ation roll, and that under the 33d section thereof he had no alternative but to give decree as craved. As confirmatory of the reading of that section contended for, reference was also made to the preamble of the Act, and to §§ 5, 8, 13, and 34. Therefore the procedure adopted by the Sheriff-Substitute was incompetent. *Second*, That in ignoring the valuation roll the Sheriff-Substitute had declined to exercise his jurisdiction; *Great North of Scotland Railway Company* v. *Dick*, 8 October 1870, 3 Irv. 616. Further, and on behalf of the appellant, inquiry was demanded as to the general rule alleged to have been laid down and acted upon by the Sheriff-Substitute—a course which it was incompetent and illegal for him to adopt; *Baillie* v. *Thomson*, Glasgow Autumn Circuit 1862; Poor Law Mag., vol. 5, p. 119.

There was no appearance for the respondent.

The Court pronounced an interlocutor remitting to the Sheriff of the county to ascertain whether the Sheriff-Substitute had laid down and acted upon the general rule, that the collector must be prepared to prove the correctness of the valuation roll, and generally of the whole circumstances, and to report to the next Circuit Court of Justiciary to be held at Glasgow.

Solicitor for Appellant—John K. Peebles, Airdrie.

COURT OF SESSION.

Tuesday, October 18.

FIRST DIVISION.

M'ALLISTER *v.* STEVENSON, M'KELLAR & CO.

(*Ante*, v, 404.)

Res judicata—*Summary Process.* Where the construction of a contract, and the determination of a party's obligations under it, are essentially necessary to a judgment ordaining implement, even though delivered in a summary process, these points must be held *res judicata* in a subsequent action for payment of the contract price.

Question—Whether such a finding in a summary process, where it was not at the root of the judgment pronounced, would be held *res judicata* in a subsequent ordinary action.

This was an appeal from the Sheriff-court of Lanarkshire. In 1865 an agreement had been entered into between the appellant and the respondents, whereby the respondents undertook to erect an ice house beside Hogganfield Loch capable of containing at least 300 tons of ice—while the appellant bound himself to take annually for ten years from the respondents 300 tons of ice, at 16s. a ton, provided that quantity could be obtained from Hogganfield Loch; delivery to be made to him free of expense whenever and in such quantities as he might require. It was farther stipulated that the respondents should be entitled to store any larger quantity of ice they chose, but that the appellant should have the right of pre-emption of such surplus quantity. Payment was to be made by instalments on receipt of each 50 tons of ice.

On 24th January 1867 Stevenson & M'Kellar wrote M'Allister, informing him that they had a considerable quantity of ice on hand over and above the 300 tons, and offering it to him in terms of their contract, provided he took delivery before the following 20th August. M'Allister replied that he would take the whole surplus ice, but would only take delivery in terms of the contract. At the end of October 1867 there remained in the respondents' ice house more than 250 tons of surplus ice still undelivered; and of the whole of which the appellant refused to take delivery, when required to do so, except in such quantities and at such times as suited him. The respondents, on 8th November 1867, in consequence of the approach of winter, presented a summary petition to the Sheriff, craving that he would ordain the appellant to take delivery of the whole ice in question, within a certain short time to be fixed; and failing his doing so, that he would grant warrant to the respondents to remove and store the said ice at the appellant's risk, or grant warrant of sale.

The Sheriff found that the only sound interpretation which the agreement of parties admitted of, was that the appellant was to take delivery of the 300 tons, and also of as much of the surplus ice of any one year, as he consented to take, within the year itself, commencing with the beginning of winter, that is the 1st November, and ending with the 1st of November of the following year. Delivery of the ice was therefore ordained to be taken by the appellant when tendered by the respondents in certain specified quantities.

The appellant advocated this judgment (see S. L. R., v., 404); but the Court substantially adhered. Delivery having been tendered in accordance with the judgment in the previous case, and refused by the appellant, the respondents thereupon broke up and stored the ice. They then brought the present action in the Sheriff-court, concluding for £209, being the contract price of the quantity of ice of which the appellant had refused to take delivery, and for certain other sums of expenses incurred by them in consequence thereof. The Sheriff found "that the final judgment in the previous case instructed that it was *res judicata* that the appellant was bound to have taken delivery before the 1st November of the whole ice in the pursuer's ice house at Hogganfield; but that what that quantity was was not *res judicata*." He further found "that, although the pursuers could not then give delivery of said ice, there was no incompetency in the primary conclusion of the summons, which was for payment of the contract price, in respect that the ice, after delivery was tendered and refused, lay at the risk of the appellant, and perished to him." He thereupon proceeded, from the evidence, to determine the amount and the price.

Against this interlocutor of the Sheriff, M'Allister appealed.

WATSON for the appellant.

SHAND and D. BRAND for the respondent.

LORD PRESIDENT—If the finding in the former process set forth by the Sheriff as constituting *res judicata* had not been necessary for the conclusion of the interlocutor in which it was contained, a question might have arisen whether such a finding, in a summary process, in which it was not necessary for the judgment pronounced, could constitute *res judicata*. But as it is, that previous process raised very directly the question of the appellant's liability under his contract; and that question was determined by the Sheriff, who construed the contract, and affirmed its obligations upon the defender. That finding lay at the root of his judgment, and must unquestionably be held *res judicata* in the present process. On the only open question, viz., the amount, I agree with the Sheriff's judgment.

The other Judges concurred.

Appeal dismissed.

Agents for Defender and Appellant—Wotherspoon & Mack, S.S.C.

Agents for Pursuers and Respondents—Campbell & Smith, S.S.C.

Tuesday, October 18.

HOWARD *v.* MUIR.

Bona Fide *Possession, Interruption of.* Where possession had begun in *bona fides*, and no interruption of *bona fides* occurred till the production of certain documents in an action of ejectment against the possessor—*Held*, in a subsequent action of damages, that he was not bound to submit until he had taken the final judgment of the Court upon these documents, and that his *mala fides* could only be counted from the date of that judgment, not from that of the production.

This was an appeal from the Sheriff-court of Lanarkshire. The petitioner had obtained a lease for seven years, from Whitsunday 1862, of a spirit shop in Stobcross Street, Glasgow, and continued in possession up till Whitsunday 1867. He then sold the lease and good-will of the shop, together with the stock-in-trade, to Douglas Gow, conform to missive letters of date May 6th 1867. As part of the price, Gow accepted three bills, and gave a back letter of date May 15th 1867, acknowledging that, until these bills were paid by him, he remained Howard's tenant in the premises. Gow entered upon and continued the business till October 1867, when he sold his lease, business, and stock to the defender, who thereupon took possession. Gow's bills remained unprovided for. Howard thereupon brought an action of ejectment against Muir in January 1868, which was not concluded until after Whitsunday 1869, when Howard's right had expired. After a variety of procedure, Howard's right to the premises was sustained by the Sheriff, though too late to be effectual. Howard did not produce either to Muir or to the Court Gow's back letter to him, on which his right rested, until required to do so by the Sheriff in the process of ejectment in January 1869. Howard thereafter brought the present action of damages against Muir for wrongous possession, concluding for £150. The Sheriff assoilzied the defender from the conclusions of the action, holding his possession *bona fide*, at any rate up to 14th April 1869, and considering that there was no evidence whereon he could assess any material damage between that date and Whitsunday 1869.

The pursuer appealed.

BRAND for him.

WATSON and MACKINTOSH for the respondent.

LORD PRESIDENT—There can be no doubt of Muir's *bona fides* at the out set. When he took the shop from Gow he must have seen the missives of May 6th 1867,—these were Gow's title to sub-let, and, as such, *ex facie* absolute. There is nothing to interrupt Muir's *bona fides* until Howard produced the letter of 15th May 1867 qualifying Gow's right. But the production was not made by Howard till required by the Sheriff in January 1869. Farther, when produced there was need of additional evidence to connect the back letter of Gow with the bills founded on. Being therefore in *bona fide* when the action was raised, I cannot think that Muir was bound to depart from his defence the minute these documents were put in. I think the result of the action was quite right, that Howard should be found entitled to get back possession, but I do not think that there was any legal interruption of Muir's *bona fides* until the action came to an end. I therefore agree with the Sheriff.

LORD DEAS—The document which Gow had to show was *ex facie* absolute, and I do not see that Muir was bound to go and inquire if it was otherwise qualified. It would have been different had there been anything of a qualificatory nature in Gow's document, or anything even to cause suspicion. But there was not, and I can see nothing to discredit the *bona fides* of Muir until the action of ejectment was brought to a final conclusion.

LORDS ARDMILLAN and KINLOCH concurred.

Appeal dismissed.

Agent for Appellant—A. Kirk Mackie, S.S.C.

Agents for Respondent—J. & R. MacAndrew, W.S.

Thursday, October 20.

SECOND DIVISION.

MORRISON *v.* HARKNESS.

Cautioner—Direct Obligation—Discussion—Mercantile Law Amendment Act—19 *and* 20 *Vict., c.* 60, § 8. A law-agent granted a holograph obligation in the following terms:—"I will see the above account settled when taxed, reserving Mr Gun's plea.—Chr. Harkness." *Held* that this document constituted a direct and primary obligation against him, which was enforceable by action without the necessity of constituting the debt against the principal debtor, or of discussion.

Observed, that if it was to be held to be a cautionary obligation, the result would have been the same.

This was an action for the amount of a business account, due by the appellants Mrs Morrison and her sister to Mr Wilson, solicitor in Dumfries, in the following circumstances:—The appellants, who were creditors in two bonds and dispositions in security over certain property in Dumfries, employed Mr Wilson to call up the said bonds, and if necessary to sell the subjects to pay the amounts contained in them. The respondent Mr Harkness was agent for the trustee on the sequestrated estate of one of the debtors, while Mr Gun was trustee on the estate of the other debtor.

On 17th May 1869 the agent of the appellants, Mr Wilson, met with the respondent, and received from him the amount of the debt, with interest; he tendered at the same time his business account. Mr Harkness, the respondent, thereupon granted an obligation in the following terms:—"I will see the above account settled when taxed, reserving Mr Gun's plea.—CHR. HARKNESS."

The appellants accordingly brought an action in the Sheriff-court of Dumfries against Mr Harkness for the amount of the account.

Harkness pleaded—"The account being disputed by one of the principals, viz., Mr Gun, trustee for John Henderson, it was necessary, in the first instance, to constitute the debt against the principals along with the defender, the cautioner, and it is incompetent to prosecute the defender alone, in respect, in the cautionary obligation libelled, the plea of Mr Gun was specially reserved—that con-