

LORD ADAM and LORD M'LAREN concurred.

The Court recalled the Lord Ordinary's interlocutor and sustained the second, third, and fourth pleas-in-law for the defender.

Counsel for the Pursuer—M'Kechnie—Salvesen. Agent—W. B. Glen, S.S.C.

Counsel for the Defenders—D. F. Balfour, Q.C.—R. Johnston. Agents—Hope, Mann, & Kirk, W.S.

Saturday, June 21.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

WINCHESTER v. BLAKEY.

Process—Multiplepoinding—Competency—Double Distress.

A sum of money was deposited in the hands of a neutral person pending the settlement of disputes between several parties claiming right thereto, one of the parties stipulating that the deposit should be for three months only. That period having elapsed, and no settlement having been arrived at, this claimant raised an action against the depositary for payment of part of the sum in his hands. On this action being intimated to the agents for the other claimants they wrote to the depositary objecting on behalf of their clients to his paying away any part of the sum entrusted to him till the rights of parties were settled, and threatening him with personal responsibility if he did so. The depositary thereupon raised an action of multiplepoinding. Held that there was such double distress as to make the action competent.

John Wood Blakey, Miss Elizabeth Wood, Mrs Brewster, and Mrs Handyside were jointly interested in a property in Hull. The property was sold in 1888 with a view to the settlement of their respective claims. Difficulties arose between Mr Blakey on the one hand, and Miss Wood, Mrs Brewster, and Mrs Handyside on the other, as to the carrying out of the sale, and the execution of the writs necessary to give a good and sufficient title to the purchasers, and the application of the price.

Ultimately, and in order to admit of a settlement with the purchasers of the property, W. G. L. Winchester, W.S., Mr Blakey's agent, wrote on behalf of his client to Messrs Romanes & Simson, W.S., the agents for the other parties, offering to retain £442, 10s. of the £587, which would fall to his client as his fourth share of the price of the property, in his own hands "for three months to meet any claim you may be able to establish against my client, failing our being able to settle the matter out of Court." Writing to Messrs Romanes & Simson on 8th April Mr Winchester re-

ferred to this offer as his client's *ultimatum*, and said—"If you wish to retain Miss Wood's £200, that could be paid to you direct, which would make the sum payable to Mr Blakey £387, 10s., and after paying him the sum of £145 there would be £242, 10s. remaining on deposit for three months to meet any claims for expenses and interest."

Messrs Romanes & Simson agreed that when the price was paid the sum of £442, 10s. would be remitted to Mr Winchester, as a "neutral stakeholder," until it was determined to whom the money should be paid.

Mr Blakey thereafter signed the documents necessary to complete the transfer of the property, the price was paid, and £442, 10s. was remitted to Mr Winchester, and was by him consigned in bank on 22nd May 1889 "in trust for behoof of the parties entitled thereto."

On 26th June 1889 an arrestment was used in Mr Winchester's hands at the instance of Miss Wood to the extent of £320 in security of the sum due under a bond granted by Mr Blakey to her for £200, dated 19th January 1881, with interest due from said date. In September 1889 Mr Blakey raised an action in the Sheriff Court at Edinburgh against Mr Winchester for payment of £122, 10s. Mr Winchester having informed Messrs Romanes & Simson of this action they wrote to him on 10th September reminding him that the money had been deposited with him as mutual stakeholder pending the settlement of the claims of parties, and objecting on behalf of their clients to his paying away any portion of it, and threatening to hold him personally responsible if he did so.

Mr Winchester thereupon raised an action of multiplepoinding and exoneration in the Court of Session, calling Mr Blakey, Miss Wood, Mrs Brewster, and Mrs Handyside as defenders, in order to have the claims of these parties to the sum in his hands judicially settled.

Mr Blakey objected to the competency of the multiplepoinding on the ground that there was no double distress, averring *inter alia* that the money, which was his, had been deposited with the pursuer for three months only, and that period having elapsed he had no longer any title to retain it.

On 25th February 1890 the Lord Ordinary (KINCAIRNEY) repelled the defences so far as stated against the competency of the action and decerned.

"*Opinion.*—The pleadings are extremely confused. Even the plea against the competency of the action is not well stated. But the objections must have been lodged for that purpose, and the argument at the bar was directed to show that the multiplepoinding was incompetent on the ground that there was no double distress. The objector, it ought to be mentioned, asked a proof of his averments. But it would be out of the question to incur the expense of a proof, and it appears to me that the point may be decided without more inquiry.

"The fund *in medio* is £442, 10s., part of

the price of property in which the defender John Wood Blakey, and three ladies, who are his aunts, and who are also called as defenders, were jointly interested. This sum of £442, 10s. was placed in the hands of the pursuer on account of certain differences between the defender and his aunts about their respective rights to the price of the property. £320 of that sum have been arrested in the pursuer's hands at the instance of one of these ladies, Miss Elizabeth Wood. The nature of the claim on which this arrestment was used is not stated. But that apparently does not signify, because the defender Mr Blakey states that he does not claim the £320, and does not dispute Miss Wood's right; and he maintains that on account of his disclaimer there is no double claim or double distress in regard to this £320, and that therefore that sum has been incompetently brought into Court by a multiplepounding. But it appears to me that that is an objection which the defender has no interest and therefore no title to take. He does not claim the £320, and has therefore nothing at all to do with it, and if Miss Wood shall claim it and shall not object to the multiplepounding, and if no one else claims it, she will just be preferred to it at once, and it will be paid to her under any deduction which may have to be made from it on account of expenses, and no one will have any right or interest to object.

"The defender, however, claims the balance of £122, 10s., and I think it sufficiently appears from No. 10 of process that his aunt claims it also, and that if the pursuer should pay it to the defender Mr Blakey, he will incur the risk of a second demand for it. He has not been interpellated from paying it by diligence, but I think there is sufficient evidence of competing claims to warrant the assertion that there is double distress.

"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 multiplepounding. I do not pretend to understand distinctly all that is set forth in the answers. Some of the averments are very indistinct; but admitting them all, there appears to be sufficient evidence of conflict of claims, at least to a part of the fund, as to justify the pursuer in bringing his multiplepounding."

The defender Blakey reclaimed, and argued—There was no double distress, and the action was therefore incompetent—*Clark v. Campbell*, December 12, 1873, 1 R. 281; *Mitchell v. Strachan*, November 18, 1869, 8 Macph. 154; *Dennistown v. Stewart*, December 8, 1853, 16 D. 154. The defender had never departed from the terms of his *ultimatum*, and the pursuer had therefore no

right to retain the money in his hands, after the three months had elapsed, that being the period to which his right to hold it was limited.

At advising—

LORD PRESIDENT—The sum placed in the hands of Mr Winchester as depositary was £442, 10s. That sum was the balance of the share of an estate belonging to Mr Blakey. Certain claims were made against this balance which are referred to and recognised as claims in what Mr Blakey calls his *ultimatum* in the following terms—"If you wish to retain Miss Wood's £200, that could be paid to you direct, which would make the sum payable to Mr Blakey £387, 10s., and after paying him the sum of £145, there would be £242, 10s. remaining on deposit for three months to meet any claims for expenses and interest." Now, that letter was written by Mr Winchester to Messrs Romanes & Simson by Mr Blakey's instructions, who founds on it as his *ultimatum*; and it is therefore plain that there is or may be a claim for expenses and interest, and in order to meet any such claim it is proposed by Mr Blakey that the sum of £242, 10s. should remain in Mr Winchester's hands as a deposit for three months.

The three months expired, and Messrs Romanes & Simson had not yet made any claim, but they had not abandoned such a claim. On the contrary, they write a letter to Mr Winchester in September 1889, after the three months above mentioned had elapsed, threatening Mr Winchester that if he parts with the money without making a settlement of their claim, he will do so at his own risk. It is true that this is not diligence, but it is not necessary that there should be double diligence to constitute double distress if there are competing claims. It may be that the parties represented by Messrs Romanes & Simson have no claim at all or a very small one, and if so they may ultimately find themselves in an awkward position with regard to the question of expenses, but that has nothing to do with the question whether or not there is double distress.

I think, therefore, the Lord Ordinary is right. He seems to have had some difficulty in understanding the nature of the objections made to the competency, and we have certainly not heard much about these objections. To my mind the correspondence is sufficient to show that the action is competent.

LORD SHAND—I am of the same opinion, and I think that Mr Blakey is acting under a clear misapprehension of the position of matters.

The money was consigned in terms of the letter which Mr Blakey calls his "*ultimatum*." He was anxious to bring Messrs Romanes & Simson's clients to book within three months, but one thing is clear, that £442, 10s. was consigned on purpose to meet two claims, one for the interest on a bond, and another quite independent claim arising on intromission, the person who intromitted

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 multiplepounding. 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 multiplepounding."

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 multiplepounding 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 multiplepounding on the mere report that some-

one 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 multiplepounding.

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 multiplepounding 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 multiplepounding 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. Burnett. 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