

penses. (*Evans v. Evans and Robinson*, L. J. vol. 28, N. S., P. & M. C., p. 136.)

MAIR, for the co-defender, in reply, maintained (1) that there was no sufficient proof of the co-defender having known at the time of his alleged adultery with the defender that she was married; (2) that in similar cases in England the co-defender had not been held liable in expenses (*Boddington v. Boddington and Teagle v. Teagle*, L. J. vol. 28, P. & M. C., pp. 53 and 55; *Priske*, L. J. vol. 29, P. & M. C., p. 195); and (3) that the wrong committed by him was not of a kind for which he could be made liable as he met the defender in a house of ill-fame.

The Lord Ordinary issued the following interlocutor and note, giving the pursuer decree for his expenses:—

"*Edinburgh, 15th January 1868.*—The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the proof adduced, and whole process: Finds facts and circumstances proved sufficient to infer that the defender committed adultery with the co-defender: Finds her guilty with him accordingly; therefore divorces and separates the defender from the pursuer, his society, fellowship, and company in all time coming: Finds and declares in terms of the conclusions of the libel, and decerns: Finds the co-defender liable to the pursuer in expenses of process: Allows the account thereof to be lodged; and remits to the auditor to tax the same as between agent and client, and to report. W. PENNEY."

"*Note.*—It was maintained for the co-defender that there was no proof of his knowing the defender to be a married woman at the time when he committed adultery with her, and that therefore he should not be found liable in expenses. There is no direct proof of such knowledge on his part. But it appears to the Lord Ordinary to be fairly inferred from the proof; and no evidence was led by the co-defender tending to establish the contrary. The case is not one of seduction or of breach of friendship towards the husband, from whom his wife had for some time lived separate. But it seems to the Lord Ordinary that, according to a sound principle, and that which apparently prevails in England, the co-defender must, unless in an exceptional case, always reimburse the expenses incurred in obtaining redress against a wrongful act in which he was directly participant. (*Evans v. Evans and Robinson*, Law Journal, vol. 20, N.S., Probate and Matrimonial Cases, p. 136.)

(Initialed) "W. P."

Tuesday, January 21.

SECOND DIVISION.

LORD LOVAT *v.* MACDONELL.

Breach of Interdict—Emerging Title—Lease—Salmon Fishing. A party was interdicted by the Court of Session from fishing in a river *ex adverso* of certain lands. He afterwards acquired a right from the Crown, under a lease, to the salmon fishings of his own lands, but without prejudice to the other right which had obtained interdict. *Held* that the subsequent title of the Crown, conferring a *prima facie* right to fish there, had been no breach of interdict, or that, if there had been a breach, it was a justifiable one.

This is a petition and complaint at the instance of Lord Lovat, with concurrence of the Lord Advocate, complaining of a breach of interdict said to have been committed by Mr Macdonell, of South Morar, and concluding with the usual prayer. The petitioner made the following statements:—The complainer is heritable proprietor of, and duly infeft in the lands and estate of Morar, with the fishings after-mentioned, being part of the barony of Glengarry, lying within the lordship of Gartmorar and Lochaber, and sheriffdom of Inverness. He completed a feudal title to the said lands and estate in 1816, in which year he was infeft upon a precept from Chancery, *inter alia*, in all and whole the twelvepenny lands of Morar, comprehending therein the particular lands and others therein mentioned, "cum silvis piscationibus et pertinen. omnes jacen. infra dominium de Gartmorar et Lochaber et Balam vestram. Et quæ terræ cum terris de Sleismein de Glengarry cum piscationibus et pertinen. earund. jacen. infra dominium et Balam vestram in liberam baroniam erectæ fuere Baroniam de Glengarry vocat, per Cartam sub magno sigillo de dato vigesimo septimo die mensis Martii anno Domini millesimo sexcentesimo vigesimo septimo in favorem Donaldi MacAngus MacAlister de Glengarry." The complainer's said lands are bounded on the south by the river Morar, and are usually designated by the name of North Morar. He and his predecessors, in virtue of their titles, have for time immemorial, or at least for forty years, exercised the sole and exclusive right of salmon-fishing in the river Morar *ex adverso* of their said lands and estate; and in particular, in that part of said river which forms the northern boundary of the lands of South Morar. During the said period the complainer and his predecessors have enjoyed uninterrupted possession of the said right of salmon-fishing, and they have constantly and continuously exercised the same by means of net and coble, in so far as practicable and convenient or expedient, and also by other lawful means.

The respondent is proprietor of certain parts and portions of the estate of South Morar, which are bounded on the north by the river Morar, and lie opposite to the said lands of the complainer. The respondent, or persons authorised or employed by him, were in the habit of encroaching and trespassing upon the complainer's said right of salmon-fishing in the said river, by angling for salmon therein *ex adverso* of the complainer's said lands of North Morar, and by spearing salmon in said part of the river.

Accordingly the petitioner, on or about the 8th day of October 1861, presented to your Lordships a note of suspension and interdict against the respondent, craving your Lordships "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondent, by himself or others in his employment, or having his authority and permission, from fishing or angling for salmon, from spearing salmon, and from erecting or using yairs or other machinery for the taking of salmon in any part of the river Morar *ex adverso* of the lands of North Morar, belonging to the complainer, being part of the barony of Glengarry, and lying in the lordship of Gartmorar and Lochaber, and sheriffdom of Inverness; or to do otherwise in the premises as to your Lordships shall seem proper."

A variety of procedure took place under this note of suspension, and a proof was led. Ultimately, on advising this proof, the Lord Ordinary (KINLOCH) pronounced the following interlocutor:—

"*Edinburgh, 12th December 1866.*—The Lord Ordinary having heard parties' procurators, and made *avizandum*, and considered the process, proof, and productions—Finds that for forty years and upwards prior to the 8th day of October in the year 1861, the suspender and his predecessors in the lands of Morar have, by virtue of a title to these lands *cum piscationibus*, fished for salmon in the river Morar *ex adverso* of the said lands, by legal and competent modes of fishing salmon: Finds that though the respondent and his predecessors in the lands of South Morar have for a similar period fished for salmon in the said river, it has not been shown that any title to fishings exists in the person of the respondent, or of any one whom he represents, or with whom he has legally connected himself: Suspends, interdicts, prohibits, and discharges in terms of the prayer of the note of suspension and interdict: Declares the interdict perpetual, and decerns: Finds the respondent liable to the suspender in the expenses of process; allows an account thereof to be lodged, and remits to the auditor to tax the same and to report."

Mr Macdonell reclaimed against this interlocutor, but his reclaiming note was withdrawn, and it became final. The petitioner then "states that notwithstanding the said interdict, and in breach thereof, and in contempt of the authority of your Lordships, the respondent on several occasions during the months of June, July, August, and September 1867, or during one or more of said months, did fish for and take, and did spear salmon in the said river Morar, *ex adverso* of the petitioner's said lands of North Morar, by means of net and coble, and also by erecting and using a scaffold or other machinery for taking and spearing salmon opposite said lands, and did take salmon and land them on the petitioner's said lands, on the north side of the said river, and did draw his net and coble on the petitioner's said lands, and did spread his nets thereon."

The respondent, in his answers, made the following statements:—

"The respondent desires, in the very outset of his answers to this complaint, to disclaim any intention to commit a breach of interdict, or to resist or fail to obey the judgment of the Court. He would add, that any manifestation of disrespect to the authority of the Court would be altogether contrary to his feelings, and that his regret would be extreme if he thought that any conduct of his was reasonably subject to such a construction.

"The judgment of Lord Kinloch, upon which this complaint is rested (for the reclaiming note against it was not insisted in), proceeded on the ground that the respondent, as proprietor of South Morar, had no title to salmon-fishings in the river Morar. At the date of the judgment the respondent had no title except his title to South Morar; and he was not prepared to contest the soundness of the judgment, and consequently withdrew his reclaiming note.

"It was, however, clear, and was admitted, that while the complainer's possession of salmon-fishing in the river under his title '*cum piscationibus*' was limited to fishing from his own lands on the north bank, the respondent had a co-extensive possession of salmon-fishing, exercised by fishing from his lands on the south bank, and that his possession was not limited to the south bank, but to a certain extent extended to the north bank also. Therefore, although the respondent had no Crown title valid to support his possession, it was clear, or

seemed to him to be so, that the complainer had not a title to the whole salmon-fishings of the river, but that the title to these fishings, to the extent to which the respondent and his predecessors had possession, was in the Crown. But the respondent was not, in the action between him and the complainer, in a situation to plead the title of the Crown, and hence the judgment, which, it will be observed, does not deal with the title of the Crown at all, or affirm, directly or indirectly, that the complainer's title was exclusive or extended to the whole salmon-fishing in the river.

"Since the date of the judgment the respondent has obtained from the Crown a lease for seven years, from Martinmas 1866, of the salmon-fishings of the lands of South Morar, belonging to him, 'but subject and without prejudice to the rights which may now legally belong to Lord Lovat in and to the salmon-fishings *ex adverso* of his lands of Morar.'

"On 29th March 1867, after the lease had been arranged, but before it was actually executed, the respondent's agent intimated the fact by letter to the complainer's factor. No answer was returned to that letter."

The respondent in respect of this lease pleads that the interdict was no impediment to the exercise of his rights as lessee; that as there is no form of process by which the interdict could be recalled, the only course open to him was to act upon the lease till it was challenged. The answers conclude with the following statement:—

"The respondent again expresses his respect for the judgment and interdict of the Court, and again disclaims all intention of acting contrary thereto. It was indeed in deference to that judgment that he applied to the Crown for the title which he now holds and maintains, and that he ceased to assert a right to fish irrespective of that title, which had no existence when the judgment was pronounced. The respondent holds it to have been decided that he has no title to fish in his own right, and he has never since the judgment attempted to do so. The possession challenged by the complainer as a breach of interdict was in truth the possession of the Crown exercised through the respondent, as a lessee of the Crown; and as this was and is well known to the complainer, it is submitted that the present petition and complaint ought to be dismissed as inapplicable to the circumstances of the case."

A minute of mutual admissions was adjusted by the parties as follows:—

That the complainer and his authors have, for forty years and upwards prior to 8th October 1861, fished the river Morar for salmon by rod, spearing, hand-nets, or sringe-nets, from the north side of the said river.

That the complainer and his authors have, from 1825 or 1826 to 8th October 1861, fished the said river for salmon by net and coble from the north side of said river.

That in fishing from the north side by hand-net or sringe-net, the mode is as follows:—One end of the net is held on the north bank, while the other end is by hand drawn across the river and brought back to the north bank, on which the net is drawn; and that in this operation no use is made of the south bank, and no boat is used.

That the respondent and his authors have, for forty years and upwards prior to 8th October 1861, fished the river Morar for salmon by rod, spearing, hand-nets, or sringe-nets, from the south side of the said river.

That the respondent and his authors have, from 1825 or 1826 to 8th October 1861, fished the said river for salmon by net and coble from the south side of said river.

That in fishing from the south side by hand-net or scringe-net, the mode is as follows:—One end of the net is held on the south bank, while the other end is by hand drawn across the river and brought back to the south bank, on which the net is drawn; and that in this operation no use is made of the north bank, and no boat is used.

CLARK and RUTHERFURD were heard for the Complainer.

YOUNG and GIFFORD for the Respondent.

The Court held that, *de facto*, there had undoubtedly been a breach of interdict, because, while the fact was that the respondent was interdicted from fishing in the river Morar, *ex adverso*, of the petitioner's lands, he now admitted that he had fished in the interdicted place. But it was competent for the Court to examine into the emerging title which was relied upon by the respondent, with the view of seeing whether that justified him in a breach of the interdict. That title gave him a *prima facie* right to fish for salmon in the river Morar, and, therefore, there was no breach of interdict, or at any rate it was justified. This was not a case of *interim* interdict where application might be made for having the interdict recalled; it could not be recalled here, and therefore the question was, Was the respondent justified in doing what he did, standing the interdict? Before further answer the Court appointed the petitioner to descend more specifically upon the acts of the respondent relied upon as founding the breach of interdict.

Agents for Petitioner—Gibson, Craig, Dalziel, & Brodies, W.S.

Agent for Respondent—W. Mitchell, S.S.C.

Wednesday, January 22.

FIRST DIVISION.

MILNE, PETITIONER.

Proof—Presumption of Death—Judicial Factor—Recal—Caution. Circumstances in which the Court refused to grant recal of appointment of judicial factor on estate of party who had disappeared, and was alleged to be dead, without caution. In place of remit for proof, the factor allowed to lodge answers stating how far he admitted the allegations of petitioner as to disappearance of the party.

In April 1866 David C. Wills was appointed judicial factor on the estate of David Milne, weaver in Bervie. The petition on which the appointment proceeded stated that Milne had disappeared on 15th or 16th January 1866, after he had, while in a state of intemperance, threatened to commit suicide; and no trace of him had since been found, except a hat which had been worn by him, and which was found on the beach at Bervie. Milne was proprietor of certain house property in Montrose. In May 1867, John Milne, a brother of David Milne, presented a petition to the Sheriff of Kincardineshire, praying to be served heir-in-general to David Milne. After answers by the judicial factor, and a proof by the petitioner, the Sheriff pronounced decree, finding that David Milne had died on or about

16th January 1866, and serving the petitioner. The petitioner took infeftment as heir of his brother David in the property owned by him, and now presented a petition for recal of the factory *quoad* these heritable subjects, and for discharge of the factor's intromissions so far as related to them. The factor lodged answers, not absolutely opposing the petition, but pointing out the absence of proof that Milne was dead. The Court, after hearing the parties, ordered the petitioner to state more specifically what he averred and offered to prove with reference to the disappearance of David Milne. The petitioner accordingly lodged a minute stating that David Milne at the date of his disappearance was sixty-seven years of age. He had resided in Bervie for about thirty years. Since the death of his mother in 1848 he had resided alone. After succeeding to the house property in Montrose he had speculated to some extent, and had been obliged, in consequence of losses, to burden his property to the extent of £500. After 1840, he had no income except what he earned as a weaver, and the surplus rent of his property. He was not of provident habits, and was always needy. Before January 1866, his earnings had greatly fallen off in consequence of failing eyesight, and consequent want of employment. From 5th to 15th January he was drinking, and frequently threatened to commit suicide, and on the morning of 16th January he left his house with no clothes but what he was wearing, and no money beyond a shilling or two. Footmarks of a full-grown man were traced to the sea at the place where the people of Bervie had access to the shore, but no return steps could be seen, and his hat was found on the shore as if blown one or two hundred yards from the mark of the footsteps. It was the common repute that Milne was drowned.

The Court, instead of remitting for proof, allowed the factor to give in answers stating how far he was in a position to admit these averments. In his answers he did not admit the statements as to the needy condition and improvident habits of Milne. He knew nothing of the history of Milne's disappearance, but admitted that the petitioner's statements on that head had been deposed to by witnesses examined before the Sheriff in the petition for service, that evidence, however, being *ex parte*. The factor suggested that if the prayer of the petition was granted, the petitioner should find caution.

The case came again before the Court.

BIRNIE, for petitioner, asked the Court to grant the prayer of the petition without caution, and cited *Hay v. Corstorphine*, M. 5956; *Hogg v. Hume*, M. 12,645; *Erskine v. Steven*, M. 12,643; *Laurie v. Drummond*, M. 12,643; *French v. Earl of Wemyss*, M. 12,644; *Sands v. Her Tenants*, M. 12,645; *Ruthven v. Clark*, M. 11,629, 8048; *Henderson v. Morton*, M. 12,646; *Forrester v. Butcher*, M. 11,674; *Ashburton v. Baillie*, 7th Feb. 1811, F. C.; *Fettes v. Gordon*, 1825, 4 S. 149; *Hyslop v. Gordon*, 1830, 8 S. 919; *Campbell v. Campbell's Trs.*, 1834, 12 S. 382; *Fairholme v. Fairholme's Trs.*, 18 Mar. 1858, 20 D. 813.

MARR for judicial factor.

The Court declined to grant the prayer of the petition without caution, and continued the case in order that caution might be found.

Agents for Petitioners—Henry & Shiress, S.S.C.
Agent for Factor—Wm. Officer, S.S.C.