interested party, but the delivery is only founded on as an item to show that the deceased intended the document to be a testamentary writing. In my opinion you cannot have parole to prove that. The Lord Ordinary has not expressed any opinion as to whether he believed the witnesses or not, but I concur in thinking that it would be impossible to have a case more strikingly illustrative of the danger of leaving the question of whether a person has died testate or intestate to depend on such evidence.

The Court adhered.

Counsel for Pursuer—Lang—C. N. Johnston. Agents—Smith & Mason, S.S.C.

Counsel for Defenders—Strachan. Agents—Mack & Grant, S.S.C.

Wednesday, November 4.

FIRST DIVISION.

[Lord Trayner, Ordinary.

STRAIN *v.* STRAIN.

Husband and Wife—Separation—Cruelty—Communication of Venereal Disease.

The reckless communication by a husband of venereal disease to his wife *held* to be cruelty entitling her to decree of separation and aliment.

This was an action of separation on the ground of cruelty at the instance of Mrs Mary Thomson or Strain against her husband Hugh Strain junior, colliery manager, Merrybank Cottage, Nettlehole, Airdrie, to whom she was married on 15th April 1884. One of the acts of cruelty on which the action was founded consisted in the communication by the defender to the pursuer of venereal disease. Other acts of cruelty were averred, which, however, it is not necessary to refer to.

The defender denied that he had communicated the disease to pursuer, and further pleaded—"(2) The defender not having wilfully and knowingly communicated venereal disease to the pursuer, he is entitled to absolvitor."

A proof was led, the import of which sufficiently appears from the opinions of the Lord Ordinary and Lord Shand *infra*.

The Lord Ordinary (TRAYNER) found the defender guilty of cruelty, and granted decree of separation *a mensa et thoro* in all time coming.

"*Opinion.*—. . . . . It is an ascertained fact that the defender was affected with venereal disease at the time of his marriage; and it is also an ascertained fact that he communicated that disease to the pursuer. But all the authorities combine in saying that that is not enough to warrant a decree of separation on the ground of cruelty—the disease must be communicated by the husband to the wife wilfully and knowingly. I can understand cases happening where a husband might communicate a disease of that kind to his wife where it could not be said that it was either wilfully or knowingly done; but I don't think that is the case I am dealing with here at all. The defender knew undoubtedly in the beginning of 1884 that he was suffering from venereal disease, because in the beginning of that year he went to a person for remedies to be applied for his recovery from that disease. Unfortunately he went to a very unqualified person, but he did go to that person knowing quite well what was the matter with him, because he went on the recommendation of somebody who knew that that person (Gibson) gave remedies or prescribed remedies for that particular disorder. Now, it is proved—and I would like to give the defender the full benefit of it—that he went to this man Gibson shortly before his marriage and asked whether he was in a condition safely to marry, looking to what had been his health in the immediately preceding month; and it may be quite true, also, that Gibson told him he was. But I don't think the defender discharged his duty by doing that. By going to a person utterly unqualified to advise him upon such a subject—a subject involving the happiness of his married life, his duty to the woman he was going to marry, and the safety of her constitution—by merely going upon the advice of a quack, who had no medical qualification at all, it does not seem to me that the defender discharged the duty that he owed, first to himself, and secondly to the woman he was going to marry. He knew that he was ill with an infectious and loathsome disorder; and I think the defender's conduct in marrying the pursuer without taking proper advice as to his condition, and the probable consequences of marriage in that condition, amounted, in the language of the authorities, to a wilful and reckless communication to his wife of the disorder from which he had been suffering. There are other circumstances brought out in the proof which go to support the view that the defender knew of his condition at the time of his marriage. I believe the pursuer when she says that for the first day or two after marriage the defender did not exercise his marital privilege. I see no reason why she should have said this if it was not true; and it goes very much to satisfy me that the defender knew what was the matter with him, and feared the consequences, when he abstained in these circumstances from exercising his marital privilege. The story about his being hurt may be quite true; but that was a hurt, as now stated by himself, to his side and back, and one that in no way hindered him from the exercise of his conjugal duty. I am therefore satisfied that he was not only aware of his illness but that he was for the time abstaining from marital privilege on account of that knowledge. I am further satisfied on the evidence that the defender was during the period of the marriage trip using remedies for the purpose of curing himself. In the whole circumstances I am of opinion that the defender wilfully communicated this disease to his wife, and that that was legal cruelty entitling her to separation."

The defender reclaimed, and argued—In order to constitute cruelty it was necessary for the pursuer to prove that the defender communicated the disease to her "wilfully and knowingly." The proof did not come up to that—Fraser on Husband and Wife, ii. 891; *Morphetr* v. *Morphetr*, L.R., 1 P. & D. 702; *Ciocci* v. *Ciocci*, 1 Spinks, 129; *Cohetr* v. *Cohetr*, 1 Curteis, 680.

The pursuer replied—It was not necessary that the defender should have acted "wilfully and knowingly." It was enough to constitute cruelty if he acted recklessly—*Chesnutt* v. *Ches-*

nutt, 1 Spinks, 200; *Boardman* v. *Boardman*, L.R., 1 P. & D. 233; *Brown* v. *Brown*, L.R., 1 P. & D. 46; *Jones* v. *Jones*, Searle & Smith, 138.

At advising—

LORD SHAND—In this case the pursuer Mrs Strain asks the Court to grant decree of separation and aliment against her husband on the ground of cruelty, and the Lord Ordinary, after a proof, has held that the charge of cruelty has been made out, and has pronounced decree.

The important facts in the case appear to me to be these—The parties were married in Glasgow on 15th April 1884, and according to the evidence of the wife, which I have every reason to believe is accurate, the defender did not have connection with her for about a week after the marriage. She states facts which indicate that the defender was using remedies at that time for the disease from which he was then suffering. After about a week connection did take place, with the result that the defender communicated venereal disease to his wife, with the most serious consequences for her. The defender in his evidence did not dispute that he had been afflicted with this disease, but said that he had reason to be satisfied that though he had been suffering before his marriage the disease had been removed from his system before the date of his marriage. The fact seems to be that the defender having contracted the disease in December 1883, some four or five months before his marriage, did not consult a medical man and take steps to get the disease removed, but consulted a druggist, or a druggist's assistant—I do not think it matters which—of twenty-six years of age, and allowed himself to be treated by him. When this witness, Gibson, was examined, he said that the defender paid him repeated visits, and that about the end of December—I think the witness must be wrong in his date, but that is what he says—he thought the defender was cured, and told him so. But while he says that, he also says that he expected the defender to come back, but that the defender never returned. He further states that he had a conversation with the defender in which the defender asked him if it would be safe for him to marry, and he gave him advice to the effect that it would; but the defender did not mention any time for his marriage. There is further evidence with regard to the state of the defender's disease. I refer to the evidence of Dr Dunlop, who is a skilled surgeon and a specialist on this subject, who attended the defender shortly before the date of the proof. He explains that in December 1884, about seven months after the marriage, the defender came to him, and he states his evidence as follows—"The defender had developed secondary symptoms, but the primary symptoms had not disappeared;" and in another passage—"(Q) Did the primary sore as a source of possible contagion exist at all?—(A) It had no broken surface, but a very little friction would break the surface, and then it would be a primary sore in all its virulence, and able to promote the disease." So that it is evident the disease was present, that the primary symptoms had not disappeared, and that if the defender had consulted a medical adviser he would have been told that he would infect his wife with the disease.

I am of opinion in that state of circumstances that there was cruelty on the part of the husband in having connection with his wife. The Lord Ordinary has put the issue whether the defender communicated the disease to his wife "wilfully and knowingly," and we were told there is a passage in Lord Fraser's book containing an expression of opinion that such elements must be present in a case to constitute cruelty. If there is such an expression of opinion, I think it would require to be explained to mean something different from "wilfully and deliberately," for I am clear on the ground of common sense and also on the authorities that to constitute cruelty it is enough if the act be reckless. If a husband has reason to believe that there will be risk in having connection with his wife, and has connection with the result of communicating disease, I think that constitutes cruelty.

In one of the older authorities, the case of *Cohetr* v. *Cohetr*, 1838, 1 Curteis, 678, Dr Lushington puts the question whether the act was done "knowingly and wilfully," but on the present state of the authorities I do not think that view of the law is now correct. In the case of *Ciocci* v. *Ciocci*, 1853, 1 Spinks, 121, the principle was adopted by the English Court, which appears to me to be reasonable in itself, that recklessness alone is sufficient. And in the most recent case of *Boardman* v. *Boardman*, 1866, L.R., 1 P. & D. 233, Lord Penzance, whose authority on a matter of this kind is of the very highest, said that the question for the jury simply was one of recklessness. It will be seen from the report that "Before the jury delivered their verdict they asked the Judge Ordinary whether the husband would be guilty of cruelty if he had exercised indiscretion and recklessness in marital intercourse, and so communicated the disease to his wife without actual knowledge that he was infected." Lord Penzance directed the jury as follows—"If the husband knew that he was in such a state of health that the having connection with his wife would be a reckless act, I think the communication of the disease would amount to cruelty." His Lordship then goes on to say, before pronouncing decree, that he had further considered the matter, and says with reference to the case of *Jones* v. *Jones*, 1860, Searle & Smith's Reports, 138—"I find that in *Jones* v. *Jones* the full Court adopted the judgment of Dr Lushington in *Ciocci* v. *Ciocci*;" and then his Lordship proceeds to quote what Dr Lushington had said in *Ciocci* v. *Ciocci*—"If this were a point necessary to be determined, I should hold, and without doubt, that if a man married under such circumstances" (*i.e.*, having been suffering from venereal disease for some time immediately prior to the marriage), "and communicated to his wife the venereal disease, it was, to use the mildest term applicable to such conduct, *such utter recklessness of the health and comfort of his wife*, that if he did communicate such disease he was guilty of cruelty in the eye of the law; and I should hold this upon the principle that whoever does an act likely to produce injury, and the injury follows, can never excuse himself by saying 'That he hoped a probable consequence might by some peculiar good fortune not follow.'" Then Lord Penzance goes on to say that the jury had adopted the term "reckless," and had found the cruelty proved, and he therefore pronounced a decree *nisi*.

On these authorities the question here is whether the defender showed a reckless disregard for the consequences of his act, and upon that I have no doubt. The disease had been recently contracted; he had not been treated by a medical man; the sore was indurated, and the risk of having connection was obvious. He himself was conscious that he still suffered from the disease, as is shown by the fact that he had no connection with his wife for several days after the marriage. But in the face of these facts the defender had connection with his wife, with the result that he communicated the disease to her, and that in my opinion constituted an act of gross cruelty.

It is not necessary, in the view I take, to go into the other facts of the case. The defender recklessly communicated a dangerous disease to the pursuer, and I think she is therefore quite entitled to decree.

Lord Mure—I am of the same opinion. It is not necessary that the act of the defender should be wilful and intentional in order to entitle the pursuer to redress. I think the pursuer is entitled to decree if the conduct of the defender shows such reckless indifference to consequences as has been proved here.

On the evidence it is clear that at the beginning of 1884 the defender was seriously affected by this disease, and that instead of going to a medical man he goes to a chemist and takes his advice. Moreover, this chemist when he told him he was cured and that he might safely marry, at the same time says that he expected to see him again after that, but that the defender never went back. I think it was within the knowledge of the defender that he was affected with this disease which he knew might break out at any time. He was not therefore entitled to marry so soon as he did. It is a very curious fact that the defender abstained for several days after the marriage from having connection with his wife, and that apparently not from any other cause than that he did not think it was safe.

I think these facts are sufficient to entitle the pursuer to decree.

Lord Adam—Perhaps it is not an accurate expression to say that anyone would wilfully and knowingly communicate to his wife such a disease as this, and what is meant by these words, I take it, is that the husband knows it is highly probable that the result of connection will be the communication of the disease. I accept the opinion of Lord Penzance, and think that a reckless disregard of the consequences of having connection is sufficient to entitle the wife to redress. On the facts which have been proved I think that the defender had knowledge of the state he was in, and that the pursuer is entitled to decree.

The Lord President concurred.

The Court adhered.

Counsel for Pursuer — Strachan — Dickson. Agents—J. & A. Hastie, S.S.C.

Counsel for Defender—D.-F. Balfour, Q.C. —Rhind. Agent—Robert Menzies, S.S.C.

Wednesday, November 4.

FIRST DIVISION.

[Lord Fraser, Ordinary.

SMITH *v.* SMITH.

Parent and Child—Aliment.

Held that a son whose father had furnished him with a good education and had entered him on a learned profession, could not claim an allowance to enable him to live apart from his father in order to prosecute his profession.

Measure of Liability for Indigent Relative.

The liability of a father for aliment to his indigent son is not a mere liability to give such support as the parish would give, and so a mere obligation to relieve the parish, but is an obligation relative to the position in life of the parties.

Observations per Lord President on the principle laid down in the case of *Thom* v. *Mackenzie*, 2 December 1884, 3 Macph. 177.

George Cayley Smith, Barrister-at-Law, residing at his father's house, Duncarron, in the county of Stirling, raised this action against his father Adam Smith, also residing at Duncarron, concluding for a sum of (1) £120, and (2) for £250 yearly in name of aliment, to be payable quarterly in advance till the pursuer should be able to maintain himself at the bar, or for such time as the Court should fix. He averred that he was thirty-two years of age, and that at his father's desire, and against his own wish, he had studied for and eventually qualified for the English bar, but that all along he had suffered from his father's failure to provide him with an adequate allowance. He further averred that after passing for the bar in March 1882 he did not obtain from his father the funds necessary to defray the cost of his chambers, so that in April 1883 he had been obliged to leave London and to return to his father's residence at Duncarron. He also alleged that his father was a man of large means, possessing heritage to the value of £60,000 and personal estate to the extent of £10,000, and that his father knew in selecting for him the profession of the bar that it was a calling in which, for some time at least, he could not earn a livelihood sufficient to support himself. He stated that by defender's conduct he was unable to make any effort to support himself.

The defender denied that he knew that the pursuer was opposed to becoming a barrister. He averred that when the pursuer went to Oxford in 1883 he paid to him or expended on his behalf £856, and that after his own retirement from business he was unable to meet such expenses, as his means were insufficient for the wants of his family and household. The allegations of the pursuer as to the defender's wealth were denied, and the defender further alleged that he was alimenting the pursuer to the best of his ability by allowing him to live in family with him.

The pursuer pleaded, *inter alia*—"(1) The defender being bound to aliment the pursuer *super jure naturæ* suitably to his station in life, decree