

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 advocacy from the Sheriff Court of Roxburghshire. The pursuers, George Hodgson & Son, Oxspring Manure Mills, Doncaster, sued the defender, William Dunn, farmer, Redden, for £72, ros., 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 possession 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 decreed 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 pursuers'

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 decreed 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 Advocate—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 advocacy from the Sheriff Court of Lanarkshire brought under the following circumstances:—

The advocator 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