division should be *per stirpes* and not *per capita.*

Lord Mure—It appears to me that looking at this deed as a whole, the principle which runs through it is that there is to be an equal division of the testator's property among his three daughters in liferent, and an equality in the division of the fee among their families. This ought to be carried out, if it can be done, in such a manner as to give a consistent meaning to the different provisions of the deed.

I am clearly of opinion that the construction contended for by the second parties should be given effect to, and that the fee of the share liferented by Mrs Cathcart should be divided equally between the families of the two sisters who survived her. There are no words in the deed that would necessarily lead to any other inference.

Lord Shand—I think the scheme of the truster's settlement was that he intended his estate to be divided into three equal parts, and that these three portions should go to his three daughters in liferent and their children in fee. That was the intention, it appears to me, not only with regard to the division of the original shares, but also with regard to shares that had lapsed. The provision with regard to the liferents must be kept in view in arriving at a conclusion as to the meaning of the deed. Is there a separate liferent given to each of the surviving daughters? If there is, then the position of matters would be that the surviving daughter would be not only liferenting her own share, but also one-half of the share of her predeceasing sister. Then supposing there were no trust, and that the daughters had both got possession of the funds, then it would surely be a remarkable thing that after each mother had enjoyed the liferent of her own share and the one-half of her sister's, that the fee of that one-half should again be divided among her own family and those of another family. And I do not think it matters that there was here a trust. If the liferents here had been joint liferents, then the considerations I have adverted to would not apply, but the general principle of the deed being what I have stated, on the question of its construction I agree with your Lordship.

It must almost be conceded that if there were not these words "or either of them," then the liferents would be joint, and the consequent division of the fee *per capita.* But then the effect of the deed is to partition the liferents, with the result of separating the fee also.

The Court pronounced this interlocutor—

"The Lords having heard counsel on the Special Case, answer the first and third questions in the said case in the affirmative, and decern accordingly: Find the whole parties to the case entitled to their expenses, as taxed by the Auditor, respectively out of the trust-estate."

Counsel for the First and Second Parties—Mackintosh—Begg. Agents—Baxter & Burnett, W.S.

Counsel for the Third Parties — Comrie Thomson — Sym. Agents— Scott Moncrieff & Trail, W.S.

Friday, December 12.

OUTER HOUSE.

[Lord Kinnear.

MACFIE *v.* BLAIR AND OTHERS.

Process—Sisting Parties — Expenses—Expenses Reserved in Inner House.

In an action of declarator a party craved to be sisted as defender, and was sisted by the Lord Ordinary. On a reclaiming-note the Inner House adhered but reserved the expenses of the discussion, and remitted the cause to the Lord Ordinary. Thereafter the defender so sisted withdrew from the action, and the Lord Ordinary granted decree of declarator against him and found the pursuer entitled to expenses. No motion was then made by the defender with regard to the expenses of the discussion in the Inner House as to his title to appear, but the objection was taken before the Auditor, and thereafter before the Lord Ordinary, to these expenses being given against the defender. *Held* that the objection was too late, and should have been made when decree for expenses was pronounced.

In this case (as previously reported 15th July 1884, *ante,* vol. xxi. p. 742) the Court adhered to the interlocutor of Lord Kinnear sisting the Scottish Right of Way and Recreation Society (Limited) as defenders, as craved by their minute, and allowing defences for them to be received. The Court at the same time "reserved the expenses of the discussion" on the reclaiming-note.

Thereafter, the case having again come before the Lord Ordinary, the defenders (the said society) abandoned their defences, and the Lord Ordinary gave decree against the society in terms of the conclusion of declarator and interdict, and found the pursuer entitled to expenses, and remitted his account to the Auditor to tax and to report.

When the Auditor reported, the defenders objected to the report in respect that the Auditor had not taxed off a sum of £30. This sum had been incurred in the discussion on the question whether the society ought to be sisted as defenders, and the society maintained that they had been successful on that point, and that the expenses of the discussion ought not to be treated as general expenses in the cause, to which, as such, the interlocutor finding the pursuer entitled to expenses could apply.

The pursuer argued that these expenses were only reserved, and not given against him by the Inner House, and that this meant that they were to follow the ultimate result of the cause in which he had been altogether successful.

The Lord Ordinary, after making avizandum and consulting with the Auditor, pronounced this interlocutor—"The Lord Ordinary having heard counsel on the note of objections for the defenders the Scottish Right of Way and Recreation Society (Limited) to the Auditor's report on the account of pursuer's expenses, repels the same, approves of said report, and decerns against the said defenders for the sum of £78, 13s. 5d., the taxed amount of said expenses.

"*Note.*—I have considered this matter along

with the Auditor, and I have examined both the authorities and the practice. The only question seems to me to be, what is the true effect and meaning of a decree for expenses? and I have no doubt at all that the decree in this case carries the expenses reserved in the Inner House. The sole purpose of the reservation was that the expenses of the reclaiming-note should follow the decree disposing of expenses generally, unless the Court saw reason afterwards to make a different provision regarding these. If there had been no reservation, neither party might have got expenses, and the reservation is simply to the effect I have mentioned. I think that only leaves open the question that was argued, as to whether this was a point upon which a party generally unsuccessful had been specially successful, and therefore the expenses which the Auditor had allowed should be disallowed under the Act of Sederunt; and on that also I hold that the Auditor has taken the course not only justified by practice but in accordance with the reason of the thing, because the meaning of the judgment of the First Division was that this was not an expense which ought to be separated from the general expenses of the case, being expenses incurred upon a point on which the party respondent was plainly successful, and I think the meaning of the judgment was that it must follow the general expenses, unless there was some other reason for dissociating it from the general expenses. If a party volunteers to come forward to contest a right, and incurs expenses and exposes his opponent to expenses in order that he may establish right to contest the case, the question whether he is ultimately to get the expenses of that discussion depends very much upon whether he really had any right or substantial interest to maintain, and if it turns out that he has none, or that in his own judgment he thinks he has so little that he does not continue to contest, I do not say there positively is, but there may be very good reasons for refusing him expenses of the discussion, because he has only been successful in throwing expenses on the other party and in obtaining no other useful result at all. Although I think it is possible to take that view, I do not say that is the view I shall take in this case, although I think it is the view on which the First Division proceeded. What I mean is, that I think there may be perfectly reasonable grounds for refusing these expenses, and that being so, I think it was plainly necessary, if the defenders wished to have these expenses excepted from the general decree, that the defenders should have moved me to that effect before I pronounced decree. Then the matter might have been discussed. It is too late now to dispose of that matter, because I have given a decree which certainly carries these expenses, and which I think the Auditor is not entitled to touch, because he could not have disallowed these expenses without differing from the First Division, and therefore I think it is too late to disturb the matter."

Counsel for Pursuer—Trayner—Thorburn—Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for Defenders—R. Johnstone—W. C. Smith. Agent—Andrew Newlands, S.S.C.

Saturday, December 13.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BROWN *v.* RODGER AND ANOTHER.

Process — Misnomer in Summons — Citation — Diligence.

A small-debt action was brought against a Miss Isabella Brown, 40 Lorne Street, Leith Walk, Leith. It was served personally on a Miss Barbara Jane Brown residing there. She did not defend. Decree was obtained in absence, and a charge and poinding followed. She then sought to interdict the poinding, on the ground that she owed the creditor nothing, and was not Isabella Brown. The Court *suspended* the poinding, and distinguished the case from *Spalding* v. *Valentine & Company*, July 4, 1883, 10 R. 1092.

Barbara Jane Brown, residing at 40 Lorne Street, Leith Walk, Leith, presented in the Bill Chamber, against William Ritchie Rodger, law agent, Edinburgh, judicial factor on the estate of the deceased Mrs Marion Macfarlane or Morton, grocer, 219 Leith Walk, Leith, and also against John Watson, sheriff-officer, this note of suspension and interdict of a threatened sale on a poinding of her effects executed by Watson on the instructions of Rodger as judicial factor foresaid. The threatened sale, she averred, was for non-payment of £5, 9s. 11d., with 7s. 1d. of expenses, alleged to be due by a Miss Isabella Brown, 40 Lorne Street, Leith Walk, to the deceased Mrs Morton, and she not being Miss Isabella Brown, and never having passed by that name, or by any other name than Barbara Jane Brown, and not being due the debt in question, the poinding was wrongous and unwarrantable. She stated that she had had dealings with Mrs Morton under her own name, and had paid all accounts she was due to her.

Rodger lodged answers, in which he stated that the complainer was a customer of Mrs Morton; that on examining Mrs Morton's books on his appointment as judicial factor he found an outstanding account due by the complainer; that he called on her and asked her to settle it, and that she admitted the debt, and said she was unable to settle it then, but promised to make an arrangement, and that she failing to do so, he raised the small-debt action, on decree in absence in which the poinding proceeded. He further stated:—"It appeared on examining the business books that the first page of the defender's account is headed thus—'Miss ~~Isabella~~ B. Brown, 40 Lorne Street,' the word 'Isabella' being delete as shown in this article. The complainer did not know the deceased Mrs Morton's customers, and therefore thinking that the 'B' in the above heading stood for 'Bella,' made out the account sued on in name of Isabella Brown. The account is contained on, *inter alia*, three pages of the deceased Mrs Morton's ledger, the first of which pages is headed as above, the second being headed 'Miss B. J. Brown, 40 Lorne Street' (the initials of the name now stated by the complainer as her proper name), while the third page is headed 'Miss Isabella Brown, 40 Lorne Street,' and bears a reference back to the prior