Their Lordships allowed the appeal with expenses and restored the judgment of the Lord Ordinary.

Counsel for the Appellants (Pursuers)—Macmillan, K.C.—Hon. Wm. Watson, K.C. Agents—James Watson, S.S.C., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Respondents (Defenders)—Wilson, K.C.—Condie Sandeman, K.C.—Hamilton. Agents—Guild & Guild, W.S., Edinburgh—Thorne, Priest, & Company, London.

COURT OF SESSION.

Tuesday, November 13.

SECOND DIVISION.

[Lord Hunter, Ordinary.

MORRISON *v.* SCHOOL BOARD OF ST ANDREWS.

Trust — Charitable and Educational Bequests—Bona fide perceptio et consumptio.

A person conveyed in trust heritable subjects "for the use and behoof of the Infant School of St Andrews, and with a view to maintain and perpetuate the Madras system of mutual instruction and moral discipline there, . . . and on the discontinuance of that system there, then for the use and behoof of" himself and his heirs and successors. The system was discontinued. The school was transferred to the school board, and the latter continued to receive the rents of the subjects. A scheme for the administration of the school was subsequently drawn up under the Educational Endowments (Scotland) Act 1882, whereby the subjects were transferred to and vested in the school board. The truster's heirs having obtained a decree of declarator of their right to the subjects in virtue of the destination-over in their favour, a decree of denuding was granted them. They now sought an accounting for the rents. *Held* (*dis.* Lord Salvesen) that the school board having received and applied the rents *in bona fide* were not accountable for them.

Alexander Morrison, Dunesslin, St Andrews, *pursuer*, one of the heirs-portioners of the late Very Reverend Andrew Bell, D.D., LL.D., brought an action against the School Board of the Burgh of St Andrews, *defenders*, whereby he sued the latter for an account of their intromissions with the rents of the heritable subjects known as 123 and 125 South Street, St Andrews, in order to ascertain the true balance due to him as one of the above heirs, and failing an accounting for payment of £3500.

The defenders *pleaded, inter alia*—"4. The defenders having received the rents of the subjects in question prior to 3rd May 1888 from the trustees of the endowment, the defenders are under no liability to account therefor to the pursuer; *et separatim*, the said rents having been received and applied or consumed by the defenders in good faith, the defenders are not bound to account therefor, and they are entitled to absolvitor. 5. The defenders having received the rents accruing after 3rd May 1888 in virtue of their statutory title, and having consumed or applied the same in good faith, ought to be assoilzied from the conclusions of the summons."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 12th January 1917 sustained the fourth and fifth pleas-in-law for the defenders and assoilzied them from the conclusion of the summons.

Opinion.—"The pursuer, who is one of the heirs-portioners of the late Dr Bell, sues the School Board of St Andrews for an account of their intromissions with the rents of the heritable subjects known as 123 and 125 South Street, St Andrews, whereby the true balance due to him as one of said heirs may be ascertained, and failing an accounting for payment of £3500. The circumstances under which the action is brought are these—In 1831 Dr Bell purchased the subjects in question, taking the disposition in name of the Provost of St Andrews and certain other gentlemen in trust 'for the use and behoof of the Infant School of St Andrews, and with a view to maintain and perpetuate the Madras system of mutual instruction and moral discipline there, but on failure of that school, or on the discontinuance of that system of education therein, then to and for the use and for behoof of the Provost and Magistrates, Town Council, and ministers of the Established Church for the time being of Cupar in Fife, and the clergyman of the Episcopal Chapel there, for similar purposes, and their respective successors in office, and on failure of them, or on the discontinuance of that system there, then for the use and behoof of the said Dr Andrew Bell himself and of his heirs and successors whomsoever.'

"Dr Bell was the founder of the Madras College in St Andrews, and the originator of the Madras system of education by which more advanced pupils in schools were employed in the instruction of younger pupils. In 1872, when the defenders came into existence as a corporate body under the Education Act of that year, this system of education was not, or at all events ceased from that date to be, in operation in the Infant School of St Andrews or in any school or institution in the burgh of Cupar.

"From 1872 until 1874 the trustees of Dr Bell collected the rents of the subjects, and are said by the pursuer to have paid them over to the defenders, who employed them for their own, *i.e.* (I presume) educational, purposes. This statement is denied by the defenders. It is not, however, important, as the negative prescription would preclude any claim by the pursuer for rents prior to 19th October 1876.

"In 1874 the trustees of the Infant School at St Andrews, with consent of the Board of Education, transferred that school to the defenders. At the same time, 'with regard

to the dwelling-house and garden in South Street, St Andrews, which were purchased by the late Rev. Dr Andrew Bell in 1831 and conveyed by his direction to the trustees in trust for the use and behoof of the Infant School of St Andrews, the trustees being of opinion that under the terms of the deed of conveyance they are bound to hold the property for the support of an infant school in St Andrews, and considering that the Education (Scotland) Act contains no provision so far as the trustees can observe empowering them to transfer the endowment to the Burgh School Board, resolved to authorise the School Board to receive the rent of said house and garden and to apply same towards the support of the Infant School in St Andrews on condition that the School Board shall maintain the property in good repair to the satisfaction of the trustees, and defray the usual rates and taxes connected with the property and the cost of fire insurance.' This appears from an excerpt of a minute of those trustees dated 20th February 1874 and incorporated in an excerpt of a minute of the School Board dated 10th March 1874. In the same document it is set forth that it was unanimously resolved by the Board to accept of the endowment on the terms indicated, and to record the thanks of the Board to the trustees for the gift.

"Upon 3rd May 1888 a scheme for the administration and management of the Madras College, St Andrews, made by the Commissioners under the provisions of the Educational Endowments (Scotland) Act 1882, received the sanction of the Crown, and by clause 23 of this scheme it was provided as follows—'The house in South Street, St Andrews, presently held under disposition to William Haig and others for the use and behoof of the Infant School, St Andrews, under disposition dated 10th May 1831 and instrument of sasine in favour of the said William Haig and others recorded in the Burgh Register of Sasines at St Andrews 21st May 1831, shall be transferred to and vested in the Burgh School Board of St Andrews without the necessity of any new conveyance or instrument.'

"On 29th January 1913 the defenders, who were anxious to sell the subjects, and who were apparently ignorant that any claim to the property might be made by Dr Bell's heirs, presented a petition to the Second Division of the Court to alter the scheme relating to the Madras College by deleting clause 23 and substituting another clause vesting the property in them absolutely and freed of the trust purposes contained in the disposition authorised by Dr Bell. The Court having ordered service to be made upon the heirs of Dr Bell, the pursuers lodged answers to the petition, which was then sisted to allow of the question of right to the said subjects being determined in a suitable process. Thereafter the pursuer raised an action before me against the defenders and others to have it, *inter alia*, found and declared that the said heritable subjects belonged heritably in property to the heirs and successors of Dr Bell, and in particular to the extent of one-fourth thereof to the pursuer, and that the defenders should be ordained to denude of the subjects and convey them to the pursuer and the other heirs-portioners of Dr Bell. No question as to the defenders' right to the rents derived from the subjects was raised in that action. On 19th November 1913 I gave effect to the declaratory conclusion of the summons. That interlocutor was adhered to in the Inner House, and on 23rd June 1916 I pronounced decree of denuding.

"To the claim now made by the pursuer several defences are put forward. It was maintained that the pursuer has no title to sue *quoad* in any event rents collected prior to his succession. The pursuer relies on the fact that he has recently served himself heir to Dr Bell. This circumstance would not, however, in my opinion, necessarily give him right to insist in his demand in its entirety. The defenders indicated that the pursuer's father, who during his lifetime was one of the heirs of Dr Bell, had left a settlement giving trustees the right to ingather his estate. Before I could satisfactorily dispose of this plea the record would require to be amended so as to set forth the facts having a bearing upon the plea.

"The main defence upon which I heard argument was that as the defenders had received and applied or consumed the rents in good faith they were entitled to be assoilzied. There is no doubt that the law of Scotland recognises that in certain cases where a *bona fide* possessor of property has had to restore the subject possessed it is inequitable that he should be called upon to restore the fruits of the subject which he has ingathered and consumed during the period of his possession. The applicability of this doctrine, known in the civil law as the doctrine of *fruges bona fide perceptæ et consumptæ*, does not appear to have been authoritatively considered in many Scotch cases. In *Darling's Trustees* v. *Darling's Trustees*, 1909 S.C. 445, it was held not to protect a liferentrix from restoration of the liferent to which she had been invalidly appointed by the donee of a power, the ground of judgment being that the doctrine of *bona fide* consumption applies only to the fruits of a subject and not to the subject itself. In that case the Lord President (Lord Dunedin) said—'I thought it was long ago settled, and indeed is clear law, that the doctrine of *bona fide perceptæ et consumptæ* is a doctrine which deals with fruits. It deals only with the case where the subject is given to a wrong person in *bona fides*, which subject can be restored as a whole, and then the doctrine deals with the fruits while they were in the wrong hands, and by that doctrine such fruits are not bound to be repaid.' In *Evans* v. *Harkness*, 13th June 1890, 17 R. 931, Lord M'Laren indicated a view, contrary to Lord Shand, that the doctrine was only applicable where parties are contending on competing titles. I do not think that there is good ground in the authorities for such a limitation of the doctrine.

"In *Hunter's Trustees* v. *Hunter*, 6th July 1894, 21 R. 949, an annuitant who had

received from trustees an annuity in excess of what she was entitled to was held not bound to repay the over-payments which had been made and received in *bona fide* ignorance of any doubt as to her right. Lord Young said that the case fell within the equitable rule or principle of property received and consumed in good faith. It may be doubted whether the Court did not in that case apply the doctrine to a case where the subject itself, and not merely the fruits yielded therefrom, had been consumed. In *Darling's Trustees* the Lord President said about the case—It 'was decided upon its own terms and conditions. I most respectfully say I am not to be held to agree with what it is said was there laid down as a general principle.'

"The present case raises no such difficulty to the application of the equitable doctrine as was presented in the case of *Darling's Trustees*. The subject itself has been restored to the pursuer, and the only question is as to his right to recover rents ingathered by the defenders during the period of their possession. Erskine in his Institutes, ii, 1, 25, says—'In order to explain the strong effects given by law to *bona fide* possession, the difference between *bona* and *mala fide* possession must be shortly stated. A *bona fide* possessor is one who, though he be not truly proprietor of the subject which he possesses, yet believes himself proprietor upon probable grounds, and with a good conscience. . . . A *mala fide* possessor possesses a subject not his own, and knows at the same time, or, which comes to the same account, may upon the smallest reflection know, that he is not the rightful owner.'

"The pursuer maintained that as the destination in the disposition authorised by Dr Bell as interpreted by the Court gave the property to that gentleman's heirs in the events which had occurred in 1872, the date of the defenders' corporation, they must be held to have ingathered the rents as constructive trustees for behoof of the heirs of Dr Bell, and cannot be treated as *bona fide* possessors. There is no doubt that persons may incur the responsibility of trustees although they have not been appointed by deed and have not expressly undertaken such duties. Illustrations of this were afforded by some of the cases to which I was referred (see cases collected in Menzies on Trusts, secs. 1271-3). I do not, however, think that there is any room for holding that a constructive trust was set up in the circumstances of the present case. Dr Bell's trustees in 1874 assented to the defenders receiving the rents from the property on condition that they maintained the Infant School. It is not suggested that the defenders did not observe this condition. Any claim by the pursuer for rents ingathered prior at all events to 1888 should be directed against Dr Bell's trustees, who have the title to prefer a claim against the School Board, but I do not see how such a claim could be successful. The case would be different if it were suggested that the defenders received the rents on a representation contrary to fact that they were continuing the system of Madras education in the school. No such suggestion is made. I do not find in the record any relevant averment of *mala fides* on the part of either Dr Bell's trustees or of the School Board. Both bodies appear to have treated the bequest as primarily intended for behoof of the Infant School, and not to have appreciated the effect thereon of the discontinuance of the Madras system of education. In my opinion the defenders are entitled to be treated as *bona fide* possessors of the subjects between 1874 and 1888. Any other view would certainly operate hardly upon the present ratepayers, as it is not disputed that the rents were applied for educational purposes from year to year.

"The situation is somewhat different subsequent to 1888. In that year the property itself was transferred to the defenders in virtue of clause 23 of the scheme for the administration and management of the Madras College, St Andrews—a scheme sanctioned by the Crown. This was done without any objection by Dr Bell's trustees, or anyone claiming as his heir. The defenders continued to apply or use the rents in the same way as they had been doing previously, and although the Court has held that they must convey the subjects to the heirs of Dr Bell, I think that their liability does not extend to restoring the rents during the period when they remained in unchallenged possession and applied the rents to educational purposes in the belief that they were entitled to do so. I propose to sustain the 4th and 5th pleas-in-law for the defenders."

The pursuers reclaimed, and argued—The doctrine of *bona fide* perception and consumption had been erroneously applied in this case, for in it the rights of the beneficiaries had been simply ignored—Ersk. Inst. ii, 1, 25; *Whyte* v. *Ballantine*, (1825) 3 S. 451 (315); *Bontine* v. *Graham*, (1838) 1 D. 286. The trustees knew that a trust for Dr Bell's heirs existed at the date when the Madras system came to be discontinued in the Infant School, and they were bound to act within the trust purposes. A trustee who was in breach of trust could not plead good faith in answer to an action by a beneficiary—*Donaldson* v. *Kennedy*, (1833) 11 S. 740. The *onus* was on the defenders to prove their case, and this *onus* they had not discharged. The statutory title which they took in their favour in 1888 was merely a trust-title, and they were fully aware of Dr Bell's disposition of 1831. If this trust was misapplied, the defenders were bound to restore the past fruits which they had enjoyed. To escape they must show that they had consumed them in good faith, believing in fact that they were the full owners, and had had a colourable title thereto. If the defenders proffered the 1888 title as giving them unfettered ownership, they could not then plead good faith, because the title convicted them of knowledge of a trust. They took the statutory title without giving any notice to the beneficiaries that the trust was to be sopited, and it was not sopited. If, on the other

hand, they admitted that what they took in 1888 was a trust, they could not now hold that they in good faith as owners consumed the fruits. The scheme of 1888, moreover, merely transferred the subjects from the original trustees to the defenders, who still held them for behoof of the Infant School, for the limited purpose set forth by the truster. It was only a link in the title of trust administration, and did not constitute, even colourably, a competing title to possess—*Morrison* v. *The School Board of St Andrews*, (1914) 51 S.L.R. 215, *per* Lord Dundas at p. 219. Counsel also cited *Scott* v. *Heritors of Ancrum*, (1795) M. 15,700; *Duke of Roxburgh*, February 17, 1815, F.C.; *Duke of Buccleugh* v. *Hyslop*, (1824) 2 Sh. App. 43; *Carnegy* v. *Scott*, (1830) 4 W. & S. 431.

Argued for the defenders—The defenders had at least a colourable title here, and they believed in it, and that according to the institutional writers was sufficient—Stair, ii, 1, 23; iv, 30, 7; Ersk. Inst. ii, 1, 25; Prin. ii, 1, 13-14. A person who had lain by instead of coming forward to claim his rights could not well plead equity where the opponent also pled equity. Council cited *Menzies* v. *Menzies*, (1863) 1 Macph. 1025, *per* Lord Neaves at p. 1036; *Lord Advocate* v. *Drysdale*, (1872) 10 Macph. 499, 1 R. (H.L.) 27, 9 S.L.R. 308; *Andrews* v. *Ewart's Trustees*, (1886) 13 R. (H.L.) 69, *per* Lord Watson at p. 73, 23 S.L.R. 822; *Evans* v. *Harkness*, (1890) 17 R. 931, 27 S.L.R. 755; *Huntly's Trustees* v. *Hallyburton's Trustees*, (1880) 8 R. 50, *per* Lord Rutherfurd Clark at p. 55, the Lord President at p. 59, Lord Mure at pp. 62-63, 18 S.L.R. 46; *Hunter's Trustees* v. *Hunter*, (1894) 21 R. 949, *per* the Lord Justice-Clerk at p. 952, 31 S.L.R. 837. The doctrine of *bona fide* perception and consumption was always applicable to the fruits of a subject of which the *corpus* was possessed—*Darling's Trustees* v. *Darling's Trustees*, 1909 S.C. 445, *per* Lord President Dunedin at p. 451, 46 S.L.R. 394. It was essentially a doctrine founded upon principles of equity, and therefore it should be applied without reference to what were only pure conveyancing technicalities. This was not merely a case of a competing title, but one involving the construction of a deed. Counsel further referred to *Carnegie* v. *Scott*, 4 W. & S. 431, *per* Lord Chancellor Brougham at p. 440; *Dick* v. *Carmichael*, (1752) M. 9954; *Creditors of Kinminity* v. *Sutherland*, (1751) M. 1727; *Thomson & Co.* v. *Pattison, Elder, & Co.*, (1895) 22 R. 432, 32 S.L.R. 339; *Crichton* v. *Henderson's Trustees*, (1898) 1 F. 24, 36 S.L.R. 22.

At advising—

LORD JUSTICE-CLERK—I have read Lord Dundas's opinion, and I concur in it.

I would only add as bearing on the question of *bona fides* that the mutual or monitorial system is averred by the pursuer "to have ceased to be in operation in the Infant School of St Andrews or in any school or institution in the burgh of Cupar prior to the year 1872." But the trustees under the trust-deed continued to pay the rents of the property which were collected by them to the defenders' predecessors for the purpose of being used (as in fact they were used) for school purposes from 1872 onwards. They were so paying them in 1888, and the then School Board might well, therefore, believe that they were the true beneficiaries in the trust, and that the 1888 title under clause 23 was not intended to affect or change any substantial or beneficial right, but merely to get rid of a useless trust, and that after 1888 the School Board were entitled to draw and dispose of the rents of the property as entirely their own for School Board purposes, as in fact they did.

I do not think the School Board were entitled in law to become trustees for the heirs and successors of Dr Bell, nor do I think Dr Bell's trustees ever meant to make them such trustees, nor that the School Board would ever have accepted such a trust even if, contrary to my opinion, they could according to law have done so. It is certain that from the first the School Board never acted as such trustees. It seems to me clear that from 1888 the School Board honestly believed themselves to be the beneficial owners of the subjects in virtue of clause 23.

LORD DUNDAS—The *terminus a quo* of the accounting demanded of the defenders by the pursuer was expressly restricted at our Bar to 3rd May 1888. The defenders resist any accounting, on the ground that they received the rents by virtue of a colourable title and consumed or applied them in good faith. I agree with the Lord Ordinary in holding that the pursuer has stated no relevant case against the defenders of *mala fides* in the sense that they acted in any fraudulent or dishonest fashion, or with design to overreach the pursuer or anyone else. Such a case would require to be supported by very definite and specific averments as to the time or times when and the mode in which such conduct was pursued, and probably also (see *e.g.*, *Thomson*, (1895) 22 R. 432; *Crichton*, (1898) 1 F. 24) as to the individual persons who pursued it. I find no such averments on this record. But even on this footing the pursuer contends that the defenders' plea must be repelled.

There was not, and I do not think there is much room for, serious dispute as to the general scope and import of the doctrine of *bona fide* perception and consumption. Lord Stair treats of it, as Professor Rankine points out in an interesting passage (Landownership, 4th ed., p. 77), first (though somewhat briefly) in his chapter on Restitution (Inst., i, 7, 10-12), and later (more fully) when dealing with possession (Inst., ii, 1, 23, 24); *cf.* also Inst., iv, 30, 7, under wrongous intromission. "The right," says Stair, "is only competent to possessors *bona fide* who do truly think that which they possess to be their own, and know not the right of any other. . . . If the possession *bona fide* be by virtue of a colourable title, though perhaps null in itself upon informalities requisite in law, or upon inhibition, interdiction, or want of power in the granter, it is effectual; yet when by a common or known law the title is void materially, in this case the possessor is not esteemed to possess *bona fide*, it being

so evident—*nam ignorantia juris neminem excusat.*" Erskine (Inst. ii, 1, 25) says—"A *bona fide* possessor is one who, though he be not truly proprietor of the subject which he possesses yet believes himself proprietor upon probable grounds and with a good conscience. . . . A *mala fide* possessor possesses a subject not his own, and knows at the same time, or, what comes to the same account, may upon the smallest reflection know that he is not the rightful owner." See also Ersk. Prin., ii, 1, 13, 14. The reported cases afford numerous illustrations of the application or rejection of the doctrine from Morison's Dictionary (under a variety of titles) onwards.

The pursuer's counsel, however, contended that the defenders are not entitled to avail themselves of the plea of *bona fide* perception and consumption. His argument, as I understood it, was to the effect that in order to give room for such a plea it is necessary that there should be competing titles; that there was here truly only one title to the possession of the subjects, viz., the trust deed of 1831, under which the pursuer and his co-heirs are the ultimate beneficiaries; that clause 23 of the Scheme of 1888 cannot be put forward as even colourably a separate and independent title to possess, for it bore on its face a reference to the trust deed, and amounted in law to no more than a link in the title of the trust administration—a mere assumption in substance and effect of new trustees; and that the defenders are simply in the position of trustees who, having paid away trust estate to the prejudice of the beneficiary justly entitled to it, are bound to make good his loss. I think this argument is fallacious. The defenders cannot, in my judgment, be regarded as standing in the position of trustees who, having misconstrued their trust deed or misunderstood the extent of their powers, have paid to A that which they were bound to make good to B. They have not paid away to a third party the rents in question, but used or applied them for School Board purposes, on the footing and in the belief that they were not trustees but beneficial owners of the property. They did this, not in virtue of the deed of 1831, but on the faith of a statutory title conferred on them by the Educational Endowments Commissioners, which was (I apprehend) intended by the latter, and was certainly believed by the defenders, to be a beneficial title by which the property was "transferred to and vested in" them. It seems to me that this statutory title was just such a "colourable title" as, according to the institutional writers, may form the basis for a plea of *bona fide* perception and consumption of the revenues of an estate. The very essence of such a plea is that the title on which possession followed, though colourable, has afterwards been found to be ineffectual.

The circumstances of the case are very peculiar. They are, so far as I am aware, quite unlike those present in any of the reported decisions. The defenders aver (ans. 8) that they "believed that their statutory title to the subjects in question conferred on them the beneficial right thereto." This attitude they have — on the advice, as we were informed, of counsel — consistently maintained. In their petition to this Court (29th January 1913) they set forth "that it was the intention of the said 23rd clause of the said scheme to vest the said heritable subjects in the petitioners, with full control over them, for the purposes of the said Education (Scotland) Act 1872, and discharged of all prior trust purposes, but in consequence of the said clause giving them no express power to sell the said subjects or to invest the proceeds of the price when sold, their beneficial administration of the said subjects is prejudicially affected." When the pursuer raised action (3rd July 1913) to have his right to the property declared and for decree of denuding the defenders averred (ans. 1) that they "were vested under statutory title with an absolute title to the said subjects," and (ans. 7) that "the sole object and purpose of the said clause was to vest the defenders, the School Board of the Burgh of St Andrews, with the sole right, title, and interest of and in the said property for the purposes of the said School Board under the Education Acts." Among their pleas-in-law was — "(6) Upon a sound construction of clause 23 of the scheme in question, and of the 32nd section of the said Act of 1882, the trust purposes contained in the disposition founded upon of the heritable subjects described in the summons must be deemed to have been abrogated, and the destination-over contained in the said disposition must be deemed to have been evacuated as from the date of the Order in Council approving of the said scheme. . . ." By the judgment of this Court, however, affirming that of the Lord Ordinary, it was decided (20th January 1914, 51 S.L.R. 215) that the plea above quoted was ill founded, and that clause 23, whatever its intention may have been, was not effectual to evacuate the original destination in favour of Dr Bell's heirs. In that case we were, of course, concerned solely with the *corpus* of the property and not in any way with its rents or revenues. I observe from the concluding words of my own opinion that the defenders' 9th plea-in-law, which sought to raise the question of *bona fide* consumption of the rents, was expressly excepted from the judgment of the Court.

It has thus been finally decided that the defenders' belief was erroneous, and that they had not, as they supposed, an absolute title of property in the subjects in question. None the less it seems to me (adopting Mr Erskine's language) that the defenders, though they were not truly proprietors of the subject which they possessed, yet believed themselves proprietors upon probable grounds and with a good conscience, and I find it impossible to affirm that on a consideration of clause 23 in juxtaposition with the deed of 1831 they might "upon the smallest reflection" have known that they were not the rightful owners. I think the elaborate opinion of the Lord Ordinary in the former action and the judgments delivered in this Court sufficiently negative any such theory. I can say for myself that I found the decision of the case to be attended with

considerable difficulty, and only reached my conclusion after a good deal of uncertainty and doubt. In my opinion therefore the defenders have had possession *bona fide* by virtue of a colourable title, and are not to be held accountable for the rents which they received and consumed or applied during the period of their possession.

If this view is correct it is unnecessary to form or to express any opinion as to the question upon which we heard argument, whether a plea of *bona fide* consumption can arise where there are not two competing titles but merely two separate interests, adverse to one another, arising under a single title, the validity of which is not challenged. Opinions in a negative sense seem to have been pronounced *obiter* by Lord Rutherfurd Clark (as Lord Ordinary) and by Lord President Inglis in *Huntley's Trustees*, (1880) 8 R. 55, 59, and by Lord M'Laren in *Evans* v. *Harkness*, (1890) 17 R. 937, to which I observe that the learned author of the Law of Land Ownership (4th ed.), p. 77, gives his adhesion, while contrary opinions, also *obiter*, were expressed by Lord Mure (at pp. 62, 63) and Lord Shand (at p. 65) in *Huntley's* case, and by Lord Shand in *Evans* v. *Harkness* (at p. 936). I am content to say that as at present advised I should be (with Lord Mure) "rather disposed to think that it is enough if there are two adverse and competing rights under the same title, and that under such a title the doctrine of *bona fides* might be held to apply."

I am for adhering to the Lord Ordinary's interlocutor.

LORD SALVESEN—In this case the Lord Ordinary has sustained the 5th plea for the defenders and has applied the well-known doctrine of *bona fide* consumption to the somewhat unusual facts which he had to consider as these are disclosed on the record. The pursuer has asked us to recal this judgment and to repel the defences as irrelevant, and alternatively to allow him a proof of his averments that the defenders in acting as they did were not acting in good faith.

We have had a full and exhaustive argument on the application and limits of the doctrine of *bona fide* consumption in Scotch law. In all of the decided cases where the plea has been sustained, with the single exception of the case of *Hunter's Trustees* v. *Hunter*, 21 R. 949, the question arose between persons who held competing titles to heritage. I do not think the application of the doctrine is necessarily limited to cases of heritable right, for I see no reason why it should not be applied where there were competing titles to moveables, such as shares in limited liability companies or mortgages on a ship; but in order to give room for the application of the doctrine at all there must, in my opinion, be *bona fide* possession of the subjects (the fruits of which have been consumed) on an apparently valid title of ownership. It is in accordance with the equitable principles which form so large a part of our common law that a man who has acquired in good faith an apparently valid title to property and has drawn the rents or profits of that property without challenge (for according to the current of authorities consumption is not necessary after there has been perception) should not be called upon to restore the fruits of the property so possessed when he has been evicted by the true owner whether that true owner was negligent in asserting his right or was incapable of doing so.

There are very few cases in recent years where the defence of *bona fide* consumption has been sustained. The last cases in which the limits of the doctrine were considered are those of *Huntly* v. *Haliburton*, 8 R. 51, *Evans*, 17 R. 931, and *Darling's Trustees*, 1909 S.C. 445. In the two former cases the decision, which was in favour of the defenders who maintained the plea, proceeded on other grounds; in the last the doctrine was held inapplicable to a liferent. In the case of *Huntly's Trustees* the opinions were entirely *obiter;* but two such distinguished lawyers as Lord President Inglis and Lord Rutherfurd Clark expressed the view that the plea of *bona fide* perception and consumption applies only in cases where a person has been in possession of a heritable subject upon an apparently good but invalid title, and has been evicted and is called on to account for the rents. Lord Mure inclined to be of a different opinion, and Lord Shand thought that the law applied to a case in which there were two adverse competing interests arising under the same title. In the case of *Evans* Lord Shand reaffirmed his view, but Lord M'Laren expressed an opposite opinion.

So standing the authorities, I respectfully express my concurrence with the views of the majority of the judges who have dealt with this matter. There is this very strong point in favour of their view, that of the seventy or eighty cases reported in the books not one is an example of the doctrine for which Lord Shand contended. Where the plea has been sustained there have always been these two elements—competing titles and eviction. There is no instance of its being applied where there were two adverse competing interests arising under the same title. But even if I were able to accept the extension of the doctrine as propounded by Lord Shand I fail to see its application to the present case. If the action had been raised against the original trustees of Dr Bell, who, instead of attending to their trust duties, had continued to pay for behoof of the Infant School of St Andrews the rents of the subjects instead of, as they were directed, on the discontinuance of the Madras system of education therein, holding them "for the use and behoof of the said Andrew Bell himself, and of his heirs and successors whomsoever," I cannot see how any question could have arisen. It is no defence to trustees that they have, even on the advice of eminent counsel, misapplied the trust funds. Still less can they be exonerated if they have committed a breach of trust because they have failed to advert to the terms of the trust-deed under which they held. The duty of trustees before they

can make payment of the interest of the trust funds to any recipient is to ascertain whether the payment is in terms of their trust duties. If they have misapplied the trust property they must restore it to the rightful owner and take their chance of getting it back from those to whom they actually paid it. Now it is common ground that at all events by the year 1872 the Madras system of education was not in operation in the Infant School in St Andrews. The fact must have been well known to these trustees, and whether it was or not it was their duty to ascertain it. At each annual meeting of the trust before payments were authorised, their trust duty was to ascertain whether the Madras system of education was still being maintained in the Infant School of St Andrews and only then to have authorised further payments. When after 1872 they continued to pay the rents of the heritable subjects in question, at first apparently to the managers of the Infant School and afterwards to the School Board of St Andrews—who are the defenders in this case—they committed a clear breach of trust against which only the long prescription can protect them or their representatives. They either knew that they were so misapplying the funds under their charge or it was their duty to know it; and the fact could have been ascertained on the smallest inquiry. A glance at the deed of trust—the directions in which are perfectly simple and unambiguous—would have sufficed if these trustees wished to administer in terms of the trust. On 3rd May 1888, however, a scheme for the administration and management of the Madras College, St Andrews, made by the Commissioners under the provisions of the Educational Endowment (Scotland) Act 1882, received the sanction of the Crown. Clause 23 of this scheme provides that the house in South Street, St Andrews (with regard to which the present question has arisen) "presently held under disposition to William Haig and others . . . shall be transferred to and vested in the Burgh School Board of St Andrews without the necessity of any other conveyance or instrument." We have already held in a previous case that this clause did not transfer the beneficial ownership in the property to the defenders, but that its only effect was to substitute them as trustees for the original disponees. That judgment is now final, and has indeed been implemented, for the defenders have conveyed the subjects to the heirs of Dr Bell, including the pursuer. It is therefore *res judicata* that the defenders' only title of possession under that clause was a trust one, and that they held the subjects as at the date when they were transferred by the clause as trustees for the use and behoof of Dr Bell's heirs, he himself having long since predeceased.

Although this was their legal position the defenders have since 1888 retained and applied for School Board purposes the rents of the house in question. I assume at this stage that they did so in good faith, believing that their predecessors had properly paid over the rents to them for the previous sixteen years, and that they were entitled to receive them, but if they had adverted to the disposition which contained the trust—and which is mentioned in the very clause on which they found—they could have been under no such misapprehension. At all events they would have ascertained that it was at least doubtful whether they were entitled to treat the clause as extinguishing the beneficial interests of Dr Bell's heirs and to appropriate the rents for their own purposes. I cannot imagine that any counsel would have advised that they were in safety so to apply the rents without judicial sanction; and even if such advice had been given it would not have protected the defenders if it turned out to be erroneous. I do not gather from the defences that the defenders at any time took the trouble to look at the terms of the disposition of 1831, which constituted their only heritable title to the subjects. It is certainly not averred that they took advice with regard to it, and it is a novel idea to my mind that good faith which is the outcome of negligent administration of a trust fund should protect trustees from the consequences that flow from a breach of trust. I have known many cases where trustees, having honestly applied themselves to carry out the directions of the truster under competent advice, have been compelled to refund money that it was held they had improperly expended. I never heard of one where their failure to consider their trust duty exonerated them from the consequences of their own negligence.

Now these being the facts I am humbly of opinion that there is no room for the application of the doctrine of *bona fide* perception and consumption. There are here no competing titles. The only title to this heritage was in the defenders, and it was only through them that the pursuer could obtain a title under his action of denuding. There has been no eviction because the defenders have never been dispossessed in the legal sense. The question would have been exactly the same if they had been directed to pay the income on the failure of the Madras system of education to named persons. So long as they continued to be trustees their duty would be to account for the income to the persons entitled. They would remain in possession of the trust subjects and continue to draw the rents. It seems to me to make no difference that the heirs of Dr Bell were entitled to call upon them to denude of the trust estate because there were no purposes left requiring the continuance of trust administration. The defenders have not been evicted—they have simply carried out the truster's direction and so brought the trust to an end. There have not even been competing interests under the same trust deed, as there might have been if two different sets of beneficiaries had been claiming and the trustees had improperly paid away the income to one set without challenge by the other. That was the kind of case to which Lord Shand's observations were directed in *Huntly* v. *Haliburton*, 8 R. at p. 65. Here the position is that those

whose duty it was to hold the subjects for behoof of the pursuer and his co-heirs have simply appropriated the income which they should have paid or retained for them to their own uses. There could be no competition in the sense in which Lord Shand uses the word between the beneficiaries and the trustees whose duty it was to act for them. I cannot see how the defenders here can maintain that they have a colourable title to trust funds. Parliament can no doubt do anything it pleases and invade or sopite private rights, but it seems to me that clause 23 is so framed, and was designedly so framed, as not to override the trust to which it refers.

With regard to the case of *Hunter* v. *Hunter's Trustees*, 21 R. 949, it only decided that as between the trustees and the liferentrix whom they had overpaid, it was not the duty of the trustees to recover the overpayments. The decision was come to in what appears to have been a friendly litigation under which the parties truly interested, namely the beneficiaries, were not represented at all except by the trustees, who had made the mistake of paying the liferentrix more than she was entitled to. There seems to have been no citation of authorities on the plea of *bona fide* consumption. On the merits of the decision I concur with the view expressed by their Lordships of the First Division in the case of *Darling's Trustees*, 1909 S.C. 445. I think it is not an authority which I could follow. Lord Trayner thought it was a case of trustees excusably misconstruing the deed of trust. I cannot think that in this view the beneficiaries who were prejudicially affected by the trustees' acting would not have had a good claim against them, even although the liferentrix might not be bound to repay money which she had erroneously received. The case, however, really does not touch the question with which we are dealing here.

For the reasons above stated I am of opinion that the Lord Ordinary's judgment should be reversed, and that the pursuer and his co-heirs should be reinstated against the misapplication of the income of the trust subject which belonged to them. I cannot see how any fault can be attributed to them in not earlier prosecuting their claim. Unless they had examined the register of sasines they had no means of knowing what their rights under the deed were. The defenders, however, had a duty to know, and as the deed was in their possession the means of knowing.

Even if I had been of a different opinion I should still have thought that as the *bona fides* of the defenders is expressly challenged on record we could not decide this case against the pursuer without inquiry. I have a shrewd suspicion that the clause was an attempt to cover up the misconduct of the original trustees in continuing to pay money to the Infant School of St Andrews after the Madras system of education had been discontinued therein. It would be interesting to know what was the original form of the clause as propounded to the Commissioners, and also what was the history of its insertion in a scheme which dealt with other trusts. The pursuer has, I think, sufficiently averred that the clause was promoted in bad faith for the purpose of defeating his right to the subjects. If that be true, it deprives the defenders of any defence to the action.

LORD GUTHRIE—The pursuer asks our judgment on the assumption that the defenders in applying the net income from the subjects in question for School Board purposes acted in the *bona fide* belief that they were legally entitled to do so. On the pleadings I think we are also bound to assume that in 1888 the Educational Endowments Commissioners, acting under the Act of 1882, knew that the defenders (1) were at the time in receipt of the income from this property, and were applying it for School Board purposes, and (2) were not entitled to hold and administer estate except for School Board purposes.

Notwithstanding, the pursuer says that the defenders must account to him for his proportion, as one of the heirs of Dr Bell, of the net income applied by them for School Board purposes since May 1888. In the end his case came to depend on whether the ordinary rule (that trustees *bona fide* misreading their trust-deed, and *bona fide* paying to the wrong beneficiary, must account to the true beneficiary, even when they have acted on competent legal advice), applies to the circumstances of this case. For the reasons stated by your Lordship in the chair and by Lord Dundas, I do not think that well-settled rule applies in the present question. Had the defenders sold the subjects and expended the proceeds, and had the law of Scotland extended the principle of *bona fide* consumption to the subject itself, and not merely to the fruits, then it would have been difficult to resist the pursuer's contention. But when dealing with the fruits I think the Court would be slow, in the absence of any express decision when the circumstances were similar, to apply the doctrine to a case where a statutory body, not entitled to hold any property for private individuals, had property vested in them by the Legislature, and thereafter *bona fide* acted on the view that they were entitled under their statutory title to use the proceeds of the property for the statutory purposes which they were created to promote.

But there is, in my opinion, another answer to the pursuer. Not only do I think that the defenders had a colourable and, as I think, a competing title, but I think *quoad* the fruits of the subject they had a good title. In the previous action, which was by no means treated as a perfectly clear or easy case, we were unable to decide the case on the words of clause 23. In my opinion I stated that I thought the word "vest" in that clause was consistent either with the pursuer's view of trust for Dr Bell's heirs, or with the defenders' contention of absolute property in them, and I think this assumption ran through all the judgments. We considered the improbability of the Commissioners wiping out of

existence private rights, and absolutely terminating a trust designed to keep them alive, and we came to the conclusion that the words used were not sufficiently unambiguous to lead to this result. But I see no such improbability in reference to annual fruits, considered in relation to beneficiaries who, if existent, had failed to make any claim for nearly twenty years. In view of the circumstances already referred to, namely, the Commissioners' knowledge, which I must assume, of the receipt by the defenders of the income of this property for several years before the date of the scheme and their expenditure of that income on School Board purposes, as would appear in their accounts published annually, and their knowledge, which I must further assume, that the defenders were not entitled to uplift and administer money for other than School Board purposes, it seems to me a reasonable and, I think, a sound construction of clause 23 to hold that it authorised the defenders to receive and administer the fruits of the property in question as they had done until a claim should be made by the heirs of Dr Bell. I do not think that the defenders' position is prejudiced because they went further, and *bona fide* thought that they were entitled to deal with the subject itself as their property—a view which we have already negatived.

The Court adhered.

Counsel for the Pursuer — Sandeman, K.C. — A. M. Mackay. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders — Constable, K.C.—Macmillan, K.C.—Wilton. Agents—Henderson, Munro, & Aikman, W.S.

HOUSE OF LORDS.

Friday, December 14.

(Before the Lord Chancellor (Finlay), Lord Dunedin, Lord Atkinson, Lord Shaw, and Lord Parmoor.)

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* BOYD & FORREST.

(*Vide* 1912 S.C. (H.L) 93, 49 S.L.R. 735, 1915 S.C. (H.L.) 20, 52 S.L.R. 205.)

Res judicata — Process — Decree of Absolvitor—Petitory Action—Medium concludendi—Parties Seeking to Recover before Arbiter under a Contract Sums Previously Sought to be Recovered in Petitory Action in which they Tabled no Claim on Basis of Contract Applying.

A firm of contractors brought a petitory action to recover from a railway company a sum of money as resting-owing for work done. The railway company defended on the ground that the work was done under a contract and that the sum due under the contract had been paid. The contractors sought to set the contract aside on the grounds of fraud and of essential error, but in this they failed, and the railway company obtained a decree of absolvitor. The contractors then presented to the arbiter named in the contract, a claim for the same sum, made up in the same way, and maintained that the decree in the preceding action did not constitute *res judicata* as that action only settled that the contract applied.

Held that the matter was *res judicata.*

Authorities examined.

Levy & Co. v. *Thomsons*, (1883) 10 R. 1134, 20 S.L.R. 753, *commented on* by Lord Dunedin.

On August 21, 1916, the Glasgow and South-Western Railway Company, *pursuers*, brought an action against Boyd & Forrest, contractors, Kilmarnock, and John Strain, C.E., Glasgow, *defenders*, for declarator "(first) that under and in terms of an interlocutor of the Second Division of the Court of Session, dated 13th day of May 1915, applying the judgment of the House of Lords of date 1st March 1915, in an action at the instance of the present defenders Boyd & Forrest against the present pursuers, concluding for payment of the sum of One hundred and six thousand, six hundred and eighty-eight pounds, thirteen shillings and elevenpence sterling, with interest thereon at the rate of five per centum per annum, the summons in which was signeted on 15th November 1907, the present pursuers have been assoilzied from all claims at the instance of the present defenders Boyd & Forrest against the present pursuers in respect of the construction by the said present defenders for the present pursuers of the line of railway known as the Dalry and North Johnstone Railway and the Dalry widening and relative works, all as more particularly described in the condescendence hereunto annexed, without prejudice to the right of the present defenders Boyd & Forrest if so advised to refer to the defender John Strain as arbiter named in the contract between the present pursuers and the present defenders Boyd & Forrest for the construction of the said works, dated 14th and 18th September 1900, all claims whether for damages or otherwise under the said contract or in respect of breach thereof, provided such claims are condescended on in the condescendence of the present defenders Boyd & Forrest in the said action, and provided they relate to (*a*) the construction of the bridge 12a and diversion of the Paisley water-pipe, or (*b*) any delay on the part of the present pursuers in furnishing plans for dealing with water-courses encountered in the cuttings; and (second) that the present defenders Boyd & Forrest are not entitled to submit to the defender John Strain as arbiter foresaid, and the defender John Strain as arbiter foresaid has no jurisdiction to entertain, any claims at the instance of the present defenders Boyd & Forrest relating to the construction of the said works or to the execution of the said contract except such claims as are