tion of the Summary Procedure Act no award of costs, in the case of an acquittal, could be given against a public prosecutor unless an express provision to that effect were contained in the Act libelled on. There was no such provision in the Salmon Fisheries Act of 1868, or any of the Tweed Fisheries Acts.

At advising—

LORD JUSTICE-CLERK—I have certified this case from the Circuit Court of Justiciary, not so much because I have any doubt on the argument as then presented to me, but because I think it of importance that the point at issue should be decided as authoritatively as possible, in order to rule similar cases. In the question as to whether the Act under which the Sheriff's judgment was pronounced did or did not authorise the Sheriff to deal with the matter of expenses under a complaint of this nature, in the way of awarding them to the accused, I am unable to understand on what ground this somewhat unjust and anomalous effect was supported. It appears to me that if the statute indicated that a Court was to deal with the matter of expenses at all, then, unless there is the clearest possible exclusion of it, the presumption in law and in ordinary justice is, both parties are to be treated in an even-handed manner; and I am now quite confirmed in my opinion that the 22d clause of the Summary Procedure Act simply brought in this matter of expenses for the purpose of clearly setting forth that the judge might impose expenses over and above the ordinary penalty The fact that the Act of 1857 gives power to award expenses to the complainer necessarily implies the same power in the case of the respondent. In this view the 22d section of the Summary Procedure Act does not apply to the case before us; and, that being so, I do not feel it necessary to go into the question of common-law presumption as to what would be the position of matters if nothing were said in the Act of 1857 about expenses to either party. Neither do I think it requisite to decide the question as to whether in this case the Procurator-Fiscal, Mr Bathgate, was acting as a public prosecutor or not, though I am of opinion that he was acting in that capacity.

LORDS COWAN and NEAVES concurred.

The Court sustained the appeal, with expenses, and remitted to the Sheriff to dispose of the question of expenses in the Inferior Court.

Counsel for the Appellant—Watson and Brown.

Counsel for the Respondents—Asher and A. J. Young. Agents—Mackenzie, Innes, & Logan, W.S.

COURT OF SESSION.

Wednesday, June 4.

FIRST DIVISION.

SOLWAY JUNCTION RAILWAY CO. *v.* GLASGOW & SOUTH-WESTERN RAILWAY CO.

Expenses.

In a case where a proof was rendered necessary by the incorrect averments of one of the parties to an action,—*held*, that though successful on the whole case, they were not entitled to the expenses of the proof.

In this case, which arose out of certain traffic arrangements between these two companies, the Glasgow and South-Western denied various averments made on the other side, and thereby rendered a proof necessary. The Lord Ordinary found for the defenders, and the pursuers reclaimed. The Court adhered to the Lord Ordinary's interlocutor, but refused to allow the defenders the expenses of the proof, which had been rendered necessary solely by their fault.

Counsel for Solway Junction Co.—Watson and Mackay. Agents—T. & R. B. Ranken, W.S.

Counsel for Glasgow & South-Western Co.—Solicitor-General (Clark) and Balfour. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Friday, June 6.

FIRST DIVISION.

[Lord Gifford, Ordinary.

COOPER *v.* BARR & SHEARER.

Right of Retention—Ship.

In a case where a firm, after executing certain repairs upon a ship on their own private slip, then launched her into the public dock, —*held* that they had thereby relinquished the actual possession which was necessary to constitute their right of retention.

In this case Mr W. E. Cooper, as mortgagee of the ship Joan Cunllo of Aberystwith, raised an action against Barr & Shearer, ship builders, Ardrossan, for delivery of the vessel, which had been put into their hands for repairs. These repairs had been partly executed in the defenders' private dock, but before they were complete the vessel had been taken into the public dock, and the pursuer contended that the defenders had thereby lost their lien, which they pleaded as a defence against the action.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 11th March* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process—Finds it sufficiently instructed in point of fact: *First*, That the defenders, Messrs Barr & Shearer, were employed by Thomas Lewis of Walcott, Bath, the owner of the ship or barque 'Joan Cunllo' of Aberystwith, and who was in possession and management of the said ship, to execute certain repairs upon the said ship; *Second*, That under and in virtue of this employment the defenders, Messrs Barr & Shearer, obtained possession of the said ship or barque, and placed her upon their slip at Ardrossan, for the purpose of executing the said repairs, or part thereof: *Third*, That under the said employment the defenders, Messrs Barr & Shearer, executed extensive repairs upon the said ship, in respect of which a large account is now due to them; *Fourth*, That the defenders, Messrs Barr & Shearer, never gave up, surrendered, or lost possession of the said ship or barque, but that they still retain possession thereof in security of the payment of their said account for repairs and work executed thereon: Finds, in point of law, that the defenders, Messrs Barr & Shearer, have a valid and effectual lien over the said ship or barque, or a right to retain the same in security of their said account, and

finds that the pursuer is not entitled to demand or enforce possession of the said ship or barque without paying or securing the said debt due to the defenders; and to the above effect sustains the defenders' pleas, and assoilzies the defenders from the conclusions of the action, and decerns; Finds the defenders entitled to expenses, and remits the account thereof when lodged to the Auditor of Court to tax the same and to report.

"*Note.*—It is quite fixed that a shipwright in a home port who builds or repairs a vessel, and who has the entire possession thereof, has, so long as he retains possession, a lien or right of retention over the ship for the amount of his account for building or repairing the same, unless there is a contract, express or implied, to the contrary—See Bell's Comms. (M'Laren's ed.), ii. 93. A shipwright in this respect is in the same position as any other tradesman to whom a moveable subject is delivered or handed over in order that work may be executed thereon. The tradesman who executes the work may retain the moveable subject until his account for the work is paid, unless he have expressly agreed to give credit, or to give up the article before the term of payment. This is the rule both in England and Scotland, although there are certain places, for example the Thames, where by local usage there is no lien for repairs on ships, the custom and implied contract being to give credit.

"It was conceded in argument, and indeed seems quite clear, that the owner of the ship now in question, Mr Lewis, was entitled to employ the defenders to repair her, and to hand her over or deliver her to the defenders for that purpose. No doubt the ship was under mortgage to the present pursuer Mr Cooper. But Mr Cooper allowed the vessel to remain under the full control and management of the owner Mr Lewis, and he cannot object to Mr Lewis having exercised any ordinary and necessary acts of management. It is sufficiently proved that the ship was absolutely in need of an overhaul, and of extensive repairs. Without such she could not continue to trade.. Her classification at Lloyd's had expired, and she could not be reclassed without being surveyed and repaired at the sight of Lloyd's surveyor. Without reclassification she would not have been employed to carry any ordinary cargo. To get her repaired at the sight of Lloyd's surveyor, and get her reclassed, was an ordinary, a prudent, and indeed quite a necessary act of administration or management, and this is just what Mr Lewis did. It seems also sufficiently proved that the repairs actually executed by the defenders have enhanced the value of the vessel to an extent at least equal to, if not greater than, the amount of the defenders' account, so that the whole of the repairs have been profitably and beneficially *in rem versa* of the ship itself. It is in these circumstances that the pursuer, the mortgagee, now demands delivery of the vessel from the defenders, the shipwrights, without paying any part of their account.

"The shipwrights, the defenders Messrs Barr & Shearer, resist the pursuer's demand, on the ground that they have a lien over the ship for the amount of their account, and the question in the present case is, whether the defenders have such lien or not? There is a subordinate question about arrestments, but these arrestments, if valid at all, which the Lord Ordinary strongly doubts, could easily be withdrawn or loosed, and the sole question really in dispute is the defenders' lien. The Lord Ordinary is of opinion that a valid and effectual lien over the ship was created in favour of the defenders, and that it still subsists.

"(1) The lien was duly created. The defenders obtained entire and absolute possession of the ship in order to execute the repairs thereon. The ship was taken into the defenders' private shipbuilding yard. She was placed upon the defenders' private slip, where she remained for a considerable time. This was absolutely necessary. The hull of the ship had to be opened up, and her bottom planking, or part thereof, removed, and this could not be done while she remained afloat. There seems no doubt, therefore, that the vessel passed into the legal possession of the shipwrights just as much as if she had been built by them in their yard or upon their slip.

"Indeed this was not seriously disputed by the pursuer, whose case was chiefly rested upon the plea that the defenders' lien and possession had been afterwards lost, and it seemed to be conceded that if the ship had always remained upon the defenders' slip, their claim of lien could not have been resisted. Still, with special reference to the alleged loss of possession, it is necessary to keep in view the state of matters even when the ship remained on the defenders' slip.

"The crew had all been discharged and paid off except the master and a man who seems to have acted as a sort of mate. When the ship was on the defenders' slip nobody lived on board of her, both the captain and mate having lodgings in town; but captain and mate, as well as the owner, were frequently going about the ship. At night also, there seems to have been a watchman employed by the captain, called a ship-keeper, whose duty it was to be on board or beside the ship, and to see that nothing was pilfered or taken away. This was necessary, for although the ship was wholly in the defenders' yard and on their private slip, the defenders' premises were quite exposed, unfenced, at least on one side, and themselves protected only by watchmen. So matters stood till the repairs had proceeded so far that the ship could again be floated. Undoubtedly, up to this point the defenders had a valid lien.

"(2.) The Lord Ordinary thinks that the defenders never lost the possession so attained by them. No doubt, about the middle of November, and while the defenders' contract was not nearly completed, the ship was taken off the slip and moved into the public dock, in order that the repairs might be there completed. It is said that this was a surrendering or giving up of possession, and that by the very act of launching her from the slip the defenders lost their possession and lost their whole right of lien. The Lord Ordinary does not think so. He thinks the possession once completely attained by the defenders was not lost by merely shifting the vessel's place for the sake of convenience.

"The removal of the vessel from the slip was not the act of the owner, or of the pursuer, or of any one representing them. She was removed by the defenders themselves, exclusively by the defenders' workmen, and solely for the defenders' convenience. Their slip was required for another vessel, and it was simply for this reason that the defenders took the 'Joan Cunllo' off the slip and put her into the dock. The owner wished her to remain on the slip, as he seems to have thought

the repairs would get on faster there. Then the ship was lauched, not with the view of delivering her to the owner, or of giving up possession, but simply that the repairs contracted for might go on with the ship afloat. It often happens that some kinds of work can only be done, or can be best done, with the ship afloat, for example, rigging, taking in engines, and so on. The defenders launched the ship, not to hand her over, but to keep her till the repairs were done. Accordingly she remained under the control of the defenders just as before, only, instead of her being on the defenders' private slip, she was moored to the defenders' quay. No doubt on one occasion, for a few hours, she was on the other side of the dock, but this was merely temporary, till a berth next the defenders' yard could be got, and the defenders' men were working on her all the time. Even after this she was actually moored, at least one end of her, to the defenders' pauls, that is to mooring-posts situated within the defenders' ground. It is true also that she had occasionally to be shifted, either to allow vessels to get off or on the defenders' slip, or to give the harbour-master the use of an important loading crane at the corner of the dock. But this was solely for the convenience of the defenders themselves, or of the harbour-master, and could not alter the legal possession of the ship. Plainly the harbour-master, who ordered some of the removals, was in no sense in possession of the ship, and the removals were always effected by the defenders' own workmen. Still farther, no change occurred in the mode of looking after the vessel. Neither master nor mate came to live in her, but just visited her as before. The night watchman watched just as before, till he also was given up or dismissed at last, and by day the repairs went on just as formerly. There is a dispute how much of the repairs were done on the slip and how much in dock, but the preponderance of evidence seems to be that about a half was executed while the vessel was floating. The account does not show exactly.

"On the whole, the Lord Ordinary holds without much difficulty that the defenders having once attained possession of the ship did not lose possession merely by themselves floating her for the express purpose of continuing the repairs. This would be a very startling conclusion, and would be both dangerous and unjust to shipbuilding interests. For example, it would prevent shipbuilders from launching vessels, even to get in machinery, until their accounts were paid. The Lord Ordinary cannot think that the moment the ship reached the water at the foot of the defenders' slip she could have been seized either by the pursuer, as mortgagee, or by the owner himself, or by the owner's creditors, and towed off, all dismantled as she was, and incomplete, to defeat the shipbuilders' rights.

"In the Lord Ordinary's view nothing turns upon the ship having been replaced on the defenders' slip. If the defenders had once surrendered possession they could not have regained their lien by taking possession of new at their own hand, and without the owner's or master's consent. But if they never lost possession they were quite entitled to make the custody secure by placing the ship in a safe place.

"The Lord Ordinary has not the means in the present action of determining the exact amount of the defenders' account. The owner is not a party to the present action, and is being separately sued All that the Lord Ordinary can do is to sustain the defenders' lien, and to this effect assoilzie the defenders from the pursuer's unqualified demand."

The pursuer reclaimed.

Authorities—Bell's Comm. i, 93, (M'Laren's ed.); Bell's Prin., sec. 1420; *Franklin* v. *Hosier*, 4 Barn. and Ald. 314; Abbot, 117, 118; *Hartley*, 1 Starkie, 408.

At advising—

LORD PRESIDENT—I confess I was rather disposed all along, if I could, to adhere to this interlocutor, because the case seems a hard one for the ship-builders, but I have formed the opinion that the facts will not justify the conclusion of the Lord Ordinary.

Although the kind of lien pleaded on the part of the defenders is very well defined, there is not much authority on the point. The law was laid down authoritatively in the case of *Franklin* v. *Hosier*, 4 Barn and Alderson, 341, and that law has since been followed in the books and decisions. In that case the Lord Chancellor sent a question to the Court of King's Bench in the following terms:—"Whether Daniel Brent, &c., as shipwrights, having the said ship 'Northumberland' in their actual possession in their dock, at the time of the bankruptcy of William Masson, the managing owner of the said ship, had a lien on the said ship for the repairs of the said ship?"

It had been contended that this lien, even when there was actual possession, was unknown to the law of England. The answer made under the presidency of Chief-Justice Abbott, who is a high authority on this branch of the law was—"We are of opinion that Daniel Brent, &c., as ship-wrights, having the said ship 'Northumberland' in their actual possession in their dock at the time of the bankruptcy of William Masson, had a lien on the whole ship or vessel called the 'Northumberland.'"

The meaning of this answer is quite plain, it says, in point of law, that the ship-wrights having had the ship in their actual possession in their dock at the time of the bankruptcy, had a lien over her.

Accordingly, not only in the latest edition of Abbott on Shipping, but in the writings of Professor Bell, both in his Commentaries and in his Principles, the law is laid down to the same effect. In section 1420 of his Principles, Professor Bell lays down, "Retention of a ship is competent for repairs. . . . This right of retention depends on possession, and is not, like hypothec, confined to the case of repairs made abroad. It is effectual for repairs made on a vessel in a home port. But ship carpenters repairing a ship in an open harbour or roadstead have not the possession necessary to retain the right."

Now, applying that doctrine to the present case, it seems to me that when the vessel was launched from the slip of the defenders after a portion of the repairs had been executed, and was placed in a berth in harbour, that the possession necessary to secure a lien had altogether come to an end.

The history of the matter is as follows—The owner of the vessel, Mr Lewis, sent her to Ardrossan to be repaired, so as to get her class at Lloyd's raised; when she arrived she went into the old harbour, and from that into the wet dock, and remained there for some days, waiting her turn for the defenders' patent slip. It was necessary that she should go upon the slip, because there was

some outside work to be done on her, such as caulking, and three new planks to be put on. When the work which could not be done except on the patent slip was completed, the ship-builders, for their own convenience, removed her to make room for another vessel. Accordingly they launched her into the wet dock, and when launched into it she was, by the orders of the deputy harbour master, removed to a berth at the north side of the dock opposite the patent slip. She lay there for a few hours, and then, because the master persuaded the harbour master, for the convenience of the carpenters, to have her shifted, she was removed to a berth at the foot of the slip, where she lay moored by her own ropes for some days. She was afterwards moved into the west corner of the dock. All that is said about her then is that her stern ropes were attached to pawls in the premises of the defenders. It seems to me that these pawls, though locally situated in the defenders' yard, were really a part of the ordinary dock apparatus. I am of opinion that as soon as she left the premises of the defenders she was no longer in that "actual possession" which is necessary to sustain a lien. In these circumstances, it appears to me she was no longer, after she left the slip, under the custody or control of the defenders—she was then under the orders of her master and the harbour master. The power of detention appears to me to be absolutely necessary to the right of lien.

For these short reasons I cannot concur with the view taken by the Lord Ordinary.

The other Judges concurred.

Counsel for Pursuer—Solicitor-General (Clark) and Mackintosh. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders—Watson and Balfour. Agents—Webster & Will, W.S.

Saturday, June 7.

FIRST DIVISION.

PETITION—FORDYCE BUCHAN'S TUTORS.

Tutorial Inventories—Next of Kin—Citation.

In an action for giving up tutorial inventories, a petition was presented to the Court to dispense with the citation of certain of the next of kin, who were stated to be resident in England, and were the nearest relations of the pupils, those who were resident in Scotland, and were called in the summons, being more distant in degree. The Court remitted to Mr Archibald Broun, P.C.S., to inquire into the practice in such cases, and the necessity of such a petition. He reported that though the course of practice was not very clear, still it seemed to indicate the necessity of such a petition; and the Court, adopting this view, ordered intimation in ordinary form.

Counsel for Petitioners—Pearson. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Saturday, June 7.

FIRST DIVISION.

[Sheriff of Edinburgh.

SHIRRA *v.* ROBERTSON.

Appeal—Competency—Sheriff-court Act, 1853, § 24 —*Court of Session Act*, 1868, §§ 53 *and* 54—*Final Judgment.*

In a case where the Sheriff on appeal recalled his Substitute's interlocutor, and allowed the defender in the action a proof before answer by the writ or oath of the pursuer—*Held* (after consultation with the Second Division) that an appeal to the Inner House was incompetent, on the ground that this was not a final judgment in terms of the Sheriff-court Act, 1853, and Court of Session Act, 1868.

This was an action raised in the Sheriff-Court of Edinburgh by Mrs Grace Edmonstone or Shirra against Mr George B. Robertson, for payment of £100, being the amount contained in a promissory note granted by him to the pursuer.

The defender averred, *inter alia*, "It is believed that the £100 contained in the bill sued for was a sum lent by the pursuer at the request of the defender's brother, James Robertson, merchant Glasgow, but it was not paid to the defender. The interest credited in the summons was not paid by or on behalf of the defender, but by the said James Robertson. The defender believes the interest has been paid by the said James Robertson since the date of the promissory note, and that the pursuer has dealt with and treated the said James Robertson as the proper debtor therein, as he was well known to be so by the pursuer. No demand was ever made by the pursuer on the defender for payment of the debt sued for till the summons in this case was served. The defender believes and avers that no debt is due to the pursuer in respect of the bill founded on, the same having been paid or otherwise extinguished by arrangement between the pursuer and the said James Robertson. In reference to the counter statement, it is explained that the first marking of interest was written by the defender at James Robertson's request, by whom the interest is supposed to have been paid. It was not paid by the defender. The second marking of payment of interest, which has been deleted, is in the handwriting of the said James Robertson. The present action has not been raised with the consent or authority of the pursuer. It has been raised at the instigation of the said James Robertson, who is the real *dominus litis*."

The Sheriff-Substitute (HALLARD) held the defender's statements to be irrelevant, and found for the pursuer.

The Sheriff (DAVIDSON) recalled the interlocutor, and allowed the defender a proof before answer of his averments by the writ or oath of the pursuer. She appealed, and the question before the Court was as to the competency of the appeal.

Argued for her, that the appeal was a competent one in terms of sec. 24 of the Sheriff Court Act 1853, and secs. 53, 54 of the Court of Session Act 1868, that the Sheriff's judgment was a final one within the meaning of those Acts, and one disposing of the whole cause, and that if his judgment were adhered to the pursuer would lose the advantage of any objection on the question of