or to compromise, an action for setting aside an arrangement by which certain shares in another company were placed at the disposal of members of the company now in liquidation. It has, since the liquidation was commenced, come out that the liquidator is himself one of those to whom shares were allocated, and although his holding may be inconsiderable, that consideration places him in an embarrassing position, and he is therefore not the most proper person to carry on the legal proceedings to a conclusion.

It was agreed, I understand, by counsel on both sides that this litigation must be brought to a conclusion one way or other, and it appears to me that in these circumstances a neutral person should be appointed to conduct it. I agree that the displacement of the present liquidator implies no reflection on the professional character or integrity of the liquidator, and indeed no such reflection is suggested in the petition.

LORD KINNEAR concurred.

The Court removed the liquidator and appointed Mr J. M. Macleod, C.A., Glasgow, in his place.

Counsel for the Petitioners — Lees — A. S. D. Thomson. Agent — Marcus J. Brown, S.S.C.

Counsel for the Respondent — Salvesen —Abel. Agents—Gill & Pringle, W.S.

Thursday, May 23.

SECOND DIVISION.

MILLER *v.* M'PHUN.

Expenses—Extra-Judicial Offer.

A workman was offered £50 as compensation for injuries sustained by him in the course of his employment. The offer was made without prejudice, and under reservation of the employer's whole rights and pleas, but if not accepted was to be founded on in any action the workman might bring. The workman refused the offer and brought an action of damages. The employer in his defences stated that an offer in the above terms had been made and declined, but the offer was not renewed on record. The pursuer was awarded a sum of £40 by a jury.

The Court (following *Critchley* v. *Campbell*, February 1, 1884, 11 R. 475) found neither party entitled to expenses.

Opinion by Lord Young that the rule of Court in the matter of tender was unsatisfactory and should be altered.

On 15th October 1894 William Miller, while in the employment of J. P. M'Phun, timber merchant, Glasgow, and engaged at building operations carried on by his employers, was injured by the fall of a crane.

On 20th December Mr M'Phun's agent wrote to Miller's agents offering £50 in full of all claims by Miller on account of the accident. The offer was made without prejudice and under reservation of Mr M'Phun's whole rights and pleas, but if not accepted was to be founded on in any action Miller might bring. The offer was refused by Miller's agent.

Thereafter Miller raised an action of damages against M'Phun in the Sheriff Court at Glasgow, concluding for £500 at common law, or alternatively for £70, 4s. under the Employers Liability Act.

In his defences M'Phun stated that an offer in the terms above stated had been made and declined, but the offer was not formally renewed.

The case was appealed to the Court of Session for jury trial. At the trial a jury found for the pursuer and assessed the damages at £40.

Both parties claimed expenses.

Argued for the pursuer—No offer had been made judicially or accompanied by an offer of expenses. There was therefore no tender. The case was distinguished from *Critchley* v. *Campbell*, February 1, 1884, 11 R. 475, where the claim was for a liquid amount, whereas in the present case the claim was in respect of personal injury the extent of which had not been ascertained at the date of the offer.

Argued for the defender—The narration of the offer on record coupled with the denial of the necessity of the action was tantamount to a judicial repetition of the offer—*Gunn* v. *Hunter*, February 17, 1886, 13 R. 593. The action had been raised and continued solely owing to the pursuer's refusal to accept a larger sum than was ultimately awarded to him, and was an unnecessary litigation—*Mavor and Coulson* v. *Grierson*, June 16, 1892, 19 R. 868. In any event the pursuer was not entitled to expenses—*Critchley* v. *Campbell*, *supra*.

At advising—

LORD JUSTICE-CLERK—In this case the defender after the accident happened offered the pursuer the sum of £50 in full of all his claims. That offer the pursuer thought proper to decline. Had the defender in his defences repeated his offer distinctly there would have been no ground for thinking that the ordinary rule should not apply that where a party gets less than what was offered to him before the action was raised he is liable in expenses from the date of the offer.

But in this case I am unable to see that the defender placed himself in that position, for on his record he did not take the course of repeating his offer in name of damages and tendering expenses of process up to that date. The case therefore cannot be held to fall under any decision except that of *Critchley* v. *Campbell*. In that case before the action was raised an offer was made of a sum down larger in amount than the pursuer afterwards got decree for, and because the offer was not repeated on record the Court held that it was not a case in which expenses should be given to the pursuer, and found neither party entitled

to expenses. This decision appears contrary to the rule laid down in former cases, but we cannot go back on it now. I therefore am of opinion that we should decern against the defender for £40, and find neither party entitled to expenses.

LORD YOUNG—I am not at all disposed to dissent, because I think it is a useful practical lesson that, where an accident of this kind occurs and a substantial offer is made by the employer, it should not be hastily or immediately rejected, as I think it was here.

I do not think that the rule of this Court in the matter of tender is very satisfactory, and I think it would be well if it was altered, even although it might require legislation to do so. It presents this feature, which is very awkward. A party tenders a sum of money. The tender is not accepted, and the case goes to trial. The battle between the parties is whether anything is due at all or not, and the defender who has made the offer puts in a plea that the Court should hold that nothing is due by him. But he fails, and something is found to be due to the pursuer. Yet in such circumstances the defender, who was entirely unsuccessful in his plea, gets all the expenses of the controversy. That is not satisfactory to my mind. The rule which prevails in England with regard to expenses in such cases is more satisfactory. According to that rule, where a defender has made a tender by paying money into Court, his liability is admitted up to that amount, and the only question remaining to fight about is whether or not the pursuer has suffered damage in excess of that sum, and he only receives expenses if a further sum is awarded to him, otherwise he is liable for the expenses incurred.

I make these observations as there have been indications of a desire on the part of Judges in the other Division of this Court to modify the rule which prevails in Scotland, and I think it is desirable that it should be altered either by Act of Sederunt or if necessary by Act of Parliament.

LORD RUTHERFURD CLARK—I agree with your Lordship.

LORD TRAYNER—The rule of our Courts on the question of tender has been placed in an unfortunate position by the decision in the case of *Critchley*. I am still of opinion that the decision in that case on this point was unsound, but as it stands in the books as a precedent, and I am unable to distinguish this case from it, I am compelled to adopt the decision.

The Court found neither party entitled to expenses.

Counsel for the Pursuer — Watt — Orr. Agent—George Inglis Orr, S.S.C.

Counsel for the Defender — Jameson — Moncreiff. Agents — Drummond & Reid, S.S.C.

Thursday, May 23.

SECOND DIVISION.

BUCHANAN BEQUEST TRUSTEES *v.* DUNNETT.

Trust — Charitable Bequest — Construction —Liability to Account.

A testatrix directed her trustees, after the lapse of ten years from her death, to make over the whole of certain lands to the Provost and Magistrates of Kilmarnock, the ministers of the Established Churches of Scotland in Kilmarnock, and the minister of the parish of Riccarton, and their successors in office, and to themselves during their lifetime, to the end that they might hold the same for the execution of the several purposes mentioned, and, *inter alia*, for payment of the residue of the income "equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith." *Held* that the ministers of the parishes of Kilmarnock and Riccarton were not bound to render accounts of the disposal of the money paid to them to the trustees.

Upon 8th July 1861 Misses Margaret, Jane, and Elizabeth Buchanan, of Bellfield, in the parish of Riccarton and county of Ayr, executed a trust-deed in order to regulate the disposal of the heritable and moveable estate which might come to be vested in the survivor of them after the death of such survivor. Miss Elizabeth Buchanan was survivor of the said ladies. In exercise of powers of revocation and alteration reserved to her by the said trust-deed, Miss Elizabeth Buchanan executed a codicil thereto, dated 11th May 1871, whereby she altered in certain respects the provisions of the trust-deed.

By the third purpose of the said codicil Miss Elizabeth Buchanan stated that it was her will and desire that the whole lands and heritages thereinafter specified (the lands and estate of Bellfield) should be devoted in all time coming to certain uses and purposes therein set forth, and that the trust in connection therewith should be called "The Buchanan Bequest." She therefore ordained and appointed her trustees to hold the said lands for the period of ten years from and after the first term of Whitsunday or Martinmas occurring six months after her death, and to apply the annual rents and proceeds thereof, and the rents or lordships which might be derived from coals or minerals, for the purposes therein set forth.

On the lapse of said period of ten years, the testatrix ordained and directed her trustees to dispone, assign, and make over the whole of said lands, heritages, and others, and all and whatever accumulations of rents and others which might then be in