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

was injured in the side and thigh while in the employment of the respondent; (2) that he is now unable to work in consequence of a cardiac affection, which was not proved in any way to be connected with the injuries sustained as before mentioned; (3) that it was not proved that the appellant still suffers from the foresaid injuries in such a way as to render him incapable of work.

"I therefore declared the compensation payable by the respondent ended as from this date and found appellant liable in expenses."

The *question of law* for the opinion of the Court was—"Whether in the above circumstances the arbitrator was right in declaring the compensation ended?"

Argued for the appellant—The conclusion arrived at by the Sheriff-Substitute did not follow from his findings in fact. (1) These left it doubtful whether the appellant still suffered from the injury or not. Incapacity from a supervening cause, coupled with absence of proof that the original cause of incapacity did not still subsist, was not sufficient. Compensation having been once awarded the *onus* was on the employer to prove recovery in order to entitle him to discontinue paying it—*Pumpherston Oil Company, Limited* v. *Cavaney*, June 23, 1903, 5 F. 963, 40 S.L.R. 724; *Steel* v. *Oakbank Oil Company, Limited*, December 16, 1902, 5 F. 244, 40 S.L.R. 205; *Crossfield & Sons, Limited* v. *Tanian*, [1900] 2 Q.B. 629. But here there was no unambiguous finding that the appellant had recovered. The finding as to the supervening cardiac affection was irrelevant unless the continuance of the former incapacity was first definitely displaced—*Sweeney* v. *Pumpherston Oil Company, Limited*, June 23, 1903, 5 F. 972, *per* Lord Kinnear at p. 977, 40 S.L.R. 721; *Donnelly* v. *William Baird & Company, Limited*, 1908 S.C. 536, *per* Lord Dundas, p. 544, 45 S.L.R. 394; *Jamieson* v. *Fife Coal Company, Limited*, June 20, 1903, 5 F. 958, 40 S.L.R. 704. (2) There was no affirmative finding that the cardiac affection was unconnected with the former injury—*Fenton* v. *Thorley & Company*, [1903] A.C. 443.

Argued for the respondent—In order to succeed the appellant must show that the Sheriff was not entitled to come to the conclusion which he did on the facts which he found proved. But here the facts clearly justified the conclusion. It was not suggested that supervening additional incapacity would deprive a workman of compensation awarded for the original incapacity, if that continued to operate—*Lee* v. *William Baird & Company, Limited*, 1908 S.C. 905, 45 S.L.R. 717. But if it were once established that there existed a new and independent cause of incapacity, the *onus* shifted on to the workman to show that he was still suffering from incapacity arising from the original cause. The appellant had not proved that here, and therefore the Sheriff's conclusion was right.

At advising—

LORD M'LAREN—This is an appeal on a stated case from the Sheriff Court of Lanarkshire. The applicant, respondent in the appeal, desired that a weekly allowance or payment of 10s. 7½d. which he makes to the appellant should be reviewed, on the ground that the incapacity of the appellant for work had latterly ceased or had at least become greatly lessened.

Proof was led before the Sheriff-Substitute, and his findings in fact are stated so succinctly that I shall not attempt to abridge them. The findings are—". . . [*Quotes findings supra.*] . . ."

It will be observed that the only affirmative finding is to the effect that the appellant was injured on 5th July 1907; while in regard to the appellant's present condition we have only negations—(1) that it is not proved that the cardiac affection is connected with the injuries previously sustained; and (2) that it is not proved that the injuries render the appellant incapable of work.

The Sheriff-Substitute declared the compensation payable by the respondent ended as from the date of his award; but in coming to this conclusion I think the learned arbitrator must have overlooked the circumstance, that the weekly allowance was payable under a registered agreement, and that it is for the employer who wishes to bring the payments to an end to establish his case by proof.

This is perhaps of less importance in considering the second finding; because if the cardiac affection is connected with the accident the appellant has not recovered; and again, if it cannot be shown to be connected with the accident, yet if this infirmity supervened before recovery from the accident it is extremely difficult for an arbitrator to determine what would be the state of the appellant's health and capacity for work if the cardiac affection did not exist.

As regards the matter of the third finding my opinion is that in order to disentitle the appellant to further compensation it must be proved that he has recovered from his injuries; and as the finding falls short of this requirement, it will not support a decree for ending the payment.

I have considered whether we should accept the suggestion of respondent's counsel to send the case to the Sheriff-Substitute for reconsideration on the question of amount; but as we have not the means of reviewing the judgment on the facts, and as the judgment is indeterminate in regard to the essential question, whether the appellant has recovered from his injuries, it must be taken that the application for review has failed.

This will not prevent the respondent from making a second application for review if he should hereafter be in a position te satisfy the arbitrator that the appellant has wholly or partially recovered from his disablement.

LORD PEARSON—This case began with a recorded memorandum of agreement, which conceded the total incapacity of the appellant for work, and his consequent right to a weekly payment of 10s. 7½d., as the result

of an injury to his side and thigh on 5th July 1907 while in the respondent's employment.

The next step was an application to the Sheriff as arbiter to review this weekly payment, and to end or diminish it, on the ground that the incapacity for work had entirely ceased, or at least become greatly lessened.

Upon a proof led on 30th June 1908 it was found by the Sheriff that he was still unable to work. It was quite competent for the employer to prove, if he could, that the original cause of the inability had ceased, and that a new cause had supervened; and if he had succeeded in proving that the Sheriff would have been warranted in declaring the compensation ended.

Now, the finding of the Sheriff is that a sufficient cause of inability has supervened, namely, a cardiac affection, and that this "was not proved to be in any way connected" with the original injuries—in other words, that it may or may not be so connected.

The Sheriff further finds, not that the appellant no longer suffers from his original injuries, but that it is not proved that he still suffers from them in such a way as to render him incapable of work. In other words, he still suffers from the injury; and these injuries may or may not be a sufficient cause of his continuing incapacity.

Obviously this raises a question as to the *onus probandi*. The Sheriff holds that there being now a supervenient cause sufficient to account for the incapacity, it lies upon the appellant either to prove that the supervening cause is derived from the original injuries, or that the original injuries still subsist as at least a concurrent cause of the inability to work. I cannot agree with this view of the position of the parties. I think it rests upon the employer to prove (1) that the supervenient cause was not connected with the original injuries, and (2) that the original injuries have ceased to operate as an effective cause of incapacity. On these two points the Sheriff's finding is a verdict of not proven; and, in my opinion, the result in law is that he had no sufficient ground for declaring the compensation ended.

As soon as the employer is in a position to prove the affirmation of these two propositions, but not till then, he will, in my view, be entitled to have the compensation ended.

LORD DUNDAS—I concur. The Sheriff-Substitute, probably from a laudable endeavour to be concise, has stated this case in a rather meagre fashion. But there seems to be enough in the facts as before us to warrant a negative answer being given to the question put for decision. The employer, it appears, has proved that the man "is now unable to work in consequence of a cardiac affection," but he has not proved that this affection is in no way connected with the injuries the man sustained by the accident. The employer, therefore, fails, in my judgment, to discharge the *onus* incumbent on him of justifying his application—under Schedule I (16) of the Act—to have the compensation ended.

The Court answered the question in the negative.

Counsel for the Appellant—Crabb Watt, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Respondent—Hunter, K.C.—A. M. Mackay. Agents—St Clair Swanson & Manson, WS.

Saturday, November 21.

EXTRA DIVISION.

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

YOUNG *v.* THOMSON.

Process—Proof—Payment—Goods Supplied on Credit—Written Receipts Retained by Creditor—Parole Proof of Existence of Receipts—Adminicles.

In a long course of dealing between a dairyman and his customer the accounts had regularly been kept in pass-books, and had been settled by monthly payments, which had at the time been entered in the current pass-book. The dairyman retained the pass-books in his own possession. In an action at his instance for the balance of his account he averred that no new pass-book had been kept for the period to which the action related, and he pleaded that the alleged payments on which the defender founded could only be proved by writ or oath. The defender averred that a pass-book had been kept in the same way as formerly, and that the account had already been paid in full and receipted in the pass-book. On proof being taken, the pursuer failed to give any intelligible explanation why, as he averred, a pass-book had, contrary to the established course of business, no longer been kept, and the Court was satisfied that the pass-book had actually existed.

Held, in the circumstances, that the substance of the written receipts could competently be founded on by way of exception to the action without a separate proving of the tenor, and that the pursuer being responsible for the disappearance of the written evidence, its tenor had been competently proved without adminicles.

On 7th May 1907 John Young, dairyman, New Pentland, Straiton, raised an action against Andrew Wilson Thomson, clockmaker, 22 Forrest Road, Edinburgh, for decree for the sum of £79, 14s. 8d., being the total price of milk and cream supplied between 19th December 1905 and 25th August 1906 to a shop kept by the defender. This amount was shown in an account produced by the pursuer.