the accident occurred. But it is unnecessary to decide the action on that ground, for, as I have said, there are other grounds for holding that it is irrelevant.

LORD KINNEAR—I am of the same opinion. We have had occasion to consider this question recently, and so I think it is unnecessary to add to what your Lordship has said, and to what was said in the recent case of *Mechan* v. *Watson*, 1907 S.C. 25.

LORD JOHNSTON—I concur, for the reasons stated by your Lordship.

LORD M'LAREN and LORD PEARSON were absent.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Kemp. Agent—Andrew Urquhart, S.S.C.

Counsel for the Defender (Respondent)—Munro—Ingram. Agent—J. Ferguson Reekie, Solicitor.

Saturday, February 6.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

GOVAN *v.* J. & W. M'KILLOP.

Expenses—Expense of Preliminary Investigations—Abandonment of Action after Proof Allowed—A.S., 15th July 1876, *General Regulations No* 3.

The Act of Sederunt, 15th July 1876, General Regulations No 3, provides that in the expense to be charged against an opposite party no allowance shall be made for preliminary investigations, except that precognitions, even if taken before the raising of the action or the preparation of defences, may be charged, if proof has afterwards been allowed. The pursuer in an action of damages for the death of her husband, which she averred was due to ptomaine poisoning caused by food supplied to him at the defenders' restaurant, abandoned the action after proof had been allowed. *Held* that the General Regulations were subject to modification in the discretion of the Court, and that, in the special circumstances, the defenders were entitled to recover the legal expenses incurred in connection with the exhumation and *post mortem* examination of the body of the deceased, carried out before the action was raised.

Expenses—Witness—Fees to Medical Witnesses—Amount.

Amount of the fees to the defender's medical witnesses allowed by the Auditor and approved by the Court in an action of damages, raised by a wife for the death of her husband from, as averred, ptomaine poisoning, and subsequently abandoned by her after proof fixed, the medical investigation having been a difficult one.

The Act of Sederunt, 15th July 1876, provides—General Regulations No. 3—"The expenses to be charged against an opposite party shall be limited to proper 'expenses of process,' without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof."

On 28th June 1907 Mrs Edith Worton or Govan raised an action against Messrs J. & W. M'Killop, restaurateurs, Glasgow, for damages for the death of her husband on 27th May 1907, which she alleged was due to ptomaine poisoning caused by partaking of lobster soup supplied to him in a restaurant owned and managed by the defenders.

The defenders on intimation of the claim on 4th June 1907, applied for authority to have the body of the deceased exhumed and examined, and on 18th June a *post mortem* examination was carried out by two medical men for the defenders, in presence of two medical men for the pursuer.

On 14th November 1907 the Lord Ordinary (SALVESEN) approved of issues for the trial of the cause. The defenders reclaimed to the Second Division, who on 20th December 1907 recalled the Lord Ordinary's interlocutor and remitted to him to allow a proof before answer.

After proof had been fixed for 12th May 1908, the pursuer lodged a minute of abandonment, and the Lord Ordinary on 6th May 1908 pronounced an interlocutor appointing the defenders to give in an account of expenses and remitting the same when lodged to the Auditor to tax and to report. In taxing the account the Auditor disallowed certain items, and the defenders lodged a note of objections in which they objected to the disallowance by the Auditor (1) of certain items amounting to £40, 10s. 7d., being the law-agent's account incurred by the defenders in connection with the exhumation and *post mortem* examination; and (2) of the charges amounting to £368, 14s. 1d. incurred by the defenders to the skilled medical witnesses employed by them, to the extent of £242, 14s. 1d.

The fees of the skilled medical witnesses were summarised thus—

"Name.	Taxed off.	Fees charged.
Professor Glaister .	£80 17 0	£133 7 0
Professor Galt . .	21 0 0	42 0 0
Sir Thomas Fraser .	31 10 0	52 10 0
Dr Brown . . .	36 18 1	36 18 1
Dr Bruce . . .	58 16 0	90 6 0
Dr Moffat . . .	11 11 0	11 11 0
Drs M'Ewan . .	2 2 0	2 2 0
	£242 14 1	£368 14 1"

[Dr Brown had acted as assistant to Professor Glaister, Dr Moffat attended the deceased on his first seizure, and the Drs M'Ewan were the doctors who had certified the cause of death.]

Professor Glaister's account was charged thus—

1907.

June 12. Consultation with your Mr Barrie, Mr M'Killop, and another, with reference to procedure for defending above-mentioned action for damages, 2 hrs. . £2 2 0

,, 18. Proceeding to cemetery at Helensburgh and making, with Dr Galt, a complete dissection of the exhumed body of the deceased Alexander Govan, 5 hrs . . 26 5 0

,, 19. Preparing report of said *post mortem* examination regarding cause of death of Mr Govan, 4 hrs. . . 4 4 0

,, 20. to July 3. To analysis, microscopic examination, and bacteriological investigation of certain parts and contents of the body of the deceased, 10 days of about 8 hours each . . . 26 5 0

,, 4. Preparing report of said analysis, microscopic examination and bacteriological investigation, and sending same to your firm, 6 hrs. 6 6 0

,, 8. Consultation with your firm and Dr Galt concerning results of said examination, 1 hr. 1 1 0

,, 18. Examination, physical and microscopic, with Dr Galt, of parts removed from body of deceased, 3 hrs. . 3 3 0

Aug. 3. Examination with Alexander Bruce, of Edinburgh, of parts removed from body of deceased, 5 hrs. 5 5 0

,, 21. Reasoned memorandum to your firm regarding report of Dr Bruce of conditions of organs of deceased, examined with me on Aug. 3rd 1 1 0

Sept. 6. Microscopic examination of and conference with Dr Bruce at Aberdeen University regarding sections of kidney of the deceased, 3 hrs. 3 3 0

,, 11. Consultation with your firm regarding further and suitable medical evidence, and suggesting names, &c. 1 1 0

Oct. 9. Microscopic examination, in Glasgow, of kidney sections of deceased, with Dr Arbuckle Brown, of Glasgow, and Dr Bruce, of Edinburgh, 3 hrs. . 3 3 0

,, 30. To preparing joint report upon blood clot from brain and kidney of deceased, and sending same to your firm, 3 hrs. . . . 3 3 0

Nov. 27. Preparing for counsel at your request extended annotations and explanations regarding technical matters in first, second, and joint reports, and sending same to you, 8 hrs. £8 8 0

Dec. 24. Preparing for giving evidence by consulting medical literature, &c., and preparing precognitions (25 f'cap. pp. type-script) and sending same to you, several days . . . 26 5 0

1908.

March 16. Attending at Edinburgh with your Mr Barrie at consultation with counsel as to proof fixed and sufficiency of evidence, and giving counsel guidance and assistance on medical and technical matters 7 7 0

1907.

June 12 to May 1908. Correspondence regarding the case with your firm and with other witnesses (45 letters).

Miscellaneous expenses (railway expenses to Helensburgh, Aberdeen, Edinburgh, and twice to Glasgow from Thornhill, Dumfriesshire, telegrams and outlays) . . . 5 5 0

£133 7 6

The Lord Ordinary repelled the objections and approved of the report.

Opinion.—"After a very full argument I feel myself in a position to dispose of this case. The first and most important question that is raised is whether the legal expenses connected with a *post mortem* examination of the deceased Mr Govan should be allowed as expenses in the cause. Now it is admitted that the present application is entirely without precedent, but it is contended for the defenders that the case itself is unprecedented, and that the result of the *post mortem* examination was the determining factor which led the pursuer ultimately to abandon her action. That statement is contradicted by the pursuer, who assigns another and a different reason for the course she took. In these circumstances I do not feel myself in a position here to allow the expenses connected with that *post mortem* examination. The Auditor has disallowed them, and that is a fact that has to be taken into consideration, because he has a large experience in dealing with the expenses of all kinds of preliminary investigations which can properly be charged against a losing party. But apart from that, I think with Mr Fraser that the case really falls within section 3 of the Act of Sederunt relative to the table of charges in connection with Court of Session litigations. That section provides—'The expenses charged against the opposite party shall be limited to the proper expenses of parties without any allowance

(beyond that indicated in the table) for preliminary investigations.' There is a proviso, but it has no application to the particular expenses that are here charged. I think it may be sometimes a hardship that parties should be put to expense in order to investigate what turns out to be an unfounded claim. But the Court has provided that certain specified fees only shall be allowed as between party and party to cover all preliminary investigations, and I think that this *post mortem* examination was really just a preliminary investigation with the view of enabling the defenders to see whether they could successfully contest the action. Accordingly I sustain the Auditor upon that part of the case.

"The next matter relates to the fees which he has allowed to the doctors whom the defenders employed. He has allowed the fees of four doctors, and it is quite plain from the allowances that he has given that he has treated them, and I think rightly, as witnesses, who would in ordinary course have been certified for additional payment. But even upon that footing he has undoubtedly allowed much larger fees than he is in the habit of allowing as between party and party in contested actions. I think it is plain from that that he has recognised that this was a very special case, and one where investigation by medical persons was necessary in the interests of the defenders. Mr Fraser challenged his opponent to produce any case where such large fees had been actually sanctioned by the Court as between party and party, and the challenge has not been answered, for the only case relied on (*A B* v. *C D*, December 13, 1894, 22 R. 186, 32 S.L.R. 148) was one which referred to the fees of medical practitioners who had proceeded from Edinburgh to London. Now that being so, I think that the Auditor has exercised a very wise discretion in what he has done. I am not moved by what Mr Fraser has said as to his having given excessive allowances. I think, on the whole, he has acted wisely in allowing somewhat larger fees than are generally allowed to medical witnesses in contested trials. He has done so on the footing that the medical investigation in this case was of an exceptionally difficult kind, and therefore one which required to be remunerated accordingly. As regards the fees of Dr M'Ewan and others there is no question of principle raised, but only one of taxation, as to which I do not know that I need say anything except this, that it is perfectly plain that if those medical witnesses had been produced at the trial, as in all probability would have been the case, as they were the medical men who attended Govan during his illness, the charges made on their behalf by the defenders could never have been allowed. Accordingly I repel the objections both for the pursuer and the defenders."

The defenders reclaimed, and argued—(1) By No 3 of the General Regulations of the Act of Sederunt, 15th July 1876, the expense of precognitions taken before defences were lodged might be allowed in such circumstances as the present. As the defenders received no intimation of the claim till after the burial of the deceased, precognitions could not have been taken except on information based on the result of the *post mortem* examination. The expenses of the *post mortem* examination were therefore a necessary part of the expense of the precognitions, and fell within the proviso of General Regulations No. 3. But even if the charges now sought to be recovered did not come within the terms of this regulation, the Regulations were not imperative, but were subject to exception in special circumstances—*Shirer* v. *Dixon*, May 28, 1885, 12 R. 1013, 22 S.L.R. 669. The circumstances here were very special, and justified exception to the general rule. The Act of Sederunt had not in recent years received the same strict interpretation as in the case of the *Consolidated Copper Company of Canada, Limited* v. *Peddie*, January 17, 1878, 5 R. 531, 15 S.L.R. 274, relied on by the pursuer—*Glen's Trustees* v. *Lancashire and Yorkshire Accident Insurance Company, Limited*, 1907 S.C. 1, 44 S.L.R. 1. (2) The Auditor had erred in taxing off so much of the fees charged for skilled medical witnesses in view of the difficulty of the cause in medical science.

Argued for the pursuer (respondent)—The items in question did not fall within the proviso of the regulation, which dealt only with precognitions. The Act of Sederunt was explicit, and was not subject to any modification, however special the circumstances—*The Consolidated Copper Company of Canada, Limited* v. *Peddie* (*cit.*). (2) The Court would not lightly interfere with the Auditor's discretion—*Stewart* v. *Padwick*, February 26, 1873, 11 Macph. 467, 10 S.L.R. 286; *Shaw* v. *Boyd*, 1907 S.C. 646, 44 S.L.R. 460—and as matter of fact he had treated the defender's charges for medical men very generously.

At advising—

The opinion of the Court was delivered by

LORD LOW—The first question raised under this reclaiming note relates to expenses incurred by the defenders in connection with the exhumation and *post mortem* examination of the body of the late Alexander Govan. These expenses amount to £40, 10s. 7d., and the Auditor has disallowed them *in toto*, and the Lord Ordinary has held that he was right in doing so. The Auditor proceeded under the third of the general regulations as to taxation of accounts for judicial proceedings contained in the Act of Sederunt of 15th July 1876. That rule is to the following effect.—[*His Lordship here read the rule, quoted supra.*]

Now the Auditor and the Lord Ordinary have proceeded upon a strict and literal reading of that rule, and it was contended with much force before us that the rule is imperative and admits of no modification, and that it was not competent for the Court to follow any other course than that which has been adopted by the Auditor and the Lord Ordinary. Now in many ways the Act of Sederunt leaves no discre-

tion to the Court. For example, where a maximum fee is fixed for a particular step in procedure, the Court cannot allow a larger fee. But I cannot doubt that the Court has some discretion in applying the general regulations, and is entitled to make some modification upon the strict letter of such regulations if the justice of the case so requires. The case of *Shirer* v. *Dixon*, 12 R. 1013, seems to me to be an authority for that view.

At the same time I recognise that the discretion is one which must be exercised with extreme caution, and only in very special circumstances. But here the circumstances are altogether exceptional. Without a *post mortem* examination of Mr Govan's body the defenders could have no idea how they stood in regard to the very serious and peculiar claim which was made against them, nor could they state a defence except a purely hypothetical one. Further, although the exception in the rule in regard to precognitions does not directly apply to the case, it comes very near to doing so, because it was obvious that the result of the case would mainly depend upon the medical evidence, and the facts necessary to enable medical men to give evidence at all could not be ascertained without a *post mortem* examination, and a *post mortem* examination was not a thing which could be delayed indefinitely, but had to be proceeded with at once. In these very special circumstances we are all of opinion that an allowance should be made for the expenses in question.

In giving effect to that view we were anxious to save the parties from the expense of a further remit to the Auditor, and that gentleman has furnished us with a note of certain charges which, in his opinion, would fall to be disallowed in any event. These charges amount to £5, 5s. 2d., which being deducted from the £40, 10s. 7d. leaves £35, 5s. 5d., to which we shall find the defenders to be entitled.

The other question relates to charges incurred by the defenders to medical witnesses employed by them. The total amount is £368, 14s. 1d.; the Auditor has taxed off £242, 14s. 1d., leaving £126. I do not think it is necessary to go into detail upon this branch of the case. We have carefully considered what was urged by both sides of the bar; we have before us the views of the Lord Ordinary in the opinion which has been printed; and we have had a meeting with the Auditor. It was suggested by the defenders' counsel that the Auditor had struck out altogether the charges relating to the *post mortem* examination. The Auditor, however, informed us that that was not the case, but that he had taken into consideration and had taxed the whole of the charges. He also gave us explanations as to the principle upon which he proceeded in taxing this part of the account, and we are satisfied that he has exercised his discretion wisely, and that there is no reason for interfering with what he has done. To that extent also we shall therefore disallow the objections to the report.

LORD LOW intimated that the LORD JUSTICE-CLERK, who was absent when the case was advised, concurred.

The Court recalled the interlocutor of the Lord Ordinary, sustained the note of objections to the extent of £40, 10s. 7d., less £5, 5s. 2d., and *quoad ultra* repelled said objections.

Counsel for the Pursuer (Respondent)—Cooper, K.C.—M. P. Fraser. Agents—Patrick & James, S.S.C.

Counsel for the Defenders (Reclaimers)—Hunter, K.C. — Munro — A. Crawford. Agents—Auld & Macdonald, W.S.

Wednesday, February 3.

FIRST DIVISION.

[Lord Dundas, Ordinary.

ANDERSON *v.* MANSON AND OTHERS.

Club — Resolution of Council Suspending Member—Reduction—Ultra vires—Alleged Irregularity in Procedure—Disqualification—Bias—Interest.

The rules of a pony-breeding society provided, *inter alia*—"All entries when lodged become the property of the council, and are received subject to the decision of the council, to whom is reserved full right . . . to publish . . . or not to publish, any or every pedigree presented for entry. . . ."

A, a pony-breeder and a member of the society, having drawn its attention to certain inaccurate entries in its studbook by B, another member, the society remitted the matter to its council "with full powers." The council passed a resolution suspending B and instructing the secretary to refuse to accept any entries from him or to grant him any certificates pending the further consideration of the matter at the next general meeting of the society. At the meeting of council A presided and concurred in the resolution. B thereafter brought an action against the society for reduction of the resolution, in respect, *inter alia*, that (1) the council had no power to suspend him, and (2) that A, who was a trade rival of his and therefore presumably biassed, had presided at the meeting of council at which he was suspended.

Held (1) that as B had not been deprived of any of his contractual rights he was not entitled to the reduction craved, and (2) that mere community of interest did not disqualify A from presiding at the meeting in question, there being no proof that he had exercised an undue influence over the other members; and defenders *assoilzied*.

On 8th October 1907, Peter Anderson, Globe, Lerwick, brought an action against Anderson Manson, Maryfield, Bressay, Shetland, and others, the president and members of