suer may die before this is accomplished; or in various conceivable ways may be prevented from executing his purpose. Is it on an estimate of such contingencies that the question is to depend, whether the directions of the truster are to be followed out as he has expressly given them? I cannot bring my mind to think so. I am of opinion that such contingencies should be all thrown out of view; and that the only sound and safe principle (as I consider it) should be held by—viz., that the directions of the truster should be implicitly carried into effect, whatever may afterwards occur. Practically this is to hold that, except to the extent of its being found that an effectual entail cannot be made by the trustees, the pursuer is not entitled to prevail in the conclusions of the present summons. I have merely to add, by way of explanation, that I consider the 43d section of the Entail Amendment Act, 11 and 12 Vic., cap. 36, to have no application to the present case."

The case was advised to-day.

Lord Cowan and Lord Benholme expressed their concurrence with the views of the majority, Lord Cowan agreeing particularly with the grounds of judgment set forth in the opinions of the Lord President, and Lord Barcaple. Lord Neaves agreed with the minority that the action should be dismissed. The Lord Justice-Clerk agreed with the majority in the result at which they had arrived, that the pursuer was entitled to decree, but expressed his sense of the difficulties which were felt by the minority of the consulted judges, and he only got over these by resting his judgment on the special ground that, while the trustees of Colonel Gordon are the only parties called, they have made no objection that all parties are not called, and they have not raised a proper process of constitution in order to determine the rights of all that might be interested. He did not think it was the duty of the Court to interpose and take an objection which the trustees had not taken.

The interlocutor of the Lord Ordinary was accordingly adhered to, the Judges being 8 to 5.

Saturday, March 3.

FIRST DIVISION.

LEARMONT'S TRUSTEES *v.* SHEARER.

Arrestment—Forthcoming—Heritable and Moveable. Circumstances in which held that a fund arrested was heritable, and the arrestment of it therefore inept. Decree of forthcoming following thereon suspended.

Counsel for Charger—Mr C. Scott. Agent—Mr James Barton, S.S.C.

Counsel for Suspenders—Mr G. H. Pattison and Mr Alexander Blair. Agent—Mr John M'Cracken, S.S.C.

The question involved in this case was the competency of an arrestment and a forthcoming. The charger, Margaret Shearer, had a claim against the common debtor, John Learmont, which she constituted in 1863 by obtaining decree in absence against him. Having used an arrestment on the dependence in the hands of the trustees named in Learmont's father's settlement (under which he had right to a sixth share of the residue of his father's estate), she thereafter raised an action of forthcoming against the trustees, and obtained decree in absence, upon which they were charged. The trustees then brought a suspension of this decree in absence, which was passed in terms of the Act 1st and 2d Vict., cap. 86, sec. 5, and a record was made up in the suspension. After a proof had been allowed and taken, the Lord Ordinary (Ormidale) found as matter of fact, that at the date when the arrestment was used in the hands of the trustees, they were not indebted and resting-owing to the common debtor in any sum of money, and, for that reason, that in point of law the decree of forthcoming was not well founded and could not be maintained. He therefore suspended the decree and charge thereon, "reserving the effect otherwise of said arrestment, and in particular its effect, if any, in attaching the *jus crediti* pertaining to the common debtor in the trust-estate of his father." The Lord Ordinary referred in support of his judgment to the case of Cunninghame *v.* Cunninghame, 28th February 1837 (15 S. 687).

The charger reclaimed, and moved that the action of forthcoming should be sisted until that portion of the trust-estate which was heritable was sold off and the sum due to the common debtor was ascertained. She had also made this motion before the Lord Ordinary, who refused it. The Court to-day adhered to the Lord Ordinary's interlocutor, holding that the arrestment was inept. The judgment of the Court was delivered by

Lord CURRIEHILL, who after narrating the above circumstances, said—This is a note of suspension, passed in terms of section 5 of 1 and 2 Vict. c. 86. It is proper to keep in view that the effect of passing the note was not to repone the suspenders. It is quite settled by decisions that the passing of such a note has not the effect of extinguishing the decree and charge, but simply of sisting them until the note is refused or decree of suspension is pronounced. It has also been settled that the record should be made up in the suspension process, as was done here. There are various reasons of suspension stated, but it is not necessary to deal with all of them. The only one which requires to be dealt with is, I think, intended to be stated in the 4th plea in law. It was stated to us in argument that as the trustees had not realised the property of the estate, and as they therefore had no money with which to pay the common debtor his share of the residue, the arrestment was therefore an inept diligence. I cannot sustain the plea stated in that broad way. Suppose there had been sufficient moveable estate out of which the share could have been paid, I think the arrestment would have been quite valid. This was settled in the cases of Grierson *v.* Ramsay, 25th February 1780 (M. 159, and Hailes 855), and Douglas *v.* Mason, 1796 (M. 16,213); and these cases have been since acted upon. I therefore think there was a fund attachable by legal diligence although it had not been realised. But that is not conclusive, for the question arises, what kind of diligence was appropriate? That depends on whether the fund was heritable or moveable. If moveable, and so far as moveable, arrestment was the proper diligence. If heritable, it was not attachable by arrestment. That leads me to consider whether the right of the common debtor in his father's estate was heritable or moveable. That depends on the construction of the trust-deed. By it the truster conveyed his whole property, heritable and moveable. The purposes of the trust were the payment of his debts, the delivery of his stock-in-trade to his two sons, William and Thomas, the payment of certain money provisions to his two daughters, and the division of the residue among his six sons and daughters. The only provision in favour of the common debtor was this sixth part of residue. This deed was executed in 1851. In 1852 the truster married again, when he granted a bond of annuity of £50 to his wife. That, of course, created a debt. In 1859 he made it a real burden on his heritage, and at the same time he made over to his wife his household furniture, &c. According to the state of the deceased's affairs at his death, it appears that after payment of the truster's provisions, there was not sufficient moveable estate to pay his debts. It therefore follows that there was nothing but heritage out of which the residue could be paid. That being the state of matters, the fund is heritable, unless the trust-deed contains a direction or power to convert it into money before division. I find in the deed no such power. Whether it may turn out afterwards that it is necessary to convert before

division is not the question now before us. At present all that the common debtor can claim from the trustees is heritage. It appears to me, therefore, that the diligence here used was inept.

The defenders moved for expenses, which, after discussion, they were allowed, but subject to substantial modification, in respect (1) they had allowed decree in absence to pass against them; and (2) they had not pleaded the invalidity of the diligence on the ground now adopted by the Court.

HODGSON AND SON *v.* DUNN.

Contract—Sale. Circumstances in which a defence to an action, for the price of manure sold, that it was not sold on the credit of the defender, *repelled.*

Counsel for Pursuers—Mr G. H. Pattison and Mr J. C. Smith. Agent—Mr Jas. Somerville, S.S.C.

Counsel for Defender—Mr Gifford and Mr J. B. Balfour. Agents—Messrs C. & A. S. Douglas, W.S.

This is an advocation from the Sheriff Court of Roxburghshire. The pursuers, George Hodgson & Son, Oxspring Manure Mills, Doncaster, sued the defender, William Dunn, farmer, Redden, for £72, 10s., the price of ten tons of turnip manure sold by them to him in May 1864. It was admitted that the manure was sent by the pursuers to the defender, and taken possesssion of and used by him. The defence was in substance that the manure was not furnished on the credit of the defender, but on the credit of a Mr David Buchan, who is alleged to have been the purchaser from the pursuers. What was said was that the defender had entered into an arrangement with Buchan, by which he, the defender, was to supply Buchan with potatoes, and Buchan was, on the other hand, to supply him with manure, and it was alleged that Buchan bought this manure from the pursuers in order to fulfil his contract with the defender. The Sheriff-Substitute (Russell) and Sheriff (Rutherford) sustained this defence, but the pursuers having advocated, the Lord Ordinary (Kinloch) recalled their interlocutors and decerned against the defender as concluded for. The defender reclaimed, and the Court to-day adhered to the judgment of the Lord Ordinary.

The LORD PRESIDENT said—As regards the position of the pursuers, it appears that they received their order through a Mr Fearby, a commission agent. The manure was sent off and received and used by the defender. The pursuers sent along with the manure an invoice which had printed on it this notice—"All receipts in discharge of payment to be signed by George Hodgson & Son only." This invoice, it is admitted, was received by the defender. There was also sent at the same time a circular letter in the following terms:—"We beg most respectfully to intimate to you that all our manure accounts this season must be paid to the firm direct. Our Mr Hodgson will have the pleasure of waiting upon you at stated times, of which you will receive due notice. In the meantime, should you be wishful to pay the account, you will please remit the money direct to Doncaster." The receipt of this letter was denied on record, but is admitted by the defender in his evidence. The case of the defender is that he had a transaction with a Mr Buchan, whereby he agreed to furnish him with potatoes, in return for which Buchan agreed to furnish him with manure. It appears that Buchan did not fulfil his undertaking in due time, and that when the time for using the manure arrived, Buchan called on the defender, and brought Fearby with him, and that the order was then given for the manure. The defender says that he understood, and that it was explained at this meeting, that the manure so ordered was to be in lieu of the manure which Buchan had agreed and had failed to furnish. On the other hand, Fearby states that he got the order from the defender in the ordinary course, although Buchan was present; that he transmitted the order to Mr Leishman, the pursuer's agent at Berwick; and that he had no authority to receive payment in potatoes, or in any other form than money. The question is, can the defender maintain the defence he has stated? The evidence is contradictory. The defender says that his understanding was that the manure was to stand for that which Buchan had agreed to deliver; and farther, that on the faith of this he handed over to Fearby, at Buchan's request, the potatoes which he had agreed to furnish, so far as not already delivered to Buchan. The evidence of Fearby and Buchan is opposed to this. I have no doubt that the defender states quite honestly what he truly believed to be the import of the transaction and its real character; but I think there appears to have been a want of proper explanation at the meeting. The defender seems to have assumed too readily that Fearby viewed the matter in the same light as he did. I don't think there is evidence sufficient to bind the pursuers to the bargain betwixt the defender and Buchan. Their circular letter states the footing on which the manure was sent quite distinctly; and having received it, the defender's eyes were opened, and he was put upon his guard. His duty was not to have taken the manure on that footing. The whole question is whether the pursuers are to lose the price of their manure or the defender is to lose the price of his potatoes; and although the defender, I believe, acted with perfect honesty, I think the pursuers, whose conduct was also open and above-board, are entitled to recover.

Lord CURRIEHILL and Lord DEAS concurred.

Lord ARDMILLAN also concurred but with very great difficulty. He thought that the evidence of the defender was much more reliable than that of Buchan and Fearby, and if this question had arisen in an action at the instance of Fearby he would have sustained the defender's plea. But in a question with the pursuers he thought the defender was liable.

The Court therefore decerned for the sum sued for with expenses, both in the Sheriff Court and the Court of Session.

OUTER HOUSE.

(Before Lord Kinloch.)

COCHRANE *v.* MASON.

Road — Statute — Construction. A local road Act having provided that "no person shall make or erect any house or other building within 20 feet of the centre of any road"—*held* (per Lord Kinloch) that this provision did not apply to the rebuilding of old houses which had been taken down in order to be rebuilt.

Counsel for the Advocator—Mr Gifford and Mr R. V. Campbell. Agent—Mr Alexander Wylie, W.S.

Counsel for the Respondent—Mr Gordon and Mr Gebbie. Agent—Messrs Macgregor & Barclay, S.S.C.

This was an advocation from the Sheriff Court of Lanarkshire brought under the following circumstances:—

The advocater is clerk to the Statute Labour Trustees of the parish of Avondale, in which parish the burgh of barony of Strathaven is situated. The respondent is proprietor of certain premises on one side of a street or lane in Strathaven, called the Big Close or Wide Close. Some time before the commencement of the present proceedings, certain of the respondent's premises having fallen into decay, he commenced rebuilding the same on their former site. Against his doing so the advocator presented a petition for interdict to the Sheriff, founding upon the 31st section of the Local Statute Labour Act, 47 Geo. III., c. 45.

The section in question, *inter alia*, enacts, with reference to the statute labour roads of Lanarkshire, that "no person shall make or erect any house or other building, excepting only stone fences or walls, not exceeding 6 feet in height, within 20 feet of the centre of any of the said roads"—and it