want of the insertion of the name of a witness in the record—a witness who was not merely an incidental witness, but a witness *in causa* whose evidence was thought by the prosecutor to be necessary.

LORD LOW—I arrive at the same conclusion. I confess, however, that I have difficulty in reading section 300 of the Act in the way in which your Lordship in the chair has read it. According to the natural meaning of the language used I should regard the provision relating to bye-laws as applying only to the purposes mentioned, exclusive of that contained in the last clause, and the last clause as meaning that so far as bathing without the use of machines was concerned, the Magistrates should have the power of regulating times and places when and where that might be done without any bye-law.

Indeed, I do not see how the provisions of the last clause could be carried out by a bye-law. It was suggested that the Magistrates should have framed regulations, and that these should have been embodied in a bye-law. That, however, would have been regulating the matter not by the Magistrates but by bye-law. Again, the so-called bye-law which has been passed does not advance matters at all, because it simply throws back the power of making regulations to the Magistrates, which is exactly what the clause in the statute had done.

I therefore think that the bye-law was not authorised by the statute, and that the complaint being laid upon the bye-law is bad.

But however that may be, I agree that there is sufficient ground here for quashing the conviction in the omission from the record of proceedings of the name of an essential witness.

The Court suspended the conviction.

Counsel for the Complainers — D. P. Fleming. Agent—George Stewart, S.S.C.

Counsel for the Respondent—D. Anderson. Agents—Alexander Campbell & Son, S.S.C.

COURT OF SESSION.

Saturday, November 24.

SECOND DIVISION.

[Sheriff Court of the Lothians and Peebles at Edinburgh.

LINDSAY *v.* J. & G. COX, LIMITED.

Expenses—Summary Proceedings — Limitation of Expenses—Expenses of Successful Respondent not Limited by Summary Jurisdiction (Scotland) Act 1881 (44 *and* 45 *Vict. c.* 33), *sec.* 4, *and Schedule A.*

Section 4 and Schedule A of the Summary Jurisdiction (Scotland) Act 1881, which regulate the expenses in complaints and proceedings instituted under the Summary Jurisdiction Acts apply only to the prosecutor's and not to the respondent's expenses, who, under section 5, is entitled to such expenses as the Court may consider reasonable.

Expenses—Summary Proceedings—Method and Time of Awarding Expenses—"Not at any Subsequent Time" — Remit to Auditor — Summary Jurisdiction (Scotland) Act 1881 (44 *and* 45 *Vict. c.* 33), *sec.* 5.

Section 5 of the Summary Jurisdiction (Scotland) Act 1881 provides that in "all proceedings under the Summary Jurisdiction Acts in every conviction, order, decree of absolvitor, decree dismissing the complaint, or other decree disposing of the complaint, and not at any subsequent time," the Court may, when a finding of expenses is competent, find such expenses as it considers reasonable.

Held that while the Court must fix the amount of expenses at the time of finally disposing of the complaint, it may delay judgment, and if necessary adjourn the diet for the purpose of considering the question, and may also remit the account of expenses to the Auditor for his report thereon.

Section 22 of the Summary Procedure (Scotland) Act 1864 (27 and 28 Vict. c. 53) provides as follows:—"In all cases of complaint under this Act for the recovery of any penalty, it shall be lawful for the Court to make an award of expenses without the same being prayed for in such complaint, but expenses shall not be awarded to or against any public prosecutor or party prosecuting under the authority of any Act of Parliament for the public interest, unless such award of expenses is authorised by such Act. . . ."

The Summary Jurisdiction (Scotland) Act 1881 (44 and 45 Vict. c. 33) provides as follows:—

Sec. 4—"*Regulation of Expenses.*—The costs and expenses of all complaints and proceedings instituted under the Summary Jurisdiction Acts shall be regulated by the table of fees contained in the Schedule A to this Act annexed, and no other or higher fees shall be allowed on taxation, and where expenses shall be awarded against a respondent the decree shall be subject to the following limitations:—(*a*) Where the penalty or penalties imposed shall not exceed twelve pounds, the total expenses decerned for shall not exceed three pounds; (*b*) Where the penalty or penalties imposed shall not exceed twelve pounds, but it appears to the Court that the reasonable expenses of the complainer's witnesses, together with the other expenses, exceed the sums hereinbefore allowed, the Court may direct the expenses of such witnesses to be paid in whole or in part out of the penalty.

"The directions contained in the schedule shall be deemed to be part of this enactment.

Sec. 5—"*Amount of Expenses to be Stated in Conviction or Decree.*—In all proceedings under the Summary Jurisdiction Acts in every conviction, order, decree of absolvi-

tor, decree dismissing the complaint, or other decree disposing of the complaint, and not at any subsequent time, the Court may, subject to the foregoing provisions, when a finding of expenses is competent, find such sum to be due in name of expenses, if any, as it considers reasonable. Expenses shall in all cases be recovered as if they formed part of the penalty, and the same diligence shall follow in case of default in payment."

SCHEDULE A.

"TABLE OF FEES.

"I.—*To the Procurator-Fiscal or Qualified Law-Agent Acting for a Private Prosecutor.*

	£	s.	d.
Framing the complaint and whole proceedings prior to trial . .	0	7	6
Each copy of complaint for service	0	1	0
Attending a trial—			
If plea of guilty	0	5	0
If proof led	0	7	6
If case adjourned for second diet	0	5	0

"II.—*Court or Clerk's Dues.*

For each complaint	0	2	6
For whole proceedings at trial—			
If plea of guilty	0	2	6
If proof led	0	5	0
Extract of any judgment, conviction, or order	0	1	0
To the bar officer for whole proceedings—			
If plea of guilty	0	0	6
If proof led	0	1	0

"III.—*Officer's Fees.*

For serving each complaint and returning execution . . .	0	1	6
For citing each witness . . .	0	0	6
For apprehending a respondent or witness	0	2	6
For each hour the prisoner is necessarily in the custody of the officer beyond the first . .	0	1	0
For travelling expenses, poinding, sale, or arrestment, the same allowances as in 1 Vict. c. 41.			

"In any case where a concurrent or assistant is required he will be allowed a sum equal to two-thirds of the fee payable to the officer for the same business. Where an officer or concurrent has to charge for a conveyance the mileage rates will not be allowed."

The Water of Leith Purification and Sewerage Act 1889 (52 and 53 Vict. cap. cvi.) provides (sec. 104)—"All offenders against any of the provisions of this Act . . . may be prosecuted summarily, and all penalties and forfeitures . . . may be recovered . . . in the manner provided by the Summary Jurisdiction (Scotland) Acts 1864 and 1881, or in any Act amending those Acts, together with the expenses of prosecution and conviction, and all damages and expense occasioned to the Commissioners by the offence complained of."

This was a stated case on appeal from the Sheriff Court of the Sheriffdom of the Lothians and Peebles at Edinburgh (acting Sheriff-Substitute Graham), by J. & G. Cox, Limited, Gorgie Mills, Gorgie, Edinburgh, against Henry Inglis Lindsay, Writer to the Signet, Edinburgh, clerk to the Water of Leith Purification and Sewerage Commissioners, incorporated by the Water of Leith Purification and Sewerage Act 1889, and acting under that Act, and the Water of Leith Purification and Sewerage (Additional Powers) Act 1893, as amended by the Edinburgh Extension Act 1896.

The case stated—"This is a complaint under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, and the Criminal Procedure (Scotland) Act 1887, at the instance of the respondent, to have the appellants J. & G. Cox, Limited, found guilty of six several offences within the meaning of the said Water of Leith Purification and Sewerage Act 1889, section 66, in so far as it was alleged that they did on six occasions, viz., on the 3rd, 4th, 7th, and 8th days of May, and on the 2nd and 3rd days of July 1906, cause or suffer noxious, polluting, and discolouring matter to flow or pass into the mill lead at Gorgie Mills foresaid, which mill lead is connected with the river of the Water of Leith, in such manner that the said noxious, polluting, and discolouring matter was carried through such mill lead directly into the said river, whereby the said J. & G. Cox, Limited, were stated to be liable on summary conviction in respect of each of said six offences to a penalty not exceeding £50.

"The trial of the cause, at which both parties were represented by counsel, commenced on Tuesday, 7th August, and was continued on Thursday, 9th, and Friday, 10th August 1906, when a number of witnesses on both sides, including skilled and expert witnesses, were examined.

"On Tuesday, 21st August 1906, I found the appellants not guilty of the offences charged, and assoilzied them *simpliciter*. Thereupon the agent for the appellants moved for expenses, and asked the Court to remit their account of expenses to the Auditor for taxation, and to find them entitled to fees for counsel and expert witnesses.

"The said Water of Leith Purification and Sewerage Act 1889 (section 104) authorises the Court to award expenses to the prosecutor, and therefore I held (on the authority of *Todrick* v. *Wilson*, March 13, 1891, 18 R. (J.C.) 41, 28 S.L.R. 724) that it was competent to award expenses against him, and I would have given the appellants full expenses if competent. But I was of opinion that by section 5 of the Summary Jurisdiction (Scotland) Act 1881 expenses, if given, must be awarded and fixed by the inferior judge when disposing of the complaint and 'not at any subsequent time,' and that it was not competent for me to remit the account of expenses to the Auditor for taxation. I was further of opinion that the appellants were not entitled to get expenses on a higher scale than the complainer (now the respondent) would have got had he succeeded, and that the appellants' expenses must be regulated by section 4 and Schedule A of the said Act of 1881 so far as applicable. I therefore fixed the amount of expenses due by the complainer to the appellants at £7, 7s."

The questions of law for the opinion of the

Court were—"(1) Was the Sheriff-Substitute bound to award and fix the amount of expenses found due to the appellants at the time of disposing of the complaint? or was he entitled to remit the account of such expenses to the Auditor of Court to tax and report? (2) Where a respondent in the Summary Court is found entitled to expenses must they be limited in amount and regulated by section 4 and Schedule A of the Summary Jurisdiction (Scotland) Act 1881 so far as applicable?"

[At the hearing of the appeal the respondent objected to the competency of the appeal on the ground that it should have been taken to the High Court of Justiciary — Summary Jurisdiction (Scotland) Act 1881, sec. 9, sub-sec. 4. He admitted, however, that the case was indistinguishable from *Braid* v. *Swan & Sons, Limited*, March 4, 1903, 5 F. 579, 40 S.L.R. 426, and *Lauder* v. *Hurst, Nelson, & Company, Limited*, November 7, 1904, 7 F. (J.C.) 65, 42 S.L.R. 49, which he submitted were wrongly decided. The Court, without calling upon the appellants, repelled the objection.]

Argued for the appellants—This was a case in which the Sheriff was, by section 104 of the Leith Purification and Sewerage Act 1899, and section 22 of the Summary Procedure (Scotland) Act 1864, impliedly entitled to make an award of expenses against a prosecutor and in favour of a respondent—*Walker* v. *Bathgate*, June 4, 1873, 11 Macph. 956, 10 S.L.R. 441, 2 Coup. 460; *Todrick* v. *Wilson*, March 13, 1891, 18 R. (J.C.) 41, 28 S.L.R. 724, 3 White 28. There was nothing in section 22 or any other section of the Act of 1864 to limit the amount of these expenses, so that if there were a limit it must have been imposed by subsequent legislation, and it was suggested that this was done by section 4 and Schedule A of the Summary Jurisdiction Act 1881. An examination of the section and schedule, however, disclosed that they only dealt with a complainer's and not a respondent's expenses, and that it was to protect respondents and not to benefit complainers that they were introduced. Thus the expenses in section 4 were expressly stated to be expenses of "complaints," and the items set forth in Schedule A were ludicrously inapplicable to a respondent's expenses. The only limitations or qualifications imposed were those provided in section 5, viz., that the expenses must be "reasonable," and fixed at the time the complaint was finally disposed of; that, however, did not stand in the way of a remit to the Auditor if desired by the Sheriff. Judgment could be delayed until the report was received.

Argued for the respondent—Under section 22 of the Act of 1864 expenses could only be awarded when expressly authorised. They were not, in the case of a respondent, so authorised by the Leith Purification and Sewerage Act 1899, and therefore in this case no expenses could be awarded to the appellants (respondents in Court below). Even, however, upon the appellants' own showing, a respondent's right in the case of a prosecution under the Act of 1889 was only implied, and was therefore derived from the prosecutor's, *ergo* it could not be greater than his, and must therefore be regulated by section 4 and Schedule A of the Act of 1881. A remit to the Auditor was out of the question, section 5 of the Act of 1881 expressly providing that the award of expenses must be made at the time of disposing of the complaint and not subsequently.

LORD JUSTICE-CLERK—The provisions of the Act of 1881 bearing on the questions before us are certainly very confused, but I am of opinion that the first question of law should be answered in the affirmative in both branches. Section 5 distinctly provides that the Sheriff is bound to fix and award the amount of expenses found due at the time of disposing of the complaint, and not at any subsequent time. But that does not prevent him taking time to consider the question of expenses before disposing of them. In most cases a few minutes would be sufficient to determine what sum the Sheriff would consider reasonable under the Act. In other cases fuller consideration might be required, and in these cases all he would have to do would be to reserve his judgment and adjourn the diet until he had time to consider the question, and then to pronounce judgment and fix the award of expenses. The next question is whether the Sheriff-Substitute was right in holding that the respondents in the complaint were not entitled to get expenses on a higher scale than the prosecutor would have got had he succeeded, and that the amount was to be ascertained by a reference to Schedule A. I have no hesitation or doubt in answering that question in the negative. There is nothing said in section 5 referring to Schedule A; it is only said that the Court shall pronounce such finding in the matter of expenses as it considers reasonable. The Judge cannot in the case of the prosecutor consider anything to be reasonable which goes beyond the different items in the table of fees stated in Schedule A, because that is settled by the Act of Parliament in section 4. He may tax the prosecutor's expenses by bringing them down below that figure if he thinks proper; but I find no reference to the respondent's expenses at all in this Act.

Mr Fraser put forward a contention which would have had great force if Schedule A had been applicable to a respondent's account of expenses. He contended that as section 4 and Schedule A limit the prosecutor in the extent of the expenses he may recover, the same limitation must apply to the respondent's expenses. I do not think that that could be held to be reasonable unless it could be shown that the items in the table of fees in the schedule were applicable to the respondent's account of expenses. I do not think they are applicable; indeed they are wholly inapplicable. A large proportion of the respondent's legitimate expenses would be for things not contained in the schedule. If he were limited to the items in the schedule, he

would be practically excluded from getting any expenses at all, and I am of opinion that a construction leading to such a result is contrary to a reasonable interpretation of the Act of Parliament. If the prosecutor loses his case the Sheriff has to pronounce judgment deciding that the prosecutor ought not to have brought the case; and then the question comes to be, what are the expenses which he may think reasonable to award to the respondent? Are they not just such reasonable expenses as would ordinarily be incurred in a defence, and not such expenses as would be allowed to the prosecutor under the schedule? I am, therefore, of opinion that the second question must be answered in the negative. In these circumstances, I think the proper and reasonable course to follow is to remit to the Sheriff to assoilzie the respondents of new, and to make such an award of expenses as he considers reasonable.

LORD STORMONTH DARLING—The Sheriff-Substitute at the end of the proceedings, when he pronounced his judgment dismissing the complaint, was of opinion that he ought to award expenses to the respondents, and he would have awarded full expenses unless he had felt himself barred by a construction of the Act of 1881. The view of the statute taken by the Sheriff-Substitute was, in my opinion, a mistaken one. By section 5 of the Act he was undoubtedly directed to dispose of the question of expenses at the same time as he pronounced his final order. That order might be a conviction or a decree of absolvitor or of dismissal, or any other decree disposing of the complaint; and he was directed to deal with the expenses then and not at any subsequent time. What was the difficulty which weighed with him? He seems to have thought that the section required him to modify the amount of the expenses there and then. I do not think he was so required. I think at that time it was perfectly open to him, if a finding of expenses was competent at all, and he could therefore award them, to fix their amount by the ordinary course of remitting to the Auditor to tax the account of the respondent's expenses. I am very clearly of opinion on the second point that the respondent was not in any way limited by section 4 or Schedule A of the Act to frame his account on the same footing as the complainer, because the two things are not in any way commensurable. I do not see how you could regulate the respondent's expenses by the scale of fees which is deemed by the Legislature to be appropriate to the prosecutor; and it seems to me that there is nothing in the Act which says that that shall be done. The scale of fees in Schedule A, as your Lordship has shown, is applicable directly in every particular to the prosecutor's expenses and not at all to the respondent's. I am quite of the same mind as your Lordship upon that, and have nothing to add to what has been said. I agree that the first question should be answered substantially in the affirmative, although I think we may have to add an explanatory finding. The Act of Parliament directs that the Court shall award such expenses as it shall consider reasonable. If the Sheriff be of opinion that a remit to the Auditor is a proper way of informing his mind as to what is reasonable, I think he would be acting in accordance with the Act if he made a remit there and then to the Auditor, but in that case it would be proper that he should delay pronouncing the formal order disposing of the complaint till he receives the Auditor's report. Therefore I think it would be perfectly just that if we send the case back to the Sheriff he should still remit; but it is plain enough that the remit should be by him and not by any other Court. And the Auditor will be in no way bound by Schedule A. It is sufficient that we negative the second question, leaving it to the Sheriff to take what course he pleases, either by fixing the amount himself or by making a remit, if he thinks that the best way to inform his mind as to amount.

LORD LOW—I am of the same opinion. I think that the table of fees annexed to the Act is plainly not applicable to the case of a successful respondent who gets his expenses. I agree with your Lordship in the chair that these enactments in the 4th and 5th sections of the Act are extremely difficult of construction. In the fourth section apparently it is contemplated that the complainer's expenses shall be liable to taxation; but then in the 5th section it is provided in quite unambiguous terms that in all proceedings under the Act when a conviction or decree of absolvitor or other order is pronounced the Court shall then, and not at any subsequent time, dispose of the question of expenses—a direction which it is very difficult to reconcile with the idea which appears in the previous section that there might be or should be taxation. Probably the answer to that is that there is really no practical difficulty in the way. In the case of a conviction there would, I imagine, in the general case, be no difficulty in modifying a sum which would be substantially that to which the complainer was entitled to under the table of fees. But in the case of a respondent a very great deal more consideration may be required, and I take it that the solution of the difficulty is that if the Sheriff or the magistrate has not the material to enable him at the time to make up his mind what is a reasonable sum to allow, it is always in his power to adjourn the case. I see in this particular case that the proof appears to have been concluded on 10th August 1906, and the Sheriff-Substitute then adjourned the diet to 21st August for the purpose, I understand, of considering the evidence and of making up his mind as to what decree he should pronounce. Now, of course, during that period he could very easily have acquired such information as would have enabled him to make up his mind as to what was a reasonable sum to allow to the respondents in name of expenses. I do not think therefore that there is any practical

difficulty in working out a solution of the enactments in these two sections, and so long as effect is given to the intention of the Act I think it is not very material what precise course is adopted.

The Court pronounced this interlocutor—

"Answer both branches of the first question in the affirmative, subject to the following finding and declaration, viz., that it would have been competent for the Sheriff-Substitute when he had come to a decision on the evidence to remit the account of the appellants' expenses to the Auditor to tax and report, and to have delayed giving formal judgment till he had fixed the amount of the expenses, either as ascertained by report from the Auditor or as otherwise settled by himself, and if necessary to adjourn the diet in order to have the amount of expenses taxed by the Auditor or otherwise fixed, and thereafter to have assoilzied the appellants, and found them entitled to the sum so fixed as expenses: Answer the second question in the negative: Find and declare accordingly and decern: Recall the interlocutor of the Sheriff-Substitute of 21st August 1906, and remit to him to find the appellants entitled to expenses, and to fix the amount thereof either by remit to the Auditor or otherwise, and having so fixed the amount of said expenses, of new to find the appellants not guilty of the offences charged, to assoilzie them, and decern in their favour against the respondent for the amount of the expenses as fixed: Find the appellants entitled to expenses since 21st August 1906, and remit," &c.

Counsel for Appellants — Grainger Stewart — Pringle. Agents — Macpherson & Mackay, S.S.C.

Counsel for Respondent—Cooper, K.C.—A. A. Fraser. Agents—J. K. & W. P. Lindsay.

HIGH COURT OF JUSTICIARY.

Tuesday, November 20.

(Before the Lord Justice-Clerk, Lord Stormonth Darling and Lord Low.)

CRAWFORD *v.* HARDING.

Justiciary Cases — Public Health — Food and Drugs Acts—Adulteration—Sample of Milk in Course of Delivery—Fair Sample—Sale of Food and Drugs Act Amendment Act 1879 (42 *and* 43 *Vict. cap.* 30), *sec.* 3—*Sale of Milk Regulations* 1901.

A, a dairy farmer, was under contract to supply to B, a dairyman, a daily quantity of sweet milk. In fulfilment of the contract A supplied from his farm, half-a-mile distant, 22 gallons of milk contained in three cans, two of which had a capacity of 8 gallons each, the third of 6 gallons. It was not proved that the cans had not been at rest. It was proved that the oscillation in being transported would appreciably prevent the milk fat of the milk in the cans from rising to the top. The dairyman provided two vessels for the reception of the milk. Into one of these vessels was poured the whole contents of the two 8-gallon cans and 4 gallons from the 6-gallon can, making in all a quantity of 20 gallons. Into the second vessel was poured the remaining 2 gallons from the 6-gallon can. Samples taken from these two vessels proved on analysis to contain a percentage of milk fat of 3·05 and 2·8 respectively, the standard required by the Regulations of the Board of Agriculture of 1901 being 3 per cent. A was prosecuted in respect of the latter of the samples under the provisions of section 3 of the Sale of Food and Drugs Act Amendment Act 1879. He was convicted and fined.

Held, on appeal, that the sample was not a fair sample of the contents of the 6-gallon can, and conviction *quashed.*

The Sale of Food and Drugs Act Amendment Act 1879 (42 and 43 Vict. cap. 30), section 3, provides:— "Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction and at the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk; and such officer, inspector, or constable, if he suspect the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analysed, and the same shall be analysed, and proceedings shall be taken, and penalties on conviction be enforced, in like manner in all respects as if such officer, inspector, or constable had purchased the same from the seller or consignor under section thirteen of the principal Act." [The principal Act is the Sale of Food and Drugs Act 1875 (38 and 39 Vict. cap. 63)].

Alexander Crawford, Boylestone Farm, Neilston, Renfrewshire, was charged in the Sheriff Court at Paisley at the instance of Charles Harding, Chief Constable of Renfrewshire, and inspector under the Sale of Food and Drugs Acts for the Burgh of Barrhead, with a contravention of these Acts, particularly section 6 of the Act of 1875 and section 3 of the Act of 1879.

The complaint, *inter alia*, set forth that the accused "having in pursuance of a contract of sale with the Barrhead Co-operative Society, Limited, having their registered office at No. 6 Graham Street, Barrhead, in the said county, and carrying on a dairy business at No. 9 Paisley Road, Barrhead, aforesaid, on the 8th day of May 1906 forwarded to the said Barrhead Co-operative Society, Limited, a quantity of a