

MAIR, for him, argued that a second reponing note was not incompetent. A third one had been granted in *Mather v. Smith*, 28th Nov. 1858, 21 D. 24.

W. M. THOMSON, for the defenders, argued that the note should be refused, because the delay was inexcusable. On 12th April the defenders' agent had written to the pursuer's agents, asking whether he would send a receipt for the expenses found due. No answer was returned, and on 12th May the case was again enrolled for decree. The pursuer did not attend to explain the delay in any way, and the action was dismissed a second time. In these circumstances, the pursuer should not be again reponed.

MAIR stated that after the decree had been pronounced, the expenses had been tendered to the defenders' agent and declined.

The LORD PRESIDENT—In *Mather's* case the failure was to find caution, and the delay was explained, there having been an objection to the bond of caution offered. I think the procedure adopted here ought not to receive countenance. The Court went very far into the case of *Mather*, and I am not disposed to regard that case as a precedent. But in it there was an explanation. Here there is none, but there was no appearance before the Lord Ordinary. The offer afterwards made was not one which the defenders were bound to accept, because the expense of obtaining the decree was not tendered.

The reclaiming note was refused with additional expenses.

Agents for Pursuer—R. & R. H. Arthur, S.S.C.

Agents for Defenders—John Ross, S.S.C.

SECOND DIVISION.

MACALISTER *v.* M'CLELLAND.

Process—Bill Chamber—Death of Party. A note of suspension having been passed on caution, and the respondent having died before caution was found, held that the note still depended in the Bill Chamber, where the respondent's successor should be sisted.

A note of suspension of a decree of removal was passed on caution; before caution was found, but within the fourteen days allowed for finding it, the respondent died, and an application was accordingly made to sist the respondent's successor in his room. The Lord Ordinary (Mure) had some difficulty as to whether this was a competent proceeding in the Bill Chamber, and whether the Lord Ordinary was not, after passing the note, *functus officio*. His Lordship accordingly reported the point.

The Court were unanimously of opinion that the application was competent. An interlocutor passing a note of suspension on caution was an interlocutor subject to a suspensive condition. If the condition were not purified, the interlocutor fell with it, and the case still remained in the Bill Chamber. Besides, if the original charger had been alive, he would have been entitled to go before the Lord Ordinary and have it found that no caution had been found, and might then obtain decree for expenses. This alone showed that the Lord Ordinary on the Bills was not *functus*.

Counsel for Macalister—Mr W. M. Thomson.

Counsel for M'Clelland—Mr Shand.

Wednesday, May 30.

FIRST DIVISION.

FERGUSON *v.* SUTHERLAND AND OTHERS.

Property—Salmon Fishings—Interim Interdict.—

Terms of interim interdict granted in a disputed question of right to salmon fishings.

This is a suspension and interdict at the instance of Colonel Robert Munro Ferguson of Raith, Novar, and Culrain, against his Grace the Duke of Sutherland; George Young, salmon fisher, residing at Invershin, in the county of Sutherland; Joseph Peacock, factor for the said Duke of Sutherland, residing at Rhives, by Golspie; Donald Gray, bank agent in Golspie; and Colin Mackenzie, W.S., Edinburgh. The complainers prayed the Court to interdict, prohibit, and discharge the respondents from fishing for salmon in the Kyle of Oykell, on either side of the same *ex adverso* of any part of the lands and estate of Culrain, belonging to the complainer, extending from about a mile to the westward of the point where the Casalay River joins the Kyle of Oykell to the point where the Culrain Burn joins the said Kyle, and from landing or in any way trespassing on the complainer's said lands and estate, or any part thereof, and from molesting the complainer or his servants in fishing for salmon in the said Kyle of Oykell, on either side of the same *ex adverso* of the complainer's said lands and estate, or any part thereof, and from taking possession of, or interfering with, the complainer's boats, nets, or other implements used by him or his servants in fishing as aforesaid.

On 17th February 1866 Lord Mure granted *interim* interdict against the respondents landing for the purpose of fishing, or otherwise in any way trespassing on any part of the lands and estate of Culrain belonging to the complainer, extending from a mile to the westward of the point where the Casalay River joins the Kyle of Oykell to the point where the Culrain Burn joins the said Kyle, or molesting the complainer or his servants in fishing for salmon in the said Kyle of Oykell, from the south side of the same *ex adverso* of the complainer's said lands and estate or any part thereof, or taking possession or interfering with the complainer's boats, nets, or other implements used by him or his servants in fishing as aforesaid.

Thereafter, answers having been lodged for the respondents, Lord Mure pronounced the following interlocutor:—

Edinburgh, 31st March 1866.—The Lord Ordinary having considered the Note of Suspension, Answers, and Productions, and heard parties' Procurators,—On caution passes the note, and in the meantime interdicts the respondents from fishing for salmon in the Kyle of Oykell, on either side of the same, from the point where the Casalay River joins the Kyle of Oykell, to the island commonly known as the Isle of Oykell, situated about three miles to the eastward of the point where the said Casalay River joins the said Kyle; or from molesting the complainer or his servants in fishing for salmon in the said Kyle, on either side of the same, between the said two points: And *quoad ultra* continues the interim interdict, and ordains both parties to keep an authentic note or account of the number and weight of the fish caught by them respectively,—the complainer between the Isle of Oykell and the Culrain Burn, and the respondent between the said Isle and the mouth of the Shin.

(Signed) DAVID MURE.

Note.—At the discussion before the Lord Ordinary the passing of the Note on caution was not objected to. But it was contended that the interim interdict which was granted before the Answers were lodged should be recalled, excepting as regards that portion of the River Oykell which lies to the westward of an island called the Isle of Oykell, situated about three miles from the junction of the Casalay River with the Oykell; while it was, on the other hand, contended by the complainer that the interdict should be extended to both sides of the River Oykell, as craved in the Note. The Lord Ordinary has been unable to see grounds for adopting either of these views.

1. As regards the claim to have the interdict extended, it is to be observed that while the respondent does not assert any right to the fishings on either side of the River Oykell, to the west of the Isle of Oykell, the complainer does not, as the Lord Ordinary understands, dispute that in this question of interim possession the respondent has shown an *ex facie* sufficient title to the fishings on the Shin, where that river discharges itself into the Oykell, and also to the fishings in the Oykell *ex adverso* of the north side of that river to the eastward of the mouth of the Shin, and between that point and what is called Pool Maikill on the plans in process; but the questions on which parties are chiefly at issue are—(1) As to which of them has right to the fishings for about four miles on both sides of the River Oykell, between the Isle of Oykell and the mouth of the Shin; and (2) Whether the fishings on the south side of the Oykell, to the eastward of the mouth of the Shin, and between that point and the Culrain Burn, belong to the complainer or to the respondent?

So standing the main questions in dispute, it appears to the Lord Ordinary to be plain that were *interim* interdict to be granted in terms of the prayer of the Note, so as to prevent the respondents from fishing on any part of the River Oykell, on either side of the same, between the Casalay River and the Culrain Burn, the respondent would be excluded from his fishings at the mouth of the Shin, and also from the fishings between the mouth of that river and the Pool Maikill, on the north side of the river Oykell, to both which he appears to have produced a title *ex facie* sufficient to maintain possession in a question of interim interdict.

As regards the portion of the river between the mouth of the Shin and the Isle of Oykell, the Lord Ordinary would have been disposed, had the general clause of salmon fishings in the charter of 1720 been continued in the titles down to the present time, to have extended the interdict to both sides of this portion of the river. Because in the view he inclines to take of that charter it seems to amount to an express grant of salmon fishings *ex adverso* not only of the lands of Culrain, on the south side of the river, but also of the lands of Linsetmure and Inveran on the north side, which were disposed of in 1727 by the proprietor of Culrain, but without any right of salmon fishing being attached to them, and are now so held by the respondent. But the fact that the word "salmon" has been omitted from the general grant in the complainer's titles since 1788, places him in this respect in a less favourable position, and seems to throw upon him the necessity either of clearing up the effect of this omission or of showing actual possession on both sides of the river, on his title, *cum piscariis*, before he can, in special circumstances of this case, ask for interdict against

the respondent fishing *ex adverso* of his own lands on the north side of the river.

2. With reference to the respondent's claim to have the interim interdict recalled, the Lord Ordinary is not, as at present advised, satisfied that the respondent's title to fishings in the Shin, and in the Oykell to the east of the Shin, taken by itself, is sufficient to give him a right to salmon fishings on both sides of the River Oykell, at any part of it; because the only title produced is one to the Shin fishings, and to the fishings described as once possessed by Lord Duffus, and Monro of Achness; and these are limited to fishings in the county of Sutherland, where the River Oykell is the boundary of the county, so that the fishings on the opposite side are in the county of Ross. The whole of the respondent's fishings are expressly so described in the titles of 1690, 1727, 1813, and 1832, founded on by him. And it is, moreover, not clear that these titles have reference to any fishings to the west of the mouth of the Shin.

In this state of the titles the respondent's claim to have the interim interdict recalled was rested mainly on the possession which he and his predecessors have had of the fishings in dispute for a number of years, and which he alleges is to be attributed to his title to the Shin and Maikill fishings. But the circumstances under which this possession was had by the respondent's predecessors do not necessarily bear out the respondent's claim, because neither he nor his predecessors seem ever to have possessed the fishings in the Oykell, in respect solely of their title to the Shin and Maikill fishings, but have always fished them in connection with a lease from the complainer of the salmon fishings of Kilmachalmack, which is a title to fishings on both sides of the River Oykell, and under which general description the complainer alleges that the respondent fished, as on lease from him, the four miles between the Isle of Oykell and the Shin; and also the fishings on the south side of the river between the mouth of the Shin and the boundary at the Culrain Burn.

And this, in reality, appears to be the main question at issue between the parties; because, assuming that the complainer may not be able satisfactorily to explain the omission of the word "salmon" from his title since the year 1788, the question to be tried will be to which of the sets of titles the possession of these four miles of river is to be ascribed. And as the title on which the respondent founds is throughout restricted to fishings in the county of Sutherland, while that founded on by the complainer, though qualified by the use of the word Kilmachalmack, is a title to fishings on both sides of the River Oykell, there are, it is thought, in the presumptions arising from the present state of the titles and averments as to possession, as good grounds for supposing that the river to the west of the Shin may have been fished, in respect of the lease which the predecessors of the respondent held from those of the complainer, as on their own titles to fishings on the Shin or Oykell—the more especially as the title of Mackenzie of Ardross to fish in the Oykell, whether as assignee to the leases held by Forbes from Ross of Ankerville, or as proprietor in his own right prior to 1827, and separate from any lease he may have held from the complainer, appears to have been limited to fishings at the mouth of the Shin; for those which had belonged to Lord Duffus, as described in the supplementary disposition of 1827, are not expressly mentioned either in those leases or earlier titles. And this being so, the Lord Ordinary has come to be of opinion that,

as regards the disputed territory, the proper course at present will be to leave each party in possession of his own side of the river, under an injunction upon each to keep an account of the fish taken.

Such is the result which the Lord Ordinary has arrived at on a consideration of the respective titles and averments as to possession. But apart from this, and having regard to the admissions in the Answers, as to the manner in which the complainer's side of the river was occupied, and his property dealt with by the respondents, or those acting under them, before the interdict was applied for, it appears to him to be expedient, if not necessary in the question of trespass, that each party should in the meantime be prevented from fishing *ex adverso* of, or from landing on, the property of the other. (Initld.) D. M.

The respondents reclaimed.

BALFOUR, for them (DUNDAS with him), argued—The respondents do not object to the note being passed, but the interdict should be recalled. The complainer has no title to the fishings in question. He has no written title to the salmon fishings at all. The respondent, the Duke of Sutherland, has been by himself and his predecessors in possession of the fishings from time immemorial. The complainer has never had any possession at all. He also referred to correspondence under the hand of the complainer's predecessor and his agents, in which the Duke's right to the fishings was recognised by them.

GORDON, SHAND, and KEIR, for the complainer, were not called on.

The LORD PRESIDENT—There are questions raised in this case which may be of importance; but the only one now before us is the question of interim possession, until some further or clearer light is obtained. In regard to that matter, the Lord Ordinary was called upon to exercise his discretion. If the title was clear on one side, there would be no dispute; but this is not so. The Duke's title is of a complex kind. He founds upon a title as proprietor, and also a right to possess under a lease. One question is, what fishings are comprehended in his title? and it is very difficult to say what the nature of the possession under the lease was. It would rather seem that if he possessed under the lease, the possession was Culrain's. In the meantime the Lord Ordinary had to regulate the possession while these questions are being tried. He has done so, and appointed the parties to keep notes with a view to adjustment afterwards. On the whole, I confess that the Lord Ordinary has dealt with the matter in a safe and judicious way, and I think we should adhere to his interlocutor. Of course the interdict may be recalled at any time by the Lord Ordinary as the case develops itself.

Agents for Complainer—Dundas & Wilson, C.S.
Agent for Respondents—Colin Mackenzie, W.S.

Thursday, May 31.

WINK v. REID AND OTHERS.

Bankruptcy—Act 1621, c. 18—Fraud at Common Law—Issue. Issues adjusted in a reduction founded on the Act 1621 and on allegations of fraud.

This action of reduction was founded on the following averments:—

David Reid was in 1856 proprietor of certain heritable subjects in the parish of Neilston. In that year, being indebted to James Harvey & Co.

to the extent of £200, he granted to trustees for that firm an *ex facie* absolute disposition of the property which was granted truly in security of that sum. On 11th June 1858, Reid paid up the £200, and the said trustees conveyed the subjects, in conformity with his request, to Reid and his wife, and the survivor, for their conjunct life-rent alimentary use alienarily, and to the children of the marriage between them, born and to be born, equally between them. Infestment passed on this disposition on 23d June 1858. In so far as the deed bore to convey any right in favour of Mrs Reid and her children, it was an alienation made by Reid when he was insolvent, without any true, just, or necessary cause to the prejudice of his lawful creditors, and as a fraudulent and collusive device for defeating their rights. Some months after the date of it, Reid suspended payment and was rendered notour bankrupt. On 31st March 1859, with consent of his wife, he disposed of the subjects to certain persons as trustees for his creditors. In this deed it was narrated that the previous disposition was null and void under the Act of 1621, as well as at common law. Notwithstanding the execution of this deed, Reid remained in possession and continued to carry on business, contracting new debts, with the proceeds of which he satisfied the debts of a number of the creditors for whose behoof the trust conveyance had been granted. In January 1864, the trustees, on the narrative that the purposes of the trust had been exhausted, disposed and reconveyed the subjects to Reid and his wife and children, with a destination similar to that contained in the disposition to them in 1858. At the date of this disposition Reid was utterly insolvent; and in so far as it bore to convey any right to the subjects to Mrs Reid and her children, it was granted without any true, just, or necessary cause to the prejudice of Reid's lawful creditors, and as a fraudulent and collusive device for defeating their legal rights. On 15th January 1864 Reid's estates were sequestrated, and the pursuer was afterwards elected trustee. It was also averred that Reid has been continuously insolvent from 1858.

The pursuer sought to reduce on these grounds, *inter alia*, the disposition to Reid's wife and children in 1858, and the other disposition to them in 1864. The action was defended by them and also by Reid. Issues were proposed for trial and reported.

SCOTT, for the defenders, objected that the issues proposed did not raise an important question as to which the parties were at variance—namely, whether the pursuer represented creditors prior to the granting of the first disposition. The pursuer averred that he did, but this the defenders denied. All these creditors had been paid.

GIFORD and HALL, for the pursuers, answered—At common law a deed by an insolvent may be challenged by creditors who were not so till after the deed was granted, but whose debts were contracted to pay off the debts of creditors who were so prior to the deed—Edmond v. Grant, 1st June 1853, 15 D. 703. They were willing, however, to insert in the issues that the pursuer now represented the creditors who were prejudiced.

The following issues were accordingly adjusted, the words in italics having been inserted by the Court in those proposed by the pursuer:—

“It being admitted that the estates of the defender David Reid were sequestrated on or about the 15th day of January 1864, and that the pursuer is trustee on the said sequestrated estates,—