I would only add that I think the evidence not only shows that Mr Morrison had no authority from the defender to give time to the pursuer; but further, that Mr Peat, the agent who acted for the pursuer, did not think that he had such authority; and, whilst taking his letter for what it was worth, took his risk of what would happen. If no authority to give time was possessed, the apprehension was not wrongful. No more was the detention; for after Mr Morrison's letter was made known to the defender he was entitled to say that it was unauthorised, and to proceed exactly as if it never had been granted.

In deciding the question before us I can pay no regard to the alleged revengeful spirit displayed by the creditor, which in no way bears on this question. I wholly disapprove of this spirit; but it is not my present function to visit it with a penalty. The only ground on which the creditor, the defender, is here sought to be made liable in damages is, that he executed his warrant after giving time to the debtor. If it is shown that he did not give time, he is entitled to absolvitor from this action; and I have no right to set up against him, directly or indirectly, any other ground of damage.

Lord Gifford—I entirely concur with the Lord President and Lord Kinloch that the rule should be made absolute. In common with all your Lordships, I have some regret in disturbing the verdict, but I am compelled to come to the conclusion that the verdict is against evidence. The sole fact in issue is, Whether the defender wrongfully apprehended the pursuer, or caused him to be apprehended *after* having agreed to delay diligence? If the question of motive were in the case, I do not see how that motive would not have been equally to be condemned had no agreement been alleged. Now, Mr Mortimer might give the delay either personally or by another authorised by him. It is not said that he consented personally, and the improper motives which actuated him come in as excluding the idea that he had consented to delay. He had two agents. Where one agent is employed by the other, it becomes a delicate question how far the sub-agent has power to bind the principal. Morrison was only a sub-agent for a limited purpose. Had the question only been, to what extent had power been delegated by Mackenzie to Morrison to delay diligence, I should not perhaps have interfered, assuming that Mackenzie could delegate the power. But the question next arises, Did Morrison give delay? On this there is a conflict of evidence. It is a matter which the jury were entitled to take into their own hands. Assuming these points in favour of the pursuer, comes the great question, Had Morrison, in the circumstances, power to bind Mortimer to give delay, without his knowledge, and to the effect of making him liable in damages if he proceeded to execute the diligence? Here arises a question of importance in law. There is no absolute rule of law, what an agent can do, and what he cannot do. I am not prepared to say that, wherever an agent at the Sheriff-court town, or in Edinburgh, is employed to carry out diligence, that he is empowered to give delay. It is a question of circumstances in each case. I think Morrison had no power to tie Mortimer's hands. That is enough. But the verdict cannot stand on another ground. Captain Cameron, or his agent, had notice of Morrison's doubt of his want of power to grant delay—(*reads Peat's evidence*). When an agent says that he does not know whether he can grant delay or not, that is fair notice, even although he does take upon himself to grant delay. He may bind himself, but not his principal.

On these grounds, I consider the verdict against evidence—viz., that Morrison, in the circumstances, had no power to grant delay; and 2*dly*, that he had intimated this defect to Peat.

Rule made absolute, and new trial granted, reserving all questions of expenses.

Agent for Pursuer—W. R, Skinner, S.S.C.
Agents for Defender—Philip, Laing, & Monro, W.S.

Friday, February 9.

THE EARL OF ROSSLYN *v.* MRS MARY CUNNINGHAM OR LAWSON.

Process—Constitution, Action of—Executor.

Where an action was brought against an executrix for a debt due by the deceased,—*Held* that, expenses being concluded for in the usual way, and not "in the event only of the defender appearing and opposing," the action was not an action of constitution merely, but petitory, and against the defender personally as executrix, and that therefore it was a valid defence that the executry funds were not sufficient to meet the demand; and proof of their amount allowed accordingly.

In this action Lord Rosslyn sued the defender Mrs Lawson for the value of coal supplied to her deceased husband from his collieries at Dysart, and concluded in the ordinary way for expenses. It was admitted that the defender was executrix of her deceased husband.

The Lord Ordinary (Gifford) allowed parties a proof of their averments. But though the defender averred the insufficiency of the executry funds, and pleaded that she was ready to hold count and reckoning with all interested, proof of the amount of said funds was not held included in the said order, and the Lord Ordinary, on 3d November, pronounced an interlocutor, finding the pursuer's claim against the defender, as executrix *qua* relict of her deceased husband, established, and therefore decerned against her in terms of the libel, with expenses.

Against this interlocutor the defender reclaimed.

Taylor Innes for her.

Watson and Trayner for the pursuer and respondent.

Authorities — *Gairdner*, Nov. 28, 1810, F.C.; *Cook* v. *Crawfurd*, 11 S. 406; and *Lamond's Trs.* v. *Croom*, March 8, 1871, 8 Law Rep. 412.

At advising—

Lord President—There can be no doubt as to the true character of this summons. In it the pursuer demands decree against Mrs Lawson as executrix dative *qua* relict of the deceased James Lawson, her husband, and concludes for a sum of £100, 9s. 1d., with interest from the 30th April 1871, "when the same fell to have been paid, until payment, together with the sum of £50 sterling, or such other sum as our said Lords shall modify as the expenses of the process to follow hereon." Now, a creditor in a summons of constitution is not entitled to expenses except in the event of the defender appearing and opposing the action. If, therefore, this was intended as a summons of con-

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 executry estate sufficient to pay the debt. That is the substance of her case. If she is not in possession of any executry 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 executry 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 executry 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*, 22*d 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-