this legacy that his son John might not be hampered in the course of his business. The testator died in 1876, and his son John died in December 1885, leaving a widow but no children. Now, the question we are asked to give our judgment upon is, whether this legacy of £2000—the sole reason for which the payment of it was deferred having now ceased—is still to be retained by the trustees under William Finlay's settlement till the period of twenty years has elapsed? This case is raised in rather an unusual way, because this case presents two peculiarities which did not occur in any of the cases referred to—*first*, the term of payment is postponed, not until the occurrence of an uncertain contingency as in the case of *Annandale* and others of that class, but to a day certain—twenty years after the testator's death; and *secondly*, we have not to search after the testator's reason or motive for the postponement as in most instances, for he explains this in the clearest terms, although when explained it is obviously inadequate. He postponed the payment for twenty years in order that his son John might not be overburdened in carrying on the business. But he forgot to provide for two events which have both happened, namely, the death of John and the consequent winding-up of the business, in either of which cases the object of postponing the legacy to James disappears entirely.

As the case now stands, there is no interest to be served by the postponement of the period of payment, unless one be found in the existence of children of James, who are now represented in this Special Case. It was right and necessary that they should be so, as if we had come to the conclusion that this legacy did not vest until the period of payment they might well have been entitled to object to any anticipation of that period. But I have come to be of opinion that it vested *a morte testatoris*, and that consequently James Finlay is entitled to transact with the trustees in regard to it. The right conferred on James Finlay's children is no other than the law would have implied.

All these cases of vesting depend on expressed or implied intention. In general, legacies are held to vest *a morte testatoris* unless the contrary be clearly indicated, and as a general rule when the term of payment is postponed by reason of interests personal to a third party, the presumption that it was intended to vest from the testator's death will not be avoided. Here the object of postponing the term was not only not personal to the legatee, but has entirely vanished, and I am therefore of opinion that the trustees may with propriety pay over the value of the legacy to James Finlay, and accept his discharge. But they must limit their payment to the present value of a sum of £2000 payable in 1896.

LORD RUTHERFURD CLARK—I am of the same opinion as to the question of the legacy of £2000 on which the chief argument was advanced to us. I think that the legacy vested *a morte testatoris*, but that it did not become payable until twenty years after the death of the testator. The consequence of the vesting of the legacy as I have said is that James Finlay can discharge the legacy if he can agree with the trustees, but the consequence of the postponement of payment for twenty years is that it is not payable until that period arrives, and consequently no interest can run on the amount until that period. The legacy will either remain in the trustee, or if they can transact with James Finlay they may do so, and the legacy may be effectually discharged by the trustees.

Our opinion is also asked on the first question, and my opinion as regards that is that the assets of the business of William Finlay & Son form part of the estate of John Finlay. These assets formed part of his property at his death, and therefore fall under the administration of his executrix-dative.

LORD M'LAREN—I concur.

LORD YOUNG and LORD CRAIGHILL were absent.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel for the parties on the Special Case, answer in the negative the first of the alternatives of the first question therein put, and the second alternative in the affirmative, subject to the declaration that provision must be made for payment out of the assets of the business of the sum of £2000 bequeathed to James Finlay; and answer the second question in the negative, and the third in the affirmative."

Counsel for Parties of the First Part (Trustees)—Macfarlane. Agent—William Finlay, S.S.C.

Counsel for Party of the Second Part (Mrs Helen Brown or Finlay)—Comrie Thomson. Agent—Charles S. Taylor, S.S.C.

Counsel for Third Party (James Finlay)—Guthrie. Agent—William Steel, S.S.C.

Counsel for Fourth Parties (James Finlay's Children)—Dickson. Agent—John Macpherson, W.S.

Wednesday, July 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

DOWNS *v.* GOURLAY (WILSON'S TRUSTEE).

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 137, 140, 147—*Aliment—Bastard—Ranking.*

Held that the mother of an illegitimate child is entitled to rank as a creditor upon the bankrupt estate of the father in respect of her claim for aliment.

Question—Whether a discharge of future claims for aliment is operated by a discharge under the Bankruptcy (Scotland) Act 1856?

On 23d April 1883 Jessie Downs gave birth to an illegitimate daughter, of which Joseph Wilson junior, who resided at 105 Hill Street, Garnethill, Glasgow, and carried on business as a confectioner in Glasgow, was admittedly the father. Wilson regularly paid for the support of the child until his death on 27th April 1885.

After his death John Gourlay, chartered accountant, Glasgow, was appointed judicial factor on his estates. Subsequently his estates

were sequestrated and Mr Gourlay was appointed trustee.

On 28th August 1885 Downs lodged in the sequestration an affidavit and claim for £88 for aliment of her daughter at the rate of £8 per annum from 27th April 1885, the date of Wilson's death, until the child should attain the age of thirteen years. The trustee admitted this claim to the extent of 7s., being the aliment due by the bankrupt for the child up to the date of the sequestration. *Quoad ultra* he rejected the claim as one which could not be ranked under the Bankruptcy Act.

Downs appealed to the Sheriff.

A similar claim was made by Downs in respect of the aliment of another child by Wilson, a son, who was not born till some months after Wilson died.

The trustee rejected this claim *in toto* on the same grounds, and Downs appealed to the Sheriff.

On 29th August 1886 the Sheriff-Substitute (ERSKINE MURRAY) pronounced this interlocutor in the former case:—"Finds (1) that the claim now in dispute (being one for inlying expenses and aliment for an illegitimate child of the bankrupt, of which the paternity is admitted at the bar) is a contingent claim of which the amount depends on the contingency of the child's survival: Finds (2) that pursuer is entitled to a ranking for the same, on the footing that the yearly amount is £8, as a contingent claim: Therefore, *primo loco*, appoints the respondent, the trustee, to value the appellant's claim, in terms of section 53 of the Bankruptcy Act of 1856: Reserving to pronounce further.

"*Note.*—. . The question as to the claim for the aliment of an illegitimate child in case of the bankruptcy of the father is one of some nicety. In the somewhat old case of *Marjoribanks* v. *Amos*, in 1831, 10 Sh. 79, the Court undoubtedly held that the mother of an illegitimate child was entitled to raise an action against the father after his discharge in bankruptcy for arrears of aliment. The Court held that he still remained liable. Lord Balgray remarking that this was a claim which arose *ex debito naturali*. But this doctrine is much affected by subsequent cases. The Court have varied their views as to *nova debita*, and the decisions are not quite consistent; but, on the whole, the Sheriff-Substitute thinks that the proper view to be taken is, that a claim for aliment is a contingent or conditional obligation existing before sequestration, and even emerging as a claim to a certain extent before sequestration, but the greater amount thereof depending on future contingencies. The case of *Garden or Fraser* v. *M'Iver*, 15th June 1860, 22 D. 1190, is considerably in point, especially Lord Wood's remarks as to contingent claims and conditional obligations; and still more so are Lord Ivory's remarks in *Clarkson* v. *Fleming*, 20 D. 1127. In the latter case Lord Ivory distinctly lays down that the liability for an illegitimate child is not a debt *ex debito naturali*, but an ordinary debt, thereby takes away the basis of Lord Balgray's view in *Marjoribanks*.

"In the cases of *Russell*, 12 Sh. 543, and *Mitchell*, 2 R. 930, it was held that a man could not get the benefit of cessio without agreeing to pay out of his future earnings for the child if it lived. The necessary inference is that the proper course for the mother was to claim in the cessio, and, as a creditor, object to the father's discharge, for it would have been unnecessary for her to do so if a discharge had not the effect of cutting off her claim."

A similar interlocutor was pronounced in the other case.

The trustee appealed to the Court of Session in terms of section 170 of the Bankruptcy (Scotland) Act 1856, and argued that this was not a debt which fell under the provisions of the Act. This debt was an inextinguishable obligation arising *ex jure naturali*—*Marjoribanks* v. *Amos*, November 30, 1831, 10 S. 79, 1 Bell's Com. 315; *Thomson* v. *Westwood*, February 26, 1842, 4 D. 833; *Tulloch* v. *Pollock*, February 3, 1847, 9 D. 582; *Corrie* v. *Adair*, February 24, 1860, 22 D. 897. But the debts with which the statute dealt were completely extinguished by discharge—19 and 20 Vict. c. 79, secs. 137, 140, and 147.

Argued for the respondent — The mother had a *jus crediti* against the father's estate for the aliment of an illegitimate child—1 Bell's Com. 635, 648; Bell's Prin, sec. 2062. The mother's claim rested upon the child's claim against both parents—*Marjoribanks* v. *Amos* had been overruled; *Gairdner* v. *Morris*, February 8, 1848, 10 D. 650; *Clarkson* v. *Fleming*, July 7, 1858, 20 D. 1224; *Bruce* v. *Steven*, December 5, 1863, 2 Macph. 208. In *Marjoribanks* v. *Amos*, as in *Tulloch* v. *Pollock*, the claim was not for a ranking but for future aliment.

At advising—

LORD PRESIDENT—I am of opinion that the interlocutor of the Sheriff-Substitute is right. He finds "(1) that the claim now in dispute (being one for inlying expenses and aliment for an illegitimate child of the bankrupt, of which the paternity is admitted at the bar) is a contingent claim of which the amount depends on the contingency of the child's survival: Finds (2) that appellant is entitled to a ranking for the same on the footing that the yearly amount is £8 as a contingent claim: Therefore, *primo loco*, appoints the respondent, the trustee, to value the appellant's claim in terms of section 53 of the Bankruptcy (Scotland) Act 1856."

The question here is, whether the mother was a proper creditor, for if she was then there is no answer to her claim. I think the mother of an illegitimate child is always entitled to sue the putative father for a contribution towards the maintenance of the child so long as it is unable to maintain itself, on the ground that the claim is one of debt. It does not matter whether it is an ordinary debt or a right arising out of natural law. It is a debt incurred by the father having begotten the child, when that fact is proved or admitted. I do not think that this is a rule confined to the circumstances of this particular case. It must hold good as a general rule, and accordingly I think the mother is entitled to rank upon the estate. This case is a good illustration of the hardship which would arrive if she could not rank, for here the bankrupt is dead, and so if she did not rank she and her child would never receive a penny.

LORD MURE—I am of the same opinion, and have no doubt as to the general rule. The mother is a creditor, and is therefore entitled to

recover from the father, and her claim is not affected by his having become a bankrupt.

LORD SHAND—I am of the same opinion. The claim for the aliment of an illegitimate child is against both parents. The claim arises from the father and mother being the cause of the child's existence. Primarily it is the child's claim, but as the mother is bound to maintain the child, she has a claim aginst the father for contribution. Whether the claim is the claim of the child or the claim of his mother, it is the claim of a creditor, and accordingly I think that the mother is entitled to rank on the bankrupt estate of the admitted father of the illegitimate child. It is not necessary for us to decide whether a discharge under the Bankruptcy Act operates a discharge of all claims for future aliment. I can very well see that a new debt may arise as each term arises.

LORD ADAM concurred.

The Court affirmed the interlocutor of the Sheriff-Substitute.

Counsel for the Trustee (Appellant)—Dickson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Downs (Respondent)—Orr. Agents—Fodd, Simpson, & Marwick, W.S.

Wednesday, July 7.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

BARR'S TRUSTEES *v.* BARR & SHEARER.

Partnership — Contract of Copartnery — Parole Evidence—Proof.

A contract of copartnery provided that the annual balance-sheet when docqueted, or if not docqueted, after the expiry of two months without objections being stated, should be conclusive between the partners. The partners acted in conformity with the provisions of the contract for nine years. On the death of one of them his trustees sued the surviving partner for a balance which they alleged was due by the firm to the trust-estate. The defender averred that he had signed the balance-sheet on the understanding that a verbal agreement should have effect, and that the valuations upon which the balance-sheets were based were utterly inaccurate. *Held* that it was incompetent for the defender to prove these averments *prout de jure.*

Provost Barr, John Howatson Thomson, and Matthew Barr were partners of the firm of Barr & Shearer, shipbuilders, Ardrossan, under a contract of copartnery dated 18th November 1874. By this contract it was provided that the copartnery should commence as on the 31st day of March 1874, and that the whole stock, plant, machinery, utensils, and assets belonging to Provost Barr should, after providing for the liabilities of the business previously carried on by him, be transferred to the copartnery at the agreed-on value of £3100, Provost Barr being entitled to interest thereon at 4 per cent., payable before the balance of profit or loss in each year was struck.

By the third article it was provided that "the profits and losses of the copartnery shall belong to and be borne by the first party to the extent of six-eighths, the second party to the extent of one-eighth, and the third party to the extent of one-eighth thereof." By the fifth article it was provided that "regular and distinct books containing the whole transactions of the copartnery shall be kept, which shall be brought to a just and true balance yearly, as at the 31st day of March in each year, and within the next two months the balance-sheet shall be docqueted by the parties as approved and correct; and failing their docqueting it within that period it shall be held as approved and correct, unless any of the parties shall within that period state in writing to the other parties specific objections thereto, in which case these objections shall forthwith be submitted to and disposed of by the arbiter after-named and designed, whose decision thereanent shall be final, and who shall docquet the balance-sheet either as it originally stood, or with such alterations as he shall deem just, which balance-sheet when docqueted or held as approved and correct as aforesaid shall conclusively fix for the purposes of this copartnership the profit and loss of the year embraced in it, and the sums due to or by each partner at the close thereof in account with the copartnership." And by the eighth article it was provided that "upon the expiry or earlier termination of this copartnery the whole assets and goodwill thereof shall be converted into cash, its liabilities discharged, and the balance divided among the parties according to their respective interests therein."

Matthew Barr died in 1877, and Provost Barr acquired his share. On 2d April 1884 Provost Barr died. Shortly after his death his trustees intimated to Mr Thomson their declinature to become partners in the concern, and on 29th April Mr Thomson intimated to the trustees, in terms of the contract of copartnery, that he was unable to carry on the business on his own account, and that it would have to be wound up. The trustees then employed a firm of shipbuilders to value the contents of the shipbuilding yard, and their valuation brought out the sum of £6960. On 8th April 1885 the trustees presented a petition for sequestration, and for the appointment of a judicial factor to wind up the concern. But on the 3d July 1885 Mr Thomson proposed that the affairs of the firm should be wound up under the provisions of the contract of copartnery, and this proposal was accepted by the trustees. On 6th August 1885 the shipbuilding yard and its contents were sold for £6960. At the annual balance on 31st March 1884 (two days before Provost Barr's death) the firm of Barr & Shearer owed the Bank of Scotland on overdraft the sum of £13,918, 4s. 6d., against which the bank held as security a valuable property in Ardrossan belonging to Provost Barr. The trustees on 8th January 1885 made a payment on account of interest of the debt, and afterwards the Bank of Scotland realised the