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

sufficient evidence to show that he had revoked the donation, and that accordingly his widow was entitled to the arrears of income from and after Whitsunday 1889 until the date of his death.

This was a special case presented to the Court for their opinion and judgment in connection with certain difficulties which had arisen in administrating the estate of Mr James Lawrence Boyd of Glendouglie, who died on 11th March 1907.

The *first* parties to the case were Mr Boyd's testamentary trustees, the *second* party was Mr James Lawrence Boyd, a grand-nephew, and the *third* parties were the trustees acting under a deed of trust in favour of the deceased's wife granted by him on 21st October 1878.

The main difficulty arose out of the following circumstances:—In 1878, in consequence of the failure of the City of Glasgow Bank, Mr Boyd became involved as a trustee shareholder in heavy liabilities. He accordingly on 21st October 1878 executed a deed of trust in favour of his wife in the following terms:—"I, James Lawrence Boyd, considering that the making of a reasonable provision for the aliment of my wife and children (if any) of our marriage is a duty incumbent on me, and, being a burden on me and my means and estate, should be satisfied and paid therefrom: Therefore I have resolved to set apart and invest a sum of £4000 in the names of the after-mentioned trustees for the above purpose; and having of even date herewith executed an assignation of a bond and disposition in security over subjects in Leith, which assignation is granted in favour of George Hannay, Esq., of Kingsmuir, Fifeshire; George Hair Pagan, Esq., Sheriff-Clerk of Fife" (now deceased); "and George Bird Mein Wyse, Esq., residing in Northumberland Street, Edinburgh" (also now deceased); "and the acceptors and acceptor, survivors and survivor, of them as trustees for the purposes set forth in these presents, I do hereby declare that the said trustees and trustee shall stand possessed of the said sum of £4000 and interests and proceeds thereof in trust for the following ends, uses, and purposes, viz., in the first place, the said trustees shall hold the said trust premises for behoof of my wife Mrs Anne Mouat Hannay or Boyd in liferent for her liferent use allenarly, exclusive of all my marital rights and interests of every kind, and pay over the annual proceeds to her on her own receipt without my concurrence during all the days and years of her life: Declaring that she shall be bound to maintain and educate therefrom her niece Robina Hannay, in fulfilment of my obligation to that effect. . . . In the fourth place, failing children of the said marriage" (which happened), "the said trustees shall hold and administer the said trust premises for the children of my brother Thomas Deas Boyd, in such shares and portions as he may direct."

The £4000 contained in the bond and disposition in security was repaid in 1885, and the fund was then invested upon the security of an estate belonging to the truster. On 14th May 1879 the trustees by minute authorised Mrs Boyd herself to receive and discharge the interest. No interest, however, was at any time paid either to the trustees or to Mrs Boyd herself, although the trustees received from Mrs Boyd a letter dated 25th May 1889 in the following terms:—"To the trustees acting under deed of trust by my husband, dated 21st October 1878,—Dear Sirs—I beg to acquaint you that I have duly received payment, through my husband, of the annual interest accruing on the funds under your charge half-yearly, as the same became due, up to and including the term of Whitsunsunday 1889.—Yours faithfully, ANNE M. BOYD."

The following statement with regard to this letter and the interest on this fund is taken from the case:—"This document is in the handwriting of a former clerk of Mr Boyd's. It was handed to Mrs Boyd by her husband as a document requiring her signature, and she signed it. She received no explanation as to the meaning of the document or the purpose for which it was required, and she did not ask for any explanation. In point of fact Mrs Boyd had not at the date of the document received payment through her husband or otherwise of the annual interest prior to that date. The interest which accrued upon the said sum of £4000 prior to the granting by Mr Boyd of the said bond and disposition in security on 14th July 1885 was uplifted by Mr Boyd and applied to his own purposes, and he never paid any interest either to the trustees or to Mrs Boyd upon the said bond and disposition in security. None of the interest upon the said trust fund was set aside or ear-marked in any way by Mr Boyd, and it cannot now be traced. From the date of the trust Mrs Boyd was alimented by her husband in his house. No receipts were signed by Mrs Boyd for the half-year's interest either prior or subsequent to the letter of 25th May 1889, nor did she subsequently sign any similar letter to the said trustees."

Upon this matter the parties stated the following *contentions*:—"The *third* parties maintain that on a sound construction of the said bond and disposition in security and deed of trust Mr Boyd made a gift to his wife of the income of the said £4000 as it accrued, and that the income so gifted, inasmuch as said gift was unrecalled at the date of his death, formed a debt against his estate. They further maintain—(*First*) that the income accruing after Whitsunday 1889 down to and including the half-year's interest due on the said bond at 11th November 1906, and amounting to a sum of £2450, is a debt due by the deceased's estate which the third parties are bound and entitled to recover and pay over to Mrs Boyd; and (*second*) that the income accruing to the said bond from Whitsunday 1878 to Whitsunday 1889 inclusive, amounting to a sum of £1540, is also a debt due by the deceased's estate which the third parties are bound and entitled to collect and pay over to Mrs Boyd, the letter of 25th May

1889 signed by her being of the nature neither of a receipt nor a discharge for said income, nor being capable of operating as a bar to the third parties recovering income, which in point of fact has not been paid. The *first* parties (with whom the *second* party concurred) maintain that the said trust, so far as it conferred any benefit upon Mrs Boyd, was a revocable donation, and that the gift of the income of the said sum of £4000, so far as accruing during the lifetime of Mr Boyd, was in point of fact revoked by him. In any event, they maintain that the said income, if it was exigible, must be presumed to have been paid, and is not now extant, and that the amount thereof is not a debt due by the first parties to the third parties, and that in no event would interest be due on it."

A subsidiary difficulty arose in connection with certain shares of banks and public companies left by the deceased amounting in value to upwards of £16,400 (the gross moveable estate being £108,052, the heritable £23,295), on which there was an uncalled liability. By what purported to be a holograph codicil dated 6th March 1901 the deceased gave power to his trustees "to retain for such time as they may think fit any securities or investments which I may hold at the time of my death, with the exception of such stocks as have an uncalled liability. By a codicil dated 20th June 1901 he authorised his trustees "to hold any investments I may die possessed of for such time as they may think fit."

The questions here involved were (*a*) whether the codicil of March 1901 was a valid testamentary document (save on this point of the trustees' powers of no general interest or moment), (*b*) and if so, whether or not it was revoked by the codicil of June (also of no general interest or moment), and (*c*) if it was so revoked, were the trustees entitled to retain, and if so, for how long, the shares with uncalled liability in respect of the powers conferred by the codicil of 20th June.

The *first* parties *maintained* that the earlier codicil was invalid, or at any rate revoked, and that it was "within their power as trustees to continue to hold the shares if and so long as they are satisfied of the safety of the said shares as a trust investment." The *second* party maintained the validity of the codicil of 6th March, and that it was not revoked by the codicil of 20th June, and "that, apart even from such express exclusion, the said shares with uncalled liability are not investments within the meaning of the codicil of 20th June 1901, and in any event the trustees are not entitled to retain such investments indefinitely at their pleasure."

The *questions of law* submitted to the Court were as follows:—"1. Is it within the power of the first parties to retain the shares referred to in paragraph 8 hereof indefinitely at their pleasure, notwithstanding that there is attached to them a liability to pay uncalled capital? Or are they bound to realise the same for the purpose of reinvestment? 2. Are the third parties entitled (*a*) to payment on behalf of Mrs Boyd of the income accruing on the sum of £4000 under the deed of trust, dated 21st October 1878, and amounting as at Martinmas 1906 to the sum of £3990; or are they entitled (*b*) to payment of the sum of £2450, being the income on the said sum for the period from Whitsuntide 1889 to Martinmas 1906, or of any part thereof? In either event, are they entitled (*c*) to interest on the arrears of said income; and if so, at what rate?"

On the first question of law counsel for the first parties cited *Thomson's Trustees* v. *Henderson*, October 25, 1890, 18 R. 24, 28 S.L.R. 2; *Thomson's Trustees* v. *Thomson*, February 22, 1889, 16 R. 517, 26 S.L.R. 368; *Ritchies* v. *Ritchie's Trustees*, July 20, 1888, 15 R. 1086, 25 S.L.R. 514; *Henderson* v. *Henderson's Trustees*, July 20, 1900, 2 F. 1295, 37 S.L.R. 976; *Smith* v. *Lewis*, [1902] 2 Ch. 667. Counsel for the second parties cited *Knox* v. *Mackinnon*, August 7, 1888, 15 R. (H.L.) 83, 25 S.L.R. 752; *Robinson* v. *Fraser's Trustee*, August 3, 1881, 8 R. (H.L.) 127, 18 S.L.R. 740; *Learoyd* v. *Whitely*, (1887) 12 A.C. 727.

On the second question of law counsel for the first parties cited *Dunlop* v. *Johnston*, April 2, 1867, 5 Macph. (H.L.) 22, 3 S.L.R. 372; *Allan* v. *Hutchison's Trustees*, February 1, 1843, 5 D. 469; *Edward* v. *Cheyne*, March 12, 1888, 15 R. (H.L.) 33, 25 S.L.R. 422; *Robertson's Trustee* v. *Robertson*, January 22, 1901, 3 F. 359, 38 S.L.R. 279. Counsel for the third parties cited *Kemp* v. *Napier*, February 1, 1842, 4 D. 558.

LORD LOW—The first question in this case is whether the testamentary trustees of the late deceased Mr James Lawrence Boyd are entitled to retain certain shares in public companies which belonged to the truster, and upon which there is uncalled liability.

There was found in the truster's repositories a holograph writing of a testamentary nature, signed by him, dated 6th March 1901, and he also left a codicil to his trust-disposition and settlement, duly tested, dated 20th June 1901. By the holograph writing the truster gave power to his trustees "to retain for such time as they may think fit any securities or investments which I may hold at the time of my death, with the exception of such stocks as may have an uncalled liability"; while by the codicil of 20th June he authorised his trustees "to hold any investments I may die possessed of for such time as they may think fit," there being in the latter case no exception of stocks having an uncalled liability.

The holograph writing was in some important respects incomplete, and that fact coupled with the circumstances narrated in the special case suggests that it was intended to be no more than a draft of a proposed codicil. The writing, however, was, as I have said, signed by the truster, and that being so, I do not think that effect could have been refused to it as a

testamentary writing if it had not been superseded by the codicil of 21st June. But it appears to me to have been entirely superseded by that codicil. The writing, besides containing the power to the trustees which I have quoted, gave directions in regard to the disposal of the residue of the truster's estate. The codicil also disposed of the residue and authorised the trustees to hold investments possessed by him in the terms to which I have referred. That being so, I am of opinion that the writing was altogether superseded and revoked, and that the truster must be held to have intentionally in the codicil omitted from the power which he gave to his trustees to hold investments, the exception of stock having an uncalled liability.

The result is that the power which the trustees have is to hold investments of which the truster died possessed for such time as they may think fit. Of course, in exercising such a power, trustees must act prudently, and they are only entitled to retain such investments if they are satisfied that to do so will be for the benefit of the trust. In the statement of the contention of the parties in the special case the trustees (the first parties) only claim right to retain the shares referred to "so long as they are satisfied of the safety of the said shares as a trust investment." I think that that is an accurate statement of their right, and if the first question had been framed in similar terms I should have had no hesitation in answering it in the affirmative. As framed, however, the question is whether the first parties are entitled to retain the shares "indefinitely at their pleasure." I am not prepared to affirm their right to retain in such wide terms, but if the words "indefinitely at their pleasure" be omitted, I am of opinion that the first branch of the first question may be answered in the affirmative, and the second branch in the negative.

The second question is attended with more difficulty, and arises in this way. When the City of Glasgow Bank stopped payment in 1878 the truster was upon the register of shareholders in respect of certain shares which he held in trust. He was, accordingly, a contributory, and the result might very well have been to ruin him. In these circumstances he executed a deed of trust, dated 21st October 1878, by which, upon the narrative that "the making of a reasonable provision for the aliment of my wife and children (if any) of our marriage is a duty incumbent on me," he assigned a bond and disposition in security for the sum of £4000 over certain subjects in Leith to trustees, and directed them, in the first place, 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 contained in the bond and disposition in security was repaid in 1885, and the fund was then 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 Mrs Boyd herself to receive and discharge the interest. Mrs Boyd, however, never received payment of the interest during her husband's life, he having uplifted and applied to his own purposes the interest of the £4000 prior to 1885 (when the fund was lent to him upon the security of his property), and having thereafter paid no interest either to the trustees or to Mrs Boyd.

In these circumstances the question is raised whether Mrs Boyd is entitled to the arrears of interest. She is not a party to the special case, but the trustees under the trust deed of 1878 are the third parties, and the title to claim the arrears of interest, if due, is in them.

It is admitted that the right conferred upon Mrs Boyd by the trust deed to the income of the £4000 was of the nature of a donation, which the truster could have revoked, and the question is whether the donation was revoked or whether the circumstances are such as to bar the trustees from claiming payment of the arrears.

I was at first inclined to think that the claim of the third parties was not well founded, and that this case fell to be dealt with upon principles similar to those which were applied in *Allan* v. *Hutchison's Trustees*, 5 D. 469, and in *Edward* v. *Cheyne*, 13 R. 1209, and 15 R. (H.L.) 37. It seems to be plain that the contingency in view of which the trust deed was granted never occurred, because whatever the truster may have been called upon to pay as a contributory in the winding-up of the City of Glasgow Bank he died a rich man in 1907, and there is no reason to suppose that he was at any time unable to aliment his wife or to maintain her in ample comfort. When, in these circumstances, it appears that the trust deed, so far as the wife's right to the income was concerned, was treated as if it had been non-existent, there is much force in the argument that the inference is that (the necessity of the wife for aliment never having arisen) the husband did not consider himself called upon to pay the interest of the £4000 to her (he being under no legal obligation to do so), and that she on her part acquiesced in that view and waived any claim which she might have.

That argument, however, assumes that Mrs Boyd had, in full knowledge of the circumstances, not only acquiesced in the non-payment of the income to her, but had deliberately waived any claim thereto which she might have. I have come to the conclusion that such an assumption is not permissible. The special case contains no facts which would warrant the assumption; on the contrary, the facts which are stated lead to the inference that Mrs Boyd was entirely guided by her husband in regard to business or money matters.

The question therefore comes to be, whether there is sufficient evidence that the truster revoked the donation of the income

of the £4000 to his wife. The only evidence is the fact that he never paid the income to his wife. I doubt whether in any view the necessary inference from that fact is that he intended to revoke the donation; and I further doubt whether the mere non-payment of the income by the truster, whatever his intention might be, was a habile method of revoking a gift of income to his wife constituted by a formal trust deed, and by the handing over of the capital sum to the trustees under that deed. But however that may be, I think that the idea that the truster revoked the gift is negatived by the letter of 25th May 1889, quoted in the case, and the circumstances in which it is admitted that the letter was written.

The letter is addressed to the trustees under the deed of trust of 1878, and is signed by Mrs Boyd, and in it she acknowledges that she has received payment of the interest of the trust fund half-yearly up to Whitsunday 1889.

In regard to that letter the statements in the special case are these—"This document is in the handwriting of a former clerk of Mr Boyd's. It was handed to Mrs Boyd by her husband as a document requiring her signature and she signed it. She received no explanation as to the meaning of the document or the purpose for which it was required, and she did not ask any explanation."

The statement in the letter that the income of the trust fund had been paid to Mrs Boyd was not true, and I suppose that it was made to satisfy the trustees under the deed of trust. But however that may be, the statement was truly the truster's statement, although put in the form of a letter from his wife, and in face of that statement by him I do not see how it can be maintained that up to the date of the letter he had revoked the donation of the income to his wife. The statement is that so far from having revoked the donation he had regularly paid the income to her. But if he had not revoked the donation prior to 1889, he never did so afterwards, because there was nothing done by him after 1889, from which revocation could be inferred, which had not equally been done prior to that date. I am therefore of opinion that the claim of the third parties cannot be rejected on the ground that the truster had revoked the gift of the income of the trust fund to his wife.

In my judgment, however, they can only claim the arrears of income from and after Whitsunday 1889, the date up to which payment was acknowledged in the letter. Mrs Boyd is not a party to this case, and she is not seeking to have the letter set aside. It is true that it is neither holograph nor tested, but it is upon the face of it an acknowledgment by Mrs Boyd that she had received payment of the income up to date, and it was sent to the trustees obviously to exonerate them in regard to past income. Standing the letter, therefore, I do not see how Mrs Boyd could claim payment of the income falling due prior to Whitsunday 1889, and I do not think that the third parties can, as regards that matter, be in any better position.

I therefore think that branch (*b*) of question 2 should be answered in the affirmative, with the deletion of the words "or any part thereof," and branches (*a*) and (*c*) in the negative.

LORDS STORMONTH DARLING and ARDWALL concurred.

The LORD JUSTICE-CLERK was absent.

The Court answered the first branch of the first question in the affirmative, deleting the words "indefinitely at their pleasure," and the second branch in the negative; answered branch (*b*) of question 2 in the affirmative, with the deletion of the words "or any part thereof," and branches (*a*) and (*c*) in the negative.

Counsel for the First Parties—The Dean of Faculty (Campbell, K.C.)—Jameson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Second Party—Lees, K.C.—Burn Murdoch. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Third Parties—Hunter, K.C.—Boyd. Agents—J. & J. Ross, W.S.

Saturday, July 11.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

SCOTT *v.* SCOTT.

Husband and Wife—Divorce—Desertion—Adherence—Jus Quæsitum—Vested Right—Defender Becoming Insane after Lapse of the Four Years, and Remaining so at Date of Action—Act of 1573, *cap.* 55—*Conjugal Rights (Scotland) Amendment Act* 1861 (24 *and* 25 *Vict. cap.* 86), *sec.* 11.

Where there has been "malicious and obstinat defectioun of the partie offender" for the full statutory period of four years, the injured spouse being all the time willing to adhere, and not being disentitled by any conjugal misconduct of his or her own from seeking the remedy of divorce, that is by itself a sufficient ground for divorce, whether it be called a vested right or a *jus quæsitum* to apply for the remedy.

Held, accordingly, that the fact of the defender to an action of divorce for desertion having become insane at a period subsequent to the four years, and being insane at the date of the action, did not affect the pursuer's right to obtain divorce. *Murray* v. *M'Lauchlan*, December 21, 1838, 1 D. 294; *M'Callum* v. *M'Callum*, February 15, 1865, 3 Macph. 550; *Muir* v *Muir*, July 19, 1879, 6 R. 1353, 16 S.L.R. 785; *Winchcombe* v. *Winchcombe*, May 26, 1881, 8 R. 726, 18 S.L.R. 517; *Auld* v. *Auld*, October 31, 1884, 12 R. 36, 22 S.L.R. 26;