The only element of hesitation which I have found in this case rests on the provisions of the Local and Personal Act, called the Annan Fisheries Act, 1841. I do not wish to give an absolute opinion on the question regarding it which has necessarily arisen in this process, but I am inclined to read that statute as not having any application to the legitimate exercise of the right of white-fishing, which is not once referred to in it from beginning to end of its provisions. I read it as directed solely, not against the exercise of other and admitted rights, but against wanton acts of encroachment without a title, intended to have a direct and injurious effect on the salmon-fishing. The 28th section, on which so much stress was laid, refers solely to devices used by poachers and others, whether successfully or not, to prevent and obstruct the passage of fish; and without going through its terms in detail, I think it is plain from its phraseology that such is its sole intention. I am not disposed to read a private, a local and personal, Act, which bears no express relation to the subject, as taking away an acknowledged right in the public which has been uniformly possessed and exercised both before and after the statute. There is one clause in the Act which of itself seems to lead to this conclusion. It is the 31st section, which provides—"That nothing in this Act contained shall be deemed or construed to alter, demolish, or destroy any stake or raise net, fish-lock, coop, bag, or other work which shall have been or may hereafter be lawfully erected in or upon the shores or seacoast aforesaid adjacent to the mouth or entrance of the said river Annan, provided also that such stake or raise net, fish-lock, coop, bag, or other work, are rendered incapable of taking fish after the 25th day of September annually, and are removed wholly from off the shores aforesaid until the 10th of March," &c. It will be observed that there are no words whatever confining this clause to nets or engines intended for the taking of salmon, and yet it is perfectly clear that neither in the enactment nor in the proviso are the stake-nets which are used in white-fishing included.

I am aware that in one instance, at least, the contrary has been found, in a possessory case in the Sheriff Court of Dumfries. If I were of opinion that the 28th section of the Annan Fisheries Act included the right of white-fishing by stake-nets, I should have come to a different conclusion in this case. No doubt stake-nets may be constructed, as any other lawful act may be done, in such a way as to come within the provisions of the clause. If indeed the right of white-fishing is only used as a pretext for doing the acts prohibited by the statute, such an abuse of the right will come within its provisions. But while the right is exercised in good faith and legitimately, it is in no respect abridged by the passing of the Act.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutor of the Lord Ordinary reclaimed against, as regards the three first findings: *Quoad ultra* recal said interlocutor, and in place thereof find and declare that the pursuer, as one of the public, has right to fish for white fish, including flounders and all other kinds of fish, except-ing salmon and fish of the salmon kind, in the sea and along the shore of the Solway Firth, and in particular in that part thereof opposite the parish of Cummertrees, and that by means of stake or other nets or engines fixed in the shore, in such places and of such a description as not to interfere with the defenders' salmon-fishing; and repel the defenders' plea so far as opposed to this declaratory finding, under reservation, however, of the right of the parties respectively to take such legal proceedings, the one against the other, as may be competent for preventing all undue or improper encroachment on or interference with his or their respective rights of fishing; and in regard to the action otherwise, dismiss the same, and decern: Find the pursuer entitled to expenses since the date of the Lord Ordinary's interlocutor, and find no other expenses due to or by either party; and remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer (Reclaimer) — Mair—Rhind. Agent—W. Officer, S.S.C.

Counsel for Defenders (Respondents)—R. Johnstone—Keir—J. D. Dickson. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, February 5.

FIRST DIVISION.

[Lord Young, Ordinary.

STEEL & CRAIG *v.* STATE LINE STEAMSHIP COMPANY.

Expenses—Process—Where a New Trial was Granted owing to Omission in the Conduct of the First.

In a maritime case an issue was adjusted and a special verdict taken at the trial and applied by the Court without any question as to the unseaworthiness of the vessel having been raised, the whole argument being directed to the effect of the clauses of the bill of lading applicable to the cargo, the injury to which upon the voyage had led to the raising of the action against the shipowners. The House of Lords, on an appeal against the judgment of the Court of Session ordering the verdict to be entered for the defenders, remitted the case for a new trial on the question of seaworthiness. At that second trial the jury found for the pursuers, and the verdict was entered for them. *Held* that the pursuers, being alone to blame for the omission which had taken place, were liable in the expense of the first trial and of the discussion following thereon.

This was the sequel of the case reported *ante*, March 16, 1877, vol. xiv. 432, 4 R. 657, and in the House of Lords, July 20, 1877, vol. xiv. 734, As directed by the House of Lords, the case was sent for a new trial to determine the question of seaworthiness, and on that question the jury found for the pursuers.

The averment in the 5th article of the condescendence, referred to in the Lord President's opinion (*infra*) and said to raise the question of sea-

worthiness, was this:—"When the said vessel left New York she was not in a seaworthy condition, in respect one of her side ports was open, or at least not sufficiently secured or fastened to prevent the influx of water into the hold; and the said port was allowed to remain open or insecurely fastened through the gross carelessness of those in charge of the vessel."

The pursuers now asked the Court to enter the verdict for them, and to find them entitled to expenses. The defenders resisted the claim for the expenses of the first trial and of the discussion following thereon, on the ground that the pursuers ought to have taken care that the question of unseaworthiness was raised by the issue, and ought not to have agreed to the adjustment of any special verdict without a finding on that point. It was no part of the defenders' duty to have raised that question.

At advising—

LORD PRESIDENT—In this case a great deal of unnecessary expense has been caused by a miscarriage, for which one or both of the parties must be responsible. We are in this unfortunate position, that while we find all the Judges in this Court and all the noble and learned Lords who delivered judgment in the House of Lords concurring in the exposition of the law applicable to this case, yet a new trial was ordered because no finding as to the fact of unseaworthiness appeared in the special verdict.

Now, in cases of maritime contract the fact of unseaworthiness is as a rule expressly put in issue. In this case, if the pursuers had relied on unseaworthiness, we should probably have made them put that in their issue; but my impression at the time of adjusting the issue certainly was that the averments as to unseaworthiness were not insisted in, and for this reason among others, that they were irrelevant; and I remain of that opinion still. If any one analyses the statement in the 5th article of the condescendence he will find, I think, that the conclusion is irresistible that the port-hole was accessible, and could have been closed at any time during the voyage, but that through the negligence of the crew it was not closed. That does not constitute unseaworthiness. We were at that time given to understand that unseaworthiness was not in the case; and, quite consistently with that, at the trial the counsel for the pursuers consented to adjust a special verdict on the footing that there was no such element in it. I cannot conceive that any one is to blame for the omission but the pursuers. They were founding on unseaworthiness, as they tell us now, and it was certainly no part of the defenders' case to see that that was put in the special verdict. Afterwards parties came here for the application of the verdict. The pursuers might even then have applied to have the verdict set aside as having been adjusted on a misapprehension. But at the discussion that then took place it was not alleged on either side that there was unseaworthiness in the case. The question then comes to be, whether the party who was in fault throughout is to pay the expenses? I think in that view that it is only reasonable and just that the defenders should pay these.

LORD DEAS, LORD MURE and LORD SHAND concurred.

The Court pronounced this interlocutor:—

"Apply the verdict found by the jury on 11th January 1878, and in terms thereof decern against the defenders for payment to the pursuers of £2793, 4s. 6d., with interest thereon at 5 per cent. per annum from 14th September 1875 till payment: Find the defenders entitled to the expenses of the first trial and of the discussion on the application of the special verdict: Find the pursuers entitled to the other expenses of the cause, including the expenses of the second trial: Allow accounts of the said expenses now found due to be lodged, and remit to the Auditor to tax the said accounts respectively, and to report; and find no expenses due since the date of the second verdict."

Counsel for Pursuers—Lord Advocate (Watson)—Balfour—Mackintosh. Agent—John Henry, S.S.C.

Counsel for Defenders—Asher—Jameson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, February 5.

SECOND DIVISION.

[Lord Young, Ordinary.

BOGIE'S TRUSTEES *v.* BROWN AND OTHERS.

Succession — Legacy — Uncertainty — "Ragged Schools."

A testator directed his trustees to pay a share of the rents of his estate annually during the subsistence of a lease for thirty years to "The Ragged Schools in Dundee."—*Held*, in a competition between the "Dundee Industrial Schools Society" and the "Mars Training Ship Institution," which was conducted on board a vessel permanently moored in the Tay, not far from Newport, that both charities were entitled to participate in the bequest so long as the existing circumstances of each remained the same.

Alexander Bogie of Balass and Newmill died on 1st June 1870, leaving a trust-disposition and settlement, in which, *inter alia*, he provided that the rents of his properties of Balass and Newmill (amounting to £550) during the subsistence of a lease of thirty years should be divided annually among certain charities, one share to be given to "the Ragged Schools in Dundee."

The question in this action (which was a multiplepoinding raised by Mr Bogie's trustees) was, Whether the Mars Training Ship, which was anchored in the Tay, in the immediate vicinity of the town, and within the precincts of the harbour of Dundee, though without the burgh and parish, came under the description of "Ragged Schools in Dundee," and was entitled to share in the bequest? The other claimant was the secretary of the Dundee Industrial Schools Society, which schools were alleged to be popularly known as "The Ragged Schools."

The Mars Training Ship Institution was licensed on 30th September 1869 (immediately before the date of the testator's settlement), under the provisions of the Industrial Schools Act 1866. There were on board about 300 boys of the