ing thereby that the pursuer was in a state of intoxication, was insufficiently and indecently dressed, and was dirty and disreputable in her appearance. 2d, That the said male defender joined approvingly in the abusive language used by his said wife on the said occasion, and said he thought the pursuer was some girl from the street, that she was drunk, and ought to go home and sleep herself sober, and violently pushed her towards the door, to the injury of her person, by all which she was hurt in her feelings, and for some time suffered in her health. 3d, That on the occasion libelled the said pursuer was perfectly sober, decently and properly dressed, respectable in her appearance, and did not use the epithets or approbrious language of and concerning the said defenders, or either of them, set forth in the counter action at their instance against the said pursuer, and did not say or do anything to account for and justify the language and conduct of the said defenders towards her; and in these circumstances find, in point of law, that the said Eliza Scorgie is not liable to the said Leslie Hunter and his said wife in damages, but that they are respectively liable to the said Eliza Scorgie in damages. But find that such damages, so far as regards the said female defender, cannot affect her person nor her means and estate falling under the *jus mariti* during the standing of her present marriage, but only her person and means or estate after the dissolution of the said marriage, or her separate means and estate, if she has any, during the standing of the said marriage which do not fall under the *jus mariti;* and subject to these findings assoilzie the said Eliza Scorgie from the conclusions of the said counter action, and decern; and in the said original action assess the damages due by the said Leslie Hunter at the sum of £5 sterling, and the damages due by the said Catherine Matthew or Hunter at the sum of 5s. sterling, and decern therefor accordingly; find the said Leslie Hunter liable to the pursuer Eliza Scorgie in the expenses of process in the conjoined actions in the Inferior Court; and decern against the said Leslie Hunter for payment to the said Eliza Scorgie of the sum of £22, 16s. 5d. sterling, being the amount of said expenses as taxed in the Inferior Court; find the said Leslie Hunter liable in expenses to the said Eliza Scorgie in this Court; allow an account," &c.

Agent for Appellants—Wm. Officer, S.S.C.
Agents for Respondent—Steuart & Cheyne, W.S.

Thursday, February 22.

SECOND DIVISION.

NIMMO *v.* CLARK AND WILSON.

Mines Regulation Act, 23 *and* 24 *Vict. c.* 151, §§ 10, 11, 22—*Special Rules.*

The above Act provides that every machine worked by steam or water power used for lowering or raising persons shall have a brake attached to it.

Held that a pitmaster had not fulfilled this obligation by providing a brake, the handle of which was not attached to the machine—but that it was the master's duty to see that the brake was in working order.

Where the Special Rules approved by the the Secretary of State for working a pit define the duties of a bottomer, it is the master's duty to provide a man to perform the duty.

Summary Procedure Act 1864, 27 *and* 28 *Vict. c.* 53, *sec.* 22—*Expenses—Public Prosecutor.*

The above Act provides that expenses shall not be awarded to or against any public prosecutor.

Held that this applies only to the expenses in the inferior court; and expenses of appeal granted to the public prosecutor.

The following complaint was presented by the Procurator-fiscal in the Sheriff-court of Lanark:—

"That James Nimmo, coalmaster, residing in Slamannan, in the county of Stirling, has contravened section 10th of the Act 23 and 24 Victoria, cap. 151, by neglecting or wilfully violating the 12th General Rule provided by the said 10th section of said Act; and the said James Nimmo has contravened section 11th of the said Act, by neglecting or wilfully violating the 9th Special Rule established and enforced under said Act, particularly the said 11th section thereof, at No. 1 coal pit, Longrigg, situated in the parish of New Monkland, and shire of Lanark, in the occupancy of James Nimmo and Company, coalmasters there, in so far as—(1) The said James Nimmo being, time hereinafter libelled, owner or agent under and as defined by said Act, particularly section 7th thereof, of said No. 1 coal pit, Longrigg, and the said coal pit being then worked, the said James Nimmo did, during the period between the 1st August 1871 and 19th August 1871, both inclusive, neglect or wilfully violate the said 12th General Rule, by having, time above libelled, neglected or wilfully failed to have an adequate brake attached to the steam-engine used at said pit for lowering and raising persons, whereby the said James Nimmo is liable to forfeit and pay a penalty not exceeding £20, specified in the 22d section of the said Act: Likeas (2) the said James Nimmo being, time hereinafter libelled, owner or agent under and as defined by said Act, particularly section 7th thereof, of said No. 1 coal pit, Longrigg, and the said coal pit being then worked, the said James Nimmo did, during the period between the 1st August 1871 and 19th August 1871, both inclusive, neglect or wilfully violate the said 9th Special Rule, then established and enforced under said Act, and particularly said 11th section thereof, at said pit, by having, time above libelled, neglected or wilfully failed to have a bottomer or signalman in said pit, or any person to perform therein the duties specified in said 9th Special Rule, whereby the said James Nimmo is liable to forfeit and pay a penalty not exceeding £20, specified in the 22d section of the said Act."

The Sheriff-Substitute (LOGIE) pronounced this judgment:—

"The Sheriff-Substitute, in respect of the evidence adduced, convicts the said James Nimmo of the offences charged, and therefore adjudges him to forfeit and pay—1st, the sum of £5 sterling of modified penalty for having neglected to have an adequate break attached to the steam engine used at No. 1 pit, Longrigg, during the period referred to in the complaint; 2d, the sum of £20 sterling of penalty for having wilfully violated the 9th Special Rule established at said pit, by not having a bottomer or signalman therein, or any person to perform the duties specified in said Special Rule during the same period; ordains instant execution by arrestment, and also execution by poinding," &c.

"*Note.*—Two penalties have been sought from the respondent in the present complaint—one for having neglected or wilfully failed to have an ade-

quate brake attached to the steam-engine used at his pit, No. 1, Longrigg, during the period between 1st and 19th August 1871, and the other for having neglected or wilfully failed to have a bottomer or signalman in said pit, or any person to perform his duties during the same period.

"The brake required by the 12th General Rule in section 10 of the Mines Regulation and Inspection Act, 23 and 24 Vict. c. 151, to be attached to every machine worked by steam or water power, used for lowering or raising persons, is usually fixed on the fly-wheel, and sometimes on the winding-shaft. The brake on the fly-wheel is described by the Government inspector as a strap of iron placed half-way round the wheel, and worked by means of a lever (Mr Moore's evidence, page 2 of Proof), and the lever or handle is placed in the engine-house beside the engineman, to give him control over his engine in case of emergency (M'Feat's evidence, page 31 of Proof). Two answers were given by the respondent to the want of a brake—1*st*, That there was a brake on the fly-wheel, and that the lever had been removed by the engineman without his knowledge; and 2*d*, That the engine was used both for winding and pumping, and that the pumping gearing itself acts as a brake.

"With regard to the first answer, it is self-apparent that, even granting that all the component parts of a brake were at the pit at the time, so long as they were not put together so as to be in working order, and particularly while the lever or handle was detached, there was no adequate brake available to the engineman in case of emergency. 2*d*, That the lever was taken off by the engineman because the brake was requiring repairs of some kind, and that this was done in the presence of the underground manger, some time before the 1st of August. 3*d*, That the respondent became personally aware that the lever was detached from the brake, so as to render it utterly useless as a brake, some time before the 1st of August, and that he failed in his duty to see that it had been replaced after having given orders to have it done. According to his own statement, he gave orders to one of the enginemen some time before 1st August to have the lever or handle attached to the brake; and on a subsequent visit to the engine-house, finding that his orders had been disobeyed, he repeated it to the other engineman—both of these orders having been given prior to 1st August. That he then made no further inquiry whether the second engineman had been more obedient to his duty than the first, until he had brought an action under the Master and Servants Act against some of his colliers for desertion, when it came out in defence for them that there was no brake on the engine, in violation of the rules established at the pit. There was therefore such *culpa* or neglect on the part of the respondent as to leave no alternative but to convict the respondent of said offence, unless his second answer is held to meet the case.

"The second plea is, that admitting there was no brake on the fly-wheel, the engine has both winding and pumping gearing, and the pumping gearing acts as an adequate brake to the winding gearing. The Sheriff-Substitute is of opinion that this defence is untenable. The Act, as already mentioned, requires that an adequate brake shall be attached to every machine which is worked by steam or water power, and is used for lowering and raising workmen. If it is attached to the machine either by being fixed to the fly-wheel or to the winding shaft, it is always there ready for use in every emergency. But even if the pumping gearing is as effectual as a brake, as the respondent and his witnesses say it is, it is only of use when the engine is pumping as well as winding. There is fully higher testimony for the procurator than that for the respondent that *de facto* pumping gearing is not a brake at all, and it certainly is not a brake in the sense of the Act of Parliament. Mr Moore, the Government inspector, says the pumping does not act as a brake to the winding engine (page 2 of Proof), and Mr Graham Stevenson, a gentleman of the highest character and reputation as an engineer, says he never heard of pumping gearing being made to serve the purpose of a brake, and that, in his opinion, pumping gearing is not a brake at all, and, as a rule, that the engineman has less control of his engine when it is both pumping and winding than when only winding or only pumping. It would therefore be a most dangerous precedent, and, as it appears to the Sheriff-Substitute, in direct violation of the words of the statute, if the owners of pits at which men are lowered to and raised from their work are to be allowed to disregard the rules established at their works, and to substitute something which, in certain circumstances, in their opinion does as well. In Spons' Dictionary of Engineering, page 585, a brake is defined to be a piece of mechanism for retarding or stopping motion by friction by the pressure of rubbers against the wheels, and such is the piece of machinery attached as a brake to the fly-wheel or the winding-shaft.

"The Sheriff-Substitute has modified the penalty to £5, because the respondent had really provided a brake at the pit in terms of the Act, so that his offence was one of neglect in not having it in working order and attached to the fly-wheel for a length of time far beyond what was necessary for any repairs it required.

"It is admitted that there was no bottomer or signalman in said pit during the period in question, and it came out in evidence that there never had been one since the pit began some three years ago. There were therefore no alleviating circumstances, and the Sheriff-Substitute has awarded the full penalty imposed by the Act. It was stated on the part of the respondent, as a good reason for not having a bottomer or signalman, that he did not employ drawers, but that the colliers in that pit drew their own coals. This, instead of being a justification for not having a bottomer, rather tells against him. If there had been a body of regular drawers engaged in drawing coals, and drawing only, it might have been supposed that these parties would soon become proficient in placing their loaded hutches on the cage, giving the appointed signals to the pitheadman, and observing any defects in the signal apparatus,—in short, discharging the duties of bottomers; but it appears from the proof that in this seam of coal there were in all about forty men and boys engaged in excavating the coal, drawing the hutches to the pit bottom, and placing them upon the cage. That some of the colliers drew their own coals, but others of them had boys, who acted as drawers for their fathers. Boys of twelve or fourteen years of age may in this way have been employed ignorant of the duties required of them where there was no bottomer, and who were utterly helpless if a case of emergency arose. The object in having a bottomer or signalman at the pit bottom is to have there at all times a person of skill to see the loads

properly placed upon the cage; to give the proper signals at the proper time, for the safety of the persons who bring the coals to the pit bottom; and, in so far as responsibility lies for want of a bottomer, it matters nothing whether the drawer who brings them is an experienced person directly employed by the master, or a helpless boy newly introduced by his father into the pit to assist him with his work."

The respondent appealed.

WATSON and R. V. CAMPBELL for him.

The Solicitor-General (CLARK) and MONCREIFF for the Procurator-fiscal.

The Court unanimously affirmed the Sheriff-Substitute's judgment.

CAMPBELL submitted that, under the provisions of the Summary Procedure Act, the Court had no power to award expenses to or against a public prosecutor.

The Court held that the word 'Court' in the 22d section of the Act, as explained by the interpretation clause of the Act, applied only to inferior courts; and they dismissed the appeal, and gave the respondent the expenses of the appeal.

Agent for Appellant—Alexander Wylie, W.S.

Agents for Respondents—Thomson, Dickson, & Shaw, W.S.

Saturday, February 24.

FIRST DIVISION.

WATSON *v.* STEWART.

Process—Sheriff—Competency of Appeal—Dismissal and Revival of Action—Statute, 16 and 17 Vict. c. 80, §§ 15 and 24 (Sheriff-court Act, 1853)—Judicial Reference.

On 2d August 1869 the Sheriff-Substitute interponed his authority to a minute of reference. The judicial referee, after various procedure before him, pronounced on 14th May 1870 an order, of consent of parties prorogating the diet for the defender's further proof till 12th October 1870. On the 12th October 1870 the parties appeared before the referee, and lodged a joint minute dispensing with proof to a great extent. After repeated appearances before the referee, a judicial award was pronounced, to which the Sheriff-Substitute interponed the authority of the Court on 25th October 1871. Against this interlocutor the pursuer, who had been substantially unsuccessful, appealed to the Sheriff, and maintained that it was incompetently pronounced, seeing that the action stood dismissed under § 15 of 16 and 17 Vict. c. 80, no proceedings having been taken for a period of three months, and the action not having been revived within the period of three months thereafter. The Sheriff did not give effect to this contention, but recalled *hoc statu* the interlocutor appealed against, on the ground that the process had fallen asleep in consequence of no proceedings having been taken for a year and day. Against this interlocutor the defender appealed to the Court of Session. The pursuer objected to the competency of the appeal, on the ground that the interlocutor of the Sheriff did not fall under any of the classes of interlocutors which can be brought under review of the Court of Session (16 and 17 Vict. c. 80, § 24.

Held that the appeal was competent, the interlocutor appealed against being practically one sisting process.

Held, on the merits (1) that in consequence of the more stringent rule introduced by 16 and 17 Vict. c. 80, § 15, it was no longer possible for a Sheriff-court process to fall asleep in consequence of no step being taken in it for a year and day; (2) that the proceedings before the judicial referee were "proceedings in the cause" in the sense of 16 and 17 Vict. c. 80, sec. 15; (3) that with respect to the interruption in the proceedings before the judicial referee between 14th May and 12th October 1870, the parties, by their conduct, must be held to have revived the action of consent within six months, although no formal interlocutor reviving the action was pronounced.

This was an appeal from the Sheriff-court of Banffshire.

The circumstances of the case, which turned entirely on points of procedure, sufficiently appear from the opinion of the Lord President.

ASHER for the appellant (defender).

SCOTT and STRACHAN for the respondent (pursuer).

At advising—

LORD PRESIDENT—This raises a question of some delicacy in Sheriff-court procedure. It is necessary to attend to the precise state of facts and dates. This cause proceeded as an ordinary action in the Sheriff-court as far as the stage of proof being allowed. After the interlocutor allowing a proof, the parties agreed to a judicial reference, and lodged a minute to that effect on 2d August 1869. On the same day the authority of the Sheriff was interponed to the reference. No interlocutor was pronounced by the Sheriff from that date till 25th October 1871, when the Sheriff-Substitute interponed the authority of the Court t the judicial award of the referee, and decerned in terms thereof. The pursuer, who had substantially failed in the reference, appealed against the interlocutor of the Sheriff-Substitute, and represented that the interlocutor could not competently be pronounced, on the ground that by section 15 of the Sheriff-court Act 1853, the action stood dismissed, no proceedings having been taken in the cause between 2d August 1869 and 25th October 1871 The objection seemed at first sight formidable, but the Sheriff got the better of it. He was, however embarrassed with another difficulty which occurred to him, viz. that supposing the process not dismissed under section 15 of the Sheriff-court Act, it had fallen asleep, no proceedings having been taken within a year and day from 2d August 1869. Being of that opinion, he recalled *hoc statu* the interlocutor of the Sheriff-Substitute appealed against,—meaning that nothing could be done until the defender brought a summons of wakening. Against this interlocutor the present appeal is brought. The question is, Whether the appeal is competent? Section 24 of the Sheriff-court Act limits the review of the Court of Session to three classes of interlocutors—"sisting process," "giving interim decree for payment of money," and "disposing of the whole merits of the cause." I am of opinion that this interlocutor of the Sheriff is in all practical effects an interlocutor "sisting process." I do not think it indispensable to use these words. It is done in effect here, for if the interlocutor stands, nothing more can be done, un-