uendo must be reasonable. The pursuer is not entitled to go to the jury with an unreasonable construction of language. I do not think the pursuer puts a reasonable construction on the words here. It is alleged that the defender said he would probably have the pursuer's premises searched. Nothing more than that. I don't think that can reasonably be held to amount to an allegation that in point of fact he had adultered bread or flour in his premises. There was some probability that he might have; but that was all. Another difficulty I have is, that suppose he said that tho flour was adulterated, that is nothing more than he had said already. If the bread was unwholesome, it was adulterated. If it is injurious bread, it must be adulterated. and that not in an innocent way, so far as the effects are concerned. There is nothing worse than that added in the inuendo. The inuendo contains nothing more about the knowledge or intention of the pursuer, or that he knowingly kept adulterated flour in his premises.

Lord Ardmillan—I agree with your Lordship in the chair; and in agreeing as to the 2d issue, I do so because the pursuer has stated that he reads the words *in mitiori sensu*, and not as meaning that the bread would actually cause the death of the consumer. None of these statements necessarily impute any dishonest act to the pursuer, they only imply that the bread was not wholesome, and it would be a strong thing to say that people were not entitled to express an opinion of that kind.

As to the 5th issue, if it had been in direct terms a charge of adulterating the bread. I think that would have been slander. The act of adulterating implies the introduction of some adulterating matter. In the other case, the cause of unwholesomeness might have been innocent on the part of the pursuer, but not so in the case of the adulteration. Now that charge is not made directly, but there is an inuendo which I think is sufficient to found the issue. The construction may not be altogether a reasonable one, but it is not so unreasonable as to make us reject it. The statement is made to imply a charge against the pursuer of having adulterated flour on his premises, and that is a relevant ground for damages.

Agent for Pursuer—D. Curror, S.S.C.

Agents for Defender—Hill, Reid, and Drummond, W.S.

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*Tuesday, March* 10.

## SECOND DIVISION.

### NISBET'S TRUSTEES *v.* NISBET AND OTHERS.

*Legitim — Advances to Son — Executry.* Circumstances in which *held* that advances made by a father to his son to purchase his commission and steps in the army were not debts due by the son to his father's executry estate, but were imputable to legitim.

This was a process of multiplepoinding brought by the trustees of the late Lieutenant-Colonel Nisbet of Mersington, in the county of Berwick, and the claimants were—(1) The *curator bonis* of Major Thomas Nisbet, the eldest son of the testator; (2) certain parties claiming as assignees of Major Thomas Nisbet, under an English deed of indenture; and (3) Miss Hannah Nisbet, the daughter of the testator, and sister of Major Thomas Nisbet. The questions raised were two—(1) Whether the *curator bonis* of Major Nisbet, on the one hand, or the English assignees, on the other, were entitled to the sums due to Major Thomas Nisbet under his father's settlement; (2) Whether certain sums advanced to Major Thomas Nisbet by his father for the purchase of his commission, and his various steps in the army afterwards, were to be dealt with as donations, or as debts, or as advances on account of legitim. The second of these two questions was that at present before the Court, and it arose between Miss Hannah Nisbet, on the one hand, and the two other claimants, on the other. It was maintained for Miss Hannah Nisbet that the advances in question, amounting in all, exclusive of interest, to £5940, 5s. 6d., were truly in the position of debts due to the executry. It was, on the contrary, maintained by those in right of Major Thomas Nisbet that the advances were donations, or, at least, were advances to account of legitim, which could not be demanded back except in a question amongst those entitled to legitim, and which, in the present case, could not be demanded back at all, because Major Thomas Nisbet was himself the only child of Colonel Nisbet claiming legitim.

The Lord Ordinary (Kinloch) pronounced the following interlocutor:—

"*Edinburgh, 19th June* 1867.—The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the process,—Finds that the right of Major Thomas Nisbet, as a child of Lieutenant-Colonel Robert Nisbet, to legitim out of his said father's moveable estate has never been discharged or lost, and remains in subsistence and validity: Finds that the said Thomas Nisbet received, during his father's lifetime, from his said father, the various sums of money set forth in the third article of the revised condescendence and claim for Miss Hannah Nisbet, No. 26 of Process: Finds that the said sums, with legal interest, constitute debts due to his father's moveable estate by the said Thomas Nisbet, to be comprehended in the amount of the fund divisible into legitim and dead's part; and, so far as they remain unpaid to the said estate by the said Thomas Nisbet, are imputable in payment of the legitim due to the said Thomas Nisbet from the same; and appoints the cause to be enrolled, in order to the application of these findings."

"*Note.*—Thomas Nisbet is by law entitled to legitim from his father's moveable estate. It is not contended that he has ever discharged the claim. He receives nothing by his father's *mortis causa* settlement, the acceptance of which might infer a discharge of legitim; and this being so, no declaration by the father, contained in that settlement, is effectual to disappoint the right.

"But it now stands admitted by the contending parties, that Thomas Nisbet received from his father during his lifetime, or had expended by his father on his behalf, certain sums, amounting, exclusive of interest, to £5940, 5s. 6d. Of these, £1081, 1s. 7d. were expended in the purchase of a cornetcy and outfit. An after sum of £650 was paid for the purpose of purchasing a lieutenancy. An additional sum of £4209, 3s. 11d. was advanced in connection with the purchase of a troop. Of this last-mentioned sum, £2000 were borrowed from Messrs George and John Humble of Kelso, on a joint bond by Thomas Nisbet and his father, and ultimately repaid by the latter.

"The question now raised is how these sums are to be dealt with in the question as to Thomas Nis-

bet's legitim. It is admitted that no express obligation of repayment was granted by Thomas Nisbet, other than is contained in the joint bond. On the other hand, there is no evidence, beyond what is implied in the nature of the case, that the advances were donations by the father. The statements in the father's *mortis causa* settlement are opposed to the idea of donation; for, whilst as to the sum of £2000 he expressly says it is to be repaid, he declares (though ineffectually), that in respect of the other advances, all claim of legitim, or other legal claim at Thomas Nisbet's instance, shall be held cut off. His object was very manifestly to turn the whole estate left by him into dead's part, to be entirely at his own disposal. The law prevents his succeeding in this object. But his failure will not give a gratuitous character to advances which do not otherwise possess that character. At the worst, the provisions of the settlement in regard to this matter must be held to have fallen, and the law to have its usual course. Thomas Nisbet could not, at the same time, repudiate the settlement, and take advantage of its terms.

"It appears to the Lord Ordinary that, in the absence of all evidence of donation,—with any evidence that exists pointing in an opposite direction,—the advances must be held proper debts by the son to the father's estate. The Lord Ordinary has a clear opinion to this effect in regard to the advances to purchase a lieutenancy and troop. The son was then afloat in the world on his own account, and in obtaining money to purchase promotion he does not appear to the Lord Ordinary to stand in a substantially different position towards his father from that held towards any other lender. The original advance for the purchase of a cornetcy and outfit creates more difficulty, for this implies a setting out in the world of a child previously unforisfamiliated. But, on reflection, the Lord Ordinary has come to the conclusion that no legal distinction can be drawn. The advance was not for aliment or education, such as a father is under a legal obligation to afford. It was not in principle different from the advance of capital to set up a son in a mercantile concern, which, unless clearly a donation, the Lord Ordinary considers to involve an obligation of repayment by the son.

"If the advances are to be held proper debts, they must be treated like other debts; that is to say, they must be held part of the father's moveable estate, and so comprehended in the fund which is divisible into legitim and dead's part. Farther, so far as unpaid to the estate, they must be imputed by Thomas Nisbet in payment of any claim of ligitim, or other claim, held by him against that estate.

"Against this view it has been contended that, even though not regardable as donations, the advances are not to be considered in the position of proper debts. They are at worst to be held advances to account of legitim, not to be estimated in the general fund of moveable succession, but simply to be imputed to account of legitim, or collated in a question with any others having right to legitim equally with Thomas Nisbet. It is then argued, that as Thomas Nisbet is the only child entitled to legitim, these advances are not to be in anywise set up against him, because *collatio bonorum inter liberos* only takes place amongst the children entitled to legitim, not in any question with others. For this principle reference is made to several cases, more particularly to the case of *Keith's Trustees* v. *Keith* (17th July 1857, D. 19, 1040) and *Breadalbane's Trustees* v. *Chandos*, 20th January 1836 (S. 14, 309, H. of L. 18th August 1836, S. and M'L. 2, 377). The practical result deducible is, that Thomas Nisbet is to be held entitled to the whole legitim, and to keep these advances besides, —which amounts to much the same thing with holding the advances to be donations.

"The terms of the Record, as made up, appear to the Lord Ordinary to be scarcely compatible with this contention. But the argument having been stated, he has judged it advisable to deal with it on its merits. It is not to be disputed that in the cases referred to it was laid down as a general principle that collation only takes place amongst the children entitled to legitim, so that when the legitim belongs wholly to one child, there is no room for collation. But beyond fixing this general principle the cases do not go. There was no judgment pronounced as to how the alleged collation was to operate in the arithmetical apportionment of the estate. Such a judgment, indeed, was impossible, because, as the Court were finding that there was no case of collation, there was, of course no room for determining how collation was to apply. The settlement of the general principle, that collation only takes place amongst those entitled to legitim, goes but a little way towards the determination of the present case, because it still remains to be inquired whether the case is legally one of *collatio inter liberos*—in other words, whether the advances in question are to be dealt with as a subject of collation, or as proper assets of the deceased father, equally affecting the whole executry.

"In the case of *Keith's Trustees*, the alleged subject of collation was a provision falling to a daughter (Mrs Villier's) under the antenuptial-contract of her father and mother, and payable after her father's death. In the case of *Breadalbane's Trustees*, it was a provision under a daughter's own marriage-contract, of which a considerable part was similarly payable. In both cases there was a fund realisable after the father's death, and in the hands of the receivers on that event. The provisions at the same time, constituted a debt against the father's estate, and a debt payable by the executors or general representatives. There was even in that case ground for contending that, like other debts of the deceased, their amount was deducible from the general executry before a division into legitim and dead's part was made, the result of which would be to make the amount fall on each proportionally. Mr Erskine says expressly (iii. 9, 22), "Donations to the wife, and obligations of provision to children, delivered to them by the granter *in liege poustie*, whether by marriage-contract or in liferent bonds, must, like other debts due by the deceased, come off the whole head of the executry." And this mode of dealing with such provisions seems equally implied in the terms of the judgment in the case of *Breadalbane's Trustees* v. *Chandos*, so far as the judgment makes reference to that part of Lady Chandos' provisions which was payable after her father's death.

"The present is a different, and, in some respects, as the Lord Ordinary thinks, a more favourable case for the contention of those opposed to Mr Thomas Nisbet's unqualified claim of legitim. This is not a case of debt due from the father's estate. It is the case of a debt due *to* the father's estate; that is to say, it is so, provided the Lord Ordinary be right in the supposition of these advances being of the nature of proper debts by the

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 specialty 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 disponee, 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 disponee 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.

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*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.

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*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-*