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.

On 15th January 1883 the company went into voluntary liquidation, and a liquidator was appointed.

The pursuer held five shares of the company's stock, on which he had previous to the liquidation paid up £5, being a call of £1 per share, and of this sum he now claimed repetition.

On 13th April 1883 the liquidator made upon the pursuer a call of £10, being £2 per share, which he failed to pay, and decree for the amount was obtained against him in the Sheriff Court at Edinburgh, under which his effects were poinded and advertised to be sold. The warrant of sale was not, however, carried out; but the liquidator applied for and obtained from the Sheriff a warrant ordaining him to execute a disposition *omnium bonorum* for behoof of his creditors.

The pursuer also made the following averments, which were denied by the defenders—He was induced to subscribe for his five shares in the company by the representations made by the defenders in the prospectus, and did so under the provisions contained in the memorandum and articles of association, in terms of the agreement that the company had adopted, and was bound to work his system. The company had been formed for the purpose of conducting a money-order business on the principle of his system, which was described in specifications and schedules annexed and subscribed as relative to the agreement. The defenders, the directors of the company, had, in violation of the representations made by them in the prospectus, and in violation of the memorandum and articles of association and of the agreement, never adopted and worked, or attempted to adopt and work, the inventions and system of the pursuer, but had worked the business in a manner wholly at variance and inconsistent in principle and form with them, and thus brought about the winding-up of the company, causing to the pursuer the loss of the £5 and £10 which he had been called upon to pay, and leading to the proceedings, above narrated, against him by the liquidator, which he alleged to be oppressive and injurious, and by which he alleged he had suffered greatly in his feelings, character, and reputation.

The pursuer further condescended on particulars in which he alleged the directors had violated the articles of association. He also averred that a report of the directors submitted to an adjourned annual meeting of the company contained false statements.

These statements were denied by the defenders.

The pursuer pleaded—"(1) The pursuer is entitled to repayment of the sum of £5 paid by him on the shares applied for by him, in respect that these were so applied for in reliance on the statements in the prospectus, and the provisions contained in the said memorandam and articles of association and agreement, and that the defenders have failed to give effect to said statements and provisions. (2) The defenders having failed to work the business of the company in conformity with the said prospectus, memorandum, and articles of association and agreement, and having otherwise mismanaged said business, and having thereby occasioned loss and damage to the pursuer to the extent concluded for, he is entitled to decree in terms of the prayer of the petition, with expenses."

The defenders stated the preliminary plea of *res judicata* in respect of a judgment pronounced on 2d August 1883 by Lord Fraser, Ordinary, and affirmed by the Second Division of the Inner House on 27th November following, in an action raised by the pursuer Scott against the Money Order Bank (Limited), concluding for £5500 in name of damages.

In their answers to the pursuer's condescendence the defenders recited the averments of the pursuer in that action in full, along with the interlocutors of the Court. From that statement it appeared that the pursuer's averments in that action were to the following effect:—By the agreement above mentioned the pursuer was to be entitled as manager of the company to a certain specified share of the profits of the company to be paid to the pursuer or his representatives for twenty-one years, which was to be a preferable burden on the assets of the company in the event of its selling or disposing of its business, or resolving on voluntary liquidation within that period. By the agreement the pursuer agreed to give to the company the exclusive right to the use of his inventions and system, and if thought expedient at any time by the company, to take out letters-patent therefor, and assign them to the company at its expense. The pursuer bound himself to instruct the company and their agents in the details and working of the system, and not to assist, advise, promote, or form any other company for the money order business.

Similar averments as to the adoption of the pursuer's system by the articles of association, and the statements to that effect in the prospectus, and as to the violation of the agreement by the defenders in not working the system, were thus made as were made in the condescendence in the present action above narrated with some specification in detail. The company, he averred, never asked him for the working plans of his system, and never consulted him, although they held out that they would work it, and refused to allow him to instruct them and their agents in the working of it. The pursuer ceased to be manager of the company one month before it commenced business, and there was no official of the company who was acquainted with the working of the system. By the failure of the bank to work the system, and by the violation by him of the agreement, the pursuer had been deprived of his share of the profits of the company, and his system and inventions had been brought into disrepute and rendered of no value to him thereafter, and he had thereby suffered loss and damage to the amount concluded for in the summons.

His pleas-in-law in that action were—"(1) Under the agreement libelled between the pursuer and the promoter of the defenders' company, and under the memorandum and articles of association of the defenders' company, or under one or other of them, the defenders were bound to adopt and work the pursuer's system of conducting money-order business in their business. (2) The defenders having failed to adopt and work the pursuer's system, and having otherwise mismanaged the business of the company, and having thereby caused loss and damage to the pursuer to the extent concluded for, the pursuer is entitled to decree in terms of the conclusions of the summons, with expenses."

The interlocutor of Lord Fraser was as follows:—"Finds that it was provided that whenever the profits of the company should exceed five per cent. on the called-up capital the pursuer should be entitled to a commission upon the profits beyond the said five per cent.: Finds that the pursuer was dismissed from the office of manager in June 1881, and that all claims for salary as such have been paid and discharged: Finds that the defenders' company went into liquidation on 12th February 1883, and is now in course of being wound up by Patrick Turnbull, chartered accountant, Edinburgh, the liquidator thereof: Finds that no profits were made by the said company between the time when it commenced business on 1st July 1881 and 12th February 1883, when it was resolved to wind it up, and that therefore the pursuer has no claim for commission on profits under the agreement entered into between him and the company: Finds that the pursuer has no claim of damages against the defenders in consequence of said profits not having been earned: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses; allows an account thereof to be given in; and remits the same to the Auditor of Court to tax and to report."

Against this interlocutor the pursuer having reclaimed, the Court refused the reclaiming-note and adhered.

In the present action the Sheriff-Substitute (RUTHERFURD) found that the pursuer was precluded *exceptione rei judicatæ* from insisting in the action, and therefore sustained the defenders' first plea-in-law, and assoilzied them from the conclusions of the libel.

Note.—[*After narrating the pleadings in the previous action as detailed above*]—Now, it is true that in the original action at the pursuer's instance he claimed damages, on the ground that the affairs of the company had been so mismanaged by the directors that they had failed to earn the profits upon which, if his system had been properly worked, he would have been entitled to a commission under his agreement with the company as patentee of the system, whereas in the present action the pursuer's claim is for the loss which he alleges he has sustained as a shareholder in the company through the operation of the same causes. In both cases, however, the ground of action is precisely the same, viz., the defenders' failure to adopt and work the pursuer's system, and their mismanagement of the company's business; and it therefore appears to the Sheriff-Substitute that although the pursuer now maintains his claim for damages in a different form and character from that in which it was originally made, this is merely an attempt to try the same question a second time. In the former action it was held, after a proof, in which the pursuer had the most ample opportunity of proving his averments, and had adduced evidence to support them, that the failure of the company was not due to any misconduct of its affairs on the part of its directors, or to their not having properly worked the pursuer's system, but to a want of capital, and to the action of the pursuer himself in circulating unfounded charges of mismanagement against the directors. In these circumstances the Sheriff-Substitute is of opinion that the judgment in the former action, even if it were not *res judicata*, is at all events an authoritative precedent which would be binding in the present instance, and in either view of the case the pursuer is debarred from insisting in the claim now made. The Sheriff-Substitute may refer to the decisions and to the opinions of the Judges in *Gray* v. *M'Hardie*, 1862, 24 D. 1043; *M'Intosh* v. *Weir*, 1875, 2 R. 877; *Earl of Leven* v. *Cartwright*, 1861, 23 D. 1038.

The pursuer appealed to the Sheriff (DAVIDSON), who dismissed the appeal.

The pursuer appealed to the Court of Session.

Argued for the defenders—The requisites of *res judicata* were satisfied by the judgment in the former case. The grounds of action were the same, the pursuer was the same, and the defenders were the same. It made no real difference that in the former case they were called as the Money Order Bank, and in the present as individuals, the directors of that bank—each and all of them were called in either case. If these three requisites were combined in an action in which judgment was given against him, the pursuer could not get into another action in which they are also combined merely by alleging a different title to sue, viz., that of a shareholder. He should have pleaded that title in the former action—*M'Intosh* v. *Weir*, July 3, 1875, 2 R. 877; *Earl of Leven and Melville* v. *Cartwright*, June 12, 1861, 23 D. 1038; *Gray* v. *M'Hardie*, June 4, 1862, 24 D. 1043.

At advising—

LORD RUTHERFURD CLARK—This is an action against Mr Macdonald and others, the directors of the Money Order Bank. The purpose of the action is to recover a sum which the pursuer says he paid for shares, and secondly, to recover damages. The pursuer libels his title as a shareholder, and the ground of action is that the defenders as directors acted in violation of the memorandum and articles of agreement, and so became liable to repay what he had advanced for shares, and secondly, so as to be liable in the damages for which he also sues. The case was raised in the Sheriff Court, and after the record was closed the Sheriff-Substitute, on 28th January 1884, pronounced this interlocutor—"Finds that the pursuer is precluded *exceptione res judicata* from insisting in the present action; therefore sustains the defenders' first plea-in-law, assoilzies the defenders from the conclusions of the libel, and decerns." That judgment was affirmed by the Sheriff on 15th February 1884. It is from that decision of the Sheriff that this appeal is taken, and the question is whether the Sheriff has judged rightly in sustaining the plea of *res judicata?*

It appears that the judgment in respect of which that plea was put forward and sustained was a judgment pronounced by Lord Fraser on 2d August 1883, and subsequently affirmed in this Division. In that action the pursuer sued the Money Order Bank, and not any individual shareholder or director, for £5500 as damages. The ground of that action simply was that he, the pursuer, had an agreement with the bank, which is set forth in the condescendence, and to which I need not fully refer. The allegation was that the Money Order Bank being under contract with the pursuer, violated that contract, and

were responsible in damages. It was in that action that the Money Order Bank was assoilzied.

In judging of a question of *res judicata* it is necessary to examine particularly the conclusions and the *media concludendi* of the previous action as well as who the parties were. The parties to that other action were not identical with these in this action, for though the pursuer was the same the defenders were not. There the defenders were the Money Order Bank, here they are the individual directors. What is more material is, that the ground of action there was an agreement, and the only ground of liability alleged against the defenders was that the pursuer had a claim against the Money Order Bank for breach of agreement. The defenders were assoilzied, and we are asked to sustain that judgment of absolvitor as *res judicata* here. I have come to the conclusion that we cannot sustain the plea, on the simple ground that the *media concludendi* here are different from the *media concludendi* in the other action. In order to sustaining the plea of *res judicata* there are three requisites--first, the pursuer must be the same; second, the *media concludendi* must be the same; and third, the defender must be the same. If these three do not concur the plea of *res judicata* cannot be sustained. Here, with respect to the second requisite, it is plain that the *media concludendi* are very different, because the pursuer here sues not in virtue of an agreement, but solely and simply as a shareholder, his allegation against the directors being that they were guilty of a breach of duty as such, and that he is therefore entitled to a remedy. I think, therefore, that the judgment of the Sheriff is not well founded.

Lord Young and Lord Craighill concurred.

Lord Justice-Clerk—When this case was heard my impression was that the Sheriff's judgment should be adhered to, but I am not prepared to dissent from the judgment proposed. The lines of demarcation are slender, and I incline to think that the Sheriff would have acted more judiciously if, without sustaining the technical plea of *res judicata*, he had left the result of the other action for consideration on the merits. I quite agree with the course proposed.

The Court sustained the appeal, altered the judgment, remitted the case to the Sheriff with instructions to repel the plea of *res judicata*, and to proceed.

Counsel for Pursuer (Appellant)—Party.

Counsel for Defenders (Respondents)—Nevay—M'Kechnie. Agents—Richardson & Johnston, W.S.

Thursday, May 28.

FIRST DIVISION.

SHIRER (FORMERLY DIXON) *v.* DIXON.

Process — Expenses — Expenses of Preliminary Investigations — Discretion of Court—A. S., July 15, 1876.

A woman who had been divorced from her husband presented a petition praying for access to her child. The application was opposed by the husband, who by means of an expensive investigation satisfied the Court that from her mode of life the petitioner was an unsuitable person to have access to her child. *Held* (*diss.* Lord Shand) that the application being to the discretion of the Court, and the interests of the child being concerned, the expenses incurred in supplying information enabling the Court to dispense with a public and formal inquiry ought to be allowed, and a remit made to the Auditor accordingly.

George Dixon, stockbroker, Glasgow, was upon 24th April 1878 married at Cheltenham to Alice Shirer. The parties thereafter cohabited as husband and wife, and on 7th April 1879 a son was born named George Clifford Dixon.

In an undefended action for divorce for adultery, at the instance of the husband against his wife, decree of divorce was pronounced by the Lord Ordinary on 2d August 1883.

On 14th August 1884 the divorced wife presented a petition to the Court of Session praying for access to her child (who was living with Mr Dixon, who had married again), under such restrictions and conditions as the Court might see fit to impose.

Answers were lodged by Mr Dixon, in which he narrated the circumstances of the adultery founded on in the action of divorce, which adultery had been committed frequently, and in his own house. He also averred that the petitioner had committed adultery with two other men not mentioned in the divorce proceedings, with one of whom she continued her immoral relation after decree of divorce was pronounced. The adultery he alleged to have been committed in London, and in various other parts of England which he named.

The Court refused the petition.

In taxing the respondent's accounts the Auditor disallowed all charges connected with the investigation of the petitioner's immoral relations with the man with whom she was alleged to have lived before and after the divorce. These included the respondent's agent's fees and travelling expenses in England while making these inquiries, and payment of a detective who had been employed. They also included a precognition of the agent, and copy correspondence with the petitioner and her agents.

The respondent lodged objections to the Auditor's report, and argued that in so far as the investigation had supplied the Court with information necessary to the disposal of the petition without proof the expense thereof should be allowed.

The petitioner replied that the Auditor had followed the ordinary rule of not allowing