maintaining that there is a large sum due to her.

The purpose of the deposit was intimated to Messrs Romanes & Simson, the agents acting for the ladies, as is clear from the letter, part of which was read by your Lordship. Well, the parties wanted the money deposited—the amount being £442, 10s., as Miss Wood had not got payment of her bond—and it was consigned for the two purposes mentioned on Mr Blakey's suggestion. The matter ought to have been brought to a point in three months, but it was not. Messrs Romanes & Simson have arrested £320 to meet the amount due under the bond with interest from 1881, and the question is whether the other claim has been abandoned. That question must, I think, be answered in the negative, for Messrs Romanes & Simson have threatened Mr Winchester with personal responsibility if he parts with the balance of the money in his hands.

The only answer made for Mr Blakey is that the three months have elapsed. Can it be said that Mr Winchester is in safety because the three months have elapsed to pay away the money in face of the threat of personal responsibility? I think it would have been most rash of him to have done so, and therefore I think he was warranted in raising the multiplepoinding. I agree with the Lord Ordinary where he says—"The contention for Mr Blakey was that the fund is his, and was placed in the pursuer's hands for three months only, as, it was said, appeared from certain letters referred to, and that period having arrived the pursuer had no longer any title to hold it, but was bound to return it. It may be so, and if the defender Mr Blakey makes that out he may be entitled to immediate payment. But the pursuer cannot on that account be deprived of his right to protect himself from the risk of being compelled to pay twice by convening all the parties asserting a claim in a multiplepoinding."

LORD ADAM concurred.

LORD M'LAREN—The only question before us is whether the action is competent, and I am not surprised that questions of this kind occasionally are raised, because it is perhaps not easy to find a clear definition of what will make it competent to raise such an action.

Of course the necessary conditions are that there must be competing parties and a fund in the hands of a neutral person. But it does not follow that when these conditions exist the action will necessarily be competent. There are, as far as I see, at least two distinct cases which require to be separately considered. We allow an action of multiplepoinding to be brought by a competing party in name of the neutral person, but that is never allowed except when there is double distress in the strict and proper sense of the term. If a person thinks himself entitled to some property which is in the possession of another, his course is to raise a direct action. He is not entitled to raise a multiplepoinding on the mere report that someone else is claiming the fund. When there are double actions, or double diligence is being done, then the only way to extricate the matter is by a multiplepoinding.

The practice of our Courts, however, warrants a much greater latitude in the case of the holder of the fund than in the case of the competitors, and for the reason that the holder of the fund can never raise a direct action, and is not bound to remain a depositary till the day of his death or till the disputing parties agree to settle their claims. He is entitled to be relieved by means of an action of multiplepoinding after a reasonable time, and accordingly it is a sufficient justification of the institution of the action, and is the criterion of its competency, that the claims intimated make it impossible for the depositary to pay to one of the parties without running the risk of an action at the instance of the other.

The present case is of this description. Mr Winchester undertook to hold a sum of money for three months on the agreement that the parties would settle their disputes within three months. The parties have not agreed, and Mr Winchester is not bound to hold the money any longer, and unless the parties are ready to give him a joint discharge he is entitled to raise an action of multiplepoinding and exoneration in order to get a discharge from the Court.

I therefore agree in the view taken by the Lord Ordinary.

The Court adhered.

Counsel for the Reclaimer—G. W. Burnet. Agent—James F. Mackay, W.S.

Counsel for the Respondent—Low—Wallace. Agent—W. G. L. Winchester, W.S.

Saturday, June 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

KENNEDY AND CURRIE *v.* WISE.

(*Ante*, p. 685, May 31.)

Reparation—Civil Action—Criminal Proceedings—Res Judicata.

Upon 13th September 1889 two fishermen brought an action in the Court of Session against a proprietor to have certain nets seized by him upon 22nd July restored or their value paid. Upon 22nd October, in a criminal prosecution in the Sheriff Court at the instance of the defender, the pursuers were found guilty of salmon poaching upon 22nd July and fined, and their nets declared forfeited. No steps were taken to have this judgment reviewed.

Held that a court of competent jurisdiction having decided in proceedings to which no exception had been taken that the nets were rightly seized, and having ordered their forfeiture, the

action for their recovery ought to be *dismissed.*

Upon 13th September 1889 Malcolm Kennedy and Lachlan Currie, fishermen at Bowmore, in the island of Islay, raised this action against Major Lovat Ayshford Wise, tenant of and residing in Islay House, Islay, for recovery of certain nets alleged to have been wrongfully seized on 22nd July 1889 by the defender's gamekeeper, or alternatively for £25 sterling, the value of the nets.

The defender averred that the nets had been used for poaching salmon within his boundaries, that he had instituted a prosecution against the pursuers in the Sheriff Court, Inverary, that warrant had been granted to serve the complaint on 26th September, and on 22nd October the pursuers were found guilty of salmon poaching and fined, their nets being declared forfeited.

The defender averred that under the Acts 9 George IV. cap. 39, and 7 and 8 Vict. cap. 95, he was entitled to seize and detain the nets when he found them used for poaching.

The defender pleaded—"(1) The action is irrelevant, and ought to be dismissed. (2) No title to sue. (3) The nets having been forfeited by order of the Sheriff-Substitute, the conclusions for their delivery, or alternatively for their value, are incompetent. (4) The defender being entitled to seize the said nets and detain them till the result of the prosecution was known, and the nets having now been forfeited by order of the Sheriff, should be assoilzied from the conclusions of the summons."

Upon 14th March 1890 the Lord Ordinary pronounced this interlocutor—"Repels the second, third, and fourth pleas-in-law for the defender as pleas to exclude the action, reserving their effect on the merits, and decerns; appoints the pursuers to lodge the issue proposed for the trial of the cause, &c.

For *Opinion* see report *supra*, p. 685.

The following issues were adjusted:—"(1) Whether, on the night of the 22nd or the morning of the 23rd day of July 1889, or about that time, five or thereby fishing nets, the property of the pursuers, were, near the estuary of the Sorn at Lochindaal, Islay, wrongfully seized by the defender, to the loss, injury, and damage of the pursuers? (2) Whether since said seizure the said nets have been wrongfully withheld by the defender from the pursuers, to their loss, injury, and damage? 1st. Damages claimed, £200. 2nd. Value claimed for the said nets, failing delivery, £25."

Upon 12th June 1890 the Lord Ordinary approved of said issues, and appointed the same to be the issues for the trial of the cause.

The defender reclaimed, and argued—The action was irrelevant. He was not liable to have an action brought against him, seeing he had merely put the law of the land (in the form of a criminal prosecution) into operation, and had succeeded. The Sheriff-Substitute's judgment was final, and was *res judicata* as regarded this case. The pursuer had taken no steps to have that judgment brought under review by appeal to the Justiciary Court as he might have done under the Salmon Fisheries (Scotland) Act 1862 (25 and 26 Vict. c. 97), sec. 28—*Maclellan* v. *Miller*, December 7, 1832, 11 S. 187; *Gilchrist* v. *Anderson*, November 17, 1838, 1 D. 37.

The pursuers argued—The action was competent and relevant. The summons had been signeted on 13th September 1889—the criminal proceedings were not instituted until 26th September, and the trial was not until 22d October. The question was whether a criminal prosecution instituted solely at the instance of the reclaimer, and disposed of summarily by the Sheriff-Substitute, barred further proceedings in a civil action brought against the reclaimer before the institution of that prosecution? It would be inequitable to hold that it did. The cases relied upon by the other side were not disputed. They did not apply, because in them the civil action was only brought after and in consequence of the criminal prosecution.

At advising—

LORD JUSTICE-CLERK—The pursuers in this case are fishermen. A question arose between them and a landed proprietor as to their right to place certain nets of a particular construction in a certain place. These nets were seized by the defender under Act of Parliament. There seems to be no question that these nets were illegal, and illegally in the place where they were when seized. It also appears that the defender in *bona fide*, and not for the purpose of countering a civil action which had been brought against him for recovery of the nets or of their value, instituted a prosecution against the pursuers to have them fined and their nets declared forfeited.

If there was any legal ground on which the prosecution could have been stopped objection to its proceeding should have been taken in Court before the Sheriff-Substitute, and we must hold that if any objection was taken the Sheriff-Substitute disposed of it, and that he decided the case ought to go on. If he did so, I think he acted rightly, but whether rightly or wrongly, we have the fact staring us in the face that no competent proceedings have ever been taken to determine the legality of his judgment, and if possible to set it aside. The Sheriff-Substitute held the nets must be forfeited. That has been done. No appeal of any kind has been taken against that judgment. We are accordingly bound to hold the decision a proper decision. We are not entitled to set it aside, and even if we were no proceedings have been taken to have that done. What, then, is the state of this case? The pursuers ask that the defender should be ordained to deliver up the nets or to pay a sum of money. Now, if the nets were properly forfeited for public purposes the defender cannot deliver them up. Neither he nor any other citizen has a right to get these nets. Then it is said if he cannot deliver them up he must pay their value, but the only claim for payment the pursuers could have for their value would be on the ground of the defender

having failed to deliver up the nets when he ought to have done so. If it was not in his power or authority to deliver them up because a public authority had said they were to be forfeited, he cannot be asked to make payment of their value as being in default.

I am of opinion that a judge in a competent court has decided the questions of fact here in dispute, and that no means having been taken to set aside his judgment there is no case to go to proof. And upon the question of damages, in respect that the defender wrongfully seized these nets and made them the subject of a criminal prosecution, I observe again that a court of competent jurisdiction has held he did rightly what he is charged with having done wrongfully. I cannot therefore see how it is open to the pursuers to make this claim, and I think that the action cannot proceed.

LORD YOUNG—I concur in the result and generally upon the grounds which have been stated by your Lordship. I wish, however, to guard myself against any avoidable general observations, and to confine myself to the individual case before us, which is in many respects special and peculiar. I begin by saying that we must assume the validity of the Sheriff-Substitute's judgment of 22nd October. His jurisdiction was not questioned, the instance was not disputed, the regularity of the proceedings was admitted. We must assume, therefore, the validity of the judgment. I would only make this observation, that in my opinion it would have been quite competent to bring under the Sheriff's notice the fact that a summons in an action by the accused against the complainer had been signeted in the previous month, and would come before the Court of Session shortly, and that it would have been quite competent for the Sheriff if he had seen fit upon that statement to have declined to go on with the case before him until that action had been disposed of. Such an application would have been addressed to his discretion, and assuming that it was made, he acted quite legally in refusing it, and I think he also exercised a proper discretion in doing so. The only questions of fact involved were two, first, were the nets of a description calculated to take salmon? and second—although this was scarcely disputed—were they placed beyond the legal boundary? The Sheriff thought it would not be wise to delay the case because the summons in a civil action had been signeted. We are dealing with the action raised by that summons, but the legality or illegality of the seizure of these nets, which is the question presented to us, is just the question which was presented to the Sheriff. I think the two questions of fact were properly and conclusively answered in the most obviously fitting court in which to try them, and between the same parties as are here, and should not be tried over again in this action of damages. I do not want to go into any case where the facts may be different, and a very little difference might distinguish another case from the present with a different result; but in the circumstances here I think the action should be dismissed.

LORD RUTHERFURD CLARK—I desire to deal with this case by itself, and I think that here the defender should be assoilzied.

LORD LEE—I think the admission that no means were taken to suspend this judgment is conclusive of the case. There are cases where something done and conclusively done in a court of supreme jurisdiction as to the subject-matter before it may be open to be tried over again in a superior court with larger jurisdiction, but there is no question of that sort here. No irregularity in the prosecution has been complained of, and I therefore concur in the judgment proposed.

The Court recalled the Lord Ordinary's interlocutor of 12th June, sustained the defences, and assoilzied the defender from the conclusions of the action.

Counsel for the Pursuers—Rhind—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for the Defender—Guthrie—F. T. Cooper. Agents—John C. Brodie & Sons, W.S.

Saturday, June 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

WADDELL *v.* THE GOVERNORS OF DANIEL STEWART'S HOSPITAL.

Landlord and Tenant—Lease—Construction—Damage by Subsidence—Mineral Working.

An agricultural lease reserved to the landlord right to work minerals, the landlord "being always bound and obliged to pay to the tenants all damage which may be done to the surface of ground by the exercise of the above powers, and that by deduction from their rent as the same shall be fixed by two neutral men mutually chosen."

In an action for arrears of rent by the landlord against the agricultural tenant the defender averred damage to the surface of the ground by subsidence. *Held* that the clause in the lease included such damage, and was not confined to damage to the surface by operation on the surface, and that accordingly the action was excluded by the clause of arbitration.

By lease dated 7th June and 19th October 1875 the Governors of Daniel Stewart's Hospital let to John Waddell & George Waddell, contractors, Edinburgh, and the survivor and his heirs, a part of the estateof Balbardie, in the county of Linlithgow, known as "Meikle Inch," for nineteen years, at an annual rent of £240 sterling. In the lease