is so unlikely to occur that I think the consideration of such a possibility would be unprofitable discussion. In any case, notice to the trustee must not be after publication of the *Gazette*. It will be time enough to consider the question of simultaneity when it occurs. Here the notice was given after the *Gazette* notice appeared, and that, I think, is sufficient for the decision of this case.

But then it was said that although the actual delivery of the letter containing the notice was not until the 28th, that was owing to the trustee's own actings, and it was said that if the trustee had happened to be at his office when the registered letter was brought the notice would probably have been in time. The facts however were different. The effect of registering the letter was to make it necessary that it should be delivered to him personally, and as he had left his office that was postponed. There was nothing here unusual in the actings of the trustee. Had the letter been brought at ten o'clock in the forenoon, and the office had then been found shut, it might have made a difference. There was no such case here, and I agree with your Lordship in thinking that the appeal should be dismissed.

LORD KINNEAR—I agree with Lord Adam that the Act cannot mean notice is to be given to the trustee simultaneously with notice to the world, and that was never seriously suggested in the argument or in the previous case. The only thing there suggested was that notice might have been sufficient if given at the same time as the publication of the *Gazette*, and that if it so happened that might be enough. I thought at the time that there was a great deal to be said in support of the stricter view expressed by Lord Young and Lord Craighill, to the effect that that would not be enough, but that notice to the trustee must precede the notice calling the meeting. It is not necessary to consider that question here, and it is enough to say that the notice to the trustee must not be later than that calling the meeting. The fact here is that the meeting was called by a notice in the *Gazette* upon the 27th, and the notice was not given to the trustee until the 28th, therefore the notice to the trustee was later than that calling the meeting. It was said that the failure to give timeous notice was owing to the absence of the trustee from his place of business. I think we cannot give effect to that view implying that it is the duty of a man of business to be at his office at all hours. Where the duty of giving notice is sufficiently discharged by sending a letter through the post, it may be enough if the letter is addressed to the office of the person receiving the notice, without the necessity of proving that the addressee was at home, or did not receive it through failure to open his letters. But here the precaution was taken of sending a registered letter, to be delivered only to the addressee personally, with the inevitable consequence that if it was after business hours delivery would be postponed until next morning. I concur in thinking the appeal should be dismissed.

LORD M'LAREN was absent.

The Court dismissed the appeal.

Counsel for Appellant—Watt. Agents—Clark & Macdonald, S.S.C.

Counsel for Respondent — Salvesen — Crabb Watt. Agents — Simpson & Marwick, W.S.

Saturday, February 27.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

VALENTINE (ONCKEN'S JUDICIAL FACTOR) *v.* MACDOUGALL (REIMERS' CURATOR).

Parent and Child—Aliment of Bastard.

Held that a bastard incapable of supporting himself was entitled to aliment out of the estate of his deceased father, and that a sum must be set aside for payment of this aliment before division of the estate in terms of the father's settlement.

Paul Gerhard Oncken, merchant in Leith, died in June 1888 leaving a trust-disposition and settlement by which he conveyed his whole estate to trustees, whom he directed (1) to pay his debts; (2) to pay legacies of £250 to his brother and his eldest son; (3) to convey his business to his eldest son, subject to a condition that he should bind himself to pay a sum of £50 a-year to each of the testator's three younger children; and (4) to divide the residue of his estate among his said younger children on their attaining the age of 25.

The testator was survived by his brother and the four children mentioned in the settlement.

On July 15, 1890, William John Valentine, C.A., was appointed judicial factor on the trust-estate. After the estate had been realised and the legacies paid, there remained in the hands of the judicial factor a balance of £1296.

On 18th November 1891 the judicial factor, with the concurrence of two of the testator's younger children, and of William Walker, who had been appointed *curator bonis* to the third younger child, presented a petition to the Court for special powers and for discharge.

The petitioner stated — "The judicial factor is ready to divide the estate, but a difficulty stands in the way of a division being made by the existence of an imbecile illegitimate son of the testator, named Alexander Gerhard Reimers, who is twenty years old, and is at present boarded at Bonnyrigg, Midlothian, at a cost to the estate of £30 per annum. There can be no doubt that the testator recognised the paternity and maintained the child, and

the judicial factor considers that the estate under his management is liable for the maintenance, at all events to some extent, of Reimers. His mother cannot be traced, and it is believed that she is dead. She was a domestic servant in the employment of the testator. The judicial factor does not think he could be maintained for a less sum than £30 per annum. It is a question as to what extent the estate is liable for his maintenance. The beneficiaries consider that in a question between them and Reimers the latter is only entitled, if entitled at all, to have an equal share with them in the residue, and that he is not entitled to any preference over them."

The petitioner craved the Court (1) to fix what sum, if any, he was bound to retain and administer in order to meet the claim for the maintenance and support of the said Alexander Gerhard Reimers, and the expenses to be incurred in connection therewith; (2) to authorise him to divide and make payment of the balance of the trust-estate in his hands, after setting apart such sum as may be fixed aforesaid, and the law expenses and the factor's commission, equally among the testator's three younger children; (3) to authorise him to divide and make payment in like manner upon the death of the said Alexander Gerhard Reimers of the balance, if any, that may remain of the sum to be set apart for his maintenance; and (4) upon a production of discharges in the petitioner's favour by all parties entitled to the estate, to approve of his actings as judicial factor, and to discharge him of all claims in respect of his intromissions with the trust-estate, and to ordain the Accountant of Court to deliver up his bond of caution.

On 19th December 1891 the Lord Ordinary (KINCAIRNEY) reported the cause to the First Division of the Court.

When the case was called in Single Bills counsel for the petitioner intimated that it was his intention to maintain that the illegitimate child had no claim for aliment on the estate of his deceased father, and accordingly the Court on his motion appointed James Patten Macdougall, advocate, to be curator *ad litem* to Reimers.

The curator thereafter lodged a minute, in which he stated, *inter alia*—"The curator *ad litem* submits that the claim of his ward for aliment is a debt due by the truster, the father of the ward, and transmits against the truster's representatives—the beneficiaries in the estate. It ought, therefore, to be provided for before any division of the estate takes place. The ward was always maintained by the deceased truster during his lifetime. . . . Upon the question of amount the curator submits, in the second place, that the Court ought to give effect to the opinion of the Accountant of Court, viz., that the sum of £750 should be set aside in the hands of the judicial factor to meet the ward's board and maintenance. The ward is both hopelessly imbecile and physically deformed, and can neither speak nor walk. He can do nothing, therefore, for his own maintenance. . . . From inquiries which the curator has personally made, he is able to confirm the statement of the judicial factor that the ward cannot be maintained at Mrs Milligan's for a less sum than £30 per annum. The cost of the maintenance of pauper lunatics in the asylums of Scotland is little, if at all, short of that figure."

The petitioner argued—The claim of a bastard against its parent for aliment was founded neither on contract or delict, but arose *ex jure naturali*. It was therefore not a claim of debt which would transmit against the estate of the deceased father—*Ker* v. *Moriston's Trustees*, 1692, M. 1363. The case of *Clarkson* v. *Fleming*, which was the chief authority for the opposite view, was an action of relief at the instance of the mother. The mother's claim, however, was one on quite a different footing from that of the child—*Reid* v. *Moir*, July 13, 1866, 4 Macph. 1060, *per* Lord Justice-Clerk, 1064, and Lord Benholme, 1067. The only recent case on the subject was also an action of relief at the mother's instance—*Downes* v. *Gourlay*, July 7, 1886, 13 R. 1101. That the child's claim was not one of debt in the ordinary sense of the word appeared clearly from the case of *Marjoribanks* v. *Amos*, Nov. 30, 1831, 10 S. 79, where it was held that a bastard's claim for aliment was not affected by the father's sequestration and discharge. Assuming the claim to be well founded, the amount which the Accountant proposed should be set aside was excessive. The petitioner had ascertained that an annuity of £30 could be purchased at a much smaller sum.

Argued for the curator *ad litem*—A bastard was a *filius nullius*, and his claim for aliment in no way depended on his being one of the family. It was thus essentially distinct from the claim of a legitimate child, and whether it arose *ex jure naturali* or not, it was a claim of debt—Bell's Comm. i., 680-1, and transmitted against the representatives of a deceased parent—*Clarkson* v. *Fleming*, July 7, 1858, 20 D. 1224; *Gairdner* v. *Munro*, February 8, 1848, 10 D. 650; Fraser on Parent and Child, 124. In *Clarkson's* case no doubt the action was at the instance of the mother, but that was no valid ground of distinction, for the mother could have no claim of relief against the father's estate unless that estate were first liable for the child's aliment. The *dicta* in *Reid* v. *Moir* to the opposite effect were *obiter*. The case of *Marjoribanks* in no way conflicted with the view that the aliment of a bastard was a debt due by the parent, for the claim then sustained was for aliment falling due after the sequestration. *Ker* v. *Moriston's Trustees* had been overruled. Assuming the claim to be well founded, the ward could not be maintained under £30 a-year, and the amount which the Accountant of Court suggested should be set aside was not excessive.

At advising—

LORD ADAM—This is a petition at the instance of the judicial factor on the trust-estate of the late Mr Oncken for special powers and discharge, and comes before us

on the report of the Lord Ordinary.

The question is, whether the judicial factor is bound to retain any, and, if so, what sum for the aliment of an illegitimate imbecile son of the late Mr Oncken. It is admitted that Mr Oncken was the father of this child.

Mr Oncken left four legitimate children. It appears from the Accountant's report that the amount of the trust-estate available for distribution is £1296, 5s. 7d.; the sum proposed to be retained in respect of claim for aliment is £750; so that if this claim be sustained, the result is that the illegitimate child may carry off the major part of the estate, leaving a sum of little more than £500 for distribution among his widow and three of his legitimate children.

It was not disputed that the father and mother of an illegitimate child are jointly and severally liable to aliment the child until he is able to support himself. The usual way in which this obligation is implemented is that the mother supports the child and recovers from the father his share of their joint debt. The action brought by the mother against the father is an action of relief, and is founded on the ground that he as well as she is liable to aliment the child. It is said, however, that the obligation to support an illegitimate child is not an obligation arising either *ex contractu* or *ex delicto*, and so giving rise to an ordinary civil debt, but that it is an obligation arising *ex jure naturali*, and giving rise to a debt having different characteristics. One of these is said to be that the debt or obligation, though valid during the life of the parent, does not transmit against his representatives. If that be so, the claim of the illegitimate child in this case must be repelled. But while I agree that the debt arises *ex jure naturali*, and may possibly have some characteristics different from an ordinary civil debt, it is clear that whatever the nature of the debt may be, it has been recognised and enforced by the civil law, and I am of opinion that it is conclusively settled by authority that the debt does transmit against the representatives of the deceased parent and will be enforced against them.

The first case to which I would refer is that of *Gairdner* v. *Munro*, February 8, 1848, 10 D. 650. In that case Gairdner died in 1836, and Munro was appointed judicial factor on the estate. A sum of £100 was set aside to meet a claim which had been intimated for aliment, present and prospective, for an illegitimate daughter Cecilia. The rest of the estate was divided among the creditors who received a dividend of 9s. in the £. From the date of her father's death in 1836 till 1847, Cecilia Gairdner had been alimented by a person of the name of Laing. In that year, with Laing's concurrence, Cecilia Gairdner raised an action against Munro for arrears of aliment. She claimed the whole sum which had been set aside to meet her claim, but the Court found her entitled only to a dividend of 9s. in the £ on the amount of her claim, on the ground that she was in no different or better position than any other creditor on the estate. It appears to me that this case distinctly affirms the liability of the father of an illegitimate child for the aliment of that child, and that that liability transmits after his death against his estate. I do not see how otherwise the pursuer could have been ranked for a dividend.

The next case I would refer to is that of *Clarkson* v. *Fleming*, mentioned in the report of the Accountant of Court. In that case the mother of an illegitimate child in the year 1847 raised an action of aliment against the father, in which she obtained decree against him for aliment for seven years, commencing as at 30th December 1844, reserving to her her claim on behalf of the child for a further extension of the period for aliment. This decree expired on 30th December 1851. The father of the child died during that year. In 1854 she raised an action of wakening and transference against William Fleming, as representative of his deceased brother, for further aliment. The Court found that "the defender as representing his deceased brother, the father of the child, is liable in a reasonable sum for the aliment of the said child, from the time he attained the age of seven years," again affirming the proposition that the estate of a deceased father of an illegitimate child is liable for his support. It was maintained that the claim in this case, being by the mother of the child against the father, for relief of his share of the aliment, which they were jointly bound to contribute, was a further claim of debt, and was different from a claim at the instance of the child against the father, which it was said was only due *ex jure naturæ*, and was not a proper civil debt, and did not transmit against his representatives. But I do not think there is any substance in this distinction. No doubt the action was an action of relief, but the ground on which the pursuer was found entitled to relief was that the deceased father's estate was equally liable with her for aliment to the child. If the father's estate had not been directly liable to the child for the debt she could have had no ground of action.

The last case to which I would refer is that of *Downes* v. *Gourlay*, 13 R. 1101. In this case Downes gave birth to an illegitimate child of which Wilson was admitted to be the father. Wilson died on 27th April 1885, when the child was two years old. After Wilson's death his estates were sequestrated, and Gourlay appointed trustee on the sequestrated estates. Downes claimed to be ranked on the sequestrated estates for aliment for her daughter until she should attain thirteen years of age. The trustee rejected the claim. The Court remitted to the trustee to rank the claim as a contingent claim. The Lord President in giving judgment says—"The question here is whether the mother was a proper creditor. If she was, 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 it is a debt. It does not matter whether it is a debt or a right arising out of natural law. It is a debt incurred on proof or admission of his having begotten the child. 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 his estate." Lord Shand says —"The claim for the aliment of an illegitimate child lies 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 the mother, it is the claim of a creditor, and accordingly I am of opinion that the mother is entitled to rank on the bankrupt estate of the admitted father of her illegitimate child." This case again was the case of a mother suing, but for the reasons I have previously stated, that can make no difference.

It will be observed that in the cases of *Gairdner* and *Downes* the claims were claims on sequestrated estates, in which legitimate children could have had no claim, but in both the claims of illegitimate children were sustained.

In *Clarkson's* case there would appear to have been no legitimate children.

However inequitable, therefore, it may appear to be that in a case like the present the claim of an illegitimate child should be preferred to that of legitimate children, the law would appear to be clear on the subject.

We were referred to the case of *Reid* v. *Moir*, in which it was said that the late Lord President threw doubts on the authority of the case of *Clarkson* v. *Fleming*.

In the case of *Reid* v. *Moir* his Lordship had occasion to consider the reciprocal obligations of parents and their legitimate children, and in the course of his opinion referred to those of parents and their illegitimate children. I do not, however, gather from his opinion that he intended to express any dissent from the decision in *Clarkson's* case. It appears to me that he merely gave expression to some criticisms on the terms in which some of the Judges had expressed their opinions, which he thought were somewhat loose and indiscriminating. But however that may be, the observations there made were entirely *obiter*, and it appears to me that as the case of *Clarkson* cannot be distinguished in principle from that of *Downes*, his Lordship's opinion in the latter's case must be taken as his final decision on the subject.

Assuming the claim of the child in this case to be well-founded, the question is as to the sum which ought to be retained by the judicial factor to meet the claim. The Accountant of Court is of opinion that £750 is the proper sum, and I see no reason to doubt that he is right.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court authorised the judicial factor to set aside the sum of £750 for the maintenance and support of Reimers, and expenses connected therewith, and *quoad ultra* granted authority as craved in the second and third conclusions of the prayer.

Counsel for the Petitioner—D.-F. Balfour, Q.C.—Salvesen. Agent—John Rhind, S.S.C.

Counsel for the *Curator ad litem*—A. O. M. Mackenzie.

Thursday, December 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

HUGHES *v.* THE CLYDE COAL COMPANY, LIMITED.

Reparation—Mine—Manholes on Road of Mine—Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap* 58).

The Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), General Rules, No. 15, provides—"Every road on which persons travel underground, where the load is drawn by a horse or other animal, shall be provided at intervals of not more than fifty yards with sufficient manholes or with places of refuge, and every such place of refuge shall be of sufficient length and at least three feet in width between the waggons running on the road and the side of such road."

A miner sued his employers for damages for personal injury caused as he averred by the fault of the defenders in not having manholes along the sides of a working road of the mine. It was proved that although there were no manholes at the place in question, the road was crossed by other two roads which were within 50 yards of each other and were wider than manholes were required to be. The pursuer while walking on this road saw a horse attached to some hutches coming towards him. He ran forward to endeavour to gain the cross-road opening which was between him and the horse. He saw however that he could not do so in time, and turned back and ran to reach the cross-road opening he had passed. The horse bolted, overtook him, and knocked him down, with the result that he was severely injured.

Held that as the pursuer had not proved that the accident resulted from the want of manholes, he was not entitled to recover damages from the defenders as being in breach of the Coal Mines Regulation Act 1887.

Question—Whether a cross-road can be considered a manhole within the meaning of the Coal Mines Regulation Act?