

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.