in the Sheriff Court, and which can quite well be tried and disposed of there.

Accordingly, this being a case which can be perfectly well tried in the Sheriff Court, I should not have thought it was a case which in your Lordships' discretion we would have kept in the Court of Session. I only make these observations because I do not want the defenders to think that they have met with hard justice upon the question of competency, this being the first case and dependent, perhaps, upon rules of procedure which up to this judgment would scarcely be present in the minds of practitioners in the lower Court. I hope, however, now that I have made it sufficiently clear to be the rule of practice in the lower Court that if an order for proof is pronounced, parties must then elect either at once to come within six days for jury trial, or if they do not do that and choose to ask for leave to appeal, that then the idea of jury trial is once and for all gone.

LORD M'LAREN—I concur.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON—I also agree.

The Court found that the minutes of remission were incompetent, and remitted the cases to the Sheriff-Substitute to proceed.

Counsel for Pursuers (Respondents)—Dean of Faculty (Scott Dickson, K.C.)—Horne—Spens. Agents—Morton, Smart, Macdonald, & Prosser, W.S.—J. & J. Ross, W.S.

Counsel for Defenders (Appellants)—John Brown & Company—Blackburn, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders (Appellants), the Clyde Navigation Trustees—Orr Deas. Agents—Webster, Will, & Company, S.S.C.

Tuesday, February 23.

SECOND DIVISION.

MELLIS' TRUSTEES *v.* RITCHIE.

Succession — Testament — Construction — Direction to Divide Fund at Death of Liferentrix Equally among her Children and Grandchildren per stirpes — Liferentrix Survived by Child having Issue — "And" Equivalent to "Whom Failing."

By his trust-disposition and settlement A directed his trustees to pay the annual income of a certain share of his estate to B during her life, and on her death to divide the capital equally among her children and grandchildren *per stirpes*. B was survived by her son C, and also by grandchildren, the children of C. *Held* that C's children were conditional institutes, and took only in the event of their parent predeceasing B.

James Mellis, soapmaker, Prestonpans, died on 1st August 1899, leaving a trust-disposition and settlement whereby he conveyed his estate to certain trustees.

He directed his trustees to divide the residue of his estate into two equal parts, and pay and make over one of the said parts to his wife Mrs Mary Marr or Mellis absolutely as her own property; with regard to the other part of the said residue he provided that his wife should enjoy the liferent thereof and that on her death it should be dealt with as follows, viz.—"As regards one-third part or share, to pay the annual revenue and proceeds thereof to Georgina Gordon or Ritchie during her life, and on her death to divide the same equally among the children and grandchildren of the said Georgina Gordon or Ritchie *per stirpes*."

The testator's widow died on 30th December 1902. Mrs Ritchie survived her and enjoyed the liferent provided for her in the will until her death on 10th November 1903. She was survived by two sons Thomas G. G. Ritchie and Robert F. A. Ritchie, and by four children of the said Robert F. A. Ritchie.

Questions having arisen with regard to the share falling to the said Robert F. A. Ritchie, a Special Case was presented to the Court, the first parties being the trustees, the second party Robert F. A. Ritchie, and the third parties Thomas C. Ritchie and others, the children of Robert F. A. Ritchie.

The second party maintained that the intention of the truster was only to call grandchildren to the succession where their parent was deceased. The third parties maintained that as children and grandchildren were generally called together *per stirpes*, the testator's intention was to give the children of each branch an equal share along with their parent.

The questions of law were, *inter alia*—"(1) Is the second party entitled to the said third share of half of the trust estate of the said James Mellis? or (2) Are the third parties entitled to share in said third part equally with their father, the second party?"

Argued for first and third parties—The grandchildren shared along with their parent. The peculiar ending of this settlement showed that grandchildren were institutes along with their parent, and not merely conditional institutes. The second party's contention required that "and" should be read as meaning "whom failing." If that reading should be adopted the result would be that grandchildren would come in only in the event of the predecease of all the children. That could not have been intended. There should be equal division between the father and his children. Alternatively the father should get half of the fund, and the children the other half.

Argued for second party—The second party was entitled to the whole fund. The grandchildren only came in on the failure of their parent. The truster had tried to effect his meaning by a shorthand method,

but it was clear that the children were only conditional institutes. "And" here was equivalent to "whom failing"—*M'Lauchlan's Trustees* v. *Harvey*, November 26, 1908, 46 S.L.R. 156.

LORD JUSTICE-CLERK—I understand that this case has been brought for the sole purpose of letting the trustees know in what manner the trust fund is to be divided. I think the true meaning of the deed is that on the death of the liferentrix the fund is to be divided among her children, or if any child had predeceased survived by children, such children should take their parent's share. I think, therefore, that the first question of law should be answered in the affirmative.

LORD PEARSON—I concur.

LORD ARDWALL—The difficulty in this case arises from an endeavour on the testator's part to express himself shortly. Such attempts often land parties interested in a deed in greater difficulty than would have been caused had the usual conveyancing expressions been adopted. I am of opinion that the testator's intention was to call grandchildren only in the event of children predeceasing their mother, the liferentrix, and leaving issue. It is suggested that children and grandchildren must be placed on the same plane, and that each is entitled to an equal share. That is contrary to the direction in the will as the division is to be *per stirpes* as well as equal. In short, to divide equally *per stirpes* among individual persons who are descendants of different degrees is impossible. We are thrown back on the interpretation that an ordinary person of good sense would adopt apart from the difficulties of construction that may be raised by the endeavour to give a meaning to every word in the clause according to testament rules. Accordingly I am of opinion that the first question should be answered in the affirmative, and the second and third in the negative.

LORD LOW and LORD DUNDAS were sitting in the Valuation Appeal Court.

The Court answered the first question in the affirmative, and the second in the negative.

Counsel for the First and Third Parties—A. R. Brown. Agents—Henry & Scott, W.S.

Counsel for the Second Party—Maitland. Agent—J. Gordon Mason, S.S.C.

Saturday, February 27.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

FINE *v.* EDINBURGH LIFE ASSURANCE COMPANY AND OTHERS.

Expenses—Compensation—Right to Set-off Decree for Costs in One Action against Decree for Expenses in Another Action—Prior Action no longer Pending nor Pars ejusdem negotii—Agent-Disburser.

A obtained a judgment with costs against B in the English Courts. He thereafter used arrestments in Scotland in the hands of C, by which he sought to attach an annuity due at the date of arrestment by C to B. Having brought an action of furthcoming in the Court of Session against C as arrestee and B as principal debtor, and having been found liable in certain expenses therein, he objected to decree therefor going out in the name of the defender's agent as agent-disburser, on the ground that he, the pursuer, was entitled to set-off the sums in the English decree against the expenses in the action of furthcoming.

Held that the agent-disburser was entitled to decree in his own name, in respect (1) that at the date of the action of furthcoming the prior action was no longer pending, and (2) that the two processes were not *partes ejusdem negotii*, as each raised a different question.

Louis Fine, 204 Gloucester Road, Bristol, having raised an action in the English Courts against Mrs Mary Selina Eyre, wife of Edward Eyre, Wotton-under-Edge, Gloucestershire, obtained a judgment against her, on 6th June 1907, for a debt of £158, 15s. 6d., with £8, 10s. of costs. This judgment was registered in the Books of Council and Session at Edinburgh on 24th June 1907, in terms of the Judgments Extension Act 1868 (31 and 32 Vict. cap. 54).

Fine thereafter used arrestments on 1st July 1907, in the hands of the Edinburgh Life Assurance Company, by which he sought to attach £43, 15s., the amount due on that date for the preceding quarter of an annuity of £175 payable to Mrs Eyre. On 4th July 1907 he brought the present action of furthcoming against the Assurance Company, as arrestees, and Mrs Eyre as principal debtor. [The dispute in the action was whether the annuity could be made available for payment of the debt.]

The action was dismissed as irrelevant in the Outer House, because there was no averment of what the law of England was upon which the decision of the question at issue depended. The pursuer was allowed to amend his record in the Inner House, but was found liable, on 15th December 1908, in expenses since the closing of the record. Thereafter the defender's agent moved the Lord Ordinary that decree for