Saturday, June 15.

SECOND DIVISION.

[Lord Johnston, Ordinary.

BELL *v.* ADAM & COMPANY.

Process—Proof—Proof or Jury Trial—Discretion of Lord Ordinary — Action of Damages for Personal Injuries—Special Cause.

In an action at common law raised by a widow to recover damages for the death of her husband from his employers, the Lord Ordinary, on the ground that the case was partly relevant and partly irrelevant, and that it was difficult before a jury to confine the evidence to what bore on the relevant part, allowed a proof before answer.

The Court, *holding* that the general rule against interference with the Lord Ordinary's discretion in the conduct of a case was inapplicable, inasmuch as they were not satisfied that any part of the case was irrelevant, the ground of his decision, *recalled* his interlocutor and *allowed* an issue.

Mrs Annie Macfarlane Rennie or Bell, Greenock, brought an action as an individual and as tutrix and administratrix-in-law for her children against William Adam & Company, coppersmiths, Dock Breast, Greenock, to recover damages at common law from the defenders for the death of her husband, who was killed by an accident while in their employment.

On 20th March 1907 the Lord Ordinary (JOHNSTON) allowed a proof before answer.

Opinion.—"I think that the condescendence is partly relevant and partly irrelevant. The pursuer's position on record is that the deceased Robert Galbraith Bell was employed as a coppersmith, and that he had no experience of the work he was ordered to undertake, which was the dismantling and removing of heavy utensils from a disused sugar refinery in Greenock.

"Now, his widow says that the deceased and those who were working with him went to the defenders' works to obtain tackle; that there was no tackle suitable for lowering the utensils to the ground; that, according to the practice in the defenders' works, all tackle required by their employees hung up in the brass shop, and from this tackle they were in use to make selection of what they required. Then she says deceased did the best he could by taking certain slings and removing them to the sugar refinery; that he and his mates broke up the utensils and lowered parts to the ground. When they came to the heavy portion they failed to get it down owing to something jamming, and in course of their efforts the pulley gave way, and the deceased was precipitated to the ground and killed. And then the pursuer goes on to aver fault on the part of the defenders.

"But she sets forth no relevant averment of defective construction.

"It is not said that the rope was frayed or insufficient for the weight, but for aught that is said it was a perfectly efficient piece of plant if properly used, but was, on the statement, improperly used, by the rope being rove through the wrong place, it having been passed through the thimble instead of round the thimble of the tackle. The thimble not being intended to stand a strain in this way, gave way, and the accident happened.

"This is not a relevant statement of defective construction or of defective condition, or of an accident happening through defective condition or construction of plant. But then it is also alleged that it was 'gross negligence on the defenders' part to entrust to the deceased and his fellow-workmen the duty of executing, unaided, work which required the direction and assistance of skilled riggers in order to allow of its being safely performed.'

"I cannot say at this stage that this is irrelevant. I think that if it turned out that these coppersmiths are artificers, whose experience is confined to the workshop, that it was not proper to have sent them out to perform this operation of breaking up and lowering from a fourth storey utensils of such considerable weight.

"I cannot say how the matter will turn out on proof, but I can say that I think there is enough relevantly stated to justify inquiry. But I do not think that the case ought to go to a jury. The case is, at least, only partly relevant, and it is difficult, before a jury, to confine the evidence to that which bears on the relevant part of the case, and, whatever care the presiding Judge may take in charging them, to induce the jury to restrict their consideration to that part of the evidence.

"I shall therefore allow a proof before answer."

The pursuer reclaimed, and argued—(1) The whole case was relevant, and accordingly the Lord Ordinary's ground for withholding it from a jury was inapplicable and fell. (2) Even assuming that part was not relevant, that was no valid ground for withholding the case from a jury.

Argued for the defenders and respondents—The Lord Ordinary had a discretion as to the mode of trial to be allowed, and as to what was special cause for not sending a case of this kind to a jury. The Court was not ready to interfere with this discretion, and there was no ground for doing so in this case — *Vallery* v. *M'Alpine & Sons*, May 16, 1905, 7 F. 640, 42 S.L.R. 535; *Jack* v. *Rivet, Bolt, and Nut Company, Limited*, March 10, 1894, 6 F. 572, 41 S.L.R. 429; *Edinburgh Railway Access and Property Company* v. *John Ritchie & Company*, January 7, 1903, 5 F. 299, 40 S.L.R. 244; *Fearn* v. *Cowpar*, March 14, 1899, 1 F. 751, 36 S.L.R. 593. *Barclay* v. *M'Alpine & Sons*, May 26, 1904, 12 S.L.T. 45, and *Cooke* v. *Leith Harbour Commissioners*, November 24, 1905, 13 S.L.T. 536, were also referred to.

LORD JUSTICE-CLERK—I should be sorry to interfere with the general rule that the Court will not interfere with the discretion

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