very peculiar kind without any capital. That business consisted of purchasing sugar to a very large extent upon the Greenock Sugar Exchange, consigning that sugar to parties in Ireland from whom he had no orders, and trusting to their accepting the consignment, drawing upon them to a very large extent for the value. Of course a business of a more precarious and reckless kind could hardly be conceived. A man begins business without a shilling of capital, and incurs large liabilities by the purchase of sugar, and he trusts to be able to pay off these liabilities by forcing consignments upon persons who have not employed him. The natural consequence followed that he found himself behind the world. He was £2500 behind in the year previous to his failure, but he went on notwithstanding until he was £6000 behind, and then proceedings were taken against him, apparently of a criminal character, for it appears from the proof he was apprehended when attempting to abscond. He says that his failure to pay 5s. in the pound arises from his having in the last six months before his sequestration lost £800 though depreciation, but that would not account for his being £6000 behind; and the Sheriff-Substitute finds that the statement of the bankrupt upon this matter is unsupported by any other evidence whatever. In these circumstances it appears to me, while there is evidence of most reckless trading, bringing about the almost inevitable consequence, that there is nothing proved upon the part of the defender which can possibly meet the requirements of the statute that his failure to pay 5s. in the pound arose from circumstances for which he is not justly responsible. He seems to me to be responsible entirely for having incurred debts at all, and not being able to discharge these debts, and it is impossible to disturb the interlocutor of the Sheriff, which is based upon grounds of the strongest possible kind.

Lord Deas—It is abundantly clear that the statute applies to the case of this bankrupt. The only question is, whether he has proved that the reason why he could not pay five shillings in the pound has arisen from causes for which he is not responsible. The Sheriff has found not only that it is not proved that this is the case, but that his bankruptcy arose from causes for which he is responsible, and I am humbly of opinion that the proof satisfactorily makes out what the Sheriff finds—that not only is it not proved that his inability to pay arose from circumstances for which he is not responsible, but that it arose from causes for which he is justly responsible. I am clearly of opinion that what the Sheriff finds is made out, and if so, we have no choice in the matter, but must refuse this petition.

Lord Mure—After all the applicant has stated, I find it impossible to find the Sheriff wrong, but, on the contrary, think he has taken quite a sound view of this case.

Lord Shand—I concur in thinking that the applicant has failed to discharge the *onus* laid upon him of proving that his inability to pay five shillings in the pound was due to causes for which he is not responsible.

The Court refused the petition.

Counsel for Objecting Creditors—R. V. Campbell. Agent—A. Wyllie, W.S.

Tuesday, December 11.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

WILLIAMS AND OTHERS (VESTRY OF ST JUDE'S) *v.* WAKEFIELD AND OTHERS.

Trust—Liability of Trustees.—Trustees of Voluntary Church.

For some time prior to 1869 an Episcopal school was carried on at the expense and under the management of D, whose property it was, and who carried it on in connection with the congregation of St J., of which he was a vestryman. D having become bankrupt, the work of the school was carried on by the church, and the trustees and vestry of the church acquired the school from D's trustee. The title was taken in names of certain members of the vestry and certain trustees of the church, and interest on the price was annually charged in the church accounts against the school. Thereafter D, who had been discharged from his sequestration, became treasurer of the church. In 1874 the school was sold by the vestry and trustees for a greatly enhanced price, and those vestrymen and trustees in whose names the title stood conveyed it to the purchaser, and D as church treasurer received the price. He applied to the purposes of the church the price paid out of its funds for the school, and another sum which the vestry and trustees had determined to apply out of the price on behalf of the church, but he dealt with the balance as his own, and subsequently again became bankrupt and left the country. The vestry and congregation then sued the vestrymen and trustees in whose name the title to the school had stood, and who had discharged the purchaser, for an accounting for the price of the school and payment of this balance, as being the property of the church. *Held* (*rev.* judgment of Lord Kinnear) that the price of the school having been paid under the defenders' authority to the treasurer of the church, who was the proper person to receive it, the defenders had no duty of supervision over him, and therefore, assuming that the balance sued for ought to have been applied to church purposes, were not liable for its loss.

The congregation of St Jude's Episcopal Church, Glasgow, is a separate and independent one, and the church and grounds connected therewith are vested in certain trustees by disposition granted in 1863. By the constitution of the church, which is set forth in a declaration of trust by the trustees, it is, *inter alia*, declared—"*Fourth*, the vestry shall consist of the incumbent, who shall be *ex officio* chairman of all meetings of the vestry, two vestrymen appointed by him, two by the congregation, and two by the trustees. The vestrymen shall be elected for two years . . . . *Sixth*, the whole temporal affairs of the church shall be under the control and management of the vestry, who shall be bound to appoint a treasurer, and the whole revenues of the church arising from seat rents, collections, or otherwise,

except the offertory at the communion-table, which shall be at the disposal of the incumbent for the poor of the congregation, shall be under their control and management." The *Thirteenth* article provided that the trustees to hold the church property should be G. J. Doddrell, J. C. Wakefield, and A. Monro, who should be entitled to resign, and in the event of a vacancy by resignation or death, the place of such party should be filled up by the vestry. This article also nominated the first vestry. "*Fifteenth*, the treasurer to be appointed by the vestry shall keep accurate accounts of the receipts and expenditure of said church, and shall annually, before the said meeting of said congregation, prepare an abstract thereof and submit it to the trustees, who shall examine the same, and certify the same as correct if they shall so find it, and the vestry shall cause the same, with the trustees' report thereon, to be printed and copies thereof placed in each pew along with the said notice calling the said annual meeting. *Seventeenth* . . . none of the trustees or vestrymen shall be under any personal liability for any act done in their respective capacities."

Mr J. C. Bousfield, one of the defenders of this action, was treasurer of the congregation from 1863 to 1871. Mr G. J. Doddrell was treasurer from 1871 to 1879, when a Mr Todd became treasurer.

One of the original vestrymen was Mr G. J. Doddrell, who was greatly interested in mission and school operations in Cowcaddens district, Glasgow. In 1861 he acquired a piece of ground there, on which he built a school, which he allowed to be in a great measure used by St Jude's congregation for school and mission purposes, but the management of which remained by his desire quite apart from that of the church. In 1869 the firm of Murdoch & Doddrell, of which Mr G. J. Doddrell was a partner, and the partners thereof, were sequestrated, and as all connected with St Jude's were anxious that the work should be carried on, Mr Edward Doddrell, brother of Mr G. J. Doddrell, entered into a minute of agreement, dated 25th and 30th October 1869, with Mr Anderson, the trustee on the sequestrated estate, by which he agreed to purchase the school and premises thereto belonging for £800. On the preceding 29th September it had been carried at a meeting of the vestry of St Jude's that the school "be obtained for St Jude's at a cost not exceeding £800, in the name of Messrs Lowndes and Cochrane" (two of the vestrymen) as trustees, and that its work be continued, and on 14th October a resolution had been carried at a meeting of the vestry and trustees that the school be obtained "in the names of the trustees and present vestry of the church out of the funds at present invested by the church trustees." On the same day, at a subsequent meeting, a like resolution was carried—the price to be £800, and the title to be "in name of the parties who hold the church, and that a rent equal to 5 per cent. on the price and expenses, after providing for repairs, should be charged to the school fund, and paid over annually to the church treasurer." Thereafter (with the consent of Edward Doddrell) the trustee on the estate of Murdoch & Doddrell and of G. J. Doddrell disponed the school at the price of £800 to Alexander Monro, J. C. Wakefield, C. H. Bousfield, R. S. Lowndes, and Alexander Cochrane, and the survivors or survivor, and their or his assignees and disponees. The disposition was thereafter registered in name of these gentlemen. Messrs Bousfield, Lowndes, and Cochrane were then vestrymen; Messrs Monro and Wakefield trustees. The church property (consisting of stocks in railway companies) which it was intended under the resolution of 14th October to sell in order to pay the price was not then sold in consequence of the state of the market, but a credit was opened with a bank, and the school purchased out of funds so acquired. Thereafter a rent equal to 5 per cent. on £800 was annually charged against the school fund in favour of the church funds. In subsequent minutes of the vestry, accounts for repairs and cleaning of the school were authorised to be paid, and arrangements were made for letting a room in it for certain weekly meetings. In the end of 1873 the vestry took the subject of the continuance of the school into consideration with regard to the new arrangements for public education under the Education Act of 1872. At a meeting of trustees and vestry of 4th November 1873 the question of selling or letting the school to the Glasgow School Board came up, and it was agreed that it be sold if the Board would buy it. It was also agreed that any sum remaining over after repaying the church the amount (£800) advanced for its acquisition, and the sum of £263 paid off by the church, "should be disposed of according to the advice of Mr G. J. Doddrell." This sum of £263 had been paid to Mr Bousfield, the former treasurer, to clear off a balance due to him at the time he retired from the office of treasurer and became a trustee.

Thereafter the school was sold for £2510 to the School Board, the disposition, which was dated April and May 1874, being granted by the gentlemen above named (except Mr Monro, who had died), in whose names the title still stood. The price was paid by the School Board to Mr Hodge, the law-agent for G. J. Doddrell, treasurer of the church, and he (Mr Hodge) paid it over to G. J. Doddrell. The church-books, which he kept as treasurer, showed of the date immediately thereafter a payment to him of £800 and of £263, and he applied both these sums to the church purposes as above resolved on. No further reference to interest on the £800 appeared. The whole price of the school was at first paid into the bank account of the church, but the balance, after the deduction of the two sums of £800 and £236 just mentioned, was a few days afterwards withdrawn and paid into G. J. Doddrell's own bank account, and never appeared in any of the church accounts.

In July 1879 G. J. Doddrell (who had been again bankrupt in 1876 as a partner of the Port-Dundas Sugar Company) resigned the treasurership, and soon after he left Scotland and settled in Portugal. He had not accounted to the church for the £1450, the balance of the price of the school after payment of the sums of £800 and £263 above-mentioned, and declined to do so. By a minute of the trustees and vestry in August 1875 it had been resolved, that he having given no account of how that balance had been disposed of, he should give such account to the trustee and vestry. In 1876 it had been resolved at a meeting of the trustees and vestry, that in order to obtain control of this sum in the interest of the church, the gentlemen in whom the title had stood, and who had conveyed to the School Board, should be requested to take such

steps as they thought best to secure the money for the church. No such steps had been taken before G. J. Doddrell left Scotland, by which time he had expended the balance as his own funds.

In 1882 this action was raised by the Rev. W. Williams and others, the incumbent, and the whole members of vestry resident in Scotland and acting (except Mr Lowndes, who was a defender), as a majority of the vestry, and as representing the whole male seat-holders being communicants who had held seats for one year and were of full age, conform to a minute of meeting of seat-holders held to consider the question. The defenders called were Messrs Wakefield, Bousfield, Lowndes, and Cochrane, of whom the two former were, at the date of the conveyance to the School Board, trustees of the church, and were still trustees, while the two latter were vestrymen at the date mentioned, and continued to be so, Mr Cochrane till 1876 and Mr Lowndes up till the date of this action. The pursuers concluded—(1) for declarator that the price of the school (£2510, with £31, 7s. 2d. of interest to the date of the payment of that price) paid by the School Board of Glasgow "belonged to the congregation of St Jude's Church, and were received by the defenders on account of the said congregation and as trustees for their behoof;" (2) for count and reckoning by the defenders for that price; (3) whether count and reckoning were made or not, the pursuers concluded for payment of £2548, 7s. 2d., as the balance of the defenders' intromissions.

The pursuers averred—"(Cond. 4) The defenders were bound to account to the said vestry of St Jude's for said sums so received by them. They have failed to do so. By minute of 4th November 1873 the vestry resolved that the said sum of £2510 should be applied, as it is believed was done, in the first place, to repayment to the church of the sum of £800, obtained by the sale of stock belonging to the church, and, in the second place, to repayment to the treasurer of the church of the sum of £263, 4s., being part of a sum owing to him on his accounts as treasurer. The balance of the said sum of £2510, after deducting the two sums just mentioned, was not handed over to the church by the defenders, and they have failed to account for the same, as well as for the additional sum of £38, 7s. 2d. . . . It is denied that the money received from the School Board was paid to Mr George J. Doddrell. . . . But if the money was received by Mr Doddrell the defenders were not entitled to entrust it to him. As treasurer of the vestry he had no right to receive or hold the said funds. At all events, the defenders were not entitled to allow them to remain in his hands unaccounted for. His annual accounts contain no entry of the sum in question. Under the 15th article of the constitution of the church these accounts fell to be submitted to the trustees in order to be examined and certified by them. The defenders, who are trustees, either failed altogether to examine the said accounts, or they passed the same knowing that they were incorrect. Further, it is explained that Mr Doddrell was sequestrated in 1869. He subsequently joined the Port Dundas Sugar Company, and again was bankrupt in or about 1876."

They pleaded—"(1) The money in question being the property of the said congregation, and falling to be administered by the pursuers, as the vestry thereof, the pursuers are entitled to decree of declarator as craved. (2) The defenders having received the said money but not having accounted therefor, are bound to count and reckon with the pursuers as concluded for."

Separate defences were lodged for (1) the defenders Wakefield and Bousfield, and (2) Lowndes and Cochrane.

The former defenders averred—"The sale to the School Board was reported by Mr Lowndes and Mr G. J. Doddrell to the quarterly meeting of the vestry on 8th January 1874. The disposition was handed to Mr G. J. Doddrell after signature, and he, in the knowledge of all concerned, undertook the settlement of the transaction. Explained that these defenders did not receive or intromit with any part of the price, which, as was well known to the pursuers and to all concerned, was received, not by the defenders, but by Mr G. J. Doddrell. Mr G. J. Doddrell at that time held the office of treasurer, and he either received and retained the money in that capacity, or was authorised by all concerned to do so. The question as to the application of the balance of the price, which was the subject of much discussion, lay over, and at a meeting of the trustees and the vestry, held on 2d August 1875, a discussion took place (as the minute bears) 'respecting the disposal of the balance of the money resulting from the sale of Dobbie's Loan School, at present in the hands of Mr G. J. Doddrell.' The said balance remained in the hands of Mr George J. Doddrell, as treasurer of the vestry, in the knowledge and with the concurrence of all concerned, including the pursuers, and was still in his hands when he resigned the treasurership on or about 10th July 1879, as was well known to the pursuers. Mr George J. Doddrell, as treasurer, was appointed by and was and is responsible to the vestry, and not to the defenders. He is at the present time engaged in his business of sugar-refining in Portugal, and residing there, and if he has not accounted for the sum which he received, it is believed to be because he maintained that he is not bound to pay it over, or at least to pay it to the pursuers."

They pleaded—"(2) No title to sue. (3) The pursuers' averments are not relevant or sufficient to support the conclusions of the action. (4) These defenders having had no intromissions with the fund in question, are not liable to account. (5) The money in question having been received and retained by the treasurer under authority of the vestry, and with their knowledge and assent, and having been repeatedly acknowledged by them as being left in their treasurer's hands, the defenders are not liable therefor; and *separatim*, the pursuers are barred from insisting in this action. (6) The defenders not being responsible for the treasurer's intromissions, and the sum, if irrevocable, having become so through delay and negligence on the part of the pursuers and their constituents, the defenders should be assoilzied with expenses."

Lowndes and Cochrane pleaded—"(2) The pursuers having no right or title to insist in this action, or to call on the defenders to account, the defenders should be assoilzied. (3) The pursuers' statements are irrelevant. (4) The defenders never having received the money in question, they should be assoilzied. (5) The said money

having been duly accounted for, the present action is unnecessary, and in any event the defenders not being responsible for Mr G. J. Doddrell, the defenders should be assoilzied."

A proof was led by which the facts above narrated were established.

The Lord Ordinary (KINNEAR) decerned against the defenders for the sum of £1458, 3s. 5d. sterling.

"*Opinion.*—In this action the pursuers seek to make the defenders personally responsible for the balance of a sum of £2510, which they received as the price of a school-house and mission-house which they had held as trustees for the congregation of St Jude's, and which they sold in 1874 to the School Board of Glasgow. The ground of liability alleged is, that while two sums of £800 and £263, 4s. have been properly applied for the purposes of the congregation, the balance was improperly allowed by the trustees to remain in the hands of Mr Doddrell, a former treasurer of the vestry, who has appropriated the money, and who has now left the country.

"There are two grounds on which liability is resisted—(1) It is maintained on behalf of all the defenders that the pursuers have no title to sue, because after the sum of £800 had been accounted for, the balance did not belong to the vestry or congregation of St Jude's. This plea is in my opinion untenable. The school-house was purchased in 1869 from the trustee on the sequestrated estate of Murdoch & Doddrell by the trustees and vestry of St Jude's, the price was paid out of the general funds of the church, and the subjects were conveyed by the trustee to the four defenders and the late Mr Alexander Monro. The disposition is *ex facie* absolute, but it is not disputed that the disponees were not the absolute owners, but held in trust, and there can be no question that they held as trustees for the congregation or vestry of St Jude's.

"The subjects were sold in 1874 for a price greatly beyond what had been paid for them in 1869, but it is not maintained that the surplus belongs to the former owners from whom the vestry of St Jude's had bought, and as they had bought out-and-out, and acquired the absolute property of the subjects, it is plain that the whole price belonged to them, and that they alone have the benefit of the increased value of their property from whatever cause it may have arisen. It is said that in the accounts of the vestry the purchase-money of £800 is treated as a loan upon which interest is charged, but that is a matter of book-keeping which is perfectly consistent with the pursuers' contention, and indicates nothing more than that in the administration of their affairs they thought it proper or convenient that a special account should be kept for this particular fund. The minutes show that the trustees and vestry were of opinion that the money they had gained by the sale ought to be applied, not for the general purposes of the church, but for some special purpose analogous to that for which the school-house was originally purchased. No special appropriation, however, has yet been determined upon, and whether it should still be made appears to me to be a question for the congregation or its administrators, which can in no way affect the right of the latter to recover the money from their own trustees unless they have already accounted for it, or are otherwise relieved from liability to account.

"(2) The remaining question is, whether the defenders are liable to make good the loss which, according to the pursuers' contention, has arisen through their negligence. It is not in my opinion necessary to consider a question which has been contested by the defenders *inter se*, viz.—Whether the duty of holding or securing such a fund as that in question lay upon the vestry or trustees under the constitution? I am of opinion that all of the defenders who held the property and received the price have charged themselves as trustees, with the purchase-money which they so received, and are liable to account for it. It appears that they allowed it to be received by Mr Doddrell, and that he paid it into a bank account kept in his own name, that the two sums of £800 and £263, 4s. were applied as already mentioned, and that on the 23d May 1874 the balance of £1458, 3s. 5d. was drawn out by Doddrell, and is still unaccounted for. It is clear from the evidence of the defenders, and from the minutes of the trustees and vestry, that this sum was not left in Mr Doddrell's hands on the footing that he had any personal right or interest in the money, but solely as treasurer of the church, and because of their confidence in him, and especially in the minutes of 2d August 1875 and 10th April 1876, at the first of which all the defenders were present, and at the second all but Mr Lowndes, they distinctly recognised the duty incumbent upon them of requiring him to account. It appears from the first of these minutes that they thought he should be consulted as to the mode in which the sum should be applied, but merely as their adviser in that matter, for they 'resolved that any sum remaining over after repaying the church the amount advanced for the acquisition of the school, and the sum of £263, 4s. paid to the late treasurer, should be disposed of according to the advice of Mr Doddrell,' and upon that resolution the minute proceeds, 'and no account having been hitherto rendered as to how the balance had been disposed of, that Mr Doddrell be requested to give the trustees and vestry an account of the same.' Again, on the 10th of April 1876 the yresolved that the gentlemen 'to whom the conveyance was originally made, and who signed the conveyance to the School Board, be requested to take such steps as they think best to secure the money for the church.' Nothing was done, or nothing effectual, for the purpose of carrying out these resolutions, but they distinctly recognise the position which the pursuers now maintain, that the money was held for the church, and that these gentlemen were charged with the duty of securing it.

"I am therefore forced, however reluctantly, to the conclusion that the defenders, as trustees of this fund, permitted it to remain in the hands of their treasurer without taking any step whatever to secure it for the trust-estate, that in so doing they neglected the duty which they had undertaken; that as the consequence of their neglect the money has been lost to the trust-estate, and that they are personally responsible to make good the loss. The case is undoubtedly one of hardship, for these gentleman were gratuitous trustees, and their error arose only from exuberant confidence in a co-trustee upon whose good faith they had no doubt great reason to

rely. But the case falls in my opinion within the rule which was explained and applied in the recent case of *Gordon's Trustees* v. *Gordon*, March 18, 1882 [19 Scot. Law Rep. 549], and there appears to me no alternative but to pronounce a similar judgment."

The defenders reclaimed.

Argued for Wakefield and Bousfield—(1) The funds derived from the sale of the premises were in no way the property of St Jude's Church. After the mission-house and school-house were acquired by the congregation of St Jude's, they were to be conducted just as they were before G. J. Doddrell's bankruptcy, and were simply held in trust for the price advanced for the building, and entirely independent of St Jude's. The pursuers then were not entitled to get at these funds and place them in the coffers of St Jude's. (2) But assuming that the funds did belong to St Jude's Church, the proper person under its constitution to receive them was the treasurer The defenders had made payment to this treasurer, and this amounted to payment to the vestry. (3) This was an action against all the trustees for money lost. There was no proof of loss at all, inasmuch as G. J. Doddrell admitted he got the money. He should have been sued as the treasurer into whose hands it had come.

The defenders Lowndes and Cochrane adopted the argument for the other defenders, arguing further that under the constitution of the church the duty of auditing the accounts was laid on the trustees alone, and therefore that they in the capacity of vestrymen were in no way liable.

The pursuers replied—The minutes of meeting of the vestry, and of the trustees and vestry jointly, clearly showed that these funds were held for the Church of St Jude's, and that the defenders were charged with the duty of securing them. They allowed them to remain in the treasurer's hands without taking any steps to recover them to the trust-estate, and therefore they were personally liable for the loss occasioned by this neglect of the duty—*Gordon's Trustees* v. *Gordon*, cited by the Lord Ordinary.

At the close of the debate the pursuers' counsel craved leave to amend the record by substituting for the latter portion of the 4th article of the condescendence, as quoted above, an additional article (condescendence 5), to the following effect:—"In reference to the answers for the defenders Wakefield and Bousfield, and to the statement of facts for the defenders Lowndes and Cochrane, the following averments are made:—At the date of the said conveyance to the School Board Messrs Wakefield and Bousfield were trustees of St Jude's, and they have since continued to act in that capacity, while Messrs Lowndes and Cochrane were members of the vestry, and continued to be so—Mr Cochrane till 18th February 1876, and Mr Lowndes till the month of October 1882. The receipt for the price of the school granted to the School Board is referred to. If the money was received by Mr Doddrell the defenders were not under the constitution of the church entitled to entrust it to him. As treasurer of the vestry he had not, under the constitution of the church, right to receive or hold the said funds. At all events, the defenders were not entitled to allow them to remain in his hands unaccounted for. His annual accounts contained no entry of the sum in question. Under the 15th article of the constitution of the church these accounts fell to be submitted to the trustees in order to be examined and certified by them. The defenders, who are trustees, either failed altogether to examine the said accounts, or they passed the same knowing that they were incorrect. Further, the whole defenders were, either as trustees or vestrymen, in a fiduciary position towards the congregation, and they all knew, or ought to have known, that the money in question was in the hands of Mr Doddrell; but although the matter was more than once in the years 1875 and 1876 specially brought under their notice they failed to take any steps to recover the money or to bring Mr Doddrell to account. Further, it is explained that Mr Doddrell was sequestrated in 1869. He subsequently joined the Port Dundas Sugar Company, and again was bankrupt in or about 1876." The pursuers also proposed an additional plea-in-law, as follows—"(4) In any view, the defenders Bousfield and Wakefield are liable to account for the said funds in respect that they failed to exercise any supervision over the treasurer of the vestry, or to take any steps for recovery of the said funds."

At advising—

Lord Justice-Clerk—The Lord Ordinary has decided this case on the ground that it is an action against four trustees of St Jude's Church, Glasgow, who were appointed to hold a certain piece of house property for the good of the church. They sold that property under instructions, and granted a disposition to the disponee, and they received the money, a sum of £2500—a very good bargain apparently for whoever the true proprietor was—because the subject originally cost £800, and there was thus a profit of £1700 on the transaction with the School Board. I suppose that house property had risen in the meantime.

This action was brought against the four trustees on a distinct allegation that they had never brought it over or accounted for it in any way to the church. And there is no other allegation whatever to be found in the record excepting this, that if they did pay the money to Doddrell, who was the treasurer, he was not the person to whom they ought to have paid it, and he was not entitled to receive it. That is the only question raised in this record. And, singularly enough, while the pursuers' plea is, that the defenders "having received the money but not having accounted for it, they are bound to count and reckon with the pursuers who received the money did not account, the plea of the members of the vestry who were also recipients of the money is, that "the money in question having been received and retained by the treasurer, under the authority of the vestry, and with their knowledge and assent, and having been repeatedly acknowledged by them as being left in their treasurer's hands, the defenders are not liable therefor." And also, that the defenders "not being responsible for the treasurer's intromissions, and the sum, if irrecoverable, having become so through delay and negligence on the part of the pursuers and their constituents, the defenders should be assoilzied." The Lord Ordinary on considering the case was of opinion that the persons who received the money have failed duly to account for it, and that Doddrell

was not entitled to receive it. And the reclaiming-note that we have now under consideration is a reclaiming-note against his interlocutor.

It is now said, without any accuracy in point of fact, that the real nature of the action was an action against the vestrymen, not only those who received the money, but against the vestry as a vestry, for leaving the money in Doddrell's hands. I think that is a wresting entirely of this action from its original purpose. I do not say in the least—and I must not be understood to express any opinion on that matter—that there may not be a claim against the vestry, and the individual members of the vestry, for not having seen that their treasurer Doddrell for a period of ten years did not account for this money which he undoubtedly kept in his hands, but I can see very serious difficulties in the way of that contention if it had been intended to bring it.

In the first place, there is a question—I do not think it at all necessary to the judgment I am going to propose—but there is a question in regard to Doddrell's relation to this particular surplus fund. £800 was the amount which was paid for the building. The church was repaid that sum, and they also repaid the balance which they owed to the treasurer. As I have said, when the property came to be sold to the School Board there was a large surplus, and the question that arises is, who is entitled to the surplus price? Well, Mr Doddrell was entitled to raise that question; but I do not think we have any materials here as regards the question with him. That would be quite a different matter, and if the congregation had brought an action against the vestry for having failed in their duty, any such question would have required to be very closely considered. The liability of the vestry, at all events, is not to be assumed. It would require to have been considered whether the claim of indemnity in the constitution did not cover any allegation which could be made in regard to their negligence. But this is not an action founded on negligence on the part of the vestry, but solely and entirely on negligence, or rather non-fulfilment of their duty, by the trustees who sold to the School Board. And the Lord Ordinary has decided against these trustees.

I am of opinion that the judgment of the Lord Ordinary is not a sound judgment. I think it quite clearly proved that these trustees paid over to the treasurer of the church the price which was received. I think they were entitled to pay it to the church—to the treasurer of the church—and that having paid it, they are not now responsible to pay out of their own pockets the amount of the surplus to the pursuers. To tell the truth, I think it a most unfounded action, and an attempt that never ought to have been made to make persons responsible who have discharged their obligations—who in my opinion did neither more nor less than their duty.

I am of opinion that the interlocutor of the Lord Ordinary's interlocutor should be altered and the defenders assoilzied from the conclusions of the action.

Lord Young—I am of the same opinion, and upon the same grounds. It is only necessary, I think, to attend to the facts of the case, which are not very complex, in order to see that the result which your Lordship has arrived at is the right one. Doddrell, the late treasurer of this chapel or congregation, or of the vestrymen thereof, it is manifest from the evidence, was a man of great piety, and very anxious to promote the cause of religious education. There is no doubt whatever about that. He was not only an office-bearer in this church, but at his own hand, and at his own expense, he established a school in the Cowcaddens. From such history as we have of it, the school was successful enough to pay its own expenses after it was set agoing. But the building was his. I do not know whether he built it or bought it, but the school was his property, acquired at his own expense, and the school was set agoing by his energy. It was an Episcopalian school, for he was a zealous member of St Jude's Church. All that we see leads to this conclusion, that he was carrying on this work by his own energy, and at his own expense entirely, down to 1869, when unfortunately his mercantile affairs got into disorder, and he became bankrupt. In October of that year after his bankruptcy, and when a Mr Anderson was acting as trustee in the bankruptcy, his brother, a Mr Edward Doddrell, came forward to rescue the school from the sequestrated effects; and he entered into an agreement accordingly with his brother's trustee to buy for £800 the school which had been so zealously conducted by him in connection with the Episcopalian Church, although without any interference on their part, or without any contribution in money from them. Now, it was certainly not unreasonable that this church, having £800 invested apparently in railway shares, should be willing to give that sum, and to take the bargain off the hands of the treasurer's brother Edward, which he had made with the trustee in bankruptcy, and thus acquire the school. And that is what they did. And the returns from the school were such as to yield 5 per cent. upon the sum of £800 which was thus paid, and down to the time when they sold it to the School Board at a very large profit in 1874—a period of four or five years. That was a very good investment, especially when we consider the price of £2500 which was got for the subject from the School Board. And when the trustees advanced that sum of £800 under the circumstances which I have stated, and the nature and character of which would not be varied by the mere language which you use to express it, it was necessary to appoint trustees to hold the property of the school. It would have been awkward to have vested the property of this school in the Cowcaddens in the trustees for the church. The deed of trust did not apply to property in any respect except the church and the ground on which it was built, and the carrying on of that church. It applied to nothing else, and Mr Doddrell, besides, explained that he was anxious that this school of his own establishing and carrying on for so many years should not go into the hands of the church. He says that he insisted upon special trustees being selected to take the title to the school, and four gentlemen were selected accordingly. It so happened that two of them were trustees of the church, and the other two vestrymen of the church, and that may have led to their having been selected. But I do not think this case, as it has been presented on this record, would have been different in any respect if those gentlemen had been strangers to the

church. I think it would have been precisely the same, and it is an accident of no manner of significance or importance that two of them were at the time trustees and two of them were vestrymen of the church. The office of trustee for a church is in any case a temporary office, and may be resigned at any time; while the office of vestrymen endured only for two years, unless there happens to be a reappointment. No doubt, at the request of the vestrymen and trustees who had advanced the £800, the title to the property was taken in the defenders' names. The deed was no doubt prepared by the agent for the vestry, and they do not appear in the title as trustees at all. It is *ex facie* absolute. They held it, and I suppose they did not interfere in any way; but out of the profits of the school 5 per cent. upon the £800 was drawn by the treasurer for the vestry for the time being. And in 1874 the property was sold to the School Board—a very advantageous transaction for the vestry of St Jude's, the £800 being turned into £2500. But for Mr Doddrell's bankruptcy the sale to the School Board would have been to his pecuniary advantage; and I assume from all we know of it, that if his affairs had been prosperous, and he had got this pecuniary advantage, he would have used the money, as he had used so much before, for charitable or benevolent purposes. I have no doubt about that at all. It would have gone to him to use it for charitable or benevolent purposes at his discretion—on what he thought best and most profitable. And if his brother had been allowed to carry out the transaction in 1869 nobody can doubt for a single moment that when the profitable sale was made to the School Board, three or four years thereafter, he, as a brother and a man of honour, would have allowed his brother, in whose behalf he had interposed when he was down in his luck, during the period of his bankruptcy, to have all the benefit; possibly the law would have enabled Edward Doddrell to take the benefit himself; but people would have had their own opinion of his conduct if he had done so. Now, Doddrell's brother vestrymen in St Jude's, who had just acted a brotherly part—which Doddrell's own brother was prepared to do—probably at some inconvenient sacrifice to themselves personally, though at none to themselves as a vestry, for they got 5 per cent. on £800—had to consider what was to be done with this great profit which had been made by the sale to the School Board. And really it seems to me that it was altogether becoming and rational, and within their power, when they said that they should allow their treasurer Mr Doddrell, in whose behalf they had interposed when, as I expressed it, he was down in his luck, to have the greater part of the benefit of it. They took their £800 back, and also a share in the profit to the extent of £260. Beyond that they merely said—Well, it was your school; you established it; we interposed merely at a period of emergency in your affairs, and we shall leave you to dispose of the balance in your own way after paying the £800 and the £260. I say I think that was entirely within their power, and entirely becoming; and I make these observations only to repudiate any assent on my part to such language applied to Mr Doddrell as to embezzlement or misconduct of any kind in relation to this money. I see no reason whatever to think that he acted otherwise than in an honourable manner. I think we see enough of his character to conclude that if his circumstances had admitted of it he would never have applied the profits made by the sale—the profit upon his own school—otherwise than to charitable, benevolent, religious, and educational purposes, to which purposes he had applied his means before his bankruptcy. But the question is this, when these strangers—for, as I have said, they might for anything that concerns the result of the case have been strangers—received the money from the School Board, did they not discharge themselves of it by paying it to the vestry? I may remark, I do not believe they received the money at all. I do not think it is right to say they received the money at all. They allowed their names to be used as trustees both in taking a title in their names to the school and in executing a disposition to the School Board. But all that conveyancing was done by the men of business or the law-agents for the vestry, and it is in evidence that that man of business for the vestry received the money from the School Board, and the man of business paid it to the treasurer of the vestry. Who in the world else was he to pay it to? Nobody that I can see. He was their man of business, and he got it, and I suppose he paid the sum to the proper bank account of the church. He could not send it to the vestry, and pay it to a multitude of men. It was a proper thing to pay it to the treasurer. And if these gentlemen had been strangers, as I have already indicated, it would not have affected the result of the case. It is impossible to say that they would not have been discharged, for they had no concern with the vestrymen or the treasurer for the vestry at all. But then, upon a more explanatory statement, it is sought to change this action into an action against individual trustees and vestrymen of the church, not for money received by them and not accounted for, but for misconduct and neglect in not looking after the treasurer of the vestry, and not seeing that the money which they knew to be in his hands was properly invested. I concur with your Lordship that that is not the nature of this action at all, and I would altogether dissent from allowing it to be converted into an action of that sort. If it were an action of that sort, I can see a conclusive answer on the part of the trustees and vestrymen upon the claim to which I have already referred, and which exempts individual trustees and vestrymen from any liability except for misappropriation—but it is not necessary to go into that. All the misconduct alleged is, that they did not interpose to prevent the resolution of the vestry to which I have referred, and which I have characterised as in my opinion an entirely proper and becoming one, from being carried out—namely, after getting their £800 replaced, with interest at 5 per cent. and a bonus of £260, leaving the disposal of the residue to the man in whose behalf they had interposed, no doubt trusting, as his character led them to conclude, that he would devote it to charitable, educational, or religious purposes. And the only negligence or misconduct which can be applied or imputed to any trustees or vestrymen here is, that they did not interpose, as I have indicated, and raise an action to compel him to pay the money. I am not required to express any opinion or conjecture

as to what the probable result of such an action would have been. I can only say that it would possibly or probably have been a failure, and that Doddrell, on principles of justice and equity—not to speak of considerations of good feeling—might have entirely prevailed. On the action as it stands I am clearly of opinion that it cannot be sustained.

Lord Craighill—The pursuers here sue for the price of the premises used as a school, first by G. J. Doddrell, and afterwards by the vestry and trustees of St Jude's Church, Glasgow. The title to these subjects was in the name of the defenders, and nothing appears upon the face of the deed to show that they held for others. But the fact is, that they were only trustees, the £800 with which the subjects were purchased having been advanced by the vestry and trustees that the property might be acquired. There is no dispute as to this between the parties. The subjects were acquired in 1869, and as arranged by the vestry and trustees these were sold to the Glasgow School Board for £2500 in 1874. The disposition to the purchaser was signed by the defenders, who on the face of the deed were, as they behoved to be—the title being in their persons—set forth as the disponers, and the defenders there acknowledge that they had received payment of the price. This price is the subject-matter of the present litigation. The whole sum, with corresponding interest, is sued for, but the pursuers now acknowledge that £800 and £263 have been duly accounted for, and their claim consequently has been restricted to £1458, which is the difference between the aggregate of these two sums and the price obtained for the property. The question is, whether that sum remains in the hands of the defenders, which is the assumption upon which this action is laid. The Lord Ordinary has taken this view of the matter—his ground of judgment being that the defenders, as trustees of this fund, permitted it to remain in the hands of their treasurer without taking any step whatever to secure it for the trust-estate. I would agree with the Lord Ordinary if I could take the same view of the facts. But he has, as was admitted by the counsel for the pursuers in the argument upon the reclaiming-note, fallen into error in holding that Mr Doddrell was the treasurer or servant of the trustees. He was not their servant in any sense. They required no treasurer—and never had one—the duties they were to perform not calling for the services of such an officer. Mr Doddrell was the treasurer of the vestry and the trustees of the church, and consequently when money was paid to him in that capacity it truly was paid to the church. Mr Doddrell recognised his position and obligation, and the £2500 was, immediately after he received it, deposited in the bank account kept in his name as treasurer. The pursuers, however, say that he was not entitled to receive the money, and so far and so long as it was left with him, it was at the risk of the defenders. But I cannot adopt this contention. Payment to the treasurer was, I think, in the circumstances of this case, payment to those whom as such he represented, the consequence being that the ground of action in place of being substantiated has been contradicted. Nor is this merely a technical answer to the pursuers' claim, for according to my reading of the documentary evidence, it appears that they assumed that the price was to come into their treasurer's hands—that they knew after it had been paid by the purchasers of the property that it had come into his hands, and that they were content, so far as not required to meet the £800 advanced by the church, and the £236, which was a debt due to a former treasurer, it should remain where it was till the use to which it was to be applied should be agreed on by all concerned. There was, in these circumstances, no duty in the premises left to be performed by the defenders. The price had passed to the treasurer, and those on whose account, and with whose knowledge, and according to whose arrangement it had been received by the treasurer, are the parties, if supervision were required, by whom that supervision behoved to be exercised. I cannot doubt, therefore, that on the action as laid the defenders must be assoilzied. The pursuers, however, now ask leave to amend the record for the purpose of setting forth an alternative ground upon which, as they say, the defenders' liability may be supported. But for the reasons which have been explained by your Lordship, I think that such leave ought not to be granted in the circumstances of this case.

Lord Rutherfurd Clark—I also think the defenders should be assoilzied. I regard this as an action laid against the trustees of the school only, and in that character it is impossible for it to succeed, so as to make them account for the money which they received when the sale was completed. I think they discharged themselves of the sum which they received or acknowledged they had received and therefore, they are entitled to absolvitor. I do not think there is any further question at all. Whatever claim may arise on any other ground is not here at all, and I say nothing whatever upon it.

The Court refused the pursuers' motion for leave to amend, recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders from the conclusions of the action.

Counsel for Pursuers—Mackintosh—Guthrie. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders Wakefield and Bousfield—J. P. B. Robertson—Low. Agents—John C. Brodie & Sons, W.S.

Counsel for Defenders Lowndes and Cochrane—Mackay—Dickson. Agents—Fraser, Stodart, & Ballingall, W.S.

Tuesday, December 11.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

THE SCOTTISH AMICABLE HERITABLE SECURITIES ASSOCIATION AND ANOTHER *v.* THE NORTHERN ASSURANCE COMPANY AND OTHERS.

Insurance—Loss by Fire—Contribution—Double Insurance—All Parties not Called.

Premises over which there were several heritable bonds were insured under four