

son to the father. They are, in this view, part of the assets of the father's moveable estate. They are debts for which the father's executor fell to prosecute Mr Thomas Nisbet, if he had funds sufficient to answer the claim. The Lord Ordinary can perceive no legal ground on which they are to be dealt with differently from other debts due to the estate; that is to say, they are to be comprehended in the general fund, which is divisible into legitim and dead's part; and after the legitim is estimated on this footing, are to be imputed against any claim by Thomas Nisbet for legitim, as payments by retention or compensation. The result will be to place Thomas Nisbet in the same position as if he had paid up the whole amount to the father's estate, and then drew back the half, or whatever else he is entitled to, in name of legitim. The Lord Ordinary conceives that these advances must be held either donations or debts. He cannot perceive any satisfactory ground for giving to them a nondescript character, which is neither one nor other. If they are donations, it may eventually be proper that they be wholly thrown out of view in estimating Thomas Nisbet's claim of legitim. If they are proper debts by Thomas Nisbet to his father, they must be brought into computation with regard to his father's moveable succession, like all other debts whatever due to the estate."

The opposing claimants reclaimed.

WATSON and KINNEAR for the *Curator bonis*.

BALFOUR for Assignees of Major Nisbet.

GIFFORD and LEE for Miss Nisbet.

The Court recalled the Lord Ordinary's interlocutor, in so far as it found that the sums in question were ordinary debts, and held that, as regards one portion of the advances, amounting to £2000, for which Colonel Nisbet and Major Nisbet had granted a joint-bond to certain parties, it was unnecessary to decide whether the same was a debt or not, as that question would be decided in another action now pending; but that, as regards the remainder of the advances, the same fell to be dealt with as advances towards legitim, and fell to be deducted from the legitim due to Major Thomas Nisbet, and that not merely in a question of *collatio inter liberos*, but in a question with the general disponees.

The following was the opinion of LORD NEAVES, who, after stating the facts, said:—I am not prepared to find that such advances are proper debts, as found by the Lord Ordinary. I have always regarded the case of *Macdougall* as an important authority, indicating that advances of this kind are not presumed to be proper loans, but must be shown to be so by some speciality sufficient to raise that presumption. I think it contrary to natural probability that a father, when he has advanced a sum to launch his son in a profession which may not for years yield any return, is entitled the very next day or year to demand repayment with legal interest, or to transmit such a right to his executors or creditors. Such a result might operate most cruelly, and might make the son's position far worse than if he had been told at once to earn his bread by daily labour. The presumption against debt is, I think, all the stronger, if there is a claim of legitim or other legal claim to which it may be reasonable to impute the advances when the claim becomes exigible, but not absolutely, or at all events so as to put them on the footing of ordinary debts. There is no doubt that the advances in question would need to be collated in a direct competition between several children claiming their legitim. But the

question is whether this equally holds where all the children accept of conventional provisions instead of legitim. This point must be met by a *distinguo*. If the legitim is satisfied in the father's lifetime, the discharge would have inured to the benefit of the other children, as if the children thus paid off were naturally dead. But if the father dies without a discharge of the legitim, the legitim vests in all parties at once by the father's death, and no subsequent arrangement or settlement can affect the rights of individual children. A non-accepting child cannot get more than he would if all of them were ranked. He cannot, it is admitted, get a larger aliquot share. Why should he get a larger share in any respect? The lapsing shares go to the general donee, who pays them off by conventional provisions, which it must be presumed are an equivalent, or more than an equivalent, for the legitim discharge. But what is thus given must be held equal to the whole legitim given up, otherwise the surrender would not be made; and on that footing the general donee ought to be allowed to recoup himself in settling with the non-discharging child, unless we hold, what no one has suggested, that the accepting child, besides getting his conventional provision, has a claim upon the non-accepting child for which that child must have paid back.

LORD COWAN and LORD BENHOLME concurred.

The LORD JUSTICE-CLERK was absent.

Agents for *Curator Bonis*—J. & F. Anderson, W.S.

Agent for Assignees of Major Nisbet—H. J. Rollo, W.S.

Agents for Miss Nisbet—Morton, Whitehead, & Greig, W.S.

Wednesday, March 11.

## FIRST DIVISION.

ZOLLER, PETITIONER.

*Trust—Assumption of Trustees—Lapsed Trust—30 and 31 Vict., c. 97.* The 12th section of the Administration of Trusts Act, applies to the case of a lapsed trust.

The 12th section of the Administration of Trusts Act, 30 and 31 Vict., c. 97, provides that in cases where trustees cannot be assumed under any trust-deed, or where any sole acting trustee has become insane or incapable of acting by reason of physical or mental disability, the Court may appoint a trustee or trustees under the trust-deed.

The Court held that this section of the Act applied to the case of a lapsed trust, where the last surviving trustee had died without having assumed any new trustees.

A. C. LAWRIE for Petitioner.

Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Thursday, March 12.

HAMILTON & CO., PETITIONER.

(*Ante*, p. 265.)

*Appeal—House of Lords—Interlocutory judgments—6 Geo. IV., c. 120.* Leave to appeal against an interlocutor repelling certain pleas as preliminary, but reserving their effect to be considered along with the merits, *refused*. *Opin-*