LORD JUSTICE-CLERK—I agree entirely in the opinions which have been given. There can be no doubt that the trust estate in the hands of a trustee or judicial factor must be watchfully guarded against any attempt of the person in a fiduciary position to make profit out of the estate in his hands, and the Courts have always been strict in enforcing the rule against such action. But on the other hand, where, as here, the things done by the factor were, as they certainly were, for the benefit of the estate in the ordinary course of business, the fact that the judicial factor, being one of a firm of law agents, received with the firm the fees which the borrowers were liable to pay, and which they did pay, for the legal work done in the business of drawing up and having completed the documents necessary to secure the loans, which was not work falling in any case to be done by the factor himself, there is no illegality.

Further, I agree that where funds were handed over to the minors' guardians, no objection can be stated against charges made for the business done for the guardians after they received the funds by the legal firm to which the judicial factor belonged, the work done being not done in the factory but after the funds had been paid out by the factor and accounted for in his accounts by the receipt of the guardians. These guardians were in the knowledge of the actings of Messrs Lindsay & Howe and took the benefit of them. Taxation seems to me to be the only right they have. I agree with the opinions expressed as regards the details of the matters involved in the case, and do not think it necessary to repeat them.

LORD STORMONTH DARLING concurred with LORD LOW.

The Court pronounced this interlocutor—

"Recal the said interlocutor [of 12th February 1908] reclaimed against so far as it sustains the objections 2, 3, 4, and 5, and repel said objections: With these findings remit the cause to the said Lord Ordinary for further procedure: Find the petitioners liable in expenses since the date of the interlocutor reclaimed against, and remit the account thereof when lodged to the Auditor to tax and to report to the said Lord Ordinary, with power to him to decern for the taxed amount of the expenses hereby found due."

Counsel for the Objectors—Horne—W. T. Watson. Agents—Duncan Smith & Maclaren, S.S.C.

Counsel for the Judicial Factor—Clyde, K.C.—Macphail. Agents—Melville & Lindesay, W.S.

Saturday, July 11.

SECOND DIVISION.

[Sheriff of the Lothians and Peebles.

GIBB *v.* LEE.

Diligence — Arrestment — Specification of Funds Attached — Funds Due to an Executor.

The pursuer in an action, having obtained decree for payment against the defender "A B, executor-nominate of C D," executed an arrestment in the hands of a law agent who had acted in the administration of the executry. The schedule of arrestment bore that the arrestment proceeded in virtue of the extract decree in this action "against A B, executor-nominate of the deceased C D, defender," and described the funds attached as the sum "due and addebted by you to the said A B, defender." In an action of furthcoming at the instance of the arrester, *held* that the arrestment was bad in respect that the schedule did not make it plain that the sum arrested was due to A B *qua* executor, and therefore that the furthcoming was incompetent.

This was an action of furthcoming at the instance of T. F. Gibb, C.A., *curator bonis* to H. W. Paterson, against John B. W. Lee, S.S.C., arrestee, and Bethune John Lee, executor-nominate of the deceased James D. Paterson, in which the pursuer craved decree against John B. W. Lee for payment of "the sum of £65, or such other sum or sums as may be owing by him to the said Bethune John Lee as executor foresaid, and arrested in his hands at the instance of the pursuer," together with the sum of £38, 7s. 8d., conform to an extract decree and warrant of the Sheriff of the Lothians and Peebles obtained in an action "at the instance of the pursuer as *curator bonis* foresaid against the defender the said Bethune John Lee as executor foresaid."

The pursuer averred that as *curator bonis* he had, in an action of count, reckoning, and payment against Bethune John Lee, as executor of J. D. Paterson, obtained decree for the sum of £68, 16s. 1d. with interest, together with the sum of £38, 7s. 8d. as taxed expenses; that John B. W. Lee had acted as agent for the executor and had in his hands, as such agent, a sum of £64, 4s. 8d.; and that by authority of the said extract decree he had executed arrestments in the hands of John B. W. Lee.

The extract decree was in these terms:—"At Edinburgh, the fourteenth day of May and the twelfth day of June Nineteen hundred and six, in an action in the Sheriff Court of the Sheriffdom of the Lothians and Peebles, at Edinburgh, at the instance of Thomas Fraser Gibb, chartered accountant, Edinburgh, *curator bonis* to Henry Welch Paterson, sometime residing at number five Sandford Street, Portobello . . . (pursuer), against Bethune John Lee, formerly residing at Granton Square, Granton,

writer, now of number forty-seven York Place, Edinburgh, executor-nominate of the deceased James Duncan Paterson, who resided at number forty-one East London Street, Edinburgh, son of the deceased John Paterson, who resided at number five Sandford Street, Portobello, under his will, dated 2nd November 1896, and recorded in the Books of Council and Session 1st April 1897 (defender). The Sheriff decerned the defender to pay to the pursuer the sum of £64, 16s. 1d., with interest thereon at the rate of five per cent. per annum from thirteenth October 1905, and £38, 7s. 8d. of expenses: And the Sheriff grants warrant for all lawful execution hereon by instant arrestment, and also by poinding after a charge of seven free days if the defender is within Scotland, and fourteen free days if furth thereof."

The schedule of arrestment was in these terms:—"I, Michael Hogg, sheriff officer, by virtue of an extract decree and warrant of the Sheriff of the Lothians and Peebles, at Edinburgh, thereon, dated the fourteenth day of May and the twelfth day of June, and extracted the twenty-seventh day of June, all in the year Nineteen hundred and six, obtained in an action in the Sheriff Court of the Sheriffdom of the Lothians and Peebles at Edinburgh, at the instance of Thomas Fraser Gibb, chartered accountant, Edinburgh, *curator bonis* to Henry Welch Paterson, . . . (pursuer) against Bethune John Lee, formerly residing at Granton Square, Granton, writer, now of number forty-seven York Place, Edinburgh, executor-nominate of the deceased James Duncan Paterson, who resided at number forty-one East London Street, Edinburgh, son of the deceased John Paterson, who resided at number five Sandford Street, Portobello, under his will, dated 2nd November 1896, and recorded in the Books of Council and Session 1st April 1897 (defender)—In His Majesty's name and authority, and in name and authority of the said Sheriff, lawfully fence and arrest in the hands of you, J. B. W. Lee, forty-seven York Place, Edinburgh, the sum of sixty-five pounds sterling, more or less, due and addebted by you to the said Bethune John Lee, defender, or to any other person or persons, for his use and behoof, by bond, bill, decreet, contract, agreement, or by any manner of way whatsoever; together also with all goods, gear, debts, sums of money, rents of lands and houses, and every other thing presently in your hands, custody, and keeping, pertaining and belonging to the said Bethune John Lee, defender, all to remain in your hands under sure fence and arrestment at the instance of the said pursuer. . . ."

The defender, John B. W. Lee, lodged defences, and pleaded—"(1) The action is incompetent. (2) The pursuer's averments are irrelevant and insufficient, and this defender should be assoilzied, with expenses."

By interlocutor, dated 16th July 1907, the Sheriff-Substitute (GUY) repelled the defender's first and second pleas-in-law.

Note.—"There can be no doubt that the averments of the pursuer are relevant, but it was argued that the action was incompetent in respect that it is an action of furthcoming founded upon a decree against an executor, and that the schedule of arrestment bears that the sum arrested is due and addebted by the arrestee to the common debtor, not in his capacity of executor, but in his individual capacity. I do not so read the schedule of arrestment. That document, in my opinion, must be read as a whole. The common debtor's capacity as executor is fully set forth in his description taken from the decree and warrant to arrest, and the arrestment bears to be of what is due by the arrestee to him as defender in the action in which the said decree was pronounced. This certainly covers what is due by the arrestee to the common debtor as executor, and may also cover what is due by the arrestee, if anything, to the common debtor as an individual, in respect that the decree upon which the arrestment followed was not only a decree for a principal sum against the common debtor as executor, but a decree for expenses. The decree for expenses was not limited to his capacity of executor."

On appeal the Sheriff (MACONOCHIE), by interlocutor dated 3rd October 1907, recalled the Sheriff-Substitute's interlocutor and sustained the defender's first plea-in-law.

Note.—"I regret that I cannot see my way to concur in the interlocutor of the Sheriff-Substitute. It appears to me that the case is ruled by the decision in *Wilson* v. *MacKie*, 1875, 3 R. 18. The present schedule of arrestment is precisely in the form of the schedule in *Wilson's* case, with this exception, that the arrested funds are here stated to be due 'to the said Bethune John Lee (the common debtor) defender,' the word 'defender' not being present in *Wilson's* case. I do not think that the addition of that word affects the case. The fault which, in my opinion, is fatal to the competency of the furthcoming which proceeds on the arrestment, is that it is nowhere said that the sum alleged to be due by J. B. W. Lee to Bethune John Lee is due to him as executor of James Duncan Paterson; and looking to the terms of the decree on which the arrestments proceed, it was, I think, necessary that that fact should be explicitly stated. The arrestment thus being bad, it follows that the furthcoming must be dismissed."

The pursuer appealed, and argued—The arrestment was not objectionable. The words "said Bethune John Lee, defender," referred to the previous description of the principal debtor, and that description showed that he was sued in his capacity as executor. Accordingly it was sufficiently clear that it was money due to Bethune John Lee as executor that was arrested. The question in *MacKie* v. *Wilson*, October 22, 1875, 3 R. 18, 13 S.L.R. 8, was as to damages, and the validity of the arrestment was not actually in issue, and, in any case, the insertion of the word "defender" distinguished the present from that case. But assuming that the arrestment was bad as to any sum due to the principal debtor as

executor, it was good as to any sum due to him personally; and the pursuer held a decree for expenses under which the principal debtor was personally liable—*Anderson* v. *Anderson's Trustee*, November 13, 1901, 4 F. 96, 39 S.L.R. 94.

Counsel for the respondent were not called on.

LORD JUSTICE-CLERK—I have no doubt that this case is ruled by the decision in *Wilson*. The only distinction between the two cases is that in this case the words "the said Bethune John Lee" have the word "defender" added to them, whereas in the case of *Wilson* the words "the said William Wilson" were not followed by the word "defender." In the one case, as in the other, the said person was the person who was called into Court as defender. Adding the word "defender" makes no difference. In *Wilson's* case, as in this case, the word "said" referred to the defender as described in the summons. Nevertheless, it was held in *Wilson's* case that the arrestment was bad. I have no difficulty in advising your Lordships to affirm the judgment of the Sheriff.

LORD STORMONTH DARLING—I concur.

LORD LOW—I am of the same opinion.

LORD ARDWALL—I am of the same opinion. It has always been held that questions relating to arrestments are questions *strictissimi juris*. In the present case Mr Lippe admitted, and made it part of his argument, that the schedule of arrestment might be held valid to attach funds due to Bethune John Lee either as an executor or as an individual. I think that that admission is fatal to the pursuer's case, because it involves this, that it does not appear from the schedule of arrestment whether the arrestment attached the executry funds or the private funds of B. J. Lee as an individual. And it is out of the question to sustain an arrestment under which it is impossible to say what funds were thereby attached. I agree with your Lordship that this case is practically ruled by the case of *Wilson* quoted in the Sheriff's interlocutor.

The Court adhered.

Counsel for the Pursuer (Appellant)—Lippe. Agent—George Mill, S.S.C.

Counsel for the Defender (Respondent)—W. Thompson—J. Macdonald. Agent—Alfred W. Lowe, Solicitor.

Saturday, July 11.

SECOND DIVISION.

BOYD'S TRUSTEES *v.* BOYD AND OTHERS.

Trust — Administration — Investment of Trust Funds—Special Powers—Power to Trustees to Hold Investments of which Truster Died Possessed, "for such Time as they may Think Fit"—Shares with Uncalled Liability—Discretion of Trustees.

A power conferred by a truster on trustees "to hold any investments I may die possessed of for such time as they may think fit," does not, especially in the case of investments in stocks having an uncalled liability, absolve trustees from the necessity of exercising such power with prudence, and they are only entitled to retain such investments so long as they are satisfied that to do so will be for the benefit of the trust.

Husband and Wife—Donatio inter virum et uxorem — Implied Revocation — Circumstances where Implied Revocation not Proved.

In October 1878, after the City of Glasgow Bank had stopped payment, a shareholder, on the narrative that the making of a reasonable provision for his wife was a duty incumbent on him, assigned a bond and disposition in security for £4000 to trustees with a direction to hold the fund for behoof of his wife" in liferent for her liferent use allenarly, exclusive of all my marital rights and interests of every kind, and to pay over the annual proceeds to her on her own receipt without my concurrence during all the days and years of her life." The £4000 was repaid in 1885, and the money invested upon the security of an estate belonging to the truster. The trustees never uplifted the interest during the truster's lifetime, having by minute dated 14th May 1879 authorised the truster's wife to receive and discharge the interest. On 25th May 1889 the truster's wife (without, however, receiving or asking an explanation of the meaning of the document) signed a letter written by her husband's clerk and addressed to the trustees, in which she stated that she had received payment of the interest up to Whitsunday 1889. She never in fact received any interest whatsoever down to her husband's death in March 1907, but never waived her claim thereto, except in so far as her letter of May 25th 1889 might be held to be a waiver. The contingency in view of which the trust deed was granted (viz., the financial ruin of the truster) never occurred, the truster having always been able to maintain his wife in comfort, and being at the time of his death a wealthy man.

Held, in a special case brought after the truster's death, that there was no