upon the security thereof, with interest on said amount at the rate of 15s. per month from 19th August 1903 until the date of said repayment, as stipulated in contract of the pledge: Therefore, subject to said conditions as to repayment of the advance to Bryce, rank and prefer the claimant Ehrmann to the subject *in medio:* Repel the claim of the claimant William Brodie Galbraith: Find it unnecessary to dispose of the claim of the appellant Bryce, and decern."

Counsel for the Claimant and Appellant Bryce—Salvesen, K.C.—Macmillan. Agent —D. Hill Murray, S.S.C.

Counsel for the Claimant and Respondent Ehrmann — Kincaid Mackenzie, K.C. — M'Clure. Agents—Cumming & Duff, S.S.C.

Tuesday, November 1.

FIRST DIVISION.

[Lord Pearson, Ordinary.

HOPE JOHNSTONE *v.* SINCLAIR'S TRUSTEES.

Succession — Legacy to a Class—Period of Distribution—Direction to "Hold"—Date when Members of Class Ascertained.

A testatrix directed her trustees to "hold" the capital and income of a fund "in trust for all the children or any, the child of A, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, and if more than one in equal shares." The trust-deed further provided that the trustees might at any time pay or apply a part, not exceeding one half, of the then expectant, or presumptive, or vested share of any child for his or her advancement or benefit.

Held that as there was no direction to pay, the period of distribution of the fund did not arrive until the members of the class were definitely determined, and consequently that a beneficiary who had attained majority was not entitled to demand payment of a share prior to the death of A.

Andrews v. *Partington*, 1791, 3 Brown Ch. Cas. 401, *commented on.*

Miss Olivia Sophia Sinclair, third daughter of the late Sir George Sinclair, Bart., and Lady Camilla, his wife, died at Thurso Castle upon the 24th January 1894, leaving a last will and testament dated 20th May 1892 and relative codicil dated 11th May 1893. By the will and testament the testatrix, *inter alia*, bequeathed to her executors "the sum of £6000 . . . upon trust that they or the survivors or survivor of them, or the executors or administrators of such survivor or other, the trustees or trustee for the time being of this my will (hereinafter called my trustees or trustee) hall invest the same in their or his names or name, . . . and shall pay one-third part of the annual income of the said sum of £6000 or the investments for the time being representing the same to . . . . Emelie Johnstone, the wife of my nephew William James Hope Johnstone, during her life or until she shall marry again: And I declare that, subject and without prejudice to the trust in favour of the said Emilie Johnstone . . . my trustees and trustee shall hold the capital and income of the said trust premises in trust for all the children or any the child of the said William James Hope Johnstone, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age; and if more than one in equal shares; . . . Provided always, and I declare that my trustees or trustees may at any time or times raise any part or parts not exceeding in the whole one-half of the then expectant or presumptive or vested share of any child of the said William James Hope Johnstone . . . under the trusts of this my will, and pay or apply the same for his or her advancement or benefit, as my trustees or trustee shall think fit, but so that no such part or parts shall be raised or applied as aforesaid during the existence of any prior interest or interests therein under this my will without the consent in writing of the person or persons having such power, interest, or interests."

The codicil contained the following declaration:—"I declare that my said trustees or trustee shall hold my said residuary estate upon the trusts following — that is to say, . . . as to another equal third part or share thereof upon the like trusts, and with and subject to the like powers, provisoes, and declarations in all respects for the benefit of Emilie Johnstone, the wife of my said nephew William James Hope Johnstone, and the issue of the said William James Hope Johnstone, as are in my said will declared and contained in their favour concerning the sum of £6000 and the investments for the time being representing the same." . . .

On 12th March 1903 William James Hope Johnstone and his wife Emelie Johnstone were both alive and had six children, three of whom had attained majority and three of whom were still in minority. On that date the three elder children raised an action against (1) the trustees under Miss Sinclair's testament and codicil; (2) the three minor children of William James Hope Johnstone; and (3) him as their curator. In this action the pursuers, *inter alia*, sought to have it found and declared that under the will and codicil "there was conferred on and became vested in and payable to each of the pursuers at the dates of their respectively attaining majority, but subject always . . . to the liferent of their mother Emilie Johnstone, wife of the said William James Hope Johnstone, at least one-sixth share of the sum of £6000, and one-sixth share of one-third of the residue of the estate of the said Miss Olivia Sophia Sinclair."

Defences to the action were lodged by Miss Sinclair's trustees.

On 17th March 1904 the Lord Ordinary (PEARSON) dismissed the action.

Opinion.—[*After narrating the facts and the declaratory conclusion of the summons quoted above*]—"The rule of construction to which the pursuers appeal as entitling them to this declarator is that which received effect in the cases of *Buchanan* v. *Buchanan's Trustees* (May 26, 1877, 4 R. 755, 14 S.L.R. 503) and *Ross* v. *Dunlop* (May 31, 1878, 5 R. 833, 15 S.L.R. 580), and in the English cases of *Emmett* (1880, L.R. 13 Ch. Div. 484) and *Knapp* v. *Vassall* ([1895], 1 Ch. 91). The principle is thus stated by Lord President Inglis in the case of *Ross*—'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, 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. . . . 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.' The rule as settled by the English authorities is thus stated (Williams' Executors, 9th ed. ii, 944) — 'No child born after the period of distribution has any claim . . . and the children are excluded who are born after the fund becomes distributable in respect of any object or member of the class, or after the vesting in possession of any of the shares.'

"The same test was applied in all the cases I have mentioned. The date sought for in all of them was the date contemplated by the deed for the division of the fund—the date when it or any share of it was distributable or payable. In the case of *Buchanan's Trustees* the deed provided that on the death of the liferentrix the trustees should hold and apply the fund and the income thereof to and for behoof of all the lawful children of A, 'payable the several children's shares to the sons on their attaining twenty-five, and to the daughters on attaining that age or being married.' In the case of *Ross* the trustees were directed to divide and apportion the fund among nephews and nieces and their descendants, declaring that the provisions of minors should not vest and be payable until they respectively attained majority. In *Emmett's* case the shares were directed to be conveyed, assigned, paid, or transferred to sons on their respectively attaining twenty-one, and to daughters on their respectively attaining that age or being married. And in *Knapp* v. *Vassall* it was declared that the shares of the settled fund should be for the portions of such younger children as should attain twenty-one, or being daughters should marry, the share of each child to be paid on vesting or the death of the survivor of A and B, whichever should first happen.

"The question then is, what is the period of distribution or payment under this will? Has it yet arrived as to any of the shares? In my opinion it has not. I think the will clearly indicates that for anything that has yet happened there is to be no payment or division at present. In the first place, the trust is for all the children of Mr Hope Johnstone who shall attain the age of twenty-one, or being daughters shall marry under that age, in equal shares. This, of course, is not conclusive, but it is a strong indication, to begin with, that the pursuers' view would not further but would defeat the intention of the testatrix. Then the trust is 'to hold,' not even 'to hold and apply,' as it was in the case of *Buchanan's Trustees*, and there is an entire absence of any words which could be construed into a direction to divide or to pay, in any of the events which have yet happened. In the third place, it is expressly declared that the trustees 'may at any time or times raise any part or parts not exceeding in the whole one-half of the then expectant or presumptive or vested share of any child . . . under the trusts of this my will, and pay or apply the same for his or her advancement or benefit, as my trustees shall think fit, but so that no such part or parts shall be raised and applied as aforesaid during the existence of any prior interest therein under this my will without the consent in writing of the person having such prior interest.' This clause negatives the idea that a vested share any more than an expectant or presumptive share is payable as matter of right to any child so long as any prior interest subsists, and it clearly contemplates that, subject to the trustees' discretionary power to make advances, all such shares are to remain in the hands of the trustees until the death or second marriage of Mrs Hope Johnstone, or possibly the death of Mr Hope Johnstone. I apprehend that this is a purpose which will receive effect, as it is in furtherance of the original intention expressed in the will, namely, that all the children of Mr Hope Johnstone who may attain twenty-one, or being daughters may marry, shall benefit in equal shares. It is true that the trustees, in making advances to a child under the clause just quoted, are restricted to one-half of the child's share, and this involves a calculation as to the amount of the child's share. But I apprehend that the trustees, in making this calculation for the purpose of any given advance, would simply take account of the number of children in existence when the advance was made, leaving any excess or defect to be rectified when the balance of the share becomes payable.

"I hold that no shares are presently payable to the pursuers, and therefore that the action must be dismissed."

The pursuers reclaimed, and at the discussion in the Inner House it was intimated that the liferentrix Mrs Emilie Johnstone had by minute agreed to a restriction of the *nexus* over the fund save as over one-third thereof.

Argued for the reclaimers—It was settled law that once the period of distribution had arrived trustees were not entitled to continue to hold the estate in the interest of *post nati*—*Wood* v. *Wood*, January 18, 1861, 23 D. 338. In England it was the rule that a bequest to all the children of anyone when they should attain twenty-one fell to be divided amongst the children *in esse* when the eldest attained that age—*Andrews* v. *Partington*, 1791, 3 Brown's Chan. Cas. 401; *Gimblett* v. *Parton*, 1871, L.R. 12 Eq. 427; *Emmet's Estate* (*supra*); *Knapp's Settlement* (*supra*). That rule was equally applicable to Scotland—*Buchanan* v. *Buchanan's Trustees* (*supra*); *Ross* v. *Dunlop* (*supra*). It followed that the children here who had attained majority were entitled to payment of the shares so far as the fund was not tied up by the liferent.

Argued for the defenders and respondents—The cases cited were not applicable, because in them there was a direction to pay while here there was not, but on the contrary a direction to hold. The rule laid down in *Andrews* v. *Partington* was no part of Scots law. The only rule was the intention of the testator, and it was clearly her intention that all the children of William James Hope Johnstone who should attain majority, or being daughters should marry, should take a share of the fund. The trustees must therefore continue to hold the fund until his death.

At advising—

LORD PRESIDENT—Everything has been said which could be advanced in support of this reclaiming-note, but the argument has failed to satisfy me that the position contended for the reclaimers is tenable. The Lord Ordinary has given a very clear statement of the clauses upon which the question in the case depends, and on the grounds stated by his Lordship I am prepared to affirm his judgment. The proposal is the trustees should pay a share of the fund in their hands to certain beneficiaries before it is known who will constitute the class entitled to participate in the fund. To accede to that proposal might cause grave injustice, and I am clearly of opinion that the Lord Ordinary was right in refusing to comply with it.

LORD ADAM—I am of the same opinion. I agree with the Lord Ordinary when he says that we must look to the date contemplated by the deed for the division of the fund. That is the real question. If the direction in the deed is to divide at a particular time—for example, upon the eldest child attaining twenty-one—that is a perfectly distinct direction, and it does not matter that other children may subsequently come into existence, because the instruction is to pay at a particular date. That is not the case here. The direction is not to pay, apply, or distribute, but to hold in trust for all the children of William James Hope Johnstone, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, in equal shares. I cannot see how it can be consistent with that direction to ask the trustees now to pay to certain children when others may come into existence. If the trustees were to pay now, what could they say to *post nati?* There is here no question of vesting, and I can see no difficulty in the question. The trustees cannot tell who are the members of the class entitled to share, and therefore they cannot pay in equal shares.

LORD KINNEAR—I concur.

LORD M'LAREN—I base my opinion on the grounds developed in the Lord Ordinary's note, but as the judgment has been brought under review and the question is put forward as one of general importance I shall make some further observations. There are two bequests in the present case, but the question to be decided regarding them is one and the same. I shall consider the terms of the bequest of £6000. With regard to the income of this fund a life-interest is given to Mrs Hope Johnstone, and the trustees are directed to hold the capital and income (I presume the income after Mrs Hope Johnstone's death) in trust for all the children or any child of Mr Hope Johnstone, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age.

There are cases where under a direction in general terms to pay at majority, the question arises whether these words import a condition of the right of the legatee or only amount to an administrative direction to pay. In this case it is not disputed that the direction quoted is a condition of the gift—the question is as to the meaning of the condition. Now the gift is to a class of persons which is subject to increase or diminution. Mr Hope Johnstone survives, and we cannot assume that his existing children are the only children he will have. We are then met by the difficulty that until the class of beneficiaries is complete we cannot know what is the amount of the share of any individual beneficiary. With regard to the suggestion of a payment to account, that is a matter for the trustees' consideration. We have here only to consider the question of right. If there were no authorities to guide us I should hold that since the class is not ascertained payment is not due. Certain cases, however, have been referred to, which, proceeding on Lord Chancellor Loughborough's opinion in *Andrews* v. *Partington* (3 Brown Ch. Cases 401), lay down the rule that where a legacy is given to children when they shall attain the age of twenty-one, and one of the class has attained majority, the number of the class is fixed as at that date. This is a purely arbitrary rule. It has never been defended as affording a correct construction of testamentary provisions. But whenever the rule has been contested the judges have said that Lord Loughborough's decision must be followed. This rule, however, has not been adopted into

our legal system. On the contrary, in the passage from the judgment of Lord President Inglis in the case of *Ross* v. *Dunlop* (5 R. 833), referred to in the Lord Ordinary's judgment, the true principle of construction is very distinctly affirmed. If, as his Lordship points out, there is no direction to pay on the attainment of majority, but only a general right to share in the fund, and the class remains undetermined, then payment must be delayed until the class is determined. There have indeed been cases where there was an express direction to pay on attainment of majority, and we in this Division have authorised payment to the beneficiaries one by one. Here, however, in the event that has happened, there is a virtual trust to hold until the attainment of majority by all the children, and the trustees must therefore keep up the trust until the death of the father, when the class will be definitely ascertained.

The Court adhered.

Counsel for the Pursuers and Reclaimers —Wilson, K.C.—J. H. Millar. Agents—Forman & Bennet Clark, W.S.

Counsel for the Defenders and Respondents Sinclair's Trustees—Smith, K.C.—M'Clure. Agents—Lindsay, Howe, & Co., W.S.

Wednesday, October 26.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

M'GILP *v.* CALEDONIAN RAILWAY COMPANY.

Expenses — Modification — Jury Trial — Small Amount Awarded by Jury in Case Raised in Court of Session.

In an action raised in the Court of Session for payment of £500 of damages for assault a jury returned a verdict for the pursuer and awarded him £10 of damages. The defenders had made no tender.

The defenders moved that expenses to the pursuer should be subject to modification, in respect that the smallness of the sum awarded showed that the case ought to have been raised and tried in the Sheriff Court.

The Court *refused* modification on the ground that no reason had been given for taking the case out of the common rule.

Alexander M'Gilp, inspector of police, Greenock, raised an action before Lord Kincairney in the Court of Session, against the Caledonian Railway Company, in which he sought to recover £500 as damages for an unjustifiable assault alleged to have been committed upon him by three servants of the company, acting within the scope of their employment. After issues had been adjusted by the Lord Ordinary the case went to trial at the sittings before the Lord President, and the jury returned a verdict for the pursuer and awarded him £10 of damages. No tender had been made by the defenders.

When the pursuer moved the Court to apply the verdict, and for expenses, the defenders moved that the expenses should be subject to modification. They argued:—It was a rule settled by recent decisions that where a pursuer only obtained an award for a trifling sum the Court would modify the expenses—*Shearer* v. *Malcolm*, February 16, 1899, 1 F. 574, 36 S.L.R. 419; *Brennan* v. *Dundee and Arbroath Joint Railway*, May 26, 1903, 5 F. 811, 40 S.L.R. 622; *Lafferty* v. *Watson, Gow, & Company, Limited*, June 3, 1903, 5 F. 885, 40 S.L.R. 622. While these were all cases which had originated in the Sheriff Court and been appealed for jury trial to the Court of Session, the rule applied *a fortiori* of a case which had originated in the Court of Session, for in it the initial expenses also had been incurred on the unnecessarily high scale. The award in this case showed that the action should have been brought in the Sheriff Court as clearly as it would have shown that the case if it had originated in the Sheriff Court ought not to have been appealed to the Court of Session.

The Court, without calling on the pursuer, refused modification on the ground that no reason had been given for taking the case out of the common rule.

Counsel for the Pursuer—Dewar, K.C.—A. M. Anderson. Agent—Alex. Ramsay, S.S.C.

Counsel for the Defenders—Guthrie, K.C. —MacRobert. Agents — Hope, Todd, & Kirk, W.S.

Friday, October 28.

BILL CHAMBER.

[Lord Pearson.

GENERAL ASSEMBLY OF THE FREE CHURCH OF SCOTLAND *v.* RAINY.

Process—Interdict—Title to Sue—Occupation of Heritable Subjects — Interdict Brought to Enforce Declaratory Judgment concerning Heritage.

A held a declaratory judgment that he was entitled to have certain heritable properties held in trust applied for his behoof, and that B had no right or interest in any part of the property. C had not been called as a defender in the action of declarator, but prior to the date of the action he had occupied certain of the subjects forming a part of the said property, with the authority of B, and after the judgment he still continued in occupation. A thereupon presented a note of suspension and interdict against C to prevent the latter entering or further occupying the subjects.