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

whisky, then shown to the defenders? Whether the defenders delivered to the pursuers a quantity of coloured whisky, amounting to 20,554 proof gallons or thereby, for which the pursuers duly paid the stipulated price? And whether the coloured whisky so delivered by the defenders to the pursuers was disconform to the said order, inasmuch as it was coloured with some colouring matter not being burnt sugar or other innocent material similar to said sample—to the loss, injury, and damage of the pursuers?"

Damages laid at £6000.

Counter Issue for Defenders.

"Whether the pursuers failed duly to return the said whisky to the defenders?"

SECOND DIVISION.

THE QUEEN *v.* GILROYS.

Excise—Statute 24 and 25 Vict. c. 91—Master and Servant. Held that a master was not liable for a contravention of an Excise statute committed by his servant beyond the scope of his employment.

Counsel for the Crown—The Solicitor-General and Mr Rutherfurd. Agent—The Solicitor of Inland Revenue.

Counsel for the Defendants — Mr Clark and Mr Guthrie Smith. Agents—Messrs Maconochie & Hare, W.S.

This is a case stated by the Quarter Sessions of the county of Lanark for the opinion and directions of the Court of Exchequer in terms of the Act of Parliament 7 and 8 Geo. IV. c. 53. An information was laid in Petty Sessions against the defendants, who are brewers in Lanark, charging them with a contravention of the Act of Parliament 24 and 25 Vict. c. 91, sec. 12, in respect of their retailing beer on the highway in the parish of Cambusnethan. The facts mainly relied upon were, that the defenders' servant, whose duty it was to take orders for beer, and to convey in the defenders' cart the quantity of beer ordered, had, on some occasions, taken in his cart more than had really been ordered, and had retailed the over-supply to casual buyers on the road at a profit of sixpence per dozen. The carter merely stated to his masters what amount of beer he had orders for, and this amount was furnished to him, and placed on his cart by the cellarman, the carter accounting on his return for the bottles taken away by him at the wholesale price. The defendants had instructed their servant not to sell beer off their cart. The question before the Court in these circumstances was, whether through the unauthorised actings of their servant the defendants had incurred a contravention of the Act libelled.

The Justices at Petty Sessions convicted the defendants, and imposed mitigated penalties. The Quarter Sessions on appeal dismissed the information, and awarded costs against the Crown.

To-day the Court were unanimously of opinion that the defendants were not liable for the actings of the servant, these not falling within the scope of his employment.

The LORD JUSTICE-CLERK said—The first point insisted on by the defendants is that the case does not set out negatively that the defendants had not a license. I am unable to give effect to that. It lies upon the defendants to allege and to prove that they had a license. As to the merits of the case, the question is, whether the defendants made the sale or not? The place of sale is the place of business of the brewer, in cases like this, where beer is sent out according to order. In the present case the sale was made not at the brewery, but in another parish, by a servant of the defendants from a cart, and as the proceeds were not fully accounted for by him, but only as much as would have answered to a sale according to order, and it does not appear that they were aware of his proceedings, the question is, whether the servant's illicit sales were within the scope of his employment. I cannot hold that they were.

The other Judges concurred on the merits. On the point of form as to the omission to state that the defendants had no license, Lord Cowan expressed no opinion. Lord Benholme thought the omission fatal; and Lord Neaves concurred with the Lord Justice-Clerk.

CLEMENTS AND MANDATORIES *v.* MACAULAY

(*ante* p. 90).

Proof — Secondary Evidence. Circumstances in which a press copy of a letter admitted as evidence, and exception disallowed.

Mandatory—Ultra fines mandati. Ruled (per Lord Justice-Clerk) that a discharge of accounts by a mandatory was vitiated as a settlement in full binding on his constituent, in respect he had given credit for a sum with which, under his mandate, he was not authorised to deal. Exception taken to this ruling and disallowed.

New Trial. A new trial granted in respect the verdict of the Jury was contrary to evidence.

Counsel for Pursuers—The Lord Advocate, Mr Patton, and Mr Alexander Moncrieff. Agents — Messrs Wilson, Burn, & Gloag, W.S.

Counsel for Defender — Mr Clark and Mr Lee. Agents—Messrs Hamilton & Kinnear, W.S.

This case was tried before the Lord Justice-Clerk and a jury at the last Christmas sittings. The verdict of the jury was in favour of the pursuers, by a majority of 11 to 1. In the course of the trial two exceptions were taken by the counsel for the defender, and these have now been discussed, along with a rule which was granted by the Court upon the pursuers to show cause why a new trial should not be granted, on the ground that the verdict was contrary to evidence. The Court disallowed the exceptions, but made the rule absolute, setting aside the verdict and granting a new trial. The judgment of the Court was delivered by

LORD COWAN, who said—The joint adventure which gave rise to the questions stated in the issues related to a speculation engaged in by the pursuer and defender for the purchase of cotton in the Confederate States, with a view to the shipment of 376 bales for sale in Europe by running the blockade, as it is termed.

The first issue regards the purchase and sale of 280 bales, and the amount due by the defender to the pursuer on that part of the joint transaction; and upon that issue the jury by their verdict found that there was indebted to the pursuer the sum of £1369, 14s. 3d., being the balance remaining of his half of the net proceeds of the sale—viz., £3331, 12s. 7d.. under deduction of the sum of £1961, 18s. 4d. admitted in the summons to have been paid to account in June 1863. On this part of the case no dispute exists between the parties.

The second and third issues relate to the purchase and sale of the remaining 96 bales, and the amount due to the pursuer in respect thereof. The second issue is framed to try an alleged breach of contract said to have been committed in these 96 bales having been sold elsewhere than at Havanna or Liverpool, and the sum consequently due to the pursuer in respect of such breach of contract. The third issue, again, is framed to have the amount due to the pursuer in respect of his interest in these 96 bales ascertained, on the assumption that the jury should not affirm the second issue. Under the second issue however, the jury have found for the pursuer, and assessed the amount due at £1104, their verdict on the third issue consequently being for the defender.

Had the jury taken a different view of these issues, and held the alleged breach of contract not proved, they must have found for the defender on the second issue; and upon the third issue they