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

goes on to declare that the trustees shall be entitled to order any building illegally erected to be removed. It was contended by the respondent that this section had no application to the rebuilding of old houses, and, further, that in any event the application to the Sheriff was incompetent, the judge ordinary having no jurisdiction under the statute.

The Sheriff-Substitute (Veitch) granted interim interdict, and allowed a proof. The Sheriff-Principal (Alison) reversed, and dismissed the petition on the ground that the Act did not apply to the rebuilding of old houses on their former sites. The petitioner advocated; and the Lord Ordinary having on 17th March 1865 sustained the competency of the advocation, and found that the petition was competently presented to the Sheriff, allowed, of consent, to both parties a proof, before answer, of their averments.

This proof having been reported and parties heard, his Lordship has now issued an interlocutor advocating the cause—finding that the 31st section of the Act is inapplicable to the circumstances of the case, and of new dismissing the petition, with expenses. In the note subjoined to his interlocutor his Lordship observes:—

"The Lord Ordinary has no doubt that the streets and closes of Strathaven (so far as not occupied by a turnpike road) are under the charge and control of the statute-labour trustees for the county. The words of the Act embrace the roads of the county generally, whether in or out of burgh; and the exception of Glasgow and Hamilton only confirms the application of the statute to the other burghs. Strathaven, as a burgh of barony (in which, however, there appears to have been for years no baillie of any kind), has no claim for exemption. Accordingly, it is proved beyond a doubt that the streets of Strathaven, including the Wide Close, have been all along taken charge of and replaced by the statute-labour trustees—and the Lord Ordinary thinks rightly.

"With regard to the special clause in question (the 31st), it is here, as in other statutes, not easy to compass the entire meaning and scope of the enactment. By the 35th section the maximum breadth of the statutory roads is declared to be 30 feet; and why by the 31st section a space of 40 feet is to be kept clear is not distinctly apparrent. The intention probably was to provide room for ditches and drains (which by the 35th section are beyond the 30 feet), or generally for greater airiness and contingent convenience. However this may be, there can be no doubt that in certain circumstances the section is imperative. The Lord Ordinary cannot doubt that a building erected for the first time on a county road must, under this section, be at least 20 feet from the centre of the road.

"But he thinks it impossible reasonably to apply the section to the actual case. There is here neither a county road nor a new erection. The case is that of an old house in a street or close of Strathaven, which is proposed to be rebuilt. The street is fully made up on both sides, with houses on either side of that in question, which the trustees cannot touch. The proposal is that the respondent shall throw back his rebuilt house greatly within the line of the houses on either side; and this for no good purpose to be served by the trustees, for they cannot widen the street generally; and can do nothing more than inflict an injury on the respondent by keeping an unnecessary gap in front of his new tenement. Nor is this the only injury he will sustain; for, not having space to the back (as might commonly be had in a rural district) to remove the entire tenement, the effect of forcing him to put back the front of his building would be simply to compel him to throw away half the building, leaving the remainder of comparatively little value. And all this is to be done by the respondent without compensation, but merely reserving his claim for payment for any ground which the trustees may take for widening the close at some indefinitely remote period.

"The Lord Ordinary is of opinion that on no reasonable construction of the section in question can it be made to apply to such a case. He thinks the 'making or erecting a house' contemplated by that section cannot with any propriety or fairness be held to mean the rebuilding of an old tenement on the side of a fully-formed street like the Wide Close.

"The Lord Ordinary finds that on this matter the road trustees have by no means had very settled views or a definite course, for the proof discloses repeated instances in which houses have been rebuilt in Strathaven without the trustees applying to the case the provisions of section 31. It appears to the Lord Ordinary that the recent interpretation of the trustees is not the sound one."

Tuesday, March 6.

FIRST DIVISION.

TAYLOR AND CO. *v.* MACFARLANE AND CO.

Reparation—Contract—Breach—Issue. In an action of damages for breach of contract the issue should set forth the contract and the alleged breach. Issue adjusted.

Counsel for Pursuers—The Solicitor-General and Mr Gifford. Agent—Mr John Henry, S.S.C.
Counsel for Defenders—Mr Clark and Mr Watson. Agents—Messrs White-Millar & Robson, S.S.C.

This is an action of damages for breach of contract. The pursuers, who are merchants in Leith, alleged that the defenders, who are distillers in Glasgow, had in 1862 contracted with them to supply a quantity of whisky conform to a certain sample as to strength, and conform to another sample as to colour. The whisky was to be exported to South Africa for the consumption of the natives there, who call it "white rum." It seems, however, that some years ago "white rum" became unmarketable at Old Calabar, in consequence, it was said, of the importation of a cheap American white spirit, which had the effect, as the natives said, of "cracking their heads." The Scotch traders thereupon resorted to the plan of colouring the whisky so as to make it resemble rum. The colouring substance used was burnt sugar or "caramel." The pursuers allege that the defenders agreed to furnish whisky so coloured, and that they used, instead of caramel, some colouring matter of a noxious and deleterious character, in consequence of which the natives refused to purchase the liquor. The pursuers therefore averred that their pecuniary loss through this breach of contract was large; and also that "the stigma on their reputation in the minds of the natives, on whose goodwill the success of their trade chiefly depends, greatly diminished their trade and prospects." The quantity of whisky supplied was 20,554 gallons, and the price was to be 1s. 4d. per gallon.

The defenders denied the breach of contract, and pleaded also that the pursuers had failed timeously to return the whisky as disconform to order.

The pursuers proposed an issue for trial, which the defenders objected to on the ground that it did not sufficiently specify the contract of parties and its alleged breach. The case relied on by the pursuers was that the colouring matter used was not what was agreed to, but something which was unwholesome. This was not brought out in the issue. The Court gave effect to the defender's contention; and after five or six editions of the issues had been printed, the following were to-day finally approved of, the pursuers being found liable in expenses since the date of the Lord Ordinary's interlocutor:—

"Whether, in or about September 1862, the defenders, on the order of the pursuers, agreed to supply to them a quantity of whisky coloured with burnt sugar or other innocent material, similar to a sample of Mackenzie & Company's