negative, and in so deciding observed that "the question is not whether he" (the executor) "may apply it" (the residue) "upon purposes strictly charitable, but whether he is bound so to apply it." I apprehend that the Master of the Rolls meant no more than this, that the bequest was not validated because the executor might under the settlement apply the whole residue to purposes strictly charitable, if he had also (as in fact he had) an expressed option to apply it to purposes outside the legal definition of charity. His Lordship pointed out that "the trusts may be completely executed without bestowing any part of the estate upon purposes strictly charitable." (See also *per* Lord Chancellor Eldon in affirming Sir William Grant's judgment in that case—*Morice*, 1805, 10 Ves. 522, at p. 541.) All the cases referred to seem thus to be quite in line upon this matter; but I do not think the doctrine which they illustrate has any application to the case now under consideration. For there is here no direction or authority given by Miss Spence to her trustees to apply any part of the residue to an illegal or uncertain purpose, whereas in all the cases referred to the settlement expressly contained an optional power to do so. There is admittedly no uncertainty as to the class indicated as the objects of the truster's bounty, but (at the most) a possible or contingent uncertainty as to the amount which may in fact be distributed by the trustees. It does not appear that they will have any difficulty in applying the whole income to and among the favoured class. So long as they so apply it no question can arise, and the executor or heir-at-law will so far as I see be effectually ousted by force of the settlement. There seems little reason to apprehend that any questions need arise in the future; but, as already observed, I think it will be time to determine such questions if and when they may emerge. Meanwhile I think the trustees ought to be left undisturbed in the free exercise of their administrative powers. I know of no case where a bequest the scope of which was confined to strictly lawful purposes has been set aside upon no other ground than that the trustees charged with the duty of administering it had a discretionary power as to the amount which they should think proper so to distribute. For the reasons I have expressed I am of opinion that the Lord Ordinary's interlocutor ought to be recalled and the action dismissed.

LORD PEARSON—I concur.

LORD M'LAREN—I also concur. I only add that the setting aside of a will on the ground of uncertainty is really a counsel of despair. It is an expression of the inability of the Court by approximation to extract the legal meaning from the will or testament. Therefore it is never to be resorted to if by the application of reasonably critical methods to the interpretation of the will we can arrive at a result consistent with the charitable intentions of the testator. I do not think that the will in the present case is in this desperate condition. The worst that can be said of it is that instead of giving the whole of her money to charitable purposes in the city and county of Aberdeen, the testatrix gave only such part of her means as the trustees might find to be necessary. Well, supposing that these words, "so much of the annual proceeds thereof as my trustees deem expedient," had not been there, and it had been found that it was impossible to spend the whole of this considerable sum of money usefully in charities of the kind which she favoured, what would the result be? Not that the will would be void, but that the Court would endeavour upon principles of approximation to apply the money to cognate purposes or that the surplus would revert to the heir-at-law. I think it would be a most unfortunate and inequitable result if the mere expression by the testator of something which everyone knows might happen, namely, that there might be a fund in excess of what was required—were to have the effect of invalidating the will which would have been perfectly good if she had said nothing about it, but had left her administrators to apply to the Court if this contingency should occur. I do not add more, because I entirely agree with Lord Dundas.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuer (Respondent)—Constable, K.C. — Hon. W. Watson. Agents —Traquair, Dickson, & MacLaren, W.S.

Counsel for Defenders (Reclaimers) — Hunter, K.C.—Grainger Stewart. Agents —Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, November 21.

SECOND DIVISION.

LAIDLAW AND OTHERS (ROBERTSON'S TRUSTEES), PETITIONERS.

Trust—Nobile Officium—Advance to Major Beneficiary out of Prospective Share not yet Vested.

A truster by his settlement directed his trustees to pay an annuity of £300 to his widow, which annuity he declared to be alimentary, for behoof not only of herself but of any children who might live in family with her and be unable to support themselves; to accumulate any surplus income and add it to the residue; and to hold and apply the residue for behoof of his children and the issue of predeceasing children *per stirpes*, payment to be made after the death of the widow and on his children attaining majority. The truster declared that these provisions should vest at the respective terms of payment, and provided—"My trustees may, in their sole discretion, even during my wife's life, lay out, pay over, and ad-

vance before the said terms of payment . . . any part not exceeding one-half of the capital falling prospectively to each child for fitting them out in business or in marriage, or otherwise as the said trustees may deem for the advantage of such child." The truster died in 1892, survived by his wife and two sons. In 1908, when the sons, who lived with their mother in London, were aged respectively twenty-four and twenty-two, the trustees presented a petition for authority to advance to each of the sons £150 per annum. The elder son was in bad health and unable to follow any occupation The younger was a clerk with a salary of £100. The capital of the estate was upwards of £35,000, and there was a yearly surplus of income of between £600 and £700.

The Court *authorised* the advance of £150 per annum to the elder son so long as he should be unable to maintain himself.

John Pinkerton Laidlaw and others, the testamentary trustees of the late John Robertson, merchant, Glasgow, who died on 5th September 1892 survived by his widow Jane Black or Robertson, and two sons, James Sangster Robertson and Robert Black Robertson, presented a petition seeking authority to advance to each of the sons so long as he was unable suitably to maintain himself a yearly allowance of £150 out of the surplus income or otherwise out of the capital of the trust estate.

The trust-disposition provided, *inter alia* —"(*Sixth*) I direct and appoint my trustees to make payment to the said Jane Black or Robertson, my wife, in the event of her surviving me, of a free yearly annuity of Three hundred pounds sterling, . . . which annuity shall be alimentary for behoof not only of my wife but for behoof of our children who may remain in family with her and be unable to support themselves, and to this purpose she shall be bound to apply same; And which annuity shall be payable as well out of capital as out of the income of my estate if the latter should at any time be insufficient: (*Seventh*) In the event of the yearly income from the residue of my estate being more than sufficient during my wife's life to pay the said annuity . . . my desire is that my trustees should apply, and they are hereby instructed and directed to apply, the surplus or such part thereof as my trustees may in their discretion and from time to time think advisable or expedient for the purpose of providing a liberal education to my children or any of them, and which sums . . . shall be paid out of and be a charge on the said surplus, and any surplus not required shall be accumulated during my wife's life and added to the residue of my estate: (*Eighth*) Subject to the foregoing provisions my trustees shall hold and apply the whole residue of my estate for behoof of my children born or to be born to me equally between and among them, share and share alike, jointly with the lawful issue of any one of them who may decease, such issue taking not only their parent's share but along with the other surviving children the share of any child's share which may lapse through decease (the division being *per stirpes*) payable after my wife's death to my children as and when they respectively reach majority, and to grandchildren on the arrival at majority of my youngest child . . . and to prevent doubts it is hereby expressly provided that the shares of my estate shall become vested interests in the persons of my children and grandchildren at and only after the death of my wife and upon the arrival of the respective periods of payment before stated, but notwithstanding this my trustees may, in their sole discretion, even during my wife's life, lay out, pay over, and advance before the said term of payment, if they shall think proper, any part not exceeding one-half of the capital falling prospectively to each child for fitting them out in business or in marriage or otherwise as the said trustees may deem for the advantage of such child or children, and such advance shall be considered as in anticipation *pro tanto* of such child's share. . . ."

The petitioners averred—"The said James Sangster Robertson is 24 years of age, and the said Robert Black Robertson 22 years of age. They were both educated at public schools in England and Scotland. The said James Sangster Robertson was for a few years a bank clerk at Godalming, and for a few months a clerk in London, but since June last, when he took ill and had to give up his situation, he has been, and at present is, in bad health, and unable to follow any occupation, being under medical treatment.

"The said Robert Black Robertson is engaged as a clerk in the principal Probate Registry in London. His salary is £100 per annum at present, rising by yearly increases of £10 to £200. For a considerable time to come he states that he will be unable to maintain himself out of his own salary. Mrs Robertson occupies rooms in a boarding house in Queen's Gate, London, and her two sons occupy a room in the same house.

"In these circumstances the testator's widow has intimated that the annuity provided to her in the terms aforesaid is insufficient to maintain herself and her sons in a manner suited to their position in life, and both sons have applied to the trustees for yearly allowances from the trust funds until such time as they may be able out of their own salaries to maintain themselves. The yearly allowance asked is £150 to each of the sons, and the petitioners consider that at present, and until some change of circumstances take place, the sum suggested is reasonable in amount.

"According to the last accounts of the trust, for the year ending 31st December 1907, the total estate of the trust amounted to £35,858, 2s. 11d. in addition to a house property 'Ellangowan,' Helensburgh, of which the trustees are directed to allow the widow the liferent use and enjoyment.

With regard to the trust funds, at presen there is a yearly surplus of from £600 to £700 after meeting the annuities provided for in the trust-disposition and the expenses of the trust. This surplus is at present being accumulated with the capital of the trust."

The petition was served on the parties on whom as next-of-kin the estate would devolve in the event of the death of the testator's sons without taking a vested interest and without leaving issue. No answers were lodged.

At the hearing in the Summar Roll counsel for the petitioners argued—The provision made by the testator for his widow and children was not in proportion to the estate left by him. The advances for which authority was sought were very much less than the testator authorised for the purpose of fitting the children out in business or in marriage, and would not even exhaust the income of the estate. The Court had exercised its *nobile officium* in similar circumstances—*Muir* v. *Muir's Trustees*, December 10, 1887, 15 R. 170, 25 S.L.R. 119.

The Court pronounced this interlocutor—

"Authorise the petitioners, as trustees mentioned in the petition, to advance to James Sangster Robertson, designed in the petition, out of the surplus income, or otherwise out of the capital of the trust estate under their charge, so long as in their judgment he is unable suitably to maintain himself, a yearly allowance of £150 a-year: Direct and ordain the petitioners to deduct from the share which will ultimately come to the said James Sangster Robertson from his deceased father's estate such advances as may be made in terms of this interlocutor, without charging interest on the said sums so advanced, such sums to be deducted from the first portion of the share of capital to be paid to or set aside for the said James Sangster Robertson; and decern *ad interim*."

Counsel for the Petitioners—Murray. Agents—Simpson & Marwick, W.S.

Saturday, November 21.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas.)

[Sheriff Court at Glasgow.

QUINN *v.* M'CALLUM.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1 (1) *and Schedule I* (16)—*Weekly Payment—Review—Onus of Proof as to Continuance of Incapacity from Original Cause—Incapacity Arising from Supervening Cause.*

On the ground that the workman's incapacity had totally ceased, an employer applied to the Sheriff as arbiter for review of a weekly payment made in virtue of a registered memorandum of agreement under the Workmen's Compensation Act 1906. The Sheriff, as the result of a proof, found (1) that the workman was unable to work in consequence of a cardiac affection "which was not proved" to be in any way connected with the injuries sustained in the employment; (2) that "it was not proved" that the workman still suffered from the foresaid injuries in such a way as to render him incapable of work.

Held, in a stated case, that the arbiter was not right in declaring the compensation ended, as his findings did not import that the employer had discharged the *onus* which lay on him of proving that the workman had recovered from the original injuries, and that the cardiac affection was unconnected therewith.

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) enacts—Sec. 1 (1)—"If in any employment personal injury by accident arising out of and in the course of employment is caused to a workman, his employer shall . . . be liable to pay compensation in accordance with the first schedule to this Act."

Schedule I (16)—"Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, . . . and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

J. B. M'Callum, builder, Glasgow, applied in the Sheriff Court at Glasgow to have reviewed, and, on such review, ended or diminished, the weekly compensation being paid by him in virtue of a registered memorandum under the Workmen's Compensation Act 1906, to Charles Quinn, mason's labourer, Glasgow.

Quinn being dissatisfied with the decision of the Sheriff-Substitute (DAVIDSON) took an appeal by way of stated case.

The case stated—"This is an arbitration under the Workmen's Compensation Act 1906, brought in the Sheriff Court of Lanarkshire at Glasgow at the instance of the respondent, in which the Sheriff was asked to review the weekly payment of 10s. 7½d. agreed to be paid by the respondent to the appellant under and in virtue of memorandum of agreement between the appellant and the respondent recorded in the special register kept in terms of said Act at Glasgow on 7th September 1907, the incapacity of the appellant for work, in respect of which the said weekly payment was agreed to, having entirely ceased or at least become greatly lessened, and on said review to end or diminish said weekly payment in terms of paragraph 16 of the first schedule to said Act.

"The case was heard before me and proof led on this date (30th June 1908), when the following facts were established—(1) That on 5th July 1907 the appellant