Thursday, November 29.

SECOND DIVISION.

[Lord Pearson, Ordinary.

LIDDELL *v.* EASTON'S TRUSTEES.

Reparation—Contract—Breach of Promise of Marriage—Circumstances in which Breach Justifiable.

A man, who was engaged to be married on the 2nd October, wrote on the 17th September to his prospective father-in-law a letter in which he disclosed that thirteen years previously he had been, at first voluntarily but subsequently under detention, in a lunatic asylum, stated he was in bad health, describing his deepening sense of depression, and, in view of his mental state, said, "It would be unwise and sinful to allow our marriage to proceed on October 2nd, and better for Mary" (his prospective wife) "and I that it should be postponed in the meantime. . . . If I had a prolonged stay in the country this depression might wear away, and I might get better and be my old self." On 29th September he entered an asylum as a voluntary patient, and on 12th and 18th October was certified as insane and a warrant for detention was issued on the 20th. Two years later he died in the asylum as the result of self-imposed injuries, never having recovered his mental balance.

An action of damages for breach of promise of marriage having been brought against the man's executors, *held* that there was no breach.

Opinions (*per* Lord Justice-Clerk and Lord Pearson, Ordinary) that if there had been a breach it was a justifiable breach.

Hall v. *Wright*, 1858, El. Bl. & El. 746 and 765, *commented on* by the Lord Justice-Clerk, Lord Stormonth Darling, and Lord Pearson (Ordinary).

This was an action brought by Mary Scott Liddell, Airlie Place, Dundee, against Alexander Dugald Findlay, Glasgow, and another, trustees of the deceased Robert Easton, Ann Street, Hillhead, Glasgow, acting under his trust-disposition and settlement dated the 28th September 1900.

The following account of the nature of the action and of the facts as disclosed by proof is taken from the opinion of the Lord Ordinary (LORD PEARSON):—"In this action the pursuer, who is a teacher, claims payment of £5000 from the testamentary trustees of the deceased Robert Easton, who was a retired draper of independent means and resided in Glasgow.

"The claim is made on two alternative grounds—(1) on breach of promise of marriage on the part of the deceased, and (2) on an alleged undertaking by him to make reparation in the event of the marriage not taking place.

"The parties met in Crieff in the summer of 1899, he being about forty-nine years of age and she about thirty-three. It appears that he then made a proposal to marry her, and after an acquaintanceship and correspondence they became engaged to each other in February 1900. Her parents' consent having been obtained, he gave her an engagement ring on 7th April and the wedding was fixed for 2nd October following.

"The correspondence which followed shows mutual regard and affection. But it also shows on his part an increasing liability to states of nervousness and mental depression, clearing away no doubt when they met, but recurring at intervals when they were parted. The inference which she drew was (naturally enough, as I think) that her company did him good, and that these states of mind would disappear when they were married. At first he looked hopefully in the same direction. But as the fits of depression grew upon him, and as the marriage day approached nearer, his outlook changed; and the reason for this is plain. Thirteen years before, on 14th September 1887, he had entered Saughton Asylum as a voluntary patient, and a few days afterwards he was certified for detention in that asylum, on the ground of depression, delusions, and suicidal tendency. He was under detention for seven months, until 1st May 1888, when he was discharged as relieved.

"This event in his history had not been disclosed to the pursuer. He had come near disclosing it, as in one letter he had referred to a breakdown in his health thirteen years before, and had expressed his intention of telling her about it when they met. The pursuer, however, says he never did so, but on the contrary passed it off; and whatever may be said as to her being put upon her inquiry, I take it that the first time she really became aware of what he had passed through was on receipt of his letter to her father of 17th September 1900 after mentioned.

"There can be no doubt that what Mr Easton was suffering from in the summer and autumn of 1900 was a recurrence of his former malady, and that as the months went by he himself recognised more and more distinctly that it was so. This feeling culminated in his letter of 17th September to the pursuer's father, in which he described his deepening state of depression and discloses the fact of his seven months' detention in Saughton Asylum in 1887-8. In view of his mental state he says—'It would be unwise and sinful to allow our marriage to proceed on October 2nd, and better for Mary and I that it should be postponed in the meantime. I know it is terrible to ask this now, but I am in such a state that I scarcely know what to say. If I had a prolonged stay in the country this depression might wear away, and I might get better and be my old self.' He adds—'It's a heart-breaking confession to make, but I must do it before it is too late. I may yet get better and become strong, but I am in such a plight that I cannot rest until I have unburdened my mind to you. I shall make every reparation to Mary, even though it should take all the days of a long life to do.'

"The letter closes with a request that the pursuer's father should come and see Mr Easton; and this he did on the following day, 18th September. Our knowledge of what took place at that interview depends on the evidence of Mr Liddell. That it did not amount to a final breaking-off of the engagement is, I think, clear, and it certainly was not so accepted at the time, nor so acted on afterwards, by either the pursuer or her father. The pursuer on record does not go further than to say that Mr Easton at that interview 'evinced an anxiety to break off the proposed marriage,' and her father in his evidence sums it up thus—'(Q) Did you come away convinced that as far as he was concerned he meant to break off the engagement?—(A) It appeared to me he was anxious to break it off.' Except as emphasising this anxiety, I do not think that the account of the interview really carried the matter beyond the point at which it was left by the letter of 17th September.

"The subsequent facts may be briefly stated. Mr Easton, who had for some years been a patient of Dr David Smith of Glasgow, called on 21st September on Dr Smith's son, Mr D. W. Smith, solicitor, and gave instructions as to making over some North British Railway stock to his niece, Miss Sloan, under certain conditions. On 26th September he again called and gave instructions for a trust-disposition and settlement, providing for his relatives, but not containing any provision in favour of the pursuer. These deeds were executed on 28th September, and on the 29th Mr Easton entered Saughton Asylum as a voluntary patient. His mental condition there was unsatisfactory from the first, and after about a fortnight the asylum authorities formed the opinion that he was certifiable for detention. After examination he was so certified by Dr Harvey Littlejohn on 12th October, and by Dr Dowden on 18th October, and on 20th October the necessary warrant for his detention was issued by the Sheriff. His condition gradually grew worse. After six months' confinement he developed distinct suicidal tendencies, and on 13th January 1903 he died in the asylum of gangrene of the leg, apparently the result of injuries received in an attempt at suicide ten days previously."

The pursuer, *inter alia*, pleaded—"(1) The said Robert Easton having promised and engaged to marry the pursuer, and having wrongfully failed to implement said promise and engagement, and the pursuer having suffered in consequence thereof, the pursuer is entitled to damages."

On 30th January 1906 LORD PEARSON assoilzied the defenders from the conclusions of the action.

Opinion.—[*After the narrative quoted above his Lordship proceeded*]—"If I am right in my view of the facts, it follows that this is not in fact a case of breach of promise of marriage. The truth of the case is that the promise was not broken, but that its fulfilment was postponed from 2nd October owing to a supervening cause for which neither party was responsible, and which, though it might not have prevented a valid marriage, rendered Mr Easton incapable, while it lasted, of the due fulfilment of the duties of the married state. I assume—and I decide the case on the assumption—that he was capable of matrimonial consent down to 2nd October, and probably for some time after—that is to say, that such a marriage could not have been declared null for want of consent. Further, I assent to the proposition that there may be circumstances in which the indefinite postponement of the execution of a contract will amount to a breach of it. But I hold that here the postponement was not without good and sufficient cause, and that it was indefinite as to time only because it was impossible to assign a date beforehand for Mr Easton's recovery. If the postponement from 2nd October was justifiable in the interest of both parties, as the medical evidence clearly shows that it was, and if there was no date betwixt that and Mr Easton's death at which the marriage could in reason have taken place, then there was no breach of contract.

"But assuming that there was a breach of contract, I cannot assimilate this to an ordinary mercantile contract, where any breach infers liability for at least nominal damages. As the pursuer recognises in her first plea-in-law, the issue here is whether Mr Easton wrongfully failed to implement his promise and engagement, and I am clearly of opinion that he did not. In the common-sense aspect of such a case I am sure that everyone, while sympathising deeply with the pursuer for what has happened, would say that she had a very fortunate escape. The medical testimony makes it plain that the engagement had caused, and that marriage would have caused, a serious disturbance of his mental balance. It practically negatives the pursuer's very natural expectation that marriage might have done him good, and leaves as the more probable alternative that she would have been the widow of a suicide and possibly the mother of his children, or else (if he had been better guarded) that she would have been tied for life to an inmate of Saughton Asylum.

"It is said that according to the general law one who persists in the breach of a personal contract and elects not to perform it is liable in damages. The pursuer relies mainly, in this part of the case, on the decision in *Hall* v. *Wright* (1858), Ellis, Bl., & Ellis, 746, 27 L.J. (Q.B.) 345, 29 L.J. (Q.B.) 43, where a man was held not entitled to resile from a contract to marry although after the promise he had become afflicted with a dangerous disease, by reason whereof he became incapable of marrying without risk to his life. This conclusion was reached in the Exchequer Chamber by a bare majority. The minority held that a promise of marriage is subject to an implied condition that the parties continue in sufficient health to perform the duties of the married state without danger to life — following Pothier (Marriage 2, 1, 61). The decision in *Hall* v. *Wright* has been questioned by Lord

Fraser (i., 491), by Sir Frederick Pollock (Contracts, 5th edit. 405), and in several American decisions of authority. I must say that my judgment goes with the opinions of the minority in the case of *Hall;* and a sufficient foundation for their view seems to be afforded by the exceptional nature of the contract to marry, as being at once the most highly personal of contracts, and also the one in which the public welfare is most deeply involved. It may even be that the criterion of danger to life may itself admit of being extended so as to include cases involving serious risk to bodily or mental health; but in the present case no such extension is needed, having regard to the medical evidence and to the presence of a distinct suicidal tendency as part of the malady.

"In either view, therefore, I hold that the first ground of action fails.

. . . [*His Lordship then dealt with the second ground of action, namely, an agreement to make reparation, which he held was not proved.*] . . .

"The result is that in my opinion the defenders are entitled to absolvitor."

The pursuer reclaimed, and argued—The evidence showed that the engagement to marry had been broken by Easton without Miss Liddell's consent, and had not merely been postponed, and that there was a probability at the time of the breach of his fully recovering. Where a man broke his engagement on the ground of illness, which did not make it permanently impossible that the marriage should take place, and the woman did not consent to the breach, he was liable in damages, even though the result of marriage might be injurious or even fatal to him—Addison on Contracts (10th ed.), p. 136 and 1176; *Hall* v. *Wright*, 1858, El., Bl. & El. 746 and 765, 27 L.J., Q.B. 345, 29 L.J., Q.B. 43, which had been followed in *Baker* v. *Cartwright*, 1861, 30 L.J., C.P. 364, and approved in *Boast* v. *Firth*, 1868, L.R. 4 C.P. 1, and was referred to in *Hick* v. *Raymond & Reid*, [1893] A.C. 22. The American cases of *Allen* (*cit. infra*) and *Shackleford* (*cit. infra*) were cases where the cause of the breach was permanent, and in these *Hall* v. *Wright* had been questioned only because it had been misunderstood, for there the Judges in the majority decided the case on the view that there was a breach, and that the breach (as distinguished from postponement) was not justifiable, as the ground for it was not a permanent one. Reference was also made to *Atchinson* v. *Baker*, 1796, Perkes' Add. Cases, 103. [Counsel also argued that there was a case of special damage, relying on *Walker* v. *Milne*, June 10, 1823, 2 S. 379; *Dobie* v. *Lauder's Trustees*, June 24, 1873, 11 Macph. 749, 10 S.L.R. 524; and *Hamilton* v. *Lochrane*, January 27, 1899, 1 F. 478, 36 S.L.R. 339.]

Argued for the defenders (respondents)—There was no breach. The letter of 17th September merely postponed the marriage, and pursuer did not suggest that postponement was not right and proper. Subsequently, till Easton's death, there was no period when the marriage could have taken place. There might be cases where protracted delay was equivalent to breach—*e.g.*, *Currie* v. *Guthrie*, November 17, 1874, 12 S.L.R. 75—but that was unreasonable delay, and there was no such case here. (2) If there was a breach it was justifiable in the circumstances. The pursuer must show not merely that Easton failed to perform the contract, but that he *wrongfully* failed. *Hall* v. *Wright* decided merely a question of pleading, but if and in so far as it decided anything more, it was wrongly decided and that by a bare majority, and the decision not being binding on this Court ought not to be followed. Illness had been held to be an excuse for non-performance in *Robinson* v. *Davison*, 1871, L.R. 6 Ex. 269. This was inconsistent with *Hall* v. *Wright*, which had never been approved except in *Baker* (*cit. supra*) v. *Boast* (*cit. supra*), the latter, however, being distinguished from it. *Hall* was binding on the Courts which decided these cases, which consequently did not add to its authority. In *Hick* v. *Raymond* (*cit. supra*) it was incidentally referred to on another matter and was not approved. Moreover, it had been disapproved—Fraser on Husband and Wife, vol. i., p. 491; Pollock on Principles of Contract, 7th ed., pp. 425-6; *Allen* v. *Baker*, 1882, 41 Am. Rep. 444; and *Shackleford* v. *Hamilton*, 1892, 40 Am. State Reports 166. [On the question of special damage, *Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587, 12 S.L.R. 380, was quoted.]

LORD JUSTICE-CLERK—I think this case may be satisfactorily decided as the Lord Ordinary has decided it. In the first place, after giving full consideration to all the circumstances and the argument which we have heard, it is quite plain to me there was no breach of contract here. There are certain things which were referred to in the evidence tending to indicate that such was the case, but in point of fact I see no ground for holding any such thing ever took place, and I am confirmed in that by seeing that the pursuer herself and her father did not think so, for the pleadings are quite inconsistent with the idea that a breach had taken place. I should have no hesitation in holding that, even if a breach had taken place in this case, it was quite a justifiable breach. I think it falls within the decisions to which we were referred. Where a person can only go on with danger to his own life, and with the greatest danger, to fulfil his engagement, he is entitled to draw back from the engagement. The case of *Hall* was strongly founded on, but it appears to me that that case depended very much on the pleading, and further that a good deal of what was laid down in it has not been accepted elsewhere, and certainly not in Scotland. Two cases in America cited to us contain, I think, sound principles — principles which are quite inconsistent with those expressed by the majority in *Hall* v. *Wright*. On these grounds I am prepared to move that the Lord Ordinary's judgment be affirmed.

LORD STORMONTH DARLING — I am so completely satisfied with the Lord Ordinary's judgment that, like your Lordship, I feel it is not necessary to add much. It is a satisfaction in this case to know that no slur has been cast on the character and conduct of the deceased gentleman. There is not the smallest attempt to impugn the summary of his mental state which is given by Sir John Batty Tuke, in whose charge his case was for two and a-half years, and who, speaking of the whole time which elapsed between Mr Easton's entrance into the Asylum on 29th September 1900 down to his death on 13th January 1903, describes it thus—"Speaking from my own general view of the progress of Mr Easton's case, his general mental condition became worse week by week, with occasional periods of improvement, but taken all over the general progress of the case was down. He became extremely suicidal, made various attempts at suicide, and at last made such an attempt that it terminated fatally. He was a very troublesome patient." It is also quite evident that the engagement which he made with this lady—with whom one sincerely sympathises—was from first to last marked by sincere affection on the part of both, and there was never misconduct of any kind, or indeed anything to be said against his treatment of her, unless it be that he for intelligible reasons shrank from the idea of making the disclosure that he had, some years before, been an inmate of a lunatic asylum. That is not a thing which is complained of by this lady now. She might have had reason to complain that her affections were gained without communicating so important a fact. But she does not complain of his making a promise, but of his breaking it, and the Lord Ordinary has decided against her mainly on the ground that it was never broken—that at first the marriage was merely postponed, and that that postponement was perfectly justifiable, owing to the mental state in which the man found himself, and which was described by a very competent observer who was called in shortly before the date fixed for the marriage—that he was then on the verge of insanity. Nobody can doubt, knowing all that we now know, that that state of matters amply justified the letter which he wrote to the pursuer's father on 17th September. Construing that letter, which was made the foundation of the pursuer's case, it is impossible to hold that it meant anything but this, that feeling himself in the condition in which he then did, he thought it highly expedient in the interests of both that the marriage should not proceed on the appointed day, and that it was "better for Mary and I that it should be postponed in the meantime." These were the words he used, and there were other words in the letter which showed his hope that he would ultimately be in a position to carry out his promise.

Well, this was followed by an interview between the lady's father and Mr Easton. I do not go into the details of that meeting, but I only say that though we have not had the benefit of any account of it except Mr Liddell's, his account entirely fails to satisfy me that there was any positive breach then made, or anything different from what the letter itself imports.

If that be the true view of the evidence there only remains the question whether anything which happened subsequently rendered it desirable, or indeed in any reasonable sense possible, for the marriage to take place. Now, Easton having entered an asylum on 29th September, three days before the day fixed for the marriage, having been after about a fortnight certified as a lunatic, and having within little more than a couple of years committed an act which led to his death, I think it is impossible to hold that at any possible time this marriage could have taken place; and I sympathise with what the Lord Ordinary says—that in point of fact the lady ought to congratulate herself that she was saved from being the wife of a man unfortunately so afflicted.

It only remains that I should say a few words about the case in 1859 that was so much enlarged upon in the speeches of both counsel for the pursuer—the case of *Hall* v. *Wright* in the Exchequer Chamber. If that case had been different from what it is, we should of course have treated it with all the respect due to every judgment of a Supreme Court in the neighbouring country, although it is not a judgment which we are bound to follow. But on examination I think it appears clearly that, besides being a decision of the barest majority in both Courts which had to consider it, it really turned, not on any general principle, bnt upon a question of pleading. Such questions, we know, at that time did control the decisions in the English Courts much more than they do now. So far as that case involved principles of general application I would only say with the Lord Ordinary that to my mind the reasoning of the minority of the Judges is much more convincing than the reasoning of the majority, and the decision has been so treated by a considerable body of authority in England, Scotland, and America. Although it has never been expressly overruled, I think, on a question of principle, it remains an authority only so far as it is a decision on the question of procedure. . . . [*His Lordship mentioned the second branch of the case, which he found was not proved, nor was that of special damage.*] . . .

LORD LOW—I am of the same opinion. I think it is impossible to doubt, in view of the letters which have been produced, that the late Mr Easton entertained a very deep affection for the pursuer, and that he looked forward to the marriage with her which had been arranged to take place on 2nd October 1900 as an event which would bring great happiness to them both. I do not believe that he would willingly or without very good cause have postponed the marriage, much less broken off the engagement. During the latter part of the summer, however, he seems to have been attacked with occasional fits of depression

which, in view of what had happened thirteen years previously, no doubt cost him a great deal of uneasiness. At first he seems to have been able to overcome these attacks, and evidently companionship with the pursuer did more than anything else to restore him from his depressed state of mind. But on 17th September he appears to have become convinced, and as it proved with only too good reason, that he was on the verge of an attack of insanity. He accordingly thought it to be his duty to communicate with pursuer's father, and he wrote the letter of 17th September 1900, which is quoted in the record. In that letter he told Mr Liddell what his condition was and said that the marriage must be postponed. He did not propose anything else. His words were—"I do not think the marriage can take place in the meantime." It seems to me that Mr Easton was not only entitled but bound to take up that position, and the terms in which he wrote to Mr Liddell were entirely creditable to him. I do not find that Mr Easton ever changed the position which he took up in the letter, and it is plain that the pursuer continued to regard the engagement as subsisting. Further, at no period subsequent to the letter was Mr Easton ever in a condition which would have justified his marrying.

In regard to what passed at the meeting between Mr Liddell and Mr Easton on the 18th September, I think that the former was under an entire misapprehension in regard to the condition of the latter. He said that he did not see much wrong with Mr Easton, and that he thought that there was no reason why the marriage should not go on. If that was Mr Liddell's view it is not surprising that he should have regarded Mr Easton's refusal to go on with the marriage at the time as equivalent to a breaking off of the engagement.

There was one circumstance which was founded on as showing that Mr Easton must have regarded the engagement as at an end, and that is that he made a will in which he made no mention of the pursuer. I think that he might have been expected to make some provision for her, but I do not think that anything can be founded on the fact that he did not do so, because it is impossible to say what his motives were or indeed to what extent his mind had been then affected.

I therefore agree with the Lord Ordinary that no breach of the engagement is proved, and that being so it is unnecessary to express any opinion in regard to the case of *Hall*.

LORD KYLLACHY was absent.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for Pursuer (Reclaimer)—Guthrie, K.C.—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defender (Respondent)—Wilson, K.C.—D. P. Fleming. Agents—Kinmont & Maxwell, W.S.

Saturday, December 1.

FIRST DIVISION.

W. & J. C. POLLOK *v.* THE GAETA PIONEER MINING COMPANY, LIMITED.

Company—Winding-up—Creditor's Petition—Disputed Debt—The Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 79 (4) *and* 80 (4)—*Caution.*

A creditor of a company incorporated under the Companies Acts 1862 to 1900 demanded payment of his account, and the amount was disputed. Settlement being delayed the creditor presented a petition under the Companies Act 1862, secs. 79 (4) and 80 (4), for a winding-up order on the ground that the company was unable to pay its debts, averring that his own and other claims were due. The company resisted on the ground that it was willing to pay whatever of the debt in question was found due, and that the other claims had not yet been presented. It offered caution if required.

The Court *refused* the petition, being of opinion that the case for refusal, the debt being in dispute, was *a fortiori* of that of a petition being presented, under section 80 (1) of the Companies Act 1862, which applies where a company has "neglected" a demand for payment; and further, that in any event the offer of caution was conclusive. *Cuninghame and Others* v. *Walkinshaw Oil Company, Limited*, November 17, 1886, 14 R. 87, 24 S.L.R. 66, *followed.*

The Companies Act 1882 (25 and 26 Vict. cap. 89), sec. 79, enacts—"A company under this Act may be wound up by the Court as hereinafter defined, under the following circumstances: (that is to say) . . . (4) whenever the company is unable to pay its debts." Sec. 80 enacts—"A company under this Act shall be deemed to be unable to pay its debts (1) whenever a creditor, by assignment or otherwise, to whom the company is indebted, at law or in equity, in a sum exceeding fifty pounds then due, has served on the company by leaving the same at their registered office, a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the reasonable satisfaction of the creditor. . . . (4) Whenever it is proved to the satisfaction of the Court that the company is unable to pay its debts."

On November 9, 1906, Messrs W. & J. C. Pollok, solicitors, Hamilton, presented a petition to the Court praying that the Gaeta Pioneer Mining Company, Limited, incorporated in 1905 under the Companies Acts 1862 to 1900 with a capital of £50,000, and having its registered office at Irvine, Ayrshire, should be wound up by the Court under the said Acts.