Friday, November 14.

SECOND DIVISION.

[Lord Young, Ordinary.

PEDDIE *v.* STEWART.

Lease—Intromission with Hypothecated Goods—Liability for Rent.

Where A gave advice and active assistance in the sale of the crop and stock on a farm, in consequence of which the landlord's hypothec was defeated,—*held* A was liable for the full year's rent of the farm.

This suit was brought by A. Steuart, of Auchlunkart, against Mrs Jane Thomson or Peddie, widow of Alexander Peddie, late tenant of the farm of Delmore, John Peddie, son and heir-at-law of the aforesaid Alexander Peddie, and his tutors and curators, and also against John Peddie, farmer, Brawlands, father of said Alexander Peddie, for recovery of an alleged balance of rent amounting to £130.

It appeared from the proof that Alexander Peddie, who was tenant in a 19 years' lease at a rent of £130, died in January 1873, and that the widow continued possession until October 1873, when she removed. She was appointed executrix to her husband. On 28th October 1873 the defender John Peddie received a letter from Mr Steuart's factor enquiring if he was to be responsible for the rent, but no answer was returned, and the crop and stock were sold before leaving the farm, nothing being left except nine or ten acres of turnips in blossom. It also appeared that the defender John Peddie had advanced money to the widow after her husband's death, and that he actually assisted in the sale of crop and stock, and received about £89 as the value of it.

The Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"25*th June* 1874.—The Lord Ordinary having considered the proof and whole process, and heard counsel for the parties, decerns against the defender John Peddie (farmer, Brawlands), and Mrs Jane Thomson or Peddie, conjunctly and severally, in terms of the conclusions of the summons, and finds them liable in expenses: Assoilzies the defender John Peddie (son and heir of the deceased Alexander Peddie) from the said conclusions: Remits the pursuer's account of expenses, when lodged, to the Auditor to tax and report, and decerns.

"*Note*—It is in my opinion satisfactorily established that upon the death, in January 1873, of Alexander Peddie, the tenant under the lease of the farm of Delmore, the possession of the farm was continued by his widow (the defender Mrs Jane Peddie) till October 1873, when she removed. The infant defender (John Peddie, son of the deceased Alexander) was entitled to the current lease as heir, but being an infant was incapable of acting. In continuing the possession of the farm the widow acted on the advice and with the assistance of the father of her deceased husband, the defender John Peddie (Brawlands). On his advice, and with his active assistance, the crop of 1873 was sown, reaped, sold, and delivered to the purchasers. Considering the infancy of the heir their conduct was quite proper, provided they were ready and willing to pay the rent for the crop which they so sowed, reaped, sold, and removed. In my opinion their conduct subjected them in liability to the landlord therefor. I cannot distinguish between them — for while neither had a title to the lease, both actively intromitted with the land and its produce on the title of the infant heir, to whom no legal or available obligation attached in consequence of their conduct. Having regard to the reality of the thing, I attach no importance to the circumstance that the intromissions were in the name of the widow, and regard both defenders as real intromitters with the land and its produce for the year and crop, the rent of which is demanded.

"With respect to the turnip crop left on the ground, and the manure, threshing-mill, and ameliorations, I am of opinion that no answer is thus afforded to the action. The landlord is entitled to payment of his rent from the intromitters with the land and its produce, and is not bound to take it in turnips, dung, &c. *Bona fide* purchasers for value are protected by the recent Act against the liability which formerly attached to them as intromitters with crop or stock, but the protection does not extend to such intromitters as the defenders.

"The infant heir has been assoilzied, for, I think, obvious reasons. I ought perhaps to observe that it is obvious that, as executrix, the widow had no concern with the farm or with the crop of 1873, and that the decree is not against her in the capacity of executrix."

The defender John Peddie reclaimed.

At advising—

LORD ORMIDALE—[After stating the facts].—The solution of this question depends on the nature of the proof. It is perplexing in some respects, but the widow distinctly says that "John Peddie and I arranged to sell the crop and stock of 1873." The letter from Mr Kelman, pursuer's factor, is of great importance, as putting him on his guard as to payment of the rent. That letter must have been received on the 27th or 28th October, and should have been answered, or John Peddie should have ceased his interference. No answer was returned, but the crop and stock was sold and delivered within two days after, partly by John Peddie directly, partly by the widow, and a few days thereafter Peddie uplifts a considerable part of the price and hands it to the widow. Now, so far as the crop is concerned, there is enough to implicate Peddie, as he gave active assistance as well as advice to the widow. Supposing him liable, how far is he to be responsible? is it only to the extent of the purchase money received by him, or for the full rent. Now, it is important that he actually sold and received about £89 as price of the crops, the widow selling separately £24—in all £114, 5s. 6d.—within £15 of the whole rent. I think we are not entitled in the circumstances to hold that sum as the full value of the crop, and I think on the evidence we must hold there was sufficient of crop alone to meet the landlord's claim, and as the whole matter was arranged by both, I think, so far as the crop is concerned, both are liable in full. As to the stock, the widow in her evidence makes no distinction between that and the crop, the consent and active assistance were the same in both. If so, Peddie has given no account of the stock, and he and the widow must know where it is, and I think are bound to account for it. But I think that, with regard to the crop alone, there is enough to make these defenders liable for the full rent.

Lord Gifford—I concur to a certain extent. My difficulty is as to the extent of the defender Peddie's liability. He acted as principal in the sale of the crop, got the price, and with the letter from the pursuer's factor unanswered, he handed the money to the widow. I think his intromissions make him liable for the value of what he intromitted with. Everything he received thus was a *surrogatum* for the crop, and he was not entitled to hand it to the widow. But I cannot go further or make him liable for money he did not receive. There is a distinction between advice and active assistance. This is a penal result we are asked to arrive at. If there had been a case of fraud I could have understood that, but the Lord Ordinary does not go on fraud. There is no question as to the widow here. She has acquiesced in the judgment of the Lord Ordinary. The only question is, whether the defender Peddie is liable for sums he has not received, or for the stock sold. It is not said the sale was *in mala fide* or at an under value. I think the defender Peddie is liable for the exact sum he received, about £89, but no further. Suppose he had handed that sum over to the landlord, could he have been made liable for more? It is not quite a case of vitious intromission, but rather of intromission with hypothecated goods, and I think he is only liable to the extent of his intromissions, as a purchaser formerly was. Suppose he had sold only a bushel of wheat, would he have been liable for the whole rent? I cannot arrive at that conclusion. Still greater difficulty arises as to the stock—vitious intromission there is out of the question, as there is a title in his daughter-in-law, and the defender only advised the sale. I do not read the proof as showing active interference on his part. It is a delicate matter, and, so far as regards the stock, the conduct of the defender certainly is against him, but as the case is presented I can find no legal principle for making him liable beyond sums actually received by him.

Lord Neaves—This is a case of considerable nicety. The defender put in a plea that he was a mere adviser. Both your Lordships agree that will not stand as to the crop. Can it be sustained as to the stock? On the whole, I think it is clear, in all the circumstances, that the defender is liable for the full rent. By selling the crop he was doing a wrong to the proprietor, and I am convinced he was instrumental in carrying out the whole matter. The only man having an interest is the father-in-law. The widow had no personal interest, and this defender's interest, who had advanced money, was to save something for his own payment. After he had commenced interference he receives a letter asking a perfectly legitimate question. There is no doubt that according to the answer made to that letter the landlord would have been influenced, but no answer is made, and in the meantime he actually assists the widow as to what is to be done, and it is clear he approved of the selling of the stock, because he calculated he was leaving enough to pay the rent in the shape of turnips, dung, and claims for ameliorations. He authorised her to leave nothing more, and he considered and arranged that. Now, what he did was quite right on the assumption he was taking on himself responsibility for the rent, and the landlord was justified in supposing he was so doing, and if he did not, but intended the landlord to shift for himself, it was such a deception that, looking at the whole proceedings as a *unum quid*, places him in a situation to incur liability for the full rent. This was such an active interference with the subjects as to make him liable, not as a vitious intromitter, but as an intromitter with hypothecated subjects in such a way as to frustrate the landlord's hypothec.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for John Peddie against Lord Young's interlocutor of 25th June 1874, Refuse said note, and adhere to the interlocutor complained of, with additional expenses, reserving the question of modification as to the expenses, and remit to the Auditor to tax the same and to report."

Counsel for the Pursuer—V. Campbell. Agents—Maitland & Lyon, W.S.

Counsel for the Defender—Asher. Agent—A. Morison, S.S.C.

Saturday, November 14.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

FRASER *v.* MACKENZIE.

Caution for Expenses.

The sole partner of a firm became insolvent, and was sequestrated. On the same day he assumed as a partner his son, who was a clerk. *Held* that the firm were not entitled to carry on an action without finding caution for expenses.

This was an action at the instance of The Fauldhouse Coal Company, carrying on business in Glasgow; and John Thomson Fraser, writer in Glasgow; and William Fraser, clerk in Greenock, sole partners of the said company, and as trustees for behoof thereof, and as individuals,—against George Mackenzie and others, concluding for reduction of an assignation of a mineral lease granted by the trustees of the late Mr Renny to George Mackenzie and others. The pursuer John Thomson Fraser alleged that he held a prior lease of the minerals. The defender averred:—"Any right or interest the pretended Fauldhouse Coal Company may have acquired has been transferred by them to Mr George W. Muir, now or lately merchant in Glasgow, by whom the present action has been in reality raised and is being prosecuted. On 9th May 1873 Messrs Crawford & Guthrie, the agents for the pursuers, wrote a letter to Messrs Paterson & Romanes, W.S., the landlord's agents, intimating that Fraser and his son had transferred the lease in question to their client Mr Muir, and requesting the landlord to accept him as assignee. The present action has been raised on the instructions and employment of Mr Muir, and he has the entire control and direction thereof. He advanced the £50 paid to the trustee, and has a direct interest in the subject-matter of the litigation. He is the real pursuer of the action, and the true *dominus litis* therein."

The Fauldhouse Coal Company consisted originally of one partner, John Thomas Fraser, who was sequestrated on 23d November 1872. On that day he assumed his son William Fraser as a