partially disabled man may be employed. A perfectly able-bodied man might be refused work in exactly the same way. To test the market for light work a man who is in search of it ought to go to people who require the services of a partially-disabled man, not to employers who have no vacancy at all or who reserve such vacancies as may from time to time arise for the benefit of their own injured workmen. The arbitrator has indeed given partial effect to this view by holding that it was not proved that the respondent had completely exhausted his chances of employment or that it was impossible for him in his physical condition to obtain employment. I think he ought to hold, on the facts as stated, that no reasons had been adduced for altering his previous award. For all that appears, the respondent's inability to obtain employment arose from economic conditions prevailing at the particular works to which he applied, and it appears to me to be very difficult to assume that because there was no employment available at these works therefore there was no market for such light work as the respondent was physically fit to perform. I am unable to understand on what materials the learned arbitrator proceeded in increasing the compensation from 10s. 3d. to 15s. per week, nor can I understand why unsuccessful applications made in January and February for light work, and not subsequently repeated prior to 9th May, when the proof was taken, could justify the arbitrator in making an increase in the compensation as from 6th June. On the whole, therefore, although I admit the difficulty of dealing with the matter except on the footing of trying it as a jury question, I think it would be unfortunate if isolated applications for light work to employers who had no vacancy available, or who reserved all their light work for their own injured employees, constituted a sufficient ground on which to increase an award already made and acquiesced in. The arbitrator here seems to me really to have proceeded to review his own award of 7th December 1916 in the light of the same facts as were then before him, for I regard the new facts narrated as having no relevant bearing on the amount of compensation to which the respondent was entitled. I am therefore for answering the question of law in the negative.

LORD GUTHRIE — I concur in the result arrived at by Lord Dundas and Lord Salvesen. The arbitrator's increase of compensation under an application for review can only be justified if the facts as found by him can lead legitimately to the conclusion in law that since the date of his award on 7th December 1916 there had been a change of circumstances warranting an increase of compensation. The change is said to consist in this, that after several applications for employment the respondent was unable to get work which he was able to do. That case, if it is to warrant increase, involves two findings in fact—(first) that the respondent reasonably tested the market, and (second) that his failure to get work was due to the injury caused by the accident. Both elements are necessary, and, like Lord Salvesen, I cannot find either found expressly in the case as stated. But I think that the first condition, although not expressly stated, and although the applications for employment seem very few and very intermittent, may be fairly gathered from the Stated Case, keeping in view that the arbitrator has local knowledge of the industrial conditions of the neighbourhood. As to the second I agree with Lord Salvesen. Had the arbitrator not stated the reasons in each case for the respondent's failure to get work it might have been possible to justify his finding in law. But he has set out these reasons, and it appears that in each case when the respondent was refused work which he would have been able to undertake it was on grounds depending on the state of the labour market, and not on account of the injury caused by the accident. I therefore think that the arbitrator, having expressly proceeded on the facts which are disclosed in the case stated by him, which facts could not entitle him to come to the legal result at which he has arrived, we must hold that he has misdirected himself and that his award cannot stand.

The Court (*dis.* the Lord Justice-Clerk) answered the question of law in the negative.

Counsel for the Appellants — Hon. W. Watson, K.C. — Gentles. Agents — W. B. Rankin & Nimmo, W.S.

Counsel for the Respondent—Maclaren —Forbes. Agent — R. D. C. M'Kechnie, Solicitor.

Tuesday, February 26.

SECOND DIVISION.

SYMMERS' TRUSTEES *v.* SYMMERS.

Succession — Trust — Uncertainty — Charitable Bequest — "Such Charitable Institutions or Deserving Agencies in Aberdeen and Stonehaven as they may Select."

A testator directed his trustees to realise and divide the residue of his estate "amongst such charitable institutions or deserving agencies in Aberdeen and Stonehaven as they may select, and in such proportions and at such times as they may think proper." *Held* that the bequest was void by reason of uncertainty.

Succession—Discharge—Legitim—Intestacy —Partial Intestacy Eventuating after a Discharge Granted by Next-of-Kin of all Claims—Personal Bar.

The testator's only child, on the narrative that he had decided to claim his legal rights thus rejecting the provisions in his favour, that the legitim fund had been calculated, amounted to a certain sum, and that sum paid to him, granted a discharge in favour of the

trustees "in full satisfaction of all I can ask or claim out of my said father's effects." The residuary bequest of the testator being held void by reason of uncertainty, *held* that the son notwithstanding the discharge was entitled to claim the residue.

A Special Case was presented by James Milne, C.A., Aberdeen, and others, the trustees acting under the last will and testament of the late John Symmers, shipmaster, Aberdeen, who died on March 28, 1915, *first parties*, and James Adam Symmers, his only surviving child, *second party*, to decide questions as to the disposal of the residue of the trust estate.

The *last will and testament* contained, *inter alia*, the following clause:—"(*Second*) I leave and bequeath to my son James Adam Symmers, master mariner, the sum of Two hundred pounds, free of legacy duty, payable at the first term of Whitsunday or Martinmas occurring six months after my death, also my grandfather clock and the box containing the binocular glasses presented to me by the late Emperor William of Germany, but in the event of my said son predeceasing me then my trustees shall deliver the said clock and binocular glasses to my eldest grandson John Symmers on his attaining twenty-one years of age. (*Third*) To my said grandson John Symmers I bequeath my gold watch and chain with French coin attached, and to my granddaughter Doreen Isabel Adam Symmers I bequeath the large Indian shawl and any jewellery which belonged to my wife and which may be in my possession at my death, and my trustees shall deliver same to said grandchildren on their respectively attaining the age of twenty-one years. . . . And (*Seventh*) with regard to the residue of my estate, my trustees shall divide the same equally among my grandchildren, and shall pay the same on their respectively reaching the age of twenty-seven years, with power to my trustees to apply the income of any grandchild's share for their maintenance and education until they reach the said age of twenty-seven years; Declaring always that the above bequests and provisions contained in the (Second), (Third), and (Seventh) purposes hereof are in lieu of and shall be accepted by my said son James Adam Symmers as in full satisfaction of his legal rights, but in the event of his not agreeing to accept these provisions but electing to claim said rights the bequests and provisions contained in the (Second), (Third), and (Seventh) purposes hereof shall lapse, and whatever residue there may be after settlement of my son's claim and payment of the legacies and satisfaction of the bequests contained in the (First), (Fifth), and (Sixth) purposes above written, I instruct my trustees to realise and divide same amongst such charitable institutions or deserving agencies in Aberdeen and Stonehaven as they may select, and in such proportions and at such times as they may think proper."

The testator was predeceased by his wife, but was survived by one child, the second party to the case, who, having elected to receive payment of legitim in satisfaction of all claims on the testator's estate, granted a *discharge* in favour of the trustees, which, after narrating the second, third, and seventh purposes of the will, contained the following clause:—"Further, considering that my father died on the twenty-eighth day of March Nineteen hundred and fifteen, predeceased by his wife my mother Isabel Adam or Symmers, and that I as the only surviving child have elected to claim my legal rights on the estate of my said father, thereby renouncing the provisions in my favour contained in the said last will and testament: And further, considering that after various communings the sum of Two thousand and eighteen pounds five shillings has been adjusted as the amount of the legitim fund (the whole of which is payable to me as the only surviving child of the said John Symmers as aforesaid) including interest accrued thereon to thirtieth November Nineteen hundred and fifteen: And now seeing that the said trustees have made payment to me of said sum of Two thousand and eighteen pounds five shillings partly by a cash payment of One thousand nine hundred and forty-six pounds, and partly by transfer to me of the following stocks and shares which I accept as equivalent to cash, viz., (*a*) Fifty-six pounds ordinary stock Scottish Northern Investment Trust Limited, (*b*) Twenty pounds ordinary stock Second Scottish Northern Investment Trust Limited, and (*c*) twenty shares of the Scottish North Eastern Investment Company Limited: And which sum of Two thousand and eighteen pounds five shillings I hereby accept in full satisfaction of all I can ask or claim out of my said father's effects: Therefore I do hereby exoner and discharge the said James Milne, William Hurry, Robert Adams Forrest Davidson, and William M'Queen Smith, and their respective heirs, executors, and successors, and all others the representatives of my said father, of all sums of money or other effects which belonged or were due to me or which I could have asked or claimed out of the estate and effects of my said deceased father, and of their whole actings, transactions, and intromissions with said moveable estate; and I oblige myself, my heirs and successors, to warrant this discharge at all hands."

The Case stated, *inter alia*—"The first parties *maintain* that as the second party has elected to claim his legal rights the direction in the seventh purpose of the said last will and testament as to the realisation and division of the said residue among such charitable institutions or deserving agencies in Aberdeen or Stonehaven as the first parties may select has come into operation, that the said direction is valid and effectual, and that the said residue falls to be disposed of by the first parties in terms thereof. The first parties further maintain that in any event the second party, by the terms of the said discharge granted by him, is barred from challenging the validity of the said direction and insisting in his present claim. 9. The second party maintains that the direction in the said seventh purpose of the said last will and testament as to the realisa-

tion and division of the residue of the estate among such charitable institutions or deserving agencies in Aberdeen or Stonehaven as the first parties may select is void and ineffectual by reason of uncertainty, and that the sum so directed to be divided accordingly falls into intestacy, and that he as heir *ab intestato* is entitled to payment and conveyance therein. He further maintains that he is not barred from maintaining his said claim as heir *ab intestato* by reason of his having claimed his legal rights and granted the said discharge."

The *questions of law* for the opinion and judgment of the Court were — "1. Is the second party barred from challenging the validity of the said direction in the seventh purpose of the said last will and testament and insisting in his present claim? If not, 2. Is the said direction as to the realisation and division of the residue of the estate among such charitable institutions or deserving agencies in Aberdeen or Stonehaven as the first parties may select valid and effectual, and does the residue in the hands of the first parties fall to be disposed of by them in terms thereof? or 3. Is the said direction void and ineffectual by reason of uncertainty? 4. In the event of the preceding question being answered in the affirmative, does the said residue fall to be made over by the first parties to the second party?"

Argued for the first parties—(1) The bequest was not void by reason of uncertainty. The Court ought, if at all possible, to allow the testator's intentions to be carried out—*Turnbull's Trustees* v. *Lord Advocate*, 55 S.L.R. 208, *per* Finlay, L.C. The nature of the bequest was amply specified by the word "charitable." There was no great difference between a deserving agency and a charitable institution. An "agency" was merely a wider term, which might include an "institution," which again might be a "deserving" one although not a "charitable" one. In cases such as *Blair* v. *Duncan*, (1901) 4 F. (H.L.) 1, 39 S.L.R. 212, the bequest had been held to be void by reason of uncertainty, because the uncertainty had been created by the use of the word "purpose," but such a case was to be distinguished from the present one. The fact that Aberdeen and Stonehaven had been specified as the towns where the deserving agencies or charitable institutions to be benefited must be situated was also a point in favour of the validity of the bequest—*Shaw's Trustees* v. *Esson's Trustees*, (1905) 8 F. 52, 43 S.L.R. 21. The following cases were also cited:—*Laurie* v. *Brown*, (1911) 1 S.L.T. 84; *Hay's Trustees* v. *Baillie*, 1908 S.C. 1224, 45 S.L.R. 908; *Paterson's Trustees* v. *Paterson*, 1909 S.C. 485, 46 S.L.R. 406. (2) The discharge was in the widest possible terms, and put the case on a different footing from the old cases of *Anderson* v. *Anderson*, (1743) M. 5054, and *Hepburn* v. *Hepburn*, (1785) M. 5056. The second party was, in respect of the discharge granted to the trustees on receiving payment of his legitim, barred from insisting on his construction of the words in the settlement. Counsel referred to Ersk. Inst., iii, 4, 9; Bell's Prin, section 583. *Naismith* v. *Boyes*, (1899) 1 F. (H.L.) 79, 36 S.L.R. 973, was distinguishable from the present case, as it turned on the construction of a clause in a testator's will.

Argued for the second party—(1) The bequest was void by reason of uncertainty. The testator had clearly shown that he desired to differentiate between "deserving agencies" and "charitable institutions." The term "public purposes" had been held to be too vague, and therefore the phrase "deserving agencies," which was still vaguer, ought to be similarly regarded. The terms used must not have so wide a meaning as to render the selection of a particular class impossible — *Turnbull's Trustees* v. *Lord Advocate* (*cit.*). The institutions and agencies to be benefited by the bequest were not limited to those in existence at the time at which the bequest was made. So long as they satisfied the clearly expressed wishes of the testator it did not matter if they originated at a date subsequent to the making of the bequest. Counsel also cited *in re Sutton*, (1885) 28 Ch. D. 464; *Grimond or Macintyre* v. *Grimond's Trustees*, (1904) 7 F. (H.L.) 90, 42 S.L.R. 466; *Shaw's Trustees* v. *Esson's Trustees* (*cit.*); *Hay's Trustees* v. *Baillie* (*cit.*). (2) The second party could only grant a valid discharge in respect of what fell to him under the trust purposes. It could not be in respect of what should accrue to him by force of law. The discharge need not be reduced. The case of *Dickson* v. *Halbert*, (1854) 16 D. 586, where the discharge was granted in ignorance of claims, was distinguishable. Counsel also referred to *Armour* v. *Glasgow Royal Infirmary*, 1909 S.C. 916, 46 S.L.R. 740.

LORD JUSTICE-CLERK — There are two questions raised in this case, and following the course which has been taken in argument I deal with the construction of the settlement first. The testator provides that in the event which has happened the residue should be divided among "such charitable institutions or deserving agencies in Aberdeen and Stonehaven" as his trustees might select.

There has been a great deal of refinement in the cases which have been decided of late years as to the classes of objects which are held to be of such a nature as to render a bequest void from uncertainty; and it is not easy to reconcile all the decisions.

I think, in the first place, that we have here a distinct alternative between charitable institutions and deserving agencies, and that the bequest cannot be read, as was suggested by the trustees, as describing only one set of objects. I think there are two distinct sets of objects—one, charitable institutions, and the other, deserving agencies. The bequest in favour of the first of these is good; the bequest in favour of the other is, I think, so vague and indefinite that it cannot be treated as valid. It appears to me that deserving agencies do not constitute a particular class in the sense of the decisions with which I am now dealing, and that the bequest is void from uncertainty.

I do not think that the addition of the

words "in Aberdeen and Stonehaven" makes any difference, because that still leaves the vagueness of the phrase "deserving agencies" as conspicuous as it was before. And therefore I am of opinion that we have a bequest which on the authorities must be treated as void and ineffectual.

The second question is whether, in respect of the discharge which the second party granted on receiving payment of his legitim, he is barred from insisting on his construction of the words in the settlement. I am of opinion that there is no such bar. On his father's death the son was entitled to claim his legitim, and to claim it as a creditor so far as the executry was concerned. No doubt in a question with ordinary creditors he would rank as an heir, but as in a question with the beneficiaries under the settlement he would be a creditor. And accordingly when he claimed his legitim he was really claiming a debt that was due to him. The discharge bears that he had elected to claim his legal rights in his father's estate, thereby renouncing the provisions in his favour contained in the settlement, and then it narrates further that the amount of the legitim had been adjusted at the figure of £2018, 5s. The only thing he was giving a discharge for in my judgment was that sum of £2018, 5s., which had been agreed upon as the amount of the legitim fund.

It is stated in the case that the claim which the second party now makes for a share of the intestate estate was not made a matter of question between the parties when adjusting the amount of his legitim, and did not form the subject of any transaction between them. I think it is perfectly plain, apart from the admission, that that correctly states the position of things between the parties when this discharge was adjusted and executed. But apart from that it seems to me that upon the authorities there is ample warrant for saying that a discharge couched in such terms as we have here, having regard to the consideration given at the time and the transaction which was taking place, did not represent a discharge of a different sum altogether from the legitim fund, namely, the sum to which the son would have been entitled, in the absence of any discharge, as heir *ab intestato* of his father. I think the cases of *Dickson* v. *Halbert*, (1854) 16 D. 586, *Naismith* v. *Boyes*, (1899) 1 F. (H.L.) 79, and *Armour* v. *Glasgow Royal Infirmary*, 1909 S.C. 916, are sufficient authority for saying that the plea that the second party is barred is not well founded.

Therefore I am of opinion that we should answer the first question in the negative, the second question in the negative, the third in the affirmative, and the fourth in the affirmative.

LORD DUNDAS—I agree. As regards the question of bar I need add nothing to what your Lordship has said. As regards the residue I think that upon the decided cases as they stand we must hold the purpose to be void from uncertainty.

The instruction to the trustees is to realise and divide the residue amongst such charitable institutions or deserving agencies in Aberdeen or Stonehaven as they may select. Now I think that it is impossible to read the clause as if it had said "such deserving charitable institutions or agencies as they may select." If that had been the intention it would have been perfectly easy so to express it, and that has not been done. I think we are bound to suppose that it was the intention of the testator to separate "charitable institutions" from "deserving agencies" by the disjunctive word "or," as separate alternatives to one another. If that be so I think that the phrase "deserving agencies" is much too vague and indefinite to be given effect to. The word "deserving" may probably mean worthy of support, but the phrase "deserving agencies," I confess, conveys nothing positive to my mind, and seems to me to be a phrase far too indefinite to receive effect without some sort of restriction or limitation to its meaning.

But then it is said that there is a limitation, namely, a local limitation to Aberdeen and Stonehaven, and that that may be sufficient as a guide to the true intention of the testator. I am afraid that is not so. I do not think it is enough to say that a sensible body of trustees might be able to administer this trust in a sensible fashion. I apprehend that we must go further and say that the testator has sufficiently indicated or described the class of objects or institutions from which the trustees are to select beneficiaries. I think the description must be sufficiently precise to leave the men of sense in no doubt as to the class which it is the expressed desire of the testator to benefit. And I think that even with the addition of the local limitation one has no clear idea and can form none as to what class the testator really intends to benefit.

I am therefore for answering the questions as your Lordship has indicated.

LORD GUTHRIE—On the question whether this bequest is or is not void Mr Watson had two arguments. The first was that the word "or" was not disjunctive but conjunctive. I think it is quite clear, whether we take the case by itself or on the authorities, that that is not so. He then said it was enough in connection with such words as "deserving agencies" that the area was sufficiently limited and distinctive. I think that was probably an open question until it was answered in the case of *Turnbull's Trustees* v. *The Lord Advocate*, 55 S.L.R. 208, where the House of Lords held that the uncertainty of the purpose was not cured by the limitation of the area. It was argued indeed that the words "public purposes" in *Turnbull's Trustees* are wider and vaguer than the words "deserving agencies," which we have here. I should have thought the opposite. There is a certain limitation in the words "public purposes," because they exclude private purposes, but I know of no limitation at all where there is simply a statement that anything can be benefited which is deserving.

It was said, however, that the last paragraph of Lord Shaw's opinion fitted this case. His Lordship there deals with the

case where there is a reference to agencies actually existing or projected to be established in a particular district. As I read this case there would have been nothing to prevent the trustees even after the death of the testator from benefiting a new agency set up before the funds were divided. And therefore Lord Shaw's dictum, which in any case was *obiter*, does not apply to the question raised here.

LORD SALVESEN was not present.

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

Counsel for the First Parties—Hon. W. Watson, K.C.—R. C. Henderson. Agents Melville & Lindesay, W.S.

Counsel for the Second Party — Chree, K.C.—M. P. Fraser. Agents—Ross Smith & Dykes, S.S.C.

Friday, February 22.

FIRST DIVISION.

GREIG'S TRUSTEES *v.* SIMPSON AND OTHERS.

Succession — Trust — Construction — Conditio si institutus sine liberis decesserit— "Family."

A testator divided the residue of his estate into five shares, and directed his trustees "to pay one of said parts or shares to my sister Alison . . . whom failing to her lawful children surviving at my death equally among them; to pay another fifth part or share to my sister J. . . . whom failing to her lawful children surviving at my death equally among them; to pay another of said fifth parts or shares to my sister Agnes . . . whom failing to her lawful children surviving at my death equally among them; to pay another of said fifth parts or shares to the family of my deceased brother J. surviving at my death equally among them; to pay the remaining fifth part or share to the children of my deceased brother G. . . . surviving at my death equally among them."

The sister, J., predeceased the testator leaving issue, and one of her daughters predeceased her but left children. A daughter of the deceased brother J. also predeceased the testator, but left children.

Held, in a special case, (1) that the *conditio si institutus sine liberis decesserit* applied to the bequest of the share to the children of the testator's sister to the effect that the children of her daughter who predeceased her took their mother's share, and (2) that there was nothing in the settlement to take out of its ordinary meaning the word "family," viz., children only, and consequently that the grandchildren of the testator's brother did not take in their mother's place a share in the share of residue bequeathed to the brother's family.

Nathaniel Watt and others, the testamentary trustees of William Greig, *first parties;* (*a*) Walter Simpson, as tutor-at-law of his pupil children by Mrs Murdoch or Simpson, a daughter of Mrs Murdoch, a sister of William Greig, and (*b*) William Murray and others, the children of Mrs Helen Greig or Murray, the only daughter of James Greig, a brother of William Greig, *second parties;* and (*a*) James Murdoch and others, the other children of Mrs Murdoch, and (*b*) James Greig and another, the sons of James Greig, *third parties*, brought a Special Case for the opinion and judgment of the Court upon questions relating to the application of the *conditio si institutus sine liberis decesserit* to the settlement of William Greig, who died on 13th November 1916.

The *trust-disposition and settlement*, which was dated 17th January 1908, after conveying the whole estates of the testator to the first parties, and directing the payment of debts and various legacies, provided —"(Fifth) I direct my trustees to divide, or to realise and thereafter divide, the residue of my means and estate into five equal parts or shares and to pay one of said parts or shares to my sister Alison Greig or Roger, widow of the late James Roger, Liverpool, whom failing to her lawful children surviving at my death equally among them; to pay another fifth part or share to my sister Mrs Jane Greig or Murdoch, wife of David Murdoch, miner, Tranent, whom failing to her lawful children surviving at my death equally among them; to pay another of said fifth parts or shares to my sister Agnes Greig or Paxton, wife of John Paxton, cab driver, Edinburgh, whom failing to her lawful children surviving at my death equally among them; to pay another of said fifth parts or shares to the family of my deceased brother James Greig surviving at my death equally among them; and to pay the remaining fifth part or share to the children of my deceased brother George Greig, who resided at Newcastle-on-Tyne, surviving at my death equally among them."

The Case set forth—"3. The said Mrs Murdoch was alive at the date of the execution of the said will, but she predeceased the testator. She died on 3rd October 1916, survived by three sons and three daughters, who form group (*a*) of the third parties. Group (*b*) of the third parties are the two sons of the said James Greig, the testator's brother, who had died before the said will was executed. 4. The said Mrs Murdoch was also survived by four grandchildren, the children of her daughter Mrs Simpson, who had predeceased the testator. The said Mrs Simpson died on 3rd March 1915. She was therefore alive at the date when the said settlement was made. Her four children are all in pupillarity. Walter Simpson, their father, as their tutor-at-law, is one of the second parties. The testator was also predeceased by Mrs Helen Greig or Murray, the only daughter of his deceased brother James Greig. She died on