Tuesday, March 20.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

TEVENDALE (INSPECTOR OF POOR OF FETTERESSO) *v.* DUNCAN.

Poor — Aliment—Alimentary Debts—Civil Imprisonment (Scotland) Act 1882 (45 *and* 46 *Vict. c.* 42), *secs.* 3 *and* 4.

A parochial board which had made certain advances for the aliment of a pauper, obtained decree against his son for the amounts so expended, and sought to enforce it by imprisonment. *Held (diss.* Lord Craighill) that as the sums decerned for were not to be applied in alimenting the person to whom or for whose behoof the decree was granted, they were not "sums of aliment" in the sense of the statute, and therefore the decree was not enforceable by imprisonment.

Question — Whether the Court of Session has jurisdiction to direct a Sheriff to imprison under the statute?

Section 3 of the Civil Imprisonment (Scotland) Act 1882 enacts—"From and after the commencement of this Act no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decerned for aliment."

Section 4 enacts—"Subject to the provisions hereinafter contained, any Sheriff or Sheriff-Substitute may commit to prison, for a period not exceeding six weeks, or until payment of the sum or sums of aliment, and expenses of process decerned for, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute may appoint, or until the creditor is otherwise satisfied, any person who wilfully fails to pay within the days of charge any sum or sums of aliment, together with the expenses of process, for which decree has been pronounced against him by any competent Court."

The Inspector of Poor of the parish of Fetteresso—the present pursuer—on behalf of the Parochial Board, obtained decree in the Sheriff Court at Stonehaven against the defender David Duncan junior, shipmaster there, for a sum of money which had been expended by the board in alimenting the defender's father, a pauper, and since dead. The defender not having implemented the decree, was charged to make payment, and the pursuer, after the expiry of the charge upon the decree without payment, petitioned the Sheriff, in terms of section 4 of the Civil Imprisonment Act of 1882 above quoted, to have the defender ordained to show cause why he should not be committed to prison for six weeks, or until payment of the advances made by the pursuer as contained in the decree, or such instalment thereof as the Court should fix.

The pursuer pleaded—"The sums decerned for, conform to the decree founded on, being alimentary, and the defender having failed to pay the same, he is liable to imprisonment, in terms of section 4 of the Civil Imprisonment (Scotland) Act 1882, and the prayer of the petition ought therefore to be granted."

The Sheriff-Substitute (COMRIE THOMSON) assoilzied the defender.

"*Note.*—This is a petition under the Civil Imprisonment Act of last session, at the instance of an inspector of poor on behalf of his parochial board, and is directed against a man to whose father when in destitution the board made advances. The petitioner obtained a decree for these advances, and he now seeks to have the respondent sent to prison in respect of his failure to pay the sum contained in the decree.

"The question involved is of wide application, is of much importance, has not been previously dealt with judicially so far as I can discover, and I feel it to be attended with considerable difficulty.

"As is well known, imprisonment for debt was competent in Scotland until a very few years ago, when the sum decerned for was above £8, 6s. 8d., and below that sum in certain enumerated cases, among which was 'sums decerned for aliment.'

"By recent legislation imprisonment for debt was entirely abolished irrespective of amount, except again in certain specified cases, among which, once more, was included 'sums decerned for aliment.' Under such a decree a defaulting debtor could be incarcerated as formerly, the creditor being bound to maintain his debtor in prison at a rate fixed by the Sheriff.

"By the Act of last session the law on the subject was again altered, and imprisonment—that is, civil imprisonment, as it was called—for 'sums decerned for aliment' was also abolished; but it was provided that a debtor failing to implement such a decree, or otherwise to satisfy his creditors, if the Sheriff is satisfied that his failure to do so is wilful, might be imprisoned, for a period not exceeding six weeks at a time, on such a complaint as the present. The defaulter on being sent to prison is, however, not considered a 'civil prisoner,' but as a person guilty of contempt of Court, or a *quasi* criminal, and is maintained at the public expense.

"It seems to me that if this complainer holds a decree 'for aliment,' he is entitled to obtain a warrant of imprisonment against his debtor, the respondent; but if, on the other hand, the decerniture he had obtained is not 'for aliment, the petition must be dismissed.

"With no small amount of hesitation I have arrived at the conclusion that the latter is the view which I must adopt, and there will therefore be decree of absolvitor.

"There is much to be said for a contrary opinion. The origin of the debt is purely alimentary. The respondent failed in his duty to support his father; if his father had sued him and got a decree which was not implemented by the son, the present proceedings, if at the father's instance, would plainly have been competent. It would have been a sum 'decerned for aliment.' I admit that there is an apparent anomaly in holding that the same remedy of imprisonment is not open to the parochial board, which stepped in to prevent the father from utter destitution, and discharged the son's duty. Further, there is some authority for adopting a view adverse to that to which I have found myself bound to give effect. In a case disposed of in the Bill Chamber by Lord Craighill—*Gibson v. Wood*, September 16, 1874, Poor Law Mag. 551—his Lordship decided that such a decree as that held by the present complainer was a decree 'for aliment' within the meaning of the Act of William IV. for abolishing imprisonment for

civil debts of small amount, and was therefore competent to sustain imprisonment thereon, although the amount decerned for did not amount to £8, 6s. 8d. I confess that I feel more pressed by this judgment than by any argument that has been presented or has occurred to me. But I may say, without any disrespect to the eminent Judge who pronounced it, that I am not bound to regard it as a settlement of the law on the point; and further, I am humbly of opinion that the course of subsequent legislation may fairly be supposed to have removed that decision from the category of binding precedents in such a question as that now before me.

"What is the decree which the complainer holds, founded upon? Not on natural law, not on the common law, not on contract, but purely upon statute. The ground of his claim against the respondent is simply and solely the provisions of the 71st section of the Poor Law Act of 1845. It is there enacted, that where in any case relief shall be afforded to a poor person found destitute, it shall be lawful for the parochial board to recover the moneys expended in behalf of such poor persons from his parents, or from other persons who may be legally bound to maintain him. The respondent here is the person who was legally bound to maintain the pauper on whose behalf moneys were expended by the complainer's board. But the action by which the board has recourse against the defaulting relative, and is relieved of the advances it has made, does not seem to me to be an action in which the sum decerned for is 'for aliment.' It is of the essence of an action for aliment in the proper sense of that expression, that it shall conclude for termly payments in advance in order to provide means for supplying from day to day the ordinary necessaries of life. It is founded on *jus naturale*, is of a most summary nature, and the claims which it enforces are fortified by special sanctions. But the decree now under consideration is one of relief for moneys expended under a statutory obligation. It is an ordinary debt, but imprisonment for ordinary debt has been abolished. Nay, imprisonment for alimentary debt, in the sense in which the expression was used prior to 1882, has also been abolished. There has been substituted for it a kind of imprisonment which can scarcely be justified, except on the ground that the debtor has not merely failed to discharge his obligation to his creditor (a failure for which he cannot now be incarcerated), but has been guilty of a social wrong—an injury not to an individual only but to the State.

"I am therefore of opinion, though, as I have said, I am by no means free from doubt on the subject, that the peculiar form of diligence created by the Act of 1882, and of which this complainer now seeks to avail himself, is not competent when it follows on a decree in an action of relief, although the sums from payment of which relief is sought were expended on behalf of a poor person.

"The parochial board is not without its remedy in the great majority of cases when a parent or a husband fails in his duty to his children or wife. By the 80th section of the Poor Law Act defaulting persons shall be deemed vagabonds under the old Scots Act of 1579, 'for punishment of strong and idle beggars, and relief of the poor and impotent,' and may be prosecuted criminally before the Sheriff, and on conviction sent to prison.

"The respondent is assoilzied."

The pursuer appealed to the Court of Session, and argued—This decree was for a sum decerned for aliment in the sense of the statute, and the Sheriff-Substitute in refusing to consider that question had failed to exercise his jurisdiction—Case cited by Lord Craighill *infra*.

The defender replied—The statute—at least that part of it founded on by the pursuer—is a penal one, and must be construed strictly. The sums decerned for must be for the aliment of the person suing. The parochial board were a statutory body having a statutory right of action; the debt was not a *debitum naturale* to them. The decree to them was not properly one for aliment, but merely one to enable them to regulate their assessments.

At advising—

Lord Young—This case presents a question which has been represented to us as of some importance under the recent Act to amend the law relating to civil imprisonment in Scotland. By the Act of 1880 imprisonment for debt was abolished, subject to certain exceptions, one of them being "sums decerned for aliment." The statute of 1882 provides that "after the commencement of this Act no person shall, except as hereinafter provided, be apprehended or imprisoned on account of his failure to pay any sum or sums decerned for aliment," so that, with the exception provided in the Act itself, imprisonment for sums decerned for aliment is no longer lawful. The provision of the statute is remarkable. The 4th section provides that "any Sheriff or Sheriff-Substitute may commit to prison, for a period not exceeding six weeks, or until payment of the sum or sums of aliment . . . any person who wilfully fails to pay . . . any sum or sums of aliment . . . for which decree has been pronounced against him by any competent Court." That is to say, that if this Court or any other competent Court in Scotland has pronounced a decree against any person for sums for aliment, any Sheriff or Sheriff-Substitute may commit him to prison for a period not exceeding six weeks. We have no power to commit, and can exercise no discretion in the matter. We can only pronounce decree—we did so the other day in an action of separation and aliment, and I suppose the sums there were sums decerned for aliment. All legal execution may be done under that decree. Formerly we could have imprisoned; now there can be no power of imprisonment exercised by us, but being the decree of a competent Court any Sheriff can commit under that decree. That is certainly a singular provision; but it is the provision of the statute. Probably we should on construction hold the expression "any Sheriff," to mean the Sheriff to whose jurisdiction the debtor was for the time subject. This might probably be implied. I make these observations for the purpose of stating this—that I doubt whether we have any power in this matter. There is no doubt that if the Sheriff committed a man to prison, outwith the provisions of the 4th section, we could interfere to stop that; whether we could interpose to direct

a Sheriff to commit to prison is another question. The Legislature has not vested the power in us. We may give decree for the aliment; we have no power to say whether the debtor should be imprisoned or not. A creditor cannot enforce our decree by imprisonment unless he can persuade a Sheriff or Sheriff-Substitute to send the debtor to prison. As we have no power to commit, and no direct power to review, I think it would be an invasion of the jurisdiction which the Legislature has conferred upon the Sheriffs if we were to interpose and direct them to exercise this power. If in this case the Sheriff-Substitute had simply refused to exercise the power, I should have had great difficulty in doing anything. But the Sheriff here has told us that the immediate ground of his refusal to commit to prison is that he does not regard this decree as one for sums for aliment; and the appeal to us is on the legal question. It is obviously very convenient and very fitting that we should declare our opinion on that question. I am of opinion that this is not a decree for any sum or sums for aliment. That depends on what is meant by "any sum or sums decerned for aliment." I think the true meaning is that the sums must be decerned for with a view to be applied, when they are got, in alimenting the party in whose favour the decree is given. I do not mean that the decree might not be given to a trustee or a relative to apply these sums for behoof of the person to be alimented; but the decree must be for sums to be used in alimenting some person or other. Aliment is a very comprehensive word. It means of course, although the Act does not say so, the aliment of human beings. A human being, too, is not alimented solely if he can live. He requires to be provided with food, shelter, and clothing, and all those things required as absolutely necessary to sustain himself in life. The house proprietor supplies shelter, the tailor supplies clothing — without which the human being could not, at least in this climate, be alimented—the butcher and baker supply food. In any other sense than that which I have attempted to give, they, if they sue, are suing for aliment. If the expression merely means that the sums must be due in respect of a debt contracted for aliment, say a hotel bill, standing over, it may be a term of months, the amount decerned for would be sums for aliment. But I think it is impossible to say that in excepting a decree for sums of aliment from the general law, acting on considerations of policy, sums of that kind were intended to be included in the exception. There is no reason why the general law should not apply to such decrees as this. In construing the meaning of such words as these, "sums of aliment," we must consider the sense of the thing—the policy of the Legislature in introducing an exception to the general operation of the law. I can conceive a reason for excepting sums to be applied in the aliment of a living human being. The case in view, it is represented, is that of a man who is ordered to aliment an illegitimate child and refuses to do so, leaving the burden upon the mother. This is a tremendous clause for such a small purpose. It is made to include a decree pronounced in this Court, for perhaps £1000 a-year, against a man whom we may have separated from his wife. The decree for that may be enforced by imprisonment by any Sheriff or Sheriff-Substitute, not by us. This is rather clumsy legislation than otherwise. The provision refers to sums for the aliment of a living human being. Now, here we have an account run up for ten years, no doubt for alimenting a man who is now dead, and then, founding on that account, the parochial board bring their action. Are these sums decerned for aliment? They are not to go to aliment; they are to go to diminish the rate for the parish for the next term. No doubt these were in a sense sums of aliment, but that would apply equally to the butcher's and baker's account. The person alimented is not interested at all. He is dead; were he alive, would he derive any benefit from these sums? The person who is receiving needful support under the Act of 1845 is supremely indifferent whether the parish gets decree from another parish, or a son or son-in-law—though I am inclined to think a son-in-law is not liable—or not. These are not sums decerned for aliment in my construction, according to the meaning you must put upon the words, and in the plain sense of the statute.

Assuming that we have jurisdiction, and thinking that we should express our opinion on the legal question, I hold that the decree is not a decree for aliment in the sense of the statute. Therefore we cannot interfere even if we had the power.

Lord Craighill—The appellant is inspector of poor of the parish of Fetteresso, and the action which has been brought up by this appeal is directed against the defender, the son of a pauper to whom parochial relief had been afforded, and against whom (the defender) decree for payment of the advances has recently been pronounced, that the defender might be ordained to show cause why he should not be committed to prison for a period not exceeding six weeks, or until payment of said advances, interest, and expenses, or until the pursuer should be otherwise satisfied, as provided for by section 4 of the Civil Imprisonment (Scotland) Act of 1882; and failing the defender's appearance, or failing his proving to the satisfaction of the Court that his failure to pay the sums decerned for against him had not been wilful, then to grant warrant for committing the defender to prison. The ground of this application is, as set forth in the condescendence, that the advances referred to, interest and expenses, are an alimentary debt; and upon this plea parties joined issue. That the defender ought to pay, that he was able to pay when in consequence of his failure to pay relief to his father was afforded, and that his failure was wilful, are things not now in dispute. So the decree referred to has been pronounced upon this ground. All that is said is that the debt has ceased to be alimentary, the money recovered being to be applied, not to the future support of the pauper, but to the reimbursement of moneys already expended on his sustentation. This is the view which was adopted by the Sheriff-Substitute, against whose judgment the pursuer has appealed. The question presented for our decision was the subject of consideration and decision by me in a process of suspension and liberation which was disposed of in the Bill Chamber on 16th September 1874, a report of which will be found in the second volume of the Poor Law Magazine, p. 551. I then decided that a debt due to a parochial board for

moneys advanced for the support of a pauper, and which they were seeking to recover from a relative liable in relief, was an alimentary debt within the meaning of 5 and 6 Will. IV., c. 70, sec. 4, which retains the remedy of imprisonment for debt in the case of "sums decerned for aliment," although the sum sued for is less than £8, 6s. 8d.; and the reasons for my opinion as set forth in the note appended to the interlocutor were these—"The claim to which originally the complainer (in the suspension and liberation) was liable was undoubtedly for aliment; and its nature, the Lord Ordinary thinks, has not been changed by reason of his failure to discharge it when it became exigible, or because in the meantime what he ought to have furnished has been supplied by the parochial board. The fallacy in the argument by the complainer's counsel is the assumption that the debt for which he has been imprisoned is a different debt or a debt of a different nature from that for which his mother-in-law originally was the creditor. First and last, the complainer's liability was for aliment, and if this is the true view of its character, the imprisonment of the complainer was lawful, and he is not now entitled to be liberated upon the ground set forth in his note of suspension and liberation. Several decisions were cited and commented on in the course of the discussion before the Lord Ordinary, among which were *Greig* v. *Christie*, December 16, 1837, 16 S. 242; *Lawson* v. *Jopp*, February 16, 1853, 15 D. 382; and *Cheyne* v. *M'Gungles*, July 19, 1860, 22 D. 1490; but though there are in these cases views presented which so far support the contention of the present respondent, none of them is a precedent upon the special point which has here been brought up for judgment. All of them however, show that the expense of obtaining decree for a sum which falls within the specified exceptions is to be regarded as partaking of the same character as the debt sued for, so far as the provisions of the statute in question are concerned; and accordingly the counsel for the complainer did not seek to draw a distinction between the expenses and the other contents of the decree upon which the complainer has been incarcerated."

This was my opinion in 1874. I am of the same opinion still. The remedy sought I think is the natural remedy, the only one consistent with a reasonable construction of the words to be interpreted. Very anomalous results would ensue were another interpretation adopted. Take the case of a father's obligation to aliment an illegitimate child. Decree cannot be got before the child is born, and there is always an interval after the birth before action is raised. That liability runs from the birth, and yet the result will be this should the Sheriff-Substitute's judgment be sustained, that the sum of aliment decerned for will be divided into two parts; for the one he may, and for the other he may not be imprisoned. A result so anomalous, not to say absurd, is a plain refutation of the Sheriff-Substitute's opinion. In these circumstances, there being no change in the conditions on which the point is now to be determined, I think that the appeal ought to be sustained, and the case remitted to the Sheriff that the warrant prayed for by the pursuer may be granted. An opposite result would be matter for regret—in the first place, because it would practically be an encouragement to the relatives liable for the support of a pauper to neglect the timeous fulfilment of their obligation; and because, in the second place, it will prevent, as it was admitted it would on the present occasion prevent, the recovery of a just debt, which were warrant for imprisonment to be granted would confessedly be recovered from the debtor.

On the question of the power of this Court to review the deliverance of the Sheriff in such a case, which has been alluded to by Lord Young, I have at present no doubt; but this is a question which was not raised at the bar, which I have not fully considered, and on which therefore I reserve my opinion.

Lord Rutherfurd Clark—I concur with Lord Young.

Lord Justice-Clerk—I agree with the result at which Lord Young proposes to arrive. If the question were whether this were an alimentary debt, it would be very difficult to say that it is not. Such a debt has some privileges, and the expression "alimentary debt" has a distinct and well-known meaning. But this is a very peculiar case. The last sub-division of section 4 of the new statute enacts that the creditor shall not be liable to contribute to the debtor's maintenance in prison, but that the debtor should be subject to the rules applicable to persons imprisoned for contempt of Court. The statute says the Sheriff may commit the debtor to prison for a period not exceeding six weeks, &c., on account of his failure to pay any sum or sums of aliment for which decree has been obtained. Do these words "sum or sums of aliment" on which these proceedings take place, mean any alimentary debt, or do they mean a sum decerned for to be applied for the aliment of the person for whom decree is given. There is a great difference between the two constructions. The first seems to have no *rationale*. There is no reason at all why a mere alimentary debt should still make the debtor liable to imprisonment. But where the sum is to be applied for the benefit of the person suing, the debt is entitled to the privilege in point of execution on the plainest possible principle. The sum sued for is for his support, and that it be applied is essential, because he has no other means of subsistence. That is really the question. I can conceive an action brought under the Poor Law Act against a person who had succeeded to property for bygone aliment. It would be absurd to say that he could be imprisoned for failure to pay. Wherever the suing is at the instance of a *quasi*-assignee, wherever the sums decerned for aliment cannot be applied for aliment, for example, whereas in the present case the account has been run up for ten years, and the person is dead, then the demand of the parochial board is nothing but an ordinary debt.

Upon the matter of competency I am satisfied that we have power to entertain the question.

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for Appellant (Pursuer)—Trayner—Rhind. Agent—W. Officer, S.S.C.

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