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

and county of Stirling, at a point about 396 yards or thereby to the south-west of Grangemouth Station, by being or passing upon the said railway, and not for the purpose of crossing the same at a level-crossing thereof, contrary to the 36th section of the Caledonian Railway Act 1898 (61 and 62 Vict. cap. 188).

"The case was tried before me of this date. It was stated *in limine* for the respondent that he, as one of the public, claimed a right to cross the railway at the place in question by virtue of the existence of a public right-of-way for foot-passengers. The appellants denied that there was any public right-of-way, and stated further that they were prepared to prove that the respondent and Gillespie did not follow the line of the right-of-way claimed.

"The respondents claimed that the complaint should be dismissed in respect that a substantial question of civil right was involved. I intimated that I could not at that stage determine whether there was a substantial question of civil right, and that the case must go to trial. Evidence was accordingly adduced in support of the complaint, and also for the respondents.

"The facts proved in evidence were as follows:—The respondent is employed in Messrs Brownlee's saw mills, which adjoin the railway on the west, and were opened about a year ago. There is another saw mill on the west of the railway belonging to Messrs Muirhead, opened three or four years ago. On the date libelled the respondent the said John Gilliespie, and twenty or thirty other workmen from these mills, left the mills at 9 a.m. to go home for breakfast. They live in the new town of Grangemouth, on the east side of the railway, and to cross the railway was a much shorter way home than round by the public road. On leaving the mills the men got on to the bank of a timber pond on which there is a footpath which the appellants allege is their private property, but which the respondents allege is part of a public right-of-way used by the public from time immemorial and before the railway entered Grangemouth. The men then got on to a piece of waste ground by the side of the railway without crossing any fence, passing through a space about five feet wide between Messrs Brownlee's fence and the corner of a garden belonging to the appellants. The railway at this point now consists of the Grangemouth branch line and eight railway sidings in all. The railway was begun in 1858 and at first consisted of a single line only.

"When the men were in the act of crossing the railway they were challenged by two railway servants who had been stationed there for the purpose. The respondent and Gillespie were stopped by the two railway servants and asked their names and addresses, which were given. The rest of the twenty or thirty men turned back, but the respondent and Gillespie proceeded and crossed the railway. To get off the railway ground they had to climb over a close sleeper fence fully six feet high, in which iron spikes had been driven in to assist persons climbing over said fence at the part where it is alleged the said right-of-way exists. By whom the spikes had been driven in did not appear.

"The respondent adhered substantially though not quite exactly to the line of the alleged right-of-way.

"Gillespie kept further north and deviated substantially from the alleged right-of-way.

"There is no level-crossing at or near the place in question, and there has been none since 1882. The notices warning against trespassing were duly exhibited at the nearest station and the nearest level-crossing, in terms of said 36th section of the Caledonian Railway Act 1898. A similar notice was also exhibited at the place the respondent crossed. Prior to the year 1882 there was a level-crossing at the place in question, with gates for the roadway and wicket gates at the side for foot-passengers. The appellants alleged that this was a private level-crossing for the use of the farm tenant who at that time had ground on both sides of the railway. The respondent admitted that as regards the roadway for carts, &c., the crossing was private, but alleged that a public right-of-way for foot-passengers coincided with the tenant's crossing, and that the wicket gates were for the public as well as for the tenant.

"From 1882 onwards members of the public occasionally crossed the railway at the point in question, in the belief that there existed an ancient public right-of-way dating from a time anterior to the formation of the railway, and leading from the old town of Grangemouth to Polmont Church.

"The question whether there really exists a right-of-way was not fully gone into, but I am satisfied that the contention was put forward *in bona fide* and was not frivolous or without some probable grounds.

"As the respondent had adhered substantially to the line of the alleged right-of-way, and as the question whether there was a right-of-way or not could not be tried under the present proceedings, I dismissed the case against the respondent. As Gillespie had deviated from the alleged right-of-way I convicted him and dismissed him with an admonition.

"The question of law for the opinion of the Court is—In the circumstances, ought the respondent to have been convicted of the contravention charged notwithstanding his allegation of a right-of-way?"

Argued for the appellants—The respondent should have been convicted. If a person wished to raise a question as to a right-of-way he must do so by proper process, as, for instance, by applying to the Sheriff under section 54 of the Railway Clauses Act 1845, or by bringing the matter under the notice of the District Committee, or of the County Council, and getting them to take the appropriate steps to vindicate the right-of-way. Here the respondent, as being or passing upon the railway, which was the definition of trespass given in section 23 of the Regulation of Railways Act 1868, was trespassing within the meaning of section 36 of the Caledonian Railway Act 1898, unless he could bring himself

within the proviso of that section and maintain that this was a level-crossing. To maintain this in view of the fact that there was a sleeper fence six feet high which had to be climbed was absurd. The question was—Was this a level-crossing? The question was not—Was this a right-of-way? Accordingly, as in *Scott* v. *Thomson*, June 4, 1887, 14 R. (J.) 45, 24 S.L.R. 557, so here, there being no question of civil right, a conviction should have followed; whereas in *Dalrymple* v. *Chalmers*, February 3, 1886, 13 R. (J.) 34, 23 S.L.R. 358, there was a question of public right involved. Even assuming that a member of the public might be entitled to compel the company to make a level-crossing here, if he did not do so, by being or passing upon the railway he was a trespasser. In *Cole* v. *Mile*, 1888, 57 L.J. (Mag. Cases) 132, relied on by the respondent, the only question was—Was the public right-of-way extinguished? The Court of Appeal held that the Justices had no jurisdiction to determine that question. But the question whether a person had right to be on a railway where there was no authorised crossing was not considered. Even assuming that case was in the respondent's favour, it was, as reported, of doubtful authority, the sections under consideration were misquoted by the judges, and it was not reported in the authorised reports.

Argued for the respondent—Where, in defence against a summary semi-criminal complaint, a civil right was maintained by the respondent, the magistrate should dismiss the complaint and leave parties to determine the question in a competent process—*Barlas* v. *Chalmers*, April 4, 1876, 3 R. (J.) 26; *Cole* v. *Miles*, *cit. sup.* The circumstances of the latter case were very similar to the present. The existence of the right-of-way must first be negatived before trespass could be affirmed. Trespass necessarily implied wrongful intrusion, and if the railway company were in fault in not providing gates at the place in question, as was its duty—Railway Clauses Act 1845, sec. 39 to 54; *Reg.* v. *Bexley Heath Railway Company*, [1896] 2 Q.B. 74—or, *a fortiori*, in abolishing without statutory warrant gates formerly there, it could not be said the respondent was wrongfully intruding. Where a person *bona fide* believed and showed that he had probable grounds for believing that in being in or passing through a certain place he was exercising a legal right, it could not be affirmed or assumed against him that he was a trespasser—*Hay's Trustees* v. *Young*, January 31, 1877, 4 R. 398, 14 S.L.R. 228; *Dalrymple* v. *Chalmers* (*cit. supra*).

At advising—

LORD JUSTICE-CLERK—In my opinion the question put in this stated case should be answered in the affirmative. It is undoubtedly a well-established doctrine that where a criminal proceeding involves the decision of a question of civil right, a Court ought not to determine the former till the latter has been answered by a competent Court. But in this case it does not appear to me that that doctrine has any application. A railway company, when it is empowered to make a line for traffic, must at all places where roads cross the line provide bridges or level-crossings according to its undertaking under its application to Parliament. On the other hand, it is vested with a power to have trespassers on its line dealt with penally by fine in a way not open to the ordinary owner of property. This power is given in view of the public safety, there being necessarily public danger if persons go on to the line at places other than those where provision is made for crossing. If persons claim a right to cross at places where such provision is not made they must take civil steps to have a crossing provided, which they can only do by proving their right. If they trespass on the line by climbing over fences they cannot claim immunity from the statutory penalties if they thus take the law into their own hands. They are trespassing if they are not crossing at a place provided for that purpose.

In this case there had been no crossing place since the year 1882. The railway company had possessed their line without a crossing during all that time. Recently persons have been crossing and climbing over the fence, which is what the clause of the statute was intended to prevent. The magistrate had one question, and one question only, before him—"Did the accused cross the line at a place where in fact there was no crossing?" In my opinion he should, on the facts stated, have answered that question in the affirmative and pronounced a conviction. Whether by proper legal proceedings anyone can prove that the company are bound to provide a safe crossing is a totally different question. The case before him did not, in my opinion, involve the decision of any question of civil right. No such matter could be raised in the proceedings on the complaint before him.

LORD LOW—If in order to decide whether the respondent Walmsley had or had not been guilty of trespassing upon the appellants' railway within the meaning of the 36th section of the Caledonian Railway Act 1898, it had been necessary to determine a question of heritable right, I have no doubt that the Sheriff-Substitute would have been justified in dismissing the complaint.

In my opinion, however, no such question required to be determined, because although the respondent maintained, upon what the Sheriff-Substitute has found to be "some probable grounds," that there is a public right-of-way across the line at the place where he crossed it, I think that the respondent was nevertheless trespassing upon the line within the meaning of the section.

By the Railway Acts a railway company is bound when it constructs its line to make provision by means of bridges or level-crossings for carrying all public roads of every description across the line, so that they may be available for the public use as freely and fully as before the construction of the railway. If, therefore, a railway com-

pany fulfils its obligations, no one has a right to cross the line except at one of the crossing places provided by the company. That, of course, is the consequence at common law of the fulfilment by the company of its statutory obligations; but from considerations of public safety the Legislature has, in addition to the rights of the railway company at common law, made trespassing upon a railway, in spite of warning, an offence punishable by fine. In the public statutes enactments to that effect will be found in the Regulation of Railways Act 1840, sec. 16, and in the Regulation of Railways Act 1868, sec. 23. Similar provisions are commonly inserted in the private Acts of railway companies, and the enactment upon which the complaint in the present case proceeds is, as I have indicated, the 36th section of the Private Act of the Caledonian Railway Company of 1898.

By that section it is provided that "any person who shall trespass upon any of the railways, stations, works, lands, and property belonging to or worked by the Company, shall, without having received any personal or other warning than as hereinafter mentioned, forfeit and pay by way of penalty any sum not exceeding forty shillings." It is then provided that notices affixed to notice boards shall be sufficient warning, and "that no person lawfully crossing the railway at any level-crossing thereof shall be liable to any such penalty as aforesaid."

The argument for the respondent was that if, as he alleged upon probable grounds, there existed a public right-of-way across the line which he as a member of the public was using, he could not be said to be trespassing upon the line, because he was there in the exercise of a right. Therefore, as the question whether the respondent had or had not committed an offence within the meaning of the section depended upon whether or not the alleged right-of-way existed, the Sheriff-Substitute was right in dismissing the complaint.

There is no doubt considerable force in that argument, but I am satisfied that it is not well founded. In construing the word "trespass" in the section it seems to me that regard must be had to the subject-matter and purpose of the enactment. It is founded upon considerations of public safety; it recognises that a railway is a dangerous place; and that for persons to cross or stray upon a railway, except in the proper use of a level-crossing, is dangerous not only to themselves but to the travelling public. Accordingly the Legislature has enacted in the public interest that a person trespassing upon a railway shall, in addition to any civil remedy which may be put in force against him, be liable in a penalty if the trespass takes place after warning has been given. It is plain that the object of the enactment would to some extent be defeated if it were a good answer to a complaint for the person who had crossed the railway in spite of warning to maintain, upon "some probable grounds," that he was following the line of an old right-of-way. It seems to me that the remedy which such a person has is to take the necessary steps to have the right-of-way which he alleges declared and the railway company compelled to make a crossing. He is not entitled to take the law into his own hands and force his way across the line. If he does so he is, in my judgment, guilty of a trespass within the meaning of the Act.

I have already pointed out that it is the statutory duty of a railway company to carry any public road, including rights-of-way, across their line, and therefore it seems to me that where there is no crossing provided there is a presumption that there is no right-of-way—a presumption strong enough at all events to lay the onus of establishing that there is a right-of-way upon the party alleging it. I do not think that that proposition could be seriously disputed, but it might be said that although the railway company might be entitled to have the *status quo* maintained by interdicting the party claiming a right-of-way from crossing the line until the existence of the right had been established in an appropriate process, they would not be entitled to attain that end by *quasi*-criminal proceedings under which a person who in fact had a right to cross the railway might be subjected to a penalty as a trespasser. That is a consideration which might have considerable weight if it were not that the matter is one concerning the public safety. For the safety of the public the Legislature considered it necessary to enact that anyone crossing a railway should be liable to a fine, provided (1) that he had been duly warned, and (2) that he had crossed the railway otherwise than by a level-crossing. It seems to me that unless a person against whom a complaint is brought can bring himself within one or other of these exceptions he must be held to have committed the statutory offence. If that view be sound, it follows that the respondent ought to have been convicted.

I have only to add that there seems to me to be nothing in the special circumstances of this case which would justify the Court in treating it as exceptional. The railway was constructed in 1858, and then a level-crossing, for carriage traffic as well as foot-passengers, was made at the place in question. That level-crossing was, however, discontinued and shut up in 1882. The fact that there was once a level-crossing may perhaps lend some probability to the respondent's contention that there was a right-of-way at the place in question, but I do not think that it affects the present case. There has been no level-crossing for more than five-and-twenty years, and accordingly it seems to me that the onus of proving that there is a right-of-way and that there ought to be a level-crossing is just as much upon the person maintaining that view as if there had never been a crossing at all. In saying that, however, I do not mean to indicate an opinion that it would have made any difference if the level-crossing had been shut up *de recenti*.

Further, I may observe, although perhaps it has no direct bearing upon the present question, that by the Local Government Act 1894 the duty of protecting and keeping open rights-of-way is laid upon the District Committee, or where there is no District Committee upon the County Council; and if a Parish Council or six parish electors represent to the District Committee or the County Council, as the case may be, that a right-of-way has been shut up or obstructed, the Committee or the Council are bound, if they are satisfied that the representation is well founded, to take such proceedings as may be requisite for the vindication of the right-of-way. I mention that circumstance, because it shows that the view which I take of the case does not involve the hardship of the respondent, and other workmen in a like position, having either to lose the use of a right of way which would be a great convenience to them, or to embark upon an expensive litigation to vindicate the right.

I am therefore of opinion that the question submitted to the Court should be answered in the affirmative.

Lord Stormonth Darling and Lord Ardwall concurred.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Blackburn, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondent—M'Lennan, K.C. — Findlay. Agents — Dalgleish & Dobbie, W.S.

Friday, June 21.

FIRST DIVISION.

MACPHERSON'S TRUSTEES *v.* MACPHERSON.

Apportionment — Will — Construction — Direction to Pay Dividends "as Received" —Apportionment Act 1870 (33 *and* 34 *Vict. c.* 35), *sec.* 7.

A testator, who died on 9th July, as to certain shares in a company the accounts of which were made up on 30th April, the dividend being declared in the October following, directed his trustees to pay the dividends accruing thereon "as received" to his wife during her life. *Held* that the widow was entitled, without any apportionment, to the whole of the dividends declared subsequent to the testator's death, irrespective of the period during which they had been earned.

The Apportionment Act 1870, sec. 7, enacts —"The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place."

William Macpherson, managing director of the Globe Express, Limited, died on 7th July 1905, leaving a trust-disposition and settlement whereby he assigned and disponed to his widow Mrs Annie Mitchell or Macpherson and others as trustees his whole estate. At the time of his death the testator held 197 shares of £100 each (fully paid) in his company.

By the sixth purpose of his trust-disposition and settlement he directed his trustees to make over upon his death a number of shares, 50 as it turned out, in his company to certain legatees, "each share carrying with it the current year's dividend corresponding thereto." The seventh purpose was—"The remainder of my shares in the company shall be retained by my trustees during the survivance of my wife, and the dividends accruing from said shares shall, as received, be paid over to her. . . ."

The Globe Express, Limited, in accordance with its articles of association, made up its accounts to 30th April of each year, and, while there was no provision as to the date of the annual meeting when the dividend should be declared, by invariable custom such meeting had been held in the October following. On 10th October 1905 the annual meeting was held, and a dividend for the year ending 30th April preceding was declared at the rate of 7 per cent. The testator's trustees were subsequently paid £1379, being the dividend on the testator's 197 shares.

A question having arisen as to Mrs Macpherson's right to the dividends declared after her husband's death, a special case was presented for (*first*) the trustees, and (*second*) Mrs Macpherson.

The case stated—"The second party now maintains that the whole of the said dividend on the remaining 147 shares, amounting to the sum of £1029, should, in terms of the 7th purpose and other provisions of the said trust-disposition and settlement, have been paid to her by the first parties when received by them, or at all events that she is entitled to the whole of the dividend which may be paid by the company for the year ending 30th April 1906, when received by the first parties. The first parties, on the other hand, maintain that the dividends payable in respect of the year ending 30th April 1905, and for the period from 30th April to 7th July 1905, form part of the capital of the trust estate and that the second party is only entitled, in terms of the eighth purpose of the said trust-disposition and settlement, and in accordance with the Apportionment Act 1870, to the free liferent of the sums representing the said dividend for the year ending 30th April 1905, and the portion of any dividend which may be declared for the succeeding year applicable to the period from 1st May 1905 to 7th July 1905, the date of the truster's death."

The questions of law were—"1. Does the whole of the dividend for the year ending 30th April 1905 on the said 147 shares of the Globe Express, Limited, held by the first parties, fall to be paid to the second party under the provisions of the said trust-disposition and settlement? 2. In the event of the first question being answered