agreed to make and keep up for the pursuer's behoof a convenient access to the sea for bathing and boating, the pursuer did not oppose the bill. Various proceedings then took place between the parties, whereby in the end the pursuer obtained and secured to herself and her successors a convenient access, by a passage under the railway, to the sea and the seashore opposite her property. The pursuer alleged that matters continued in this state until May 1865, when she accidentally heard that the defenders had a bill before Parliament to authorise a great extension of their works at Burntisland, the effect of which would be, *inter alia*, entirely to exclude the pursuer from the sea-shore. A correspondence ensued between the pursuer's agents and the defenders, resulting, the pursuer alleged, in an agreement whereby, in consideration of the pursuer taking no steps in opposition to the defenders' "Additional Powers Bill," the defenders agreed to refer to two arbiters mutually chosen, or an oversman to be named by them (1), to fix and determine in what way an extended access to the sea, proposed to be given to the pursuer, should be made and maintained by the Company; (2) if such should be found impracticable, to fix the compensation due to the pursuer for loss of access to the sea; and to adjust certain other questions between the parties. The defenders obtained their bill in July 1865. The pursuer now brought this action to compel the the defenders to proceed with this reference, alleging that they had refused to proceed with it, and that they had commenced works different from those laid down in the plans lodged by them, and which would have the effect of completely cutting off the pursuer's access to the sea-shore; the passage under the railway would now open into the corner of a harbour or basin, into which all kinds of refuse would be floated by the tide, and would be of no use either for bathing or any other useful purpose. The defenders admitted their refusal to enter upon the reference, but contended that they were not bound to enter upon it, they not having carried out the plan at one time proposed by them, and the agreement having no reference to the existing circumstances.

The Lord Ordinary (JERVISWOODE) sustained the defence.

The pursuer reclaimed.

CLARK and ADAM for reclaimer.

YOUNG and SHAND for respondents.

The Court reversed, and gave judgment for the reclaimer.

Agent for Reclaimer—James Steuart, W.S.

Agents for Respondents—Macdonald & Roger, S.S.C.

Saturday, February 15.

ROY *v.* HAMILTON AND COMPANY.

Summons—Supplementary Summons—Conjoined Actions—Additional Claim—Competency. A party raised an action against his employers for £4000 as amount of salary and commission. Having ascertained in the course of a proof in the action that he had understated his claim, he brought a supplementary summons, concluding for conjunction with the former action, and, whether conjoined or not, for payment of £6000, under deduction of the sum to be decerned for in the former action. Pleas by defender of *lis alibi* and incompetency repelled, and competency of the second action sustained; and observed, that though conjunction was inexpedient at present, it might become expedient, and that in the meantime the second action might stand alone as a separate and substantive action under its second conclusion.

The defenders are merchants in Glasgow, and are engaged in the African trade; and the pursuer is an African agent, and acted as representative of the defenders on the African coast from October 1857 till the spring of 1862. He was remunerated at first by a salary, and latterly by a commission on the gross proceeds of the produce traded for by him, as realised in this country. In 1865 he raised an action against the defenders for £4292 as salary and commission, founding his conclusions on accounts supplied to him by the defenders. A proof was taken, in the course of which the pursuer, having recovered the account sales, and bills of lading, found the accounts to be erroneous, his commissions being in consequence largely understated. He thereupon raised a supplementary summons, the conclusions of which were thus stated:—"Therefore this summons on being called in Court ought and should be remitted and conjoined with an action now in dependence between the pursuer and defenders before our said Lords, (LORD KINLOCH) Ordinary, the summons in which was signeted the 23d day of May 1865; and the said summons being so conjoined, or whether the same shall be conjoined or not, the defender ought and should be decerned . . . . to make payment to the pursuer of sums amounting to £6260; but under deduction from the foresaid several sums and interest thereon, as the same became due and accumulated, of such sums as the defender can legally instruct to have been paid to account of the said sums and interest so accumulated at the dates of payment, or of such part of the foresaid sums as may be decerned for in the said action at the instance of the pursuer against the defenders raised as aforesaid on 23d May 1865."

The defenders pleaded,—(1) *Lis alibi pendens.* (2) That the action was incompetent, and ought to be dismissed in as much as the whole claims competent to the pursuer against the defenders in respect of services rendered by him to them on their employment were embraced in the action already raised against them at his instance; and (3) that the second action could only be pursued on the first being abandoned.

The Lord Ordinary (KINLOCH) dismissed the supplementary action as incompetent, adding this note:—

"The present action has been raised, and is sought to be conjoined with the other, on the grounds, (1) that in the former action the commission due to the pursuer was under-estimated in consequence of his not being in possession of the due materials for rightly calculating its amount; (2) that in the former action he proposed to restrict and did restrict a certain charge to £100, and now, for what he thinks good reasons, departs from this restriction, and states the sum at a greatly larger amount.

"There appears to the Lord Ordinary to be no good ground for supporting a supplementary action to be conjoined with the former process. There are grounds for abandoning the former action, and raising a new one. They amount simply to a discovery of errors in the first action now sought to be corrected. They are amendments of the

former record which cannot now be made directly in respect of the former record being closed; and which are now attempted to be made indirectly, and as the Lord Ordinary thinks irregularly. If the present attempt were successful, there never would be an abandonment of an action, but simply a supplementary summons."

The pursuer reclaimed.

YOUNG, CLARK, and H. SMITH for him.

A. MONCREIFF and GLOAG for defenders.

LORD PRESIDENT—In this case the Lord Ordinary found the proceedings incompetent, and dismissed the same, and his ground is in respect of the dependence of a previous action, to which this is represented as being supplementary. I am not able to agree with him in that. I think it is a competent action, whatever may be its fate hereafter. The first action by Roy against Hamilton & Company concluded for specific items amounting to £4292, which was represented on the record as being a balance due on a variety of accounts to him as agent. In the first action Roy says, in the 21st article of the condescendence, that since he resigned his situation as agent, he has endeavoured to induce the defenders to adjust their account with him, but without success, and on 23d May 1865, raised an action against them for £4292, 12s. 1d., and interest, under deduction of sums paid to account. The sum sued for was estimated by the pursuer from accounts furnished to him by the defender. These accounts so furnished to the pursuer have now been ascertained to be erroneous in several respects, and "accordingly this action has been raised in supplement of the other action, and with a view to its being conjoined therewith." And then in the 13th article he says—"The balance due to the pursuer for his services prior to 5th November 1857 amounted to the sum of £300 of salary, exclusive of the 'dash' or per centage, which was not fixed. The pursuer was willing and offered to accept of the sum of £100 in full of the said dash, but the defender did not agree to the said offer, and it is hereby withdrawn."

The effect of these two additions to the claim of the pursuer is to raise the amount from £4292, as concluded for in the first action, to £6200, as concluded for in this action. Whether the pursuer is well founded in making this additional claim, we have at present no means of judging, and it would be premature to enquire. Whether he is bound by anything in the former action, or outwith it, is a matter we have nothing to do with, but what I say is, that there is a claim in this action amounting to £2000 over the claim in the former action, and it appears to me that it must be competent to make that claim in some form or another. It may be a bad claim, but it is inconsistent with the forms of process in any Court to say that it is incompetent. And yet the Lord Ordinary has found that the summons is incompetent. If he means by that that the claim is incompetent, I do not agree with him. He may, perhaps, mean that it is put forward in an incompetent form. That leads me to consider the conclusions of the action. Now, the first conclusion is that this action should be conjoined with the former one. I give no final opinion on that matter. I am very clear that it is inconvenient to join them in their present state, and the Lord Ordinary probably is of the same opinion; but as to whether they may be afterwards conjoined, we cannot anticipate. In the other action, a large body of evidence has been taken, and now this additional claim is set up. It is not necessary to the subsistence of this summons that it should be conjoined, for the second conclusion is, "the said summons being conjoined, or whether conjoined or not," and therefore in the second alternative I must inquire what are the other conclusions? They are for the entire sum of £6260, but under deduction of sums paid to account, and also of such part as may be decerned for in the first action. That appears to me to be a perfectly competent conclusion in form for recovery of the additional claim, on the assumption that the pursuer is well founded on the merits. I therefore think that the preliminary objections are not well founded. It is not of much consequence whether this is a supplementary or a separate summons. It is called a supplementary summons, but a summons by being called supplementary is not necessarily made so. It is supplementary when it cannot go on without the other, but it may be supplementary by adding to the former claim. But that is, in a sense, not supplementary, but separate and substantive. That is the case here. This summons could stand alone. There is no statutory rule established by Statute or Act of Sederunt to regulate this matter. We are to deal fairly with it on the ordinary principles of process, and I see no difficulty in sustaining this summons. There are some things mixed up in the preliminary pleas that may become available to the defender afterwards; for example, in the second plea, he says—[*reads second plea*]. If you abstract the word "incompetent" it may become a good plea on the merits. I suggest that, to prevent the defender suffering prejudice, we dispose of the first and second pleas as preliminary pleas, but reserving them as pleas on the merits.

LORD CURRIEHILL concurred.

LORD DEAS.—I object to any reservation of these pleas that shall imply that they are proper pleas on the merits, and nothing else. If this summons could be regarded as a summons to be used in conjunction with the first action, to the effect of introducing new matter into it, I should think it was incompetent, for when there is a closed record it is not competent to introduce into it by supplementary summons anything that could not be introduced by amendment of the libel. That was decided in the case of the *Glasgow Union Canal Company*. The judges laid that down there,—I don't say that that was the only ground of judgment—but each made the observation that it would defeat the whole intention of the Judicature Act as to finality of records, and the necessity of getting over that only by abandonment of the action, or by condescendence of *res noviter*, if new statements and new matter could be introduced into a closed record by a supplementary action. I cannot agree with your Lordship if you express an opinion that this action is competent. It may be competent or incompetent. Dealing with it strictly on the face of it, I should say it was incompetent, for it is supplementary with the view of conjunction. It is true that an action may be supplementary in another sense, simply as an additional claim, not comprehended in the first action. But that is not what we call a supplementary action. You bring an action for an additional claim, and then in respect of similarity, you conjoin them. Why I don't say now that it is incompetent is that the summons says 'whether conjoined or not,' though

that is not the usual way of bringing a separate action. I don't say that a separate action may not be involved in that way, and therefore it may stand as a separate action. It may turn out a separate action, and it may turn out purely supplementary. Your Lordship has said that the sum concluded for is the whole sum subject to deduction of what is decerned for in the first. Suppose the two to go on, and it is found in the first that the pursuer get nothing, the result would be to try the whole questions in the second action. That would be very anomalous.

Lord Ardmillan concurred with the Lord President.

Agents for Pursuer—Henry & Shiress, S.S.C.
Agents for Defenders—Wilson, Burn, & Gloag, W.S.

Saturday, February 15.

SECOND DIVISION.

M'COLL *v.* GIBSON.

Issue—Relevancy—Reparation—Written Slander—Summons—Condescendence. A party sued for damages on account of a written slander, the terms of which were quoted in the summons, but in the condescendence it was only stated that the letter was written, but not that it was despatched. *Held* that these statements were relevant to entitle the pursuer to an issue.

In this action Sarah M'Coll, domestic servant in Glasgow, was pursuer, and John Gibson, residing at Uddingstone, was defender. The pursuer sued for wages and board wages, and also for damages on account of wrongous dismissal. The conclusion for damages is thus stated in the summons:—"Therefore the defender ought and should be decerned to pay to the pursuer the sum of £100, being damages sustained, and to be sustained, by the pursuer in her character, credit, feelings, and reputation, and as a *solatium* to her in consequence of the defender having, on or about the 18th day of January 1867, and at or near or within the defender's house or place of business at Uddingstone, or in or near Helensburgh, or elsewhere to the pursuer unknown, wickedly, maliciously, and without probable cause, slandered and calumniated the pursuer by stating wickedly, or writing wickedly, falsely, maliciously, and without probable cause, injuriously, and calumniously, that the pursuer's character for honesty and trustworthiness had much altered, and that the pursuer was far from honest, and quite an adept in all the usual modes of theft common amongst servants—all as contained in a letter written by the defender, and bearing date on or about the 18th day of January 1867, addressed and delivered about that time, or on or about said date, to Peter M'Callum, Esquire, Helensburgh, a former master of the pursuer's, and which letter is written of and concerning the pursuer, and the tenor whereof is as follows, viz.:—'*Uddingstone Iron-works, near Glasgow, 18th January* 1867.—P. M'Callum, jun., Esq., Helensburgh.—Dear Sir,—Some two months ago I engaged a girl as servant of the name of Sarah M'Coll. She showed me a certificate of character from you, where you state that she is respectable, honest, &c. She represented that both she and her sister were in your service till Martinmas last, but had left solely from a desire of change. I have now reason to believe that she was not in your service so recently as she represented, and that since she left you her character for honesty and trustworthiness has become much altered. Indeed, I have had sufficient evidence that she is far from honest, and quite an adept in all the usual modes of theft common amongst servants. May I kindly ask the favour of your saying if you ever had a girl of this name in your service, and, if so, how long it is since she left you, the cause of her leaving, and your opinion of her. Your doing so will greatly oblige, yours faithfully," (Signed) "John Gibson."

A record was made up in the Inferior Court of Lanarkshire, where the action originated, by condescendence and answers. In the condescendence the ground of action on account of damages was thus stated:—"On or about the 18th January 1867, the defender, at or near or within his house or place of business at Uddingstone, or in or near Helensburgh, or elsewhere to the pursuer unknown, wickedly, maliciously, and without probable cause, slandered and calumniated the pursuer by stating or writing wickedly, falsely, maliciously, and without probable cause, injuriously and calumniously, that the pursuer's character for honesty and trustworthiness had much altered, and that the pursuer was far from honest, and was quite an adept in all the usual modes of theft common amongst servants, all as contained and set forth in a letter written by the defender, and bearing to be written at Uddingstone, and to be dated the 18th January 1867." The defender *inter alia* made the following statement:—"Under these circumstances, the defender wrote the letter founded on to Mr Peter M'Callum, Helensburgh, under the impression that Mr M'Callum would consider the same confidential. The defender did not on any occasion slander the pursuer, neither did he circulate nor publish any statements regarding her. Any publicity given to the matter has been occasioned solely by the pursuer herself in exhibiting the letter in question to her acquaintances."

The Sheriff-substitute (Veitch) pronounced the following interlocutor:—"The Sheriff-substitute having heard parties' procurators in terms of appointment, and considered the closed record, Finds that this is an action for wages, board wages, and damages, at the instance of a domestic servant against her master, on the ground of the defender having brought slanderous accusations of dishonesty against her, and injured her character, and dismissed or compelled her to leave his service: Finds that the only ground on which she can claim wages and board wages is that of illegal dismissal: Finds that that ground of action is only not supported by, but is, on the contrary, inconsistent with the averments in the condescendence, by which she is represented to have left the service entirely in consequence of the alleged slander by the defender, and not in consequence of having been discharged by him: Therefore, dismisses the action *quoad* the conclusions for wages and board wages; and, in regard to the remaining conclusion for damages, allows to both parties a proof of their respective averments on record, and to the pursuer conjunct proof: Grants diligence at the instance of both parties against witnesses and havers, reserving to fix a diet for proceeding with the proof on this interlocutor becoming final."

On hearing on appeal, the Sheriff (Glassford Bell) pronounced the following interlocutor:—"Having heard parties' procurators on the pur-