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-

less the defender takes a step which the Sheriff thinks necessary. I regard then the appeal as competent.

With respect to the merits of the appeal, I am of opinion that section 15 of the Sheriff-court Act puts an end to the possibility of Sheriff-court processes falling asleep under any circumstances. It substitutes a rule which was intended at least to be very stringent. I think that the Sheriff's construction of the proviso at the end of the section is not sound. The Sheriff construes it as saying that if a third party acquires the right under the action within the period of six months, he is not to be affected by the operation of the clause at all; therefore, in his case, the process must be liable to fall asleep, otherwise there might be no end to the delay. I think that what is meant by the proviso is, that the lapse of six months shall not affect the third party, but when once sisted as a party to the process, he is to be subject to the same regulations as any other party. If he personally allows three months to elapse, then he is liable to have the action *eo ipso* dismissed, and if he allows six months to elapse, he is out of Court altogether. There is just as little room in this case as in any other for the idea that falling asleep in consequence of no proceedings being taken for a year and day is applicable to a Sheriff-court process.

But there is another question suggested in the reclaiming petition to the Sheriff, and revived to-day in argument. During the long interval between 2d August 1869 and 25th October 1871, the parties were going on before the judicial referee. The question is, Whether the proceedings before the judicial referee have the effect of keeping the process alive, just as proceedings before the Sheriff would have done? That depends on the construction of section 15 of the Sheriff-court Act. That section has no application if during the period of three months either of the parties has taken any proceeding in the cause. It would be far too strict a construction of these words to say that no proceeding in the cause can be taken except before the Sheriff. Proceedings before a judicial referee are proceedings in the cause, in the sense that they are taken under the authority of the Court, and with a view to the ultimate settlement of the cause by a judgment of the Sheriff.

Still further, Mr Scott maintains that there was an interruption of five months in the proceedings before the judicial referee, viz. between 14th May and 12th October 1870. He argued, that if these proceedings before the judicial referee, which are absolutely essential to prevent the process from going out of Court, are themselves interrupted for three months, the process needs to be revived, and as this was not done within six months, the process is now finally dismissed. There is a specialty in this case which enables the Court to get the better of this difficulty as well as of the other. The interlocutor of 14th May 1870, prorogating the defender's further proof till 12th October, proceeded on the consent of parties; so that the interruption was deliberately consented to by both parties. On the 12th October the parties, who had meanwhile come to the agreement that they could dispense with proof to a great extent, lodged a minute to that effect. After a great many subsequent appearances of the parties, between which there was no serious interruption, the referee issued his award. It is a strong proposal on the part of the pursuer, who consented beforehand to the interruption, and afterwards went on contesting the cause before the referee, and taking his chance of a decision in his favour, to turn round and say that no award can be given against him, and that the process must be held as dismissed. It is settled by the case of *Mackintosh*, Nov. 10, 1863, 2 Macph. 48; and of *Steuart* v. *Grant*, March 29, 1867, 5 Macph. 736; that after a process stands *eo ipso* dismissed in consequence of the lapse of three months, the parties may revive it of consent within the next three months, and, further, that if that consent is given before the expiry of the second three months, the process will be effectually revived although the interlocutor reviving the cause is not pronounced till after the expiry of the period. The proceedings which took place after 12th October 1870 before the judicial referee amount to consent on the part of both parties to revive the process. They were still within the time, and by their acts they signified their consent that the process should be treated as an existing process. No doubt there was no interlocutor of the Sheriff afterwards pronounced reviving the process. This struck me at first as a difficulty, looking to the terms of section 15. But this is rather too technical a view. Section 15 provides that it shall be competent to either of the parties to revive the said action in either of two ways, viz. on showing good cause to the satisfaction of the Sheriff why no procedure had taken place, or upon payment to the other party of the preceding expenses incurred in the cause. The statute distinctly expresses what is to be the effect of such revival. Such action shall be revived and proceeded with in ordinary form. Is it absolutely indispensable that the Sheriff shall pronounce an interlocutor holding the action revived? I have no doubt that this is the practice. It is the most distinct way of recording the revival. But suppose the party who wishes to revive the action pays to his opponent the whole previous expenses, would he be deprived of the benefit which he has thus purchased, by the fact that the Sheriff had not pronounced an interlocutor of revival? It has been distinctly held that the interlocutor of the Sheriff may be pronounced after the six months—*Steuart* v. *Grant*. If a party by paying expenses may thus at his own hand secure a revival of the cause, surely the opposite party may dispense with payment, and indicate by his proceedings that he does not require it. I am not prepared to say that in a case like the present an interlocutor of revival must be pronounced. I do not see why, if it were necessary, it could not still be done. We might recal the interlocutors both of the Sheriff and Sheriff-Substitute, and remit to the Sheriff-Substitute to pronounce an interlocutor of revival. But it is not necessary. The parties are tied down to a revival by their conduct and proceedings within the six months. We should recal the interlocutor of the Sheriff, and adhere to that of the Sheriff-Substitute.

The other Judges concurred.

The Court recalled the interlocutor of the Sheriff, and affirmed that of the Sheriff-Substitute, and found the appellant entitled to expenses in both Courts.

Agent for Appellant—Alexander Morison, S.S.C
Agent for Respondent—David Milne, S.S.C.