back-green was being carried on in an illegal manner. I think that he has not done so. The pursuer avers in condescendence 2 that these greens "are primarily for the purpose of a drying green, and not a playground"; but it is not said that to play cricket of any sort in them is forbidden, and I gather from condescendence 5 that such a thing is not unprecedented. The averments of "fault" are of the most vague and general nature. The mere fact that a regrettable accident has occurred cannot, of course, by itself infer damages as for fault or negligence. The record as a whole seems to me to contain no definite facts from which the conclusion ought necessarily or reasonably to be deducted that this game of bat-and-ball, such as it was, was dangerous and illegal in this back-green. That seems to me sufficient for the disposal of this case, and upon that ground I should propose to affirm the Sheriff's interlocutor. It is not necessary to decide the further point and the further difficulty—*prima facie* a somewhat serious one—that seems to lie in the pursuer's way, owing to the fact that he does not know which of the players—three little boys and one man—actually struck the ball over the wall, and yet brings his action against them all. I only desire for myself to say that I think the case of *Taylor* v. *Dick*, referred to by the Sheriff, can be distinguished from the present; and that, on the other hand, I should hesitate, as at present advised, to affirm that, if it were proved or admitted which one of the four players struck the ball, all would be liable in damages, even assuming that the game was being carried on in such a way as to be illegal.

LORD LOW was absent.

The Court dismissed the appeal.

Counsel for Pursuer—Crabb Watt, K.C.—J. A. T. Robertson. Agent — Alexander Wylie, S.S.C.

Counsel for Defenders—Jameson—J. T. Robertson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.—Dugald Maclean, Solicitor.

Saturday, January 29.

SECOND DIVISION.

ALSTON & ORR *v.* ALLAN'S TRUSTEES.

(Reported *supra*, p. 203.)

Expenses — Reserved Expenses — General Finding—A.S., 15th July 1876, *General Regulations, Article V.*

In an action of reduction the Lord Ordinary repelled the preliminary defences, reserving the question of expenses. A record having been made up on the merits, the defenders were assoilzied and found entitled to expenses generally. *Held* that under the general finding for expenses the defenders were entitled to the expenses which had been reserved.

Expenses—Incidental Expenses Found to be Expenses in the Cause—General Finding—Party Unsuccessful in Branch of Cause—Taxation—A.S., 15th July 1876, *General Regulations, Article V.*

The defenders in an action of reduction were unsuccessful in an incidental reclaiming note. The expenses were declared to be expenses in the cause. The defenders were ultimately found entitled to expenses generally. *Held* that it was the duty of the Auditor to disallow the expenses of the reclaiming note.

The General Regulations as to the preparation and taxation of judicial accounts appended to the A.S., 15th July 1876, provide—Article V—"Notwithstanding that a party shall be found entitled to expenses generally, yet if on the taxation of the account it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful . . . he shall not be allowed the expense of such parts or branches of the proceedings."

Alston & Orr, writers, Glasgow, brought an action against John Allan, wright and pattern maker, Glasgow, in which they concluded for reduction of an interlocutor pronounced by John Herbertson, builder, Glasgow, in a reference between the pursuers and the defender, On John Allan's death *pendente lite*, his testamentary trustees were sisted as defenders. The defenders lodged preliminary defences.

On 21st November 1907 the Lord Ordinary (JOHNSTON), after a proof, pronounced this interlocutor—". . . Repels the preliminary defences, . . . and decerns: . . . Finds the pursuers entitled to expenses of the proof allowed in connection with the said preliminary plea-in-law: . . . Reserves the question of expenses in connection with the lodging of the said preliminary defences to be discussed with the expenses on the merits. . . ."

The defenders reclaimed, and on 1st July 1908 the First Division pronounced this interlocutor—". . . Vary the said interlocutor by inserting therein before the words 'and decerns,' the words 'in so far as preliminary, reserving their effect on the merits:' Adhere to said interlocutor thus varied, and decern: Find the expenses of the reclaiming note to be expenses in the cause, and remit to the Lord Ordinary to proceed as accords."

On 6th January 1909, the defenders having lodged defences on the merits, and a record having been made up and closed, the Lord Ordinary assoilzied the defenders and found them "entitled to expenses."

The pursuers reclaimed, and on 22nd December 1909 the Second Division adhered to the interlocutor of the Lord Ordinary and found the defenders "entitled to additional expenses."

On the taxation of the defenders' account the Auditor allowed the reserved expenses

(*v.* interlocutor of 21st November 1907), but disallowed the expenses which had been found to be expenses in the cause (*v.* interlocutor of 1st July 1908).

Both parties lodged notes of objections to the Auditor's report. The defenders objected to the disallowance of the expenses which had been found to be expenses in the cause. The pursuers objected to the allowance of the reserved expenses.

Argued for the defenders—The Auditor was right in allowing the reserved expenses, but was wrong in disallowing the expenses which had been held to be expenses in the cause. Where expenses were reserved, that meant that they were to be disposed of by the Court which decided the general question of expenses. If that Court granted a general decree for expenses, the reserved expenses fell under the general decree. If it was desired that that result should not follow, a motion must be made to the Court at the time when the question of expenses was dealt with—*Caledonian Railway Company* v. *Chisholm*, March 19, 1889, 16 R. 622, 26 S.L.R. 489; *Macfie* v. *Blair*, December 12, 1884, 22 S.L.R. 224. That had not been done here. Accordingly the defenders were entitled to the reserved expenses. Expenses which had been declared to be expenses in the cause were in the same position.

Argued for the pursuers — Expenses which had been declared to be expenses in the cause were in the same position as any other part of the account. But although a party had obtained a general decree for expenses, it was the duty of the Auditor on taxation to disallow the expenses of any part of the case in which the party was unsuccessful—A.S., 15th July 1876, General Regulations, Article V. The defenders here had been unsuccessful in the first reclaiming note, and therefore these expenses had been rightly disallowed. Reserved expenses were in the same position as expenses which had been found to be expenses. The defenders had been unsuccessful in the preliminary defences, and the expense of lodging and preparing them should have been taxed off—*Gardiner* v. *Victoria Estates Company, Limited*, October 27, 1885, 13 R. 80, 23 S.L.R. 55. *Caledonian Railway Company* v. *Chisholm* (*cit.*) was wrong, and should be reconsidered.

At advising—

LORD ARDWALL—This is an action of reduction in which the defenders were ultimately successful. The Lord Ordinary (Lord Johnston), by interlocutor of 6th January 1909, pronounced, *inter alia*, these findings—"Finds the said defenders entitled to expenses: Allows an account to be given in, and remits the same to the Auditor to tax and report"; and this Division of the Court, in disposing of a reclaiming note against the said interlocutor, pronounced an interlocutor dated 22nd December 1909, which contains, *inter alia*, the following—"Adhere to the said interlocutor reclaimed against, and decern: Find the compearing defenders entitled to additional expenses, and remit the same to the Auditor to tax and report."

The whole of the defenders' accounts of expenses were accordingly sent to the Auditor for taxation. Besides the defences on the merits, which were lodged later, the defenders lodged preliminary defences against satisfying the production just after the calling of the summons, and with regard to these defences the Lord Ordinary on 21st November 1907 found the pursuers entitled to expenses of the proof in connection with the preliminary defences, but reserved the question of expenses in connection with the lodging of the preliminary defences to be discussed with the question of the expenses on the merits. The Lord Ordinary's judgment on this matter was reclaimed against, and with a slight alteration on the interlocutor the First Division on 1st July 1908 adhered to the interlocutor, and with regard to expenses pronounced this finding—"Find the expenses of the reclaiming note to be expenses in the cause, and remit to the Lord Ordinary to proceed as accords."

When the cause was finally disposed of by this Division upon 22nd December 1909 no motion was made by the counsel for the pursuers regarding the reserved expenses, and it may be added that previous to that no such motion was made before the Lord Ordinary when he finally disposed of the question of expenses. They neither asked that they should be found entitled to these reserved expenses, as already they had been found entitled to the expenses of the proof, nor did they ask that these reserved expenses should be excepted from the general allowance of expenses in favour of the defenders. Accordingly the only accounts remitted to the Auditor were accounts for the defenders, and two notes of objections are lodged to the Auditor's taxation. The pursuers, in the first place, object to the Auditor having allowed to the defenders the whole of the reserved expenses occasioned by the preliminary defences, on the ground that on the whole of that branch of the case the defenders were entirely unsuccessful.

I am of opinion that the Auditor acted rightly in allowing these expenses to the defenders, and that for the reason that they must be held to have been carried by the general finding for expenses—in other words, that the question reserved as to the liability for these reserved expenses having been decided in favour of the defenders without objection by the pursuers, it is now too late for the pursuers to move that these expenses be disallowed, and was too late to do so when the account was before the Auditor. This follows, I think, from the cases which were quoted to us, of the *Caledonian Company* v. *Chisholm*, 16 R. 622; *Macfie* v. *Blair*, December 12, 1884, 22 S.L.R. 224; Lord Shand's opinion in *Gardner* v. *Victoria Estates Company, Limited*, 13 R. 88, being overruled in the case of *Chisholm*. The reasoning on which these decisions proceeded was that the question of disposal of the special expenses dealt

with in these cases having been reserved, that question fell to be decided by the court which disposed of the general question of expenses, and that that court must be held, if they make a general finding of expenses without reservation, to have determined the question of the reserved expenses in favour of the party in whose favour the award of general expenses has been made.

I am therefore of opinion that the note of objections for the pursuers must be repelled.

The defenders, however, have objected to the Auditor having disallowed the expenses of the reclaiming note to the Inner House on the preliminary defences. The Auditor's taxation on this matter is supported by the pursuers on the ground that under section 5 of the General Regulations as to the preparation and taxation of accounts for judicial proceedings contained in the Act of Sederunt of 15th July 1876 the Auditor was entitled to disallow these expenses. That section is in the following terms—" . . . [*Quotes, v. sup.*] . . ."

Acting in pursuance of this provision, the Auditor has disallowed, and I think rightly, the expenses of the reclaiming note in connection with the preliminary defences. I do not think the alteration made by the Inner House on Lord Johnston's interlocutor was such as, in view of the whole case as now decided, to entitle the defenders to recover these expenses. Unfortunately for the pursuers, the defenders cannot now be made liable for them, because the pursuers omitted to ask for them when the case was finally disposed of. It appears, I may observe, that new defences altogether had to be lodged, so the success, if success it can be called, which the defenders obtained by reclaiming against Lord Johnston's interlocutor was really valueless.

But the question still remains whether it was competent for the Auditor, seeing that these expenses had been directed to be expenses in the cause, to disallow them in terms of the said fifth section of the Regulations. It was maintained by the defenders that it was not, and that these expenses not having been specifically dealt with or asked to be dealt with at the final disposal of the case, the matter cannot now be opened up, and that the Auditor was precluded from doing so by the general finding for expenses. In short, it was maintained that they were in precisely the same position as, or at least a similar position to, reserved expenses. I cannot agree with this. These expenses were simply declared to be expenses in the cause, and to my mind this can only mean that they are in no different position from any other expenses in the cause, and accordingly a general finding of expenses, though it includes them, does not prevent them being disallowed "on the taxation of the account," if in the words of article V. of the Regulations it appears that they apply to a branch of the litigation in which the party found entitled to expenses generally has proved unsuccessful. In my opinion the defenders have proved unsuccessful in that branch of the litigation, and although unfortunately the pursuers failed to ask at the first disposal of the case by this Division on 22nd December 1909 for the expenses of the reclaiming note to the Inner House on the preliminary defences, and therefore cannot now recover them, yet I am clearly of opinion that the defenders are not entitled to recover their expenses of that branch of the litigation from the pursuers, and that it was alike competent and just for the Auditor to act as he has done.

I am accordingly of opinion that the objections for the defenders should be repelled.

LORD DUNDAS and the LORD JUSTICE-CLERK concurred.

LORD LOW was absent.

The Court repelled the objections for the pursuers and the defenders and approved of the Auditor's report.

Counsel for Pursuers—M'Lennan, K.C.—Mercer. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for Defenders — Wilson, K.C. — Lyon Mackenzie. Agents—Macrae, Flett, & Rennie, W.S.

Friday, October 22, 1909.

OUTER HOUSE.

[Lord Salvesen.

WILSON *v.* RAPP. M'LAUCHLAN *v.* RAPP.

Process — Ship — Conjunction — Salvage — Two Claims in respect of Services on Same Occasion—Separate Actions against Shipowner.

Two persons raised separate actions against a shipowner for salvage of a certain vessel which had gone ashore, each making similar averments as to the dangerous position of the ship, the value of the property salved, and the meritoriousness of the services rendered, but claiming the award for himself. On a motion for conjunction of the actions on the part of the defender, which was opposed by one of the pursuers, the Court (*per* Lord Salvesen, Ordinary) ordered the actions to be conjoined, and appointed one of the pursuers to conduct the case so far as it was common to both pursuers.

Process — Procedure — Ship — Conjoined Actions—Tender and Acceptance—Tender by Common Defender — Acceptance by Each of the Pursuers—Cumulo Amount of Both Acceptances in Excess of Tender —Motion by Defender to be Dropped from Cause.

In conjoined actions by two pursuers claiming an award of salvage for services rendered on the same occasion, the common defender tendered a sum of £550. One pursuer lodged a minute