to the view expressed by Lord Salvesen as to the meaning and effect of the latter part of the codicil. The testator had evidently come to think that as his son had no children, and might not have any by his marriage, it would be a right and proper thing that in such an event the money should ultimately go to his daughter and her children, and he so expressed his desire. That is a request, not a bequest.

LORD DUNDAS was absent, being engaged in the Extra Division.

The Court pronounced this interlocutor—

"... Answer branch (*a*) of the first question of law in the negative and branch (*b*) thereof in the affirmative: Find it unnecessary to answer branch (*c*) thereof: Answer question second by declaring that the liferent to which the fifth party is entitled is for her alimentary liferent allenarly: Find it unnecessary to answer the third question: Answer branch (1) of the fourth question in the affirmative: Find it unnecessary to answer branches (2) and (3) of said fourth question. . . ."

Counsel for the First and Sixth Parties—Murray, K.C.—Normand. Agent—William Hugh Hamilton, W.S.

Counsel for the Second, Third, Fourth, and Fifth Parties—Macphail, K.C.—Maconochie. Agents—Traquair, Dickson, & MacLaren, W.S.

Thursday, January 21.

SECOND DIVISION.

[Lord Skerrington, Ordinary.
[Lord Anderson, Ordinary.

MITCHELL'S TRUSTEES *v.* MITCHELL'S TRUSTEES.

Succession — Will — Uncertainty — Residue Clause—Direction to Trustees to Make Payments out of Residue to such of Testator's Children and Grandchildren as they might Think most Deserving.

A testator, after empowering his trustees to pay certain special legacies to his children, directed them "from time to time, as they think proper, to make such special payments out of the free residue and remainder of my estate to such of my children or children's children as they may think most deserving, with special instructions to relieve any of them who may appear to be in want, provided always that they have not brought themselves into such circumstances by their own misconduct. My great desire is to assist merit and thrift, and not to acknowledge indolence or folly." *Held* that the clause was not void from uncertainty. *Opinions* that the bequest was a charitable one.

Succession — Accumulations — Thellusson Act (39 and 40 Geo. III, cap. 98).

The Thellusson Act, sec. 1, provides that no one shall thereafter settle any real or personal property by will or otherwise in such a manner that the interest thereof shall be "accumulated for any longer time than the life . . . of any such . . . settler . . ., or the term of twenty-one years from the death of any such . . . settler, and in every case where any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void. . ."

A testator, after directing his trustees to carry out certain trust purposes, appointed them from time to time, as they might think proper, to make such special payments out of the residue of his estate to such of his children or children's children as they might think most deserving, with special instructions to relieve any who might appear to be in want, provided their circumstances were not due to their own misconduct. A period of twenty-one years having elapsed from the truster's death, during which the trustees had accumulated the revenue of the residuary estate, owing to the fact that they were not satisfied that any cases existed which warranted payment out of the trust funds—*held* (*rev.* judgment of Lord Anderson, Ordinary) that as the accumulations had not resulted from any direction, express or implied, and were not a necessary consequence of the direction given, the Thellusson Act did not apply to prevent such accumulations.

The Thellusson Act (39 and 40 Geo. III, cap. 98) is *quoted supra in second rubric.*

James Napier Hotchkis, W.S., St Andrews, and others, the testamentary trustees of the late Robert Mitchell, quarrymaster, Strathkinness, Fife, *pursuers and real raisers*, brought an action of multiplepoinding and exoneration against themselves as trustees and against William Isles Mitchell and others, *defenders*, for the determination of certain questions arising under the residue clause of Mr Mitchell's trust-disposition and settlement. Claims were lodged by the trustees and by the children, grandchildren, and representatives of deceased children, of the truster.

The *trust-disposition and settlement* contained the residue clause quoted *supra in first rubric* and this clause—"And in order to prevent the failure of the discretionary powers hereby conferred in consequence of the office of trustee lapsing, I request my trustees, as soon as their number is by resignation or otherwise reduced below three, to assume other trustees with the same powers as are hereby conferred upon themselves."

The claimants other than the trustees pleaded, *inter alia*, that the residue clause of the testament was void from uncertainty, and that the residue, in consequence, fell into intestacy.

On 12th June 1912 the Lord Ordinary (SKERRINGTON) found as regards the residue clause that the same was not void from uncertainty, and therefore that, subject to the provisions of the Thellusson Act,

the testamentary directions contained in that clause fell to be carried out by the trustees.

Opinion.—"The late Robert Mitchell died on 31st July 1891, leaving a trust-disposition and settlement, and codicil dated 22nd June 1891, by which he made provision for the eight children of his first marriage and for the two children of his second marriage. He explained that his wife, who survived him, had been already sufficiently provided for in their antenuptial marriage contract of November 1884, and he declared that the legacies to the two children of his second marriage were in addition to what they should receive under their parents' marriage contract. He made special provision for one of the daughters of the first marriage, who was to be boarded out and maintained by the trustees on the interest of £500. As regards the remaining children of the first marriage and the two children of the second marriage, the testator directed his trustees to pay to each, on his or her arriving at the age of twenty-four years complete, 'special legacies,' consisting of sums varying from £2000 to £300. The daughter of the second marriage, afterwards Mrs Brown, died before attaining the age of twenty-four, and one of the questions in the case is whether her legacy of £1000 vested in her. But the most important question is as to the validity of the residue clause which the claimants, other than the trustees, maintain to be void from uncertainty. It is as follows:—'. . . [*quotes, v. supra, first rubric*] . . .' The testator further requested his trustees, as soon as their number was reduced below three, to assume other trustees with the same discretionary powers as had been conferred on themselves.

"The beneficiaries contingently interested in the residue are a limited and ascertainable class, viz., the testator's children and grandchildren. The trust is, however, peculiar in respect that it does not direct the distribution of the residue among the members of this class in such proportions and at such times as the trustees shall in their discretion think proper. The clause merely directs payments to be made from time to time to individual members of the favoured class, apparently for some special reason such as individual desert or innocent misfortune. If this be the meaning of the direction, intestacy may result either as to income through the operation of the Thellusson Act (which has already come into effect) or as to the whole or part of the capital through the death of all the contingent beneficiaries. But the possibility of ultimate intestacy, either partial or total, is no ground for annulling a direction which commits an intelligible and workable discretion to testamentary trustees. Of course I may have misinterpreted the clause, but if so the Court can at the proper time declare its true construction. The fact that a testamentary direction is susceptible of various interpretations does not make it 'uncertain' in the legal sense—in other words, impossible to construe and inextricable. Again, the Court may control the trustees if they exercise their discretion in an unreasonable and perverse manner—*Thomson* v. *Davidson's Trustees*, 1888, 15 R. 719, 25 S.L.R. 235; *Ritchie* v. *Davidson's Trustees*, 1890, 17 R. 673, 27 S.L.R. 530.

"While I should have been glad to order the estate to be distributed among the testator's legal heirs, I do not see my way to hold that his testamentary directions are void from uncertainty. In so deciding I have kept in view that the trust is not a charitable one as was the case in *Weir* v. *Crum Brown*, 1908 S.C. (H.L.) 3, and that accordingly it cannot claim any specially benignant interpretation of its provisions. I have also kept in view that the word 'such' as applied to 'payments' in the residue clause is ungrammatical, and suggests that something may have been omitted.

"I accordingly find that the residuary clause is not void from uncertainty. It is unnecessary for me to express an opinion upon hypothetical questions which I have no power to decide, viz., as to the rights of the claimants in the event of the clause being held invalid and of intestacy resulting. It is, however, proper to note that the heirs in movables gave up the contention made in their pleadings to the effect that the heritable property had been constructively converted. The only question argued between them and the heir in heritage was whether the latter was bound to bear a rateable share of the testator's debts and legacies. There was also a question between the children of the first marriage and the children of the second marriage as to the effect of the marriage contract of 1884 upon the rights of the children of the second marriage in the event of their father dying partly intestate. In the view which I have taken of the validity of the residuary clause the question does not arise."

Up to the date of the action the trustees had accumulated the revenue earned by the residuary estate without making any payments out of it as empowered by the clause. On 31st July 1912 a period of twenty-one years had elapsed from the truster's death, and the question was raised whether the provisions of the Thellusson Act applied to the revenue earned by the residuary estate subsequent to that date. In order to have this question properly determined additional condescendences and claims were lodged by the trustees and by certain of the parties to the original action.

The trustees pleaded, *inter alia*—"(1) On a sound construction of the trust-disposition and settlement the directions thereof do not result in illegal accumulation of income in the circumstances which have emerged, and the claimants are entitled to be ranked and preferred in terms of their claim."

The other claimants pleaded, *inter alia*—"(1) In terms of the Statutes 39 and 40 Geo. III, cap. 98, and 11 and 12 Vict. cap. 36, sec. 41, the income accruing on the trust estate after 31st July 1912 falls to be paid to the heirs *ab intestato* of the testator so long as the capital thereof remains in the hands of the trustees."

On 14th November 1913 the Lord Ordinary (ANDERSON) found, on a sound construction of the residuary clause of the trust-disposi-

tion and settlement of the deceased Robert Mitchell, there was an implied direction to his trustees to accumulate the revenue of his residuary estate; that the provisions of the Acts 39 and 40 Geo. III, cap. 98, and 11 and 12 Vict. cap. 36 and 41, applied to accumulations of said revenue subsequent to 31st July 1912, and that said accumulations fell to be distributed as on intestacy amongst the heir in heritage and the heirs *in mobilibus* of the said Robert Mitchell as at the date of his death, and with these findings continued the cause for further procedure and granted leave to reclaim.

Opinion.—". . . The residuary estate held by the trustees consists mainly of heritable property. The revenue from this part of the residue is about £50 per annum. The interest on the portion of the residue which is movable is about £13 per annum.

"The fund *in medio* in the supplementary action consists of the accumulated revenue of the residuary estate since 31st July 1912.

"As all accumulations which trustees may make are not struck at by the Thellusson Act, the first point to be determined is whether that statute applies to the accumulations which Robert Mitchell's trustees have made since 31st July 1912.

"It has been decided that the Thellusson Act applies where accumulation is directed, expressly or by implication, by the terms of the deed, and also where accumulation is the necessary consequence of the direction given—*Lord* v. *Colvin*, 23 D. 111; *Logan's Trustees* v. *Logan*, 23 R. 848, 33 S.L.R. 638; *Moon's Trustees* v. *Moon*, 2 F. 201, 37 S.L.R. 140. In the present case accumulation necessarily resulted from the terms of the residuary clause. There is no disposition or bequest of the annual revenue of the residue in the event of it not being required for the specific purposes set forth in the clause. The trustees were therefore bound to accumulate. I am accordingly of opinion that the provisions of the Thellusson Act apply to the fund *in medio* in the supplementary action."

The pursuers and real raisers reclaimed, and of consent the Court was asked to review the interlocutor of 12th June 1912 as well as that of 14th November 1913.

Argued for the pursuers and real raisers—(1) The residuary clause was not void from uncertainty. It was sufficient if the provision therein contained could be carried out in certain possible circumstances, and though the occasion had not yet arisen there was nothing to prevent it arising in the future—*Crichton* v. *Grierson*, July 25, 1828, 3 W. & S. 329; *Weir* v. *Crum Brown*, 1908 S.C. (H.L.) 3, 45 S.L.R. 335 (*s.v. Murdoch's Trustees* v. *Weir and Others*); *Laurie* v. *Brown*, 1911, 1 S.L.T. 84; *M'Conochie's Trustees* v. *M'Conochie*, 1909 S.C. 1046, 46 S.L.R. 707; *M'Phee's Trustees* v. *M'Phee*, 1912 S.C. 75, 49 S.L.R. 33. (2) There was no necessary accumulation of income in the present case. The Thellusson Act (39 and 40 Geo. III, cap. 98) did not apply where the trustees had a discretion to distribute the income. The accumulations were not the necessary result of the deed, but of the way in which the trust was administered. Any beneficiary in want through no fault of his own could have demanded payment out of the fund—*Lindsay's Trustees*, 1911 S.C. 584, 48 S.L.R. 470; *Gollan's Trustees* v. *Booth*, July 5, 1901, 3 F. 1035, *per* Lord Kinnear at p. 1040, 38 S.L.R. 762.

Argued for the other claimants—(1) The residue clause was void from uncertainty. Its provisions were unworkable, and the very fact that the trustees had found no occasion to exercise their powers under it for twenty-two years showed how vague and indefinite were the *criteria* on which the trustees were left to act. It was certain that the testator had no clear idea himself as to what his trustees were to do, and he did not say how much was to be spent, or when or why or on whom—*Hardie* v. *Morison*, 1899, 7 S.L.T. 42; Jarman on Wills (6th ed.), vol. i, p. 470; *Webb's Case*, 1 Roll Ab. 609 (D) 1. (2) In any event, after twenty-one years the Thellusson Act applied, because the provisions of the residue clause led as a necessary result to accumulation. There was no vesting and no bequest either of capital or income to any particular persons—*Logan's Trustees* v. *Logan*, June 24, 1896, 23 R. 848, 33 S.L.R. 638; *Lord* v. *Colvin*, December 7, 1860, 23 D. 111; *Hutchison* v. *Grant's Trustees*, 1913 S.C. 1211, 51 S.L.R. 6. As there was no bequest the income became payable to the heirs *ab intestato* of the testator—*Smith* v. *Glasgow Royal Infirmary*, 1909 S.C. 1231, 46 S.L.R. 860.

At advising—

LORD SALVESEN—The main controversy between the parties turns on the residue clause of the late Mr Robert Mitchell's will. The heir and next-of-kin maintained that it is void from uncertainty, and that the fund falls to be distributed now as intestate succession. In the Outer House Lord Skerrington negatived this contention, holding that the clause contained "an intelligible and workable direction to testamentary trustees." I agree in this result, although I am not altogether at one with his Lordship as as to the meaning of the direction.

It is unnecessary that I should quote the residuary clause, as that has been fully done in Lord Skerrington's opinion. It is, however, in my view a point of importance that the testator made anxious provision to prevent the failure of the discretionary power which he conferred, through the failure of trustees, by providing that as soon as the number was reduced below three the surviving trustees should assume others with the same powers as were thereby conferred upon themselves. It is therefore plain that the testator contemplated that the trust would be of long duration, and indeed would endure so long as there were any children or grandchildren of his in existence. The object of his direction with regard to the residue was, I think, to enable the trustees to give pecuniary assistance to any of his children or grandchildren who appeared to be in want, provided always that they had not brought themselves into such circumstances by their own misconduct, and, apart from cases of actual or apparent want, to enable the trustees to make grants to such

of his children or grandchildren as they might think most deserving. The word "deserving" is of course open to interpretation, but I think in the collocation in which it occurs the word must be construed as meaning deserving of pecuniary assistance. I cannot imagine that he desired his trustees to make payments to the objects of his bounty simply because one or more had attained distinction intellectually or otherwise, and without regard to the means that they might possess. We are all familiar with the term "deserving poor," which denotes that the poor persons' character and conduct have been such as to give them a moral claim to a larger share of material comforts than they actually possess. Poverty is of course a relative term, and with the class whom the testator desired to benefit I think it would include pecuniary inability to give a particular child the advantage of a higher education so as to qualify for the professions or the like intellectual pursuits. I do not think it imposes on the trustees the invidious duty of considering whether of half-a-dozen well-doing and prosperous children one was to be considered as more deserving than another. I can quite understand that the exercise of this discretionary power in the circumstances of this particular family, all of whom seem to be well-to-do, may have been exceedingly difficult, and this goes far to account for no payments having in fact been made during the twenty-three years that have elapsed since the testator's death. But at any time the circumstances of the children or grandchildren might have been or may yet become such as to call for an exercise by the trustees of their discretionary powers; and cases may easily be figured in which their duty would be clear enough. It may also be that the trustees have not had a clear idea of the construction which they ought to put upon the clause, and have refrained for that reason from making any payments to the beneficiaries. Our judgment will help them in the future when applications come before them, or the circumstances of any particular beneficiary are brought to their knowledge. Their duty is from year to year to consider whether there is any beneficiary in whose favour they ought to exercise the power bestowed upon them; and while they are not limited to expending the income of the fund, it would, no doubt, be their duty not unduly to encroach on the original capital in view of the probable long continuance of the trust. I am not sure that I agree with the Lord Ordinary that such a trust is not a charitable one. It appears to me in effect to be a trust to prevent any of the testator's descendants from falling into poverty through no fault of their own, or from being in the position that through lack of means they cannot afford such expenditure as persons in their station in life might reasonably desire to incur. The fact that two of the testator's children, who are beneficiaries, have been assumed as trustees must make the exercise of the discretionary power more difficult than it need be. For myself I think it would be better that the trustees administering the fund should not be hampered by personal or family considerations. The testator himself appointed independent trustees, and I think it would have been better if none of the beneficiaries had been assumed into the trust.

The next question is whether the Thellusson Act applies. I entirely accept the Lord Ordinary's statement of the law that it does so "where accumulation is directed, expressly or by implication, by the terms of the deed, and also where accumulation is the necessary consequence of the direction given." I think, in view of the decision in *Logan's Trustees*, the statement might have been even broader. There a testator directed his trustees, on the death of the last of certain annuitants, to realise his estate and divide the residue among certain persons who until that event were to have no vested right. The income of the estate was more than sufficient to pay the annuities and the surplus was accumulated in the hands of the trustees, there being no person to whom it could lawfully be paid. At the end of twenty-one years from the testator's death two of the annuitants still survived. It was held "that there was an implied direction to the trustees to accumulate the surplus income, and that accumulation beyond twenty-one years being prohibited by the Thellusson Act the surplus income that had accrued fell into intestacy." Now in the strict sense there was no direction, either express or implied, to accumulate income beyond twenty-one years, for all the annuitants might have died within that period, but the implied direction being one to accumulate until the death of the last of certain persons who in fact survived more than twenty-one years, this was held to be an implied direction to accumulate in that event for a period in excess of the statutory limit. I cannot, however, agree with the Lord Ordinary in holding that "in the present case accumulation necessarily resulted from the terms of the residuary clause." The testator neither directed accumulation nor so far as I can see did he contemplate it. On the contrary, he appointed his trustees to make payments not merely out of the income but out of the capital of the estate. It is true that they have not done so, the reason which they allege being "that they were not satisfied that any cases existed which warranted payment out of the trust funds on the ground of want or special merit." Personally I think that if they had applied their minds to their duties in the proper spirit they would not have found so much difficulty in executing their trust duties. But whether this be so or not, the fact that there have been accumulations beyond twenty-one years has not resulted from a direction, express or implied, nor do I think that the accumulation is the necessary consequence of the direction given. It has resulted entirely from something extraneous to the deed, namely, the inability of the trustees to find proper objects of the testator's bounty. One can conceive a case of a testator directing the income of his estate to be paid to a certain beneficiary whom though alive the trustees are unable to find, with the result that for more than

twenty-one years the income accumulated in their hands. Could it be said that such an accumulation was struck at by the statute? I apprehend not. The statute itself uses the words—"In every case where any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void, and the rents, issues, profits, and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated, contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." Now there is no direction here to accumulate after the lapse of twenty-one years any more than during the currency of twenty-one years; and I see no ground why the trustees should not have paid the whole income of the twenty-second year to any of the testator's children or grandchildren that might appear to be in want, and who had not disentitled himself to assistance by his own misconduct. There is every likelihood that during the continuance of this trust such beneficiaries will emerge, and the fact of accumulation beyond twenty-one years is not due to any direction of the testator but to the accident that there have been no objects on which his bounty could be bestowed. The same thing might occur if a testator gave instructions to trustees to pay the annual income of the funds to persons within a given parish who happened to be attacked by cancer or some less common malady, and no such person existed during a period exceeding twenty-one years. In the case of *Lord* v. *Colvin* Lord President M'Neill, 23 D. at p. 124, expressly contemplated accumulation beyond twenty-one years resulting from the operation of law "as may happen in regard to minority," and plainly implied that such an accumulation would not be struck at by the statute although exceeding twenty-one years. I am, therefore, of opinion that the Thellusson Act does not apply, and that we must recal the interlocutor reclaimed against, while affirming the prior interlocutor of 12th June 1912, which has also been brought up for review.

LORD GUTHRIE—I am of the same opinion. Two questions were argued in this case. It was said that the clause in Robert Mitchell's settlement dealing with residue was void from uncertainty as to the beneficiaries, namely—[*His Lordship read the clause*]. It was also said that the so-called accumulations which have arisen since 31st July 1912 through the trustees not having made any payments in terms of the above provision of Mr Mitchell's will fall under the provisions of the Thellusson Act. In my opinion the clause in question is not void from uncertainty, and the provisions of the Thellusson Act do not affect the so-called accumulations.

In regard to the first question, the uncertainty is said to arise from the way in which the testator has ordered his trustees to have regard to the elements of merit and poverty in the selection of the beneficiaries. Mr M'Lennan called these "clashing criteria." I am unable to see the inconsistency, although it is easy to see the difficulties which may arise in administration. I read the clause thus—the payments to the children or children's children are to be special payments—that is to say, they are not to be made *en bloc*, but are to receive separate consideration. The general criterion is to be that the recipients must be "deserving," that is, deserving, as Lord Salvesen put it, of pecuniary assistance, and those are to be preferred who are "most deserving of assistance," subject, however, to the proviso that among those who are most deserving of assistance relief is to be given to those who are in actual want. The testator evidently contemplated payments to beneficiaries who without being in actual poverty might be unable to secure the education or other advantages proper to their station in life, such payments, in short, as, had he survived, he himself would naturally have made in the shape of gifts to his children or grandchildren. At the same time, wishing his trustees to act as he himself would have done had he survived, he ordered them specially to relieve those in want, by which language I think he had in view that they should give a preference to any who might be in actual want. His exclusion of those whose necessities were brought about by their own misconduct, and his "great desire to assist merit and thrift, and not to acknowledge indolence or folly," only lay down for the trustees principles which most parents and grandparents are in the habit of following when considering the distribution, both *inter vivos* and *mortis causa*, of their estates among their descendants. The provision in Mr Mitchell's will does not seem to me any more difficult of application than the provision in favour of "the deserving working people in the parish of Annan," which was sustained in the Outer House case of *Brown*. I do not think the decision of Lord President Dunedin (sitting as a Lord Ordinary) turned on the trust being a charitable one. But suppose it did, I agree with Lord Salvesen that the present case has all the essential features of a charitable trust. I do not see why the mere fact that the charity not only begins but ends at home should prevent the trust being a charitable one.

The alleged application of the Thellusson Act turns to some extent on the same question as that which I have just considered. If the provision is not void from uncertainty it must be capable of application, not necessarily continuously but from time to time. In the history of every family adverse circumstances will arise which may not produce actual poverty, but which, unless relieved, will involve such drawbacks as the testator naturally wished to prevent. The testator neither ordered accumulations nor did he contemplate accumulations. If accumulations have arisen, or do hereafter arise, this will not be in consequence of the provisions of his will, but will be the result

either of the trustees' failure to give a reasonably liberal interpretation to the provisions of the testator's will, or to the accidental absence from time to time of any suitable beneficiaries. The case seems to me one which falls under the rule as to savings from income, which were held not to be accumulations in the sense of the Thellusson Act, in *Lindsay's Trustees*, and not under the rule as to accumulations which were contemplated by the testator and necessarily resulted from the provisions of his will, laid down in the case of *Logan's Trustees* v. *Logan*.

LORD JUSTICE-CLERK—I concur in the opinion of Lord Salvesen, which I have had the opportunity of reading.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"Having considered the reclaiming note for the pursuers and real raisers against the interlocutor of Lord Anderson dated 14th November 1913 and having considered also the interlocutor of Lord Skerrington of 12th June 1912 which *quoad* the 2nd finding is reclaimed against, and having heard counsel for the parties, Recal the first-mentioned interlocutor: Find of new that as regards the residuary clause of the trust-disposition and settlement and codicil of the deceased Robert Mitchell the same is not void from uncertainty: Find further that the provisions of the Thellusson Act do not apply, and that the testamentary directions in said clause fall to be carried out by the trustees: Therefore affirm said interlocutor of 12th June 1912 so far as reclaimed against."

Counsel for the Pursuers and Real Raisers—Horne, K.C.—Normand. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Claimant and Respondent James Mitchell (eldest son and heir-at-law of the testator)—Maclennan, K.C.—W. J. Robertson. Agents—Laing & Motherwell, W.S.

Counsel for the Claimants and Respondents Mrs Fraser and others—Chree, K.C.—Wilton. Agents—Young & Falconer, W.S.

Thursday, January 21.

SECOND DIVISION.

[Sheriff Court at Glasgow.

JOHN HAIG & COMPANY, LIMITED *v.* BOSWALL PRESTON.

(*Ante*, p. 226.)

Expenses—Sheriff—Application to Court to Certify Charges for Expert Witnesses—Time within which Application must be Made—Time within which Charges must be Certified—Codifying Act of Sederunt, M, ii, Table of Fees, chapter 10, 5 (*b*).

The Codifying Act of Sederunt, M, ii, provides—*Table of Fees—Chapter* 10—*Witnesses Fees*—5 (*b*)—"Where it is necessary to employ skilled persons to make investigations prior to a proof or trial in order to qualify them to give evidence thereat, charges shall be allowed for the trouble and expenses of such persons of such amount as shall appear fair and reasonable, provided that the judge who tries the cause shall, on a motion made either at the proof or trial, or when leave is asked to abandon the case, or within eight days after the date of any interlocutor disposing of the case, certify such skilled persons for such charges."

In an action in the Sheriff Court the Sheriff-Substitute, after a proof led, pronounced an interlocutor assoilzieing the defenders with expenses. Two days later the defenders lodged a minute craving the Court to certify charges for expert witnesses. After the expiry of more than eight days since the date of the interlocutor, although the Sheriff-Substitute had not disposed of the minute, the pursuers appealed to the Sheriff, who recalled the interlocutor of the Sheriff-Substitute and decerned against the defenders. On an appeal to the Court of Session the Court assoilzied the defenders with expenses in both Courts. Thereafter the defenders applied to the Court either to certify the charges or to remit to the Sheriff-Substitute to dispose of the minute, and the Court *remitted* as craved, *holding* that the provision in the Act of Sederunt "does not make it incumbent on the judge to grant the certificate within eight days after the date of the final interlocutor. It is enough if the application is made within that period."

John Haig & Company, Limited, distillers, Markinch, *pursuers*, brought an action in the Sheriff Court at Glasgow against Gordon Houston Boswall Preston, and Alistair Houston Boswall Preston, sole partners of and trading under the firm name of the Central Motor Engineering Company, 51 Pitt Street, Glasgow, *defenders*, for sequestration for and payment of rent.

On 5th April 1913 the Sheriff-Substitute (BOYD), after a proof led, assoilzied the defenders with expenses.

On 7th April 1913 the defenders lodged a