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

minute craving the Court to certify certain charges for expert witnesses and to sanction the employment of counsel.

The Sheriff-Substitute was absent on holiday during a vacation of the sitting of the Court, and the pursuers on 21st April 1913 appealed to the Sheriff (GARDINER MILLAR) although the Sheriff-Substitute had not disposed of the minute. On 25th July 1913 the Sheriff recalled the interlocutor of the Sheriff-Substitute and decerned against the defenders. The defenders appealed to the Second Division of the Court of Session, who on 17th December 1914 recalled the interlocutor of the Sheriff and dismissed the action, finding the pursuers entitled to their expenses in both Courts.

The minute never having been disposed of, on 21st January the defenders presented a note to the Court narrating the above circumstances and craving the Court to certify the charges for expert witnesses and to sanction the employment of counsel, or to remit to the Sheriff-Substitute to dispose of the minute.

Argued for the defenders—The defenders were not responsible for the fact that the minute had not been disposed of within the eight days prescribed by the Act of Sederunt, and it was competent for the Court either itself to certify the charges for expert witnesses and sanction the employment of counsel, or to remit to the Sheriff-Substitute to dispose of the minute—*Reid* v. *North Isles District Committee of County Council of Orkney*, 1912 S.C. 627, 49 S.L.R. 511.

Argued for the pursuers—The pursuers had a duty to take steps to get the minute disposed of by the Sheriff-Substitute, and if the provision of the Act of Sederunt was not complied with the charges for expert witnesses could not be certified—*Gibson* v. *West Lothian Oil Company*, March 9, 1887, 14 R. 578, 24 S.L.R. 420.

LORD JUSTICE-CLERK—This motion raises a question as to the certification of the skilled witnesses for special fees. The application for that certification was made in proper time. Unfortunately the Sheriff-Substitute has not dealt with it at the proper time, but I do not see why the defenders should suffer through this.

I think our proper course is to remit to the Sheriff-Substitute who tried the case to grant the certificate either for or against the application. If the Sheriff-Substitute wishes to refresh his memory he can have the proof and the interlocutor sheet sent to him. I am for granting the motion.

LORD SALVESEN — I am of the same opinion. I think it is desirable that the construction of the section of the Act of Sederunt which has been referred to here should be authoritatively settled. [*His Lordship here read section X*, 5 (*b*).] I am quite clear that that provision 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. It is not possible for the party to secure that the judge shall grant the certificate; all that he can do is to apply for such a certificate. There may be excellent reasons why the judge cannot immediately apply his mind to such a motion, as, for instance, his absence from home—as happened in this case—or illness: and the suggestion that the successful party forfeits his right to obtain the certificate by not thereafter reminding the judge of his failure to grant it does not commend itself to my mind.

According to the practice in the Sheriff Court the judge who tried the case does not deal with such a certificate if, before it is brought to his notice, he finds that an appeal has been taken to a higher Court. I do not in the least suggest that it is incumbent on him to deal with it even although he has not the interlocutor sheet before him; but it was quite natural that the litigants here should, in view of that practice, not have thought it proper or decent to make any further application to the Sheriff-Substitute other than that which they had already made, and which was strictly in terms of the Act of Sederunt. No inconvenience really is caused by the judge's failure to deal with the matter at the time except in so far as he himself may have to refresh his mind with regard to the facts of the case so as to enable him to deal with it judicially. The practical question arises only when there has been a final interlocutor and an account falls to be taxed.

Accordingly, I think there is no doubt that the appellants here are entirely within their rights, and that we should adopt the course which your Lordship in the chair has proposed, of remitting to the Sheriff-Substitute to deal with the application, which it would have been better if he had dealt with at the time it was made.

LORD GUTHRIE—I am of the same opinion. I desire only to add that I am sure the Court does not wish to give countenance to the idea that an application of this kind should not be dealt with at once by the Judge. He is obviously in a much better position to deal with it if he does so at once. I am bound to say that in one's own experience in the Outer House I often found it difficult after the lapse of some time to apply one's judgment to the question of how many and which witnesses should be certified.

LORD JUSTICE-CLERK—I should like to add, as regards the interpretation of the section of C. A. S. referred to, that the words "within eight days" apply to the application, and have nothing whatever to do with the time of the decision as to the certificate.

LORD DUNDAS was not present, being engaged in the Extra Division.

The Court pronounced this interlocutor—

"Remit to Sheriff-Substitute Boyd to consider and dispose of, as to him may seem just, the motion for the defenders craving certification of skilled witnesses and also the sanction of the employment

of counsel: Direct the said Sheriff-Substitute to append his decision to the said motion."

Counsel for the Pursuers — Crawford. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders — Duffes. Agents—J. S. & J. W. Fraser-Tytler, W.S.

Friday, January 22.

FIRST DIVISION.

(SINGLE BILLS.)

MITCHELL AND OTHERS *v.* SELLAR.

Process—Proof—Appeal—Additional Evidence—Re-opening of Proof After Judgment Pronounced — One of Pursuers Disclaiming Action.

Circumstances in which one of the pursuers in an action in the Sheriff Court having disclaimed the action after judgment was pronounced and an appeal taken to the Court of Session, and offered his evidence in support of the defender, the Court *allowed* the proof to be opened up and this pursuer tendered as a witness for the defender, along with two other witnesses who corroborated his evidence.

John Mitchell, residing at 92 Queen Street, Peterhead, John Falconer, fisherman, Portnockie, and William Falconer, fisherman, Portnockie, registered owners of the steam-drifter "Kimberley," BF 965, and Alexander Stuart, Alexander Murray, and Angus Murray, all fishermen residing in Lewis, *pursuers and respondents*, brought an action in the Sheriff Court at Aberdeen against Colin Reid Sellar, residing in Boddam, registered owner of the steam-drifter "Spartan," PD 206, *defender and appellant*, for damages in respect of a collision which occurred in the South Bay of Peterhead on 22nd July 1913 between the said steam-drifter "Kimberley" and the said steam-drifter "Spartan." The Sheriff-Substitute having granted decree against the defender, the defender on June 1, 1914, appealed to the Court of Session.

On January 22, 1915, the defender and appellant presented a note to the Lord President in Single Bills craving his Lordship to move the Court to open up the proof, and allow the defender and appellant to tender as witnesses in the case the said William Falconer, William Kewley, surfaceman, residing in Cullen, and William Hutchison Leask, shipowner and Provost of Peterhead.

The note, *inter alia*, stated—"In the view of the Sheriff, if the collision happened at the point alleged by the pursuers, it was brought about in the manner averred by them, whereas if it occurred at or about the point alleged by the defender the explanation given by the defender may be accepted. On a review of the evidence the Sheriff affirmed the contention of the pursuers.

The pursuer John Falconer, who was skipper of the "Kimberley," stated in evidence that the pursuer Alexander Stuart was the outlook, and that he was at his post. The said Alexander Stuart stated in evidence that he was not the outlook on the day of the collision, but that the mate was forward. The mate of the "Kimberley" was the pursuer William Falconer, and he was not examined as a witness for the pursuers, nor was any explanation of his absence offered.

"Of this date (Dec. 31, 1914) the said William Falconer addressed a letter to the defender's solicitors in Peterhead in the following terms:—'Dear Sirs—In the case of the "Kimberley" against the "Spartan" I have to inform you that I never gave instructions nor permitted my name to be used as a pursuer. In fact I was never asked to do so. Accordingly I disclaim the case altogether. I have all along said that the "Kimberley" was solely to blame, and I have told my co-owners repeatedly this, as I was the only man on deck at the time of the collision who could have seen the whole of it. Will you please see that my name is withdrawn from the case as I now withdraw it.—Yours truly, WILLIAM FALCONER, fisherman, 267 Portnockie, part owner of "Kimberley," BF 965.'

"The defender's solicitors were subsequently informed by the said William Falconer that he was on the lookout when the collision occurred, that it took place in the manner and about the point alleged by the defender, and that it was caused by the helm of the 'Kimberley' having without warning been put hard-a-port in order to avoid a sailing vessel in front, with the result that the 'Kimberley' went round to starboard and attempted to cross the line of vessels going into the harbour.

"In consequence of the information received from the said William Falconer the defender has also interviewed William Kewley, surfaceman, residing in Cullen, who was engaged as cook on the 'Kimberley' and who was on deck at the time of the collision, but who was not examined as a witness for the pursuers. The said William Kewley is prepared to support the statements of the said William Falconer.

"Further, since the judgment was pronounced by the Sheriff the defender's solicitors have been informed by William Hutchison Leask, shipowner and Provost of Peterhead, that on the day in question he was sitting at his office window which overlooks the South Harbour of Peterhead, and that he saw the collision take place at or about the place spoken to by the said William Falconer and William Kewley."

Counsel for the defender and appellant referred to the following cases:—*Taylor* v. *Provan*, June 16, 1864, 2 Macph. 1226, Lord Justice-Clerk at 1230; *Allan* v. *Stott*, June 14, 1893, 20 R. 804, 30 S.L.R. 728; *Glengarnock Iron and Steel Company, Limited* v. *Cooper & Company*, June 12, 1895, 22 R. 672, 32 S.L.R. 546; *Coul* v. *Ayr County Council*, 1909 S.C. 422, 46 S.L.R. 338.

LORD PRESIDENT—This is one of a class of cases in which the Court has certainly a very wide discretion—at the same time a discretion which is only exercised under very exceptional circumstances. So far as