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

appeals, as it was empowered to do under the 8th section of the Appellate Jurisdiction Act (39 and 40 Vict. cap. 59). No petition of appeal had been presented.

Mrs Macpherson and Andrew Ross Robertson objected to the verdict being applied, and argued —If they had obtained an order for service the Court could not have proceeded to a final judgment. Such an order could not be obtained unless Parliament was assembled. This new sitting of the House of Lords was not a meeting of Parliament, and it was impossible to obtain such an order. The expression 'orders' in sec. 8th means any incidental orders after the case is before the house. Consequently the rule is as before, that the petition of appeal must be presented and an order of service obtained within eight days after the next evening meeting of Parliament, and that it is within the discretion of the Court to proceed to final judgment or not as they may see fit. As the estate in dispute here is under the management of a judicial factor, there can be no harm in delay. To proceed to final judgment would seriously prejudice the interests of the unsuccessful party.

Authorities—*National Exchange Co.* v. *Drew & Dick*, 19th March 1858, 30 Jurist, p. 484; *Tulloch* v. *Davidson*, 15th July 1858, 30 Jurist, p. 747, and 20 Dunlop, p. 1319.

The successful party argued that these very cases showed that nothing but an order of service would stop proceedings. That might have been obtained, but had not, and therefore it was inexpedient to allow further delay.

At advising—

Lord President—There may be a very important question under the 8th section of the Appellate Jurisdiction Act of 1876—whether an appeal against a Bill of Exceptions, when judgment is pronounced during the sitting of the House of Lords, as provided in that section, must not be presented within fourteen days? But that is a question for the House of Lords, and I am sure your Lordships will be unwilling to pronounce any opinion on that question. But putting out of view the new provisions as to the sitting of the Appellate Court—judgment having been given on a Bill of Exceptions it is competent just as it was before to present a petition of appeal and obtain an order of service within fourteen days if Parliament is sitting, or if Parliament is not sitting then within eight days after the next ensuing meeting of Parliament. If during the time that Parliament is not sitting the petition is presented, and the party who has presented it gives intimation of it to the successful party, I should hesitate to pronounce a final judgment, because the effect of a reversal of our judgment on the Bill of Exceptions would be to send the case to a new trial. There is no incompetency in doing so, for nothing but service of the petition of appeal can stop procedure in this Court; but there is certainly a discretion with us, and looking to the circumstances of the case, and especially to the fact that the estate is in the hands of a judicial factor, I think it is expedient not to apply the verdict at present.

Lord Deas—I think it is better not to go into the points of which your Lordship has spoken. Generally speaking, it is the right of a successful party to go on to final judgment, and cause must be shown why he should not; and I have considerable difficulty in interfering with the successful party in this case. But in the circumstances I am not prepared to differ from your Lordship.

Lord Mure—This is a delicate matter, but when I consider that there is a judicial factor in possession of the estate, and that therefore the successful party will take no prejudice by our refusal to apply the verdict, I am prepared to agree with your Lordship.

Lord Shand—I do not doubt that it is within the discretion of this Court to say whether the case shall proceed to final judgment. It has, on the other hand, been required to be the rule that nothing but an order of service can effectually stop proceedings here. But while that is the rule, I agree that in the special circumstances we should not apply the verdict.

Counsel for Mrs Mackintosh—Nevay. Agent—A. Nivison, S.S.C.

Counsel for John Ross Duncan—Hall. Agent—W. J. Sands, W.S.

Counsel for Reid's Trustees—Blair. Agents—Philip, Laing, & Monro, W.S.

Friday, December 8.

FIRST DIVISION.

[Lord Craighill, Ordinary.

AULD (MABON'S FACTOR) *v.* MABON AND OTHERS.

Succession—Heritable and Moveable—Conversion—Trustee—Power of Sale.

A truster conveyed her estate to trustees "to sell and dispose of the subjects above conveyed as they may think proper, and convert the same into cash, or to borrow money on the security of the said subjects, or to apportion and divide the same among my children . . . . as they may think proper or be advised." They were further directed to hold the residue in trust for six children "equally, and in case of any of my said children dying before majority or marriage," then such child's "share was to fall to the survivors," declaring "that the said several provisions shall be strictly alimentary," and not assignable or attachable by creditors. *Held* (1) that the share of each child vested at majority or marriage, at which time the trustees were entitled to pay it over; and (2) (no actual sale having taken place before vesting) that as there was no intention of conversion by the truster, and it was not indispensable for the administration of the estate to sell, the interest acquired was a *jus crediti* in an heritable estate.

This was an action of multiplepoinding brought by William Auld, C.A., Glasgow, as judicial factor on the trust-estate of Mrs Agnes Ballantyne or Mabon, wife of David Mabon, sometime weaver in Glasgow. The claimants were children and representatives of children of the marriage.