him under the *inter vivos* disposition executed by his father. Had there been no such disposition and had the property fallen to be dealt with according to the rules of intestate succession, he would still have been entitled to it as his father's heir-at-law. In that case it could not have been denied that, as one of his father's heirs, he had acquired estate "left" by his father, and that accordingly such estate was included in the terms of the will before us. I can see no distinction between such a case and the case now submitted to us, and I agree with the view as to the construction of the will expressed by your Lordship.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court answered the first and fourth questions in the negative, and the second and third questions in the affirmative.

Counsel for the First and Second Parties—Skinner. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Third Party—Campbell, K.C.—M'Clure. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Fourth and Fifth Parties—Salvesen, K.C.—D. Anderson. Agent—William Fraser, S.S.C.

Friday, June 12.

FIRST DIVISION.

[Lord Pearson, Ordinary.

TURNBULL *v.* NORTH BRITISH RAILWAY COMPANY.

Expenses — Jury Trial—Fees to Medical Witnesses.

An action of damages for personal injuries was settled during the trial after certain evidence had been led by the pursuer but before any of the medical witnesses had been examined. In terms of the settlement the pursuer was found entitled to expenses, and the account thereof was remitted to the Auditor to tax and report.

On a consideration of objections to the Auditor's report, in respect that, of the sums charged for four medical witnesses, he had disallowed *in toto* the sums charged as fees for two medical witnesses, and also the sums charged for drawing precognitions of two medical witnesses, and had reduced the sums charged as fees for two medical witnesses to £4, 4s. each, *held* that the Auditor in his report had correctly followed the rule in *Watson* v. *The Caledonian Railway Company*, June 22, 1901, 3 F. 999, 38 S.L.R. 717, as to the fees to be allowed to medical witnesses, and note of objections *refused*.

James Turnbull, sometime warehouseman, 60 West End Park Street, Glasgow, raised an action against the North British Railway Company to recover £5000 damages for personal injuries sustained by him in an accident on the defenders' railway on August 30th 1902.

An issue was adjusted, and the case went to trial before a jury on March 26th 1903.

At the trial certain evidence was led for the pursuer, but before any of the medical witnesses had been examined the action was settled on condition of the defenders paying £1150 and expenses, and the jury of consent returned a verdict in favour of the pursuer for £1150.

On May 19th 1903 the Court applied the verdict, and found the pursuer entitled to expenses, and remitted the account thereof to the Auditor to tax and to report.

After the accident the pursuer had been attended in the hospital throughout his illness by Dr Knox and Dr Boyd, who were both in attendance as witnesses at the trial. He had also been examined and reported upon by Dr Beaton. Some time before the trial the pursuer had been examined by Professor Annandale and Dr Murray, who were also in attendance at the trial to give evidence for the pursuer.

The Auditor having made his report on the pursuer's account of expenses, the pursuer objected thereto in so far as the Auditor had disallowed partially or in whole the following items in the pursuer's account of expenses:—

"1903

Jan. 27.	Framing following precognitions—	Taxed off.	
	Dr Boyd - - - - -	£1 4 0	£1 4 0
	Dr Knox - - - - -	2 16 0	2 16 0
	Making three copies of precognitions -	1 16 0	1 16 0
March 26.	Paid witnesses per Schedule—		
	Dr Knox, Prof. of Surgery, Glasgow, 1 day - - - - -	10 17 6	10 17 6
	Dr Boyd, Glasgow, 1 day - - - -	7 14 6	7 14 6
	Dr Murray, Surgeon, Alexandra Hospital, Glasgow - - -	10 17 6	6 6 0
	Professor Annandale, Edinburgh, 1 day	15 15 0	11 11 0
		£51 0 6	£42 5 0"

The Auditor allowed fees to Dr Knox and Dr Beaton for reports of examination of pursuer prior to the raising of the action, and the agent's charge relating thereto, and also a fee to Dr Boyd for attending an examination of the pursuer along with the defenders' doctors, and the agent's charges relating thereto, as well as the agent's charges in connection with the examination of the pursuer and the reports thereon by Dr Murray and Professor Annandale.

Argued for the pursuer and objector—The medical fees charged were in the circumstances fair and reasonable and should be allowed. The Auditor had allowed only fees to two medical men, viz., four guineas each, and had disallowed *in toto* the fees to the other medical men who were properly in attendance as witnesses at the trial. This allowance was entirely inadequate, having

regard to the serious nature of the pursuer's injuries, the medical questions arising in relation thereto, and the necessity in the interest of the pursuer to bring forward medical evidence to balance the weighty medical evidence which in the knowledge of the pursuer it was in contemplation to lead on behalf of the defenders. The case was distinguishable from *Watson* v. *Caledonian Railway Company*, June 22, 1901, 3 F. 999, 38 S.L.R. 717. In regard to the two fees of four guineas allowed by the Auditor for the other medical witnesses, it was not a matter of concern to the pursuer whether these fees should be allowed, as had been done by the Auditor to Dr Murray and Professor Annandale, who had been called in to report, or to Dr Boyd and Dr Knox, who had attended the pursuer during his illness.

Counsel for the defenders were not called on.

LORD PRESIDENT—The condition under which the present note of objections comes before us is that the Auditor has allowed fees to five doctors, and the question is whether any ground has been stated to us for adding to the number or amount of these fees.

We had occasion in the case of *Watson* v. *The Caledonian Railway Company* (3 F. 999) to consider carefully the question of the fees which should be allowed to medical men in accident cases, as the number and the amount of such fees had been growing in a manner it was impossible to approve of.

It was our intention in that case to place a reasonable limit to the amount which a litigant could be called on to pay for medical men, either as witnesses for his opponent or for services rendered by them prior to the trial.

In the present case it appears to me that the fees allowed are quite adequate, and that to allow more would be inconsistent with the decision in the case of *Watson*, which we intended should form the rule of practice.

LORD ADAM—I am of the same opinion.

With regard to the objections to the charge for the precognitions of Dr Boyd and Dr Knox, I think the Auditor has followed accurately the decision in the case of *Watson* (3 F. 999).

With regard to the charges which the Auditor has allowed for the attendance at the trial of the medical witnesses a little explanation is necessary.

The Auditor has disallowed *in toto* the charge of £10, 10s. for Dr Knox and £7, 7s. for Dr Boyd. Now, these were the two doctors who attended the pursuer after the accident, and they were proper witnesses of fact in the case, and in ordinary circumstances the pursuer would be entitled to charge a fee for their attendance at the trial. But in this case a fee is allowed for the attendance of two other surgeons, viz., Professor Annandale and Dr Murray, at the trial, and these fees are allowed in place of those asked for Drs Knox and Boyd, as I understand by the desire of the pursuer.

LORD M'LAREN—When a case has been compromised before trial or during the course of the trial it is necessary to distinguish between evidence as to matters of fact and evidence of opinion for the purposes of taxation of expenses. Now, when a medical man or a lawyer is called as a witness to speak to matters of fact he is in no more favoured position than any other citizen. He may be compelled to attend the trial, and he is entitled to receive no more and no less than the fees allowed by the Act of Sederunt. In his case they may be an altogether inadequate recompense for his time and trouble in connection with giving evidence; but that is just one of the burdens which the duties of citizenship impose upon him, and the Court can allow no higher standard of remuneration in his case. But when a medical man is desired to give evidence as to matters of opinion he is not a compellable witness, and as it is open to him to refuse to attend unless he gets what he considers an adequate fee he is enabled to make his own bargain as to his remuneration. Now as far as I know there are no provisions in the Act of Sederunt as to charging against the opposite party the fees of expert witnesses, except that the presiding judge may certify that expenses have been rightly incurred to an expert witness for his trouble in preparing himself to give evidence at the trial. But as in this case a compromise was arrived at before any expert evidence had been adduced, the judge was not asked to certify the expenses of the experts who were in attendance, and I do not see how in these circumstances he could have certified. I am therefore of opinion that the fees for the expert witnesses cannot properly be allowed in this case.

But I agree with Lord Adam in his view that the fees for attendance at the trial to the other two doctors who treated the pursuer in the hospital, and who were therefore witnesses to facts, are proper charges in this case, and no doubt the Auditor's reason for disallowing them was that he thought the pursuer would prefer that the fees should be allowed to his expert witnesses. Although, as I have said, these fees would more properly have been allowed to the two medical witnesses who attended the pursuer at the hospital, I see no reason to interfere with the Auditor's taxation, as in a re-audit the pecuniary result would be the same.

When a case is compromised before the trial is concluded the parties will no doubt take into consideration in determining the amount of the compromise that certain charges incurred in preparation for the trial cannot be recovered from the other party, and there is therefore no hardship in applying the strict rule of taxation.

LORD KINNEAR concurred.

The Court refused the note of objections, with £2, 2s. of expenses to the defenders.

Counsel for the Pursuer—Salvesen, K.C. —Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders—Ure, K.C.—Grierson. Agent—James Watson, S.S.C.

Friday, June 12.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

STREET *v.* DOBBIE.

Superior and Vassal — Feu-Contract — Stipulations—Buildings—Iron Foundry —Obligation to Erect "Substantial Stone or Brick Buildings for the Purpose of an Iron Foundry"—Enclosing Walls not all of Stone or Brick.

By a feu-contract the feuar was taken bound, *inter alia*, to erect within a specified time upon the ground feued "substantial stone or brick buildings for the purpose of an iron foundry" of a specified value. In an action of declarator of irritancy at the instance of the superior against the feuar on the ground that he had failed to implement the condition of the feu-contract as to the erection of buildings, it was proved that the defender had erected a foundry which satisfied the requirements of the feu-contract as to value, and having a middle wall, a back wall, and a chimney and furnace of brick, but with three of its outside walls composed of iron pillars and wood. It was proved that other foundries in the neighbourhood were built in the same manner. *Held* (*aff.* judgment of Lord Kincairney, Ordinary) that the pursuer had failed to prove any contravention of the conditions of the contract, and that the defender was entitled to absolvitor.

This was an action at the instance of John Shepherd Street, brick manufacturer, Inverkeithing, against James Dobbie, ironfounder, Banknock Foundry, Hollandbush, in which the pursuer, as superior of certain lands feued to the defender as vassal, concluded for declarator of irritancy of the feu-contract in respect that certain conditions therein contained had not been implemented, or otherwise that they had been contravened by the defender.

The feu-contract between the pursuer and defender, which was dated July 1899, contained, *inter alia*, the following clauses:—"(*First*) the second party (the defender) and his foresaids shall be bound to erect within five years from the term of Martinmas Eighteen hundred and ninety-six, and thereafter to uphold and maintain in good order and repair in all time coming, and when necessary to rebuild upon the said plot or area of ground substantial stone or brick buildings for the purpose of an iron foundry, and if desired by the second party or his foresaids substantial dwelling-houses of stone or brick, and said buildings shall have slated, tiled, or iron roofs, and shall be of a value sufficient at all times to yield a free yearly rental according to the valuation roll equal to not less than triple the amount of feu-duty exigible from said portion of ground as after provided: . . . . Declaring, as it is hereby expressly provided and declared, that in the event of the second party or his foresaids failing to comply with the conditions, declarations, restrictions, obligations, and others before inserted as to erecting and maintaining buildings on the said portion of ground or as to repairing or rebuilding, or in the event of his or their contravening any of the conditions, declarations, restrictions, obligations, and others before written, then and in the option of the first parties or their successors these presents and all following hereupon shall become *ipso facto* void and null, and the second party and his foresaids shall amit, lose, and forfeit all right and interest in said portion of ground and buildings thereon, which shall thereupon revert and belong to the first parties and their foresaids free and disencumbered of all burdens whatsoever." . . .

The defender had erected a dwelling-house on the feu, to which the pursuer took no objection.

The defender had also erected certain buildings for the purposes of a foundry. These buildings were as follows:—A brick gable wall was erected at one end of the foundry, and from it another brick wall was erected in the middle of the foundry to the other end. There were also a chimney stalk, boiler seat, and engine seat, and a furnace, all of brick. The outside walls of the foundry other than the gable referred to consisted of iron columns about 10 feet apart, upon foundations of brick or concrete, the spaces between the iron columns being filled in with wood. It appeared that the other foundries in the neighbourhood were built in the same manner and that none of them were enclosed by four brick or stone walls.

The pursuer maintained that the foundry building erected by the defender was not such as to be sufficient implement of the conditions of the feu-contract, in respect that it ought to have had, but had not, its four side walls composed of brick or stone.

The feu-duty payable by the defender was £12 *per annum*. The foundry was entered in the valuation roll as of the yearly value of £40, and the dwelling-house of the yearly value of £20.

The pursuer pleaded—"(1) The defender having contravened the conditions and obligations of the feu-contract condescended on, and having forfeited his right and interest thereunder, the pursuer is entitled to decree of declarator as craved, with expenses."

The defender pleaded—"(3) The pursuer's averments, in so far as material, being unfounded in fact, the defender should be assoilzied with expenses."

On 29th January 1903 the Lord Ordinary (KINCAIRNEY), after a proof, pronounced an interlocutor in the following terms:—"Finds it not proved that the defender has