provisions of Acts of Parliament. I think that in terms of the Pupils Protection Act 1849, sec. 1, the Guardianship of Infants Act 1886, sec. 12, and the Court of Session Act 1857, sec. 4 (5), this is clearly one of the petitions which should be brought in the first instance before the Junior Lord Ordinary and not before a Division of the Court.

LORD DUNDAS—I agree. I think the statutes are quite explicit to the effect that as matter of procedure such a petition as this must in the first instance be presented to the Junior Lord Ordinary. I am not satisfied from anything I have heard that there has been any practice to the contrary, but if there has, then it was a wrong practice, and ought to be put a stop to. In *Logan's* case I gather from the report that the Court's attention was not drawn to this question of procedure.

LORD JUSTICE-CLERK—Upon the question before us, which is one of procedure only, I think the statutes must apply according to their plain words.

The Court remitted the process along with the report by Mr Young to the Junior Lord Ordinary to proceed.

Counsel for the Petitioner—MacRobert—Agents—Carmichael & Miller, W.S.

Thursday, January 27.

SECOND DIVISION.

[Sheriff Court at Hamilton.

WARD *v.* ABRAHAM AND OTHERS.

Reparation — Negligence — Joint - Delinquency—Playing Cricket in Unsuitable Place.

A father brought an action concluding for damages against four defenders, a man and three little boys, jointly and severally, or severally, in respect of personal injury caused to his pupil child. The pursuer averred that his child, while sitting in his back green, had been struck by a cricket ball which had been hit from a neighbouring back-green belonging to the major defender; that at the time of the accident the defenders were engaged in playing in the major defender's back-green, and that the ball was hit by one of them, whose name was unknown to the pursuer. The pursuer also averred that the defenders knew or should have known that it was "a highly dangerous and unlawful thing to play a game of cricket in a small enclosed place, such as was being done here," and that they took no precautions to warn the neighbours that there was danger of the cricket ball being hit into such a position as might cause them injury.

Held that as it was not illegal to play cricket in a back-green, and there were no averments to show that it was being played in an illegal way, the pursuer's averments were irrelevant, and the action must be dismissed.

Query if there would have been any joint liability supposing the game had been carried on in an illegal way?

John Ward, 26 Glasgow Road, Silverbanks, Cambuslang, as tutor of his pupil child Mary Ward, brought an action of damages in the Sheriff Court at Hamilton against Arthur Abraham, 2 Ardoch Gardens, Cambuslang; Charles Thomas, 5 Ardoch Gardens, Cambuslang; Gilbert Cunningham, 2 Ardoch Gardens, Cambuslang; and Charles Robinson, Rowanlee, Buchanan Drive, Cambuslang. The pursuer craved decree against the defenders jointly and severally, or severally, for the sum of £300.

The pursuer averred—"(Cond. 1) . . . The defenders the said Charles Thomas, aged 12, Gilbert Cunningham, aged 12, and Charles Robinson, aged 11 . . . are pupils. . . . (Cond. 2) The pursuer's house is part of a row of tenements, the back of which looks into the back of the house where the said A. Abraham resides. There is a back-green behind the pursuer's house for the use of the tenants in the tenement, and there is a similar green behind the house where the said A. Abraham resides. The respective tenants have the use of these greens, which are primarily for the purpose of a drying green and not a playground. The green in connection with pursuer's house is separated from the green in connection with the said A. Abraham's house by a stone wall 5½ feet high and a lane about 11 feet in width. . . . (Cond. 3) On the evening of 2nd July 1908, between the hours of seven and eight o'clock, pursuer's wife was in the back-green behind her dwelling-house with the said Mary Ward. . . . Whilst there a cricket ball came unexpectedly and without warning from the defender A. Abraham's back-green and hit the pursuer's said daughter Mary on the back of the head, injuring her very seriously. . . . (Cond. 4) At the time of said accident and for sometime prior thereto the said Charles Thomas, Gilbert Cunningham, Charles Robinson, and A. Abraham had been engaged playing cricket in said back-green. The stumps were placed close up against the back wall of the building in which the said A. Abraham resided, and one of the four defenders was possessed of the bat, whilst another bowled to him, the other two in the meanwhile being engaged in fielding and consequently taking an active part in the game. It is believed and averred that the four took turns in batting, bowling, and fielding, and it was whilst in the course of said game that one of the four, whose name is presently unknown to the pursuer, hit the ball after it was bowled to him which caught the pursuer's said child as previously mentioned. . . . (Cond. 5) The pursuer's said child was injured through the fault of the defenders Charles Thomas, Gilbert Cunningham, Charles Robinson, and A. Abraham jointly and severally, or severally. They knew or ought to have known, in particular the said A. Abraham,

who is an elderly man, that it was a highly dangerous and unlawful thing to play a game of cricket in a small enclosed place, such as was being done here. They knew or ought to have known that there was grave danger of the ball being hit outwith the boundaries of said back-green, as was done on several occasions prior to the accident to pursuer's child, into neighbouring back-greens, and even on to the public roadway contiguous to the green in which defenders were playing, with the attendant danger of causing injury to innocent third parties. No precautions were taken by the defenders or either of them even to warn people who were in places where they were lawfully entitled to be, that there was danger of the cricket ball being hit into such a position as might cause them injury. For their negligence, jointly and severally, or severally, the defenders are liable in damages to pursuer as craved."

On 20th August 1909 the Sheriff-Substitute (A. S. D. THOMSON) assoilzied the defenders.

Note.—"I think the pursuer's case is quite insufficient as against the defender Arthur Abraham. I cannot see any duty upon him to police the back-yard of the tenement in which he and others were tenants.

"As regards the pupil defenders, the case seems to me irrelevant. The three children were playing 'cricket' in the back-yard, and one of their number hit the ball a distance it is said of 55 yards, so that it fell into the yard of pursuer's tenement and struck a child of his. The affair was plainly a mere accident. No one apparently had ever warned them that they might injure someone in an adjoining tenement, and the possibility of such a thing happening could not have been present to such young children in connection with their little play.

"It was argued that a pupil cannot be liable in damages for negligence, but I cannot accept this as sound. A baby might ruin a lady's dress or destroy a valuable vase, and certainly no action would lie against the baby, however rich it might be.

"But a boy of thirteen who wilfully broke the vase or injured the person of another might quite justly be held liable in damages. The question is one of fact in each particular case, regard being had to the age and mental capacity of the child and the nature of the act and its possible consequences.

"It might be argued that if the matter at issue in this case be thus a question of fact I ought to allow a proof, but I think the pursuer avers enough to put his case out of Court."

On 15th November 1909 the Sheriff (MILLAR) recalled the interlocutor of the Sheriff-Substitute and dismissed the action.

Note.—"The ground of the action in this case is that the defenders played with a bat and a cricket ball in the back-green, which they knew was unsuitable for the game, and that they thereby must have foreseen that they exposed the neighbours to danger. The ground of action is under the maxim *sic utere tuo ut alienum non lædas.*

"So far as the pupil defenders are concerned it seems to me that the action fails, because the law will not presume that children of such tender years should have the prudence to see that the green was unsuitable for play and the foresight to anticipate danger to the neighbours. Accordingly I think the action should be dismissed *quoad* them as irrelevant.

"With regard to the defender Arthur Abraham I have had much more difficulty. If four adults play together in a place which is unsuitable for the game, and they thereby expose the neighbours to risk, I should have thought that in the event of injury to the neighbour each of them would be held liable. In my view it would not matter which of them projected the ball which caused the injury, as they were all consenting to the dangerous game, and it was a mere accident that the ball was projected by one rather than the other. But then there is the case of *Taylor* v. *Dick*, 4 S.L.T. 297, in which the defender with three companions went out rifle shooting in Berrylaw Quarry, about half a mile from the pursuer's residence, and the pursuer's son was shot in the breast. Lord Kincairney, who was the Judge, directed the jury that it was necessary for the pursuer in order to establish his case to prove by reasonable evidence that the defender was the individual who fired the shot. In a novel question of this kind I think I am bound to accept the opinion of the learned Judge, and as the pursuer does not aver that the defender Abraham was the person who projected the ball into his back-green I think the case is irrelevant with regard to him also."

The pursuer appealed, and argued—A small enclosed space like the back-green in question was not a suitable place for playing cricket. It was inevitable, sooner or later, that the ball should be sent out of the ground, and the defenders must have known that this would happen. The defenders were in fault because they had disregarded altogether the safety of the people who might lawfully be on the other side of the wall. The fact that three of the defenders were children could not exclude inquiry. The question of whether a child could be guilty of fault was a question of fact depending mainly on the intelligence of the child. A child of five had been held to be guilty of contributory negligence—*Cass* v. *Edinburgh and District Street Tramways Company, Limited*, 1909 S.C. 1068, 46 S.L.R. 734. If so, it could not be affirmed as a proposition of law that boys of twelve could not be guilty of negligence. It was not necessary for the pursuer to aver which of the defenders actually struck the ball. All the players were acting in concert, and were jointly and severally liable as co-delinquents—*M'Lauchlan* v. *Monach*, December 16, 1823, 2 S. 590, N.E. 506; *Murray* v. *Brown*, December 16, 1881, 19 S.L.R. 253; *Scott* v. *Shepherd*, Smith's Leading Cases, i, p. 438.

Argued for the defenders—The defenders were liable only if they had been guilty of fault. They were not in fault merely because they played cricket in a back-green. This was not serious cricket, where it was part of the game to hit the ball out of the ground. If the ball were sent out of the ground the game would be stopped. Such an accident as the present was thus a remote contingency. It could not be anticipated even by adults, and the case of children was *a fortiori*. The amount of care required by the law varied with circumstances, and in particular depended on the degree of the risk run—*Mackintosh* v. *Mackintosh*, July 15, 1864, 2 Macph. 1357 (*per* Lord Neaves). As the risk here was small, the pursuer was bound to aver that the game was negligently played. But that had not been relevantly averred. If there was any fault at all, it was the act of the striker in sending the ball out of the ground. But the pursuer had not averred which of the players struck the ball. As this was not a case of joint-wrongdoing, the other players were not liable for the act of the striker—*Taylor* v. *Dick*, February 6, 1897, 4 S.L.T. 297. The pursuer therefore had failed to state a relevant case.

LORD JUSTICE-CLERK—I come practically to the same conclusion as the Sheriff, but I am unable to say that I concur in all the views which he has expressed, and the way in which he deals with the case of *Taylor* v. *Dick*. I must not be held as concurring in these observations at all. I think the case of rifle shooting is totally different from the case of playing cricket. Rifle shooting is not legal except in certain definite circumstances, unless there are such arrangements as make it safe, and when it is engaged in at a place where it is not safe the shooter would be liable. What was decided in *Taylor* v. *Dick* was that when firing from a rifle ground you must not shoot so that the bullet may land in a place where you have no permission to shoot. But this is a different case from that. Cricket is in itself a dangerous game only in very special circumstances. It is a game which, as we all know —and judges must, to some extent, proceed upon common knowledge—boys play wherever they can get a place to play it in. I see no relevant ground at all in this case for holding that the way in which the defenders played with bat and ball was illegal. There was nothing to suggest that at all, and there being no averment to the effect that it was wrong to play there, I should be inclined to hold that the summons was irrelevant upon that ground, and that it ought to be dismissed. But as it is only to be dismissed, it is possible that another case might be raised, and I think it is only fair to the parties to indicate my opinion more fully as regards the question whether there was fault in playing the game. The case is that three or four persons, one of them an elderly man, were playing the game in a back-green, but it is not said what part each was taking, or who hit the ball over the wall. One of the boys must have hit the ball over the wall, but whether he or his father would be liable is a question we need not consider just now. But of this I am quite clear, that it cannot be held that if small boys are playing cricket in a back-yard, and others join in the play, and one is holding the bat and using it, and the others have no reason to suppose that he would play in such a way as to hit the ball outside the lines of the yard, that all would be responsible for what the batsman does. It is quite plain as regards the conduct of the game that the boy with the bat could have no possible object in playing the ball outside the yard. On the contrary, it would stop the game, and probably lead to serious consequences. If they had to go into other back-greens and over walls in order to get the ball, the neighbours would object and the ball would probably be confiscated. The object of playing the game is to play it within the yard. How it could be supposed that the three persons who join the boy in playing cricket within the yard are to be held liable for anything he does in the way of playing outside the yard by hitting the ball over a wall into some other back-green I cannot understand. However, it is unnecessary to decide that question at present, because I am clearly of opinion that the action is irrelevant and ought to be dismissed.

LORD ARDWALL—I concur in what your Lordship has said. I do not think it can be affirmed as a general proposition that cricket is such a dangerous game in all its varieties that it is necessarily illegal to play it in a back-green; and that seems to me sufficient for the disposal of the case, because there is no relevant case stated against anyone individually. It is not said who hit the ball that injured the pursuer's child. This is a case which, if it is to stand at all, must stand upon joint and several liability; and there cannot be joint and several liability unless the four people who were engaged in the game were engaged in an unlawful act. For the reason I have stated I am of opinion that that cannot be held here. Circumstances are not averred relevant or sufficient to entitle the Court to affirm that what the defenders were engaged in at the time and place the accident occurred was an unlawful act. That ground is sufficient for the determination of the case.

LORD DUNDAS—I agree, and upon quite short and simple grounds. I do not think it can be laid down as an abstract proposition that it is illegal to play cricket or bat-and-ball in a back-green or garden. One could, of course, quite well figure a case which might be stated where obviously the conditions and manner of the play would be such as to infer damages for negligence. On the other hand, one can equally well imagine a game being played in a back-green or garden under obviously legitimate conditions. The point at this stage is to determine whether this pursuer has or has not stated a relevant case to the effect that this game in this

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., 15*th 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., 15*th 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