

stitution merely, it should have been framed on that principle, and expenses only asked in the event foresaid. This has not been done, expenses are asked simpliciter and in the ordinary way, therefore I hold that the decree asked is one against the defender personally. Her defence against this is simply that she is not in possession of executory estate sufficient to pay the debt. That is the substance of her case. If she is not in possession of any executory estate, then decree cannot go out at all. If she can pay a dividend upon debts due by the deceased, then the decree may be modified so as to give the pursuer right to a sum proportional to his debt. In this state of matters there can be no satisfactory conclusion till we know the one important fact in the case, namely, what is the amount of the executory estate which the defender ought to have in her hands. I think, therefore, that we must order proof upon this point.

The rest of the Court concurred.

An interlocutor was accordingly pronounced, allowing parties a proof upon the subject of the amount of executory estate in the defender's hands.

Agent for Pursuer—P. L. Beveridge, S.S.C.
Agents for Defender—Murdoch, Boyd, & Co., S.S.C.

Friday, February 9.

NOTMAN v. KIDD.

Sheriff—Process—Appeal—Competency.

Held incompetent to appeal against an interlocutor of the Sheriff, recalling that of his Substitute, opening up the record, and ordering condescendence and answers, and finding the pursuer liable in expenses, on the ground that such interlocutor was not one "giving interim decree for payment of money" in the sense of the Sheriff-court Act of 1853, section 24.

Counsel for Appellant—Paterson. Agents—J. & A. Peddie, W.S.

Counsel for Respondent—Black. Agent—David Forsyth, S.S.C.

Thursday, February 22.

SCORGIE v. HUNTER.

Husband and Wife—Reparation—Slander—Process—Decree—Expenses.

The rule that a husband is not liable for the wife's slander does not apply to a case in which he is present and joins approvingly in the wife's abusive language.

Where a husband and wife had joined in a slander, although the wife had taken the leading part, the husband was found liable in £5 of damages, and the wife in 5s. The husband was also found liable in expenses.

Form of decerniture against a married woman.

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

Eliza Scorgie brought an action of damages against Leslie Hunter and Catherine Hunter for verbal slander and ill-treatment, concluding against each of the defenders for £20.

The defenders raised a counter action of damages against Scorgie, also for verbal slander.

Both actions arose out of circumstances which took place on 3d July 1871, and which are set forth in the interlocutor pronounced by the Court.

The Sheriff-Substitute (COMRIE THOMSON) conjoined the actions, and afterwards (8th August 1871) pronounced an interlocutor, which, after findings in fact, proceeds—"Finds, as matter of law, that Mrs Hunter represented her husband in the shop at the time, and that he so identified himself with her actings that he is liable in damages along with her, and as taking burden on himself for her; therefore finds the said defenders, Mr and Mrs Hunter, liable in damages to the pursuer Scorgie; assesses the amount thereof at £5, 5s. sterling, and decerns therefor against the said defenders in terms of the libel; finds the pursuer Scorgie entitled to expenses of process; allows an account," &c.

On appeal, the Sheriff (GUTHRIE SMITH), on 6th November, affirmed the interlocutor appealed against.

On 24th November 1871 the Sheriff-Substitute decerned for £22, 16s. 5d., as the taxed amount of expenses, against the defenders Leslie Hunter and Mrs Catherine Matthew or Hunter.

Mr and Mrs Hunter appealed to the Court of Session.

RHIND, for them, argued that, in any view, the husband was not liable for the wife's slander.

JAMESON for the respondent.

The case of *Barr v. Neilson*, March 20, 1868, 6 Macph. 651, was referred to.

The Court had no doubt that the interlocutor of the Sheriff-Substitute correctly expressed the facts of the case. In perfectly unconnected acts of slander there could be no joint liability. But here the husband joined approvingly in the wife's abusive language, and finally laid hands on the pursuer, and attempted to push her out, and therefore must be held to have adopted his wife's improper proceedings. The only difficulty is the precise form in which decree should go out.

The case was again put out to-day, February 22.

To meet the difficulty that damages against the wife could only be recovered during the subsistence of the marriage from her separate estate, if she had any, JAMESON, for pursuer, asked for decree against the husband only.

The Court considered that this would involve absolvitor of the wife, which would be inappropriate, as she was the worst offender; and accordingly proposed to divide the damages into two unequal parts, finding the husband liable in much the larger part, and the wife (under reservation) in the other part.

The following interlocutor was pronounced:—

"Edinburgh, 22d February 1872.—Recal the interlocutor of the Sheriff-Substitute of 8th August 1871, the interlocutor of the Sheriff of 6th November 1871, and the interlocutor of the Sheriff-Substitute of 24th November 1871, and in lieu thereof Find, in point of fact—1st, that on the occasion libelled, in the public bar of the tavern in Aberdeen, then kept by Leslie Hunter and Catherine Matthew or Hunter, his wife, defenders in the original action, the said female defender, in presence and hearing of the said other defender, her husband, and of the persons named in the libel, or some of them, accused the pursuer in the said original action, Eliza Scorgie, of being drunk, said she was a dirty trull or trail, ordered her out and to go home and dress herself, and used towards her other approbrious and abusive epithets, mean-

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 opprobrious 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 assolvie 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 pointing,” &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-