Counsel for the Complainers and Respondents—H. Johnston—Gillespie. Agents—Mackenzie & Kermack, W.S.

Counsel for the Respondents and Reclaimers — D.-F. Balfour, Q.C.—Guthrie. Agents—Henderson & Clark, W.S.

Saturday, May 31.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

KENNEDY AND CURRIE *v.* WISE.

Process — Reclaiming Note — Allowance of Proof—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 27 *and* 28—*Act of Sederunt* 1870, *sec.* 2.

Held that an interlocutor disposing of the pursuers' title to sue, and of the competency of the action, but not disposing of the relevancy of the action, and "appointing the pursuers to lodge the issues proposed for the trial of the cause" on a day fixed, was not an interlocutor importing an allowance of proof, and therefore could not be reclaimed against within six days without the leave of the Lord Ordinary.

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.

"*Opinion.*—In this action, the summons in which was signeted on 13th September 1889, for delivery, or failing delivery for the value of nets wrongfully taken possession of, and for damages in consequence of their illegal seizure, it appears to me that the pursuers have stated a relevant case, and apparently when the action was raised there was no ground for contesting their right to have their action tried. The defender may have been able to establish a complete defence, but I do not see that he had any plea by which he could have avoided a trial of the cause. But it appears that after the action was raised, the defender lodged a complaint against the pursuers in the Sheriff Court of Argyllshire at Inveraray, charging them with an offence under the Salmon Fisheries Act, 7 and 8 Vict. cap. 95, on the occasion in question, and praying for infliction of the penalties provided by the Act, and for forfeiture of their nets; and on 11th October the Sheriff-Substitute, over-ruling an objection founded on the subsistence of this action, and after a proof, convicted the pursuers of the offences charged, imposed a penalty, and declared the nets to be forfeited.

"I understand that the nets so forfeited are the same nets for delivery of which, and failing delivery for the value of which, this action concludes.

"The defender now pleads this conviction as a conclusive answer to the present action, which entitles him to absolvitor without inquiry.

"Had the prosecution been instituted and the conviction obtained before this action was raised, I should have felt much difficulty in sustaining the action, and should have considered the cases of *M'Lellan* v. *Miller*, December 7, 1832, 11 S. and D. 187, and *Gilchrist* v. *Anderson*, December 17, 1838, 1 D. 37, quoted for the defender, especially the former, as weighty authorities against it. But it appears to me that the fact that this action was brought before the prosecution was instituted makes an important difference. The institution of this action may not be a bar to criminal prosecution, but I cannot hold that after a question has been duly submitted to the Civil Court the defender can institute a summary prosecution, and present a conviction which he has obtained in it as a conclusive solution of the questions raised in the civil action. If that could be done at this stage of the action it would be equally competent at any future stage, at least before judgment. But I do not know of any authority for pressing a summary conviction to that extent. Besides, I cannot ascertain from the procedure following on the complaint or from the conviction, assuming it to be correct, whether or not the defender was justified in seizing the pursuers' nets *brevi manu*, and in withholding them. It appears to me, therefore, that the pleas put forward to exclude the action must be repelled. The defender may have a complete defence, and the fact that the pursuers have been convicted may favour the conjecture that he has, and

possibly or probably he may establish that he is in a position of privilege. These questions remain over for consideration. All that I decide at present is that inquiry into the merits is not foreclosed by the conviction founded on."

The defender reclaimed, and argued—The interlocutor was one importing an allowance of proof, and as such could be reclaimed against within six days without the leave of the Lord Ordinary—*Little* v. *North British Railway Company*, July 4, 1877, 4 R. 980; *Brown* v. *Virtue & Company*, July 16, 1889, 16 R. 987.

At advising—

LORD JUSTICE-CLERK—This case comes before us on a reclaiming-note against an interlocutor in which the Lord Ordinary has disposed of the 2nd, 3rd, and 4th pleas-in-law for the defender, but not the 1st plea on the relevancy of the action. In not pronouncing an interlocutor disposing of the plea of relevancy at the stage at which the action now stands the Lord Ordinary has acted acording to the ordinary and, in my judgment, the correct practice.

The respondents in the reclaiming-note maintain that the reclaiming-note is incompetent.

The matter is ruled by the 28th section of the Court of Session (Scotland) Act 1868, as that section bears upon the 27th section and the 2nd section of the relative Act of Sederunt of 1870. The 28th section enacts—"Any interlocutor pronounced by the Lord Ordinary, as provided for in the preceding section, except under sub-division (1), shall be final unless within six days from its date the parties or either of them shall present a reclaiming-note against it to one of the Divisions of the Court, by whom the cause shall be heard summarily." . . .

Now, the only sub-sections which bear upon the matter are the 2nd, 3rd, and 4th sub-sections of the 27th section. The 2nd sub-section provides—"If the Lord Ordinary considers that further probation should be allowed, but that it should be limited to proof by writ or oath, he may pronounce an interlocutor to that effect." The 3rd sub-section provides—"If the Lord Ordinary shall think that further probation should be allowed, and that it should be taken before a jury, he may without adjournment proceed to adjust issues for the trial of the cause, and pronounce an interlocutor approving of the issue or issues which have been so adjusted." The 4th sub-section enacts—"If the Lord Ordinary shall think further probation should be allowed, but that such probation should not be taken before a jury, he may pronounce an interlocutor dispensing with the adjusting of issues, and determining the manner in which proof is to be taken." . . .

The 2nd section of the Act of Sederunt 1870 provides—"That the provisions of the 28th section of the said statute shall apply to all the interlocutors of the Lord Ordinary herein referred to, so far as these impart an appointment of proof, or a refusal or postponement of the same."

Now, looking at the interlocutor in question in its own simple plain terms, it appears to me not to be an interlocutor falling under any of the sub-sections of the 27th section, and I am equally clearly of opinion that it does not fall under section 2 of the Act of Sederunt of 1870.

The only thing which led to the case being postponed for further consideration was that a case was quoted to us from the Scottish Law Reporter—*Little* v. *North British Railway Company*—in which the First Division had allowed a reclaiming-note to proceed in circumstances said to resemble those of the present case.

We have had an opportunity of consulting the Lord President, and after an examination of the case itself we have come to the conclusion that the case does not bear upon the competency of this reclaiming-note. In the case of *Little* the Lord Ordinary had sustained the relevancy of the action, which the Lord Ordinary in this case has not done. Having sustained the relevancy, the action was plainly put in the position that proof by some mode or other was competent, and issues were ordered. The First Division held in those circumstances that the question was one of probation, and that it was competent to reclaim against the interlocutor.

Here the Lord Ordinary has not done what was done in that case. He has ordered issues to be lodged, but under the Act of 1868 issues should have been lodged already without any order, because in the 27th section it is enacted—"If the parties shall not agree to renounce further probation the Lord Ordinary shall appoint the cause to be debated summarily at the end of the motion roll on a day to be then fixed, before which day the parties shall respectively lodge the issue or issues, if any, which they propose for the trial of the cause."

No doubt, after the Act of Sederunt was passed, the procedure prescribed by the 27th section was not followed in most cases. But the principle remained, and that being that issues are to be lodged, it is plain that lodging issues at that stage in no way settles the question whether there is to be proof, or the question how the proof is to be taken.

Here, though issues are to be lodged, it does not settle the question of the relevancy.

It is convenient in many cases that issues should be lodged in order to test the relevancy of an action, or to enable the Judge to decide as to whether the averments of the pursuer in the action justify the granting of an issue, or the allowance of proof by any other mode, and accordingly throughout the 27th section and its sub-sections there is no idea suggested that the ordering of issues disposed of the question whether the case is relevant. It is a matter of weekly practice in cases coming from the Outer House or from the Sheriff Court with proposed issues. The pursuer obtains leave to lodge his issues, and only after they have been lodged is the question of relevancy considered and disposed of. Up to that point accordingly there is no decision whether the case is to go to a jury or

to proof, or whether there is to be probation by any mode.

We must therefore hold this reclaiming-note incompetent.

LORD YOUNG, LORD RUTHERFURD CLARK, and LORD LEE concurred.

The Court refused the reclaiming-note.

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

Counsel for the Respondents—A. J. D. Thomson. Agent—William Officer, S.S.C.

Wednesday, June 4.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

DOUGLAS *v.* GRAY.

Reparation — Master and Servant — Personal Injury—Pure Accident.

A storekeeper, while breaking up an old iron tank with the assistance of a man in his employment, missed his aim with a forehammer which he was using to drive a chisel in between the plates of the tank, and struck his assistant, who was standing near, on the foot.

Held that the storekeeper was not liable in damages to his assistant, the injuries sustained by the latter being the result of a pure accident.

On 25th June 1888 John Gray was employed by David Douglas, marine storekeeper, Greenock, to assist him in breaking up a small iron tank. In the course of this work David Douglas struck John Gray a severe blow on the foot with a forehammer.

The present action was raised by John Gray in the Sheriff Court of Renfrew and Bute against David Douglas to recover damages for the injuries he had sustained.

The pursuer pleaded — "The pursuer having been injured in manner libelled through the personal fault of the defender, he is entitled to compensation from the defender for said injuries."

The defender pleaded, *inter alia*—"(3) The said injury having been purely accidental, or the result of the pursuer's own actions, no reparation or compensation is claimable by him in respect thereof."

The Sheriff allowed a proof.

The pursuer's account of the accident was as follows:—"I recollect of his employing me on 25th June last. I commenced working to him that morning at the back of ten o'clock; he employed me to take bottles from his store to Mr Prentice's in Nicolson Street. I removed two crates of bottles that day. The defender paid me 6d. a crate for such work; and when I was doing other work for him he paid me the same, viz., 6d. an hour. . . . After I returned from removing the crates I laid the barrow down, and the defender said to me, 'John, I have a small tank in here, and when you are here I think we will just begin and cut it up.' I helped the defender out of the store with the tank, and then he fetched the tools. I think that the tank was about 2 feet cube, but I could not say exactly. The rivet heads of the tank were inside, I remember. It is my experience, as a caulker, of that sort of work, in small tanks, that the rivet heads are always in the inside, and that the clinched side is outside; there is a small crest put at the clinched side of each rivet, outside. When we began to break up the tank the forehammer was the first tool that the defender used, and he told me to take up the side-cutter, and see and cut off the crests of the rivets outside; and we tried that, but it was of no use; the tank was very thin, and whenever he struck the side-cutter with the forehammer the side-cutter rebounded, and would not take a grip of the crest of the rivet, and we did not manage to take off any that way. Then, that failing, the defender suggested that he should try and spring the plates of the tank asunder by inserting hand-chisels between the seams of the plates. I do not know that any of the chisels produced were used on that occasion, but we did make use of some chisels like these. I myself put in some of the chisels with a small hand-hammer, and I wedged them in at the top. There would be two or three chisels in at one time—as one came out I just put in another. When I had inserted two or three of these chisels the defender took the forehammer and used it to them. When he struck then with the forehammer I was not holding any of the chisels—I was standing perhaps a foot or a foot and a-half away from the tank. I considered that I was standing at a safe distance away. To the best of my knowledge a foot or a foot and a-half was a safe distance away. I swear that I was not holding a chisel when the defender used the hammer at the time of the accident, nor was I using a side-cutter at the time of the accident. I did not use the side-cutter at any time except trying to cut the rivet crests off. The side-cutter could have been used as a wedge. When I had inserted the chisels, and left them, the defender lifted the forehammer and aimed at one of the chisels, but he missed his blow altogether, and struck me on the foot, and at that same moment as I was struck on the foot some dirt or substance jumped up and struck me in the eye, and I was knocked stupid altogether."

The pursuer's account was corroborated by the evidence of John Harrison, an iron merchant, who saw the accident from a little distance, and deponed that when he came up he saw chisels sticking in between the plates of the tank. He and another witness experienced in this class of work deponed that the fact of missing a blow with the hammer argued either carelessness or unskilfulness on the part of the person using it. On the other hand, John Cook, a blockmaker, a witness for the pursuer, admitted that the chance of missing a blow with the hammer would happen with the best of people, and that he had missed a blow many a time himself.