I should suppose Iona is not a port, and yet thousands of passengers are landed there from steamships every year. I desire further to point out that the obvious and indeed the only sure test by which the master of any ship can determine whether his ship is in the ordinary meaning of the words "carrying passengers between one place in the British Islands and any other place so situate" is the destination of the passengers as entered in the ship's books or papers, and for their passage to which place they have paid the customary fares. In "*The Hanna*," L.R., 1 A. & E. 288, and "*The Lion*," L.R., 2 P.C. 525, and 2 A. & E. 102, payment of a fare was taken as the test of whether a person was or was not a "passenger" on board a ship within the meaning of the earlier Shipping Statutes, and I think that similarly the test of the place to which the ship is "carrying" any person is the place to which such person has paid his fare.

I am therefore of opinion that at the time the collision occurred the "Eildon" was not, according to the ordinary use of language or within the meaning of the statute, carrying passengers "between any place in the British Islands and any other place so situate," but was in the ordinary sense of the phrase carrying passengers between Leith and Dunkirk, and that accordingly it was not compulsory on the master to employ a pilot. Lord Low supposed the case of the "Eildon" carrying one passenger to Middlesborough, and pointed out that it was hard that for want of that one passenger the others should be deprived of the safety afforded by the employment of a pilot. But the presence of that passenger would have altered the whole case and made the section applicable, with the result that the passengers to Dunkirk would have obtained a protection which under the statute they were not entitled to.

I am accordingly of opinion that the Lord Ordinary's interlocutor should be recalled, the third plea-in-law for the pursuers sustained, and the second plea-in-law for the defenders repelled, and that *quoad ultra* the parties should be allowed a proof of their averments and the pursuers a conjunct probation.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor—

"Recal the said interlocutor reclaimed against: Sustain the third plea-in-law for the pursuers: Repel the second plea-in-law for the defenders: *Quoad ultra* remit the case to the Lord Ordinary to allow the parties a proof. . . ."

Counsel for the Pursuers (Reclaimers)—Murray—Horne. Agents—Boyd, Jameson, & Young, W.S.

Counsel for Defenders (Respondents)—Scott Dickson, K.C.—Carmont. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, July 9

SECOND DIVISION.

[Lord Guthrie, Ordinary.

SLEIGHS *v.* SLEIGH'S FACTOR.

Trust—Judicial Factor—Agent and Client—Law Agent—Factor's Firm Acting (1) *in Loans by Factory to their own Clients,* (2) *for Beneficiaries of Factory Subsequent to Payments by Factor, and* (3) *for Guardians of Beneficiaries—Fees and Commission Received by Factor's Firm.*

A solicitor was appointed judicial factor on a trust estate. He lent part of the factory funds on heritable security to clients of his firm, and the firm acted in the matter and received the usual fees from the borrowers. The firm also did certain work for the guardians of the beneficiaries and for the beneficiaries themselves when of age, such work being in connection with the receipt and subsequent employment of the respective sums of income paid by the factor from time to time to the guardians or the beneficiaries, and the preparation of the deeds required through the beneficiaries having applied for an advance of capital.

Held (*rev.* judgment of Lord Guthrie) that the judicial factor was not bound to account to the factory estate for the commission and fees received or charged by his firm for so acting.

The late James Hume Sleigh, sometime Secretary and Treasurer of the Bank of Bombay, died in Edinburgh on 26th June 1899. He left a will, dated 30th October 1896, whereby he conveyed his whole estate to trustees, and a codicil, dated 1st January 1898. Mr Sleigh was survived by his three children — Edgar Hume Sleigh, Charles Hope Sleigh, and Marie Edgar Sleigh—who were all in minority. By his will the truster directed that the income of an equal share of the residue of his estate should be paid to each of his three children, the capital being settled for each child's issue. The truster also appointed his sister Miss Jane Slight, and his brother-in-law Dr Henry M. Church, as guardians of his children. Miss Slight and Dr Church accepted office as guardians. The trustees appointed by the truster having declined to act, Alexander Yeaman, W.S., Edinburgh, was on 4th November 1899 appointed judicial factor on the trust estate. On 22nd January 1907 the beneficiaries under the trust presented a petition for recal of the appointment of the judicial factor and for the appointment of new trustees. On 26th February 1907 the Lord Ordinary (GUTHRIE) recalled the appointment of the judicial factor, and remitted to the Accountant of Court to examine his accounts.

A note of objections to the factor's accounts was lodged for Edgar Hume Sleigh, Charles Hope Sleigh, and Marie Edgar Sleigh. The note of objections stated,

inter alia—"2. . . . . The factor himself undertook the law agency business of the factory, and continued to act as such agent until the recal of the factory, under the firm name of Messrs Lindsay, Howe, & Company. The net factory estate amounts approximately to £47,700, of which the factor invested approximately the sum of £43,600 in heritable bonds. Of this sum over £20,000 has been lent to the clients of his own firm. All the said bonds were prepared in the name of Messrs Lindsay, Howe, & Company as agents for the factor, but the same were truly prepared by the factor himself. The factor has been called upon to furnish a note of the fees received in name of his firm for these bonds, and to account to the beneficiaries of the said factory estate therefor, but he refuses to do so. The said fees amount to not less than £350. . . . The factor was paid in full for the realisation and re-investment of the whole capital estate at the rate of 1 per cent., the total sum allowed to him therefor by the Accountant being £499, 12s. By thus acting in the name of his said firm the factor received an additional and illegal payment for his services *qua* factor. Moreover, the factory estate was thereby deprived of independent advice in connection with the investment of the said funds and the security arising therefrom. The factor is accordingly bound to communicate to the factory estate the fees thus obtained in the name of Messrs Lindsay, Howe, & Company in connection therewith, but he refuses to account for and pay the same.

"3. During the minority of the petitioners the income of the estate was alleged to be paid to Messrs Lindsay, Howe, & Company, who in turn, it is represented, paid it over to the guardians of the beneficiaries. For this service the said firm charged the sum of £34, 2s. 6d. in name of commission and £33, 16s. 6d. in name of business charges. Said disbursement of income in the name of Messrs Lindsay, Howe, & Company was truly made by the factor, who had received full payment otherwise for his trouble in collecting and disbursing the same. The Accountant of Court has fixed the factor's fee for said services at the rate of 4 per cent., and a sum of £441, 8s. 9d. has on this basis been deducted by the factor from the funds of the estate. By making said additional charges through his firm the factor has received double remuneration for the work of the factory, and the petitioners object to the double charges thus made by him against the estate. In any event, it was improper and illegal to employ his firm to perform said duties, or at least to remunerate them therefor, and accordingly the factor is bound now to communicate to said estate the amounts of said commission and business charges.

"4. After the petitioners came of age, the factor, under his firm name of Lindsay, Howe, & Company, disbursed to them the sums to which they were entitled, and charged them with similar commission. The petitioners maintain that the charges which the factor is entitled to make in respect of his disbursement to them of the income of their respective shares of the estate, are covered by the aforesaid percentage upon the income of the estate allowed by the Accountant of Court, and that he is bound to communicate to the portions of the factory estate respectively effeiring to the petitioners the sums so charged by him in name of commission. The petitioners believe that the said commissions amount approximately to the sums of £25, 16s. 6d. to Edgar Hume Sleigh, £19, 8s. to Charles Sleigh, and £2, 2s. to Miss Marie Sleigh.

"5. By holograph codicil appended to the last will and testament of the late James Hume Sleigh it is provided that the sum of £2000 contained in a deposit-receipt of the National Bank of India should in the event of the truster's death 'be the property of my children and administered as provided for in my last will and testament.' The petitioners Edgar and Charles Sleigh requested out of the said sum payment of £300 to each. The factor realised the securities in which their shares of the £2000 were invested. Said realisation resulted in a loss to said petitioners Edgar Hume Sleigh and Charles Hume Sleigh of £51, 13s. 6d. In connection with the payment to them of the sums of £300 each, the factor represented to them that they had only a liferent in the said sum of £2000 and took bonds in security for the repayment thereof. Said bonds were alleged to be drawn by the said firm of Lindsay, Howe, & Company, but were in reality drawn by the factor. In any event, the factor being a partner of said firm is not entitled to make said charges through the said firm. The charges made by the factor under the firm name of Lindsay, Howe, & Company against the said petitioners amount to £8, 19s. 4d. The factor is not entitled to credit therefor, and is bound to communicate the same to the factory estate."

The judicial factor lodged answers, in which he stated—"2. No fees for law agency have been charged against the factory. . . . The whole expenses, amounting to £295, 17s., incurred in connection with the investment of the factory funds on the said heritable securities were paid by the borrowers, against whom they were charged by Messrs Lindsay, Howe, & Company, who prepared the necessary security deeds, &c. No charge was made against the factory in connection therewith. The deeds, certificates, and other papers put before the Accountant at the time disclosed that Messrs Lindsay, Howe, & Company prepared the necessary deeds.

"3. The objectors' guardians, Miss Sleigh and Dr Church, appointed Messrs Lindsay, Howe, & Company to be their agents, who in that character performed certain services for which the ordinary professional charges were made. Messrs Lindsay, Howe, & Company were not employed by the factor to do any work for the factory, and no charge against the factory was made by them. When the objectors attained majo-

rity the said guardians and their agents, Messrs Lindsay, Howe, & Company, were discharged, and all accounts homologated.

"4. The charges referred to were not made in respect of any work pertaining to the factory, but, as the objectors are well aware, for the professional service outwith the factory altogether performed on their individual behalf and at their request. The receipts called for by the Accountant are produced herewith.

"5. The objectors Edgar and Charles Sleigh having applied for an advance out of the factory estate the same was made to them by the factor. The necessary documents were prepared and charged for by Messrs Lindsay, Howe, & Company against them as individuals—no charge was made against the factory estate, and no fee was allowed to the factor by the Accountant for the realisation rendered necessary by the request."

On 11th July 1907 the Lord Ordinary remitted to the Accountant of Court to consider the objections and to report. The Accountant of Court reported, *inter alia*—"(3, 4, and 5) That the late Mr Sleigh by will appointed guardians to his children, and Messrs Duncan Smith & Maclaren appear to have acted for them when the petition for a judicial factor was presented. Thereafter Messrs Lindsay, Howe, & Company appear to have acted as agents for them and for the beneficiaries after they came of age. They prepared annual accounts which were submitted to and approved of by the guardians and carried through the necessary discharges. The Accountant is of opinion that the factory had no connection with or interest in the charges for these operations."

The objectors produced the following letters written by Miss Slight and Dr Church respectively—

Letter, Miss Slight to Duncan M'Laren, S.S.C., dated 3rd December 1907.

"Dear Sir,—In answer to your question as to the factorship on my late brother's estate during the minority of my two nephews and niece, it was my impression that the appointment of factor embraced *all* the duties requiring to be discharged in connection with the estate, and that the appointment was made, not only to facilitate my duties as guardian, but also to avoid further expenses which would have been incurred by a law agent. I was not aware, therefore, that Messrs Lindsay, Howe, & Company were employed separately as agents on the estate, as all my transactions were through the factor himself."

Letter, Dr Church to Charles H. Sleigh, dated 30th November 1907.

"My dear Charlie,— . . . I wish to say that I did not appoint Messrs Lindsay, Howe, & Company as law agents on your behalf in connection with your late father's estate."

On 12th February 1908 the Lord Ordinary sustained the objections to the judicial factor's accounts, and granted leave to reclaim.

Opinion.—". . . . *Objection* 2—Stripped of specialities, the question in objections 2 to 5 is the same, namely, whether a judicial factor can retain sums paid to him or his firm for business done in connection with the trust. In dealing with the second objection, the Accountant indicates his view that the principle, as derived from actual decision, is limited to this, that 'a factor cannot make profit at the expense of the estate.' If this be the extent of the principle, then the second objection would fall to be disallowed. But the principle is based on the view that the factor must not place himself in a position of double interest. His duty is to choose the best agents for the trust. His own firm may be the best, or they may not; his membership of the firm prevents his arriving at an independent and unprejudiced judgment on that question. If this be the foundation of the principle, then the application will strike at all cases of remunerative employment by the factor of his firm whether profit be made by him and his firm directly at the expense of the estate, or whether the profit comes directly from the borrowers from the estate, but all the same through the employment of the factor's firm by him. That view has been repeatedly laid down both in Scotland and England. It may be sufficient to refer to the judgment of Lord Chancellor Lyndhurst in *New* v. *Jones*, 1 Hall & Twells, p. 632 (quoted by the Lord Justice-Clerk Hope in the Whole Court case of *Lord Gray and Others*, 19 D. p. 1, at page 5), and Lord Chancellor Cranworth in *Broughton* v. *Broughton*, 1856, 5 De Gex M. & G. p. 160 (also quoted by the Lord Justice-Clerk in *Lord Gray's* case at page 9), and to the opinions in the same case of *Lord Gray* and in the subsequent case of *Lauder* v. *Millars*, 21 D. 1353. The result is thus stated by Lord Cranworth in *Broughton*—'The rule applicable to the subject has been treated at the bar as if one sufficiently enunciated by saying that a trustee shall not be able to make a profit of his trust; but that is not stating it so widely as it ought to be stated. The rule really is that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty, and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them.'

"*Objection* 3—The principle deciding the second objection applies here, unless the factor could instruct his averment, contained in the answers, that his firm was employed, not by him, but independently by the objector's guardians, Miss Sleigh and Dr Church. That, however, is denied by Miss Sleigh and Dr Church in their letters. A proof on this point was not asked; and I therefore sustain this objection.

"*Objections* 4 *and* 5—These objections fall to be sustained if my view is correct that it is illegal for a factor to make profit through his firm by the business of the trust. No evidence was tendered of any independent selection and employment of the factor's firm by the beneficiaries as in-

dividuals. This result cannot be affected by any view I may entertain of the shabbiness of the objections. In all calculations of interest I fix the rate at four per cent."

The judicial factor reclaimed, and argued—*Second Objection*—A trustee who acted as agent for the trust could not charge for his services—*Robertson* v. *Morison*, April 26, 1849, 6 Bell's App. 422; *Lord Gray*, November 12, 1856, 19 D. 1; *Lauder* v. *Millars*, July 15, 1859, 21 D. 1353—but if he did not charge the trust estate, there was nothing illegal in his acting as agent—*Lauder* v. *Millars*, *cit. per* L. J.-C. Inglis. Here the fees had been paid not by the factory but by the borrowers. It followed that the factor was entitled to retain the amount of the fees. No doubt the factor was bound not to act as *auctor in rem suam*. That meant that the factor must not place himself in such a position that his own interests might come into conflict with those of the factory. Here there was no conflict of interest. The factor was as much interested as the factory estate in getting the best possible investment, because he was personally liable for any loss which might be sustained. The work had been done at less expense than would otherwise have been possible. The object of appointing professional men as factors was to obtain the benefit of their experience and connection in the selection of investments. No doubt if a trustee, while acting in the execution of the trust, obtained secretly an advantage for himself, he was bound to communicate that advantage to the trust estate. That principle only applied where the advantage was obtained secretly—*Huntington Copper and Sulphur Company, Limited* v. *Henderson*, January 12, 1877, 4 R. 294, 14 S.L.R. 219, *affd.* 5 R. (H.L.) 1, 15 S.L.R. 217; *Ronaldson* v. *Drummond & Reid*, July 15, 1881, 8 R. 956, 18 S.L.R. 690. Here the beneficiaries or their guardians knew that the factor was acting as agent, and must be held to have known that he would be paid by the borrowers in accordance with the table of fees. Neither *Keech* v. *Sandford* (Select Chan. Cases, p. 61, referred to in 1 Macq. 472), nor *Broughton* v. *Broughton*, 1855, 5 De G. M. & G. 160, had any application to the present case. *Keech* v. *Sandford* (*cit.*) was a case where a trustee obtained for himself the renewal of a lease which the landlord had refused to grant to the trust. In *Broughton* v *Broughton* (*cit.*) an executor who was a solicitor had been employed to do legal work for the executry estate, and was held entitled only to out-of-pocket costs. Lord Cranworth's dictum must be read with reference to the class of case with which he had to deal. *Third Objection*—This objection should be repelled. The firm of Lindsay, Howe & Co. had been employed by the guardians, and were entitled to deduct the amount of their charges from the sums paid over year by year. *Fourth and Fifth Objections*—These objections related to charges made for services rendered to the beneficiaries personally. The charges were made against the beneficiaries personally, not against the estate. Accordingly the objections should be repelled.

Argued for the objectors—*Second Objection*—A person occupying a fiduciary position was not entitled to make any profit out of the execution of the trust other than that which was properly incidental to his office—*Robertson* v. *Morison*, *cit. sup.*; *Huntington Copper and Sulphur Co., Limited* v. *Henderson*, *cit. sup.*—and was bound not to place himself in such a position that his interest as an individual might conflict with the interests of the trust—*Keech* v. *Sandford*, *cit. sup.*; *Broughton* v. *Broughton*, *cit. sup.*; *ex parte James*, 1803, 8 Vesey jun. 337; *Aberdeen Railway Co.* v. *Blaikie Brothers*, July 20, 1854, 1 Macq. 461. Both of these principles applied to the present case. If the factor were allowed to retain the fees paid by the borrowers, he would clearly be making a profit out of his office over and above his fee, and he would be making a profit which he could not have made if he had not held the office. It was immaterial that the fees were not paid by the factory estate. What was struck at was not merely making a profit at the expense of the estate, but making a profit out of the execution of the trust. It was clear that there was a conflict between the interests of the factor and those of the estate. It was the duty of the factor to see that the agent for the factory made no improper charges—*New* v. *Jones*, 1833, 1 Hall & Twells 632. By acting as agent he had put it out of his power to perform that duty. The conflict of interest was still clearer where the factor acted as agent for the borrower as well as for the factory. It was the interest of the borrower to get a low rate of interest, while it was the interest of the factory to get a high rate of interest. It was immaterial that the work had been done by the factor's firm even if that were the case—*Lord Gray*, *sup. cit.*; *Lauder* v. *Millars*, *sup. cit.* *Third, Fourth, and Fifth Objections*—These objections should be sustained on the general principle that a trustee was not entitled to make a profit out of the execution of his office. If these objections were not sustained, the factor would make a profit which he could not have made if he had not held the office of factor. There was no separate employment either by the guardians or by the beneficiaries.

At advising—

LORD LOW—The judicial factor in this case is a partner of the firm of Lindsay, Howe, & Company, W.S., and it appears that part of the trust funds was invested by him upon heritable securities, the borrowers being clients of his firm. Perhaps I should explain that it was only one-half of the amount which was invested upon heritable securities which was lent to clients of Messrs Lindsay, Howe, & Company. The fees received by the firm for the professional services rendered by them in carrying through these transactions amount to £295, 17s., and the contention of the beneficiaries under the trust is

that that sum must be credited to the trust estate. The answer made by the judicial factor to that claim is that the whole of these fees were paid by the borrowers, against whom they were charged by Messrs Lindsay, Howe, & Company in accordance with the recognised practice in Scotland. The Lord Ordinary has, however, given effect to the claim of the beneficiaries.

There are two well-established principles of trust law, both of which are said to be applicable to this case. The one is that a trustee must not make profit from the execution of his office (a rule which, of course, does not apply to the remuneration of a judicial factor for work done *qua* judicial factor), and the other principle is that a trustee cannot be allowed to place himself in a position in which his interest as an individual conflicts, or may conflict, with his duty as a trustee.

The Lord Ordinary's opinion is that both of these principles have been infringed in this case, and that accordingly the judicial factor is bound to communicate to the trust estate the profit which he has made, through his firm, by acting as agent both for the borrower and the lender in carrying through the transactions to which I have referred. Now if the fees received by the firm had been charged against and paid by the trust estate, I imagine that the soundness of the Lord Ordinary's view could not be impugned. But no part of the fees was, or could have been, charged against the trust estate, because they were earned by and paid to the judicial factor (through his firm) not as judicial factor, or as acting as law agent for the trust, but as law agent for the borrowers. I know of no authority for saying that the judicial factor is bound to credit these fees to the trust estate. All the cases, so far as I know, in which a person in a position of trust has been held bound to communicate profit which he has made to the trust estate have been cases in which that profit has been earned either directly or indirectly out of, or at the risk of, the trust estate. Thus if a trustee chooses to do professional work for the trust, which he would have been entitled to employ another professional man to do, he cannot claim remuneration from the trust estate, but only actual outlays. Again, if a trustee receives a commission from a person dealing with the trust, he must communicate the benefit to the trust estate; and if he trades with trust funds, the profits belong to the trust estate.

Such cases are familiar, and the law in regard to them is well settled, but there is no case, so far as I know, in which the Court has compelled a trustee to communicate to the trust estate remuneration for professional services rendered to a third party, such remuneration being wholly paid by the third party, and to no extent either directly or indirectly coming out of the trust estate. I am, therefore, of opinion that the rule that a trustee must not make profit from the execution of his office does not apply to this case, because in my opinion he has not done so in any reasonable sense.

In regard to the rule that a trustee must not enter into a transaction in which his duty as a trustee comes in conflict with his interests as an individual, the penalty for infringing the rule is that the transaction will not be enforceable against the beneficiaries, and may be set aside at their instance, while if loss to the trust estate results the trustee will be liable to make it good. Thus in *Aberdeeen Railway Company* v. *Blaikie Brothers*, 1 Macq. 461, where a director of a railway company contracted to supply certain material to the company, it was held by the House of Lords that he could not enforce the contract; and in the *York Buildings Company* v. *Mackenzie*, 3 Pat. App. 378, the purchase by the common agent in a ranking and sale of part of the estate sold by public roup, was reduced by the House of Lords many years after the transaction, and although the purchase was made in complete good faith.

In this case the sufficiency of the securities is not challenged. It is not suggested that the investments were not sound trust investments or that the securities were other than ample. If the beneficiaries had been seeking to have the investments set aside on the ground that the judicial factor lent trust funds to his own clients and acted as law agent for both parties, it may be that the Court would, without inquiring into the sufficiency of the securities, have ordained the factor to restore the money to the trust estate, he receiving an assignation to the securities. But there being no suggestion that the transactions should be set aside, I can find neither authority nor principle for imposing a fine upon the factor—because it really comes to that—to the amount of the remuneration which he received from the borrowers for professional services rendered to them alone.

The result is that in my opinion the Lord Ordinary was wrong in sustaining the second objection. In taking this view, however, I differ from the Lord Ordinary only upon the question of remedy, and I am not to be taken as dissenting from the opinion which he indicates that in lending trust funds to his own clients the judicial factor placed himself in a position in which his interest as an individual might possibly conflict with his duty as a trustee.

The third and fourth objections to the factor's accounts have also been sustained by the Lord Ordinary. They arise in this way—By his will the late Mr Sleigh directed his trustees (in whose place the judicial factor stands) to divide the income of the trust estate among his children, and to hold the capital for their issue. He also appointed guardians to his children. So long as the children were in minority the free income was paid by the factor to their guardians, and when they came of age it was paid to them. Lindsay, Howe, & Company acted as law agents first for the guardians and afterwards for the children when they came of age, and the account to which the third objection refers is an account rendered by the firm to the

guardians for professional services rendered in receiving payment of the income from the factor and thereafter administering it as agents for the guardians. The account to which the fourth objection refers is a similar account rendered to the children after they came of age. The Lord Ordinary has held that Lindsay, Howe, & Company are not entitled to claim payment of the charges contained in either of these accounts on the ground that they represent charges for professional work done by the factor through his firm in connection with the trust. I am unable to assent to that view. The judicial factor's duties were ended when he paid the income to the guardians or the beneficiaries as the case might be, and if the latter chose to employ Lindsay, Howe, & Company to act as their law agents in ingathering and administering the income for them, I see no reason why the firm should not have undertaken the employment and made the usual professional charges for their services.

The Lord Ordinary refers to two letters, Nos. 41 and 42 of process. The former is written by Dr Church, one of the guardians, to one of the beneficiaries saying—"I did not appoint Messrs Lindsay, Howe, & Company as law agents on your behalf in connection with your late father's estate." No. 42 of process is a letter by the other guardian, Miss Slight, to Mr Duncan M'Laren, S.S.C., in which she says that her impression was that the factor's appointment "embraced all the duties requiring to be discharged in connection with the estate," and that she was, therefore, not aware that Messrs Lindsay, Howe, & Company were employed separately as agents on the estate.

It is to be observed that these letters were addressed to third parties, and there is nothing to show that they were ever communicated to the factor or his firm, and in the objections there is no suggestion that the firm were not authorised to act as law agents for the guardians and for the children after they came of age. If there had been a specific averment to the effect, inquiry might have been necessary, but in the absence of any such averment or any motion for inquiry I am not prepared to give any weight whatever to the letters.

The objection which is stated to the accounts is that the services which are charged for were services which it was the duty of the factor to perform and which were covered by his factor's fee. As I have already said, I do not think that that is an objection which can be sustained to the effect of holding that no part of the accounts can be charged against the guardians or the beneficiaries. The accounts might indeed have contained certain charges which fell to be struck out on the ground that they represented services truly rendered to the trust and not to the guardians or the beneficiaries, or that they represented work which fell to be performed by the factor and was covered by his fee. Such charges, however, would raise questions of audit merely, and not questions of principle to be determined by the Court. As, therefore, the accounts have been examined by the Accountant of Court, and he has reported that they are in order, I am of opinion that objections 3 and 4 and objection 5, which is in a similar position, as well as objection 2, should be repelled.

LORD ARDWALL—It is settled law that neither a trustee nor a judicial factor is entitled to obtain remuneration out of the trust funds for agency business performed by him for the trust under his charge. The leading Scotch case is that of *Lord Gray and Others*, decided by the Whole Court on November 12, 1856, 19 D. 1. The principle on which this rule is based undoubtedly is that the trustee or factor must not place himself in a position where he has or may have a double purpose to serve, namely, his own interest and the interest of the estate; and in order to discourage persons in such fiduciary positions from doing business for the estate under their charge the law has said that although it is not illegal for them to do so, yet they shall not get any remuneration for so doing, but shall only be entitled to recover cash outlays which they have made (see *Gray, supra*). But it has never, so far as I can find from any cases quoted during the argument, been laid down that a trustee or factor must not only forego any remuneration from the trust, but must communicate to the trust any profit which he has in any way made arising out of his position as trustee or factor.

The cases of *Robertson* v. *Morrison*, 6 Bell's App. 422; and *Lauder* v. *Miller*, 21 D. 1353; the case of *Gray*, above quoted; and *Broughton* v. *Broughton*, 1856, 5 De Gex, M. & G., p. 160, were all cases where a person in a fiduciary position was claiming to recover payment of accounts for business done in connection with the trust out of the trust estate, and therefore I think the closing words of Lord Cranworth's dictum in *Broughton*, quoted by the Lord Ordinary, were not intended to apply to any other kind of case than that then under consideration.

The ground stated by Lord Cranworth as the foundation of the rule in such cases is as follows:—He says—"It has often been argued that a sufficient check is afforded by the power of taxing the charges, and the answer to this is that the check is not enough, and the creator of the trust has a right to have that and also the check of the trustee. The result, therefore, is that no person in whom fiduciary duties are vested shall make a profit off them by employing himself, because in doing so he cannot perform one part of his trust, namely, that of seeing that no improper charges are made."

In the present case, as I shall presently point out, this ground of the rule has no application, nor has the only penalty that has hitherto been imposed upon law agents doing work for the estate on which they are trustee or factor any application in the present case, because that penalty simply

consists in their not being allowed to recover out of the trust estate any remuneration for the work done.

The present case arises out of the circumstance that the factor through his own firm obtained suitable investments upon heritable security for the funds of the factory estate. According to the rule in the table of fees the expense of such an investment falls entirely upon the borrower. It is the borrower, therefore, in this case who has the interest to see that no improper charges are made, and not the factor, because *qua* factor he has no interest to protect, inasmuch as the estate is not liable for any charges whatever, be they proper or improper. He is accordingly not in the position of having a divided duty, first to the estate and then to himself, so far as these charges are concerned. Further, I see no equitable grounds for holding that these fees, paid as they are by the borrower, should be credited to the trust estate. It has been suggested that the factor's fee covers all work done for the estate or in connection with it, and that therefore these charges paid by the borrower should be applied to reimburse the estate *pro tanto* for the factor's fee. I think it is sufficient answer to this to say that the work of drawing or revising the deeds necessary to carry out a loan upon heritable security is not work in the contemplation of parties in calculating a factor's fee at all, but is entirely extra work so far as the duties of the factor are concerned. It is true some suggestions were made on behalf of the respondents to the effect that to allow trustees or factors to lend money through the firm of law agents to which they belong might have the result of raising a conflict of interests in which the factor might be tempted to accept unsatisfactory securities out of favour to his own firm or his own clients; but if he were to do so, the remedy would be to reduce the transaction and claim damages from the trustee. I therefore do not think suggestions such as this can be held to affect the matter. It has often been said that it is undesirable that an agent should act both for the borrower and the lender in any case, and this so far is true, but the Courts have never held that such an arrangement is illegal, although they have frequently said that in such transactions agents must be particularly careful in carrying them through, otherwise they will be liable to actions of reduction and damages at the instance of one or other of their clients.

Some minor suggestions were also thrown out, but I consider that they were too remote possibilities to take into consideration in this matter, and on the whole I am unable to find authority or principle for the proposition that a factor or trustee ought to be penalised for carrying out loan transactions through his own firm by having to pay into the trust estate fees received from the borrower which never belonged to the trust, and to which, so far as I can see, the trust has no legal or equitable right.

The Lord Ordinary has sustained objections 3, 4, and 5 on the same general ground on which he has sustained objection 2, namely, that they relate to accounts which the firm of Messrs Lindsay, Howe, & Company, of which the factor is a partner, charged against certain beneficiaries of the trust estate or their guardians, that accordingly these accounts must also be regarded as an attempt to make profit out of the estate under the factor's charge, and that therefore the accounts must be disallowed except in so far as they consist of outlays. This matter has been decided without a proof, but if it were necessary a proof might be allowed in order to prove or disprove the allegation that these accounts as they bear are not accounts belonging to the trust at all, but are accounts incurred by the beneficiaries under the trust, or their guardians after these parties had received payment out of the trust of the sums due to them from time to time. It was said that these beneficiaries and guardians never knew that Messrs Lindsay, Howe, & Company were acting for them, and supposed all along that the work now charged for was being done by or on behalf of the factor. All I can say is that if they thought this they were certainly mistaken, but the fact that they were mistaken will not disentitle Messrs Lindsay, Howe, & Company from recovering these charges unless it can be shown that they had no right to make them in respect that they did not do the work. I think that the memorandum and docquets appended thereto clearly show that the guardians, at all events Miss Slight and Dr Church, knew perfectly well that Messrs Lindsay, Howe, & Company were taking charge of their interests, and that they approved of their doing so, while the accounts themselves show that all the charges made are not charged as is suggested against the trust estate, but against the sums received by the guardians or their agents from the judicial factor on the trust estate after such sums had been received. It is of course open to the guardians of the children to have these accounts taxed, but when that has been done I can see no good reason for their resisting payment.

Messrs Lindsay, Howe, & Company were legally just as much entitled to act for these guardians and beneficiaries as they would have been entitled to act for any other person who happened to have an interest in this trust with regard to moneys which had ceased to be in the trust and had been paid over to the beneficiaries. At the same time I do not think that Messrs Lindsay, Howe, & Company ought to have undertaken the business in question, because these guardians and beneficiaries were, properly speaking, the clients of Messrs Duncan Smith & M'Laren, and the factor's firm ought not to have interfered with them.

I am accordingly of opinion that the Lord Ordinary's interlocutor ought to be recalled in so far as it sustains the objections 2, 3, 4, and 5, and that these objections should be repelled and the case remitted to the Lord Ordinary for further procedure.

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,