

templated the granting of such a conveyance as the pursuer asked.

The other Judges concurred.

Agents for Pursuer—Mackenzie & Black, W.S.

Agents for Defender—Hamilton, Kinnear & Beatson, W.S

Friday, February 25.

SECOND DIVISION.

STOOLE *v.* MACLEISH.

Breach of Promise. Circumstances in which held that the pursuer of an action of breach of promise of marriage had failed to prove the breach of the engagement.

This was an appeal in an action of breach of promise of marriage, brought by a dressmaker in Dundee, against a party who has recently returned to this country from California, and is resident in Dundee, where he owns considerable property. There was no dispute that the parties had been engaged, but the question came to be whether the defender had so behaved as to imply a breach of the engagement. The pursuer maintained the affirmative, and founded on repeated postponements of the marriage and other conduct on the part of the defender, which she alleged was the result of a determination on his part to force her to give up the match. The defender, on the other hand, alleged that he had always been, and still was, honestly willing to marry the pursuer, and that the marriage had been broken off by the pursuer and her friends, because they came to think that, from the defender's temper and habits, it would not be suitable.

The Sheriff-Substitute (GUTHRIE SMITH), assolized the defender. The Sheriff added the following Note to his judgment:—"It is admitted that there is no evidence of an express refusal by the defender to marry the pursuer. It is also the fact that he has not disabled himself from making the pursuer his wife by marrying another. But it is said that his conduct during the engagement, and more particularly on the evening before his marriage day, was so unlike that of a man on the threshold of matrimony, as to amount to a constructive refusal, and justified the pursuer in herself putting off the wedding. This the defender denies, and, by way of correcting all former mistakes and misunderstandings, makes a fresh tender of himself in his defences. That tender, of course, the pursuer is entitled to disregard, if the engagement was ever broken; but the question is, Was it ever broken? In dealing with this question, the Sheriff-Substitute is of opinion that he must throw out of view all that took place prior to the 23d June, when the wedding was fixed for the following Thursday—first, because the consent of the pursuer to that arrangement was like a forgiveness of all that was past; and, secondly, the repeated postponements are sufficiently accounted for by the situation of the defender's affairs. Having been long absent from Scotland, a factor had been appointed by the Court of Session to manage his property, and much difficulty was experienced in bringing this person to account. The defender had, consequently, nothing to marry upon till he received from the factor, by way of settlement, a payment of £100, on the 23d June, and that very day it was settled that the wedding should be on the 25th, an interval brief enough to

allow of the friends being invited; but as they had been for some time making preparations for the event, they were all ready to come. Further, in considering the evidence, the Sheriff-Substitute thinks that allowance must be made for occasional infirmities of temper, and some ludicrous peculiarities of manner, which seem to have adhered to the defender after his return to civilisation. The pursuer cannot well found on these to the defender's prejudice, because a woman engaging herself should consider the kind of man she is going to marry before she consents to take him, and if he afterwards turn out to be a fool, that may be her misfortune, but it is not in itself a ground of damages. Now, it appears that, on the Wednesday morning, the day before the 25th, the defender called at the pursuer's, and expressed himself in a somewhat intemperate manner, saying, amongst other things, 'You will never go a married wife to Letham;' but that he meant nothing serious is shown by the fact that he again called about eight o'clock the same evening, and showed no desire to retract from his position, but quite the contrary. He had, however, promised not only to provide the marriage feast, but to engage the minister, and procure the marriage 'lines.' As to the first, the only provision made was a bride's cake and a ham, which, it must be admitted, would have formed an extremely rudimentary refection; but, still worse, he had quite forgotten both minister and the 'lines,' and the session clerk's office being now shut, it became apparent that the wedding could not possibly go on next morning, at all events at the hour named. Apparently, the cause of this miscarriage was that the defender, having been up packing his furniture the whole of the previous night, and being worn out with fatigue and excitement, instead of going to the minister, had gone to bed, and, as he himself put it, 'slept in.' Mrs Hill, who had gone up to see the pursuer, and was in her house on the occasion of defender's visit, says she understood that he had offered to go for the minister at that late hour, but Miss Agnes Stoolie 'would not let him, as he had the smell of drink.' The consequence was that the Stoolies at once decided to put the marriage off; and the defender left with the impression that it was not to go on. Accordingly he did not appear next morning at the hour named; but it would not have mattered though he had, as, ere this, the two sisters of the pursuer were off to Letham to bring back her things—having resolved to declare the match at an end. The defender, again, however, tendered himself in the course of the forenoon through his sister Mrs Fyall (who found the door locked, did not get her message delivered), and wrote, or caused to be written, before he left at one o'clock for Letham, a letter, which was found under the door about 4 P.M. That letter has mysteriously disappeared; but it is admitted by Miss Stoolie that it was a distinct assurance that he was still willing to adhere to his engagement. It is in the face of all this that pursuer says the defender must be found liable in damages as guilty of a breach of promise. The Sheriff-Substitute thinks that she is as much to blame as the defender for the miscarriage of the arrangement on Wednesday. The defender was residing only a few yards off; and when he failed to make his appearance, a person in the situation of the pursuer might well have been excused for sending one of her sisters to see what was the matter. This course was actually

suggested by one of her visitors in the course of the evening, but the advice was not taken; and hence the difficulty which afterwards occurred. On the whole matter, it rather appears that, if this lady had not been so desirous of getting damages from the defender, she might by this time have had him for her husband."

The pursuer appealed, but the Sheriff (HERIOT) adhered. In a Note the Sheriff said:—"The Sheriff has carefully read and considered the evidence in this case, and he concurs in the view taken of it by the Sheriff-Substitute, that the pursuer has failed to prove her case.

"The marriage was fixed to take place on the morning of Thursday the 25th June at ten o'clock. It is said that the defender was up all Tuesday night packing the furniture, &c. It is proved that he was engaged in packing very late, and that he was also up on Wednesday morning at four, so that it would seem to be true that he was up all that Tuesday night. He called at the pursuer's about nine on the Wednesday morning, and is said to have used some angry words. He said, 'You will never go a married wife to Letham for me.' All parties, however, seem to have regarded this as a foolish and hasty expression, and not intended to break off the marriage, as he was expected to call during the day and make the final arrangements. He did not call until after eight in the evening. He explained that he had gone to bed and 'slept in.' Looking to the evidence of his sister Mrs Fyall, with whom he resided, this statement seems to have been correct. She says that he had been tasting, and was at mid-day, when he went to bed, a little the worse of liquor, which probably contributed, along with the fatigue and want of sleep, to prolong his slumbers.

"When he appeared at the pursuer's on the Wednesday evening, it turned out that he had omitted to get up the marriage-lines from the session-clerk, and that he had also forgotten to summon the minister, which it is alleged he had undertaken to do.

"The pursuer alleges that he had neglected these essentials on purpose that the marriage might not proceed on the morrow. It seems to the Sheriff that the drink and the 'sleeping in' is as good an explanation of his neglect as any desire to draw back. According to Mrs Hill's evidence, the defender, on the Wednesday night, seemed to have been quite willing to do what he could to remedy matters, and offered still to go and bespeak the minister for the morning; but one of the pursuer's sisters would not let him, 'as he had the smell of drink.' It seems to have been then arranged accordingly that the marriage could not proceed next morning, not because the defender was unwilling, but because the final arrangements were not completed.

"So far as the Sheriff can discern, the defender showed no unwillingness to proceed with the marriage. He had given her a gold watch and chain; he had also given her £30 to purchase dresses for her outfit; he had placed in her custody 100 sovereigns on which they were to commence house-keeping together; he had taken a house at Letham for them to live in after it had been seen and approved of by her; he had purchased, and despatched on the Wednesday morning furniture for the same; and he had their names proclaimed in church on previous Sabbath. In such circumstances it would be necessary for the pursuer to

establish very clearly that the defender after all refused to proceed.

"Some stress is laid on what the defender said on leaving on the Wednesday night. The pursuer said to him, 'This is a pretty position you have placed me in, allowing me to send away all my clothes, except what I was to be married in.' He answered, 'I have done you no harm. You can get one of your sisters and bring back your things.' This is not a refusal on his part to proceed. It is as if he had said, 'If you don't wish to go on you may bring back your things. It was rather throwing on the pursuer the responsibility of fixing whether or not the marriage was to proceed. She fixed, and possibly she wisely fixed, that she would not go on with it; but, in such circumstances, she is not entitled to demand damages from him.

"It may be that the defender has not behaved well to the pursuer on various occasions; but this of itself is no ground in law for subjecting him in damages."

The pursuer appealed.

STRACHAN for her.

ASHER in answer.

The Court adhered, taking substantially the same view of the facts as that arrived at by the learned Sheriff. Their Lordships rested their judgment on the principle of law, that if the defender of an action of breach of promise has so acted towards the pursuer as to induce a reasonable belief that he wished to break off the marriage, he will be liable for a breach of promise. There were cases where the defender had judicially expressed his willingness to go on with the contract, but that was no answer to an action for breach of marriage, if the defender had shewn that he wished the marriage broken off. The circumstances of the present case, however, did not require the application of that test unfavourably to the defender. He had certainly acted improperly, but not so as to render himself liable for breach of his engagement.

Agent for Appellant—D. Milne, S.S.C.

Agents for Respondent—Maclachlan & Rodger, W.S.

Wednesday, March 2.

FIRST DIVISION.

SPECIAL CASE—PRINGLE'S EXECUTORS.

Widow—Terce—Conventional Provisions—Election—Acquiescence—Service to Terce. A lady, after surviving her husband for ten years, died intestate without having made her election between her conventional provisions under her husband's testamentary deeds and her right to terce. In the meantime the trustees under these deeds had consigned judicially the amount of these provisions in bank, and intimated to the lady. They had also called her as defender in an action of multiplepounding brought for the purpose of dividing the estate of her husband, in which she made no appearance. *Held* that she had acquiesced in the provisions made for her by her husband, and that her representatives were not entitled to claim the arrears of terce.

Question—Whether, in order to transmit any right to arrears of terce to her representatives, it is necessary for a widow to have been served to the terce?

This was a special case submitted to the Court