

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.