COURT OF SESSION.

Friday, July 9.

FIRST DIVISION.

[Lord Blackburn, Ordinary.

WINGATE *v.* WINGATE'S TRUSTEES.

Succession — Election — Equitable Compensation—Bequest to Son during his Lifetime of Free Annual Income of Residue "in Full Satisfaction of his Claim of Legitim" — Election to Take Legitim — Lapsed Testamentary Provision—Residue or Intestacy—"Provision."

A testatrix by the second purpose of her trust-disposition and settlement directed her trustees to convey to her son a sum equal in amount to five-sevenths of his beneficial interest in his grandfather's estate which he had assigned to her during her lifetime. By the sixth and subsequent purposes she directed them to pay him during his lifetime the free annual income of the residue of her estate, and on his death to divide the residue among his children and the issue of predeceasing children, or in the event of his leaving no issue among certain charities and religious institutions. The settlement contained the following declaration — "And I declare that the foregoing provision in favour of my said son shall be accepted and held by him as in full satisfaction of his claim of legitim." By a codicil the testatrix revoked the bequest contained in the second purpose of her settlement, and in place thereof directed her trustees to pay the free income of the sum therein mentioned to her son during his lifetime, and after his death to pay the capital to his issue, whom failing to certain beneficiaries named. The codicil also provided — "Except in so far as hereby altered, I confirm the foregoing trust-disposition and settlement and relative codicils." The son claimed legitim. *Held* (1) that the word "provision" included all the provisions in favour of the son contained in the settlement and codicil; and (2) (*diss.* Lord Cullen) that the income of the residue of the estate set free by the son's election to claim legitim did not fall into residue but became intestate estate of the deceased, and fell (equitable compensation having been fully made to the estate for the sum withdrawn to meet the claim for legitim) to the son as heir of his mother *in mobilibus*.

Ashmore Kyle Paterson Wingate, Castle Douglas, *pursuer*, brought an action against Wilson Rowan Meikle and others, the trustees acting under the trust-disposition and settlement of the deceased Mrs Margaret Ashmore Kyle or Wingate, his mother, in which he concluded, *inter alia*, for declarator "that the whole revenue accumulated and to be derived from the capital estate of the said deceased Mrs Margaret Ashmore Kyle or Wingate so far as remaining in the hands of the defenders as trustees foresaid, after providing for repayment out of the said revenue to the capital funds of the said estate in the hands of the defenders as trustees foresaid, of the amount paid to the pursuer in name of legitim and interest, is payable to the pursuer immediately so far as accumulated, and so far as to be derived hereafter, from time to time as it accrues, during the lifetime of the pursuer." Conclusions for accounting followed.

Mrs Wingate died on 30th November 1912 leaving the said trust-disposition and settlement and several codicils thereto. By the second purpose of the settlement she directed her trustees to convey to the pursuer a sum equal to five-sevenths of his beneficial interest in his granddfather's estate which he had assigned to her during her lifetime. This direction, however, was revoked by a codicil dated 17th December 1910 and the following provisions were substituted therefor—"I hereby cancel and revoke the second purpose of the said trust-disposition and settlement, and in place thereof I direct my trustees to retain and invest in their names a sum out of my estate equal in amount to the net capital sum paid or to be payable to me or my trustees in virtue of assignation by my son Ashmore Kyle Paterson Wingate in my favour, dated sixth June Nineteen hundred and nine, whereby I acquired five-sevenths of his beneficial interest (both capital and income) in the estate of his grandfather the late Thomas Wingate, sometime engineer and shipbuilder at Whiteinch, near Glasgow, and who thereafter resided at Broomhall, Partick, in virtue of his trust-disposition and settlement dated seventeenth April Eighteen hundred and sixty-seven, and relative codicils: And I direct my trustees to pay and apply the whole free income arising therefrom to and for behoof of my son the said Ashmore Kyle Paterson Wingate during his lifetime, and that at such term or terms, in such proportions, and in such way and manner as my trustees shall in their sole discretion think proper; which liferent interest shall be purely alimentary and shall not in any way be affectable by the debts or deeds of my said son or attachable by the diligence of his creditors: And in the event of my said son predeceasing me, or on my son's death should he survive me, I direct my trustees to hold and apply said net capital sum to and for behoof of and to divide and pay the same equally among and to his children, if any, on their respectively attaining the age of twenty-five years jointly, *per stirpes*, with the issue of any of said children who shall have predeceased leaving issue (such issue being entitled equally among them to the share which their parent or parents respectively would have taken on survivance) . . . And failing issue of my said son to take in terms of the foregoing destination, I direct my trustees to pay and deliver said net capital sum in the following proportions, namely [in one-third shares to certain beneficiaries named] . . . And except in so far as hereby

altered I confirm the foregoing trust-disposition and settlement and relative codicils."

The fifth and subsequent purposes of Mrs Wingate's settlement were as follows—"(*Fifth*) Subject to the foregoing provisions I direct my trustees to convey to my son Ashmore Kyle Paterson Wingate as his own property absolutely the whole household furniture and plenishing which shall belong to me at the time of my death, including therein bed and table linen, silver plate, books, and pictures: (*Sixth*) Subject to the whole provisions hereinbefore contained I direct my trustees to pay to my said son, or to apply or expend for his behoof during his lifetime, the whole free annual income which shall arise from the residue of my estate, and that in such sum or sums and at such term or terms in each year all as my trustees may in their own discretion consider proper: (*Seventh*) Subject to the provisions hereinbefore contained, I direct my trustees, in the event of my son leaving issue surviving him, to hold and apply the whole residue of my means and estate to and for behoof of, and after the death of my said son, should he survive me, to divide and pay the same equally among and to the children of my said son on their respectively attaining the age of twenty-one years jointly, *per stirpes*, with the issue of any of said children who shall have predeceased leaving issue (such issue being entitled equally among them to the share which their parent or parents respectively would have taken on survivance) . . . (*Eighth*) On the death of my said son should he survive me and leave no issue, or on my own death should he predecease me without leaving issue, I direct my trustees to divide the free residue of my means and estate into three equal parts, and to pay one of such parts to [each of certain named charities and religious institutions] . . . And I declare that the foregoing provision in favour of my said son shall be accepted and held by him as in full satisfaction of his claim of legitim."

The parties averred, *inter alia*—"(Cond. 5) After his mother's death the pursuer claimed legitim out of her estate. Disputes arose as to the amount payable to him in name of legitim, and an action was ultimately raised against him by his mother's trustees for the purpose of fixing the amount of his legitim. In that action it was determined by decree dated 5th June 1917 that the amount of legitim payable to the pursuer was £1448, 7s. 9d., and that he was entitled to interest thereon from the date of his mother's death. The trustees duly made payment to him of the said sum of £1448, 7s. 9d. together with the sum of £246, 7s. 10d. in name of interest. (*Ans.* 5) Admitted. (Cond. 6) The defenders and their predecessors in office as trustees of Mrs Wingate have accumulated the whole free revenue of the residue of her estate since her death. The accumulated revenue now exceeds the sum paid to the pursuer in name of legitim. The only directions contained in the testamentary writings as to the revenue of the residue of the estate (including the estate assigned by the pursuer to his mother) are the directions above quoted in terms of which the whole revenue falls to be paid to the pursuer during his lifetime. The ultimate beneficiaries of the fee of the said residue are ascertainable only on the death of the pursuer, so that the said fee is retainable in the hands of the defenders during the pursuer's lifetime. The revenue accumulated and to be derived during the lifetime of the pursuer (after making up the amount paid to him as legitim) is either payable to the pursuer by virtue of the said testamentary writings or else forms intestate estate of the testatrix, and is payable to the pursuer as her sole heir-at-law and heir *in mobilibus*. The statements in answer in so far as not coinciding herewith are denied. (*Ans.* 6) Admitted that defenders as trustees of Mrs Wingate have accumulated the whole free revenue of her estate since her death, and that the accumulated revenue now exceeds the sum paid to the pursuer in name of legitim. The directions contained in the testamentary writings as to the revenue of the residue of the estate (including the estate assigned by the pursuer to his mother) are referred to for their terms. Admitted further that the ultimate beneficiaries of the fee of said residue are ascertainable only on the death of the pursuer, so that said fee is retainable in the hands of the defenders during the pursuer's lifetime. *Quoad ultra* denied. The pursuer by electing to claim and by having received payment of his legal rights has completely and finally lost all beneficial right and interest in the conventional provisions conceived in his favour by said testamentary writings. Further, the defenders as trustees foresaid maintain that subject to the provisions of the Thellusson Act (39 and 40 Geo. III, cap. 98), said revenue falls into and forms part of the residue of said estate and the pursuer is not entitled thereto. In any event the defenders as trustees foresaid are only bound to pay said revenue to such persons as may be found entitled thereto by judicial determination."

The pursuer *pleaded*, *inter alia*—"1. In respect that the revenue accumulated and to be derived during the lifetime of the pursuer from the capital estate in the hands of the defenders as trustees foresaid after providing for repayment to the capital funds of the estate of the amount paid to the pursuer in name of legitim, is payable to the pursuer either (*a*) in terms of the testamentary writings of the deceased, or (*b*) as intestate estate of the deceased, decree of declarator should be granted as concluded for."

The defenders pleaded, *inter alia*—"1. The pursuer having elected to claim legitim and having received payment thereof is barred from claiming any beneficial right or interest under the conventional provisions of the said testamentary writings, and the defenders as trustees foresaid should be assoilzied from the declaratory conclusions of the summons. 2. In respect that the surplus revenue of the estate of the deceased, set free by pursuer's election to claim legitim, and by payment of legitim to him falls into

and forms part of the residue of the estate of the deceased, subject always to the provisions of the Thellusson Act, the defenders as trustees foresaid should be assoilzied from the declaratory conclusions of the summons."

On 20th November 1920 the Lord Ordinary (BLACKBURN) repelled the pleas-in-law for the pursuer, sustained the second plea-in-law for the defenders, and dismissed the action.

Opinion.—"Mrs Wingate, the mother of the pursuer in this action, died in 1912 leaving a trust-disposition and settlement dated 9th July 1909, and among other codicils one dated 17th December 1910. By the second purpose of the former deed she directed her trustees to convey to her son a sum equal in amount to five-sevenths of his beneficial interest in his grandfather's estate, which he had assigned to her during her lifetime. By the fifth purpose she directed them to convey to him her whole household furniture, and by the sixth purpose to pay him during his lifetime the whole free annual income of the residue of her estate. By the seventh purpose the trustees were directed, on the death of the pursuer leaving issue surviving him, to divide and pay the residue of the estate among his children and the issue of predeceasers, while in the event of his leaving no issue they were directed by the eighth purpose to divide the residue among certain named charities. Immediately after the eighth purpose there follows a declaration as to the vesting of the shares of succession and a clause giving the trustees discretionary powers as to the dates of payment, and then comes the following declaration, viz.—'And I declare that the foregoing provision in favour of my said son shall be accepted and held by him as in full satisfaction of his claim of legitim.'

"By the codicil of 17th December 1910 the testatrix revoked the second purpose of her trust-disposition and settlement by which she bequeathed a capital sum to her son, and in place thereof she directed her trustees to invest and hold the said capital sum for payment of the free income thereof to her son during his lifetime and after his death for payment of the fee to his issue, whom failing to certain of her other relatives. The codicil contains the following provision, viz. —'Except in so far as hereby altered, I confirm the foregoing trust-disposition and settlement and relative codicils.'

"On Mrs Wingate's death the pursuer claimed legitim, and thereafter the income of the estate provided to him was applied to restore to the capital of the residue a sum equivalent to that withdrawn to meet the legitim claimed. This has now been done, and the question arises as to how the income set free by the pursuer's claim of legitim is to be disposed of in the future.

"The pursuer claims it (*a*) in terms of the testamentary writings of the deceased, or (*b*) as falling into intestacy; while the defenders, who are Mrs Wingate's trustees, maintain that it forms part of the residue of the estate, and that subject to the provisions of the Thellusson Act it must continue to be accumulated for the benefit of the residuary legatees.

"With regard to the pursuer's first claim, it was not contended that he was entitled in terms of his mother's testamentary writings to the whole of the income set free. It was admitted that the declaration in the trust-disposition and settlement that the provision in his favour was 'in full satisfaction' of legitim, and the recent decision in *Rose's Trustees* (1916 S.C. 827) provided a complete answer to any such claim.

"But it was argued that he was entitled to that part of the income set free which consists of the interest of the capital sum originally bequeathed to him. This argument depends, in the first place, on the construction to be put upon the words 'the foregoing provision,' which in terms of the trust-disposition and settlement is declared to be in full satisfaction of legitim. The pursuer maintains that the word 'provision' being in the singular the clause only applies to the provision of the income of the residue contained in the sixth purpose of the settlement, and was not intended to refer to the gift of capital in the second purpose or of the furniture in the fifth. I do not think there is any substance in this suggested construction, which obtains no support from the position of the satisfaction clause in the settlement, and which, further, in my opinion violates a very ordinary meaning of the word 'provision' as including all that has been provided. Nor do I think there was any more substance in the argument submitted in the second place to the effect that the declaration does not apply to the codicil. The settlement and the codicil must be construed together, and the effect is merely to read into the original settlement a bequest of liferent instead of one of fee. I have no difficulty in holding that the declaration applies to this liferent, and I think that by confirming the trust-disposition and settlement in the codicil the testatrix clearly shows that she intended it should do so.

"This disposes of the first alternative branch of the pursuer's first plea-in-law. The question in the second branch is a sharp one, namely, Does the income set free continue to fall into residue, or is it now intestate succession? So far as I am aware this question has never been the subject of express decision in any case analogous to the present, although it was considered in the well-known case of *Macfarlane's Trustees* v. *Oliver*, 9 R. 1138. In that case the testator left the residue of his estate in two equal share to his son and daughter in liferent and to their issue respectively in fee. There was no clause in the will declaring that these provisions were in full satisfaction of legitim. The daughter claimed her legitim, and after all the interests thereby affected had been compensated the question arose as to what was to become of the surplus income. The majority of the whole Court held that there being no satisfaction clause in the will it was not contrary to the testator's expressed intention that the daughter should revert to her provision, and accordingly that she was entitled to do so. The minority were of opinion that a satisfaction clause must

be implied in every will purporting to be a universal disposition of the testator's estate, and that the effect of such an implied clause required the complete surrender by the daughter of the provision in her favour. While this was the only question decided by the Court it was necessary for the consulted Judges to consider what was to become of the surplus income in the event of the views of the minority prevailing. Their opinions therefore cannot be regarded as mere *obiter dicta*. Four of the consulted Judges—Lords Rutherfurd Clark, M'Laren, Adam, and Kinnear—who were all of the majority above referred to, gave it as their opinion that unless the daughter was found entitled to the surplus income it must fall into intestacy. I do not well see how they could have reached any other conclusion, having already committed themselves to the opinion that it was not inconsistent with the testator's expressed intention that the surplus income should be applied for behoof of the daughter alone to the exclusion of all the other beneficiaries entitled under the will. How completely this view of the testator's expressed intentions entered into their opinions as to the ultimate disposal of the surplus income in the event of the testator's intention not being given effect to is clear from paragraph 5 of the joint opinion of Lord M'Laren and Lord Rutherfurd Clark (p. 1160), and the last paragraph of the joint opinion of Lord Kinnear and Lord Adam (p. 1162). I do not think that the opinions of any of these learned Judges have any bearing on a case where the testament under construction contains a clause declaring the provision to be in full satisfaction of legitim, except in so far as they indicate that the governing consideration in disposing of the surplus income must always be the testator's intention. The opinions of the consulted Judges in the minority deal, however, with a state of matters which are similar to those in the present case, except that the condition which they read into the will they were construing is expressed in that now under consideration. Of these judges Lord Justice-Clerk Moncreiff, Lord Craighill, and Lord Lee were of opinion that under such circumstances it was to be assumed that the testator intended the surplus income to fall into residue and not into intestacy. Lord Fraser, however, who was also one of the consulted Judges in the minority, took a different view, and was of opinion that the surplus income fell into intestacy. He reached this conclusion on two grounds which are apparently quite distinct. In one part of his opinion he says that to hold otherwise would be 'inconsistent with the principle on which a court of equity has acted in establishing the doctrine of compensation,' and in another that 'the surplus was undisposed of,' and that 'the testator did not anticipate the event which happened.' It would, I think, be difficult to support the second of these reasons had the condition that the provision was to be taken in full satisfaction of legitim been express instead of implied, and I am accordingly left in doubt as to what conclusion Lord Fraser would have reached in a case like the present, but there is no doubt that like all the Judges in the case he attached chief importance to the intentions of the testator as indicated by his testamentary writings.

"When the case came to be advised Lord President Inglis, Lord Mure, and Lord Shand agreed with the majority of the consulted Judges that the construction which they proposed should be put upon the settlement would most effectually carry out the intentions of the testator. This being the judgment of the Court it was unnecessary for them to consider how the surplus income should have been disposed of on the hypothesis that the intentions of the testator were not to be given effect to. The Lord President at the end of his opinion refers to the matter as follows:—'I observe that some of the consulted Judges in the majority express an opinion on the question. . . . I am unable to give any opinion on that question as a question on the construction of the testator's settlement, because I cannot say which alternative is most inconsistent with the intention of the testator. They appear to me to be equally so.' This I take to mean that the guiding factor as to how the surplus income is to be disposed of must always be the testator's intention, and that it was idle to consider how it should be disposed of on the assumption that what was held to be the testator's intention was not to be given effect to. Lord Mure and Lord Shand, however, indicate that had the question arisen they would have concurred in the opinion of the consulted Judges in the majority. But the question did not arise, and I think it is clear from the opinion of Lord Mure as expressed in the subsequent case of *Russell's Trustees* (13 R. at p. 995) that he did not regard his concurrence as indicating that the proper alternative to the judgment pronounced was to hold that the surplus income fell into intestacy. Referring to *Macfarlane's Trustees* he says—'The real controversy there was whether the parties who had brought about the defeat of the settlement could claim anything under it after full compensation had been made for the loss thereby occasioned, or whether the fund then remaining fell *into residue*.' I think this shows that in Lord Mure's mind the true alternative to the conclusion he arrived at in *Macfarlane's Trustees* was that reached by the Judges in the minority, and that had he shared their opinion as to the testator's intention he would have held that the surplus income fell into residue. This supports the conclusion I have arrived at that none of the opinions in *Macfarlane's Trustees* which point to intestacy as the ultimate destination of the surplus income have any bearing on a case like that now under consideration where the settlement contains an express clause of satisfaction.

"The only assistance in this case that I think can be derived from *Macfarlane's Trustees* is that the testator's intention must provide the guide as to how the surplus income is to be disposed of, and that three learned Judges in the minority were of opinion that the effect of a satisfaction

clause in the settlement indicates an intention on the part of the testator that the surplus income should fall into residue. In my judgment this conclusion as to the construction to be placed on such a clause is sound, and in the present case is the only way in which effect could be properly given to the intentions of the testatrix. It cannot be said that she has overlooked the right of her son to claim legitim in view of the declaration that the provision for him is to be accepted 'in full satisfaction' of his legitim. She gives him an option of taking the provision on condition that he allows the legitim fund to fall into the residue. It seems to me to be an inevitable inference that if he did not take the provision and deprived the residue of the legitim fund she intended the provision to enure to the residue fund. In the view I take of this case there is no interference with the principles of equitable compensation such as are suggested in the opinion of Lord Fraser in *Macfarlane's Trustees*. I do not think this is a case to which equitable compensation has any application as there are no interests affected which call for its interference. The testatrix has in my opinion sufficiently clearly indicated her intention that in the event of the son claiming legitim the income set free should go to residue, and to residue it has gone, and I think should continue to go till at all events twenty-one years from the death of the testatrix. The result is that the residue fund when it comes to be distributed will be larger than it would have been had the son accepted his provision. But the moment he elected to claim legitim the value of the residue was affected, and inevitably its ultimate value became dependent on the duration of his life. I do not think it can be assumed that the testatrix overlooked or ignored this possibility, or that it is unlikely that she should have intended her residuary legatees to take any benefit as well as to bear any loss which might result from so uncertain a contingency.

"Accordingly in my opinion the second branch of the pursuer's first plea-in-law cannot be sustained. As the conclusions of the summons draw no distinction between the income accruing before and after the period when the Thellusson Act comes into operation, I think the proper way to dispose of the action is to repel all the pursuer's pleas-in-law, sustain the second plea for the defenders, and dismiss the action."

The pursuer reclaimed, and argued—The declaration in the settlement that "the foregoing provision" in favour of the pursuer was "in full satisfaction of his claim of legitim" did not apply to the bequest made to him in the codicil of 17th December 1910. This codicil dealt with the estate that had been assigned to the testatrix during her lifetime by the pursuer, and was thus of the nature of a repayment. The use of the word "provision" in the singular number was significant, and showed that the clause only applied to the income of the residue dealt with in the sixth purpose of the settlement, and did not refer to the gift of capital in the second purpose. The above circumstances distinguished this case from that of *Rose's Trustees* v. *Rose*, 1916 S.C. 827, 53 S.L.R. 630. The pursuer therefore was entitled to the income of this portion of the estate after compensation had been made for the payment of his *jus relictæ*. Alternatively he was entitled to the income of the residue of the estate as heir *in mobilibus* of his mother, for the income fell not into residue but into intestacy—*Macfarlane's Trustees* v. *Oliver*, 9 R. 1138, 19 S.L.R. 850, *per* Lords Mure, Shand, M'Laren, and Kinnear. The case of *Innes' Trustees* v. *Bowen*, 1920 S.C. 133, was also referred to.

Argued for the defenders—The pursuer's claim in so far as based on the terms of the will was excluded by the decision in *Rose's Trustees*. The principal deed and the codicil must be read together. The word "provision" (although in the singular number) included all that had been provided. As regards branch (*b*) of the pursuer's first plea-in-law, the presumption in law was against intestacy, and the present deed was quite susceptible of a construction whereby intestacy might be avoided. The bequest of the liferent to the pursuer was conditional on his surrender of legitim. It was merely a charge on the residue which would fly off on lapse or surrender. Moreover, it was evident that the testatrix actually contemplated the contingency that the pursuer might repudiate the testamentary provisions and claim his legal rights, for she had provided against it. What was forfeited was not residue but the income of the residue, and that fell on being discharged not into intestacy but into residue. The surplus income therefore, both accrued and prospective, fell to be added to residue. The following cases were referred to:—*Pursell* v. *Elder*, 1865, 3 Macph. (H.L.) 59; *Sturgis* v. *Meiklam's Trustees*, 3 Macph. (H.L.) 70; *Storie's Trustees* v. *Gray*, 1 R. 953, 11 S.L.R. 552; *Russell's Trustees* v. *Gardiners*, 13 R. 989, 23 S.L.R. 719.

At advising—

LORD PRESIDENT—I agree with the Lord Ordinary in holding that the clause in the testatrix's settlement declaring "that the foregoing provision in favour of my said son shall be accepted and held by him in full satisfaction of his claim of legitim" applies to the whole provisions in his favour (notwithstanding the use of the singular number) contained in the settlement as amended by the codicil of 17th December 1910. The provision substituted by the codicil for that contained in the second purpose of the settlement is to be read just as if the testatrix had put her pen through the latter and had written in the former in its place.

The case is thus one in which the son's election of his legitim had the effect of discharging finally all his mother's testamentary provisions in his favour—*Rose's Trustees* v. *Rose*, 1916 S.C. 827 (first part of the case). The discharged provisions include (*a*) those of the codicil, and (*b*) that contained in the sixth purpose of the settlement, which is in these terms—"Subject to the

whole provisions hereinbefore contained, I direct my trustees to pay to my said son or to apply or expend for his behoof during his lifetime the whole free annual income which shall arise from the residue of my estate, and that in such sum or sums, and at such term or terms in each year, all as my trustees may in their own discretion consider proper." As the Lord Ordinary points out—and as indeed both parties admitted—the final discharge of this provision, which must (in view of the clause referred to at the outset) be imputed to the pursuer as the result of his electing legitim, disposes of the first branch of his first plea-in-law.

It appears that since the date of the death of the testatrix the trustees of the settlement have accumulated the whole free income of the residue, and that the sum so accumulated now exceeds the amount paid to the pursuer as legitim. The inroad made on the residue of the estate in order to pay the legitim has thus been fully repaired. The seventh purpose of the settlement is as follows:—"Subject to the provisions hereinbefore contained, I direct my trustees, in the event of my son leaving issue surviving him, to hold and apply the whole residue of my means and estate to and for behoof of, and after the death of my said son, should he survive me, to divide and pay the same equally among and to the children of my said son," on majority, jointly *per stirpes* with the issue of predeceasers. By the eighth purpose, on the death of the son, should he survive the testatrix and leave no issue, the trustees were further directed "to divide the free residue of my means and estate into three equal parts," and to dispose of them in favour of certain named charities and religious institutions.

In the circumstances the pursuer's case is that his liferent right to the free annual income of the residue—on its being finally discharged as the result of his election of legitim—became intestate estate, and fell (subject only to retention by the trustees so long as it might be necessary to enable them to accumulate and restore a sum equivalent to the legitim) to himself as heir of his mother *in mobilibus*. The trustees' reply is that the discharged provision fell into residue and should be disposed of in accordance with the seventh and eighth purposes, and accordingly that (subject only to the limitations imposed by the Thellusson Act) it must be accumulated—as forming part of such residue—for the benefit of the pursuer's issue or (failing such issue) of the named charities and religious institutions. According to this view the principle of equitable compensation has no application to the discharged provision, because the undischarged interests in the residue are simple rights of fee uncomplicated by any conflict—*e.g.*, as between the interests of a liferenter and a fiar—among the parties interested in it.

The argument so clearly and cogently presented to us by Mr Murray has differed somewhat from that which was addressed to the Lord Ordinary. It turns in the end on the construction of the purposes of the settlement dealing with residue. But it is necessary to explain how this comes about.

Generally speaking, if a conventional provision which is *finally discharged* by a claim to legal rights is itself the residuary provision of the settlement or part thereof, such conventional provision falls into intestacy in consequence of such final discharge. There is nothing left to prevent that result, however long it may be postponed by retention of the provision in the trustees' hands for the purpose—temporary at best—of making equitable compensation out of it. A clause disposing of residue is, so to speak, the last fence which the settlement erects against intestacy. When the last fence fails there is nowhere for the provision to go except into the hands of the heir *in mobilibus*. I am fortified in this view by the opinion—albeit (strictly) *obiter*—of Lords Rutherfurd Clark and M'Laren in *Macfarlane's Trustees* v. *Oliver*, 1882, 9 R. 1138, at p. 1160.

If on the other hand the conventional provision is one of the prior purposes of the settlement, then such provision on being discharged falls (in the absence of heirs-substitute to take it) into residue. Nor does it do so any the less because—where necessary to preserve justice as between interests of liferent and fee among the substitutes or among the residuary legatees—the principle of equitable compensation is applied to it. The second part of the case of *Rose's Trustees* v. *Rose*, 1916 S.C. 827, furnishes an example of the application of the principle to a substituted liferent. In such a case the principle operates only to regulate the participation *inter se* of liferenter and fiar in that which belongs to them in liferent and fee respectively, and to prevent the inequitable disturbance of those interests in relation to each other which would otherwise flow from the assertion (in hostility to the settlement) of some other beneficiary's legal rights.

The distinction may be thus stated. Where the conventional provision is itself the residuary provision of the settlement or part thereof the principle of equitable compensation derives its sanction from the fact that the testator did not intend to send his estate the way of the heir *in mobilibus* at all. Therefore it is said to be in accordance with his intention to withhold it from such heir—Lord Eldon in *Ker* v. *Wauchope*, (1819) 1 Bligh 1, at p. 25—at least for such time as is required to effect compensation for the inroad made on other provisions. But where the conventional provision falls, on its discharge, to an heir-substitute or into residue the equitable compensation is superimposed upon the substituted or residuary interests created by the testator in order merely to preserve as far as possible the balance between those interests which the testator intended.

Now the pursuer's contention is that the conventional provision he discharged is part of the provisions dealing with the disposal of the testatrix's residue. He reads the sixth, seventh, and eighth purposes as providing the residue to him in liferent and to his issue, whom failing to the charities

and religious institutions, in fee, and maintains that the liferent estate has fallen into intestacy and goes to him as heir *in mobilibus*. The trustees answer this contention by a critical examination of the purposes mentioned, from which they argue that on a sound construction the testatrix must be held to have created two residues—(*a*) in the sixth purpose, a residue remaining after the fulfilment of the purposes first to fifth inclusive; and (*b*) in the seventh and eighth purposes, a residue remaining after fulfilment of purposes first to sixth inclusive. The settlement is peculiar in respect that instead of disposing of the residue in liferent and fee in ordinary form it breaks up the residuary provision into three purposes, prefacing the sixth purpose (in which the proceeds of the residue are dealt with) with the words "Subject to the whole provisions hereinbefore contained," and the seventh (in which the capital of the residue is provided to the pursuer's issue) with the words "Subject to the provisions hereinbefore contained"—*not* "subject to the *aforesaid* provisions hereinbefore contained." No similar words are used in the eighth purpose. Further, the creation of successive "residues" in a settlement is a by no means unprecedented expedient of settlors or their conveyancers, however inconvenient and perplexing it may be. Generally speaking the conception of the term residue is a comprehensive one and includes everything accessory to the *corpus* composing it — *Sturgis* v. *Meiklam's Trustees*, (1861) 23 D. 1128, (1865) 3 Macph. (H.L.) 70. When the liferent of a residuary fund is conferred on a beneficiary the liferent remains as truly part and parcel of the residue as the fee, which is given to another; and the notion that the testatrix in adopting the admittedly unusual form followed in the settlement sought to make a separate and prior bequest of the liferent of her residue so as to produce a second and different residue for disposal in fee, seems to me strained and unnatural. There is really nothing in the settlement to support it except the echo in the seventh purpose of the formula, "Subject to the foregoing provisions." While these words afford a narrow — if logical — basis for the contention of the trustees, my opinion is that, construing the three clauses together, they form one residuary provision whereby the remainder of the estate after fulfilling purposes first to fifth inclusive was disposed of as one residue for the estates of liferent and fee respectively.

If this is sound the Lord Ordinary's interlocutor must be recalled and the pursuer must have decree in terms of the declaratory conclusion, the case being remitted to the Lord Ordinary to dispose of the conclusions for accounting.

LORD MACKENZIE—I agree with the Lord Ordinary that the pursuer's first plea-in-law (*a*) should be repelled, and think that it is unnecessary to say anything further on this point.

The question of difficulty in the case arises on branch (*b*) of the same plea. What is to become of the surplus income provided by the will to the pursuer after the estate has been compensated for the withdrawal of the sum withdrawn to meet the claim for legitim?

The first question on this point is—What is the general principle? The second question is—Do the special provisions of the settlement take the case out of the general rule?

The general principle which provides the answer to the first question is this, that if the provision which is discharged is itself a share of residue, then when discharged it cannot fall back into residue but goes to the next-of-kin as intestate succession. Before it reaches the next-of-kin it is subjected to the operation of equitable compensation and goes to make up what has been taken out of the estate. When that is complete then the next-of-kin take. What is itself a share of residue cannot be regarded as a burden on residue. The intention of the testator is frustrated and to a certain extent cannot receive effect. So far as it can receive effect this is accomplished by quantitatively and exactly compensating the estate for what is withdrawn. When that has been done the will operates upon it in accordance with the expressed intention. But a portion remains upon which there is no expressed intention to operate. The legatee who has taken instead of it his legal rights cannot claim it. The residue cannot catch it, for *ex hypothesi* it is a part of the residue which has become derelict. It is therefore intestate succession.

The result is different if the provision discharged is a special provision and not a share of residue. Such a provision is merely a burden on the residue. When discharged it in like manner has first to fulfil the duty of making equitable compensation to those affected according to their respective interests, and then when that has been completed it falls back into residue.

This is consistent with what has been said in the case of *Macfarlane*, (1882) 9 R. 1138. It is not inconsistent with what was said in *Pursell* v. *Elder*, (1865) 3 Macph. (H.L.) 59, and *Sturgis* v. *Meiklam's Trustees*, (1865) 3 Macph. (H.L.) 70.

The second question is really the one upon which the decision of the case turns, and it depends upon the construction put upon the sixth, seventh, and eighth purposes of the settlement. The argument against the pursuer is that there is in the seventh purpose a provision of a specific residue applicable to the date of distribution, *i.e.*, the son's death. By the seventh purpose, it was argued, the testator meant at the period of final distribution to provide for the lapse of the income arising from residue which had been dealt with under the sixth purpose.

I am unable so to construe the settlement. The expression "residue" when used in the sixth, seventh, and eighth purposes means the same thing. There is one residue, not two residues. Income arising from residue is residue and not of the nature of a special provision. Therefore the case is one to which the general principle applies. The income now set free, in my opinion, falls into intestacy.

LORD CULLEN—I agree with your Lordships in thinking (1) that the word "provision" used in the clause as to legitim includes all the provisions in favour of the pursuer contained in the settlement and the third codicil, and (2) that in consequence of the pursuer having taken legitim the special provision in the codicil falls into residue.

As regards the remaining question, it is clear that the testatrix took particular cognisance of the pursuer's right to legitim, and in offering him the conventional provisions in full satisfaction of that right she cannot presumably have failed to contemplate the contingency of his refusing the offer, so that these provisions, and in particular the provision under the sixth purpose here in question, would have no operation for his benefit. It is notwithstanding possible that although she contemplated this contingency she refrained from disposing, or omitted *per incuriam* to dispose, of the subject-matter of the provision under the sixth purpose in the event of the contingency being realised. But in construing a settlement there is a presumption against intestacy where, as here, a testator has set out to dispose of the *universitas* of the estate. Accordingly if the terms of this settlement are susceptible of more than one construction, I think we should prefer a construction which will avoid intestacy; and I think that the directions by the testatrix as to the disposal of residue, which are unusual in their terms, are susceptible of a construction to that effect.

After making a variety of special bequests the testatrix in the sixth purpose proceeds to give the pursuer the income of "the residue" during his survivance as an alimentary provision. This provision has failed to take effect—a contingency which *ex hypothesi* the testatrix must have contemplated. It would seem a very natural intention to ascribe to the testatrix that in the event of the said alimentary provision so failing it should be treated as a charge or burden on the gift of residue made *quoad ultra* which had flown off, so that its lapse should make an accrual to the *quantum* of that gift, for there is nothing in the settlement to suggest that the said gift of income was taken off the residue with any other object than that of benefiting the pursuer if he should choose to take it and to surrender his legitim; and the terms of the seventh purpose sufficiently indicate to my mind that the testatrix did so intend. She there says —"Subject to the provisions hereinbefore contained I direct my trustees, in the event of my son leaving issue surviving him, to hold and apply the whole residue of my means and estate," &c. She thus in the opening words of the purpose classes together the undoubted special bequests which precede and the gift of income or residue to the pursuer, which also precedes, as burdens on the *quantum* of an ultimate gift of residue which she proceeds to make in favour of the pursuer's surviving issue, whom failing (under the eighth purpose) certain charitable or religious organisations. By thus classing together the special bequests and the gift of income of residue to the pursuer as burdens on such ultimate gift of residue she shows her intention to be, in my opinion, that these should all operate on the *quantum* of that gift in a similar manner—that is to say, by diminishing it if they should take effect, otherwise not. This has the effect, in the case of the provision to the pursuer in question, of making a gift out of residue revert on a lapse to an intended ultimate residue. But it was of course quite within the competency of the testatrix so to condition an ultimate gift of residue by her, and such cases are by no means unknown in practice. I may refer, for example, to the case of *Alves* v. *Alves* ((1861) 23 D. 712), where a lapsed one-third share of residue fell to the persons who were given the other two shares, because the testator was held to have made an ultimate gift of residue to these persons by appointing them to be his "residuary legatees." There is nothing so rigid and inflexible about the term "residue" that its content may not vary if on construction of a particular deed it appears that the maker so intended.

Following these views I am of opinion that the pursuer's claim on this head of his case fails.

LORD SKERRINGTON did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary, found and declared in terms of the declaratory conclusion of the summons, and remitted the cause to the Lord Ordinary for further procedure.

Counsel for Pursuer — Brown, K.C. — Graham Robertson. Agents—Ronald & Ritchie, W.S.

Counsel for Defenders— Dean of Faculty (Constable, K.C.)—Murray. Agents — Carmichael & Miller, W.S.

Saturday, July 9.

SECOND DIVISION.

[Sheriff Court at Dumbarton.

WILLIAM BAIRD & COMPANY, LIMITED *v.* MURPHY.

Workmen's Compensation — Expenses — Extrajudicial Offer of Sum Ultimately Awarded — Absence of Formal Tender— Discretion of Arbitrator — Workmen's Compensation Act 1906 (6 *Edw. VII, cap* 58), *Second Schedule* (7).

Prior to the initiation of proceedings under the Workmen's Compensation Act the employers of an injured workman offered him compensation in respect of partial incapacity, and the offer was repeated during the debate in the arbitration which followed. No formal tender of the sum offered was made either in the pleadings or by minute. The offer was rejected by the workman. The sum offered was ultimately awarded by the arbitrator. *Held* that the offer of the sum ultimately awarded was sufficient to entitle the employers to