opinion it is not such an account as should be followed by the exercise of a power of sale, and therefore I think the note should be passed without caution or consignation.

Lord Deas—I agree with your Lordship on all the grounds which you have stated for passing this note without caution or consignation. But there are some other grounds. I have no doubt that where a heritable creditor has lent money, whether on a bond and disposition in security or on an *ex facie* absolute disposition and back-bond, that it is in the power of the Court to interfere upon equitable grounds with the exercise of the power of sale. If it can be shown that no hardship or prejudice will be caused to the creditor, and that there may be such to the proprietor of the estate, I have no hesitation in saying that it may be in the power of the Court to interfere to stop the sale.

Considerations of that kind would apply to this case. The stipulation is that upon the failure of the debtors to pay and relieve, the power of sale may be put in force upon one month's notice, and the sale is to be either by public roup or private bargain. That is such a power as I do not remember to have seen before. The premonition is generally three months, and coupled with it is a provision for advertisement for a certain period of time. There is nothing of that kind here. There is a power of sale at any time if the debtor has declined to pay after one month's notice. That is unusual either in a back-bond or in a bond and disposition in security. The circumstances are such as that the Court would more readily interfere than in the ordinary case. I do not see any prejudice that can happen to the creditor, and ruin perhaps may befall the other. The moment the month expires, and without any competition, the estate may be sold.

I am clearly of opinion that we ought to pass this note without caution or consignation.

Lord Mure—I agree with your Lordship in the chair that the account produced is *ex facie* not an account falling under the terms of the second head of the agreement between the parties. It is a factorial account between the complainers and the son of the respondent. It is distinctly averred by the complainers that the account partly consists of "a great variety of miscellaneous charges and alleged payments, many of which ought to have been made, and which the complainers believe were made, by George Gardner, their agent and factor, out of moneys belonging to them." If that is true, the account will be cut down to a very large extent. It will be necessary for the respondent to instruct the Lord Ordinary that the account falls within the second head of the agreement before he can have the interdict recalled.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming-note for the complainers against Lord Rutherfurd Clark's interlocutor, dated 1st November 1876, Recal the interlocutor, and remit to the Lord Ordinary in the Bill Chamber to pass the note and continue the interim interdict without caution or consignation."

Counsel for Complainers — Lord Advocate (Watson)—Balfour—J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondent — Kinnear — Asher. Agents—Adamson & Gulland, W.S.

Tuesday, December 5.

FIRST DIVISION.

[Lord Shand, Ordinary.

THE LORD ADVOCATE *v.* EARL OF ZETLAND.

(Before seven Judges.)

Succession—Succession Duty Act (16 *and* 17 *Vict. cap.* 51), *sec.* 2—*Predecessor—Disposition—Devolution by Law—Entail.*

An entailed estate, destined to A "in liferent, and to the heirs-male procreated or to be procreated of his body in fee," passed in terms of the destination to B, who was served as nearest heir-male of tailzie and provision to C, his uncle, the immediately preceding substitute. *Held* (by a Court of seven Judges) that in the sense of the Succession Duty Act, B took not by disposition but by "devolution of law; that accordingly C, and not A, was his predecessor, and that he was therefore liable to pay a duty of three per cent.

In the succession to an entailed estate, where a class (*e.g.*, of heirs-male) is called, and it is left to the law to determine who is the person to take in the event of a death amongst the class, the transmission of the estate is, for the purposes of the Succession Duty Act, a "devolution by law."

By deed of entail, dated 25th May 1768, Sir Lawrence Dundas, of Kerse, Bart., destined certain lands to his son Thomas Dundas, "in liferent, for his liferent use only during all the days of his natural life after my death, and to the heirs-male lawfully procreated or to be procreated of his body in fee," whom failing to certain other substituted heirs in their order as specified in the deed. On the death of Sir Lawrence Dundas in 1781, the said Thomas Dundas, afterwards Lord Dundas, succeeded to the estates under the destination to him in liferent. In 1813 he disentailed portions of the estates in virtue of a Private Act. Under that Act other lands of equivalent value were entailed, the destination in the deed of entail being exactly similar to that in the first deed —"To and in favour of myself in liferent, for my liferent use only, during all the days of my natural life, and to the heirs-male lawfully procreated or to be procreated of my body in fee," whom failing to the same series of substituted heirs as in the above mentioned entail by Sir Lawrence Dundas.

On the death of Thomas Lord Dundas in 1820 he was succeeded by his eldest son Lawrence First Earl of Zetland, who died in 1839, succeeded again by his eldest son Thomas Second Earl of Zetland. He was succeeded by his nephew the present Earl of Zetland, who was duly served and retoured as nearest heir-male of tailzie and provision to his uncle. Certain of the lands and estates were held by him under an arrangement by which they had been disentailed partly in 1852

and partly in 1865, while other lands were held under contracts of excambion, having been exchanged for parts of the disentailed lands. The disentails were however carried through with the consent of the next heirs entitled to succeed, under deeds of obligation by the late Earl by which he undertook not to alter the order of succession to these lands, as prescribed by the deeds of entail of 1768 and 1813, under which the same were held, without the special consent of the nearest heir, and that in the event of any part of the lands being sold, the price should be applied towards payment of entailer's or other debts affecting the fee of the lands.

This was a Special Case between the Lord Advocate and the Earl of Zetland, and the questions submitted for the opinion and judgment of the Court, arising upon sections 2 and 10 of the Succession Duty Act (16 and 17 Vict. cap. 51) were—"Who is to be regarded, in the sense of the Succession Duty Act, as the predecessor of the said Lawrence Dundas, the present Earl of Zetland—(1) In regard to the lands and estates held under the entails of 1768 and 1813? (2) In regard to the lands and estates held under the disentails of 1852 and 1865? (3) In regard to the lands received in excambion for portions of the disentailed lands?"

The parties were agreed that the lands held under the disentails, and the lands acquired by excambion for part of those disentailed, were to be regarded for the purposes of the case as held under the destinations in the original entails.

The Lord Advocate mantained that the property held under the entails, and also the property held under the disentails or received in excambion for disentailed lands, were taken by the Earl of Zetland by devolution from his uncle the last Earl of Zetland, who was his predecessor, and that, being a descendant of a brother of the predecessor, he was liable to pay succession duty at the rate of three per cent.

The Earl of Zetland maintained that the said estates were not derived by him from the last Earl as predecessor in the sense of the Succession Duty Act, but that the predecessors from whom they were derived were the makers of the two entails, both of whom were his lineal ancestors, and that he was consequently liable in succession duty only at the rate of one per cent.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 17*th July* 1876.—Having considered the cause, Finds that the deceased Thomas Second Earl of Zetland, the heir of entail last in possession of the estates in question, is to be regarded in the sense of the Succession Duty Act as the predecessor of Lawrence Third and present Earl of Zetland in the whole lands and estates which are the subject of the Special Case, and that the rate of duty to which the said Lawrence Earl of Zetland is liable in respect of his succession to the said lands and estates is three per cent., and decerns: Finds the said Lawrence Earl of Zetland liable in expenses, and remits the account thereof, when lodged, to the Auditor for taxation and to report.

"*Note* . . . . The question between the parties is Whether, in the sense of the Succession Duty Act, Thomas Second Earl of Zetland, the last heir of entail in possession of the estates, is the predecessor of the present Earl—as maintained by the Crown—or whether the entailers, Sir Lawrence Dundas, the maker of the deed of 1768, and Thomas Lord Dundas, the maker of the deed of 1813, are the predecessors of the present Earl? The contention of the present Earl practically resolves into this, that the maker of the entail of 1768 was his predecessor in the estates in the sense of the Act, for, as already noticed, the entail of 1813 (like the other proceedings above referred to) was executed under an obligation originally imposed by the deed of 1768.

"If the entailer had been a stranger in blood to the present Earl, it would have been the interest of the present Earl to maintain the view now urged on behalf of the Crown, viz., that his predecessor in the estate was his uncle the last heir, for in that case, if the view which he now maintains were sound, it would follow that he was liable in duty at the rate of ten per cent. in place of three per cent.—the amount claimed by the Crown, being the succession duty payable by the descendant of a brother of the predecessor. It happens however in this case that, as an heir-male of the body of Thomas Lord Dundas, the present Earl is also a lineal descendant of the entailer, and he maintains that the entailer is truly his predecessor in the estate, and, being his lineal ancestor, that he is liable only at the rate of one per cent on the succession.

"It has been repeatedly said in the cases of this kind that have occurred that the answer to the question, Who is the predecessor of the person who has succeeded? depends on the answer to be given to the other question, Has the person who has succeeded obtained his right by disposition or by devolution, within the meaning of the Succession Duty Act? If the present Earl has derived his right by disposition, the entailer was his predecessor. If he has derived his right by devolution, then his predecessor was his uncle, the last heir in possession.

"I am of opinion, both on principle and on the authorities, that the latter of these views is the sound one. The whole subject has undergone a very full discussion in the case of *Lord Saltoun*, 16th December 1858, 21 D. 124, and April 1860 (House of Lords), 3 Macq. 659; and *Gordon*, 19th July 1872, 10 Macph. 1015. In the former of these cases it was expressly decided that an heir under a deed of entail, called by name and taking up the estate as a new *stirps*, or the first of a new series of heirs after the exhaustion of a previous branch or branches of the destination, takes the estate—laying out of view the particular mode of making up his title in accordance with Scotch law—by disposition or conveyance directly to himself, and not by devolution, and that consequently the entailer is to be regarded as his predecessor. The opinions of the minority of the Judges in this Court, which ultimately received effect, as well as those of the learned Judges in the Court of Appeal, in almost every instance contain expressions shewing that, while the head of a new branch in the destination called *nominatim* takes from the entailer as his predecessor, his heirs, taking as such under that description, ought severally to be regarded as taking by devolution, not by disposition—the result being that the last heir in possession, by whose death the estate devolves, and not the entailer, is in that case the

predecessor. In the succeeding case of *Gordon* that view was adopted. The case is a direct decision to that effect. The result is, that in the great majority of instances in the case of entailed estates the predecessor of the succeeding heir in the sense of the Act is the immediately preceding possessor, to whom the succeeding heir stands in relationship by blood, more or less near, and the succeeding heir has thus the advantage of this relationship in fixing the rate of succession duty.

"The counsel for Lord Zetland did not dispute that the case of *Gordon* was decisive of the present question, but stated that it was intended to submit the point for reconsideration. Of course this can only be done before the Court of Review. I can only give effect, as I have done, to the rule already laid down. But I may at the same time say, that even if the question were open I should entertain no difficulty in deciding this case in accordance with the view given effect to in the case of *Gordon*.

"If it be suggested that the distinction drawn in the statute between succession by disposition and by devolution is intended to mark the distinction between intestate succession and succession by deed of any kind, and that consequently every one who takes a beneficial interest by deed throughout any course of succession, however long, takes by disposition from the granter as his predecessor, the answer is, this view has been practically negatived after full consideration by the Court of last resort in the case of *Lord Saltoun* ; for in that case the ground of decision was, not that Lord Saltoun took the estate as an heir called by the deed, but that there was a direct conveyance to him *nominatim* as the head of a new branch of the destination. The idea that the line was drawn between intestate succession on the one hand and succession anyhow by virtue of a deed, received no countenance from any of the Judges, and would have been subversive of the rule which has been applied to succession in entailed estates in England, where the donee or remainder-man who takes by purchase is the successor, and the entailer the predecessor; while 'with respect to the heirs of the body, the donee in tail is the ancestor, and the heir of the body is the successor' (*per* Lord Wensleydale, 3 Macq. 685.

"If, then, a narrower rule is to be adopted, it appears to me that the rule indicated throughout most of the opinions in the case of *Lord Saltoun*, and which received effect in the case of *Gordon*, is the only practical one, and is probably the best fitted to do justice in the great majority of cases, leading generally to liability for a smaller succession duty where the immediately preceding possessor of an estate is an ancestor or near relative, than in the case where he was a stranger to the person next succeeding. It was suggested in the argument that where a son immediately followed his father in the possession of an entailed estate, the Court should hold the father to have been the predecessor, but that if the degree of relationship was greater the heirs succeeding should be regarded as taking from the entailer. There appears to be no principle for this view. And even if it received effect the result would probably be, that though it happens that in this case Lord Zetland as a descendant of the entailer would benefit, in the great majority of cases it would be a misfortune for the heir succeeding that he should be held to take by disposition from the entailer—often a stranger in blood to him, and at least not a lineal ancestor. If it be assumed in the present case that the entailer was a stranger in blood to the persons called under the branch of the destination which still regulates the estate, then, according to the argument submitted for Lord Zetland, each succeeding heir would have to pay ten per cent. as succession duty. The only exception suggested was that of a son following his father in the estates, in which case it was said the rule ought to be different. I am unable to see any principle for the difference, for a person directly succeeding his uncle has in the general case the same reason for claiming that his uncle should be regarded as his predecessor, so as to limit the duty to three per cent. instead of ten, where the entailer is a stranger to him, as a son succeeding to his father would have in maintaining that his father was his predecessor, so as to limit the duty to one per cent. in similar circumstances. It appears to me that the practical and sound rule in the interpretation of the statute is that which has received effect by the judgments of the Court and the practice which has resulted, viz., that in a destination to a person named and his heirs, or in a series of similar substitutions, the head of each separate branch should be held to take by the disposition in his favour from the granter of the deed as his predecessor, while the others take by devolution, and have thus the benefit, in a question as to the succession duty, of the relationship which subsists between the person named and those called as his heirs."

The Earl of Zetland reclaimed, and in respect he admitted that the case of the *Lord Advocate* v. *Gordon*, decided by the Second Division of the Court, July 19, 1872, 10 Macph. 1015, was a direct authority against him, the cause was appointed to be argued "before the Judges of this Division with the assistance of the four Judges of the Second Division."

He argued—What was decided in *Lord Saltoun's* case was that *nominatim* substitutes took by "disposition," and not by "devolution of law." The head of a new *stirps* took by "disposition." So soon as a divergence to collaterals and their descendants occurred, a new *stirps* began. That was the position of Lord Zetland. 'Devolution by law" was applicable to a case where the same party took who would have taken *ab intestato*.

At advising—

Lord President—My Lords, when this reclaiming note came before us in the First Division on the 4th of November last, the counsel for the Earl of Zetland admitted that the judgment in the Second Division in the case of *Gordon* was directly adverse to the pleas he was about to maintain. But he intimated at the same time that the special case had been adjusted between Lord Zetland and the Lord Advocate for the purpose of obtaining the judgment of the Court of last resort on the question raised and decided in the case of *Gordon*, and that he was prepared to contend that the question had been determined by the Second Division on principles inconsistent with those adopted by the House of Lords in *Lord Saltoun's* case. In these circumstances, the Judges of the First Division thought it desirable, and consistent with practice in the like cases, to appoint a hearing before the Judges of both

Divisions, with a view to a deliberate reconsideration of the question before pronouncing the judgment to be carried to appeal. We have now heard a full and able argument on the question n all its bearings.

The facts of the case may be very shortly stated. In 1768 Sir Lawrence Dundas made an entail of certain lands in favour of "Thomas Dundas, my son, in liferent for his liferent use only during all the days of his natural life after my death, and to the heirs male procreated or to be procreated of his body in fee," whom failing to certain other substituted heirs. The entailer died in 1781, and his son Thomas, who was created Lord Dundas, succeeded to the liferent of the estate. He was empowered by a private Act of Parliament to disentail a portion of the entailed lands upon condition of entailing other lands of equivalent value. This power he exercised, and the lands substituted for the disentailed lands were settled by him by deed of entail in 1813, which destined the lands, in conformity with the previous entail, "to myself in liferent for my liferent use only during all the days of my natural life, and to the heirs-male lawfully procreated or to be procreated of my body," whom failing to the other heirs substitute called in the previous entail. On the death of Thomas Lord Dundas, in 1820, his son Lawrence, the first Earl of Zetland, entered into possession of the estate as full fiar under both the deeds of entail. The first Earl of Zetland dying in 1839, was succeeded by his son Thomas, the second Earl, who died without issue in 1873. The present Earl, being the eldest son of the immediate younger brother of the second Earl, was thus the nearest existing heir male of the body of Thomas Lord Dundas, the entailer's son, and as such was duly served and retoured as nearest heir male of tailzie and provision to his uncle, his immediate predecessor in the estate.

The question for decision is, whether under the operation of the Statute 16 and 17 Vict. c. 51, the present Earl's succession is to be taxed on the footing of his being the successor of the last Earl, his uncle, or of his being the successor of the entailer. If I were called upon to decide the question before us on scientific legal principles, I should adopt without qualification the opinion of my brother Lord Deas in *Lord Saltoun's* case. According to legal principle every substitute of tailzie takes the entailed estate as the heir of the immediately preceding substitute—no doubt as heir of provision, but not the less on that account as his heir in the proper legal acceptation of the term.

But scientific principles are in the present question displaced, to some extent at least, by statutory rule, and the statute which introduces the disturbing rule is intended to apply equally to the two different and somewhat inconsistent systems of succession to heritable property which prevail in England and Scotland respectively. Therefore, as Lord Chancellor Campbell says, the technicalities of both systems must be disregarded, and the language of the Legislature must be taken in its popular sense.

What, then, according to this canon of construction, does the Legislature mean when it distinguishes between a disposition of property by reason of which one person becomes beneficially entitled thereto on the death of another, and a devolution by law of such beneficial interest to one person on the death of another. In both cases there is a succession in the statutory sense; in the former case the predecessor is the settler or disponer; in the latter the predecessor is the ancestor of the person taking the succession.

The inquiry is, Who is the predecessor of the present Earl of Zetland? But the answer depends on the solution of another question—Does the present Earl take the estate by disposition or by devolution of law? If he takes it by force of the disposition of the entailer, contained in the deed of entail, then the entailer is his predecessor. If he takes it by devolution of law from the heir last vest and seized as of fee in the entailed lands, then his uncle, the last proprietor, is his predecessor. It appears to me that the judgment in the House of Lords in *Lord Saltoun's* case has established in the construction and application of the statute a distinction between two classes of heirs of entail—between an heir who succeeds by virtue of his being individually named or circumstantially described in the entail, and who may therefore be fairly said to take *per formam doni*, and one who takes as one of a class of heirs described, *exempli gratia* as the heirs of the body of one individually named or circumstantially described. Now, it is quite clear that the present Earl of Zetland does not belong to the former category, and it is equally clear, I think, that he does belong to the latter. But it is contended that a further distinction may be introduced consistently with the judgment and with the rule of the statute among heirs who take, not because they are individually named or described, but because they belong to a class of heirs who are appointed to succeed one generation after another until the class is exhausted. The distinction sought to be introduced is between an heir who succeeds by force of the entail, who would not succeed to the last proprietor according to the law of intestate succession, and an heir who, being the heir entitled under the destination, is also the heir *alioqui successurus*.

I confess I do not see how this distinction can avail Lord Zetland, for in point of fact he combines the character of heir of tailzie and that of heir of line of his uncle the last Earl. But I think it right to say that I am not prepared to admit the proposed distinction, and agree in the opinions of the Judges of the Second Division who decided the case of *Gordon*, in which the party succeeding was an heir-male of the body of a nominatim substitute, but was not the heir-of-line of the last heir in possession. I think that when upon the death of a nominatim substitute the estate devolves on the heirs-male of his body in their order, the succession is, according to the true construction of the statute, a devolution by law. The entailer has selected the class he wishes to favour—heirs-male of the body—but he has left it to the law to say what shall be the order of succession of the individuals within that class. The law on the death of the eldest son of the nominatim substitute prescribes that the son of that eldest son, and not his immediate younger brother, shall take as the next heir-male of the body of the nominatim substitute. But if the law of succession were altered, and an immediate younger brother were preferred to the eldest son of a deceased proprietor, then a destination to heirs-male of the body would suffer a corresponding change of meaning. In short, the will of the entailer when he calls a class of

heirs-male of the body is, that the law shall determine within that class who is the person to take on every occasion on which a death occurs among the class, causing a devolution of the estate; and from this it seems to follow that on every such occasion the transmission of the estate from the dead to the living is a devolution by law. For the same reasons I reject another suggestion made in the course of the argument, that a devolution by law may be held to occur so long only as the descent of the estate among the heirs-male of the body is direct from father to son, but not when it diverges to collaterals and their descendants, as in the present case of succession by a nephew to an uncle. If the above reasoning be sound, this is a merely fanciful distinction not contemplated by the statute, and plainly not justified by that popular sense of the words used, which it has been settled affords the true rule of construction.

Lastly, it was contended that succession among a class of heirs prescribed by the entailer cannot be devolution by law unless the class of heirs prescribed by the entailer be the same class of heirs to whom the estate would devolve in intestate succession. If this argument is to have any meaning or consistency, it must go the length of maintaining that the order of succession among a class of heirs of entail can never be by devolution of law unless the destination in the tailzie be to the heirs of line, or the heirs at law, or the heirs whatsoever of the entailer, or of some person named or circumstantially described, so that the order of intestate succession may come into operation as soon as the entailer or party first named or described fails. But it is well settled in many cases, and notably in the cases of *Leny of Dalswinton*, June 28, 1860, 22 D. 1272, and of *Gordon of Cluny*, March 2, 1866, 4 Macph. 501, that as soon as the estate, in terms of the destination, devolves on heirs of line or heirs at law, or heirs whatsoever, there is an end of the tailzie, and such heirs are not heirs of entail. The success of this argument, therefore, would lead to the conclusion that there can never be within the meaning of the statute a devolution by law from one heir of entail to another, which I apprehend to be quite inconsistent with the principle of the judgment in *Lord Saltoun's* case.

After the fullest consideration, therefore, I have found no reason to doubt the soundness of the judgment pronounced in the case of *Gordon*.

Lord Justice-Clerk—The question presented in this case is precisely similar to that which we had to consider in the case of *Gordon* in the Second Division; and as in that case I had occasion to express pretty fully the views which I entertain on the subjects that have been discussed before us, I think it quite unnecessary, especially after the very clear and satisfactory opinion that we have just listened to, to enter upon the subject at all. The opinion which I had formed at that time, and which I still retain, is that the doctrine of *Lord Saltoun's* case substantially, if not identically, runs along the same lines as the English doctrine of purchase and descent, and that in construing this statute we shall not go far wrong if in considering the signification of the terms devolution of law and disposition we follow the analogy which I think has been provided for our guidance. The result of that, as I expressed in my opinion in the case of *Gordon*, is that wherever a party takes under an entail according to the forms of the law of Scotland, either first as the institute, or secondly as a nominatim substitute, or thirdly as the head of a new or fresh stirps or class of heirs, he is held to take by *gift or disposition*; on the other hand, that any one who takes simply as the member of a stirps or class takes by devolution of law.

In the present case that rule is quite sufficiently applied by coming to the result that your Lordship has expressed, and thus every one within the class, whether the succession go directly in the line of descent among the members of the class or deviate, it may be to collaterals, or even ascend to a former generation, still all these constitute the stirps, and will take by descent, by inheritance, by devolution of law. I do not think it necessary to say more. I had intended to make one remark upon Mr Balfour's most ingenious argument, that this rule is only applicable as long as the line of succession continues in the line of descent, and that even within a stirps where a succession goes to a brother or an uncle it ceases to be inheritance and becomes disposition. But your Lordship has already expressed what I think is a very sufficient answer to that view. On the whole matter I remain of the opinion which I expressed in the case of *Gordon*.

Lord Deas—I am entirely of the opinion which has been expressed by your Lordship in the chair. I am very glad that, apparently mainly by the analogy of the law of treason dealt with in the correspondence between Lord Hardwicke and Lord Kames, the House of Lords found themselves in a position to arrive at the result which they did in the case of *Lord Saltoun;* because I think it is a much more reasonable and equitable result than that to which the majority here held ourselves compelled to come, going upon the feudal law as administered in the case of heritable rights in Scotland.

Lord Neaves—I am of the same opinion, upon the grounds stated by your Lordship. This matter was fully considered in the case of *Saltoun* here and in the House of Lords, as well as in the case of *Gordon*; and I think the judgment in *Saltoun's* case, which ruled the case of *Gordon*, ought also to rule the present case. A stirps once begun, the party takes by devolution of law from his predecessor. There is a good deal in the remark which has been made that there is a certain equity in the different amount of tax imposed in the one case and the other. A person succeeding to a father or uncle has fair reason to look forward to the estate becoming his; but the matter is different in the case of a comparative stranger. The question, however, is what is the interpretation of the statute; and I agree in the view stated by your Lordship on that subject.

Lord Ormidale—I pronounced the judgment as Lord Ordinary in the case of *Gordon*, which was afterwards affirmed by the Second Division of the Court. In the note to my judgment in that case I explained pretty fully the grounds on which I proceeded, and I also explained that these were in conformity as I thought with the principles given effect to in the case of *Saltoun*. I have not heard anything in the argument addressed to us here to induce me to think that I went wrong in the case

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-