

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 against 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 docquetted, or if not docquetted, 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 docquetted by the parties as approved and correct; and failing their docquetting 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 thereon 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 docquetted 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 declination 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

security, and applied the proceeds, £11,850, at 15th May 1885, in payment *pro tanto* of the overdraft. The balance of the debt, with interest down to 6th August 1885, was on that date paid by the trustees to the bank. Further, it had been arranged between the parties that the expenses connected with the application for the appointment of a judicial factor, and in making up a title to the ships, should be paid out of the £6960, the proceeds of the shipbuilding yard, &c., and these sums, amounting to £187, 1s. 8d., were deducted, leaving a balance of £6772, 18s. 4d., which was received by the trustees. The assets of the firm, other than the shipbuilding yard, &c., consisted, as shown by the balance-sheet as at 31st March 1885, of outstanding accounts due to the firm, amounting to about £2900, and there were outstanding trade debts, not exceeding £200, due by the firm.

The trustees alleged that a balance of £8000 was due by the firm to the trust-estate, that the assets of the firm were insufficient to meet this debt, and that under the third article of the deed of copartnership one-eighth of the loss fell to be contributed by Mr Thomson. Mr Thomson denied liability, and alleged that he was the firm's creditor for £8721.

The trustees brought this action of count, reckoning, and payment against Mr Thomson, concluding for payment of £2000.

The defender averred (in answer to Cond. 16 for the pursuer)—“That from the commencement of the copartnership in 1874 up till the date of his death in 1884 the late Provost Barr incurred accounts as an individual to the firm of Barr & Shearer for large amounts. These accounts were for repairs on vessels of which Provost Barr was owner; materials supplied and work done for a coal work at Doura, of which he was proprietor; repairs on machinery belonging to a printing establishment carried on by him in Ardrossan; and material supplied and work done for house property in Ardrossan of which he was proprietor. The amount of these accounts, under deduction of the annual salary of £50 due by the firm to Provost Barr, and the amounts of contra accounts for goods and materials supplied by him to the firm was, conform to abstract of accounts produced herewith, £8721, 10s. 7d. No part of this sum was ever paid by Provost Barr to the firm. At the first annual balance made after the commencement of the copartnership, the amount of the accounts incurred by Provost Barr during the preceding year, and which amounted, after deduction of the salary due to him by the firm, to £3308, 15s. 6½d., was entered in the list of outstanding accounts in the draft balance-sheet prepared by the said Matthew Barr, otherwise Matthew Barr Findlay. At the request of Provost Barr, this sum, subject to discount of £10 per cent., was, in the adjusted balance-sheet, deducted from the amount of his capital account, to which had been added his share of profits then calculated upon the year's business. This mode of disposing of the amount due by Provost Barr to the firm was adopted on an obligation being given by him that, should circumstances arise necessitating a new valuation of the buildings, machinery, and stock-in-trade belonging to the firm being made, which were entered in the balance-sheet at a valuation put on them by

Provost Barr himself, and the new valuation be less in amount than his valuation, he would make up the difference to the extent of the sum then, or any sums which might thereafter be, deducted from his capital.” The defender further averred that the valuation of the buildings, machinery, and stock-in-trade was utterly extravagant. It was admitted that the balance-sheets from 1875 to 1879 inclusive were docketed, and that those from 1880 to 1883 inclusive were not docketed.

There was produced the following

“BALANCE-SHEET of Barr & Shearer, Shipbuilders, Ardrossan, dated 31st March 1875.

ASSETS.

I.—Property, &c.

Erections, per last balance, . . .	£2,433	0	0
Machinery, tools, &c., per do., . . .	2,377	0	8
	£4,810	0	8

II.—Stock.

Timber, . . .	£4,395	4	7½
Iron, . . .	350	14	2
Chandlery, . . .	1,880	7	4¾
New vessel in course of construction, . . .	756	13	0
	7,292	19	2

III.—Book Debts Outstanding.

Book debts outstanding, £7,268 13 9½			
Off discount, 5 per cent., 363 8 9½			
	6,905	5	0

IV.—Barr and Another v. Cooper et al.

Barque “Joan Cunllo’s” account, valued at 1,000	0	0	0
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V.—Cash.

Balance on hand, per Cash Book, . . .	56	10	10
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VI.—Partners.

John Barr, per account, . . .	3,022	18	0
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Total amount of Assets, £23,087 13 8

LIABILITIES.

I.—Sundry Creditors on Open Account.

Sundry creditors on open account, . . .	£2,038	9	9¾
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II.—Bills Payable.

Bills payable, . . .	1,422	0	3
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III.—Sundry Creditors.

54 Bank of Scotland, £11,812 3 8			
87 James Shearer's trustees, 876 6 1			
	12,688	9	9

IV.—Partners.

John Barr, Capital at 31st March 1874, £3029 15 5½			
Interest thereon at 4 per cent., . . . 121 3 9½			
Salary, . . . 50 0 0			
Old debts collected since last balance, 118 13 7¾			
	£3,319	12	10¾

Total amount of Liabilities, 19,468 12 8½

Nett balance, . . . £3,619 0 11½

V.—Profits.

John Barr, 6-8th share, £2,714 5 9			
John Howatson Thomson, 1-8th share, . . . 452 7 7½			
Matthew Barr, 1-8th share, 452 7 7			

3,619 0 11½

CAPITAL ACCOUNT.

I.—John Barr.

Capital at 31st March 1874, . . .	£3,029	15	5 $\frac{1}{2}$
Interest thereon at 4 per cent., . . .	121	3	9 $\frac{1}{2}$
Salary,	50	0	0
Old debits collected since last balance, . . .	118	13	7 $\frac{1}{2}$
Profits,	2,714	5	9

	£6,033	18	7 $\frac{1}{2}$
Deduct—account-current,	3,022	18	0

£3,011 0 7 $\frac{1}{2}$

II.—John Howatson Thomson.

Profits,	452	7	7 $\frac{1}{2}$
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III.—Matthew Barr.

Profits,	452	7	7
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Nett capital, £3,915 15 10 $\frac{1}{2}$

"Ardrossan, 3d June 1875.—E. & O. excepted.

"Docquetted in terms of Article 5 of Deed of Copartnership, executed on 18th November 1874.

"JOHN BARR.
"JOHN H. THOMSON.
"MATTHEW BARR."

The pursuers pleaded—" (4) The obligation referred to in answer 16 can only be proved by writ or oath. (5) The claims put forward in the 16th answer are excluded by the contract of copartnership."

The defender pleaded—" (3) On a just accounting, no sum being due by the defenders to the pursuers, the defenders are entitled to absolvitor, with expenses."

On 22d May 1886 the Lord Ordinary (KINNEAR) pronounced this interlocutor—" Allows the defenders a proof of their averments contained in the answers to the 16th article of the condescendence for the pursuers, and to the pursuers a conjunct probation."

The pursuers reclaimed, and argued that down to 1879 the balance-sheets were all docquetted, whilst from 1880 to 1883 they were made out in the same way but not docquetted. Both sets of balance-sheets were therefore conclusive under article 5 of the deed of copartnership. It was incompetent to prove *prout de jure* a verbal agreement to vary the terms of a written contract, especially when the actings of the parties had been in conformity with the provisions of the latter—*M'Laren v. Liddell's Trustees*, Feb. 22, 1862, 24 D. 577; *Kirkpatrick v. Allanshaw Coal Co.*, Dec. 17, 1880, 8 R. 327.

Argued for the defender—It was not necessary for his case to obtain new valuations. All that he wanted was a different method of stating the accounts. The materials to correct the balance-sheets were thus within the balance-sheets themselves. It was from the method of stating the account that the business seemed to be worked to a profit. The balance-sheets were based upon extravagant valuations. The cases showed that a docquetted account was not to be taken as a discharge—*M'Laren v. Liddell's Trustees*, *supra*; *Laing v. Laing*, July 17, 1862, 24 D. 1862. Besides, the defender was entitled to prove his agreement *prout de jure*—*Lindley on Partnership*, ii. 820.

At advising—

LOED PRESIDENT—The contract of copartnership was to commence as on the 31st day of March

1874, and by the fifth article it is provided that "Regular and distinct books containing the whole transactions of the copartnership 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 docquetted by the parties as approved and correct; and failing their docquetting 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 thereon shall be final, and who shall docquet the balance-sheet either as it originally stood, or with such alterations as he shall deem just." And then follow the words, "which balance-sheet when docquetted 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."

Now, when provisions under a contract of this kind have been brought under the notice of the parties to it, and it is clearly before them, what is to be the effect of docquetting the balance-sheet? If they docquet an incorrect balance-sheet they have themselves to blame for the result, because it is matter of contract between them that the balance-sheet shall conclusively fix the accounts between the partners. In the present case a balance-sheet was made out regularly every year. These balance-sheets show *ex facie* that they were carefully prepared, and year after year they were docquetted and subscribed by the partners, first of all in 1875, and thereafter down to Provost Barr's death.

In order to get over the fifth article of the contract of copartnership the defenders have averred, in their answer to the sixteenth article of the condescendence, "That from the commencement of the copartnership in 1874 up till the date of his death in 1884 the late Provost Barr incurred accounts as an individual to the firm of Barr & Shearer for large amounts. These accounts were for repairs on vessels of which Provost Barr was owner; materials supplied and work done for a coal work at Doura, of which he was proprietor; repairs on machinery belonging to a printing establishment carried on by him in Ardrossan; and material supplied and work done for house property in Ardrossan of which he was proprietor. The amount of these accounts, under deduction of the annual salary of £50 due by the firm to Provost Barr, and the amounts of contra accounts for goods and materials supplied by him to the firm was, conform to abstract of accounts produced herewith, £8721, 10s. 7d. No part of this sum was ever paid by Provost Barr to the firm. At the first annual balance made after the commencement of the copartnership, the amount of the accounts incurred by Provost Barr during the preceding year, and which amounted, after deduction of the salary due to him by the firm, to £3308, 15s. 6 $\frac{1}{2}$ d., was entered in the list of outstanding accounts in the draft balance-sheet prepared by the said Matthew Barr, otherwise Matthew Barr Findlay. At the request of Provost Barr this sum, subject to discount of £10

per cent., was in the adjusted balance-sheet deducted from the amount of his capital account, to which had been added his share of profits then calculated upon the year's business."

So far the averment takes objection to the mode in which the balance-sheets were prepared. But they go on to say—"This mode of disposing of the amount due by Provost Barr to the firm was adopted on an obligation being given by him that, should circumstances arise necessitating a new valuation of the buildings, machinery, and stock-in-trade belonging to the firm being made, which were entered in the balance-sheet at a valuation put on them by Provost Barr himself, and the new valuation be less in amount than his valuation, he would make up the difference to the extent of the sum then, or any sums which might thereafter be, deducted from his capital." And they go on to say that the effect of what was done was that while no alterations were made in the valuations, these valuations were utterly extravagant, and it is alleged that if these valuations had been accurate it would have been seen that the firm had made no profit at all, that the balance-sheets were erroneous, and that Provost Barr should not have made a penny. I do not, however, think that the averments are relevant. It is said no doubt that the valuation never alters, but that is not startling. It is not uncommon in stating valuation of buildings and machinery to take them at one fixed value, and if this is a matter of arrangement between the parties there is nothing improper in it. It may be, of course, only approximately correct, but if a business is to be carried on the buildings must be kept up to a standard of efficiency and therefore it is not unlikely that they are of much the same value throughout a period of years. It is quite true that the valuation put upon the stock-in-trade is also complained of, and we were referred to an obligation which I do not very well understand in this connection. The stock-in-trade is shown, *ex facie* of the balance-sheets, to have been valued every year. It could not have been otherwise. But if such a yearly valuation was made, the terms of the obligation are utterly inapplicable to the stock-in-trade. "These circumstances" and "this necessity" arise every year, and therefore the alleged agreement has so far no meaning at all, while with regard to the buildings and machinery it is irrelevant to aver that it was extravagant. It was the valuation agreed to by the parties.

I cannot, therefore, agree in the Lord Ordinary's course of allowing a proof of the averments in the answers to the 16th article of the condescence.

LORD MURE concurred.

LORD SHAND—I must own that I think this a very clear case. This copartnership was carried on for nine years. The contract provided that each year a balance should be struck of profit and loss as between the parties, so as to preclude the possibility of any subsequent dispute. This course was followed during a series of years, and what is proposed now is that this is to be gone back upon and opened up. I confess I do not, after listening with careful attention to all that has been said by Mr Salvesen and Mr Dickson, understand the case presented by the defenders. I do not understand whether they want a sum

deducted from Provost Barr's profits, or a re-valuation over all the nine years. Nor does this record help us. It speaks of an obligation. "This mode of disposing of the amount due by Provost Barr to the firm was adopted on an obligation being given by him that should circumstances arise necessitating a new valuation of the buildings, machinery, and stock-in-trade belonging to the firm being made, which were entered in the balance-sheet at a valuation put on them by Provost Barr himself, and the new valuation be less in amount than his valuation, he would make up the difference to the extent of the sum then, or any sums which might thereafter be deducted from his capital." But in the first place, we do not know what the circumstances provided against can possibly be, and in the second place, the thing mentioned, viz., a new valuation, is an impossibility so far as stock-in-trade is concerned. Except in the case of the last year it has been used up in the business. How could that possibly be used in an adjustment of the balance-sheets of previous years?

I think that the argument of the Solicitor-General that the whole actings of the parties are against such an idea is thoroughly borne out by the facts; for the system contemplated by the contract was carried out for nine years. I think that there is no relevant case stated to entitle the defenders to parole proof of an obligation, by means of which to cut down this contract of copartnership.

LORD ADAM concurred.

The Court pronounced this interlocutor:—

"Recal the interlocutor: Find that the averments made by the defenders in their answer to the 16th article of the condescence are irrelevant in respect of the annual balance-sheets prepared in terms of the 5th article of the contract of copartnership, and remit to the Lord Ordinary to proceed with the accounting."

Counsel for Pursuers (Reclaimers)—Sol.-Gen. Asher, Q.C.—Lorimer Agents—Hamilton, Kinneir, & Beatson, W.S.

Counsel for Defenders (Respondents)—Dickson—Salvesen. Agent—J. Young Guthrie, S.S.C

Thursday, July 8.

FIRST DIVISION.

EVANS *v.* STOOL.

(See *ante*, vol. xxii., p. 872, 12 R. 1295.)

Process—Jury Trial—A. S. February 24, 1846.

Issues were adjusted on 15th June 1886 in an action raised in January 1885. On 18th June 1886 the pursuer gave notice for jury trial at the Summer Sittings. The pursuer then on 5th July, which was the last day on which notices for trial at the Summer Sittings could be given, countermanded this notice and gave notice for trial at the Christmas Sittings. Defenders moved the First Division, under the provisions of