see that they are conform to contract, and in the event of their proving not to be so, to return them immediately to the seller, and if he does not do so (unless the defect is latent, and only discoverable after use) he is barred from refusing to pay the contract price.' In the present case the pursuer could not tell by examination on delivery whether the seed was conform to order or not, and when he found that it was not, it was no longer possible to return the article. The Sheriff-Substitute has found that the pursuer ought to have seen before he began selling the plants that they were late ones, and to have given the defenders the opportunity of supplying him with plants of the right kind. This is not one of the defenders' pleas, and they have not averred that if they had been given this opportunity they could and would have given the pursuer plants of the right kind. I presume *Carter's* case is held to apply in respect that the defect though latent was discoverable before use. But it was not discoverable before use of the seed, and it is not clear that the doctrine applies also to the use of the plants which the seed produced. But granted that it does, I am not satisfied that in the circumstances any blame was attachable to the actings of the pursuer. The point involves two questions—First, could the pursuer have told before he sold the plants that they were late ones; and if so, was he bound to keep examining the plants from time to time while they were growing? There is a conflict of evidence, but I think, on the whole, it may be held that at some stage before the sale of the plants, a minute examination might have enabled a skilled person to tell that the plants were not of the early cabbage, but of late. But the difficulty I have felt in agreeing with the view of the Sheriff-Substitute is this, that I cannot see that in the autumn of the year in which the seed was sown the pursuer had any occasion in the course of his business, or any duty, to go and examine the plants. He sowed the seed in full confidence, from past experience of dealing with the defenders, that he had got the seed which he ordered. He says that as he was suffering from sciatica he did not go into the field where the cabbage plants were, but even if he had not that excuse I cannot see that he was bound to go and inspect them closely when it was quite evident from a distance that the seed had done well, and that there was a satisfactory braird; while I think it possible that the mistake might have been discovered in the autumn, I am

not satisfied that it could have been in the late winter, or any sooner in the spring than it was discovered. It is proved that the winter was a bad one for plants of this sort, and the witness William Neil explains the effect of that—'After a severe winter the plants get smaller than before winter, and the leaves come off them. The stem of the plant gets brown as well, but though there had been leaves large enough on them, and so much frozen, nobody could tell which sort they were.' This witness, who bought plants from the pursuer, could not tell when they came that they were not early ones, neither could William Scott nor David Aitken, who grows both kinds for prize purposes.

"It is quite evident that the pursuer did not at first discover the mistake when he began to pull the plants for selling. The defenders recklessly aver on record, at least in one of their pleas, that the pursuer knew when he sold the plants that they were late ones. There seems to me no foundation for this insinuation. It would have been against his interest to do so, and besides whenever his suspicions were aroused he called the defenders' attention to the matter, and declined at first to send them any of the plants. Mr Syme, one of the defenders' witnesses, admits that 'after a severe winter it is a difficult thing to know plants at a certain stage.' Anyone acquainted with gardening knows that in plants of the brassica species the lower leaves are the first to wither or fall off under the influence of frost or other severe weather, and these are always the leaves that are most fully developed.

"I am therefore of opinion that the defenders have not shown any ground for their not being held liable for breach of contract. But there is not sufficient evidence to show how far the pursuer has suffered by the breach, at least as regards the effect of his dealing with his customers. At the date of the proof a few claims had been intimated to him, but he had not settled any of them, and it did not then appear what other claims might be made. It is probable that by this time matters have come more to a head, and the pursuer will be able to say if he lost any customers this spring on account of the mistake of last year. I have therefore allowed him additional proof, but I recommend that the parties should agree upon a sum to be paid in name of damages.

"Even if I had not differed from the Sheriff-Substitute upon the question of law, I should have had to modify the decree for expenses, because a large portion of the proof was taken up by an endeavour to establish points in regard to which, in any view, the defenders have been unsuccessful."

"27*th October* 1893.—The Sheriff having considered the additional proof led for the pursuer, and the whole process, Sustains the third plea-in-law for the defenders: Assesses the damages at £80, for which sum decerns against the defenders: Finds the pursuer entitled to expenses under deduction of one-fourth of the total amount, &c.

"*Note.*—The pursuer has in my opinion proved that he has sustained considerable loss through the mistake for which the defenders have been found liable, and this not only by loss of profit on the plants which he could not sell, and on those which he sold and could not get paid for, but also by loss of custom. It is difficult to arrive at the exact amount of his loss. Only an estimate can be given, and it is possible that the sum awarded is too small. I am convinced that it is not too much. I have modified the expenses partly because the sum decerned for is much less than that sued for, and partly because the pursuer did not at first sufficiently prove the damage sustained."

The defenders appealed to the First Division of the Court of Session, and argued — The pursuer should have discovered the mistake at an early date, when the plants were quite young, and should have sold them as late plants, and called upon the defenders to supply him with early ones. He had neglected his duty as a practical gardener to make an early inspection of the plant, and had gone on incurring damages for which he now asked to be reimbursed. These were too remote for the sellers to be liable for them, being caused by the pursuer's negligence; nor were the defenders liable for damages incurred by sub-vendees. The law of Scotland was the same as that of England on this point. The pursuer should have tried to minimise the damage. Even after discovering they were late plants, he should have dealt with them as such, and merely sued the defenders for the difference in value. He had no right to plough them down, making thus a total loss of them. The principle for assessing damages in such cases was that they should be such as could be necessarily foreseen. This was laid down in the cases of *Grébert Borgny* v. *J. & W. Nugent*, April 28, 1885, L.R. 15 Q.B.D. 85; *Thol* v. *Henderson*, December 3, 1881, L.R. 8 Q.B.D. 457; *Duff & Company* v. *Iron and Steel Fencing Company*, December 1, 1891, 19 R. 199.

Argued for respondent — The *onus* of showing that his negligence led to increased damages lay upon the defenders. It was not his duty to make a minute examination in September — *Randall* v. *Roper*, April 21, 1858, 27 L.J. Q.B. 266; Ellis and Blackburn's Reps. (1858 vol.) p. 84; *Smith & Son* v. *Waite, Nash, & Company*, March 9, 1888, 15 R. 533. He was entitled to damages for the decline of his business in the following year. The only question was, "Had he taken all reasonable means to mitigate the damage?" and he had done so. It was for the defenders to show that when they sold they were unable to discover they were selling something different from what they delivered. They had failed to show this.

At advising—

LORD PRESIDENT—The argument in this appeal proceeded on the footing that the seed supplied was disconform to contract, the difference being that it was seed of late

cabbages, whereas the contract was the seed of early cabbages. The difficulty in the way of the pursuer's case arises from the facts relating to a later stage of events. The defence that the goods were not timeously rejected is plainly inappropriate. The question is therefore really as to the amount of damage; but although the tendency of the Court is to support a Sheriff's award of damages, we cannot evade the decision of such definite questions as the defender has raised under this appeal, although the amount involved is not large.

The seed was sown in July 1891 in the pursuer's own market garden, and the plants came up. The evidence of the pursuer himself seems to show quite clearly (indeed he says so in so many words) that by the month of September any skilled gardener can tell the difference between early and late cabbage plants. Unfortunately the difference was not noticed, the reason apparently being that the pursuer's son had not had much experience at that time, and the pursuer personally was not about. But not the less is it the case that in the ordinary course of events the difference would have been noticed. Well, then, from September onwards sales were made of the plants as early cabbage plants, and the two first heads of damage arise (1) from claims of damages by the purchasers of those plants, and (2) loss of business arising from the disappointment of customers leading them to give up dealing with the pursuer. I have come to the opinion that the pursuer cannot recover on those grounds. The proximate cause of the mistake of the customers getting late instead of early plants was the omission of the pursuer or his son to notice that the plants which he sold to his customers were late cabbages, and this was not a natural consequence of the defenders' breach of contract.

The next head of damage relates to certain of the plants which were transplanted about the middle of May, and dealt with by the pursuer as early cabbages for retail sale. But unfortunately here the same answer applies. It was only after the transplanting that the discovery was made, which in ordinary course should have been made the September before, and if the discovery had been made the transplanting would never have taken place.

The disallowance of the three heads of damage which I have now gone over would strike £60 off the sum which the Sheriff has awarded. The remaining £20 was mainly supported in argument by a theory about "ploughing down" in May, which comes perilously near the objection which wrecks the other claims. I think, however, that an award of damages to the amount of £20 may be justified upon somewhat broader grounds. It was directly due to the breach of contract that the pursuer's nursery ground was to a considerable extent and for a considerable time occupied with seed which, on the evidence, was not remunerative. Even if the pursuer had made the discovery in September, the general facts of the case warrant the inference that he had already to a certain extent irretrievably lost the profitable occupation of his ground and a certain amount of labour. It is to be regretted that the pursuer has not in evidence made this aspect of his case clearer—his attention having been too much given to claims which are unsound in law. But the evidence seems to me adequately to support an award of £20.

I am for recalling the last interlocutor of the Sheriff, finding in fact that the seeds supplied were disconform to contract and that the pursuer has suffered damage to the amount of £20. On these two findings in fact, and the appropriate and obvious finding in law, I would give the pursuer decree for £20.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court found that the seeds supplied were disconform to contract, and that the pursuer had suffered damage to the amount of £20.

Counsel for the Appellants—Dickson—Cook. Agents—Pringle, Dallas, & Company, W.S.

Counsel for the Respondent—MacWatt—Watt. Agents—Winchester & Nicolson, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MACRAE *v.* LORD ADVOCATE.

Revenue — Legacy Duty — Legacy Compounded for Less than the Amount thereof.

The Act 36 Geo. III. cap. 52, sec. 23, provides that where any legacy shall be released for consideration or compounded for less than the amount or value thereof, the duty shall be paid in respect of such legacy according to the amount taken in satisfaction thereof, and by section 37 provides that if a will has been avoided, any excess of legacy-duty paid before avoidance shall be returned to the person who has paid the same.

After a multiplepoinding had been brought, and claims lodged to determine the right to money left to strangers in blood, but claimed by the next-of-kin as being an invalid bequest, an arrangement was entered into, to which the Court interponed authority, by which each set of claimants took one-half.

Held that under the 23rd section of the above Act the strangers in blood having released the legacy for consideration and compounded for one-