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.

In Mrs Mabon's trust-settlement, dated 31st August 1832, she, with the consent of her husband, conveyed to certain persons named, "as trustees for the ends, uses, and purposes after mentioned, All and sundry lands and heritages, of whatever kind or denomination, as also my whole moveable or personal means and estate," . . . . with full power to my said 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 after named, as they may think proper or be advised." The first purpose of the trust was for payment of debts, &c.; the second made provision for her husband; and the third for her eldest son. The fourth purpose was as follows:—"I hereby, with consent aforesaid, direct and appoint my said trustees or trustee to hold the whole residue and remainder of my said whole subjects and estate in trust for my children, David Mabon, John Mabon, Thomas Mabon, William Mabon, Agnes Mabon, and Charles Mabon, equally, and in case of any of my said children dying before majority or marriage, then the share of such child or children predeceasing shall accrue to the survivors equally, share and share alike; declaring always, as it is hereby expressly provided and declared, that the said several provisions shall be strictly alimentary, and shall not be assignable or liable to be attached in any way by any of the creditors of my said husband and children respectively."

The truster died in 1837, but her trust-disposition, though registered upon 24th July 1845, was lost sight of till 1871. Meantime, in 1861, Mr Thomas Neilson, house factor in Glasgow, had been appointed by the Court judicial factor upon the estate, and had administered it until the recovery of the lost deed, when his appointment was recalled, but on the failure of trustees to accept he was reappointed. He died in 1874, and Mr Auld was then appointed factor. The estate committed to Mr Auld's hands consisted of (1) a sum of £4739, 6s. 9d., the surrogatum of certain heritable subjects near Drygate Street, Glasgow, which had formed part of the trust-estate, but had, under statutory powers of compulsory purchase, been acquired by the trustees under the "Glasgow Improvements Act 1866;" and (2) of £2395, 14s. 1d., the surrogatum for certain other heritable subjects which had originally formed the remaining part of the trust-estate, but had, under statutory powers of compulsory purchase, been acquired by the Prison Board of the Northern District of the county of Lanark. Both these sums were paid in August 1874. There were certain debts affecting them, which it is unnecessary to specify. The testatrix was survived by seven children, including the eldest, for whom special provision had been made, but three only—Charles, Thomas, and William—survived at the date of the action, and each claimed one-sixth of the estate. The daughter of another, who died in 1856, claimed a fourth one-sixth. The children of another, named John, viz., James Mabon, Mrs Agnes Mabon or Anderson, and William Mabon, claimed another sixth between them, or, in the event of the succession being heritable, James Mabon claimed the whole. The sixth child, named Agnes, married, and died in 1850, leaving several children, who claimed the remainder between them, or, if the succession were found to be heritable, one of them, Dr Cowie, claimed the whole.

The judicial factor claimed to retain three sixth shares of the estate for Charles, Thomas, and William, paying to them their annual income as an alimentary provision, in terms of the trust-disposition.

The Lord Ordinary pronounced an interlocutor, in which, after certain findings as matter of fact, he found "as matters of law—(1) that the taking by the public bodies above specified was not a sale and disposal of the trust-estate, and conversion of the same into cash, in the exercise of the powers conferred upon the trustees, and that the character of the truster's succession as heritable or moveable must be determined as it would have been if the trust-estate had still consisted of the heritages left by the truster: and (2) that the other facts being as above set forth, the trust-estate must be regarded and dealt with as heritable and not as moveable succession. In the second place, and as regards the right of the truster's children, among whom the residue and remainder of the trust-estate was to be apportioned and divided, or for whom it was to be held by the trustees—Finds that, according to the sound interpretation of the trust-deed, each of these beneficiaries on attaining majority or being married acquired a vested right in his or her share, and was entitled to delivery thereof, free from any burden or condition by which the free use or disposal of the same would or might be affected, so soon thereafter as in the circumstances of the trust this could be conveniently accomplished. In the third place, appoints the cause to be enrolled," &c.

Mrs Anderson and William Mabon reclaimed, and argued—Under the clause in the deed there was constructive conversion. There could be no apportionment of the estate which was not also a division. To give *pro indiviso* shares would not fulfil the direction to apportion and divide. There was therefore an order or direction to convert. It was here indispensable to sell according to the truster's view. A compulsory sale did not take away the discretion of the trustees. It forced upon them the consideration of the mode of dividing the estate. If the fund was not thereby to be made moveable, it should be reinvested in heritable property.

Authorities—*Buchanan* v. *Angus*, March 13, 1860, 22 D. 979, H. of L. 4 Macq. 374; *Weir* v. *Lord Advocate*, June 22, 1865, 3 Macph. 1006; *Fotheringham's Trs.* v. *Paterson*, July 2, 1873, 11 Macph. 848; *Boag* v. *Walkinshaw*, June 27, 1872, 10 Macph. 872; *Lord Advocate* v. *Blackburn's Trs.*, Nov. 27, 1847, 10 D. 166.

Argued for Charles Mabon—There was no conversion if there was merely an option or discretion in the trustees. To make conversion there must be an absolute and unconditional trust for sale. The clause here presented an alternative on the face of it. There was no other provision in the deed which conflicted with that reading. The Court had held that an estate consisting of heritable bonds must be sold to be divided. But this estate was different. The words "as they may think proper" gave a discretion to the trus-

tees to distribute equitably in any case; compulsory conversion did not alter the truster's intention.

Argued for the judicial factor — The truster had directed him to hold, and he was thereby prevented from paying over.

Authorities—*Lady Massy* v. *Cunninghame*, Dec. 5, 1872, 11 Macph. 173: *Gardner* v. *Ogilvie*, Nov. 25, 1857, 20 D. 105; *Allan* v. *Allan's Trs.*, Dec. 12, 1872, 11 Macph. 216; *Heron* v. *Espie*, June 3, 1856, 18 D. 917.

At advising—

Lord President—In this case the question is, How is the succession of Mrs Mabon to be regulated in terms of the trust-disposition? She left her estate to her six children, and directed her trustees to hold "in trust, for my children, David Mabon, John Mabon, Thomas Mabon, William Mabon, Agnes Mabon, and Charles Mabon, equally, and in case of any of my said children dying before majority or marriage, then the share of such child or children predeceasing shall accrue to the survivors equally, share and share alike, declaring always, as it is hereby expressly provided and declared, that the said several provisions shall be strictly alimentary, and shall not be assignable or liable to be attached in any way by any of the creditors of my said husband and children respectively." This is the operative part of the trust-disposition; it is the only part of it that expresses the will of the testatrix as to the division among her children. There is a clause in a former part of the deed which has been said to do so, but I shall deal with that presently. The estate consisted entirely of heritable property at the date of her death, and till a recent period continued in the same form. No conversion of it was made by either of the factors, who could not have done so without obtaining express authority from this Court.

The Lord Ordinary has found that the trust-estate must be regarded as heritable, and not as moveable succession, and "that, according to the sound interpretation of the trust-deed, each of these beneficiaries on attaining majority or being married acquired a vested right in his or her share, and was entitled to delivery thereof free from any burden or condition by which the free use or disposal of the same would or might be affected, so soon thereafter as, in the circumstances of the trust, this could be conveniently accomplished."

Now, upon the matters to which these findings refer, three points of difficulty have arisen and have been discussed. First, it has been maintained by the judicial factor that he is bound to hold these shares and not to divide them, that the provisions of the trust-deed may receive effect; that he must reserve the capital during the lifetime of the children, and pay the annual income to them respectively as an alimentary provision. That I think is inadmissible under the trust-deed. I think that the plain meaning of its provision is that the trustees, so long as they held the shares, were to consider them as alimentary, but that so soon as they vested in the children they should be entitled to pay over the capital sum to them. In the second place, it cannot in my opinion be contended that no share vested till all the children had either attained majority or been married. It is of very little consequence whether that was the meaning or not, for the period at which that happened is long past, but I may say that I agree with the Lord ordinary on that point too.

Then the only question that really remains is, What was the character of the succession? Now, the interest of the parties in this question is a good deal limited. As regards three of the children they are alive, and are each entitled to one-sixth of the estate, whatever its character may be. Another, again, died in 1856, leaving only one child. That child will take his share whether the estate be heritable or moveable. It is with regard to the families of John, who died in 1857 leaving three children, and of Agnes, who died in 1857 leaving five children, that the question does arise—Was this succession heritable or moveable? If it be heritable, one-sixth will fall to the eldest son of John and one-sixth to the eldest son of Agnes. If it be moveable, each sixth part will be divided among the families of John and Agnes.

Now the Lord Ordinary, it appears to me, has taken the right view here also.

The clause I read to your Lordships from the deed does not suggest any intention to convert the estate before it is assigned to the children. The only other part that is said to suggest this is that occurring immediately after the conveyance to the trustees. She conveys to them "as trustees, for the ends, uses, and purposes after mentioned, all and sundry lands and heritages, of whatever kind or denomination, as also my whole moveable or personal means and estate," "with full power to my said 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." There there is undoubtedly a power of sale conferred on them, and as a concomitant of that power a power of borrowing money on the security of the property. One easily understands why a testator having nothing but real estate such as this should give a power of borrowing. It would be very inconvenient in many cases that might arise in the management of the estate if no such provision had been made. For instance, if the testatrix had left debts behind her which must be discharged so as to extricate the trust, the subjects would have to be sold in part, or money borrowed on their security.

Then the other alternative is put before them. If they do not sell they are to "apportion and divide the same among my children after named, as they think proper or be advised." It is quite plain to me what was in the mind of the testatrix here. The heritable property shall be apportioned or divided as the trustees may think proper or be advised. It has been maintained that the only way of dividing it was to find as many subjects all of equal value as there are parties, and give one to each party. But that contention is quite a false and mistaken one. If the trustees were to proceed to a division they would find many better ways than that. They might frame a scheme of division, or they might convey the whole estate *pro indiviso* to the whole parties. But I find words of very great importance in the deed in solving this difficulty. The trustees are to divide the estate "as they may think proper or be advised." That cannot be meant to affect the amount of the share that each child is to receive, for afterwards it is provided that they are to have equal shares. It must

therefore mean the manner of division. I think then it is left to the trustees to apportion and divide the estate *in forma specifica*. How this is to be done is left to their discretion.

The question that arises is this, Is it a natural consequence of these provisions that the estate should be converted into money? or is it not rather merely that the trustees shall have power in a case of difficulty occurring in the administration of the estate to sell? It is quite consistent with the authorities that the existence of a power of sale will not affect the nature of the estate if no sale has taken place and the administration has been in conformity with the expressed wish of the testator. I am of opinion, then, that each child acquired as they came of age a *jus crediti* in a heritable estate.

Lord Deas—In this case the whole estate consisted of heritable subjects. I am of opinion that when that is so the succession must be ruled by the law applicable to heritable property, unless the party objecting can make out either—first, that it is obvious that the testator meant it to be converted; or secondly, that the purposes of the trust are inextricable without such a conversion. Now there is nothing here to show any intention of conversion except the power of sale given to the trustees. That is a mere discretionary power, and it is quite settled that unless that power is exercised there is no conversion. But it is maintained that unless that is effected the purposes of the trust cannot be carried into effect. I am not satisfied of that. The power of borrowing is a very peculiar provision. I am disposed to think that the trustees might have borrowed money and used it to equalise the shares of the children, but if that had not been possible I am disposed to think that the trustees may convey to the parties *pro indiviso* as your Lordship suggested. The result is very much the same as if they had borrowed money to equalise the shares, for any one of the parties may then insist on a division, in which their rights will be equalised in the same way.

As regards the clause as to the shares being alimentary, I think that that has no effect in determining this question. She meant that the whole capital and interest should be alimentary. It does not create an alimentary liferent. In no view has that any effect.

Lord President—I forgot to notice the conversion that has actually taken place. As the compulsory powers under which that was done were exercised long subsequent to the date of vesting that fact can have no effect.

Lord Deas—I agree with your Lordship in that opinion.

Lord Mure—The only question is—Is the estate heritable or moveable? There was merely a power of sale given to the trustees; Was it indispensable for the proper management of the estate that it should be sold? It is the result of the opinions in *Buchanan* v. *Angus*, and in other cases, both here and in the House of Lords, that unless such conversion is indispensable we cannot hold that the character of the succession is moveable. Now, I concur with your Lordships in thinking it was not by any means necessary for the administration of the trust.

The Court adhered.

Counsel for Mrs Anderson and William Mabon—M'Laren—Lorimer. Agent—D. R. Grubb, Solicitor.

Counsel for Charles Mabon—Lord-Advocate (Watson)—Scott. Agent—George Begg, S.S.C.

Counsel for Dr Cowie and Judicial Factor—Kinnear—Mackintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, December 8.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

WEST AND OTHERS *v.* THE ABERDEEN HARBOUR COMMISSIONERS.

River—Salmon Fishings—Obstruction—Upper and Lower Heritors.

By virtue of an Act of Parliament, Harbour Commissioners executed certain operations on the bed of a river, in consequence of which fishing on one bank was rendered impossible. This state of matters continued for four years. The Commissioners having afterwards acquired right to the fishings, proceeded to make alterations on the bank so as to be able to resume fishing. In the course of their operations the depth of the river was considerably altered. In an action for interdict by the upper heritors, *held* that the operations complained of were not obstructions in the legal sense of the term.

Observations (*per* Lord President) on the right of an inferior heritor to improve his fishings.

This was a note of suspension and interdict for Lieut.-Colonel West and others, proprietors of salmon-fishings in the river Dee, against the Aberdeen Harbour Commissioners. The following narrative of the facts of the case is taken from the note of the Lord Ordinary:—

The complainers are proprietors of salmon-fishings in the river Dee, the one called "The Pot" and the other "The Fords," which extend for a considerable distance on both sides of the river above the Wellington Suspension Bridge, the "Pot" being immediately above the bridge, and the "Fords" immediately above the "Pot." The respondents, the Aberdeen Harbour Commissioners, incorporated by sundry Acts of Parliament, are proprietors of the Midchingle fishings on the Dee, which begin at a point immediately below the "Pot" and extend downwards for a considerable distance on both sides of the river. The Dee is a tidal river, and the tide flows to a point considerably above the "Fords" fishings. The complainers object to certain operations by the respondents on the north or left bank of the river, in the Midchingle water, as being prejudicial to the "Pot" and the "Fords" fisheries. The respondents deny the right of the complainers to interfere with these operations unless a case of injury to the upper fishings by illegal operations can be established, and they maintain that the operations are neither illegal or injurious. Hence the present application for interdict.