arrangement fixed at £250 per annum. There were two children of the marriage, both girls, who when the decree was pronounced were aged fifteen and twelve respectively.

This was a petition by Thomas Stewart to restrict the sum of aliment payable to his wife.

The petitioner set forth the sources of his income, and averred that when the sum of £250 was arranged he was anxious to deal liberally with his wife, but that he now found that owing to losses in business, and to other causes for which he was not responsible, his income, now derived wholly from private investments, was £184 per annum, and he was unable to pay the aliment agreed on. He was also proprietor of a house valued at £45 rental, in which he lived.

He offered £52 per annum, and asked to be allowed a proof of his averments, and thereafter that the aliment should be restricted. He stated his desire that the children of the marriage should now live with him.

Mrs Stewart lodged answers.

She alleged that her husband's income was not less than £820 per annum. She denied all knowledge of the losses stated by the petitioner to have been incurred by him, and averred that the sum offered was totally inadequate for her support. She objected to the proposed removal of her daughters to live with the petitioner.

The Court pronounced the following interlocutor:—

"Remit to Mr A. Moore, C.A., Glasgow, to inquire into the circumstances of the parties, and to report: Grant diligence for the recovery of writings, and commission to the said accountant to examine havers and to receive their exhibits."

Counsel for Petitioner—W. G. Miller. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondent — Ure. Agents — J. P. Bannerman, W.S.

Tuesday, July 6.

SECOND DIVISION.

FINLAY'S TRUSTEES *v.* FINLAY.

Succession—Legacy—Vesting—Postponement of Payment.

A truster directed his trustees to make over his business to his son John, subject to payment of his debts and to payment of a "legacy or debt" to be paid by him to the truster's other son James at the first term of Whitsunday twenty years after the truster's death, it being declared that payment was postponed for such a length of time in order that John might not be unduly burdened in carrying on the business. Provision was also made that the trustees should protect the interests of James by satisfying themselves that the business was being carried on to profit, and if it was not, that they should wind it up and realise it, and invest the proceeds, subject to the "legacy or debt" to James, for behoof of John, and on his death for his lawful children. John died without leaving issue, within the twenty years, and the business was given up. *Held* (1) that the business was his, and the assets of it fell to be administered by his executor, subject to provision for the legacy to James; (2) that the legacy vested in James *a morte testatoris*, but was not payable for twenty years after the truster's death; and (3) that James was entitled to discharge it on arranging with the trustees as to its value as a legacy not payable or bearing interest till that period expired.

William Finlay, cabinetmaker n Edinburgh, died on 10th February 1876, survived by two sons, James Finlay, a farmer in New Zealand, and John Finlay, cabinetmaker in Edinburgh, and leaving a trust-disposition and settlement and codicils dated 3d, 4th, and 8th February 1876. By this settlement he appointed certain persons to be his trustees. He left to his elder son James Finlay various specific legacies, including the rent of some buildings used as workshops, which were to be let by trustees to the younger son John Finlay at a rent of £100 per annum. By the last clause of his settlement, in respect that his son John had for many years assisted him in the active management of his business, he directed his trustees to make over to him (John) the business in Princes Street carried on by him (testator), with the leases of the business premises, stock-in-trade, book and bill debts, &c., and generally the whole of the estate not specially destined—the conveyance to be burdened with his debts due at the time of his death, "and also with a legacy or debt of £2000 sterling in favour of my said eldest son James, to be paid to him by his brother John at the first term of Whitsunday twenty years after my decease (payment of the above legacy or bequest being postponed by me for such a length of time in order that my son John may not be unduly burdened in conducting the said business); and in the event of my son James dying before the said legacy becomes payable to him, then I direct my trustees to pay and divide the same equally among his lawful children." The testator also provided that in order to protect the interests of his son James Finlay the trustees were to have power, and were directed to take means, to satisfy themselves that the said business was being properly and profitably carried on, and in the event of it appearing that the business was not being carried on to a profit, they were directed to wind up the same, realise the trust estate, and invest the proceeds, "subject always to the foregoing legacy or debt of £2000 to my son James," for behoof of John, and upon his death to divide the estate among his lawful children, making such provision for his widow, if he left one, as they might think proper.

James Finlay was married, and had several children.

The business continued to be carried on by John Finlay, and from time to time he submitted to his father's trustees statements showing the position of the business, and also exhibited to them the books used for conducting the business, the whole business assets being treated as falling under the settlement and forming part of the testator's personal estate.

John Finlay died intestate on 5th December 1885, leaving a widow but no children. His widow was appointed executrix-dative *qua*

relict. In consequence of John Finlay's death the trustees resolved to discontinue the business, and various questions arose as to the duties of the trustees, and the rights of the parties interested, in these circumstances. This Special Case was therefore laid before the Court for opinion and judgment.

The trustees (first parties) maintained that they were in the same position as if they had resolved to wind up the business in virtue of their power to do so in certain events, while Mrs John Finlay (the second party) maintained that the assets of the business formed part of the intestate estate of her husband, and fell to be administered by her as executrix, subject to proper provision for James Finlay's "legacy or debt" of £2000. James Finlay (third party) maintained that he was entitled to immediate payment of his legacy, or otherwise to have it invested on his account, and the interest paid to him till 1896, and then the principal paid over. The trustees, however, and Mrs John Finlay (first and second parties) maintained that the legacy was absolutely postponed till 1896, to which postponement John's death and the giving up the business were immaterial; or else that the £2000 should be invested by the trustees and the interest paid till 1896, and then the principal. The trustees were willing, if the legacy were held vested in James Finlay so that he could discharge it, to arrange with him for an immediate discharge, and James Finlay maintained that he could give such discharge.

James Finlay's children were fourth parties, and they maintained that the legacy had not vested in him, and in any case was not payable till 1896.

The questions stated were the following:—"I. Do the assets of the business carried on under the firm of William Finlay & Son, as at the date of the death of John Finlay on 5th December 1885, fall to be administered by the parties hereto of the first part, as trustees under the trust-disposition and settlement of William Finlay? Or, Do the assets of the said business form part of the estate of John Finlay, and as such fall to be administered by the party hereto of the second part as executrix-dative of the said John Finlay?

"II. Is the effect of the death of John Finlay, and the consequent discontinuance of the business hitherto carried on under the firm of William Finlay & Son, to entitle James Finlay to demand immediate payment of the legacy of £2000 bequeathed to him by his father, or at least to demand that interest be paid to him periodically upon the said sum of £2000 from the date of the discontinuance of the business up to the term of Whitsunday 1896, when the legacy itself becomes payable in terms of the settlement of William Finlay?

"III. Has the said legacy of £2000 vested in James Finlay to the effect of his now being in a position to discharge the same under an arrangement for that purpose between him and the parties hereto of the first and second parts?

A fourth question was also stated relating to the administration of certain subjects specially bequeathed to James Finlay, and in which he alone was interested, but the Court having expressed the opinion that the subject was a matter under the discretion and administration of the trustees, the question was withdrawn.

The trustees argued—The event which had occurred, viz., the death of John Finlay and the consequent stoppage of the business, was not provided for by Mr Finlay's settlement. The trustees therefore were in the same position as they would have been if they had resolved to wind up the business during John Finlay's lifetime, as the business really belonged to the trustees.

The party of the second part argued—The business belonged truly to John Finlay, and when he died the assets of the business became part of his estate, and as such fell to his executrix. The £2000 was not to be paid to James Finlay until twenty years after the death of the testator. That was a condition of the legacy.

The party of the third part argued—If the testator had not stated his reason for postponing the payment of the legacy, then it might have been held that the condition was absolute. But here the reason was given that John Finlay should not be hampered in his conduct of the business. John was now dead, and the business about to be wound up, so that the necessity for the condition no longer existed, and the legacy became immediately payable—*Annandale* v. *Macniven*, June 9, 1847, 9 D. 1201; *Lewis and Others (Alexander's Trustees)* v. *Waters and Others*, Jan. 15, 1870, 8 Macph. 414; *Robertson* v. *Davidson*, Nov. 24, 1846, 9 D. 152; *Lucas' Trustees* v. *Pullar and Others*, Feb. 18, 1881, 8 R. 502; *Pretty and Newbigging* v. *Stewart (Hunter's Trustees)*, March 2, 1854, 16 D. 667. The sum of £2000 vested in James Finlay *a morte testatoris*. What was to be paid to John's children was to be paid only after the £2000 was paid. This was a present legacy the payment of which was postponed—*Waters and Others (Waters' Trustees)* v. *Waters*, Dec. 6, 1884, 12 R. 253.

The parties of the fourth part argued—The legacy of £2000 did not vest in James Finlay *a morte testatoris*, and was not payable to James Finlay until Whitsunday 1896—*Bryson's Trustees* v. *Clark, &c.*, Nov. 26, 1880, 8 R. 142; *Howat's Trustees* v. *Howat*, Dec. 17, 1869, 8 Macph. 337; *Thorburn* v. *Thorburn*, Feb. 16, 1836, 14 S. 485; *Foulis* v. *Foulis*, Feb. 3, 1857, 19 D. 362.

At advising—

Lord Justice-Clerk—This Special Case is presented to us for opinion and judgment under the following circumstances—William Finlay, sometime a cabinetmaker in Princes Street, Edinburgh, died on the 10th February 1876, leaving a trust-disposition and settlement dated shortly before his death. By this settlement he left to his son John Finlay his business in Princes Street, and to his son James the sum of £2000. He gave his trustees power to satisfy themselves that the business was being carried on by his son John in a proper and profitable manner. If the business was not being carried on to a profit he directed his trustees to wind up the business and realise the estate.

The substance of the settlement therefore is, that there is a lease of the business to John Finlay, and a legacy of £2000 is left to James Finlay, but subject to this provision that it is not to be paid to James until the first term of Whitsunday twenty years after the decease of the testator. The testator in his settlement states as his reason for so postponing the payment of

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