tune or the playing it is "threatening, abusive, or insulting;" and that being so, I have no difficulty whatever in dealing with the matter of competency.

LORD ADAM—I think that all that has been here charged against the suspender is that he played on the flute a particular air called "Boyne Water," and that a crowd assembled. Nothing is said of intent to create a breach of the peace, or as to a breach of the peace having been actually created. I am quite unable to sustain the conviction which has been obtained under such a complaint.

LORD JUSTICE-CLERK—This case is one of some importance, but I am anxious that the judgment about to be given by this Court should not be thought to go further than it is intended to do. The meaning of the charge here is substantially this—That the defender played an air which was known to be insulting and irritating, because of its associations, in a neighbourhood where there were people of a different religious and political persuasion than the musician who so employed his time. I do not by any means mean to say that conduct of this nature may not in some circumstances be an offence under this Act. It might be that the mode adopted was peculiarly aggravating, but at the same time I am by no means disposed to stretch far the law so as to interrupt or prevent the doing of acts of a kind which in themselves are perfectly innocent, where the only reason why they are likely to cause a breach of the peace may be that there are some people who do not choose to have their party or religion the subject of discussion or derision. What the air of "Boyne Water" may be is more than I know. To the effect of this conviction I only remember one application of the law, and that one I should not be at all inclined to follow. In the trial of *Muir* and *Palmer* in 1793 it was proved against Muir that he had desired an organist to play the *Ca Ira*. Now, if in this complaint we had had the words and character of "Boyne Water" described and specified—that it was a song sung by the Orangemen of Ireland for the purpose of turning their Roman Catholic brethren into ridicule, and that it was here sung or played to Roman Catholics for the purpose of creating, or did in fact create, a breach of the peace—then I am far from saying that there would not be a relevant statement of an offence under the Act. But as this complaint stands it manifestly contains no charge of any crime at all. In many parts of Scotland "Boyne Water" might be sung with the greatest possible impunity.

The Court repelled the objection to the competency, quashed the conviction, and found the suspender entitled to seven guineas expenses.

Counsel for Suspender—H. J. Moncrieff. Agent—George Fleming, S.S.C.

Counsel for Respondent—Asher—Brand. Agent—G. Andrew, S.S.C.

COURT OF SESSION.

Friday, May 31.

FIRST DIVISION.

SPECIAL CASE—DUNLOP OR ROSS AND OTHERS.

(*Ante*, p. 109.)

Succession—Legacy—Trust—Legacy to a Class.

Where a bequest of residue is made to a class, and the testator contemplates various periods for the distribution of different portions of the residue, the members of the class entitled to share in the various distributions of the fund are to be ascertained as these various periods occur.

A testator in his trust-settlement bequeathed a certain portion of the residue of his estate "to the children of my nephew." He had directed his trustees to hold a sum not exceeding one-half of the residue of his estate to provide for the payment of two annuities of considerable amount. At the date of the truster's death, and at the date of the death of the first annuitant, the family of the testator's nephew consisted of eleven children. A twelfth child was born subsequently, and before the death of the survivor of the two annuitants. *Held* that this *post natus* was not entitled to any share of that portion of the residue that became distributable on the death of the testator, nor to any share of the fund set free by the death of the first annuitant, but was entitled to share in the fund set free by the death of the second annuitant.

This was a Special Case submitted to the Court by the trustees and certain beneficiaries under the trust-settlement of the late Charles James Tennant. The purposes of this trust-settlement, which was executed of date 7th October 1863, were to pay the truster's debts and various legacies of trifling amount, and to provide an annuity of £2000 each to his brother John Tennant and his sister Mrs Couper, and for payment of these annuities he directed his trustees to hold a sum not exceeding one-half of the residue of his estate, and the annuities were restricted accordingly. He further directed that the residue of his estate should be divided among his nephews and nieces in different proportions. He mentioned each by name, and provided that in the event of the decease of any of them before the provision given to him or her vested, the shares should be payable to their lawful issue. But in the case of one of his nephews, who was dead, he made the bequest directly to his children; and in the case of another nephew, James Dunlop, the provision was thus worded—"To the children of James Dunlop, Esquire, residing at Poverty Bay, New Zealand." It was further declared "that the provisions of minors shall not vestor be payable until they respectively attain majority."

The clauses of the deed so far as material are quoted in the opinion of the Lord President (*infra*).

At the date of the testator's death on 31st October 1870 James Dunlop had eleven children, who were the first parties to this case. A twelfth child, Henry Colin Dunlop, the third party to

the case, was born on 16th May 1874. Mrs Couper, one of the annuitants, was by this time dead, having died on 27th November 1871. Mrs Tennant, however, the other annuitant, survived the birth of this child, and lived till April 17, 1878. The question between the parties was whether the third party, the child *post natus*, was entitled to any share of the residue. Some previous procedure in the case is reported, *ante*, p. 109.

The trustees estimated that the residue would amount to between £245,000 and £250,000. Of that amount they retained £122,500 to meet the annuities, and divided the rest among the residuary legatees. On Mrs Couper's death in 1871 they divided a further sum of £61,000, and on Mr Tennant's death in 1878 there was as much more available for division.

The parties—who were (1) James Dunlop's children other than Henry Colin Dunlop; (2) the trustees under the trust-settlement; and (3) Henry Colin Dunlop, the *post natus*—submitted the following questions to the Court:—"1. Are the trustees of the said Charles James Tennant entitled to withhold payment of the whole or any part of their shares of the truster's bequest from such of the children of the said James Dunlop as have attained majority until it becomes certain that there shall be no more children born to the said James Dunlop? 2. Is the said Henry Colin Dunlop entitled under the provisions of the trust-deed of the late Charles James Tennant to an interest in the bequest to the children of the said James Dunlop—(1) To the effect of entitling him to an equal share thereof with all the children born or to be born to the said James Dunlop? or, (2) To the effect of entitling him to take an equal share with his younger brothers and sisters of such portion of the sum bequeathed as may remain after deduction of such portion thereof as had vested in those of his brothers and sisters who attained majority prior to his birth? or (3) To the effect of entitling him to take a share equally with all his brothers and sisters of the family's share of such sums as have been set aside to meet annuities, and as have fallen into residue subsequent to his birth, or may yet fall into residue?"

Argued for the first parties—When was the class of children to be ascertained? In the case of *Wood* v. *Wood*, January 18, 1861, 23 D. 338, where children were to take at the date of the death of a liferentrix, that was held to be the date at which the class fell to be ascertained. Now, here the children were to take at once, or at least those of them who were major at the truster's death were entitled to take then, and that they might take equal shares the number of children fell to be ascertained then. To postpone the date of payment was to defeat the express provision of the testator, and to run counter to the presumption of law that vesting took place as soon as possible—*Mainwaring* v *Beevor*, 8 Hare 48-49; *Gimblett* v *Purdon*, L.R. 12 Equity, 427. Now, these would be direct authorities if there was no sum locked up to satisfy annuities; but that a sum was so set apart did not alter the principle applicable, since the children in existence at the truster's death could test upon their share of the whole fund, including these sums set apart, for they too were expressly included in the fund available for division—*Hagger* v. *Payne*, 23 Beavan 474. In the case of *Christie* v. *Wisely*, January 29, 1874, 1 R. 436, all children were included whatever the date of their birth, in the terms of a clause very similar to this, but then the liferentrix there was their mother, and therefore their number could be finally ascertained at her death—*Blair's Executors* v. *Heron Maxwell's Trustees*, May 31, 1872, 10 Macph. 760; *Hamilton Ralston* v. *Hamilton*, 1862, 4 Macq. 397; Theobald on Wills, 142; *Buchanan's Trustees* v. *Buchanan*, May 26, 1877, 4 R. 754 (Lord Rutherfurd Clark's opinion); *Biggar's Trustees* v. *Biggar*, November 17, 1858, 21 D. 4.

Argued for the third party—It was no doubt true that where there was a simple bequest and no postponement of the term of payment was contemplated, a *post natus* would not be included. But where payment was to be made on a particular day such a clause as this meant "all children existing on that day," and moreover if there were words indicating that *nascituri* were to take, caution would be required for repetition from children who were entitled to receive payment—*Biggar's Trustees* quoted above, and *Scheniman* v. *Wilson*, June 25, 1828, 6 Shaw 1019. The only reason that was held sufficient to exclude a *post natus* was an intimation of the truster's intention that his estate should be at once wound up. Where it was impracticable to do so—and it was certainly so here—then the class must be ascertained when the period for winding-up arrives—*Mainwaring* v. *Beevor*, and *Wood* v. *Wood*, *supra*; *Douglas* v. *Douglas*, March 31, 1864, 2 Macph. 1008 (Lord Curriehill's opinion). It was an entirely artificial rule that where the majority of the children was directed to be the time of payment, the class fell to be ascertained when the eldest child attained that age. That rule was not adopted in Scotland, for there caution for repetition might be required—2 Jarman on Wills, 141; *Andrews* v *Partington*, 1791, 3 Brown's Chancery Cases, 401; *Hort* v. *Pratt*, 1798, 3 Vesey jun., 729; *Sibbley's Trustees*, February 17, 1877, L.R. 5 Ch. Div. 49. In *Buchanan's* case the child with whom the question was to be tried was not in existence. The Court did not therefore find it necessary to decide it, and the opinion of the Lord Ordinary erroneously proceeded on the assumption that repetition was impossible; but that was clearly contemplated in *Biggar's* case.

At advising—

Lord President—The late Charles James Tennant died on 31st October 1870, leaving a deed of settlement, dated 7th October 1863, by which he bequeathed the residue of his estate, amounting to a very large sum as we have ascertained, to be divided among his nephews and nieces and their descendants; and in the clause of his settlement that disposes of the residue of his estate he mentions each of his nephews and nieces separately, and in every case except two he gives his or her share of the residue to each of the beneficiaries *nominatim*. In the case of one nephew, who is dead, he directs that his share of the residue should be paid to his children, and in regard to another, who is not dead, but is described as "residing at Poverty Bay, New Zealand," he directs that a certain share of the residue should be given, not to him, but to his children. The question in this case relates to the bequest of this share of the residue.

Now, the scheme of the settlement generally is, that after providing for certain bequests, of no very great amount looking to the amount of the estate altogether, he directs his trustees to pay an annuity of £2000 to each of his brother John Tennant and his sister Mrs Couper, and for the purpose of securing payment of these annuities he authorises his trustees to set aside out of the residue of his estate a sum not exceeding one-half of that residue, such as should be sufficient to provide the requisite amount of income to pay these annuities. The words he uses are—"And for securing payment of said annuities, I direct my trustees, after implement of the foregoing provisions, to set apart out of the residue of my estate such a sum as shall be sufficient to yield an annual return sufficient to pay said annuities, and to invest such sum on such security as to my trustees shall appear most eligible; but declaring that my trustees in setting apart a sum out of the residue of my said estate to meet the said annuities shall not be entitled to set apart more than one-half of the residue of my means and estate after implementing the prior purposes hereof, including in such implement the payment or satisfaction of any legacies or provisions provided by me in any separate codicil or writing as above specified; and in case the half of said residue shall be set apart to provide said annuities, and that the income thereof shall not amount to Four thousand pounds sterling per annum, the said annuities shall each be restricted to one-half of the actual free income of the amount so set apart." Thus, one-half of the residue is tied up for division at some indefinite time, but one-half is left entirely free; and then the testator proceeds in the last purpose of the trust to the disposal of the residue as follows, viz.:—"I direct and appoint my trustees to divide and apportion the residue and remainder of my means and estate, including the sum set apart to meet the said annuities; at the termination thereof respectively, among my nephews and nieces and their descendants in the following proportions." Now, that clause, when you analyse it, seems to result in this—that immediately after the death of the testator there is one-half of the estate ready for immediate distribution, while the remainder is tied up while these annuitants live, and as each of them dies the amounts set apart to secure payment of their annuities are then set free for distribution. The way in which the trust has worked in fact is this—The clear residue was estimated to amount to some £250,000. £122,000 of this was set apart to secure the payment of these annuities, while the rest was divided in 1871. Very soon thereafter Mrs Couper died, and that set free £61,000 for distribution at that time. Much more recently the other annuitant Mr John Tennant died, and that set free the last portion of the residue, amounting to £61,000. There are therefore in effect three periods of distribution, and three periods at which a portion of the residue became available for distribution. The children of Mr Dunlop are now twelve in number, but one of them, who is the third party in this case, was not born till 16th May 1874, all the rest having been born in the lifetime of the testator. The question therefore comes to be, whether this twelfth child is entitled to participate in the distribution of the residue of the estate or any part of it? He was not in existence when the first half of the residue became distributable, nor when the second portion became distributable on the death of Mrs Couper, but he was born before the last portion became divisible by the death of Mr John Tennant, the survivor of the two annuitants.

Now, I think that the principle of law applicable to questions of this kind is very well settled. The general proposition is, that if a testator desires that a fund should be distributed in equal or different proportions among a class of children at a particular day, that only the children in existence when that day arrives can receive a share, for they are the only children in existence at the day when payment is to be made. That rule received its highest development in the very able judgment of Lord Cowan in the case of *Wood* v. *Wood*. I concurred in that judgment at the time it was delivered, and I have had no occasion to doubt the soundness of the principles laid down there since. The question is—How far that rule is applicable to the present case? Now, that rule of course is subject to this limitation, that if there is any indication of an intention to admit a child who is not in existence at the time when the distribution is to take place, that will prevent the operation of the general rule, for the general rule is based on no stronger foundation than this—that you cannot carry out the direction to distribute at the particular time specified without giving the benefit solely to those who are in existence at that time, but if the testator has indicated with sufficient clearness that he intended others to participate, you must give effect to that intention. Now, is there anything here to indicate that when the periods of distribution I have referred to arrive the trustees are to retain funds in their hands for the benefit of children who may subsequently come into existence? Now, I find no indication in the leading clause of this deed except that the testator contemplated three periods of distribution. The words with reference to this class of children are—"To the children of James Dunlop, Esquire, residing at Poverty Bay, New Zealand." It is very difficult to make out that he intended a different principle to apply here from that which he has applied in the case of all his other nephews and nieces.

The case of *Wood* is directly applicable here, but it must be applied in this way—As each period of distribution arrives you are to inquire who are the children of James Dunlop. At the first and second period of distribution the children of James Dunlop consisted of the children of James Dunlop other than the *post natus*. But at the third period there was this *post natus* added to their number. The only result then, consistent with these facts, is that this *post natus* should be held entitled to share in the distribution of this last portion of residue. I do not think that the provision that minors are not to receive payment till they attain majority makes any difference. That does not alter the period of distribution. The first portion became distributable at the death of the testator. No doubt the trustees were directed to hold the shares of such of the beneficiaries as were minor, those who were major were to receive payment, and so again at the other periods. The arrangements regarding

minors are merely arrangements of convenience and propriety, but the period of distribution is not affected by them. I am therefore of opinion that the third party is entitled to receive a share of the last dividend, if I may call it so, and to have the third branch of the second question answered in his favour, but is not entitled to receive any share of the other sums.

Lord Deas—I am entirely of the opinion expressed by your Lordship, and I think that the case of *Wood*, if we were now to go back upon it, was rightly decided. Although it does not go the whole length of this case, yet it affirms a principle that is of great importance. It affirms the importance of the period of division, and it affirms the proposition that the period of division is the most important of all considerations in questions of this kind. We are to decide according to the expressed or presumed intention of the testator. When the testator makes a provision of this kind it is difficult to suppose either that he intended that a child born before the period of division should have no share in the fund, or, on the other hand, to suppose that a child coming into existence subsequently to one or more periods of division should have a share of all that has already been distributed. Either of these courses would be attended with the greatest inconvenience. It is very hard and very difficult to suppose that a child coming into existence while part of the fund is not yet ready for division should receive nothing, or that other children who had received their shares perhaps years before should after that lapse of time be compelled to disgorge that share that they have received, and, it may be, spent. The natural way to extricate the principle involved in the case of *Wood* is to hold that there shall be no going back on the divisions that have taken place, but that the *post natus* shall share in that portion of the fund which remains for division. That comes as near to the proper interpretation of the case of *Wood* and to the intention of the trustees as can be. It is desirable that questions of this kind should be decided at once. I am not now so strongly of opinion that caution should be required before payment as I was in the case of *Biggar*. The ground on which I proceeded in that case was that we had not in the field all the individuals with whom the case might have to be tried; but it is not desirable to leave such a matter undetermined, and if we have the question in such a shape as to admit of the formation of a judicial opinion, it is much more expedient to determine it at once than to leave it unsettled for an indefinite time.

Lord Mure—The cases of *Wood*, *Biggar*, and *Blair* fix this, that the period of distribution is to be taken as the period when the children are to be fixed among whom the distribution is to take place. There are different periods of distribution fixed by this settlement, and I agree with your Lordships in thinking that at these different periods we must inquire who are the children of James Dunlop then existing, and divide that portion which then falls to be divided accordingly.

Lord Shand—I am of the same opinion. The case of *Wood* clearly recognises the general principle that in a bequest to children of a particular party the class is to be ascertained at the period of distribution. The reason of that is that it is presumed that the intention of the testator in providing a period of distribution is that those only in existence at that time shall share, for otherwise the fund would either require to be locked up for an indefinite time, or those who had already been admitted to a share in the fund would have at some future time to repay part of what they had received. Either of these courses would evidently be highly inconvenient.

The distinction—the only distinction as it appears to me—between this case and the case of *Wood* is that here there is a provision that none of this fund shall vest or become payable till the children attain majority. The result of this is that at the period when the first child attained majority, and was in a position to demand payment of his share, the law should fix the class among whom the fund is to be divided again on the presumed intention of the truster, for, as he has provided that the shares should be payable on majority, his intention is shown thereby that the class among whom the fund is to be shared should then be ascertained. Now two of the children were, I see, at the date of the truster's death entitled to demand payment. It was necessary to fix their shares then, and I think accordingly that the class had then to be ascertained. I am therefore of opinion that the child here has no right to any portion of this fund which was ready for distribution before the date of his birth; but, on the other hand, as there was a period of distribution appointed by the testator—viz., the death of the last annuitant, which has happened subsequently to the birth of this child—it is equally consonant with the rule of *Wood's* case that this child should have a share in that portion of the fund that was thereby made divisible

The Court therefore, in answer to the second question, found that Henry Colin Dunlop, the party of the third part, was entitled, "to an interest in the bequest to the children of James Dunlop, to the effect of entitling him to take a share, equally with all his brothers and sisters, of the family's share of such sums as have been set aside to meet annuities and have fallen into residue subsequent to his birth, or may yet fall into residue, but is not entitled to any further or other share of the residue"; and accordingly answered the first question in the negative.

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Counsel for the Second Party—Couper. Agent —F. J. Martin, W.S.

Counsel for the Third Party—Asher—Crawford. Agents—T. & R. B. Ranken, W.S.