of the Lord Ordinary as to whether a proof or a jury trial should be allowed. But although that is the general rule, this is not a case in which the rule is applicable. Apparently the Lord Ordinary's reason for allowing a proof was because he was of opinion that while part of the pursuer's averments were relevant the other part was not. Now, I am not satisfied that the whole case for the pursuer is not a relevant case. Presumably, although he does not say so, if the Lord Ordinary had been of this opinion he would have allowed the case, which does not appear on the facts to be a complicated one, to go to a jury. Accordingly I am in favour of recalling the Lord Ordinary's interlocuter and allowing the issue proposed, as to the form of which no objection was taken.

LORD STORMONTH DARLING, LORD LOW, and LORD ARDWALL concurred.

The Court recalled the interlocutor reclaimed against, and allowed an issue.

Counsel for the Pursuer (Reclaimer) — Morison, K.C. — A. Moncrieff. Agents — Laing & Motherwell, W.S.

Counsel for the Defenders (Respondents) —Constable. Agents—Bonar, Hunter, & Johnstone, W.S.

Saturday, June 15.

SECOND DIVISION.

(SINGLE BILLS.)

DET FORENEDE DAMPSKIBS SELSKAB (OWNERS OF S.S. "OLGA") *v.* SOMERVILLE & GIBSON (OWNERS OF S.S. "ANGLIA") AND VAN EIJCK & ZOON AND OTHERS (OWNERS OF CARGO ON BOARD S.S. "ANGLIA").

(*Ante* March 16, 1905, 42 S.L.R. 439, 7 F. 739, and July 20, 1906, 43 S.L.R. 841, 8 F. (H.L.) 22.)

Expenses—Ship—Collision—Limitation of Liability—Collision Occasioned by Fault of Both Vessels—Petitioners for Limitation of Liability Found Liable in Expenses of Claims—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 503 *and* 504.

The owners of a ship brought a petition under the 503rd and 504th sections of the Merchant Shipping Act 1894, for limitation of their liability for loss caused by a collision in which both ships were found to be in fault. *Held* that the owners of the other ship, and the owners of the cargo on the other ship, were entitled to the expenses of their respective claims, and relative procedure in the limitation proceedings, against the petitioners, and that the fact that both ships were to blame did not affect the matter.

This case is reported *ante ut supra.*

On 18th February 1903 a collision occurred between the s.s. "Olga" and the s.s. "Anglia." Cross actions of damages were brought, and the Court held both ships to blame, and the loss of the owners of the "Anglia" was found to be £14,687, and that of the owners of the "Olga" £387, 10s. 11d., the total loss thus being £15,074, 10s. 11d. Each ship was debited with half that sum, and after crediting the "Olga" with the amount of her loss, the Court decerned against her for the balance, viz., £7149, 14s. 7d. Thereafter the owners of the "Olga" petitioned under sections 503 and 504 of the Merchant Shipping Act 1894 for limitation of their liability. The owners of the cargo on board the "Anglia" lodged a claim for one-half of the value of the cargo which had been lost, and disputed with the owners of the "Anglia," who claimed to rank for the full amount of their decree, the correctness of the value of the "Anglia" as found by the Court in the previous proceedings, and claimed, and eventually were held to be entitled to, reopen the question of her value.

[Up to this point the case is reported *ante ut supra.*]

Thereafter both claimants moved for the expenses of lodging their respective claims and relative procedure in the limitation proceedings. They argued that the limitation proceedings were an advantage to the petitioners as preventing the expense of defending separate actions, and that it was settled that the petitioning ship was liable for the expenses of lodging claims. The cargo owners, alternatively, argued that in any case the fault of the "Anglia" did not affect them. Reference was made to *Burrell* v. *Simpson & Company*, July 19, 1877, 4 R. 1133, 14 S.L.R. 667; *Carron Company* v. *Cayzer, Irvine & Company*, November 3, 1885, 13 R. 114, 23 S.L.R. 81; and Marsden on Collisions, p. 161.

The petitioners opposed the motion, and argued that the rule that the petitioning ship paid the expenses of lodging claims did not apply where both ships were in fault, and that in the cases cited only one ship had been in fault. They referred to *Miller and Others* v. *Powell and Others*, July 20, 1875, 2 R. 976, at 979.

LORD JUSTICE-CLERK—Whatever might have been our opinion if this question were now before us for the first time, I think the matter is practically settled by authority in the case of the *Carron Company* (1885, 13 R. 114). The Lord President observes that a party who has presented a petition for limitation of liability is bound to pay the expenses of the procedure, for the reason that the procedure is rendered necessary by the fact of the collision occasioned through his fault. In the present instance the collision was occasioned by the fault of the petitioners' vessel and the fact that the "Anglia" was also to blame does not seem to me to matter at all in the question before us. The owners of the "Olga" appeal by petition under Act of Parliament in order to limit their liability, and to save themselves from actions which would be

raised against them, and to which they would otherwise have had no defence. In such circumstances I think it is perfectly right that they should pay the expense of claims lodged in the petition.

LORD ARDWALL—I concur. I think this matter is settled by invariable practice not only in Scotland but also in England, where there are many more cases of this nature than in our Courts. Further, I think that the rule as laid down in these cases is founded on good sense and equity. The petition is presented by the ship or one of the ships which is to blame for a collision in order to get rid of full liability for damage. It is presented purely in the interest of the shipowner, who thereby escapes paying full damages, and the expenses of many actions which might have been brought against him. I think that the fund to which liability has been limited should not be encroached upon by the expenses of the limitation petition, and that the petitioner should pay the expenses of the claimants in these proceedings, excluding of course all expenses caused by the competition between the various claimants in which he has no interest and for which he has no responsibility.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court pronounced this interlocutor—

". . . Find the claimants Robert Somerville and another, and C. A. Van Eijck & Zoon, entitled to the expenses of their respective claims and relative procedure in the limitation proceedings against the petitioners the owners of the s.s. 'Olga.' . . ."

Counsel for the Petitioners—Hon. W. Watson. Agents—Alexander Morison & Company, W.S.

Counsel for the Claimants (the Owners of the s.s. "Anglia")—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Claimants (the Owners of the Cargo)—Spens. Agents—Boyd, Jameson, & Young, W.S.

Tuesday, June 18.

SECOND DIVISION.

[Sheriff Court at Falkirk.

CALEDONIAN RAILWAY COMPANY *v.* WALMSLEY.

Railway—Administration of Justice—Trespass—Civil Right—Crossing Railway otherwise than at a Level-Crossing—Right-of-Way Alleged as a Defence to a Prosecution—Caledonian Railway Act 1898 (61 *and* 62 *Vict. cap.* 188), *sec.* 36.

The Caledonian Railway Act 1898 enacts, section 36—"Any person who shall trespass upon any of the railways . . . belonging to or worked by the company, shall . . . forfeit and pay by way of penalty any sum not exceeding forty shillings . . . provided . . . that no person lawfully crossing the railway at any level-crossing thereof shall be liable to any such penalty as aforesaid."

A member of the public was charged under the Summary Jurisdiction (Scotland) Acts 1864 and 1881 with trespassing on a certain portion of the railway of the Caledonian Railway Company by being or passing upon the railway, and not for the purpose of crossing the same at a level-crossing, contrary to the 36th section of the Caledonian Railway Act 1898. He pleaded in defence that there was a right-of-way for foot passengers across the railway at the place in question, and the Sheriff-Substitute, on the ground that the contention was put forward *bona fide*, and not without probable grounds, and that the question of the right-of-way could not be tried in these proceedings, dismissed the action.

Held on appeal in a stated case that the respondent ought to have been convicted of the contravention charged notwithstanding his allegation of a right-of-way.

The Railway Regulation Act 1840 (3 and 4 Vict. cap. 97), enacts, section 16, *inter alia*— . . . "If any person shall wilfully trespass upon any railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said company, every such person so offending, . . . when convicted . . . shall . . . forfeit to Her Majesty any sum not exceeding five pounds, and in default of payment thereof shall or may be imprisoned for any term not exceeding two calendar months. . . ."

The Regulation of Railways Act 1868 (31 and 32 Vict. cap. 119) enacts, section 23—"If any person shall be or pass upon any railway except for the purpose of crossing the same at any authorised crossing, after having received warning by the company which works such railway, or by any of their agents or servants, not to go or pass thereon, every person so offending shall forfeit and pay any sum not exceeding forty shillings for every such offence."

The Caledonian Railway Act 1898 (61 and 62 Vict. cap. 188), section 36, is quoted in the rubric and in Lord Low's opinion.

This was an appeal by way of stated case from the Sheriff Court at Falkirk. The appellants were the Caledonian Railway Company, and the respondent was George Walmsley, saw sharper, Wallace Street, Grangemouth. The case as stated by the Sheriff-Substitute (MOFFAT) was as follows:—"This is a case brought under the Summary Jurisdiction (Scotland) Acts 1864 and 1881, at the instance of the appellants against the respondent and John Gillespie, labourer, residing with James Gillespie at 68 Forth Street, Grangemouth, charging that on the 23rd March 1906 they did trespass upon the railway belonging to the appellants, in the parish of Grangemouth