Wednesday, May 27.

SECOND DIVISION.

[Lord Fraser, Ordinary.

ANDREWS AND OTHERS *v.* M'GUFFOG AND OTHERS.

Trust—Personal Liability of Trustees—Powers of Trustees—Ultra vires—*Application by Trustees of Funds in One Trust to Extinction of Debt in Another Trust for Same Purposes.*

James Ewart left a trust-disposition in which he directed his trustees to devote certain funds to building and maintaining a ragged school at Newton-Stewart. The ragged school was built accordingly. Four years afterwards his brother John died leaving a will, in which he directed his trustees to pay over to James's trustees £7000, to be held and applied for James's ragged school, but with power, should they consider the funds left by James sufficient for that school, to apply a part, not in excess of £500 of the £7000, in building a school to be attached to the ragged school for affording a superior education to children of the middle classes, and to apply the interest of the balance of the £7000 in maintaining it. Three years thereafter, Agnes, a sister of James and John, died, and in her trust-deed she directed her trustees to pay the residue of her estate to James's trustees, the interest to be applied by them to the ragged school, but with power to them, should they consider James's funds sufficient for the ragged school, to apply the whole or part of the interest of the said residue in maintaining the superior school founded by John. James's trustees received £3000 from Agnes's trustees, granting a discharge therefor. They treated the money of John and Agnes as one fund, and in order to avoid disturbing an investment of John's money, they applied that of Agnes to pay building and other debts incurred by his trust. The Court *dismissed* an action at the instance of the parents and guardians of children entitled to take benefit in Agnes's bequest of residue, seeking to make them personally liable for this application of her money, *holding* that the funds of both John and Agnes had been manifestly left for precisely the same object, and that the defenders had acted in *bona fide* and beneficially for the purposes of the trusts by treating them as one fund.

James Ewart, a draper in Newton-Stewart, who died on 10th April 1859, executed a trust-disposition and settlement on 28th December 1855, in which he directed his trustees, who were his brother John Ewart and William M'Guffog, farmer in Palwhilly, near Newton-Stewart, and John M'Gill, farmer, Barsalloch, Wigtown, as follows:—"*Septimo*, I direct and appoint my said trustees to set apart the sum of £4000 sterling for the establishment, building, fitting up, and maintenance of a ragged school at Newton-Stewart, and which shall be kept up, governed, and managed under and according to such rules and regulations, and for the benefit of such parties, as I, by any writing under my hand, and failing such writing, as my said trustees by any writing or deed of constitution under their hand, shall fix and determine." By a codicil of 8th February 1859 he made the following provision, viz.—"And I further appoint my said trustees to divide the whole residue or remainder of my said whole estate, heritable and moveable, so far as not hereafter disposed of by me by any writing under my hand, rateably among (first) the Ragged School, which by my said trust-disposition and settlement I appointed my trustees to establish, build, fit up, and maintain at Newton-Stewart."

The trustees proceeded to carry out the truster's intention, and founded a Ragged School, and framed rules for its management.

In 1863 John Ewart, a brother of James Ewart, died leaving a last will and testament, in which, on the narrative of the above provision made by his brother James Ewart for the foundation of the Ragged School, he declared it to be his will and intention that the sum of £7000 should be paid over by his trustees or trustee to the trustees under his brother's trust-disposition and settlement, to be by them held and applied in aid of and for promoting and furthering, so far and in such respects as could lawfully be done, the object and purposes for which the money left by him was settled by the same trust-disposition and settlement and codicil or addition thereto of his said brother, "with power to the said trustees or trustee for the time being of my said brother's settlement as aforesaid, should they or he consider that the funds left by my said deceased brother are sufficient for the efficient conduct, management, and support of the said Ragged School, to apply a part not exceeding £500 or thereby of the said sum of £7000 in building and fitting up in the same style of architecture as the said Ragged School, of a school to be erected at the north end of the master's house already erected or in course of erection, so as to complete the design of the present building, and to apply the interest or annual produce of all or any part of the balance of said sum of £7000 in the maintenance and support of said last-mentioned school, and which school shall be for the affording of a superior education to the children of the middle classes." He further provided—"And it is my will and intention that the balance of the said sum of £7000 shall be invested by the said last-mentioned trustees or trustee in their or his names or name, or in the names or name of such other persons or person, if any, appointed by them or him for that purpose, under any such writing or deed of constitution under their or his hands, as authorised by the said trust-disposition and settlement of my brother, the said James Ewart deceased, in or upon the parliamentary stocks or public funds of Great Britain, or at interest upon Government securities, or on the securities of any body corporate, or other public body authorised by Parliament to borrow money, but not in the purchase of shares or stock in any bank or railway, and to alter, vary, and transpose all or any of the said stocks, funds, and securities for or into any others of the description aforesaid from time to time, as often as may be deemed

expedient, or the said balance of same sum of £7000 shall, in like manner as directed by my said brother in his said trust-disposition and settlement with respect to any balance of the said sum of £4000, and the said residue and remainder as aforesaid, be invested by the said last-mentioned trustees or trustee, or in the names of the parochial boards for the management of the parishes of Penninghame and Minnigaff, jointly, or in the names of such person or persons or corporation or corporations as said last-mentioned trustees or trustee shall think proper, and the interest or annual produce of the balance of which said sum of £7000 shall be permanently applied for the improvement of and furthering the said school, and for promoting a higher standard of education in Newton-Stewart, and for the efficient repair, cleansing, painting, and decoration of the buildings, and otherwise for the maintenance of the said Ragged School and Superior School, under the rules and regulations."

James Ewart's trustees having resolved that the Ragged School was already sufficiently provided for, proceeded to erect the new school, since known as the High School, and they incurred an expenditure upon its erection, furnishing, fitting up, laying out, and enclosing, &c., of the sum of £3178, 13s. 6d., the building being erected under the superintendence of the same architect as had built the Ragged School, and who had been supervised in that work by John Ewart himself. By the time that John's legacy was actually handed over to them, on 16th July 1864, the building of the High School was almost completed; and after meeting some payments they on the same day invested £5500 of the amount in a deposit-receipt of the National Bank in terms of a special arrangement by which they thereafter received interest at the rate of 4½ per cent.

In 1866 Agnes Ewart, a sister of John and James Ewart, died leaving a trust-disposition and settlement dated 5th February 1863, when the High School was still only in contemplation, and in which she directed her trustees to pay the residue of her estate to the trustees under the settlement of her brother James, to be invested by them in such manner as they should think fit, "the produce or interest of such investment or investments to be applied annually by said last-mentioned trustees and their foresaids towards the support and maintenance of the Ragged School in Newton-Stewart instituted by my brother, the said James Ewart, under and in virtue of his said trust-disposition and settlement and codicils aforesaid, with power to the said last-mentioned trustees and their foresaids, should they or he consider that the funds left by my deceased brother, the said James Ewart, to or on behalf of said Ragged School, are sufficient for the efficient conduct, management, and support of said Ragged School, to apply the whole, or any part of the annual produce or interest of said residue, rest, and remainder of my said estate in the maintenance and support of a school which it is in contemplation to erect at the north-east end of the master's house, erected at the north-east end of said Ragged School, and which school so contemplated to be erected is to be for the affording of a superior education to the children (male and female) of the middle or higher classes." This school was to be governed in such manner as the trustees of James (failing directions by John) should appoint, and the two schools were to be called the "Ewart Institute."

On the 15th April 1870 the trustees of James Ewart received from Agnes Ewart's trustees the sum of £2595, 18s., which, by interest that had accumulated thereon before the payment, was increased to £3000, granting a deed of discharge therefor in their capacity of "surviving acting trustees under the trust-disposition and settlement and codicils of the deceased James Ewart, sometime draper in Newton-Stewart, and only surviving acting trustees of the Ewart Institute, Newton-Stewart." Out of it they paid a sum of £286, being arrears for the previous eight years of the salary of the factor for the trustees of James and John Ewart, at the rate of £35 per annum. Second, a sum of £647, 8s. 2d. was applied in paying off a balance of interest due upon an overdrawn bank account by James Ewart's trustees. The balance of £2072, 11s. 10d. was lodged on deposit-receipt in name of James Ewart's trustees on 18th April 1870, and remained so deposited till 14th November 1877, when the money was uplifted and applied to the payment of an overdrawn bank account by the same trustees. On 5th September 1879 they executed a deed of constitution whereby, on the narrative of the settlements of James and John Ewart, and that no rules had been made by the latter for the government and management of the High School, or of the Ewart Institute, and that they were about to invest in the names or for the behoof of the governors and managers after mentioned, the balance of the said sum of £7000, in order that the said balance might be held by them, and that the annual interest thereof might be permanently applied by them for the maintenance, improvement, or furthering of said High School, therefore they nominated and constituted certain persons—the Earl of Galloway, Cumming Andrews, and others—along with themselves, to be governors and managers of the Ewart Institute High School, and they laid down rules and regulations for the management of the institution. The 7th article of the deed was in the following terms:—"That the balance of said bequest of £7000, and any further donation, bequest, or endowment which may hereafter be obtained, shall, in terms of said will or settlement, be invested in name of said governors and managers in or upon the Parliamentary stock or public funds of Great Britain, or at interest upon Government securities, or on the securities of any body corporate, or other public body authorised by Parliament to borrow money (but not in the purchase of shares or stock in any bank or railway); with power to the said governors and managers to alter, vary, and transpose all or any of the said stocks, funds, or securities for or into any others of the description aforesaid from time to time as often as may be deemed expedient, and the interest or annual produce of the balance of which said sum of £7000, or of any further donation, bequest, or endowment, shall be permanently applied for the maintenance, improvement, or furthering of said High School and for promoting a higher standard of education in Newton-Stewart, and affording a superior education to the children of the middle classes, and for the efficient repair, cleansing, painting and decoration of the buildings, payment of

salaries, taxes, and other claims and expenses, or otherwise for the maintenance of said High School under the rules and regulations and for the purposes herein mentioned or referred to." This deed was submitted and accepted by minute of meeting of the managers and governors held on 29th August 1879. They were also managers and governors of the Ragged School. The sum of £5500 (of John's £7000) in the hands of James' trustees, which was held upon deposit-receipt at 4½ per cent. with the National Bank, and which they had been unwilling to disturb when Agnes' money was paid over to them, was uplifted and reinvested in a bond granted by the Greenock Harbour Trustees in the name of the new managers and governors created by the deed of constitution.

This action was raised by Cumming Andrews, a governor and manager of the Ewart Institute, and by certain other persons alleging themselves to be parents and guardians of children entitled to take benefit from the bequest of residue by Agnes Ewart, and was directed against M'Guffog and M'Gill as the surviving trustees of James Ewart, and as individuals, and also against the members of the Parochial Boards of Penninghame and Minnigaff, and against M'Gill and M'Guffog as governors of the Ewart Institute, and against M'Guffog as surviving trustee under the settlement of Agnes Ewart. The purpose of the action was to have it declared that it was the duty of M'Guffog and M'Gill, as James Ewart's surviving trustees, to have invested the sum of £3000, which they received from Agnes' trustees, in heritable or other safe securities, and to have paid the annual produce thereof annually towards the support and maintenance of the Ragged School instituted by James Ewart, or otherwise to have applied it in the maintenance of the High School of the Ewart Institute. Then followed conclusions against M'Gill and M'Guffog, as trustees of James, for accounting for the £3000 which had come to them from the estate of Agnes, and failing accounting for payment thereof. The pursuers stated in Cond. 6—"The defenders William M'Guffog and John M'Gill, although well aware of their duty with reference to the said £3000, have never invested the same, and they have not paid or applied any interest therefrom to or for the purposes hereinbefore specified. The fact is, that contrary to their duty, and in breach of the trust reposed in them, these two defenders have, since the receipt of the said £3000, grossly mismanaged and misapplied the same; and the result is, prior to the year 1879, the said £3000 was entirely lost through the gross and culpable carelessness and mismanagement of the said defenders."

The defenders stated—"(Stat. 3) . . . As by the terms of Miss Ewart's settlement it was clearly shown that her own and her brother John's funds should be applied to the same purposes and in the same way, the defenders did not consider it necessary to keep the funds of John Ewart's trust and Agnes Ewart's trust distinct; and as, further, they did not wish to disturb the £5500 investment [of John's money] which was got under special circumstances, and which was yielding a high rate of interest, they paid the money into their bank account in connection with the High School section of the Ewart Institute—*i.e.*, John's trust—which they had considerably overdrawn, owing to payments of expenses incurred in connection with the erection and fitting up of the schools. From that time down to the date of the transfer to the present governors, one account was kept by the trustees of their intromissions with the bequests of both John and Agnes, in the belief that the evident intention of the testators in their settlements warranted them in amalgamating the funds and dealing with them as a whole. On 5th September 1879 these defenders executed the deed of constitution in favour of the other defenders, and handed over the estate to the governors, which then consisted of the above sum of £5500, and the building and furnishings, fittings, walls, &c. If it is to be held as necessary that the bequests of John and Agnes be kept separate and distinct from each other, then the said residue of Agnes is included in said sum of £5500." "(Stat. 4) The governors of the institution appointed on 31st March 1883 a committee of their number to go over and audit the whole accounts of the defenders as trustees on the three trusts of John, Agnes, and Janet Ewart. Of this committee the pursuer Andrews was a member. The said committee made a report, of date 14th May 1883. . . . By said report it was found that the defenders' intromissions were all properly vouched, and that they had accounted for the whole moneys received by them. In the opinion of the reporters, however, the capital account, as in a question with the revenue account, had been encroached on to the extent of £510, 6s. 7d. The whole of the governors, *dissentientibus* the pursuer Andrews and one other, resolved to take no action on said report." "(Stat. 5) The defenders, in their management of the various Ewart trusts, acted throughout in *bona fide*, and with a view to promote the true intention of the trusters. Owing to their exertions and management, which were entirely gratuitously given, the Ewart Institute is in a most flourishing condition, and the High School successfully supplies the demand for secondary education in Newton-Stewart. Even assuming that the view of the reporters is right, and that, as in a question between capital and revenue, the former has been encroached on to the extent specified, the defenders maintain that they were justified in so acting during the first years of the school's existence; and that now that the school is flourishing, it will be quite easy to save out of revenue, and so replace the amount overdrawn from capital. In any view, this is a mere question of discretion, and one with which the governors as a body are alone entitled to deal."

The pursuers pleaded—"(2) The said residue having been lost through the gross and culpable carelessness of the defenders M'Guffog and M'Gill, they are bound to replace the same."

The defenders M'Guffog and M'Gill pleaded—"(2) The defenders having accounted for all the moneys received by them on account of Agnes Ewart's trust, they ought to be assoilzied. (3) The said moneys having been duly applied to the purposes of the trust, the defenders should be assoilzied. (4) Any question as to the distribution of payments between capital and revenue being properly cognoscible by the governors of the Institute, the present action at the instance of

the present pursuers should be dismissed."

Proof was led. Its import, so far as not stated in the foregoing narrative, appears in the note of the Lord Ordinary and the opinion of Lord Young.

The Lord Ordinary (FRASER) pronounced this interlocutor—"Finds, decerns, and declares in terms of the declaratory conclusions of the summons: Finds that the defenders William M'Guffog and John M'Gill did not invest the sum of £3000 received from Agnes Ewart's trustees in heritable or other safe securities, and that they are bound now to do so: Decerns and ordains the said William M'Guffog and John M'Gill, on or before the first sederunt day in October next, to invest the sum of £3000 in their own names as trustees, or in the names of the other defenders, the governors and managers of the Ewart Institute, to be held for the purposes set forth in the trust-disposition and settlement of Agnes Ewart, and reserves all questions of expenses: Grants leave to reclaim."

"*Opinion.*—Several members of a family of the name of Ewart devoted a large portion of their means to the promotion of education in the district of Newton-Stewart, from which they came. The outcome of their bequests has been the establishment of an institution in Newton-Stewart called 'The Ewart Institute,' which has been successful in its operations, and though cramped in its pecuniary resources has supplied a felt want. The present action has been instituted by persons who have a title to sue, for the purpose of challenging the mode in which the trustees of the different testators have administered the funds committed to their charge. The conclusions of the action have reference, however, only to the moneys left by one of the Ewarts, viz., Agnes; but as each brother or sister, in making his or her will, founded upon the wills of the other members of the family, the whole have become so united together that any statement as to the way in which the funds of Agnes were disposed of must be prefaced by a narrative of the wills of her two brothers.

"James Ewart, who was a draper in Newton-Stewart, by his trust-disposition and settlement, directed his trustees to set aside the sum of £4000 for the establishment, building, fitting up, and maintenance of a Ragged School at Newton-Stewart; and by a codicil to his will directed the residue of his estate to be in part applied to the same purpose.

"The trustees under James Ewart's deed proceeded to carry out the testator's intention. They founded a Ragged School, and framed rules for its management; and that Ragged School is now in working operation. He died in the year 1859.

"He had a brother called John Ewart, whose place of abode was Liverpool, and who died in the year 1863, leaving a last will and testament appointing trustees for the distribution of his estate. His ideas went beyond those of his brother James. The objects of the latter's benevolence were the children fitted for a Ragged School. But John thought that there might be ingrafted upon such an institution another for the education of the middle classes. He therefore left £7000 to be paid over by his trustees to the trustees of his brother James, to be applied by them for promoting and furthering the Ragged School schemes of his brother, but with power to his trustees, should they consider the funds left by James sufficient for the Ragged School, 'to apply a part, not exceeding £500 or thereby, of the said sum of £7000 in the building and fitting up, in the same style of architecture as the said Ragged School, of a school to be erected at the north end of the master's house already erected, or in course of erection, so as to complete the design of the present buildings, and to apply the interest or annual produce of all or any part of the balance of said sum of £7000 in the maintenance and support of said last-mentioned school, and which school shall be for the affording of a superior education to the children of the middle classes.'

"With regard to the investment of the balance of the £7000, after deduction of £500 for the building, he directed that it should be invested in parliamentary stocks or public funds, or upon Government securities, or on the security of any body corporate, or other public body authorised by Parliament to borrow money. He further directed that 'the interest or annual produce of the balance of which said sum of £7000 shall be permanently applied for the improvement of and furthering the said school, and for promoting a higher standard of education in Newton-Stewart, and for the efficient repair, cleansing, painting, and decoration of the buildings, and otherwise for the maintenance of the said Ragged School and Superior School.'

"The Superior School here spoken of is now called the High School. John Ewart's trustees thought that the funds left by James were sufficient for the support of the Ragged School, and therefore they resolved that the High School should be established. Their view of their power was that they could, out of the £7000 bequeathed by John, take as much as was necessary for the building of the High School; and in a report it appears that they spent, in all, in building, furnishing, and fitting, and on outside walls, the sum of £3178, 13s. 6d. The construction so put upon the trust-disposition of John Ewart was erroneous. Apparently at the time when he made his settlement it was in contemplation to build the High School, and he left the £7000 (all but £500) for the purpose of an endowment. So far as regards the building, his contribution thereto was strictly restricted to the sum of £500. He anticipated, no doubt, that the funds for the building, with the aid of his bequest, would be obtained by subscriptions from the general public; and that thus the balance of the £7000, viz., £6500, would then remain as an endowment towards the efficient support of the Institution. The trustees, however, took a different view, and did what they had no power to do. They applied the sum already mentioned towards the building, finishing, &c., of the High School; and no attempt was made by them to obtain subscriptions from the public or elsewhere.

"It now falls to make reference to the trust-disposition and settlement of Agnes Ewart, in regard to whose estate the present action has been brought. Agnes Ewart died in 1866, but she left a trust-disposition and settlement of later date than those of her two brothers James and John. By this deed she directed her trustees to pay the residue of her estate to the trustees under the settlement of her brother James, to be in-

vested by them in such a manner as they should think fit, the produce or interest of the investment to be applied by them towards the support and maintenance of the Ragged School, but with power to James Ewart's trustees, 'should they or he consider that the funds left by my deceased brother, the said James Ewart, to or on behalf of said Ragged School, are sufficient for the efficient conduct, management, and support of said Ragged School, to apply the whole or any part of the annual produce or interest of said residue rest and remainder of my said estate in the maintenance and support of a school which it is in contemplation to erect to the north-east end of the master's house, erected at the north-east end of said Ragged School, and which school so contemplated to be erected is to be for the affording of a superior education to the children (male and female) of the middle or higher classes.' At the time when Agnes executed this deed in 1863, the High School was still only in contemplation. She directs no part of her funds to be applied in the building of such a school. It is only the annual proceeds of the residue of her estate which the trustees are to spend, and these are to be appropriated to its maintenance and support if the trustees think there is enough for the Ragged School.

"The trustees received £2595, 18s., which, with interest that had accumulated thereon before the payment, was increased to £3000, and which must be held as the amount of the residue of Agnes. What they did with this money was first to pay, on 18th April 1870, a sum of £280, being arrears for the previous eight years of the salary of the factor for the trustees of James and John Ewart, at the rate of £35 per annum; second, a sum of £647, 8s. 2d. was applied in paying off a balance of interest due upon an overdrawn bank account by James Ewart's trustees. The balance of £2072, 11s. 10d. was lodged on deposit-receipt in name of James Ewart's trustees on the 18th April 1870, and remained so deposited till 14th November 1877, when the money was uplifted and applied to the payment of an overdrawn bank account by the same trustees. No part of Agnes Ewart's money was ever invested either in parliamentary stocks or any other stocks whatever. The whole money was paid away in meeting debts due by another trust. The defence of this proceeding is that the money of James and John Ewart and of Agnes Ewart was intended for the same purpose, and that therefore it was of no moment whether the obligations of James Ewart's trustees were paid out of John's legacy of £7000, or by applying the money from Agnes' estate of £3000 to the same purpose. There was a balance of £5500 in the hands of James Ewart's trustees which they had invested upon deposit-receipt at the rate of 4½ per cent. with the bank, and which being a secure and safe investment, they were unwilling to disturb. Therefore, instead of calling up so much of that money as was necessary to clear off the obligations of James Ewart's trust, the shorter and more easy course was adopted of applying Agnes' £3000 to that purpose.

"Now, it is quite true that there is not in this action any direct challenge of the application of John Ewart's funds to an unauthorised object. But this is done indirectly, because the £3000 from Agnes' estate has been taken for the purpose of liquidating the obligations of James Ewart's trustees who spent John Ewart's money. Now, if these trustees had no power to spend more than £500 on the building of the school, they certainly were not authorised to appropriate any portion of Agnes' money for that purpose. So far as concerns that money, all they had power to do was to apply the annual produce to the support of the school and nothing more; and when they paid the arrears of the factor's salary and the overdrawn bank account of James' trustees, they did what they had no power or authority to do.

"The result is that they must be ordained to invest the sum of £3000 upon proper security.

"The two defenders William M'Guffog and John M'Gill, when they received payment of the £3000 from the trustees of Agnes Ewart, granted a regular discharge for it. They granted this discharge in their capacity of 'surviving acting trustees under the trust-disposition and settlement and codicils of the deceased James Ewart, sometime draper in Newton-Stewart, and only surviving acting trustees of the Ewart Institute, Newton-Stewart.' On the 5th September 1879 they executed a deed of constitution, whereby, on the narrative of the settlement of James Ewart and John Ewart, and that no rules and regulations had been made by the latter for the government and management of the High School, 'and that we are about to invest in the names or for the behoof of the governors and managers after mentioned, the balance of the said sum of £7000 in order that the said balance may be held by them, and that the annual interest thereof may be permanently applied by them for the maintenance, improvement, or furthering of said High School,' therefore they nominated, constituted, and appointed certain persons, proprietors of estates, ministers and elders, along with themselves, to be governors and managers of the Ewart Institute High School, and they laid down rules and regulations for the management of the Institution. The 7th article of this deed is in the following terms—[*His Lordship here quoted the 7th article ut supra*].

"It does not appear from the proof, but it was explained to the Lord Ordinary, that the sum of £5500 which was held upon deposit-receipt with the National Bank had been uplifted, and that sum (or what remained undisposed of it) was invested in a bond granted by the Greenock Harbour Trustees, where the money at present remains in the name of the new managers and governors created by the deed of constitution. The defenders contend that the money of Agnes is in reality invested, seeing that there is more than £3000 under the control of the defenders, contained in the bond by the Greenock Harbour Trustees. This, however, is a view of the case which the Lord Ordinary cannot take. The money received from Agnes' estate was all expended and never was invested. In the report of the committee of the Governors of 14th May 1883, on which the defenders found, they set forth quite correctly that 'the whole capital has been exhausted by the trustees in their administration.' Now this capital must be replaced and put upon a distinct investment. How this is to be done is a matter for the consideration of the defenders themselves. The Lord Ordinary does not say that it would be incompetent by some

declaration of trust to appropriate a part of the bond now held by the managers of the Institute to that purpose. Whether this would raise any question as to John Ewart's £6500 is a matter with which we are not concerned in this action.

"The Lord Ordinary must add in conclusion an expression of regret that this action was instituted. The administration and management of what is called the Ewart Institute have been such as to deserve all commendation. The expense of management has been extremely moderate. Gentlemen of character and position have given their time and their labour to make the Institute a success, and they have succeeded. They have set agoing an educational agency which is a credit to the district, and it is only to be regretted that in the outset they did not spend a little money in taking legal advice as to their powers. If they had done so they would now have an endowment fund of £6500 and £3000=£9500, and would not have been under the necessity of reducing the masters' salaries and increasing the school fees. Perhaps yet it is not too late to appeal to that public support to which John Ewart looked for the erection of the High School when he subscribed only £500 to that purpose, and that in consequence there will be no further litigation as to the application of John Ewart's £7000."

The defenders reclaimed, and argued—James's trustees had rightly and naturally treated the funds handed to them by the trustees of both John and Agnes as funds to be slumped together and used for the same purpose, viz., the building and maintenance of the High School, for which provision was made in identical terms by both John and Agnes. They were quite, then, within their power in leaving undisturbed an unusually good investment of John's money and making temporary advances of Agnes' money to meet the overdrafts which resulted in building the High School, until things ultimately came right; M'Laren on Wills and Succession, ii. 393, *M'Leish's Trustees* v. *M'Leish*, May 25, 1841, 3 D. 922, and *M'Culloch, &c.* v. *Kirk-Session and Heritors of Dalry*, July 20, 1876, 3 R. 1182. They had acted in *bona fide*, and this action seeking to fix personal liability on them ought to be dismissed.

The pursuers replied—The only power to build the superior school was contained in John's will, and that was limited to £500. The defenders had exceeded their powers. They were personally liable for having taken funds from a separate trust to repay the excess of expense incurred beyond their powers.

At advising—

Lord Young—We have found this to be a perplexing and troublesome case. It is an action brought for the purpose of trying a question arising under the settlement of Agnes Ewart, and is directed against the trustees of her brother James Ewart, to whose trustees she directed her own trustees to pay over the residue of her estate. The purpose of the action is plainly, and indeed avowedly, to make the three gentlemen, who as the trustees of James received the funds of Agnes from her trustees, personally liable to refund the sum of £3000 which they expended chiefly in erecting a school in Newton-Stewart, upon which as the trustees of James they were directed to expend out of the money bequeathed by John a sum of £500—and not more—of his funds. They did spend more than £500 on this purpose, and they admittedly took the excess over £500 out of the estate of Agnes which was in their hands. The purpose of the action, as I have said, is to make them restore that. The facts of the case are few, though they present a perplexing aspect. The Lord Ordinary has set them out, I think, quite accurately in the note to his judgment. There were three charitable funds, all of which must be taken account of in the case here presented. The first was founded by James Ewart, a tradesman in Newton-Stewart, who died in 1859. He left to trustees a legacy of £4000 and the residue of his property for the purpose of founding a ragged school there. The second was founded by John Ewart, the brother of James. He was in trade in Liverpool, and died in 1863 leaving £7000 to be paid by his trustees to the trustee of James, to be applied by them for providing his brother's school, with power to them if they thought the funds of James sufficient for the Ragged School, which they did, "to apply a part, not exceeding £500 or thereby, of the said sum of £7000 in building and fitting up, in the same style of architecture as the said Ragged School, of a school to be erected at the north end of the master's house already erected or in course of erection, so as to complete the design of the present building, and to apply the interest or annual produce of all or any part of the balance of said sum of £7000 in the maintenance and support of said last-mentioned school, and which school shall be for the affording of a superior education to the children of the middle classes." The third foundation is that of Agnes, and is that immediately in question. She died three years after John, viz., in 1866. By her will she directed her trustees to pay, as John's did, the residue of her estate to the trustees under the settlement of James, to be invested as they thought fit, the proceeds to be applied towards the maintenance of the Ragged School instituted by James, with power, if they thought the estate of James sufficient for the Ragged School, to expend the whole or part of the residue in the maintenance and support of the school which was to be erected at the north-east end of the Ragged School, to afford education to the middle and higher classes, and to be governed according to the regulations which John Ewart might appoint.

I can perceive no distinction between the will of Agnes and that of John. James began and left money to a school, John followed, leaving his money to the trustees of James to be expended on his school, the residue above what might be required for it to be expended in maintaining a superior school. Agnes died last, and did precisely the same as John. The two gentlemen who are immediately called as defenders in this action were the trustees of James. It is said by the Lord Ordinary (and also in the condescendence), quite accurately, that the money of James was sufficient for his Ragged School, and therefore that of John and of Agnes was devoted to the superior school ultimately called the High School. On 5th September 1879 the defenders M'Guffog and M'Gill executed a deed of constitution of the High School of the Ewart Institute, and it appears that the Earl of Galloway and others, including Mr

Cumming Andrews, one of the pursuers, are the managers and governors acting under it, and that at a meeting of the managers and governors on 29th August 1879 the deed of constitution was submitted and accepted.

I have already observed more than once that the only direction to expend money in the building of a superior class school is in John's will, and he limits that sum to £500. The trustees found that was not enough for building a school, and that a large expenditure was necessary. They had invested John's money well, and when they came to meet the expenditure on the school —about £3000—they had Agnes' money in their hands, and they took that. They say that they did so in order to avoid the necessity of disturbing the investment of John's money. Whether they would have been entitled to discontinue the investment of John's money and take more of it than £500 to build the school we cannot determine in this action. My impression, and I think that also of your Lordships, was and is that they at least acted in good faith, and in the honest discharge of their duty when they made the expenditure which they did, and that there are no reasons sufficient to involve them in personal liability. If that be so, it is a thing immaterial to anybody whether they took the money which was in excess of £500 out of the estate of John or that of Agnes, for both of them were devoted by the pious donors to the same purpose. If there be personal responsibility, and they must make the money good—that is, pay the excess over and above the £500—they cannot replace the money of Agnes' by taking John's, and if there be not personal responsibility, I think it immaterial whether the money was taken out of the one fund or out of the other. The same trustees had the funds in one pocket or the other, and it would be idle to order them to be kept separate, and the one to be replaced by an equivalent from the other. I have before observed that in this action, which is brought by the pursuers professedly as interested only in the settlement of Agnes, and for the recovery of her money, I do not think we can determine whether it would be lawful for the trustees to take the money out of John's funds or not. I have expressed my impression that, acting in *bona fide* for the purpose of carrying out the will and beneficially, they are not personally liable. But if it is thought by anyone with an interest to make them liable that they are so, they must be sued as administering John's will as well as Agnes', and if a proper action be brought against them as administrators of both funds, so that the only question which can be usefully decided may be determined, it will be determined. But that cannot be done in this action, and I am unable to affirm the proposition on which this action is based—that the money "having been lost through the gross and culpable recklessness of the defenders M'Guffog and M'Gill, they are bound to replace the same." I have therefore to propose that this action be dismissed with expenses.

Lord Craighill, Lord Rutherfurd Clark, and the Lord Justice-Clerk concurred.

The Court dismissed the action.

Counsel for Pursuers (Respondents)—Trayner — M'Kechnie — Dunsmore. Agent — Thomas Carmichael, S.S.C.

Counsel for Defenders (Reclaimers)—Mackintosh—Graham Murray. Agents—J. & J. Milligan, W.S.

Wednesday, May 27.

SECOND DIVISION.

[Sheriff of the Lothians.

SCOTT *v.* MACDONALD AND OTHERS.

Process—Res judicata, *Requisites of*—Media concludendi.

To found a plea of *res judicata* it is required that in the action the decision in which is founded on, the pursuer, the *media concludendi*, and the defender must have been the same as in the action in which the plea is stated.

An action was raised against a public company for damages for breach of an agreement into which the pursuer had entered with it, and by which the company agreed to work a system of which he was the inventor. *Held* that the decree in this action was not *res judicata* in a subsequent action of damages which he, as a shareholder, raised against the directors concluding for repayment of the price of his shares and for damages in respect of their having, contrary to their memorandum and articles of association, failed to work his system, and having otherwise mismanaged the business.

This action was raised in the Sheriff Court of the Lothians at Edinburgh by James Gibson Scott against John Hay Athole Macdonald, Q.C., and others, for payment of (1) the sum of £5, and (2) the sum of £2500.

The pursuer in his condescendence stated the following facts, which were admitted by the defenders. The defenders were the whole directors of the Money Order Bank (Limited), which was registered under the Companies Acts on 12th March 1881, and had its registered office in Edinburgh. The objects of the company as stated in its memorandum of association were—(1) To conduct or carry on a trade or business for facilitating the transmission of money by means of money orders or stamped paper; (2) To adopt and carry out an agreement between the pursuer on the one part, and Mr Macdonald, on behalf of the company, on the other part, relative to the acquirement by the company of the pursuer's inventions for facilitating the transmission of money by means of money orders or stamped paper, and to work the same. The articles of association contained a provision that this agreement was thereby adopted and confirmed by the company, and that its provisions should be binding upon, and be carried into effect by the company. The company subsequently issued a prospectus which stated that the pursuer's inventions had been adopted. The agreement proceeded, *inter alia*, on the preamble that whereas the company was to be formed for the purpose of conducting a money order business on the principle of the system invented by the pursuer, a certain agreement had been come to between the parties, various particulars of which were here set forth by the pursuer.