vehicle sitting on the near side with his legs over the side; that he was overtaking the defenders' vehicle, which was moving at a walking speed; that hearing the bell of a tramcar he looked over his shoulder for a moment, and while in the act of doing so his legs came against the defenders' vehicle, and he was thus severely injured. He avers that this happened in consequence of the horse in the defenders' vehicle stopping, and thus not leaving room for him to go clear upon the off-side, and that the horse had a habit of stopping without cause, and was thus vicious; and that the defenders were in fault in using such a horse in their business.

The Lord Ordinary has found the pursuer's averments to be relevant to entitle him to an issue to go to a jury. I am unable to agree with the Lord Ordinary. I cannot hold that the averments of the pursuer disclose a case of fault or negligence. The things which he avers do not, to my mind, present any case which would make it a wrong to keep and use the horse in question in doing work at a walking pace. That a horse when walking should stop, without receiving indication by rein or voice to do so, does not, as I think, point to danger to anyone. A horse on the street may stop at any time, and cart-horses which are kept long hours in the shafts are expected to do so when stopping is necessary, and it is new to me to hear it suggested that such a stoppage could cause any danger to anyone who was attending to his own safety, whether on foot or on horseback or driving. Could it be held that a driver of a horse moving at a walk would be guilty of fault if he stopped his horse to adjust harness, or to pick up something dropped on the road, or himself to go to the side of the road for a necessary purpose? I do not suppose, until this case was raised, that any such idea ever occurred to anyone that a driver was bound to anticipate that someone might be coming up behind, so near, with his legs dangling over the side, and looking away from the direction in which he was going, as to cause danger. If this is so, then the thing itself was not a danger reasonably to be anticipated in the case of a horse which sometimes stopped without apparent cause, so that a person owning such a horse was doing a wrong in using it.

It would be a very different case, and one calling for inquiry, if it was averred that a horse was given to shying or bolting or jibbing. All such things are productive of active movement of an unexpected kind which may be highly dangerous. But what the pursuer avers has no resemblance to such actions, and I am unable to see that what is averred here is relevant to infer fault. I am therefore in favour of dismissing the action.

LORDS KYLLACHY, LOW, and STORMONTH DARLING concurred.

The Court recalled the interlocutor reclaimed against and dismissed the action.

Counsel for Pursuer and Respondent—Orr, K.C.—Laing. Agent—R. W. Cockburn, W.S.

Counsel for Defenders and Reclaimers—Watt, K.C.—Horne. Agents—Connell & Campbell, S.S.C.

Tuesday, June 5.

FIRST DIVISION.

MORRISON *v* WATERS & COMPANY AND ANOTHER.

Expenses—Several Defenders—Liability of Unsuccessful Defender for Expenses of Successful Defender.

In an action against two defenders "conjunctly or severally or severally" for damages in respect of the death of the pursuer's son, one of the defenders was found liable and the other assoilzied.

Held, in the circumstances of the case, that as the successful defender had been brought into Court owing to the conduct of the unsuccessful defender in repudiating liability, in the knowledge of facts peculiarly within his own province and which no inquiry on the part of the pursuer might have been able to discover, the unsuccessful defender was liable in expenses to the successful defender as well as to the pursuer.

Mackintosh v. *Galbraith and Arthur*, November 6, 1900, 3 F. 66, 38 S.L.R. 53; and *Thomson* v. *Edinburgh and District Tramways Company, Limited*, January 15, 1901, 3 F. 355, 38 S.L.R. 263, *commented on*.

On 15th July 1905 Robert Morrison, boiler maker, 23 Orchard Street, Renfrew, raised an action of damages against Waters & Company, contractors, 37 New Sneddon Street, Paisley, and William Martin Murphy, tramway contractor, 13 St James Place, Paisley, in which he sought decree "conjunctly and severally or severally" against the defenders for £500 in respect of the death of his son, who had been run over and killed by a tower-waggon belonging to Murphy but drawn by horses supplied by Waters & Company. The pursuer before raising his action had been unable to find out whose servant, Russell, the driver of the tower-waggon, was, and each defender had written saying his claim was against the other. The case was heard by Lord Ardwall and a jury on 6th December 1905, when a verdict was returned finding that Morrison's son had been killed through the fault of the driver Russell, and that Russell was at the time of the accident under the control of Waters & Company, and damages were assessed against them at the sum of £120. On a rule the Court refused a new trial, and on 5th June 1906 it applied the verdict, decerned against Waters & Company for £120, and found them liable to the pursuer in expenses. The defender Murphy there-

upon moved for his expenses against the other defenders Waters & Company, who opposed the motion.

Argued for defender Murphy—The rule as to expenses in such cases depended on the question who was responsible for bringing the successful defender into Court. Here it was the unsuccessful defender who had repudiated liability for an accident for which he was aware he was responsible—*Caledonian Railway Company* v. *Greenock Sacking Company and Others*, May 13, 1875, 2 R. 671, 12 S.L.R. 443; *Mackintosh* v. *Galbraith and Arthur*, November 6, 1900, 3 F. 66, 38 S.L.R. 53; *Thomson* v. *Edinburgh & District Tramways Company, Limited*, and *Thomson* v. *Kerr*, January 15, 1901, 3 F. 355, 38 S.L.R. 263.

Argued for defenders Waters & Company—The general rule was that stated by Lord Moncreiff in *Mackintosh* v. *Galbraith and Arthur* (*ut supra*), viz., that "if a pursuer convenes two defenders and one is assoilzied, the pursuer, and not the unsuccessful defender, pays the expenses of the successful defender." The pursuer was bound to make inquiry and to take the risk. In the tramway case (*ut supra*) the fault admittedly lay between the two defenders. Here neither of the defenders admitted liability, and neither might have been found responsible.

LORD PRESIDENT—In this case the father of a child who was killed by being run over by a waggon, intimated a claim of damages against the carting contractor who owned the horses and employed the driver. The contractor maintained that he was not liable, on the ground that the waggon, which was one of peculiar construction, belonged to another party, who had full control over the driver.

The father applied to that other party, who denied liability, alleging that he had no control over the driver. The father called both parties as defenders, but in the conclusions of the action asked decree against them conjunctly and severally, or severally. Both parties denied that there had been any negligence in fact. A trial ensued, in which a jury found that there had been negligence in fact on the part of the driver, and that he was in fact the servant of the carting contractor.

An application was made for a new trial. Counsel for both the defenders admitted that there had been negligence in fact, but they contended as between each other as to whose servant the driver actually was. Your Lordships thought the jury had come to a right conclusion, and refused to disturb their verdict. The effect of the verdict was to find the carting contractor liable and to assoilzie the other defender. The pursuer is clearly entitled to his expenses against the unsuccessful defender, and the question therefore is, whether the successful defender is to get his expenses from the pursuer or from the unsuccessful defender.

The question on which the rule in such cases depends is this—Whose fault was it that the additional defender was brought into Court? Of course, a pursuer who has a right of action is not entitled to bring all the world into Court, but there may be cases in which a pursuer is forced to call more than one party, owing to the action of another defender. The cases of *Mackintosh* v. *Galbraith & Arthur*, 3 F. 66, and *Thomson* v. *Kerr*, 3 F. 355, which were quoted to us, afford illustrations of that. For my own part I rather agree with the minority in the case of *Mackintosh*, but such cases must be determined on their own facts, and this seems very clearly a case in which the successful defender would not have been called into Court but for the action of the other defender, who maintained that the accident was due to the successful defender's fault, and who said so on a question of fact peculiarly within his own province and not within that of the pursuer—a question which no amount of inquiry on the pursuer's part might have been able to solve. This seems clearly a case for finding the successful defender entitled to expenses as against the other defender and not against the pursuer.

LORD M'LAREN—*Prima facie* it is for a pursuer to find out who is responsible to him for a wrong which he considers he has sustained, and in general if he calls as a defender a party who is innocent of the alleged wrong he will be liable in expenses. But this rule is subject to exceptions, especially where the claim is made in the first instance against the party who is truly responsible, and it is at his request and instance that another party is called into the field. Here the question is who is responsible for bringing the successful defender into Court. In this case I have no doubt that it was the unsuccessful defender, who, as we see, from the beginning sought to shift the burden from his own shoulders and put it on the tramway contractor. I therefore concur with your Lordship that the unsuccessful defender must pay the costs of the successful defender.

LORD KINNEAR—I agree. It is clear that the unsuccessful defenders were responsible for bringing the successful defender into Court. Mr Guthrie has argued that it lies with the pursuer to make inquiries and find out who is liable, and there can be no question that as a general rule that is the pursuer's duty before he brings anybody into Court. But the question is not whether the pursuer would be liable in expenses to the successful defenders with or without relief against the defenders who have failed, but whether the latter, against whom the claim is actually made, can throw upon the pursuer the consequences of their own action. They caused proceedings to be taken against a person who had no responsibility in the matter, by their allegation that he was in fact the responsible employer of a man who was really their own servant. That depended upon facts which were within their own knowledge, and of which the pursuer knew nothing, and they can hardly be heard now to complain that he did not find out before the trial that their statement was without foundation.

LORD PEARSON—I agree. I think this a clear case for awarding the expenses as your Lordship proposes.

The Court pronounced this interlocutor—

"The Lords . . . assoilzie the said defender William Martin Murphy from the conclusions of the action, and decern: Find the said defenders Waters & Company liable to the said defender William Martin Murphy in the expenses incurred by him in the cause, and remit the account thereof," &c.

Counsel for Pursuer—T. B. Morison—Gillon. Agents—Kirk Mackie & Elliot, S.S.C.

Counsel for Defenders Waters & Company—Guthrie, K.C.—Hunter—Mitchell. Agents—Lister Shand & Lindsay, S.S.C.

Counsel for Defender Murphy—Cooper, K.C—Hon. W. Watson. Agents—Webster, Will, & Company, S.S.C.

Monday, August 28, 1905.

OUTER HOUSE.

[Lord Ardwall, Ordinary on the Bills.

YOUNGS, PETITIONERS.

Judicial Factor—Special Powers—Power to Sell Heritable Subject—Report by Accountant of Court against Power Craved—Power Granted by Court.

Circumstances in which a petition for the appointment of a judicial factor on an intestate estate, with special power to sell a heritable property included in the said estate, having been presented, the Court *granted* the special power craved, although the Accountant of Court, to whom a remit had been made, had reported against the special power being granted.

This was a petition presented by Mrs Jeanie Cunninghame M'Bride or Young, residing at Garail, Dunoon, and Alexander Young, residing at Cessford, Troon, for the appointment of a judicial factor on the estate of the deceased John Reid Young, who had died intestate. The petitioners were the widow and the eldest son and heir-at-law of the deceased.

The petition, *inter alia*, sought power for the factor to complete a title to and to sell a villa known as Garail, situated at Dunoon.

It was stated in the petition that the widow was desirous of leaving Dunoon in order to provide suitable education for her children, that it would probably be difficult, and certainly not remunerative, to let Garail for a term of years unfurnished, that the property was only suitable for residential purposes during the summer months, and that it would be impossible to let for a summer tenancy unless the furniture were to remain in the house, and that even if a satisfactory rent were received for the summer months a considerable amount would be involved in the upkeep. It was also stated that it was the intention of the deceased prior to his death to sell Garail during 1905.

The Lord Ordinary having remitted to the Accountant of Court to consider and report with reference to the power of sale craved, the Accountant *inter alia* reported as follows—"The gross annual income of the estate may be stated at from £750 to £850, divisible one-third to the widow, and two-thirds to children. That as stated the present assessed rent of Garail is £85, but the valued rent is £110, from which deduct a liberal estimate to meet feu-duty, taxes, and repairs, &c., £59, leaving £51, which is 4½ per cent. on £1200, the proposed upset price, a higher rate than can be obtained from investment in trust securities. In these circumstances the Accountant cannot report in favour of a sale as craved, there being neither necessity nor high expediency. See case of *Gilligan*, May 14, 1898, 25 R. 876, 35 S.L.R. 690."

LORD ARDWALL—"It is with hesitation that I consider myself bound in this case in the interests of the estate to take a different view from the Accountant of Court. The case of *Gilligan's Factor*, 25 R. 876, is an authority for my doing so. On the merits that case differs most materially from the present. There the value of the property consisted in the site, which was in an improving and central locality in Glasgow, and the site was practically certain to rise largely in value and it would have been folly to sell it. Further, the petition was opposed by the pupil's grandmother. In the present case the subjects belong to a class of property which it is notorious has enormously decreased and will probably decrease still more in value. This is owing to the opinion that has gained ground amongst the well-to-do inhabitants of Glasgow that a more beneficial change of air can be got by going to the central and eastern portions of Scotland than by going "down the water" as it is called. There are also greater railway facilities than formerly, and persons from Glasgow can reach such places as Stirling, Dunblane, Callender, Crieff, Comrie, St Fillans, Crawford, Biggar, and other places in the upper ward of Lanarkshire, and even watering-places on the Fife Coast, with comparative ease. Building of villas and cottages has greatly increased recently in all those localities, and the new erections are greatly taken advantage of by people from Glasgow. There is therefore no future in such a property as that in question. Further, it is a most undesirable class of property to keep as a letting subject. There is always the initial difficulty of getting a tenant, rendering the obtaining of any income uncertain. If in any year a tenant is not obtained the garden and greenhouses must be kept up at an expense probably of not less than £60 to £100 a-year without a return. There is, further, the difficulty about wear and tear of furniture if it is let furnished. I have had experience myself both personally and among my friends of