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

expenses, a formal tender not being necessary in proceedings under the Workmen's Compensation Act.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Schedule (7), enacts—"The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the . . . arbitrator."

In an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court at Dumbarton, William Murphy, 18 Church Street, Kilsyth, *respondent*, claimed compensation from William Baird & Company, Limited, St Flannans Pit, Twechar, *appellants*, in respect of an accident arising out of and in the course of his employment with the appellants. Previous to the arbitration the appellants had offered the respondent the sum of 15s. a-week, and they repeated that offer at the debate in the arbitration proceedings. No formal tender was lodged in process. The respondent did not accept the offer.

The Sheriff-Substitute (MENZIES) awarded compensation at the rate of 15s. a-week, and found no expenses due to or by either party. At the request of the appellants he stated a Case for appeal.

The Case stated—"1. On 21st March 1918 the workman, while in the employment of the defenders as a coal miner, was injured by a fall of coal upon his right leg. The accident arose out of and in the course of his said employment. 2. As a result of the accident he sustained a fracture of the upper third of the right tibia. 3. Till 4th March 1919 the employers paid him compensation at the rate of 25s. per week in respect of total incapacity. He was then and is now offered a reduced rate of compensation of 15s. per week as from that date in respect of partial incapacity. 4. The injury has resulted in a permanent outward convexity of the right tibia, causing the workman to walk upon the outer side of the right foot with a slight permanent limp. He has perfectly free movement of the knee and ankle. 5. The leg is permanently weakened and incapable of standing the same strain as a sound leg. 6. He is now, and has been since 4th March 1919, able to do any kind of light work that does not require great nimbleness of feet or excessive strain on his right leg. No work has since that date been offered to him by the employers. He was not an 'odd lot' in the labour market. 7. Since 4th July 1919 he has been engaged as a pedlar on his own account, carrying a substantial pack holding his wares, walking several miles a-day and climbing several stairs to his customers. 8. Before starting peddling he had never been employed in any other work than mining. 9. He is capable (*a*) of work at the picking tables, the wages paid for this work being £2, 17s. 3d. per week; (*b*) of work as a screeman, the wages for this work being about £3, 18s. 3d. per week; and (c) work as a pit bottomer on the night shift, the wages paid for this work being about £4, 8s. per week. 10. His wages at the time of the accident were £3, 18s. per week, and would at present be about £5 if he had not been injured.

"I found in law that the respondent was entitled to compensation from 4th March 1919 in respect of partial incapacity. I awarded him 15s. per week as compensation from 4th March 1919. I found no expenses due by or to either party."

"The *questions of law* for the opinion of the Court are—1. On the foregoing facts was I entitled to find no expenses due to or by either party? 2. On the foregoing facts was I bound to award expenses to the appellants?"

The arbitrator's *note* included the following passage—"Now it is agreed that his wages at the time of the accident were £3, 18s. per week. Under section 3 of the 1st Schedule to the Workmen's Compensation Act he cannot as a partially incapacitated man receive more than the difference between this £3, 18s., and 'the average weekly amount which he is earning or is able to earn in some suitable employment after the accident.' He was offered on 4th March 1919 by the employers 15s. per week, and at the hearing before me this offer was formally repeated by the employers' agent as a factor in the case. Therefore unless his wage earning capacity is found to be less than £3, 3s. per week he cannot obtain any higher rate of compensation than that of the 15s. per week offered to him, as a higher rate would be more than the difference between his wages of £3, 18s. and this figure of £3, 3s. What his actual earnings as a pedlar are I am unable from the nature of the evidence before me to give any finding upon, and this consideration must be put aside. But as I have reached the conclusion that he is capable of the work of a pit bottomer on the night shift, the employers are entitled to the benefit of that conclusion in a finding of the wage earning capacity equal to the wages paid for that work, viz., £4, 8s. That being so any question of his being entitled to more than 15s. per week offered by the employers does not arise. Even had I found him capable of nothing more than the lower paid job of screeman with its £3, 15s. 3d., no question could have arisen in view of the employers' offer. As to expenses there is no such formal tender of this 15s. per week on record as would justify my giving expenses against the workman, but the workman has not recovered more than what was originally offered to him, and this precludes my giving him expenses against the employers."

Argued for the appellants—In proceedings under the Workmen's Compensation Act parties were expected to reach agreement if at all possible, and litigation should be avoided. Here the appellants had made an offer of the sum ultimately awarded, and the sole cause of the litigation was the respondent's refusal of that offer. The expenses of the proceedings should fall on the respondent who had caused them—*Mikuta* v. *William Baird & Company*, 1916 S.C. 194, *per* Lord President Strathclyde at p. 197, 53 S.L.R. 160 at p. 161; *Fife Coal Company* v. *Feeney*, 1918 S.C. 197, 55 S.L.R. 223; *Farme Coal Company* v. *Murphy*, 1918 S.C. 659, *per* Lord Justice-Clerk Scott-Dickson at p. 661, 55 S.L.R. 557 at p. 559.

Argued for the respondent — The arbitrator had applied his mind to the question of expenses, and had not acted harshly. It was a matter of discretion, and where the arbitrator had considered the point and had exercised his discretion reasonably the Court would not interfere—*Farme Coal Company* v. *Murphy, cit., per* Lord Salvesen. The offer could have been put in a formal tender, but that not having been done the respondent was entitled to consider it as withdrawn, and in any event by the ordinary rules of tender he could not be found liable in expenses for failure to accept such an informal offer. *Farme Coal Company* v. *Murphy* was distinguishable, as there the sum offered was higher than the sum ultimately awarded.

LORD JUSTICE-CLERK—In this case, before arbitration proceedings were initiated, the employers offered to pay the workman 15s. a-week on the footing of partial incapacity. He rejected that offer on two grounds. In the first place he said that for part of the time in question he was totally incapacitated, and secondly, for the remainder of the time during which he was partially incapacitated he maintained that 15s. a week was too little and that he should get 20s. After having heard evidence on the matter the arbitrator came to be of opinion that the man was not totally incapacitated during any part of the period, and also that on the provisions of the statute it was not permissible for him to award more than 15s., having regard to the man's wages before the accident and the income he was earning in his disabled condition.

The obvious result of these considerations would seem to be that the employers should have been found entitled to expenses. The arbitrator, however, refused to give them expenses, and his only reason for so refusing was that there was no formal tender in the Court. In my judgment that is not enough. What the Lord President said in the case of *Mikuta* v. *William Baird & Company*, 1916 S.C. 194, applies here in terms. As regards a tender, in workmen's compensation cases you do not apply the strict rules of practice which would be applied in an ordinary action, the reason being that there is not a litigation in the ordinary sense. I think it is a pity that here the offer was not in terms repeated upon the pleadings, but in my judgment that is not enough to deprive the employers of their expenses. The offer was made and was never withdrawn, and was formally repeated in the course of the proceedings, and it is not suggested that the employers ever contended that he should get less than 15s. The arbitrator just awarded what the workman would have got before the proceedings were instituted. I do not know—it is not necessary to express any opinion upon it—what the result would have been in an ordinary litigation if a tender of an amount greater than or equal to the sum ultimately awarded had been made extrajudicially before the proceedings began; but in this case where the obvious purpose of the statute, so far as possible, is to promote settlements without proceedings before the arbiter, it seems to me that it is in the interest of all parties, where a distinct offer is made before the proceedings are initiated and no more is given as the result of the proceedings, that the party who has made the offer should be found entitled to expenses.

Accordingly in this case I think the arbitrator has gone wrong in allowing his judgment to be influenced by the fact that the tender which was made before the proceedings were begun was not repeated on the record. In my view the employers should have been awarded their expenses. They had made a full tender of the sum ultimately awarded before the proceedings began; the workman's claim has failed. The whole expense of the proceedings was simply thrown away. I think, therefore, that we should answer the first question in the negative and the second question in the affirmative.

LORD DUNDAS—I am of the same opinion. I think we are bound to answer these questions in the way your Lordship proposes.

LORD ORMIDALE—I concur.

LORD SALVESEN did not hear the case.

The Court answered the first question of law in the negative and the second in the affirmative.

Counsel for the Appellants—T. G. Robertson—Gillies. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Fraser, K.C.—Scott. Agents—Warden, Weir, & Macgregor, S.S.C.

Tuesday, July 19.

FIRST DIVISION.

MACONOCHIE WELWOOD'S TRUSTEES *v.* MUNGALL AND ANOTHER.

Superior and Vassal — Feu-Contract — Teinds — Clause of Relief from Teind Duties and Stipend—Future Augmentations of Stipend—Usage.

The proprietor of an estate disponed parts of it to A and B by feu-contracts entered into in 1737 and 1738 respectively. The feu-contract in favour of A contained a conveyance of teinds and an obligation by the superior to free and relieve the vassal "from payment of all feu and teind dutys, minister stipend, schoolmaster fees payable forth of yesd lands in time coming." In the feu-contract in favour of B there was no conveyance of teinds, but there was a clause binding the superior to free and relieve the vassal from "payment of all feu and teinds dutys, ministers' and schoolmasters' stipends payable forth of the saids lands in all time coming." At the dates of the deeds the teinds of the lands feued had not been valued, and they were not subsequently valued.