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

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