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-*

*ion, per* Lord Deas, that the difference of opinion among the judges founding an appeal in certain cases must be a *substantial* difference.

The interlocutor of 15th February in this case was as follows:—"The Lords having advised the reclaiming note for William Roy, No. 10 of process, and heard counsel for the parties—Recall the interlocutor of the Lord Ordinary submitted to review: Repel the two first pleas, in so far as they are stated as preliminary pleas, to exclude the action on the ground of incompetency: Reserving their effect, *quoad ultra*, to be considered along with the merits of the case: Find the defenders liable to the pursuers in expenses since the date of the Lord Ordinary's interlocutor reclaimed against; allow an account to be given in, and remit to the auditor to tax and report to the Lord Ordinary, and remit to his Lordship to decern for the expenses."

The defenders craved leave to appeal. They stated that they were of opinion that there was a difference of opinion on the Bench in delivering judgment on 15th February, but as the pursuer contended that the judgment was unanimous, they craved leave to appeal.

At advising—

Lord President—I think this is an interlocutor disposing of a dilatory defence, and not disposing of it in the way of dismissing the action; and therefore it falls under the 5th section of the Judicature Act. Notwithstanding that, it is of course competent for us to grant leave to appeal, but I must say I never saw a clearer case for refusing it.

Lord Currichill—I am of the same opinion.

Lord Deas—This is a mere question of procedure, and the matter is not finally determined. It may or may not be a disadvantage to the defenders to have it determined in this way in the meantime; but while, no doubt, you must look to the result of the defender succeeding in his appeal, you must also look to the other result, that he may fail. I think it right to call attention to this too, that on another occasion, when there was some difference of opinion, the House of Lords held that the difference must be a substantial difference; and, even assuming there might be some difference here, it would require to be shown that the difference was substantial, and I do not think that would be an easy matter.

Lord Ardmillan—I think this is a case in which it is the obvious intention of the Act of Parliament to prevent appeals at this stage. This is purely a question of procedure. The plea might have been disposed of in three ways; it might have been at once sustained, and the action dismissed; or it might have been repelled; or it might have been repelled only as preliminary, reserving its effect to be considered along with the merits of the action, and that was the case here.

Agents for Petitioners—Wilson, Burn & Gloag, W.S.

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## *Friday, March* 13.

### JAMIESON, OFFICIAL LIQUIDATOR OF THE GARPEL HÆMATITE COMPANY (LIMITED), PETITIONER.

*Partnership—Contributory—Limited Liability—Liquidator—Title to Sue*—Bona fides—*Fraud.*

Articles and a memorandum of association were subscribed by the intending partners of a limited company, bearing that the "nominal capital of the company is £105,000, divided into 1000 shares of £105 each, whereof £100,000 is paid up, and £5000 remains to be called." A petition was presented by the official liquidator, in the winding-up of the company, alleging that the statement as to paid-up capital was false, that, in fact, no part of the subscribed capital was paid up, and that the subscribers to the memorandum and articles knew this to be the case; and craving the Court to settle a list of contributories as proposed by him, and make a call of £30 per share. In a question between the petitioner and certain parties, who had purchased shares from original shareholders subsequent to the formation of the company, and who disputed their liability for more than £5 per share or such part thereof as remained unpaid, *held*, by a majority of the whole Court, that the petitioner was entitled to a proof of the grounds upon which he contended that the names of these parties ought to be placed on the list of contributories. Opinion, by majority, that the limit of liability depended not on the *bona fides* of purchasers of shares, but on the *fact*, how far the amount of the shares was paid or unpaid. *Held*, that to the effect of enforcing any statutory liability of the shareholders to the creditors of the company the liquidator represents the creditors.

This was a petition at the instance of George Auldjo Jamieson, accountant, official liquidator of the Garpel Hæmatite Company (Limited), in the judicial winding-up of the company under "The Companies Act 1862," 25 and 26 Vict., c. 89.

In 1857 Mr and Mrs Cathcart let to John Hall Holdsworth, Joseph Holdsworth, and Edward Sinclair, their heirs, assigns, and sub-tenants, for a rent, or a lordship, in the option of the landlord, the hæmatite iron ore and other minerals in the estate of Craigengillan, belonging to Mrs Cathcart, in the County of Ayr. A small quantity of minerals was raised by the lessees, and they continued in possession as lessees during 1857, 1858, and 1859, but paid neither rent nor lordship. In 1858 a joint-stock company was projected, for the purpose of raising funds to work the iron ore in the lease. On the 27th February 1858, a memorandum of association was subscribed by J. H. Holdsworth, J. Holdsworth, and Sinclair, along with other six parties, which bore that "the nominal capital of the company is £105,000, divided into 1000 shares of £105 each, whereof £100,000 is paid up, and £5000 remains to be called." The articles of association contained the same clause, and declared that "the company may from time to time make such calls upon the shareholders in respect of the sum of £5000, now remaining unpaid on their shares, as they think fit, provided that such call shall not exceed, at any one time, 10s. per share," the calls to be at intervals of not less then three months, and due notice to be given of all such calls. The mineral lease before mentioned was assigned to the company in June 1858, and the assignation intimated to the lessors. In 1861 the lessors raised an action of declarator of irritancy and payment against the original lessees, against Staples, Andrew, and Smith, who alleged an interest in the lease, and against the company, and in 1862 and 1863 obtained decrees declaring the lease to be at an end, and for payment. The lessors, and another leading creditor of the com-