

struction is that the level of the ceiling of the saloon must not exceed in height the level of the ceiling of the shop, whether that consists of one or more floors, so long as it is in fact only one shop. In other words, the open space required, and which must be unbuil on by the Act, is opposite that portion of the building designed for dwelling-houses, the object in view being to secure free air and thorough ventilation for the dwellings.

"The plea that the height of the saloon would be prejudicial to the lights of the respondent's property is clearly untenable, as under the provisions of the Act the open space or area has reference solely and directly to the protection of light and air for the benefit of the dwelling-houses in 'new buildings' without regard to the neighbouring properties.

"As the Dean is of opinion that the respondents were justified in appearing in order that the part of the operations in which they were interested might be carried out under supervision, and as various pleas have been advanced that have not been sustained, it has to some extent been a case of mixed success, and therefore expenses have not been awarded."

The defenders appealed to the Court of Session, and argued—The Act contemplated only that the ground floor was to be used as a shop and offices, and any saloon erected behind that part must be of the height of the ceiling of the ground floor only. If any division was made internally, then the saloon must be only of the height of the division. The provision was intended for the benefit not only of the persons living above the shop but also to secure ventilation for the houses round about. Here the saloon was meant to be the height of two floors, and therefore was against the provisions of the Police Act.

The petitioner's counsel was not called upon.

At advising—

LORD JUSTICE-CLERK—I have been unable to discover in what respect it is said there has been a contravention of the 130th section of the Dundee Police Act of 1882. The provisions of that clause are perhaps not of the most lucid description, but the intention and, I think, the result are clear enough. There is leave given to build shops, &c., on the vacant space in question, provided that "if in any new building the ground floor is designed for and to be occupied as shops or business offices the Commissioners shall, notwithstanding that the building otherwise is intended to be used as a dwelling-house or for dwelling-houses, permit the erection of saloons or warerooms in connection with such shops or offices, and immediately behind the same," unless they see reason to determine otherwise; "but the level of the ceiling of such saloons or warerooms shall in no case exceed in height the level of the ceiling of such shops and offices." In the present case there is a shop, and the ceiling of the shop is of the height of two storeys, and this saloon is only alleged to be higher than the ceiling of the shop would have been if the shop had consisted only of one floor. As I understand it, the real meaning of the provision is, that when it is only a shop, the saloon may be as high as the shop. I think the Dean of Guild is right, because in the strictest con-

struction of these words what has been done is precisely in accordance with the terms of the statute.

LORD YOUNG—I am of the same opinion, and think the judgment of the Dean of Guild is right, and clearly so. The clause on which the objection is founded is applicable to every building intended to be used as a dwelling-house, and requires that it should have a clear space behind. But if the building was intended to be used as shops or anything but dwelling-houses the rule as to clear space has no application at all; there is no provision for vacant space behind. But then it occurred to the framer of the Act that buildings might be erected and used partly for one purpose and partly for another; and the part of the clause which is founded upon applied to that case. Of course the reason of the thing would apply to shops on the upper floor and dwelling-houses on the under. The purpose being to secure ventilation of dwelling-houses, if the dwelling-houses were below and the shops above that would be a good reason against an erection behind. But if the shops were below and the dwelling-houses above one might, so far as there were shops, erect saloons behind, leaving the ventilation of the upper portion entirely free. The height does not signify in the least, because otherwise it would be quite irrational. If the height of the shop extended to the very slates, then the liberty to build behind extends to the very slates; and the division of the shop within—whether it had one floor or half-a-dozen floors—was of no matter or consequence to anybody.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The Court refused the appeal.

Counsel for Trustees—Guthrie—Macfarlane. Agents—Henderson & Clark, W.S.

Counsel for Petitioner—D.-F. Mackintosh, Q.C.—Murray. Agent—J. Smith Clark, S.S.C.

## HOUSE OF LORDS.

Tuesday, June 29.

(Before Lord Chancellor Herschell, Lords Watson, Blackburn, Fitzgerald, and Ashbourne.)

ANDREWS AND OTHERS v. EWART'S TRUSTEES.

(*Ante*, May 27, 1885, vol. xxii. p. 60; 12 R. 1001.)

*Trust—Personal Liability of Trustees—Application by Trustees of Capital of One Trust to Restore that of Another where Income of Both Applicable to Same Purpose.*

James Ewart by his will appointed funds to be employed in founding a ragged school. John Ewart subsequently died, and left £7000 to the trustees of James for the same object, but with power, if they considered that the funds of James were sufficient for

the ragged school, to apply part, not exceeding £500, of the £7000 in building and fitting up adjoining it a school for the middle classes, and to apply the interest "of all or any part of the balance of the said sum of £7000 in the maintenance and support of said last mentioned school." Thereafter Agnes Ewart died leaving money to be paid over to the trustees of James on trust for the maintenance and support of the ragged school, and with power, if the funds of it were sufficient, to apply the interest of the whole or part of the funds in the maintenance and support of John's higher class school.

Before the death of Agnes the trustees had erected a higher class school adjoining the ragged school, as directed in John's settlement, but £500 being quite insufficient to build it, had spent more than that sum in building it, and had also spent more than the income in administration and maintenance of it, and when the money of Agnes was paid over to them, they, on the ground that the trusts were substantially the same, applied it in replacing the debit which had thus arisen on John's trust. An action was brought against them as trustees of Agnes by persons interested in the schools to have the money taken from the trust of Agnes replaced and separately invested.

*Held (aff. Second Division)* (1) that the trustees being gratuitous charitable trustees acting in the *bona fide* endeavour to execute the trust, and not having diverted the funds from the trust objects, but only at most erred as to the way of carrying them out, were not personally liable to make good money they had so applied; but (2) (*alt. Second Division*) that it was competent in the action, though brought against them as trustees of Agnes, to inquire also into the administration of John's trust, and case remitted for inquiry as to whether, if at all, the encroachments in question ought to be replaced by the future revenue of the school.

This case is reported *ante*, May 27, 1885, vol. xxii. p. 660.

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD WATSON—My Lords, the respondents William M'Guffog and John M'Gill are the surviving trustees under the settlement of the late James Ewart, draper in Newton-Stewart, who died in April 1859. After his death the respondents and their co-trustee, the deceased John Ewart, a brother of the truster, in compliance with the directions contained in the settlement, built a Ragged School in Newton-Stewart, and set aside funds for its endowment and maintenance. John Ewart, who died in April 1863, seems to have taken an active interest in the execution of his brother's trust, and in the design and erection of the Ragged School buildings.

By his last will and testament, dated 21st July 1862, John Ewart appointed his executors to pay over the sum of £7000 to the trustees of his brother James, to whom he gave power, in the event of their considering that his brother had made sufficient provision for the maintenance of the 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, 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 a superior education to the children of the middle classes, which children shall be bound to pay, and the rector or master shall be entitled to exact, such modified fees as shall be fixed by the trustees of my said brother's settlement." He also directed that in said event the interest or produce of the balance of the £7000 should 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." James's trustees being of opinion that sufficient provision had already been made for the Ragged School, resolved to devote the whole of John's bequest to the purposes of a secondary school. They accordingly proceeded to build a school-house, now known as the High School. The new school was completed in September 1864; it was shortly afterwards opened, and has ever since been available to all members of the public who may choose to send children there to be instructed. The £7000 was paid over to James' trustees on the 16th July 1864.

Agnes Ewart, the sister of James and John, who died in January 1866, by her trust-disposition and settlement, dated 5th February 1863, appointed the residue of her estate to be paid to the trustees of James, with power to them, in the event of their considering that the Ragged School was already sufficiently provided for, "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." The trust-estate was not finally wound up until the 18th April 1883, when the free residue, amounting in all to £3000, was paid over to the respondents as trustees of James, subject to the trusts of Agnes Ewart's settlement. That sum was made up of £2595, 18s. of principal and £404, 2s. of accumulated interest.

The present action was brought by the appellants in January 1884, and concludes, *inter alia*, to have it found and declared that the respondents are bound to invest the said sum of £3000 in good securities, and to apply the interest thereof annually towards the support and maintenance of the Ragged School or of the High School, and failing production of such securities, to have the respondents decerned and ordained to invest or pay such sum of £3000 in order to its being invested at sight of the Court. The appellants alleged not only that the respondents had failed to invest the money, but that they had grossly mismanaged and misapplied it, and that in consequence it had been entirely lost through their gross and culpable negligence.

The Lord Ordinary (Fraser) on the 4th June 1884 allowed both parties a proof of their respective averments, which was thereafter taken before his Lordship. The following facts, which it is necessary to keep in view in considering the judgments of the Lord Ordinary and of the Second Division of the Court, appear from the evidence, and are not disputed. In erecting and opening the new High School the respondents had paid or incurred liability for (1) £1727, 13s. 2d. for building the school; (2) £615, 14s. 11d. for finishing, furnishing, &c.; (3) £296, 16s. 6d. for advertising the school, &c.; and (4) £538, 8s. 11d. for outside walls—these sums amounting in all to £3178, 13s. 6d. The expenses of administration and maintenance had also been in excess of the annual revenue, and the consequence was that at the time when the residue of Agnes Ewart's estate was paid over the respondents held an investment of £5000 of John Ewart's bequest, and had a largely over-drawn account with the National Bank. On receiving the £3000 from the trustees of Agnes the respondents applied it in payment of the debit balance on that account. It is in my opinion proved, and it was assumed by the Lord Ordinary and by the Judges of the Second Division, that the sum of £500 mentioned in John Ewart's trust-disposition and settlement was altogether insufficient for the erection and fitting up of a school in the same style of architecture as the Ragged School so as to complete the design of the existing buildings.

The Lord Ordinary, by interlocutor of the 12th July 1884, gave the appellants decree in terms of the declaratory conclusions of their summons, and ordained the respondents on or before the first sederunt day in October 1884 to invest the sum of £3000 in terms of Agnes Ewart's trust. On a reclaiming-note the Second Division recalled his Lordship's interlocutor and dismissed the action.

The judgments of both Courts, as explained in the opinions delivered by their Lordships, appear to me to proceed on too narrow a view of the scope of the present action. The Lord Ordinary seems to have thought that it was not necessary or even competent to inquire into the details of the respondents' administration of John Ewart's bequest, or to determine anything with respect to that administration. His Lordship, speaking with reference to the replacement of the capital of Agnes Ewart's bequest, says—"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 for 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." Practically the same view appears to have been taken by the learned Judges in the Second Division, who seem to have been of opinion that in this action no question as to the personal liability of the respondents could be raised or determined. Lord Young, who delivered the judgment of the Inner House, said—"If it is sought by anyone having an interest in the matter to make them personally liable, then they must be sued as administering John's trust as well as Agnes' trust; and if the proper action is brought against them

as persons charged with both sets of funds under the directions of both deeds, so that the question of personal liability or not can be determined, then the only question which can be usefully decided or decided with any purpose whatever, or which anybody has a real interest in, would in that way be determined. But that cannot be done here."

The consequence of that restricted view of the limits of the action has been, that without deciding anything as to the administration of John's bequest, the Lord Ordinary has given decree against the respondents for the full amount of £3000, and the Judges of the Second Division have dismissed the action *simpliciter*. In any aspect of the case I think the Lord Ordinary erred in directing the investment of more than £2595, 18s., the capital sum received by the respondents from Agnes Ewart's estate. Even if the decree had been limited to that sum the respondents would have been left free, as his Lordship points out, to deal with John's bequest, in such manner as to lead to a new litigation involving the very same questions which have been argued before your Lordships upon the present record. On the other hand, according to the judgment of the Inner House, the appellants must bring a new action before they can obtain any decision with regard to the personal liability of the respondents.

It appears to me to be undesirable that the expenses already incurred in this action should be thrown away, or that a decision should be given which leaves the real questions at issue between these parties to be determined in a new litigation with reference to the administration of John Ewart's bequest. Either of these alternatives might, without benefiting the litigants, prove very prejudicial to the interests of the High School. But I do not think your Lordships are compelled by the shape of the present action to adopt one or other of them. It is true that the conclusions of the summons which are directed against the respondents in their individual as well as their fiduciary character, relate exclusively to the bequest of Agnes Ewart, but the defence stated by the respondents is wholly rested upon their administration of John Ewart's £7000. In my opinion the statements and pleas put upon the record by the respondents make it competent for the Court to adjudicate upon all matters touching the administration of John's trust so far as may be necessary in order to decide the main question of the respondents' liability, whether as trustees or as individuals, to replace the funds taken by them from Agnes's trust. The balance of John's £7000, under deduction of the cost of building, and the capital sum bequeathed by Agnes, are subject to the same trusts; and if the respondents would have been entitled to apply John's funds to the purposes for which they used the money which they got from Agnes' estate, it would, in my opinion, necessarily follow that they were justified in using her money in order to avoid disturbing an investment which they had already made with John's funds.

There are other reasons for which I am unable to assent to the opinions expressed by the Lord Ordinary in giving judgment. His Lordship appears to me to have dealt with the present case as one depending upon the ordinary rules which govern the liabilities of trustees to beneficiaries

under a private trust, and to have overlooked the fact that this is an *actio popularis*, as well as the distinction which exists in law between the liability of private trustees and that of trustees administering a charitable trust for behoof of the public interested. Both these considerations seem to have been present to the minds of the learned Judges of the Second Division, although their Lordships thought themselves precluded by the form of the action from giving judicial effect to them. Lord Young expressly states the opinion of the Court to have been that the respondents "acted in good faith, and in the honest discharge of their duty, in making the expenditure which they did, and that there were no grounds sufficient to involve them in any personal responsibility."

This is an action in which the appellants have an undoubted title to insist. They do not, however, sue in their own private interest, but in the interest of all members of the public who have or may have occasion to avail themselves of these means of education afforded by the High School of Newton-Stewart. The Court must, therefore, have exclusive regard to the interest of the general community, and that, in other words, is the interest of the school. The question is not what decree would the appellants be entitled to demand if they were beneficiaries under a private trust, but what course is *tota re perspecta* best for the interest of the school. Even if the respondents had been liable for their administration to the same extent as private trustees, I should still have thought that it was not only within the competency, but that it was the duty of the Court, before pronouncing any decree to consider how far the respondents might be entitled to recoup themselves by taking (*exempli gratia*) the furniture of the school, or by accumulating the future income of these bequests, and what effect their so doing might have upon the efficient maintenance of the school. The pursuers in a case like the present have, in my opinion, no right to demand a partial decree, which will leave unsettled matters affecting the future administration of the trust; and the Court may, in its discretion, refuse to give any decree until it is enabled to form a judgment upon all such matters.

The rule as to the personal liabilities of charitable trustees for the public was thus expressed by Lord Eldon in *Attorney-General v. Corporation of Exeter* (2 Russell 54)—"With respect to the general principle on which the Court deals with the trustees of a charity, though it holds a strict hand on them, it will not press severely upon them when it sees nothing but mistake. It often happens from the nature of the instrument creating the trust that there is great difficulty in determining how the funds of a charity ought to be administered. If the administration of the funds, though mistaken, has been honest and unconnected with any corrupt purpose, the Court while it directs for the future, refuses to visit with punishment what has been done in the past. To act on any other principle would be to deter all prudent persons from becoming trustees of charities." The principle thus laid down by Lord Eldon does not apply with the less force to the circumstances of the present case, because in the case his Lordship was dealing with the funds had been applied to objects which were not within

the charity. To expend trust funds upon objects not contemplated by the founder is a much more violent inversion of his trust than to expend them in attaining one of the main objects of the trust by means which he did not contemplate. In the Scottish case of *Clephane v. The Lord Provost and Magistrates of Edinburgh* (L.R., 1 Sc. and Div. 421) the Lord Chancellor (Westbury) observed:—"Now, in both countries (England and Scotland) this principle has prevailed, namely, that there shall be a very enlarged administration of charitable trusts. You look to the charity which is intended to be created, and you distinguish between it and the means which are directed for its accomplishment."

I cannot discover in the words of John Ewart's bequest the least trace of an intention, or even an expectation, on his part, that there should be delay in building the High School or that there should be accumulation of the interest of his bequest of £7000, or of any part of it, for the purpose of creating a building fund. He very distinctly prescribes the architectural character of the building which was to be erected, at the same time that he limits the amount to be expended on it to £500. These two directions are now proved to have been absolutely incompatible; evidence was scarcely needed in order to demonstrate that £500 was quite insufficient to meet the cost of the structure which he directed. It might be difficult to determine whether the erection of a High School uniform with the Ragged School which he had already built as one of his brother's trustees, or the limitation of its cost to £500, was the leading purpose in the mind of the testator. Had it been necessary to decide the point I should have been disposed to hold that his main purpose was to complete the Ewart Institute according to the same style in which it had been begun by himself, and that he erred in calculating the cost of its completion. The terms of his will are, to say the least, ambiguous, and I am willing to assume, for the purposes of this case, that the respondents were mistaken in their construction of them. Under the influence of that mistake they proceeded immediately after the testator's death to erect the High School. Had they not done so it is difficult to speculate as to the precise period of time which must have elapsed before the inhabitants of Newton-Stewart derived any advantage from his bequest. The income arising from the balance of the £7000 is specially devoted to the maintenance of the school after it has been erected, and the accumulated interest of £500, together with the principal, would probably have been insufficient to build such a school as is directed by the testator until several generations had passed away. The Lord Ordinary suggests that John Ewart looked to the aid of public subscriptions for the erection of the High School, when he subscribed only £500 to that purpose; but the suggestion is not to be found in John Ewart's will, and it appears to me to be at variance with his wishes and intentions as expressed in that document.

The appellants in the argument addressed to your Lordships did not disguise the fact that the present action was brought for the purpose of fixing upon the respondents personal liability for the amount of residue received by them from Agnes Ewart's trustees, leaving them to recoup themselves to such extent, if any, as they might

be found to be entitled to out of John Ewart's bequest. Having regard to the law applicable to charitable trustees in their position, and to the whole circumstances of the case, I agree with Lord Young and the other Judges of the Second Division in thinking that no case has been made out for subjecting the respondents to personal liability. Their *bona fides* is not impeached. The money which they are said to have misapplied has been spent in executing, according to the specific directions of the testator, one of the main purposes of the trust, and the buildings, furniture, and fittings, which represent their capital expenditure, are all in the possession of the trust, and are indispensably necessary for carrying on the work of the High School. The only administrative error which the respondents have committed consists in their having honestly mistaken the mode in which the testator's purpose was meant to be attained. There does not appear to me to be any reasonable ground for supposing that the interests of those classes of the community for whom the High School was to be established have suffered through the respondent's error. They have now had for nearly twenty-two years the benefit of an efficient secondary school, which they would not have enjoyed during that period, nor probably for many years to come, if the respondents had treated the sum of £500 and its accruing interest as the only fund available for building a school according to the directions of John Ewart's will.

I am accordingly of opinion that the respondents ought to be absolved from the conclusions of the action in so far as these are directed against them in their individual capacity. But there are various questions arising upon the administration of John Ewart's trust which I think ought, in the interest of the school, to be settled in this action, but which cannot be satisfactorily adjusted with the aid of the evidence before us. It appears to me to be for the consideration of the Court whether the encroachments which have been made on the capital (whether of John or Agnes Ewart's bequest) ought to be repaired to any, and if so, to what extent by accumulation of future income? That will necessarily depend upon the present condition of the High School and its funds, and to some extent upon the amount of fees which the Court may consider it reasonable to exact from scholars. It appears to me that if your Lordships remit the cause to the Court of Session, the Second Division, before disposing of these matters, may either direct such inquiry as they may think proper, or allow the parties to amend their record and adduce further evidence. I do not think it is either necessary or expedient to give any special directions in making a remit, as I am satisfied that the Court will rightly exercise their discretion as to the best course to be pursued. Nor do I think the fact that John Ewart's funds are at present in the hands of the managers of the school ought to form any impediment to such matters being inquired into and determined in this action.

I therefore advise your Lordships to reverse the interlocutor of the Second Division, dated the 27th May 1885, except in so far as it recalls the Lord Ordinary's interlocutor of 12th July 1884, to declare that the respondents are entitled to absolvitor from the whole conclusions of the

action in so far as directed against them individually, and subject to that declaration to remit the cause to the Second Division of the Court to proceed therein as may seem just, with power to determine all questions as to expenses hitherto incurred by the parties in the Court of Session. I think the appellants and respondents ought each to bear their own costs of this appeal, and that these costs ought not to come out of either John or Agnes Ewart's bequest.

LORD CHANCELLOR—My Lords, I entirely concur in the conclusions which have been expressed in the opinion of my noble and learned friend. In this action the dealings of the respondents with the fund bequeathed by Agnes Ewart are alone impeached, but I think it is impossible to dispose of the case without having regard to the questions which have been raised as to the disposal of John Ewart's bequest also. The money received by the trustees from the estate of Agnes Ewart was employed in discharging liabilities incurred by the trustees in relation to the school whilst acting under the trust created by John Ewart. At the time the money was received under Agnes' will the trustees had an invested fund of £5500. If the liabilities which the money so received went to discharge were lawfully incurred, and might properly have been met by using part of this invested fund, I think it cannot be doubted that the trustees would have been perfectly justified in employing Agnes' bequest as they did—treating the invested capital *pro tanto* as representing it—and this is in fact the defence set up by the respondents. The appellants, however, allege that the liabilities which Agnes' bequest went to discharge were not properly incurred. It therefore becomes essential to investigate the question thus raised. It was alleged by them that looking at John's bequest alone, inasmuch as £500 only was destined for employment upon the completion of the building which he desired to be completed, there ought to have remained £6500 of invested capital. Now, there can be no doubt that part of the capital left by John had disappeared through an excess of expenditure on the building over the sum of £500, and part of it in an excess of expenditure on the management of the school, beyond the interest derived from the capital sum remaining after the completion of the building.

Now, as regards the expenditure on the building, I entirely agree with what my noble and learned friend has said. I think myself that the main object of the testator was the completion of the building in the manner described by him, and I confess that for my part I think that if the expenditure had been limited to £500, and the building had been left uncompleted, or only partly finished in the style and manner designated by the testator, the trustees would have been disregarding that which appears to me to have been of the substance of the testator's intention.

As regards the expenses of management, I think the case stands upon a somewhat different footing. There can be no doubt that both John Ewart and Agnes Ewart intended the interest to be used in the management of the school, and the capital to remain as a permanent investment, and I think that the appellants were per-

fectly justified, having regard to the manner in which the capital had been dealt with, for what I may term income purposes, in coming to the Court to seek to have the affairs of the institution put upon a sounder footing. But I think the appellants have put their case too high in seeking to impose personal liability upon the respondents, and I think too it is to be regretted that charges of personal misconduct were insisted upon in the pleadings in the action, for which I do not think there is any foundation.

No doubt it may at the outset have been difficult to carry out the declared intention of the testator, that the interest only should be expended upon the management of the school, but I think that the trustees erred in making the expenditure they did. It was their duty to administer the trust according to the dispositions of the testator, not to make other dispositions which might seem to them better suited to carry out the main purpose which he had expressed in founding the school, and I think that if it appeared to them that the main purpose could not be efficiently accomplished without departing from the terms of the trust, their proper course was to have come to the Court for a scheme to enable them to depart from the declared intention of the testator so far as was necessary for the purpose of carrying out that main object. But although it might have been better that they should have come in the first instance to the Court to sanction what they thought it expedient to do, yet I can entertain no doubt that they acted perfectly honestly and with the very best intentions with regard to the trust which it was left to them to administer. Under those circumstances I think it is impossible to come to the conclusion that the Court should hold them personally liable in respect of the expenditure of the money although they have departed from the strict letter of the trust.

My Lords, I entirely concur in the view which has been expressed by my noble and learned friend as to the proper way to deal with this action, namely, by remitting the cause to the Court below to make further inquiries in the sense which he has indicated. There is only one question upon which I perhaps entertain a somewhat stronger view than he has expressed, and that is with regard to replacing so much of the capital as has been expended upon the management of the school as distinguished from what may properly be termed the capital purpose, namely, the erection and completion of the building. I think that in determining how the fund should be dealt with in the future it should be borne in mind that both the testator and the testatrix did intend to establish a permanent endowment, and did not intend that the capital should be exhausted during the early years of the institution, and the school afterwards left unendowed. It appears to me, therefore, that if provision can, consistently with the main object of the bequest, be made to replace out of the future income the capital which has been expended upon management purposes, it ought to be done. To do it hastily would perhaps cripple the charity, it may be that it can only be done very slowly, but this will be done, having regard to the fees charged, the object of the bequest, and all the other circumstances of the case. Taking all these matters into consideration, I think that

the object of the testator to create a permanent fund, the income of which alone was to be applied to the support of the school, should be distinctly kept in view.

My Lords, I concur in thinking that the interlocutor appealed from should be reversed, with the declaration which my noble and learned friend has stated.

**LORD BLACKBURN**—My Lords, I also agree in the opinion which has been delivered by my noble and learned friend on my right (Lord Watson), and I think the case should be remitted in the manner which has been proposed. I do not think that I can add anything with advantage to what has been said by the Lord Chancellor and by my noble and learned friend near me (Lord Watson) as to the mode in which the Court below have to exercise their discretion when the case is remitted to them. I think that probably until they have ascertained the facts and figures it is impossible to say how their discretion should be exercised, and I should therefore prefer to leave the Court, as I understand it is proposed, unfettered in the exercise of their discretion until they have ascertained the facts.

**LORD FITZGERALD**—My Lords, at the close of the argument in this case we had all agreed as to the conclusion to be arrived at, but delayed delivering judgment in order that the decree to be pronounced should be properly expressed by my noble and learned friend (Lord Watson), so as to lessen further litigation and be a guide to the parties. My Lords, I entirely concur in the reasons expressed by my noble and learned friend, and in the extent and shape of the order which he has proposed for your Lordships' consideration.

**LORD ASHBOURNE**—My Lords, I also entirely concur in the conclusion at which your Lordships have arrived, and having had an opportunity of reading the opinion of my noble and learned friend opposite (Lord Watson), I do not think it necessary to trouble your Lordships with any further observations.

Interlocutor of the Second Division of the Court of Session, dated 27th May 1885, except in so far as it recalls the Lord Ordinary's interlocutor of 12th July 1884, reversed: Declared that the respondents are entitled to absolvitor from the whole conclusions of the action in so far as directed against them individually: Subject to that declaration, cause remitted to the Second Division of the Court of Session to proceed therein as may seem just, with power to determine all questions as to expenses hitherto incurred by the parties in the Court of Session, including power to order repayment of any costs already paid: Appellants and respondents each to bear their own costs of this appeal; these costs not to come out of either John or Agnes Ewart's bequest.

Counsel for Appellants—Sol.-Gen. Asher, Q.C.—MacClymont. Agent—Andrew Beveridge, for Thomas Carmichael, S.S.C.

Counsel for Respondents—Sol.-Gen. Davey, Q.C.—Graham Murray. Agent—John Graham, for J. & J. Milligan, W.S.