

roborate the account given by the van-driver, and though there were others who say that they thought the driver should have pulled up, yet in the face of the fact that there certainly was some hesitation and halting, which led to a misunderstanding, I am unable to see that the averment in the condescence is proved. I am therefore disposed to take the same view as the Sheriff-Substitute.

LORD SHAND—Although I have had some difficulty in regard to this case, I have come to the conclusion that we ought to revert to the judgment of the Sheriff-Substitute. There are three witnesses for the defender who were examined at the end of the cause who gave the same account, which is, practically, that while the driver was going down the street at a reasonably slow pace, the deceased was crossing in front of the van, and that he halted, and then, after halting, he changed his mind and attempted to go forward, when he was knocked over by the shaft. Assuming that these witnesses are giving a true account, the occurrence is thus described by M'Connell—“After the old man halted he seemed to think he would have time to pass, and went on, and then the van went on. It was a misunderstanding between them which of them should move first.” If that is a true account of what happened, then it certainly was an accident and not the fault of the driver, for he thought, from the fact of the old man halting that he did not mean to cross in front, and if the deceased changed his mind, then the driver is not responsible.

The only difficulty in the way of this view of the case is that the driver does not give specifically the same account of what happened, but it must be observed that he is the first witness examined for the pursuer, so that it is truly cross-examination. It is very unfortunate that he was not recalled or examined for the defender, but I think that it is possible, if his evidence is read reasonably, to find that he corroborates the view taken on the evidence of the other witnesses. He says that while he was driving slowly down he called out to the deceased several times—“I was pulling up at the same time as I roared to the old man Docherty. He looked up about the third time I roared, and made a quick step forward, and the left-hand tram struck him and knocked him down.” This appears to corroborate the view that on the third call the deceased halted and looked up, and that then the driver went on. On the whole, I have come to the conclusion that as the Sheriff-Substitute thought the witnesses who spoke to this mode of the occurrence were to be relied on, we should revert to his judgment, and assolvie the defender.

The LORD PRESIDENT concurred.

LORD DEAS having been absent at the time of the debate gave no opinion.

The Court pronounced this interlocutor:—

“Recal the interlocutor of the Sheriff of 15th November 1883: Of new find in terms of the findings in fact contained in the interlocutor of the Sheriff-Substitute of 19th June 1883: Assolvie the defender from the conclusions of the action, and decern: Find

the pursuers (respondents) liable to the defender in expenses since the date of the Sheriff-Substitute's interlocutor.”

Counsel for Pursuers (Respondents)—Ure—Law. Agents—Ker & Smith, W.S.

Counsel for Defender (Appellants)—Trayner—Wallace. Agents—Rhind, Lindsay, & Wallace, W.S.

Saturday, March 1.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WALKER v. SMITH.

Sheriff—Debts Recovery (Scotland) Act 1867 (30 and 31 Vict. c. 96), sec. 2—“Men's Ordinaries” —Aliment—Implied Contract.

Held that an action against a husband at the instance of his mother-in-law for board and lodging afforded to his wife and infant child, whom he knew to be living with the pursuer and for whom he was not providing aliment, was founded on implied contract, and competent under the Debts Recovery (Scotland) Act 1867.

This was an action under the Debts Recovery (Scotland) Act 1867 in the Sheriff Court at Glasgow, at the instance of a Mrs Walker against her son-in-law Joseph Smith, for the sum of £31, 5s., which was alleged to be due in respect of board and lodging furnished by the pursuer to the defender's wife and infant child between 15th November 1882 and 25th June 1883.

Section 2 of the said Act provides—“It shall be lawful for any Sheriff in Scotland, within his sheriffdom, to hear, try, and determine in a summary way, as more particularly hereinafter mentioned, all actions of debt that may competently be brought before him for house mails, men's ordinaries, servants' fees, merchants' accounts, and other the like debts, wherein the debt shall exceed the value of £12 sterling, exclusive of expenses and dues of extract, but shall not exceed the value of £50 sterling, exclusive as aforesaid.”

The defence was (first) that the action was irrelevant, and also incompetent under the Act; and (second) that the defender was not due the sums sued for, and that he made no contract with the pursuer to aliment his wife and child.

A proof was taken, and the material facts are detailed by the Sheriff-Substitute (BALFOUR) in the following interlocutor:—“Finds that this is an action raised by a mother-in-law against her son-in-law for board, washing, lodgings, clothing, and medicine furnished by her for about thirty-two weeks to the son-in-law's wife and child: Finds that the action is competent in this Court in respect that it is a claim for men's ordinaries, and in that category are included supplies or furnishings of the description already mentioned: Finds that the defender and his wife were married in April 1879, and they resided together until November 1881, when the defender left his wife; that at that time he left his wife in a house which he had taken

until Whitsunday 1882, and the defender paid the rent of the house, and also a weekly allowance of 15s. to his wife; that prior to Whitsunday 1882 the defender went to the house and took away the furniture, excepting three chairs, a table, and a grate in the kitchen, and he gave up the house, and took no other residence for his wife, but he says that he continued paying the weekly allowance until September 1882; that from and after 15th November 1882 the defender's wife and child resided with the pursuer, and received the supplies specified in the account sued for; that the defender was aware that his wife and child were living with the pursuer, and he paid them no aliment and made no provision whatever for their maintenance; that the defender alleges that in December 1882 he made an arrangement with his wife that he was to withhold aliment from her, and that by her orders he arranged to pay it to 'her creditors,' i.e., in payment of debts incurred by her after the defender left her, viz., in November 1881: Finds that to a certain extent the wife admits the arrangement, but she qualifies it by stating that she agreed to give up the aliment if the defender paid the accounts and took a home for her, and that she was to get £8 for aliment from him up to that time; that the defender's wife further alleges that she intended at that time to take a situation, and that she sent a man over to the defender to get his name in order to procure a sewing-machine, but he would not give it, and that then her child became ill and continued ailing until 31st May 1883, when it died, and that she was then unable for work, as her time was entirely taken up in nursing the child: Finds, under these circumstances, that the defender has failed to prove an unconditional arrangement between him and his wife whereby she was to give up her claim for aliment and earn her own livelihood: Finds with regard to the actual arrangement made between the husband and wife (1st) that it was made subject to the conditions of him providing his wife with a home and paying her £8, which condition the defender did not fulfil; (2d) that it was made in the expectation that the defender's wife would be able to earn a livelihood by working for herself, which expectation was not realised on account of the child taking ill and requiring constant nursing; (3d) that the defender himself, according to his own showing, has not acted upon the alleged arrangement, because the aliment at the former rate, which he paid to his wife, viz., 15s. per week, would have amounted for thirty-two weeks to £24, and he did not apply that sum in paying accounts to the wife's creditors, but from the accounts produced in process it appears that after the December agreement was entered into the defender applied about £10 in payment of accounts which his wife had incurred for family purposes while he and she were residing together; and (4th) that the agreement, if absolute, might have affected the wife's own rights, but it could not affect the rights of the infant, and a considerable portion of the account applies to the infant: Therefore decerns against the defender as libelled, with five pounds nine shillings and sevenpence of expenses."

On appeal the Sheriff (CLARK) adhered.

The defender appealed to the Court of Session, and argued—Debts due *ex debito naturali* do not

fall under the statute, but only debts depending on contract. Cases construing the Triennial Prescription Act 1579, cap. 83, were authorities here, as the language of the two Acts was the same.—*Finlayson v. Gown*, July 7, 1809, F.C.; *Thomson v. Westwood*, Feb. 26, 1842, 4 D. 833; *Davidson v. Watson*, M. 11,080; *Moncrieff v. Waugh*, Jan. 11, 1859, 21 D. 216.

The pursuer replied—This claim falls under "men's ordinaries." It depended on implied contract, and was not *ex debito naturali*.—*Taylor v. Allardyce*, Jan. 16, 1858, 20 D. 401; *Ersk. Inst.* iii. 3, 92. The cases cited for the defender had reference to the aliment of minors, but a wife living separate from her husband was not in the same position.

At advising—

LORD PRESIDENT—The only question of the smallest importance in this case is whether the claim is competent under section 2 of the Act to facilitate the Recovery of certain Debts, by which it is provided that actions may be brought for the recovery of "house mails, men's ordinaries, servants' fees, merchants' accounts, and other the like debts." Now, as these words are borrowed from the Triennial Prescription Act of 1579, c. 83, authorities construing the words are directly applicable in a question as to the construction of this Act. It is said to be competent to pursue for "men's ordinaries . . . and other the like debts," and there have been several cases under the Act of 1579 as to the meaning of these words, the general result of which has been to comprehend claims for aliment within the term men's ordinaries. There are exceptions undoubtedly, but when the aliment is to be paid in respect of a contract, express or implied, then the triennial prescription would be applicable, and so the claim might be maintained under the Act with which we are dealing.

I agree with what Lord Ardmillan said in the case of *Taylor v. Allardyce*, Jan. 16, 1858, 20 D. 401—"That the triennial prescription or limitation introduced by the Act 1579, cap. 83, applies to an action for repayment of aliment, advanced on express or implied contract, as an 'action of debt for men's ordinaries, and other the like debts,' appears to be the natural construction of the words of the statute, and the rule is so laid down by many authorities." If that be so, then the question that remains is, whether there was here a contract, express or implied, between the husband and the wife that he was to make her an allowance for aliment. The separation was in November 1881, and at that time the husband made an agreement with his wife that he was to pay her aliment at the rate of 15s. per week, and if there was nothing more in the case than that, then, in the event of the wife going to live with anyone, she would come under an implied obligation to apply the 15s. per week she was receiving from her husband, so far as necessary, in payment of her board and lodging.

There was clearly an implied contract between the wife and the person with whom she was living, and it was on the faith of that implied contract that the board and lodging was given.

The husband may be said to have become a party to this implied contract, for he came under an obligation to furnish his wife with

aliment at the rate agreed on, and if he withholds this aliment which enables the wife to procure board and lodging, he is in the position of breaking the implied contract between his wife and the person with whom she is living. I have no doubt that there was here an implied contract that payment was to be made for the board and lodging furnished by the pursuer to the defender's wife.

There is a peculiarity in the case which, however, only at first sight seems to create a difficulty. That peculiarity is the fact that after the separation there was another arrangement made by which the wife agreed that her husband should be entitled to pay out of the sum allowed her for aliment the debts she had incurred since the separation. But that did not absolve the husband from paying the aliment, for payment of these debts was payment of the aliment. It was not contemplated that the whole of the aliment was to be applied in payment of the debts, but only so much at a time; that is what I consider the only reasonable construction of the agreement. As it has happened, however, none of the debts have been paid by the husband, so that there is no deduction to be made from the sum of 15s. per week, the whole of which is due from the date of the separation down to the present. Therefore what is apparently a peculiarity really disappears, and on the merits I have not a word to say that has not been anticipated by the Sheriff-Substitute in his remarkably well considered and well reasoned judgment.

LORD DEAS, LORD MURE, and LORD SEAND concurred.

The Court refused the appeal.

Counsel for Pursuer (Respondent) — Lang. Agents—Smith & Mason, S.S.C.

Counsel for Defender (Appellant) — Ure. Agents—Dove & Lockhart, S.S.C.

Wednesday, March 5.

SECOND DIVISION.

[Lord Fraser, Ordinary.

J. & W. WEEMS AND OTHERS v. STANDARD LIFE INSURANCE COMPANY.

Insurance—Life Insurance—Misrepresentation of Material Fact—Truth of Answers to Queries by Company.

A person insured his life with an insurance company, making a declaration relative to the policy that the statements made by him in answer to the queries in the form of proposal were true, which declaration was to be the basis of the contract between him and the insurance company. Two of the queries were—“(1) Are you temperate in your habits? and (2) Have you always been so?” Answers—“(1) Temperate; (2) Yes.” The policy provided “that if anything averred in the declaration shall be untrue, this policy shall be void, and all monies received by the company in respect thereof shall belong to the company for their own benefit.” In an action on the policy, raised after the death of

the insured, the insurance company resisted payment on the grounds that the answers to the queries were false—the truth being that the insured was intemperate, and died of the effects of drinking. *Held*, on a proof, which established that the insured had been in the habit of using intoxicating drink, and occasionally to excess (*diss.* Lord Rutherford Clark), that the evidence did not warrant the conclusion that the answers were false so as to void the policy.

Opinion (per Lord Rutherford Clark) that where an answer to a query, material to the risk, is proved to have been untrue, it will void the policy, whether the untruth be due to conscious dishonesty or to mere heedlessness.

This was an action on a policy of life assurance executed on 25th November 1881 for £1500 by the Standard Life Assurance Company on the life of William Weems, Provost of Johnstone, who died on 29th July 1882. The action was for payment of that sum, and was at the instance of J. & W. Weems, the firm to which the insured belonged, and for behoof of which the policy was entered into, and Alexander Wylie, his surviving partner, and Robert Reid, to whom the policy had been assigned in the assured's lifetime by bond and assignation in security. The defenders resisted payment on the ground that the statements made by Weems in his answers to the printed questions contained in the form of proposal submitted by him to the company, and with reference to which he had signed a declaration that they were true, which declaration was declared to be the basis of the insurance, were false in material points. The policy contained a provision that “if anything averred in the declaration . . . shall be untrue, this policy shall be void.” The particular questions founded on, and the corresponding answers, were:—

“5. For what disease or diseases since those of childhood have you required medical assistance? State also when and where you required such advice. Answer—None.

“7. (1) Are you temperate in your habits, and (2) Have you always been strictly so? Answer—(1) Temperate; (2) Yes.

“12. State any other circumstances connected with your health, habits, occupation, family history, or otherwise, which ought to be communicated in order to enable the company to judge fairly of the risk of an assurance on your life? Answer—None I know of.

“14. Name and residence of ordinary medical attendant, and how long known to him, for reference as to present and general health and habits.

“Name any other medical gentleman whose advice has been sought; and state for what complaints and when his services were required.

“(If you have received no medical advice, you will state so). Answer—No medical advice.”

The declaration appended to the form of the proposal was signed by Weems, and was as follows:—“I, the said William Weems (the person whose life is proposed to be assured), do hereby declare that I am at present in good health, not being afflicted with any disease or disorder tending to shorten life; that the foregoing statements of my age, health, and other particulars