of the *Attorney-General* v. *Brackenbury* is any authority against the view I am now recommending to your Lordships. In that case a person, who had a general power of appointment in her will charged the fund over which she had that general power of appointment with certain legacies and bequests, and having charged it with certain legacies and bequests, proceeded to make a gift of the residue of that sum in favour of the same people who would have taken in default of the exercise of the power. It is clear of course that those persons could not say that they took in default of the exercise of the power, but must say they took in virtue of the will, and the whole point of the judgment, as said by every one of the learned Judges who gave judgment in the case, was that the testatrix there had really made the fund her own by charging it with her own debts and legacies. In other words, she did not appoint the fund to those beneficiaries; she appointed it to her own executor, and the point would have come out, if you had supposed that in that case the lady had died practically insolvent as regards her own funds. In the actual case, obviously from the report, she did not, and therefore there was a sum of money left intact which was equal to the sum of money over which she had the power of appointment. But supposing she had died insolvent, it is clear that in that case the sum of money over which she would have had the power of appointment would have been good to meet the legacies which she left to other legatees. I think it is clear that the *Attorney-General* v. *Brackenbury* has really nothing to do with this case.

LORD M'LAREN—My opinion is the same as that which has been delivered by your Lordship in the chair. I think it is plain that Miss Routledge did not exercise any independent judgment in regard to the disposal of the half of her brother's estate which had been put under her power of disposition. She wished the property to pass as he intended it to pass, and again there is no devolution or transfer of estate in virtue of her will. The estate went exactly as it would have gone if Miss Routledge had died intestate. She did not die intestate, but left what may be called an ambiguous direction or provision in regard to the half of her brother's estate—a provision which might either mean that she did not desire to exercise the power of appointment that had been given to her, or that she meant to exercise it but to exercise it by giving it to the same persons to whom her brother had appointed it. Now, it is plain enough that whichever way you interpret or explain this ambiguous direction, the effect of it, so far as regards beneficial interests, is exactly the same. The first view, that she does not mean to exercise the power, is to my mind the simple and the more direct interpretation of the lady's settlement, and I do not think that we ought to displace that interpretation for no purpose connected with the administration of the estate, but merely for the purpose of enabling the Crown to maintain a claim of legacy duty which would not otherwise be due, which would not have been due if this provision had been drawn by a lawyer who had had his attention directed to the point.

LORD KINNEAR—I also agree. I do not think that this case ought to be decided by any minute analysis of the language of Miss Routledge's will, and certainly not by a rigorous construction of particular words and phrases which she uses in the course of it, but that, reading the instrument as a whole, we should see what is its true effect and meaning, and reading it in that way, it appears to me that, in the first place, she begins by reciting the power of appointment which had been given to her by her brother, for the purpose of separating the fund over which that power extended from the estate which she intended to settle by her own will. First of all she recites the power, and then, as I read the will in the same way as your Lordship reads it, she goes on to say in effect—"Having this power it is my wish and desire, so far as regards that fund, that my brother's trust-disposition and settlement should have effect, and that it should not be carried by my own trust-disposition and settlement which I am now about to set forth in detail, and that my trustees shall have nothing whatever to do with it." I think the true meaning is to leave the brother's trust-disposition and settlement operative with regard to this fund, and therefore it is upon that, and that alone, that the legatees are entitled to take the money.

LORD PEARSON concurred.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Defenders and Reclaimers—Cooper, K.C.—Kemp. Agents—Henry & Scott, W.S.

Counsel for the Pursuers and Respondents—The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—The Solicitor of Inland Revenue.

Tuesday, January 15.

FIRST DIVISION.

[Single Bills.

GORMAN *v.* HUGHES.

Expenses—Modification—Jury Trial in Court of Session—Verdict for £10 *where* £250 *Claimed—Pursuer Aware that Damages could not Amount to* £25.

A pursuer raised an action in the Court of Session for £250 in name of damages sustained by his being run over by the defender's motor car. The jury awarded him £10.

The Court, on the defender's motion, modified the pursuer's expenses to one-half of their taxed amount, *holding* (1) that the pursuer was bound to have

known that under no possible circumstances could he obtain a verdict for even £25, and (2) that the defender was fairly entitled to maintain that he was not in fault.

Observed by the Lord President—"I see no reason for dissenting to what is laid down in the case of *Ridley* v. *Kimball & Morton*, May 23, 1905, 7 F. 655, 42 S.L.R. 559, that the special circumstances of each case must be considered. Farther, in a motion of this sort, the Court is entitled to be enlightened by the judge who presided at the trial as to what these circumstances were. I say this with a view to future practice."

On 10th July 1906 Frederick L. Gorman, spirit salesman, Glasgow, raised an action of damages in the Court of Session against George Hughes, wine and spirit merchant, Glasgow, in which he claimed £250 as damages. He averred, *inter alia*, that while cycling on Great Western Road, Glasgow, he was suddenly knocked down by a motor car belonging to the defender and seriously injured; that he required medical attendance, and was unable to follow his occupation; and that the cost of repairing his bicycle was over £5.

The case was tried before the Lord President and a jury. The facts on which the pursuer's claim was based appear from the Lord President's opinion.

The jury awarded the pursuer £10. The defender, who denied that he was in fault, had made no tender.

The pursuer having moved the Court to apply the verdict and find him entitled to expenses, the defender maintained that no expenses should be allowed.

Argued for defender—The action should have been brought in the Sheriff Court, as it must have been perfectly obvious to the pursuer that under no possible circumstances could he have obtained a verdict even for £25. Accordingly, the pursuer's right to expenses was limited by the Sheriff Court scale. Against these, however, the defender was now entitled to set off the extra unnecessary expense he had been put to in the Court of Session, with the result that the expenses to which the pursuer was originally entitled were entirely wiped out—*Wilkie* v. *Alloa Railway Company*, December 3, 1884, 12 R. 219, 22 S.L.R. 166.

Argued for pursuer—The defenders had made no tender. The pursuer was therefore entitled to expenses without modification — *M'Gilp* v. *Caledonian Railway Company*, October 26, 1904, 7 F. 4, 42 S.L.R. 33; *M'Daid* v. *Coltness Iron Company, Limited*, November 4, 1904, 7 F. 32, 42 S.L.R. 50; *Ridley* v. *Kimball & Morton, Limited*, May 23, 1905, 7 F. 655, 42 S.L.R. 559. Section 40 of the Court of Session Act 1868 (31 and 32 Vict. c. 100) implied that a verdict for £5 or over carried expenses.

LORD PRESIDENT—This is a notice of motion to apply the verdict in a case in which Frederick Gorman was pursuer and George Hughes defender, the case being an action of damages by a cyclist for injuries caused to him by being run over by the defender's motor car. The action concludes for £250; a verdict was returned for £10; and the defender, who has nothing to say against the verdict being applied, submits that full expenses ought not to be awarded, on the ground that the action was not appropriate for the Court of Session, and was only made competent by the pursuer concluding for a sum entirely incommensurate with what he could hope to get. A case of *Ridley* v. *Kimball & Morton*, 7 F. 655, was cited to us, and I see no reason for dissenting to what is there laid down, that the special circumstances of each case must be considered. Further, in a motion of this sort the Court is entitled to be enlightened by the judge who presided at the trial as to what these circumstances were. I say this with a view to future practice. In the present instance I myself happened to be the presiding judge, but it might be otherwise, and the judge who presided might not be one of the Division before whom the motion is made. It was urged that the case was an appropriate one for jury trial, and the investigation as to the facts was by no means easy. That, though true, is not relevant to the question; what is important is the sum which the pursuer thinks he ought to recover by way of damages. I need scarcely say that if there was any likelihood of the pursuer being able to recover a sum greater than the limit below which actions are not allowed in the Court of Session, we should not be inclined to take a critical view of the matter, but if the pursuer knowingly comes into Court well aware that he has no chance of getting a sum equal to that limit, a different question arises. In such circumstances a pursuer has no business to come to the Court of Session. A decision of the Second Division (*Wilkie* v. *Alloa Railway Company*, December 3, 1884, 12 R. 219, 22 S.L.R. 166) was quoted to us which virtually amounts to that; undoubtedly it is often difficult to estimate the amount of damages to which a pursuer may fairly be entitled, but, having been the presiding judge at the trial, I have no hesitation in saying that this pursuer was bound to know that under no circumstances could he have got £25. His bicycle could have been repaired for 35s. Moreover, I do not think, as regards the bicycle, the claim made was an honest one. The pursuer no doubt had a bad fall, as he was thrown on the hard pavement, but no limbs were broken, and no shock or permanent injuries sustained. He was out of employment for only about a week, and none of these things could have justified him making a claim for £25. I think in such circumstances he had no business to come here. The justice of the case will, I think, be met by modifying the expenses to one-half.

It is said by the pursuer that the defender might have lodged a tender. Decree, after a tender has been put in and accepted, is pronounced on the assumption that the defender is in fault, and in this case I think the defender was entitled to say that he

was not in fault at all. That question therefore does not affect the matter which I have already dealt with.

LORD M'LAREN—After hearing your Lordship's exposition of the facts I am satisfied that the defender might fairly maintain that he was not liable on the question of fault, and that on no reasonable estimate of its value was the case worth more than £25. It is provided by statute that cases below the value of £25 are to be brought in the Sheriff Court. But we can only imperfectly apply the rule, for in many cases we do not, when the action is initiated, know the real worth of a claim of damages. There are many cases, however, where a pursuer must know the extent of his claim, and in this case the pursuer could not conscientiously say that his claim of damages was worth more than £25. That being so, he can only justify his coming here by a preference for the Court of Session. It would not be convenient that expenses should be taxed on the Sheriff Court scale, and we do not have the machinery for doing so. I think, therefore, we may modify the pursuer's expenses to one-half of the taxed amount as your Lordship proposes.

LORD KINNEAR—I agree.

LORD PEARSON—I also agree.

The Court found the pursuer entitled to one-half of the taxed amount of his expenses.

Counsel for Pursuer — Wilton. Agent—C. Clarke Webster, Solicitor.

Counsel for Defender—Hunter, K.C.—Constable. Agents—Simpson & Marwick, W.S.

Wednesday, January 16.

FIRST DIVISION.

[Single Bills.

WARRAND *v.* WATSON AND OTHERS.

(*Reported* December 14, 1905, 42 S.L.R. 252, 7 F. 253; July 19, 1906, 43 S.L.R. 799, 8 F. 1098.)

Expenses—General Finding against Several Defenders — Whether Liability Joint and Several or pro rata—Time at which such Question must be Raised.

Where parties desire a decree for expenses againt others jointly and severally, they must move for it at the time they ask for expenses, and it is too late to raise the question for the first time on the Auditor's report.

This was a case in which the proprietor of salmon fishings on the Ness had brought a petition of suspension and interdict against a number of persons who, he averred, had been trespassing on his fishings. After proof the Court granted interdict against certain of these persons, the interlocutor containing the following finding as to expenses "Find the said" A, B, C, D, the persons against whom interdict had been pronounced, "liable to the complainer in expenses, and find the complainer liable in expenses to the respondents" E, F, G, H, the persons against whom interdict had been refused, "and remit the accounts of said expenses to the Auditor to tax and report."

On 21st December 1906 counsel for the complainer moved the Court to approve of the Auditor's report, and to grant decree for expenses against A, B, C, D, jointly and severally.

Counsel for respondents opposed the motion.

Argued for the respondents—(1) A general finding of expenses against several persons implied only *pro rata* and not joint and several liability, especially where, as here, the cases of the various defenders were clearly separable. If it was desired to make the defenders jointly and severally liable, there ought, at anyrate, to have been a plea or a conclusion to that effect. (2) In any event, it was now too late to make the motion, which ought to have been made when expenses were moved for. The following cases were cited:—*Blair* v. *Paterson*, January 28, 1836, 14 S. 361, p. 373; *Inch* v. *Inch*, June 7, 1856, 18 D. 997; *M'Leod* v. *Heritors of Morvern*, February 16, 1870, 8 Macph. 528.

Argued for the complainer—Decree should be against the respondents jointly and severally. It was absurd to say that it was too late to make the motion. The decree had not gone out, and the Court were not being asked to alter their interlocutor, but merely to construe it. The cases of the various respondents were not separable. The following authorities were cited:—*Macgown* v. *Cramb*, February 19, 1898, 25 R. 634, 35 S.L.R. 494; *Lindsay* v. *Kerr*, January 15, 1891, 28 S.L.R. 267.

LORD PRESIDENT—This is a case where the proprietor of certain salmon-fishings on the Ness brought a petition of suspension and interdict against a number of persons who he said had been trespassing on his fishings. Various grounds of defence were stated, but, *inter alia*, it was denied that there had in fact been any trespassing at all. Eventually a proof was allowed and taken, and after the proof your Lordships pronounced an interlocutor granting interdict against some of the defenders and refusing it against the others. The interlocutor then proceeded—"Find the said" A, B, C, and D—the persons against whom interdict had been pronounced—"liable to the complainer in expenses, and find the complainer liable in expenses to the respondents" E, F, G, and H—the persons against whom interdict had been refused. As regards the latter part of the interlocutor, no question has arisen, except on the Auditor's report, but on the Auditor's report the complainer now asks that decree should go out against A, B, C, and D jointly and severally, while the respondents maintain that they are only liable severally.

I am surprised to find that this point has not been authoritatively settled one way