

partner. The son was a clerk in Greenock, with a salary, the amount of which was not stated, but it was averred that his circumstances were such as to render the Company solvent.

There were other questions between the parties; but the only questions which were argued were the relevancy of the action, and the motion by the defenders that the pursuer should be ordained to find caution for expenses. The Lord Ordinary allowed a proof, and the defender reclaimed.

At advising—

LORD PRESIDENT—I see no reason for interfering with the Lord Ordinary's interlocutor. The case is not so clearly irrelevant as to entitle us to throw it out without allowing a proof.

But the question remains, whether the pursuers are not bound to find caution. This is a question for the discretion of the Court. The circumstances are very peculiar. It is not the case of a company which is solvent but of which one of the partners is bankrupt. The company consisted originally of one partner, John Thomson Fraser, and he became bankrupt, and was sequestrated on 23d November 1872, and down to that date he was the sole partner. The company was therefore just as much bankrupt as the sole partner. But on the same day John Thomson Fraser assumed a new partner, his own son William Fraser, who was not in the coal trade. He was a clerk in Greenock, with a salary, the amount of which he will not tell us. He is represented as having so much solvency as to render the company solvent. There is an amount of fiction about all this that it is difficult to understand. This, coupled with the circumstance that Fraser is about to transfer his lease to Mitchel, puts the pursuers in such a position that I think they ought to be made to find caution for expenses.

The other Judges concurred.

Counsel for Pursuer—Dean of Faculty (Clark), and Maclean. Agents—D. C. Crawford & J. Y. Guthrie, S.S.C.

Counsel for Defenders—Solicitor-General (Watson) and Strachan. Agents—Walls & Sutherland, S.S.C.

Tuesday, November 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CURRIE v. GUTHRIE.

Breach of Promise—Damages.

The defender engaged to marry the pursuer on a certain day, which he twice postponed, and thereafter a third day was mentioned, on which he failed to appear.—*Held* that the circumstances inferred a positive fixing of the day, and that the defender was in breach and liable in damages.

Observed that constant delay in fulfilling a matrimonial engagement may ultimately amount to a breach.

This was an appeal from the Sheriff of Lanarkshire (GILLESPIE DICKSON) in an action of damages for breach of promise of marriage, in which the pursuer and defender were respectively the daughter of a moulder, Shotts, and a miner, Stane,

Cambusnethan. Damages were laid at £50. The promise of marriage was said to have been made in August 1872, and the banns were put in in order that the marriage might be celebrated on 25th April 1873. The defender afterwards, according to the pursuer's averments, postponed the marriage first to the 29th April, and then to the 9th May of that year; and thereafter refused to fulfil his promise at all. The breach of promise was denied by the defender, who further alleged against the pursuer the birth of an illegitimate child by another man, but intimated his willingness still to marry her. The pursuer, however, refused at that stage to accept the offer, holding that his previous conduct had amounted to a breach of promise, and urging that it was not an encouraging circumstance on which to enter into marriage.

After proof, the Sheriff-Substitute (SPENS) pronounced the following interlocutor and note:—

“*Hamilton, 23d March 1874.*—Having heard parties' procurators and made avizandum with the proof and process: Finds in fact that pursuer and defender became engaged to be married, and that pursuer shortly after last New Year left her situation at Muir's Hotel to make preparation therefor: Finds that it is not denied by defender that at the time of said engagement he was aware that pursuer had some two or three years previously given birth to an illegitimate child: Finds that defender gave pursuer £10 for the purchase of dresses for the marriage: Finds the pursuer has not proved that she was put to farther or greater expense in said preparation than would be covered by the said sum admittedly received from defender: Finds that said marriage was fixed to take place on the 25th April, and that defender gave orders for the proclamation of banns on 6th, 13th, and 20th April: Finds that said proposed marriage was put off by defender, as alleged, for a brother's convenience, till the 29th April: Finds the defender again put off the marriage till the 9th of May, giving as reason for so doing that his brother wanted a suit of clothes and his folk wanted a quiet affair: Finds that on or about Wednesday 30th April defender passed pursuer without recognition: Finds that pursuer, knowing where he had gone, went to meet him again and ask an explanation: Finds she met him and the explanation given by defender for his so doing was that 'it was some nonsense of his folk': Finds, however, at this interview he arranged to come to pursuer's father's house that night: Finds he came accompanied by the witness Stewart: Finds dresses of pursuer's were then exhibited, and it was understood that the marriage was to proceed on the 9th of May: Finds he called on the 2d of May, but nothing was said as to the marriage: Finds defender never came back to pursuer's father's house, and so it was presumed that he did not intend the marriage to take place on said 9th May: Finds, farther, that his whole course of conduct for three weeks or a month prior to the 9th of May last was calculated to make her absolve defender from his engagement to her, and presumably he so intended: Finds in law that defender has committed a breach of promise of marriage, and is liable in damages therefor, and, under reference to subjoined note, assesses these at £20, for which sum decerns against the defender, &c.

“*Note.*—It is admitted that pursuer will not

now marry defender, as she considers the course of conduct pursued towards her by him would be a very bad start for married life; and the Sheriff-Substitute agrees with her. It is a jury question whether there has been a breach of promise of marriage, and the Sheriff-Substitute, without going into greater detail than the findings in fact in the preceding interlocutor, is of opinion that there has.

"As to damages, defender admittedly paid pursuer £10 to expend in preparation for the marriage. She has got the articles bought therewith, or money (if any) over, for her own use and behoof, and the Sheriff-Substitute in assessing damages has given credit to defender to some extent therefor. Pursuer has not proved the expenditure of funds of her own, or indeed any other expenditure that would not easily be covered by the £10.

"Defender is a collier, and wages, though high at present, are fluctuating. In the whole circumstances, the Sheriff-Substitute thinks £20 a fair award for *solatium* and damages. The Sheriff-Substitute is not prepared to hold that the fact of pursuer having had an illegitimate child makes any difference in the question of damage, there being no doubt that defender was fully aware of this, and there being no repudiation of the engagement on that account.

"The Sheriff-Substitute may add, that he can see no good reason why parties in breach of promise of marriage cases should not be made competent witnesses. They are competent witnesses in England, and he desiderates any good reason for the distinction of law between the two countries in this respect."

An appeal was taken to the Sheriff-Depute (GILLESPIE DICKSON), who reversed the judgment of the Sheriff-Substitute, and pronounced the following interlocutor and note:—

"Glasgow, 23d June 1874.—Having heard parties' procurators on the defender's appeal, and considered the record and proof, adheres to the interlocutor appealed against in so far as it finds that the pursuer and defender were engaged to be married: *Quoad ultra*, under reference to the observations in the note, recalls the said interlocutor: Finds that after the marriage between the parties had been fixed for 25th April, it was at the defender's request put off to the 29th, and again till some day in May: Finds it not proved that it was fixed for 9th May: Finds that the pursuer being disappointed at the marriage not having gone on on 9th May, caused her agent to write the defender on the 10th the letter quoted in article 18th of the condescence, charging him with having broken his promise, and threatening legal proceedings within three days; and finds that the present action was raised on the 14th of the said month: Finds it not proved that prior to the raising of the action the defender had broken or resolved to break his said promise: Therefore sustains the defences and assolizes the defender: For the reasons stated in the note, finds neither party entitled to expenses, and decerns.

"Note.—There is a good deal of difficulty in this case, as it cannot be disputed that the defender's conduct towards the pursuer was at least equivocal, although it is thought not to be proved that he had resolved to break his engagement.

"In judging of this a good deal of the evidence

must be put aside as hearsay—such as, that 'people said they did not believe it would go on,' what the pursuer is said to have told her mother about the marriage having been put off to 9th May, and about the defender having passed her without recognition, and arranged to come to see her, and what Murdoch Currie says he 'understood,' and was 'told by his sister.'

"The pursuer's case is supported by the fact that the marriage was twice put off—by there appearing to have been something said about 9th May as the day for it, and by the defender not having visited pursuer for the week before that day, and not having come forward upon it to marry her.

"On the other hand, it is not proved that he ever refused directly or indirectly to keep his engagement. Up to near the end of April his visits and attentions were quite satisfactory in frequency and warmth. His having the marriage put off twice indicated some abatement in his anxiety for it; but his intention to keep his promise seems to have continued unaltered and unsuspected till at all events 30th April, when it is said that he passed her without recognition—an important fact of which there is no evidence whatever but hearsay of the pursuer's statement. Whatever happened then, he was in her father's house on 2d May with his friend Stewart. The father's evidence does not show that he then actually fixed the 9th for the marriage, but only that he said it would be certain to come off in May; and Stewart corroborates this, as he does not remember hearing that that day was fixed, although the defender said to him it would come off on the Friday eight days (which was the 9th May). The evidence of this witness and of Forrest shows that the pursuer was hesitating in consequence (according to Forrest) of something he had heard about the pursuer, but that his mind was not at all made up to break the engagement.

"The conduct of the pursuer and her family, however, is conclusive that the 9th of May was not fixed for the ceremony; for they seem to have made no preparation for it then, by asking a clergyman to attend, or a bridesmaid to assist, or having any friends invited, or entertainment provided for the occasion.

"It is not even said that any of the family actually expected the defender on that day, and unquestionably nothing was arranged about the hour, a very important matter in such affairs. Farther, there was no communication between the pursuer or her family and the defender between the 2d and the 9th as to his intentions regarding the latter day, or as to their expectation of his coming forward then.

"Accordingly, the Sheriff holds it not proved that 9th May was fixed by both parties for the marriage.

"That being so, the conduct of the pursuer and her father, on the following day is of great importance. Instead of taking some kind and friendly means, such as a right-minded woman and her family would have used to her betrothed, to obtain an explanation of his conduct and ascertain his intentions, her father gets a law agent to write him a letter in terms the reverse of becoming or conciliatory, charging him with breaking his promise, demanding 'ample satisfaction and reparation,' under a threat that if that was not done in

three days, his intentions to raise legal proceedings would be carried out.

"To a man of any spirit such a letter was a personal insult. It showed also that the pursuer could have had no real attachment for him, and it was a rash and hasty attempt to force matters to a crisis, which was not warranted by the defender's delay, for only a few days at the most, in coming up to the pursuer's expectations.

"If the defender had hesitated at all before about the marriage, the receipt of the letter must have made him resolve finally not to go on with it; for there was little prospect of domestic happiness for him with a wife who could treat him so.

"He answered by a letter, on the 15th of May, which the Sheriff-Substitute finds was written with the intention of getting her to release him from his promise.

"The Sheriff is not prepared to find that as a specific fact, but he thinks there is considerable ground for suspecting it.

"But on that footing the letter must be read as provoked by the agent's accusation and threat, and by the pursuer's conduct in connection with it.

"On the whole case, therefore, the Sheriff considers that if the defender finally resolved to break off the marriage (which is not clear), he did not do so till after receipt of the letter referred to, and that the receipt of that letter was a sufficient justification for his doing so.

"Costs have not been allowed to him, although successful in the action, because his conduct was equivocal, if not also suspicious."

Against this decision the pursuer appealed to the Second Division of the Court of Session.

The pleas in law for the pursuer were as follows:—(1) The defender having promised marriage to the pursuer, and the day having been fixed therefor, was bound to have fulfilled the engagement. (2) The defender, without good cause, having postponed the marriage and fixed another day, was bound then to have fulfilled his engagement. (3) But, still without good cause, having again postponed the marriage, and, on the third day fixed, having failed altogether to make arrangements for the marriage then, and having failed on the said last day fixed even to attend or offer explanation, the defender deliberately and wilfully committed a breach of his promise, and warranted the present action, and entitles the pursuer to decree as craved. (4) The letter of the defender, after the action was raised, intimating that if the pursuer wished the promise fulfilled she must accompany him abroad, is a mere evasion and device, and cannot, after the conduct and behaviour above explained, be set against the defender's obvious design to get quit of his promise."

The defender pleaded—(1) The defender, not having committed any breach of promise to marry the pursuer, is not liable in damages. (2) The defender being, and all along having been, ready and willing to fulfil his promise to marry the pursuer, this action was uncalled for. (3) In the whole circumstances, the defender is entitled to absolvitor with costs."

At advising—

LORD JUSTICE-CLERK—My Lords, we have in this case a weighty expression of opinion as well as a judgment from the Sheriff of Lanarkshire, but on a full consideration of the somewhat peculiar

circumstances in which the action was raised, I think the Sheriff-substitute was right in the decision at which he arrived. The whole question turns upon the fact of whether there was or was not a promise on the part of the defender to marry the pursuer on the 9th of May 1873. We come then to a double inquiry—in the first place, as to whether that day was fixed for the wedding, and in the next, as to whether the contract if thus made was broken. Now, as to the first point, I do not think there can be any doubt at all. Two days, the 25th and 29th of April, were certainly fixed, and it is impossible to suppose that the third day was not fixed also. Further, all the evidence adduced is in accord with this view, and that evidence embraces the statements of the pursuer's father and mother, and of the friends of the defender. Then, as to the point of the breach, there was, it is clear, down to that 9th May and subsequent to April 29th no communication between the parties. This, to say the least of it, was remarkable where an engagement to marry undoubtedly existed, and that suspicions of the defender's intentions were engendered in the minds of the pursuer's family is manifest. It cannot be denied that the defender was sharply pulled up when he received the lawyer's letter on the 10th, but even in a higher rank in life such a course might have been justified. In circumstances like the present no doubt there should be forbearance, but certainly the defender cannot say that. My Lords, on the question of damages, I propose that we should fix them as assessed by the Sheriff-substitute, who had an opportunity of judging accurately in the matter.

LORD NEAVES—I concur, and would only add that constant delay in fulfilling a matrimonial engagement may ultimately amount to a breach of promise. Were this not so, by mere use of a technical word and ever putting off, a man might evade successfully the consequences of his conduct. There was certainly twice in this case an application for further delay, and the lady's friends would not, I think, have consented to this unless a subsequent day had been fixed. The defender says Friday May 9th was fixed "unless something come in the way." Did anything come in the way? Did he inform the pursuer that such was the case? Certainly not. No communication passed between them from April 29th till May 9th. When a man denies a promise to marry on the day for which the marriage is fixed, it is a strong point against him. It is quite clear that this man has broken his promise and had been scheming to get out of his engagement.

LORD GIFFORD concurred.

LORD ORMDALE—Absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the appeal, Find that the defender (respondent) promised to marry the pursuer (appellant); find that after two previous days had been fixed for the marriage it was postponed by the respondent till the 9th of May, on which day it was fixed by both parties to take place; find that the respondent did not appear on the 9th of May, nor had he communicated with the appellant for some days previously, and never made any communication explana-

tory of his conduct; therefore find that he committed a breach of the said promise; sustain the appeal; recal the interlocutor of the Sheriff of 23d June 1874; find the appellant entitled to £20 of damages, and decern in favour of the appellant and John Lockhart, her husband, therefor; find the appellant entitled to expenses, both in this and in the Inferior Court, and remit to the Auditor to tax the same and to report."

Counsel for Appellant—Scott. Agents—D. Crawford and J. Y. Guthrie, S.S.C.

Counsel for Respondent—M. Kechnie. Agent—Thomas Carmichael, S.S.C.

Wednesday, November 18.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

WATSON v. WATSON.

Process—Separation and Aliment—Adultery—Cruelty—Condonation—Competency.

In an action of separation and aliment at the instance of a wife against a husband on the ground of adultery and cruelty, the defender pleaded that the pursuer after having left him as she alleged on account of his cruelty and adultery had condoned the alleged acts by returning to his society, although in the full belief of his guilt. The pursuer admitted her return, but averred that she did so on representations which led her to the conclusion that the defender was innocent of the adultery. The Court ordered proof of the alleged condonation, reserving all questions of the competency of the plea in the bar of action.

Observations—(per Lord President) on the competency of the plea of condonation in bar of an action of separation and aliment on the ground of adultery and cruelty.

This was an action of separation and aliment at the instance of Mrs Elizabeth Ponton or Watson, against her husband, on the grounds of adultery and cruelty.

The pursuer had at one time left her husband on account, as she alleged, of his cruelty, but she subsequently returned to live with him. In reference to this return the pursuer made the following averment—"After various communing outwith the knowledge of the pursuer's agents, the defender, of this date, (December 27, 1873), by his repeated promises of desisting from his cruel treatment of the pursuer, and in future leading a steady life, and shewing kindness to the pursuer and their children, induced her, on these representations, made to herself and others, to return to his house and live with him."

The defender stated the following answer:—"The pursuer thereafter, in the perfect, though erroneous, belief that the defender had committed adultery, cohabited with the defender as his wife, and fully condoned the alleged acts of adultery, and also the alleged acts of cruelty."

The Lord Ordinary (MACKENZIE) pronounced this interlocutor—"Finds that the pursuer having, as she admits, returned to the defender's house on

27th December 1873, and cohabited with him after that date, in the knowledge of the acts of adultery averred by her to have been committed by him prior to that date, cannot found upon these alleged prior acts of adultery in support of the present action."

The pursuer reclaimed, and obtained leave from the First Division to amend the record to the effect of adding the following statement—"Previous to the service of the summons, the defender was in the habit of following the pursuer about upon the street, using abusive language towards her, but after that, and before his defences were due, he wholly changed his behaviour, and seized every opportunity of visiting and speaking to her in her father's house (where she was residing), when her father was out, and also of speaking to her on the street and elsewhere, on which occasions he solemnly declared to her that there was no truth whatever in the charge of adultery made against him, and that the said Catherine Mitchell was an impostor, and implored the pursuer to come home and take charge of the shop for the sake of the children. On Friday, 26th December 1873, he followed the pursuer to the house of Mrs Robbie, 31 Regent Place, Edinburgh, where the pursuer had gone to call. He there again solemnly declared to her, and by his persistency induced her to believe, that he was innocent of the charge of adultery made against him, and insisted upon the pursuer going back to live with him. This she then declined to do, from her still being afraid of cruel treatment. He would not, however, allow her to leave the house until she would at all events sign a letter which he had written to her agents, requesting them to suspend all proceedings, and to release his account at the bank, which she did, and he posted it that same evening. The pursuer remained that night with her father. On the evening of the following day, viz., Saturday 27th December 1873, he sent over a note, addressed to her to her father's house, stating that he wished to speak to her after the shop was shut, and she was induced to go over. He did not shut the shop till it was going to twelve o'clock, and he thereafter detained her on various pretences till far on on Sunday morning, when he said it was too late for her to go home, as the lights in her father's windows were out, and he bolted the door. He then again and again solemnly protested that the charge of adultery was wholly false,—in consequence of which, and of his previous protestations of innocence, and his promises of desisting from his cruel treatment to her, she was induced to believe his said declarations, and to remain all night and sleep in the same bed with him. Next night, being Sunday, the defender having, as he thought, accomplished his purpose, commenced to taunt the pursuer, and told her to go and see what her lawyers could do now; and the pursuer at once perceived that the defender had intended merely to entrap her into an apparent condonation, and she thereafter, so long as she remained in the defender's house, refused to sleep with him, and occupied a bed with her children in a different room from the defender. After that date, the defender treated her with even more than his previous cruelty, and it is believed and averred, continued, outwith the pursuer's knowledge, to carry on his adulterous intercourse with the said Catherine Mitchell. The pursuer never condoned the defender's guilt."