grown in East Lothian, out of a stock of well-known goodness. The representation was true. The seed was grown in East Lothian, and was from the stock of a farmer near Dunbar, of well-established good character.

I am further of opinion that the case does not fall within the provision of the Mercantile Law Amendment Act, applicable to "goods expressly sold for a specified and particular purpose." I conceive the contract not to be in its terms what the Mercantile Law Amendment Act points at in these words. It is true that seed may fairly be said to have been sold for the purpose of sowing, though it is obvious to remark that the seed in this case was not sold to a farmer for the purpose of putting into the ground, but to a seedsman for the purpose of commercial traffic. But it happens in a great many cases that the purpose for which goods are sold can be no other than one purpose only, and yet this does not operate the case contemplated by the statute. The statute does not contemplate a case of mere implication. It requires express contract to be engaged in. The purpose for which the goods are sold is not only to be a particular, but a "specified" purpose, that is to say, is to be expressly set forth in the contract. It is only then that this provision in the statute takes effect. There is nothing of this kind in the contract in question. Besides, it cannot, I think, be said that the seed was unfit for the purpose for which by implication it was sold. The seed was perfectly fit for sowing. It produced East Lothian purple tops, and nothing else. The objection is, that it did not produce an adequate amount of growth—in other words, that the germinating power was defective. The result was simply that a greater quantity of seed required to be sown to produce the expected quantity of turnips. This implies a defect in quality or sufficiency, not an unfitness for the contemplated purpose, in the sense of the statute. The case therefore falls under the clause of the statute referring to quality or sufficiency, not to the clause referring to an unfitness to fulfil "a specified and particular purpose."

It is not suggested in the present case that the seller was guilty of any fraud. There was perfect *bona fides* both in seller and purchaser. The article did not turn out a totally different article in kind from what purported to be sold; which is what happened in some of the reported cases, and which might have produced a different result. The whole of what has occurred in the case is that, from some mysterious cause, the seed turned out inferior in quality from what both seller and purchaser believed at the time of the contract. There is good reason for believing that this is not unfrequently the case in regard to seed. The fact, at any rate, raises the pure question of law, whether the seller or purchaser, each equally in good faith, is to suffer for the unexpected inferiority. I think the Mercantile Law Amendment Act solves this question. It is a case in which, in the express terms of the Act, the seller "was without knowledge that the goods were defective or of bad quality." The express provision of the Act applies, that the seller "shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser."

The practical deduction is, that if in such a contract the purchaser desires to free himself from having the risk of quality thrown on him, he must insert in the contract words of special warranty, such as do not occur in the present case. Another practical inference, applicable perhaps both to Sheriffs and seedsmen, is, that they should carefully study the Mercantile Law Amendment Act.

I would only add, before concluding, that there are other grounds on which a strong argument could be raised against the plea of non-liability set up by the purchasers. I doubt whether the proof adduced of a want of germinating power is sufficient—that is to say, I doubt whether the testing process, which has certainly produced very anomalous and inconsistent results, is such as could warrant a conclusion against the growing power of the seed, if put in the usual way into the ground. Again, I doubt if the purchasers were not *in mora* in stating their objections to quality, for if this germinating test was to be held a sufficient criterion of the right of rejection, it plainly could have been applied, and the result notified, at a much earlier period. It is clear from the proof that such seed as that in question is liable to have its quality deteriorated by various influences, within a very short space of time. But whilst noticing these points as points which would have in any view demanded consideration, I rest my judgment on the ground that, under the statute, the purchaser does not possess the right of recourse against the seller to which effect has been given by the Sheriff.

I am of opinion that the judgment should be recalled, the defences repelled, and decree pronounced in favour of the pursuer.

Agent for Pursuer—A. Kelly Morrison, S.S.C.

Agents for Defenders—J. W. & J. Mackenzie, W.S.

Wednesday, May 25.

HARDIE *v.* SMITH & SIMONS.

Contract—Warrandice—First Class Stock—Mercantile Law Amendment Act—Turnip Seed. Held as above, though before acceptance of the seller's offer the buyer asked the seller whether he knew "this seed to be of really first class stock and good growth; perhaps you may be able to state the per centage of germination?" and that he in reply wrote "the seed is first class stock, the same stock having been grown regularly by father and son for the last thirty years; it is good growth; having been tried in earth about one month since, it grew 90 per cent; 150 bushels of the same seed were sold two months ago, and had no faults; it has been well cleaned since, and will likely grow the same; in short, you may have all confidence in the seed." These words the Court held did not amount to a warranty.

The circumstances in this case were nearly the same as those in the preceding one. They differed however in these respects: On 22d May 1867 the defenders wrote the pursuer a letter in which they said—"Please say whether you know this seed to be of really first class stock and good growth. Perhaps you may be able to state the percentage of germination. Waiting favour of reply in course." The pursuer wrote in reply—"*May* 23, 1867.—Gentlemen, In answer to yours, the seed is first-class stock, the same stock having been grown regularly by father and son for the last thirty years. It is good growth; having been

tried in earth about one month since, it grew 90 per cent. 150 bushels of the same seed was sold about two months ago and had no fault; it has been cleaned since, and will likely grow the same. In short, you may have all confidence in the seed." On 28th June the defenders wrote expressing their dissatisfaction; and eventually in the course of the month rejected the seed.

The Sheriff-Substitute (GALBRAITH) assoilzied the defenders; and the Sheriff (GLASSFORD BELL) adhered in the following interlocutor:—

"*Glasgow, December 10th* 1869.—Having heard parties' procurators on the pursuer's appeal, and thereafter made avizandum with the proof, productions, and whole process: Finds that, in reply to the pursuer's letter of 21st May 1867, offering to sell 50 bushels of East Lothian Purple Top Swede Turnip Seed, the defenders sent the pursuer, on 22d May, the letter No. 53, in which, before accepting the offer, they wrote, 'Please say whether you know this seed to be of really first-class stock and good growth; perhaps you may be able to state the per centage of germination': Finds that, in answer, the pursuer sent the defenders, on 23d May, the letter No. 54, in which he writes, "In answer to yours, the seed is first-class stock, the same stock having been grown regularly by father and son for the last thirty years; it is good growth, having been tried in earth about one month since, it grew 90 per cent. 150 bushels of the same seed were sold two months ago, and had no faults; it has been well cleaned since, and will likely grow the same; in short, you may have all confidence in the seed:" Finds that, although this may not be a warranty that the seed would grow 90 per cent., but only a representation that such growth was probable, it *is* substantially a warranty that the seed was of good growth, and it was under said warranty that the purchase was made: Finds it proved, that when the seed was tested it was found not to be of good growth, seeing that no such seed is, according to the established understanding of the trade, of good growth if it does not possess a germinating power of at least 85 per cent., whilst the seed in question shewed an average germinating power of only 63 per cent.: Finds that the defenders ascertained the quality of the seed by the proper and usual method of testing, within a month of its delivery, and as soon as they found that it was not a merchantable article, or, at all events, not the article intended to be bought, and not according to warranty, they intimated to the pursuer their rejection of it: Finds that there was no undue delay on the defenders' part in making this intimation, and the pursuer was bound to have taken back the seed: Therefore sustains the defences, adheres to the interlocutor appealed against, dismisses the appeal, and decerns.

"*Note.*—There are four points in this case which support the defence: First, that it was expressly stated by the pursuer, and that in such a manner as to amount to a warranty, that the seed was of "good growth," which means of full germinating power; second, that the deficiency in the seed was latent, and could not be discovered by merely looking at it; third, that on being tried, it was found not to be of good growth, or reasonably fit for the use for which it was sold; and fourth, that the trial was made, and the rescinding of the purchase was intimated without any unreasonable delay. When all these elements combine, goods to which they are applicable cannot be forced upon the buyer.—See Parson on Contracts, vol. i, p. 592; Story on the Law of Personal Property, p. 456; and Benjamin on Sale, p. 488. See also *Dickson* v. *Kincaid*, Dec. 15, 1808, F.C. It may be right to add that, although the interlocutor sheets instruct that a judicial warrant was granted, *pendente lite*, to sell the seed, it appears from the statement of parties that no sale has taken place, and the pursuer is consequently entitled to have the seed returned to him."

The pursuer appealed.

BLACK and CAMPBELL for him.

SHAND and BALFOUR in answer.

The Court unanimously reversed the Sheriff's interlocutor upon the same grounds as in the preceeding case.

The statement by the pursuer of the germinating power of the seed was in answer to a question, and it was only a statement of what it had yielded to his experiments. No others of those who had received the seed had complained, though there had been a great many purchasers. There had been in this case less delay in complaining of the seed. The same judgment, however, ought to be pronounced. The Court commented upon the peculiar fact that the Mercantile Law Amendment Act did not seem to have been pleaded in the Sheriff-Court, and that decision had been given irrespective of it.

LORD KINLOCH—I am of opinion that the same judgment should be pronounced in this case as in that we have just considered. At first sight it appears as if something more was warranted than in the other case, the seed not only being stated of "first class stock," but of "good growth." But on looking into the correspondence, it appears that the statement was given in answer to a question in these words—"Please say whether you know the seed to be of really first class stock, and good growth. Perhaps you may be able to state the percentage of germination." The answer is—"The seed is first class stock, the same stock having been grown regularly by father and son for the last thirty years. It is good growth, having been tried in earth about one month since; it grew 90 per cent." He afterwards adds, "it has been cleaned since, and will likely grow the same." This statement is not proved to be untrue, on the contrary its truth is established by the evidence. I am of opinion, that there is not here any special warranty that the growth would be 90 per cent., or of any particular sort. I think the seller fairly stated all he knew of the matter in reply to the inquiry of the purchasers, and the purchasers had brought before them the seller's whole ground of knowledge. I cannot assume that here, any more than in the other case, there was any special warranty of quality or sufficiency, and the same conclusion must, I think, be come to in both cases.

Agent for Pursuer—A. Kelly Morrison, S.S.C.

Agent for Defenders—J. W. & J. Mackenzie, W.S.

Wednesday, May 25.

ABBOTT *v.* MITCHELL.

(*Ante*, vol. vii, p. 160.)

Lease—Bankrupt—Delegation—Power to grant Leases.

A granted an *ex facie* absolute disposition of certain subjects to B & Co.; but by back-bond it