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

should be pronounced as craved. (3) *Separatim.* The pursuer having qualified as a barrister at the special desire of the defender, and on the faith of his promise and agreement to provide him with a suitable maintenance until his practice should be sufficiently remunerative, and the defender having refused to give the pursuer any allowance, the pursuer is entitled to decree as craved."

The defender pleaded, *inter alia*—"(2) The pursuer being thirty-two years of age, and well qualified to earn his own livelihood, the defender is not bound to aliment him. (3) The defender should be assoilzied in respect that he has all along alimented and is alimenting the pursuer, and *separatim*, that he has not the means to give the pursuer a pecuniary allowance."

The Lord Ordinary on 11th July 1885 sustained these pleas-in-law for the defender and assoilzied him from the conclusions of the action.

"*Opinion.*—This case raises a question of some interest and importance. The pursuer George John Cayley Smith is a barrister-at-law, thirty-two years of age, and in good health. He now sues his father, a retired Falkirk writer, living at Duncarron House, near Denny, in Stirlingshire, for an allowance towards his maintenance as a barrister in London. The pursuer was educated at the University of Edinburgh, and was for some time at the University of Oxford, and was called to the English bar in March 1882. Like most young barristers and advocates, and most other professional men, he finds the first year of professional life not to be productive of any professional gains upon which he can live, and he now demands from his father £250 a-year so as to enable him to live in London in the prosecution of his profession, and he further asks payment of £120 in order to pay past-due debts incurred by him for necessary clothing, &c.

"The Lord Ordinary is of opinion that this action cannot be maintained. The pursuer is the son of a person said to be very wealthy (which is denied), but which in the view of the Lord Ordinary is a circumstance of no moment in regard to the question here to be answered. The pursuer is of full age, and furnished with the best education that the best educational institutions of the country could give. In these circumstances the Lord Ordinary holds that no claim for further aliment can be made against his father. It is admitted that there are decisions which sanction a contrary doctrine, and which are well condensed in one of them in these words (*Scot* v. *Sharp*, Mor. App. *v.* Parent and Child, No. 1, 1759)—'It occurred to the Court that though the *patria potestas* is such that a peer may breed his son a cobbler, and after putting him in business with a competent stock is relieved from all further aliment; yet if a son be bred as a gentleman, without being instructed in any art that can gain him a farthing, he is entitled to be alimented for life, for otherwise a palpable absurdity will follow, that a rich man may starve his son or leave him to want and beggary.' The Court seem to have interpreted these words—'breeding a son as a gentleman'—somewhat widely. In *Aiton* v. *Colvil*, M. 390, 1705, where the son was an advocate, this plea was sustained—'The name of an employment will not afford a man bread, neither is the race always to the swift nor the battle to the strong; and we have known many advocates who have risen to a great eminency and practice who at the beginning have had little or no employment.' Similar decisions were pronounced during the last century; but the Lord Ordinary is unable to regard them as being law after the case of *Maule* v. *Maule* (1 W. & S. 266). No doubt Lord Eldon in this case over and over again repeats, *suo more*, that in reversing the judgment of the Court of Session he only meant to do so in the special circumstances of that case, but there were no special circumstances. The son and heir of a great landed proprietor had £90 a-year as an ensign in the army, to which his father made an addition of £100, and it was determined that the Court of Session could not control the discretion of the father. The law is more distinctly stated by Lord Redesdale (who concurred with Lord Eldon)—'Whatever,' says his Lordship, 'may have been the cases which have been determined, some of which go one way and some another, it does seem to me that the rule is properly laid down by Lord Kames, that the whole goes to this—support beyond want—and that all that is beyond that is left to parental affection.' In other words, if the son be entitled to parochial relief the father is bound to support him rather than the parish.

"All the cases which have occurred on the subject since the decision in the case of *Maule* have recognised this as a binding rule. Where a child is in bad health (as in the case of *Bain* v. *Bain*, 16th March 1860, 22 D. 1021) the father's obligation springs again into vitality; but he discharges it by offering a share of his own home. And in every case where from mental or bodily infirmity the child is incapable of earning a livelihood liability may be enforced against the parent. But we have nothing of the kind here. The pursuer being in no way afflicted bodily or mentally, and being well educated, must, if he cannot succeed at the bar, turn his attention to some other employment The defender has offered to maintain him in his own house at Duncarron—which offer, as might be expected, the pursuer (who wants to prosecute his profession in London) cannot see his way to accept. Even although this offer had not been made, the Lord Ordinary would have come to the same conclusion in regard to the pursuer's claim for aliment. A child who has been fairly educated to a profession, and fairly started in the world, must make his own way without further demands upon his father for assistance. It is of course very stupid and hard-hearted on the father's part, after advising his son to go to the English bar, not to give him assistance (if he be able to do so, which the pursuer offers to prove) during the years of non-employment that almost always must be expected at the commencement of a professional career. But at the same time any such claim must entirely depend upon parental affection. A court of law cannot enforce it, be the consequences to the pursuer even the enforced abandonment of his profession."

The pursuer reclaimed, and asked for a proof as to the amount of his father's means, as he was bound in law to aliment his son, who was deprived by his actings and penuriousness of earning a livelihood. A sum ought at any rate to be allowed sufficient to enable him to start in his profession.

Authorities—*Maidment*, May 25, 1815, F.C.; *Wooley*, March 6, 1818, 6 Dow 257; *Maule*, July

9, 1823, 2 S. 464, and June 1, 1825, 1 W. & S. 266; Ersk. i. 6, 56; Bell's Prin. 1630; *A* v. *B*, March 9, 1858, 10 D. 895; *Bain*, March 16, 1860, 22 D. 1021; *Thom* v. *Mackenzie*, December 2, 1864, 3 Macph. 177.

Replied for the respondent—The Lord Ordinary had taken a reasonable view of the case. The pursuer had received an excellent education; he was sound in mind and body and ought to be self-supporting; at any rate his father was doing all he could afford to do for him.

Authorities cited by the Lord Ordinary.

At advising—

LORD PRESIDENT—The pursuer of this action is a young man, a member of the English bar, who by his father's desire qualified after a course of study and passed the prescribed examinations, and was duly called in March 1882. He says that his father has declined to allow him a sufficient sum to enable him to live in chambers in London until such time as he has earned a sufficient income by his profession to enable him to maintain himself. The defender, on the other hand, says that he cannot afford to make his son an allowance, and that the only assistance which he can offer is to aliment him as he has been doing for the last three years at his house in Stirlingshire.

The pursuer is thirty-two years of age, he has received an excellent education, and is sound in body and in mind, and in these circumstances he certainly ought to be earning a sufficient income to support himself. I am therefore inclined to adopt the view of the Lord Ordinary, that a child who has been fairly educated in a profession and fairly started in in the world must make his own way without making further demands on his father for assistance, with this proviso, that the child must be one who has reached such an age as the pursuer, and who is capable of undertaking intellectual work. As to the reasons which have induced the defender to adopt the course he has done, we as a court of law cannot go into these. The Lord Ordinary has expressed a very strong opinion upon the father's actings in the present case, but I do not propose to examine or go into these reasons at any length. The father is under no obligation to disclose,to us the motive of his actions, nor the circumstances which may have compelled him to change his mind as to his son's profession. The practical question comes to be, Are we to ordain the defender to make his son such an allowance as will enable him to live in chambers in London doing nothing? Now, upon that matter I agree with the Lord Ordinary in the decision at which he has arrived. But there are some views contained in his Lordship's note which I am afraid I cannot pass over in silence, lest that silence should be misconstrued. Quoting the opinion of Lord Redesdale in the case of *Maule* he say — "The law is more distinctly stated by Lord Redesdale" (who concurred with Lord Eldon). "Whatever," says his Lordship, "may have been the cases which have been determined, some of which go one way and some another, it does seem to me that the rule is properly laid down by Lord Kames, and that the whole goes to this—support beyond want—and that all that is beyond that is left to parental affection." Which *dictum* the Lord Ordinary thus paraphrases—"In other words, if the son be entitled to parochial relief the father is bound to support him rather than the parish." Now, I cannot agree with that doctrine. I think that the law of aliment is independent altogether of considerations of that kind. If we were to endorse this, it would have the effect of reducing the obligation of a father to aliment his children, which is *ex jure naturali*, and of converting it merely into an obligation to relieve the parish.

I do not think that I can better express my views upon this matter than by reading a part of my opinion in the case of *Thom* v. *Mackenzie*, where the views of both parties were very extreme, and where the position taken up was very much that of the defender in the presentation—"It has been maintained for the defender that the full extent of a defender's obligation in an action for aliment is to afford the pursuer a bare subsistence, enough to keep body and soul together, and to prevent him or her from having to apply to the parish. That I hold to be an entirely unsound view of the law. The principle of the poor law is this—it disregards all social distinctions, and equalises all ranks by reducing all to the level of the lowest, and when a person is in a condition of bodily or mental inability to earn a subsistence, then, and then only, is he entitled to call upon the parochial board. If we were to apply the principle of the poor law to cases of aliment, not only must the amount of aliment be restricted in all cases to needful sustentation in the sense of the poor law, but no able-bodied person could ever sue a claim of aliment. It is clear that that is not the principle of the law of aliment." And then a little lower down, when referring to an expression of Lord Kames, I said—"But when he speaks of want, dealing with this question of aliment as having its foundation in natural obligation, and being an exercise of the virtue of benevolence, he uses the word *want* in a very different sense from that in which the defender uses it. He uses it as a word which has a relative meaning—relative to the situation of the person who is said to be in want. A person who has received the education of a gentleman, and who has been deprived of the means of subsistence, would not be placed above the reach of want by getting the relief of a parish pauper. The right to be relieved from want in a case of aliment is a right to be secured against that pressure of want which would place the pursuer in the position of a pauper relatively to his position in life." Now, I would not have ventured to have read so largely from my own opinions in the case of *Thom* had it not been that the opinions I then expressed were adopted by the other Judges, and were in one or two cases put even more strongly. Thus Lord Benholme says—"It was strongly urged by the defender that in such actions as the present there was no difference between the aliment to be awarded to the poorest and to the highest ranks; accordingly I think it right that we should all express our dissent from a doctrine so repugnant to the old law of Scotland, and so little justified by later enactments." And Lord Neaves says—"I cannot hold that a party's station in life has not some bearing on this question, for it is obvious that what would be a liberal allowance to a person accustomed to poverty would be privation to one of a higher condition and less hardy habits."

The question raised by the case of *Thom* is not the one we have at present to deal with, and I

would not have referred to that case at all but to dissent as strongly as possible from the propositions upon the law of aliment laid down by the Lord Ordinary.

Lord Mure—I concur in the result at which the Lord Ordinary has arrived, and think that the defender ought to be assoilzied from the conclusions of the action. But at the same time I do not concur with the opinions expressed by the Lord Ordinary in his note on the law of aliment, but, on the contrary, agree entirely with the remarks of your Lordship and with the opinions read from the case of *Thom* v. *Mackenzie*.

The facts of the present case are very peculiar, and we are urged by the pursuer to allow a proof that he might show that he had been forced by his father to adopt a profession which he disliked, and that now his father had refused to allow him such a sum as would start him in his profession and so enable him to earn a livelihood.

I do not see how we can go into these questions, and therefore I think the demand for a proof should be refused, especially as the father denies that he is possessed of the means which are attributed to him, and has done all that he says he can do by offering his son the shelter of his own house, and by alimenting him there as he has done for the last three years.

That being the state of matters, it is impossible that the Court can institute an investigation as to the father's means, or that they can award the son an allowance from his father's estate. In such a matter the discretion of the father is absolute, and we cannot interfere, especially as the father may have excellent reasons for what he is doing which we cannot inquire into.

Lord Shand—I agree with your Lordships that the interlocutor of the Lord Ordinary ought to be adhered to, and am content for my part to put my judgment upon the same grounds as the Lord Ordinary. The pursuer of this action is in good health, both mental and physical, and it would be nonsense to say that his father is to be bound to support him in all time coming, or is to be bound to supply him with an income to live in London and do nothing. He is perfectly capable of finding employment in some other line of life, and this Court cannot oblige his father to maintain him in the profession to which he has been brought up.

If we were to interfere in such a matter as this, there would be no end to the cases that might be brought here for solution. To take, for example, the instance I suggested in the course of the discussion. A father brings up his son as a doctor, and after the son has passed several of his examinations the father changes his mind and desires that his son should adopt some other line of life. Are we to compel the father to let his son pass his final examinations, and to continue him in a profession which, for private and probably very excellent reasons, he now desires him to abandon?

Upon the question of aliment, while quite agreeing with what fell from your Lordship as to the law applicable to aliment, I do not think there is such a difference between that opinion and the Lord Ordinary's. I do not think that the Lord Ordinary intended to say anything counter to the opinions read by your Lordship. I have no doubt that in using the word *want*, Lord Kames referred to the word relatively to the position in life of the party claiming aliment, and I cannot think that the Lord Ordinary meant that the measure of relief afforded by a father to a son was to be the same as that which would be bestowed by the parish.

Upon the whole matter, I concur entirely both in the judgment and in the note of the Lord Ordinary.

Lord Adam, who was absent on circuit during the discussion, delivered no opinion.

The Court adhered.

Counsel for Pursuer — Comrie Thomson — Wallace. Agents—Rhind, Lindsay, & Wallace, W.S.

Counsel for Defender—Low. Agent—David Turnbull, W.S.

Thursday, November 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MEIKLEJOHN *v.* THE GLASGOW WORKING MEN'S PROVIDENT INVESTMENT BUILDING SOCIETY.

Building Society—Withdrawal from Membership—Rules—Casus improvisus—Ultra vires.

A registered building society which consisted, *inter alios*, of investing members who were entitled under the rules to withdraw from the society and receive payment of the sums at their credit on giving certain notice, found itself exposed to the risk of losses owing to serious depreciation in the value of the properties held by it in security for advances made in the course of its business. The rules of the society contained no provision for such an event. The society at an annual general meeting adopted by a majority a resolution to make a deduction from the shareholders' accounts at the rate of 7s. 6d. in the pound, which was carried into effect by debiting each shareholder at that rate on his account, and carrying the amount so brought out to a suspense account. Thereafter a shareholder whose shares were matured or fully paid-up, objected to this course, and claimed to be paid out in full under the rules, on the footing that on his shares having matured he had ceased to be a shareholder, and had become a creditor of the society for the amount standing at his credit in the society's books at the date of the maturity of his shares. *Held* that he was not a creditor but a shareholder, and was entitled to payment only of the sum at his credit under the deduction.

See the case of *Auld* v. *Glasgow Working-Men's Provident Investment Building Society*, *ante*, vol. xxii. p. 883.

The defenders in this case were a building society incorporated under the Building Societies Act 1874. The membership consisted of advanced or borrow-