At advising—

The Lord President—If this were a summons upon which the Sheriff was asked to give decree for permanent aliment, I should hold it to be incompetent, for it would involve the separation of the spouses by the Sheriff. But the summons only concludes for interim aliment, until the rights of the parties are fixed by the Supreme Court. It is easy to suppose a case in which such an application would be an absolute necessity. Here, it would be a very serious matter if this pursuer could not in the meantime get enough to live upon. There is no doubt that it is the practice to award interim aliment in the Sheriff Court, and I would be sorry to do anything to disturb that practice, as I do not think there is any incompetency in it. Whenever anything consistorial is to be done, then it is incompetent for the Sheriff to do it. But there is nothing of that sort here. The woman only says, whatever my rights may be, in the meantime I must have enough to keep me alive; and I think she is entitled to apply to the Sheriff for decree to that effect. I am therefore for adhering to the judgment appealed against, and remitting the case to the Sheriff. I think the Sheriff may also make a further award upon further cause shown. Under cover of this, however, it would be quite incompetent for the Sheriff to make an award for final aliment, on the ground that the parties were to live separate.

The other Judges concurred.

The Court adhered.

Counsel for the Pursuer—Mair. Agent—William Officer, S.S.C.

Counsel for the Defender—Lorimer. Agent—Thomas Hart, L.A.

Friday, June 12.

FIRST DIVISION.

[Sheriff of Wigtown and Kirkcudbright.

YOUNG *v.* MITCHELL.

Res judicata—*Master and Servant Act* 1867.

A judgment in a complaint under the Master and Servant Act 1867, is *res judicata* in an action in the ordinary Courts involving the same question, and between the same parties.

Process—Supplementary Summons—Competency.

A supplementary summons to call a new party into Court cannot be maintained as a substantive and separate action, but must stand or fall with the principal action.

This was an appeal from the Sheriff-court of Wigtown and Kirkcudbright in the following circumstances:—On 20th October 1873 Thomas Young, farm-servant, brought a complaint in the Sheriff-court, under the Master and Servant Act 1867, against Quintin Mitchell, farmer, of Meikle Firth-head, for £25 damages for breach of contract, committed by the respondent dismissing the complainer from his service on 18th October 1873.

The Sheriff-Substitute (Nicholson) found the complaint not proven.

On 7th November 1873 the complainer raised an action against the respondent, claiming payment of—(1) £9, 15s. as the amount of wages due to the pursuer for the half-year from Whitsunday to Martinmas 1873. (2) £1, 15s. as the amount of board wages due to the pursuer from 18th October to Martinmas 1873, and (3) £15, as the amount of damages due to the pursuer by the defender in consequence of his having been wrongfully dismissed from his services on 18th October 1873.

The Sheriff-Substitute, by interlocutor of 13th October 1873, dismissed the action on the ground of *res judicata.*

Before this interlocutor, and on 28th November 1873, the pursuer Thomas Young, in consequence of its being pleaded by the defender in the action of the 7th November that the instance was defective in respect that his mother and not himself was the tenant of the farm of Meikle-Firthhead, brought a supplementary summons with the same conclusions, directed not only against the said Quintin Mitchell but also against his mother.

In regard to this supplementary action, the Sheriff-Substitute on 21st January 1864 found that, as it was supplementary to the action which he dismissed by interlocutor of 13th December 1873, it could not be further proceeded in, and therefore dismissed the action.

On appeal the Sheriff (Hector) adhered to the judgment of the Sheriff-Substitute in both actions.

The pursuer appealed against the judgment of the Sheriff in both cases, and argued—The Master and Servant Act was in substance a criminal Act, involving penalties of a criminal character. A judgment in a complaint laid under that Act could not therefore be founded on in support of a plea of *res judicata* in an action for damages in the ordinary Courts.

As to the supplementary summons, it was in truth a new action, and could be maintained as a separate action now, although the first action should be dismissed.

Roy v. *Hamilton & Co.*, 15th Feb. 1868, 6 Macph. 452.

At advising—

Lord President—There are two actions before us, upon separate appeals. In the first action the Sheriff-Substitute, and on appeal, the Sheriff, sustained the plea of *res judicata.* The ground of action is a breach of contract of service, by the defenders having wrongfully dismissed the pursuer from service on or about the 18th day of October 1873, and the damages claimed are £26, 10s. The judgment which is founded on in support of the plea of *res judicata* was pronounced by the same Sheriff in a complaint between the same parties under the Master and Servant Act of 1867. This complaint alleges the same breach of contract as that narrated in the summons. The complaint indeed does not specify what the breach of contract consists of, but the date is the same and the parties are the same, and so there can be no doubt that the alleged breach is the same.

It is maintained for the appellant that the summary proceeding before the Sheriff was of the nature of a criminal complaint, and so what happened in these proceedings cannot be pleaded as *res judicata.* I think that argument is bad. A judgment in a Criminal Court may support a plea of *res judicata* in a Civil Court if the action in both Courts involves the same question between the same parties. But it is said that the claim for damages in the complaint is only in compliance with the form of the Act of Parliament, and that the Sheriff might not have given damages, but

might have found for the complainer, and imposed a fine or something of that sort instead of awarding damages. That is quite true, for under the Act in a complaint of this sort there are five different courses open to the Judge trying the case. In the first place, the Judge may impose the penalty by abatement of wages, or, in the second place, he may require security with an alternative of imprisonment, or he may annul the contract and apportion the wages, or he may inflict a fine, or, in the last place, find the party liable in damages. So every complaint has all these alternatives embodied in it, just as if each was separately concluded for. Now, in this complaint the breach of contract was not proved, and the Sheriff granted decree of absolvitor, and the complainer can therefore get none of the remedies competent under the Act, and competent under this complaint, although it only concluded for damages. Now, I think that judgment is plainly pleadable against an action brought to obtain damages for the same complaint. So I think the Sheriff was right to sustain the plea of *res judicata*. The section 18 of the Act of 1867 provides that nothing shall prevent employer or employed from enforcing their rights in the ordinary Courts "in any case where proceedings are not instituted under this Act.' That provision clearly shews that where proceedings are instituted under the Act an action in the ordinary Court shall not be competent.

As to the second action, the Sheriff has dismissed it because it is supplementary to a principal action which had been disposed of. The object of this supplementary action is to bring a new defender into the Court, and I do not think that a supplementary summons to call a new party into Court can be maintained as a substantive and separate action, but it must stand or fall with the principal action. This case is different from the case of *Roy* v. *Hamilton*, for in that case the supplementary action was supplementary in a different sense, being an action brought, not to introduce a new party to the case, but to bring a new claim against the same party. It is clear that might have been made the subject of a new action, and was not properly a supplementary action at all. I should be sorry to extend the doctrine laid down in the case of *Roy* to the ordinary case of supplementary actions, and I am therefore of opinion that the Sheriff is right.

The other Judges concurred.

Appeal dismissed.

Counsel for the Pursuer—Scott. Agent—D. F. Bridgeford, S.S.C.

Counsel for the Defender—Watson and Mackechnie. Agent—W. Scott Stuart, S.S.C.

Thursday, June 18.

SECOND DIVISION.

MUNRO AND OTHERS *v.* STRAIN AND OTHERS.

(*Ante*, p. 254.)

Jury Trial—Issue—Fraud and Circumvention—Motion for a New Trial.

On a motion for a new trial, where a jury had affirmed the following issue:—"Whether on or about 23th November 1872, the said deceased A was weak and facile in mind and easily imposed upon, and whether the defender B, taking advantage of the said weakness and facility, did, by fraud or circumvention, obtain or procure from the said A the said trust-disposition and settlement, to the lesion of the said A?"—New trial *refused*, and rule discharged.

Expenses.

A deed was set aside on the ground of its having been impetrated by fraud or circumvention.

Two sets of defenders appeared in the action of reduction, namely, the trustees and certain beneficiaries under the deed set aside. The Court allowed payment of the account of the expenses for the trial out of the trust-estate to these defenders.

This suit was raised by certain of the trustees appointed by the deceased James Paterson, Edinburgh, under a will, dated the 31st August 1872, for the purpose of setting aside and reducing a subsequent settlement of Paterson, dated 28th November 1872. By the first deed Paterson left the residue of his estate (estimated at about £30,000), after payment of his debts and certain legacies to his son and grandchildren, for the establishment and endowment of a training institution for servant girls; and by the second deed he put his whole estate in trust for certain purposes, to be afterwards declared, and revoked his former will. Paterson died on 8th February 1872, without having declared any purposes of any kind, and thus, having died intestate, his estate (assuming the validity of this deed) fell, not to the founding of the institution just mentioned, but to his natural and nearest heirs—viz., his grandchildren—his son having died shortly before the execution of the second deed. Some of the trustees under the first deed, however, challenged the validity of the second deed, and on this challenge the case was tried by a jury, under the direction of the Lord Justice-Clerk. At the trial the pursuers submitted three issues for the determination of the jury—(1) Whether, at the date of the execution of the first deed, Paterson was of unsound mind? (2) (and this was the issue on which the case ultimately turned, his Lordship having declared that the pursuers had failed on the other two issues), "whether, on or about the 28th day of November 1872, the said deceased James Paterson was weak and facile in mind and easily imposed on; and whether the defender George Rigg, taking advantage of the said weakness and facility, did, by fraud or circumvention, obtain and procure from the said James Paterson the said trust-disposition and settlement, to the lesion of the said James Paterson? and (3) whether the deed had been obtained from Paterson by Mr Rigg representing the deed to be other than it really was?" On the second issue the jury ultimately found unanimously for the pursuers. The defenders at the trial were the trustees under the second deed, and the grandchildren, and after the verdict these latter asked the Court for a new trial, on the ground that the verdict was disconform to evidence, there being especially no proof of facility on the part of the testator. The Court granted a rule on the pursuers to shew cause why a new trial should not be granted.

Authorities cited—*Marianski*, 12 D. 1206, 15 D. 268; *Jaffray*, 12 S. 241, 1 M'Queen, 212; White & Tudor's Leading Cases, ii. 569 (4th ed.).