of *Gordon*, or that the unanimous decision of that case by the Second Division was in any respect ill-founded. It was acknowledged, that that decision was directly in point here, and therefore I concur in the result that your Lordships have arrived at.

Lord Mure—I have come to the same conclusion as that which your Lordships have arrived at. The case of *Gordon*, which is admitted to rule this if rightly decided, was decided by the Second Division upon a proper construction of the statute which we are here called on to interpret; and I shall simply add this—that after having heard the matter fully argued, and having considered deliberately the opinions in the case of *Gordon* and the opinions delivered in the House of Lords in the case of *Saltoun*, I do not see how it was possible for the Second Division to have come to any other conclusion; because I find Lord Chancellor Campbell in the case of *Saltoun*, after stating that he considered the appellant was a party who took directly under the entail, says "I consider it equally clear that if the appellant were to die leaving a son, the son would take by devolution, the appellant being considered the predecessor, and so it would go on by devolution from generation to generation, till a new stirps came in under the entail." That was the opinion of the Lord Chancellor as to what the law was with regard to such questions, and Lord Wensleydale uses very similar expressions. He says, "the donee or remainder man who takes by purchase is the successor to the entailer the predecessor; but in respect to the heirs of the body the donee in the entail is the ancestor, and the heirs of the body are the successors." Now these are said to be *obiter dicta*. I do not think that they are. I think they were the distinct expression of the grounds and reasons on which the learned Judges arrived at the conclusion they came to. And applying these observations, and in particular that of Lord Wensleydale, to the pedigree in the present case, I cannot come to any other conclusion than that which your Lordship has arrived at; for I find that the first stirps was Lawrence the first Earl of Zetland, and that the party whose case we have now under consideration is an heir of the body of that first stirps.

Lord Gifford—I concur with your Lordship in the chair, and I have nothing to add.

The following interlocutor was pronounced:—

"The Lords having resumed consideration of this cause with the assistance of four Judges of the Second Division, and heard counsel on the reclaiming-note for the Earl of Zetland against Lord Shand's interlocutor of 17th July 1876—after consultation with the said other Judges, and in conformity with the opinion of all the seven Judges present at the said hearing—Recal the said interlocutor: Find that the deceased Thomas second Earl of Zetland is within the meaning of the Succession Duty Act (16 and 17 Vict. cap. 51) the predecessor of the present Earl of Zetland in the lands contained in the two deeds of entail, dated respectively in 1768 and 1813, and that the rate of duty to which the Earl of Zetland is liable in respect of his succession to the said lands is three per cent., and decern: Find the Earl of Zetland liable in expenses, and remit to the Auditor to tax the account thereof and report."

Counsel for the Lord Advocate—Lord Advocate (Watson)—Rutherford. Agent—D. Crole.

Counsel for Earl of Zetland—Balfour—H. J. Moncrieff. Agents—H. G. & S. Dickson, W.S.

Tuesday, December 5.

FIRST DIVISION.

[Sheriff of Renfrew.

APPEAL—DRUMMOND *v.* BALGARNIE.

Bankrupt—Cautioner—Ranking.

A person who had become cautioner for a debt, and the debtor, both became bankrupt, and the creditor ranked upon the cautioner's estate for the amount. The cautioner was otherwise largely indebted to the debtor, who also claimed upon his estate.—*Held* that there fell to be deducted from the debtor's claim the amount of dividend actually paid by the cautioner's estate to the creditor.

Mr Drummond, as official liquidator of the Army, Navy, & Family Supply Association, lodged with Mr Balgarnie, the trustee in bankruptcy of Messrs Wormald & Anderson, a claim amounting to £918, 7s.; from this there was admittedly to be deducted two sums of £197, 7s. 7d. and £89, 0s. 10d. respectively, as counter claims by Mr Wormald. Mr Balgarnie deducted a further sum of £118, 7s. 1d., being the amount of an account due by the Supply Association to Messrs Small & Greig, for which Wormald had become cautioner, and for which Small & Greig had ranked on his estate. The appellant objected to this deduction.

The Sheriff-Substitute (Hamilton) pronounced the following interlocutor:—

"*Edinburgh, 20th October* 1876.—The Sheriff-Substitute having resumed consideration of the foregoing appeal, and having again heard parties' procurators—Finds that the respondent now offers to rank the appellant on the estate of Wormald & Anderson to the extent of £513, 5s. 6d., conform to state now lodged, and finds that the appellant, while willing to accept the proposed ranking otherwise, objects to the deduction therefrom of £118, 13s. 1d., being the last item of said state: Finds, with reference to said item, that it represents the price of goods supplied by Small & Greig, therein mentioned, to or for behoof of the Army, Navy, & Family Supply Association (Limited), now in course of liquidation, and of which the appellant is the official liquidator: That said goods were ordered, and payment of the price thereof was guaranteed by J. D. Wormald, partner of Wormald & Anderson, as secretary, or otherwise acting for the said Association: That Small & Greig sued Wormald and his firm for payment of said price, obtained decree against them, and have been ranked on their sequestrated estate for the amount of the decree, being said sum of £118, 13s. 1d., and that the respondent now seeks relief against the said Association, and the appellant as official liquidator, and has pro-

duced in process a letter from the agent of Small & Greig, undertaking on their behalf not to claim or rank for said debt on the estate of the said Association: Finds that, in the circumstances above set forth, the respondent is warranted in making the deduction of the sum of £118, 13s. 1d. referred to: Therefore approves of said state: Recals the deliverance appealed against, and directs the respondent to rank the appellant on said estate of Wormald & Anderson to the extent of £513, 5s. 6d.: Finds the respondent entitled to expenses; modifies these to the sum of £2, 2s. sterling, and decerns.

"*Note.*—Parties are substantially agreed upon the facts connected with the sum of £118, 13s. 1d. The appellant referred to the case of *Ewart* v. *Latta*, 10th June 1863, as supporting his contention that the respondent was not entitled to make the deduction in question. The Sheriff-Substitute has read that case attentively, but it does not seem to be in point. The only difficulty he has had is connected with the fact that the respondent has not obtained a regular assignation to Small & Greig's claim. Mr Skinner's letter, however, almost amounts to such an assignation; and, at all events, it seems sufficient to secure against a double ranking upon the estate of the Supply Association."

The appellant appealed.

Authorities quoted—for the appellant—*Ewart* v. *Latta*, 10th June 1863, 1 Macph. 905, H. of L., 3 Macph. 36. For the respondent — *Hall* v. *Donaghy*, 24th November 1866, 5 Macph. 57; Sec. 170 of the Bankruptcy Act; *Anderson* v. *M'Kinnon*, 17th March 1876, 3 Ret. 608.

At advising—

Lord President — The claim as originally lodged by Mr Drummond, as official liquidator of the Army & Navy Supply Association, against the sequestrated estate of Wormald & Anderson, amounted to £918, 7s., but from that there are to be deducted certain disbursements made by Mr Wormald, amounting to £89, 0s. 10d., on behalf of the Association, and also the amount of a business account incurred by the Association, viz., £197, 7s. 7d. If these deductions are allowed, the amount of the claim will be reduced to £631, 18s. 7d., but the Sheriff-Substitute allowed further deductions, and so reduced the claims of the Supply Association to £513, 5s. 6d., for which he allows them to be ranked. Now, the question to be determined is, Has this sum been properly deducted? The sum is one of £118, 13s. 1d., and represents an account due to Small & Greig for goods furnished to the Supply Association. These were furnished on the credit of Mr Wormald, who became liable as guarantee to Messrs Small & Greig. He was therefore cautioner for the Association to them. Now, the creditor has ranked on the cautioner's estate for the amount of his debt, but has not ranked on the principal debtor's estate, nor assigned his debt to any one. The cautioner has been distressed, but only to the amount of a dividend of 3d. or 4d. per pound, and he therefore has only a claim of 3d. or 4d. per pound against the Association; but he finds on turning to the Association that it also is bankrupt. He being only one of many creditors is only entitled to a dividend, and he can only take a dividend on his dividend of 3d. or 4d. per pound on his own estate. I am of opinion that this case is entirely ruled by the case of *M'Kinnon* v. *Anderson*.

Lords Deas and Mure concurred.

Interlocutor recalled, and the following interlocutor pronounced:—

"Recal the deliverance of the Sheriff-Substitute, dated 20th October 1876, complained of: Find that the appellant is entitled to be ranked on the estate of Wormald & Anderson for Six hundred and thirty-one pounds eighteen shillings and sevenpence, as the balance of debt due by Wormald & Anderson, at the date of their sequestration, to the Army, Navy, & Family Supply Association, subject to deduction of the sum which may be actually paid in name of dividend by the trustee on Wormald & Anderson's estate to Small & Greig on a claim by the last-named party; and remit to the said trustee to rank the appellant in terms of the above finding, and decern: Find no expenses due in the Inferior Court: Find the appellant entitled to expenses in this Court; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Appellant—Guthrie Smith. Agents—Irons & Roberts, S.S.C.

Counsel for Respondent—Rhind—Mair. Agent—Robert Menzies, S.S.C.

Friday, December 8.

FIRST DIVISION.

MACPHERSON AND ROBERTSON *v.* DUNCAN AND REID.

Process—Appeal—Competency.

Where a petition of appeal against the judgment of the Court on a Bill of Exceptions had been intimated to the opposite party, but Parliament not being assembled no order for service had been obtained—*held* that it was in the discretion of the Court to determine whether they should proceed to apply the verdict.

Appellate Jurisdiction Act—(39 *and* 40 *Vict. cap.* 59), *sec.* 8.

Observed that it is for the House of Lords to say whether they can issue orders for service of appeals while sitting for the purpose of hearing appeals, as authorised by the 8th section of the Appellate Jurisdiction Act.

This is the sequel of the case reported *ante*, p. 16, of date November 9, 1876. The successful parties enrolled the case in the Single Bills, and moved that the verdict should be applied. It was stated at the bar that they had twice received notices, viz., on November 21st and December 1st, that it was the intention of the parties who presented the Bill of Exceptions—Mrs Macpherson and Andrew Ross Robertson—to appeal against the decision of the Court to the House of Lords within seven days after the date of the notices. The House of Lords was then sitting for the purpose of hearing