Sheriff to receive complainer's defences, allow proof, and proceed in the cause.

The complainer was tenant of the farm of Bogangreen and Muirside in Berwickshire under a nineteen years' lease from the deceased Thomas Weir, dated 3d December 1863 and 14th April 1864. The complainer's estates were sequestrated under the Bankrupt Acts on 14th April 1869, but he was thereafter discharged under the sequestration and reinvested in his estates on 3d December of the same year. On 12th January 1870 the complainer was served with a summons raised before the Sheriff of Haddington and Berwick, at the instance of the respondents, founding on the 5th section of the A.S. of 14th December 1756, and setting forth that the complainer had deserted his possession of the farm leased to him, and had left it unlaboured at the usual time of labouring. It then concluded that the complainer be ordained to find caution for the yearly rent of the said farm for the five crops from Whitsunday 1869 to Whitsunday 1874 inclusive; and, failing his finding caution, that he be decerned and ordained to flit and remove, &c. The complainer entered appearance to defend the action, and at the calling of the summons his procurator stated certain defences which he proposed to minute, and in particular he denied that the complainer had deserted his possession of the farm and left it unlaboured at the usual time of labouring. He stated further that the complainer resided on the farm as he had always done since his entry thereto, that he had already ploughed part of the lands, and was in the course of having the farm properly laboured for the crop of the current year. For the respondents it was objected to the said defence being minuted till the complainer had found caution for violent profits in terms of the A. S. of 10th July 1839, § 34. This objection the Sheriff-Substitute sustained, whereupon the complainer offered to verify forthwith his defence, and in particular to prove that he had not deserted and left the land unlaboured. This offer was refused, and an interlocutor pronounced by the Sheriff-Substitute (DICKSON) ordaining the complainer,—in respect he had not found caution for violent profits, and had not instantly verified a defence excluding the action,—to find caution for the rents for the five following crops. To this interlocutor the Sheriff (SHAND), on appeal, adhered. The complainer having failed to find caution for violent profits, was decerned against in the removing in terms of the conclusions of the summons. On this decree a charge was threatened, and the complainer accordingly brought the present note of suspension. The Lord Ordinary on the Bills (LORD MURE) refused the note. Against this judgment the complainer reclaimed.

SCOTT and BRAND, for the complainer, pleaded that the Judges in the inferior court had totally misconstrued the nature of the case: that the process raised was not in its inception an action of removing at all, but an action for caution, and that it was only on the failure to find caution that an interlocutor of removing could be pronounced. This was the course followed in the analogous case of *Cossar* v. *Home*, Feb. 8, 1847, 9 D. 617. Further, that the complainer could not competently be asked to find caution till the respondents had proved their averments and the complainer allowed an opportunity of verifying his defence. There had been error in treating this case as if the lease had expired or was about to expire, for then, and then only, did the 34th section of the A.S. 1839 apply; *Mackenzie* v. *Mackenzie*, May 23, 1848, 10 D. 1009, was an authority in point as to this.

A. MONCRIEFF and KINNEAR, for the respondents, maintained that *Cossar* was a direct authority for them, for the report of the case is not intelligible unless on the supposition that the respondent there had been ordained to find caution for violent profits before the interlocutor ordaining caution for the five following crops was pronounced; that the case of *Mackenzie* was so peculiar in its circumstances — from an action having first been raised by the tenant to compel the landlord to implement the terms of his lease, — that it could not be used as an authority against them, and that the present action was in all respects an action of removing to which the A. S. of 1839 directly applied. That therefore the interlocutors of the inferior court were well founded, and that the letters ought to be found orderly proceeded.

The Court unanimously held that the action was not, properly speaking, one of removing, but an action for caution, and could only become one of removing in the event of the complainer failing to find caution, but that he could not competently be ordained to find caution till the respondents had proved their averments of desertion and failure to labour at the usual time of labouring, and the complainer been allowed an opportunity of meeting that proof. They also held that the cases of *Cossar* and *Mackenzie* were both authorities for this view, and that the A. S. of 10th July 1829 had no application, in respect the lease had not expired nor was about to expire. The note was sought to be passed on juratory caution, but Lord Cowan was disposed to pass it without caution. The interlocutor pronounced did not however pass the note, but altered the interlocutor of the Lord Ordinary, and remitted to the Lord Ordinary to remit to the Sheriff to allow the defences tendered for the complainer to be received, and thereafter to take proof and proceed in the cause as might be just; and found the complainer entitled to the expenses incurred in the Bill Chamber.

Agent for Complainer—David Milne, S.S.C.

Agents for Respondents—Hamilton, Kinnear & Beatson, W.S.

Wednesday, May 25.

FIRST DIVISION.

HARDIE *v.* AUSTIN & M'ASLAN.

Contract—Warrandice—First-class Stock—Mercantile Law Amendment Act—Turnip Seed. On construction of a contract to supply 50 bushels East Lothian Swede turnip seed of first-class stock, crop 1866, *held* (1) that this meant of not first-class quality but first-class pedigree; and (2) that under the Mercantile Law Amendment Act the seller was not liable in warrandice for deficient germination, as he did not know of any bad quality in the seed when he sold it, gave no express warranty, and did not supply them for any particular purpose, but only for the general purpose of growing crops.

Observed by Lord President—A sale of oats for grinding purposes, or oil for food, as distinguished from burning, would be a sale for a particular purpose and imply warranty.

The pursuer is a seed merchant in Haddington,

the defenders are seedsmen in Glasgow. In the beginning of 1867, or the end of 1866, the pursuer having a quantity of East Lothian Swede turnip seed for sale, offered a part of it to the defenders for sale, but at that time the offer was not accepted.

On 17th May 1867 the defenders sent the pursuer a memorandum in the following terms:—"You made an offer to us of East Lothian Swede turnip seed this season; if you still wish to find a buyer, let us have a sample, with lowest value, and say the season it was sowed. We do not promise to buy it, but will see." On 17th May the pursuer in answer wrote—"I give you offer of two lots of East Lothian Swede, subject to your reply by return. Turnip seeds are now going up in price, and are sure to go farther, but having given you the offer before, and as I grow East Lothian Swede largely, I will, at this time, quote you low, which I hope will lead to further transactions. Fifty bushels East Lothian Swede, crop 1866, at 22s. 6d., or fifty bushels, crop 1865, at 22s., cash in two months. Both lots were grown in East Lothian, and are first-class stocks. I supply wholesale merchants in Edinburgh regularly with the same stock every year. Some of them to the extent of 150 bushels." On May 25th the defenders wrote:—"We are in terms with another party about Swede turnip seed, but we have not closed yet, and before coming to terms, expected to have had samples of your seed, which have not yet come to hand. Mark the season on each lot in which they were sowed." On 27th May the pursuer, in reply, wrote:—"I have now a little difficulty in giving you the offer of the seed, but if you attend to the undernoted, you may secure one of the lots. Enclosed you have the two samples, and if you accept the one lot or the other at the prices quoted, you must send telegram *to-morrow*, saying which lot you take." The defenders did not answer on the following day, but on 31st May they wrote:—"If you have not parted with your Swede turnip seed yet, we will take one of the lots (50 bus.), and let it be the crop of 1866, if you have it. It should be cleaned a little better, as we observed some gravel amongst it. If the other sample was of the last crop, we would take it fully as readily, as it is a good sample and well dressed; whichever you send us, let us know of as soon as possible in confirmation of the purchase." The pursuer on 1st June sent the defenders 50 bushels of the said East Lothian purple top Swede turnip seed, of crop 1866, in thirteen bags. These bags, which were also sold or delivered to defenders were of the price or value of 1s. 3d. each. The pursuer also sent the defenders an invoice of the seed and bags. On 13th August the defenders wrote,—"Very much against our desire, we have occasion to complain very much at the result in growth of the Swedish turnip seed we had of you, and which we could not entertain until we had given it repeated trials in our nurseries. The returns shew only 50 per cent., fully 8 per cent. of that low growth, weak. Having purchased the seed from you of crop 1866, and net seed, we concluded there must have been some error in our proofs, but find them as stated. We cannot, therefore, retain the seed, as it is evidently not of recent saving; and will thank you to give us directions how to place it on your account. We are glad the market value has advanced since we had the seed delivered, otherwise you might have had occasion to doubt our representations."

The pursuer complained of the defenders' delay in keeping the seed if they were dissatisfied with it, but maintaining there was no cause for dissatisfaction. He stated that he had supplied many other merchants with lots of the same seed; and that they had made no complaint. A proof was led; and in it the defenders shewed that they had carried on a variety of tests, the returns of which shewed a low per centage of yield—about 50 per cent.—and they maintained that the delay was due to the time for carrying on these tests.

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

"*Glasgow*, 15*th December* 1869.—Having heard parties' procurators on the pursuer's appeal, and thereafter made avizandum with the proof, productions, and whole process: Finds, first, in point of fact, that the Swede turnip seed in question was sold by the pursuer, and delivered to the defenders on 1st June 1867; that before the sale was concluded a sample was exhibited, and the defenders were assured in writing by the pursuer that the seed was 'first-class stock:' Finds that, to constitute first-class Swede turnip seed, it ought to have a germinating power of not less than from 85 to 90 per cent., but the quality of the seed cannot be discovered by merely looking at it, and it is impossible to ascertain the germinating power until it has been tried by sowing: Finds that, between the 1st June and 13th August following, the defenders tested the seed by sowing several small quantities of it taken from each of the bags in which it was contained, and the result was that its germinating power did not average more than from 60 to 65 per cent.: Finds that, on the last-mentioned date, the defenders wrote to the pursuer the the letter No. 5–7, intimating the inferior quality of the seed, declining to retain it, and asking what the pursuer wished should be done with it; and the pursuer, on the 14th August, wrote in answer the letter No. 5–8, in which he declined to consent to the sale being rescinded, and repeated his belief that the seed was of excellent quality: Finds, however, that the pursuer has not led any evidence to contradict the proof adduced by the defenders of the inferior quality of the seed, and he (the pursuer) does not now deny that its inferiority has been sufficiently established, although it would appear that other seed of the same stock had turned out better, and had given satisfaction to the parties to whom it had been sold: Finds, farther, although it is in evidence that four out of the thirteen bags in which the seed was forwarded got wet externally when in the hands of the carrier, there is no reason to believe that any loss of germinating power is attributable to that cause: Finds, *second*, in point of law, that the assurance given by the pursuer that the seed was 'first-class stock' may fairly be construed as an assurance that it was first-class quality; that, at all events, the terms of the contract were such as to make it incumbent on the pursuer to supply seed of a merchantable description, which the seed in question turned out not to be; that, although a sample was exhibited, the sale was not, in the proper sense, a sale by sample, in respect that the character of the seed could not be judged of by merely looking at the sample, and the rule *caveat emptor* does not therefore apply; that there was no such delay on the part of the defenders in testing the seed, and no such dealing with it or any part of it by re-sale, use, or otherwise, as to bar them from their right to cancel the contract, they having, as soon as the

defect was discovered, given notice that they did cancel it;—Therefore adheres to the interlocutor appealed against, dismisses the appeal, and decerns.

"*Note.*—The pursuer pleads that the seed was sold by sample, and that there is no evidence that it was inferior to sample. Effect might be given to this plea if the article sold had been of such a kind that its quality could have been ascertained by inspection of the sample, for then, as was held in *Parkinson*, May 20, 1802, 2 East, p. 813, the maxim would have applied *caveat emptor*. But there are many sales where, though sample is exhibited, such exhibition does not constitute a sale by sample. (See Story on Contracts, vol. ii. sec. 835; Benjamin on Sale, p. 482; and Story on Personal Property, sec. 376.) All that a buyer can ascertain by inspecting a sample of turnip seed is that it is well cleaned and pure; and if he were subsequently to object that the bulk were inferior in these respects, it would be a good answer that it was equal to sample. But when the defect is latent, and of that nature which the mere inspection of a sample would afford no means of discovering, the rule is *caveat venditor*, not *caveat emptor*, for even where there is no express warranty, if the seller knows the purpose for which the article is wanted, there is an implied warranty that it is reasonably fit and proper for that purpose (Ross' Leading Cases in Mercantile Law, vol. ii, p. 375). The pursuer pleads, farther, that it was the duty of the defenders to have tested the quality of the seed sooner than they did, and that they were barred by *mora* from rejecting it. The rule as to this is, that when the article sold is defective, the challenge must be made by the purchaser 'without unreasonable delay,' but what unreasonable delay is depends on the circumstances of the case. If the defective quality may be discovered at once, by an examination of the article, then, as was explained by the Lord Justice-Clerk (Hope) in *Smart*, June 23, 1852, where seed was the article purchased, there must be no delay, the article being perishable, and capable of immediate examination. But, in the words of Mr Ross, *ut supra*, p. 845, 'Where it is impossible to know absolutely whether the article is defective or not without a trial, the purchaser is entitled to make a trial of the article before returning it.' Accordingly, in *Hill*, December 11, 1837, a dealer in grass seed was held liable in damages and repetition of the price for certain seed grown by himself, and sold by him at a good price, but which, from its bad quality, did not vegetate; and it was even held not to be a bar to the action that before sowing the seed the purchaser had observed it to have a bad colour and smell, and had not then returned it or intimated that circumstance to the seller. The Lord Justice-Clerk (Boyle) said, 'I demur to the law laid down by the Sheriff that he should at once have sent the seed back. He had not tried it, and having paid a full price for it he might have been told he was not entitled to return it without trial. Neither can I hold the action barred by delay to bring it, for seed in particular seasons may be dormant, and the proper time to ascertain how it has sprung is when the crop is cut, and then the pursuer told the defender he would not stand to the bargain.' See also, to the same effect, *Baird*, February 13, 1788, and *Dickson*, 15th December 1808, F. C., the rubric of which last case, as given by Ross, is—a seller is 'liable for damages arising from latent defects in the article sold by him (Swedish turnip seed), although acting *optima fide*, and in ignorance of the existence of the defects.' These cases are on all-fours with the present, and seem conclusive of the questions now raised, the seed having been challenged as soon as its latent inferiority was ascertained, and no more than a reasonable time having been taken for so ascertaining."

The pursuer appealed.

BLACK and CAMPBELL for him.

SHAND and BALFOUR in answer.

The Court unanimously reversed the Sheriff's interlocutor. They held that the solution of the question was to be found in the construction of the letters in which the contract was embodied. By the contract, turnip seed of a certain kind, and grown in a certain place, was to be sent. The seed was of the kind specified, and it has been grown in East Lothian. It was to be of first-class stock, and by this it was evident, from the nature of the evidence and of the contract, seed of first-class pedigree or patronage, stock long grown and well known was meant, and not seed of first-class quality. Now, it was clearly proved that the seed precisely answered all these stipulations. And the complaint of the purchasers was that, having tested it, it did not yield as great a crop as they expected. But the tests did not seem reliable; some were in the open air, some in an atmosphere heated by a stove, some on wet flannel. The tests were made in many ways, and the seed yielded results up to 80 per cent. The tests were probably influenced by the way they were made, but there was no information how the seed turned out in actual growth. Under the contract it was plain the seller was not liable for any deficiency in the germinating power of the seed. As to warranty, that was now fixed by statute. By the 5th section of the Mercantile Law Amendment Act the risk was laid on the purchaser, unless he knew of bad quality in the article sold, or gave an express warranty. Here the seller gave no express warranty, and did not know of any defect in the quality of the seed. The question then was, Did this case fall within the exceptions provided in the Act? It clearly did not. There had been no express warranty, nor had the seed been sold for a particular purpose. Selling oats for seed as distinguished from grinding purposes, or oil for food and it proved only fit for burning, would be sale for a particular purpose, and would imply warrandice; but here the seed was sold for general purposes. The pursuer was therefore entitled to decree in terms of the libel.

LORD KINLOCH—It is indispensable that, in deciding this case, we have regard to the law as to the sale of goods, now fixed by the Mercantile Law Amendment Act 1856, to the effect that "the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods; or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose."

I am of opinion that in the present case there is no express warranty of the quality or sufficiency of the goods. It was stated as to the seeds offered for sale, "Both lots were grown in East Lothian, and are first class stocks." I am clearly of opinion that this refers merely to what has been called the parentage or pedigree of the seed; that is to say, that all the representation is that the seed was

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