

the appeal, to the effect prayed for; and having heard counsel for the parties on the Auditor's report on the pursuer's account of expenses, No. 278 of process, and on the objections thereto for the pursuer, No. 279 of process, Sustain the objection to the said report, disallowing fees to the Solicitor-General as counsel for the pursuer, to the effect of adding £22, 4s. to the taxed amount of the said account; *quoad ultra*, repel the objections and approve of the Auditor's report, and decern against the defender for payment to the pursuer (petitioner) of the sum of £584, 1s. 8d (being the taxed amount of the account with the addition aforesaid): Further, decern against the defender for payment to the pursuer (petitioner) of the sum of £100 towards her expenses as respondent in the appeal, as prayed for, and allow the said decrees for expenses and other decrees foresaid, to go and be extracted *ad interim*, and execution to proceed thereon, notwithstanding the appeal."

Counsel for the Pursuer—Asher. Agents—J. & R. D. Ross, W.S.

Counsel for the Defender—Scott. Agent—J. Galletly, S.S.C.

Thursday, June 11.

FIRST DIVISION.

[Sheriff of Lanarkshire.

SMITH v. SMITH.

Husband and Wife—Aliment—Sheriff—Competency.

A wife brought an action for interim aliment against her husband in the Sheriff Court, on the ground of desertion and failure to provide for her and her children. The defence on the merits was substantially a denial and recrimination. *Held* that the action was competent in the Sheriff Court.

This was an action for interim aliment, at the instance of a wife against her husband, in which the conclusion was for a sum in name of interim aliment, "until the rights of parties are permanently fixed by the Supreme Court," the defender having deserted the pursuer and her children, and ceased to provide for them, notwithstanding that he earned wages at the rate of £12 per month.

The defender stated a preliminary plea that the action was incompetent in the Sheriff Court. The defence on the merits was as follows:—"A denial that the defender has ceased to provide for his wife and children. The defender was abroad following his employment of a steam-ship engineer for twenty-two months, and on his return he found the pursuer occupying a small hired room, and that a deal of valuable furniture and effects which he had left with her was all either sold or pawned, although he had never failed to make her ample remittances for the support of herself and the children, and had to pay, on his return, accounts for provisions, &c., incurred by her in his name in his absence. The pursuer chose to dispendish the defender's house in his absence, and his means do not enable him instantly to refurnish a house; but he has never refused to provide her with an aliment, although the sum concluded for is, ridiculously extravagant. He has offered her, in the meantime,

and did so before this action was raised, and still offers her, 7s. a-week, and he has, besides his three children by the pursuer, his children by a former marriage to support, and the pursuer is very able as a needlewoman to earn as much as support herself. As to the children, for whom aliment is sought by the pursuer, they were, before the date of this action, taken by the defender to live, at his expense, with a sister of his, and it was the pursuer's own fault if that did not take place sooner, as the pursuer refused to give up the children. The defender is ready to take the pursuer to reside in family with him."

The Sheriff-Substitute pronounced an interlocutor allowing interim aliment at the rate of 7s. per week.

On appeal, the Sheriff (W. G. DICKSON) pronounced this interlocutor and note:—

"Glasgow, 13th February 1874.—Having heard parties' procurators on the defender's appeal, which the defender's procurator stated was directed only against the decree of 15th October last for interim aliment, for the reasons stated in the note, adheres to the interlocutor appealed against, and dismisses the appeal.

"*Note.*—The rate of interim aliment allowed in the Sheriff-Substitute's interlocutor is that which the defender states in the Minute of Defence he is willing to allow the pursuer. It was not pretended at the discussion to-day that the defender is really prepared to take the pursuer back into his family, although that is stated in the Minute of Defence. The only ground on which his procurator resisted the decree for interim aliment was, that the pursuer had kept certain furniture belonging to him, which she refused to give up. The pursuer denied that statement. She must be allowed a sufficient sum for her maintenance while that matter is under discussion."

The defender appealed, and argued—The action was not competent in the Sheriff Court, but only in the Consistorial Courts. The Act 11 Geo. IV. and 1 Will. IV. cap. 69, s. 32, enacting that "action of aliment may be instituted, heard, and determined in any Sheriff Court of Scotland," only applied to actions of aliment other than those of actions between husband and wife, as between them the aliment was incidental to another action, which was not competent in the Sheriff Court. At all events, the Sheriff, in cases of this sort, had no greater power than the Court of Session had before the consistorial jurisdiction was transferred to it in 1830. Before that, if a husband deserted his wife, or turned her out of the house, and offered no defence, or did not appear, the Court of Session would grant interim interdict. But if the husband appeared in Court and denied the desertion or alleged cruelty, there arose consistorial questions, to be inquired into by a competent Court, before aliment could be awarded. In such a case the Court of Session would have refused to interfere. This was a case of this latter sort, and therefore it was not competent in the Sheriff Court.

Authorities—*Lang v. Lang*, April 19, 1869; 13 Journal of Jurisprudence, p. 351; *M. Gregor and Barclay v. Martin*, 12th March 1867, 5 Macph. 583; *Rennie v. Rennie*, 7th Feb. 1863, 1 Macph. 389; *Bel. v. Bell*, 22d Feb. 1812, F.C.; *Anderson v. Anderson* 3d March 1819, F.C.; *Jackson v. Jackson*, 3d March 1825, 2 Shaw, 610; *Benson v. Benson*, 15th Feb. 1854, 16 D. 555.

The pursuer was not called on.

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 complainant from his service on 18th October 1873.

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

On 7th November 1873 the complainant 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