to expenses out of the fund *in medio*, in respect they had reasonable grounds for making their claims, and that it was not their fault, but that of the testatrix, that litigation became necessary to have it determined which of the papers or writings left by her were to be held as forming her settlement. On the other hand, it was maintained not only that the claimants who were wholly unsuccessful should not get any expenses, but that they ought to be subjected in expenses. The Lord Ordinary has arrived at the conclusion, that, in the circumstances of this case—and there is no absolute or invariable rule as to expenses—the medium course, viz., of finding no expenses due to or by the claimants in question, is the correct one. The expenses of raising and bringing the process into Court have been, by a former interlocutor, awarded to the parties by whom these expenses were incurred out of the fund *in medio;* but the Lord Ordinary does not think that the present is a case for awarding out of the fund *in medio*, the expense of preferring and maintaining claims founded on writings which have been held by the Court not to be part of the testatrix's settlement at all. The fund not being very large in itself, and various parties having made separate claims, founded on the invalid writings referred to, the consequence would be, that, if all of them were to be found entitled to expenses out of the fund *in medio*, a very serious inroad would be thereby made upon what, according to the present standing judgment of the Court, belongs to others."

The unsuccessful claimants reclaimed.

WATSON (with him A. R. CLARK), for them, argued—The Court have recognised a distinction in disposing of such questions between the case where a party takes his risk of the construction of a clause in a deed admittedly valid, and where he seeks to establish the validity of deeds the operativeness of which is on all hands recognised as a question of doubt. Here the difficulty has been induced by the testatrix herself, and it is only reasonable that the parties who were thereby led to be claimants should have expenses allowed to them out of the fund. Hill *v.* Burns, 2 W. and S., 389; Cameron *v.* Mackie, 7 W. and S., 106; Morgan *v.* Magistrates of Dundee, 3 M'Qu., 176; Dunlop, 1 D., 912.

GLOAG (with him A. MONCRIEFF), answered—The Court have never, except in very exceptional circumstances, which are not present in this case, given effect to the plea of the reclaimers. But here the respondents are in the position of residuary legatees, and the effect of allowing the unsuccessful claimants whom they have defeated to get their expenses out of the fund, would be to diminish the fund to which, contrary to opposition, they have been preferred. Allan, 7 D. 908; Lady Baird's Trustees, 18 D. 1246; Wilson *v.* Crosbie, 3 M'P., 882.

At advising,

Lord JUSTICE-CLERK—The reclaimers maintain that when a question is raised as to the construction and meaning of a settlement, or as to what papers constitute the settlement of a person deceased, and the question is difficult and requires to be determined before the estate can be distributed, the expenses of the inquiry should all be paid out of the fund, no matter what is the state of interest in the fund. I confess that this is too broad and abstract a proposition. There have been cases in which expenses have all been paid out of the fund *in medio*, but these cases have all been based on considerations of equity. I don't think that the general rule, which has been approved of both in the Court of Session and in the House of Lords, should be extended. The rule is one of a very dangerous kind, and I am rather disposed to deal with each case upon its own circumstances. Here it is obvious that the right of the residuary legatees under the testatrix's deed is unchallenged and unchallengeable. There is no doubt as to their right. But the unsuccessful claimants, who maintain that they should not be found liable in expenses, endeavoured to set up and constitute special legacies, which, of course, would prove a burden on and must be provided out of the residue. And what would be the effect of allowing them expenses out of the fund?—that a winning party would be ordained to pay the expenses of the party unsuccessful. I don't say that that is conclusive, because there are cases in which such order has been given. But it would not be consistent with justice in the present case, but would be a direct violation of it, to order the party who was successful in defending his own fund to pay the expense of the party attempting to diminish it. I am disposed therefore to adhere. It was said that the question was one of unusual difficulty, and nothing can be said otherwise, for by our judgment we altered the interlocutor of the Lord Ordinary, and did so only by a majority. But though the question was a difficult one, that only carries us the length which the Lord Ordinary has gone, and that is far enough, that the unsuccessful claimants should pay their own expenses.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to, and the reclaimers were found liable in expenses since its date.

Agent for Reclaimers—Wm. Miller, S.S.C.

Agents for Respondents—Wilson, Burn, & Gloag, W.S.

GRAY *v.* GRAY.

Husband and Wife—Divorce—Identification of Wife—Conjugal Rights Act—Final Judgment—Additional Evidence. The pursuers of an action of divorce obtained decree of divorce from the Lord Ordinary. On hearing a reclaiming note for the defender, the Court intimated an opinion that the evidence as to identification of the defender was insufficient, whereupon the pursuer moved for leave to open up the proof, with the view of leading additional evidence upon this point. (1) Held (Lord Cowan dissenting) that the ground of action being really the charge of a crime against the defender, she could not be called a second time to answer for it; and motion accordingly refused as incompetent. (2) Circumstances in which allegations of adultery held not proven.

This is an action of divorce at the instance of Richard Gray, stationer, Edinburgh, against his wife, founded on the alleged adultery of his wife. The evidence was led before Lord Kinloch last session, and the proof was taken under the Conjugal Rights Act. The defender was cited as a haver by the pursuer, but she did not appear. The evidence as to the identification of the defender consisted of statements made by witnesses that a person called Mrs Gray was in the habit of coming to the house of the co-defender during the period libelled, and of the following statements in the deposition of the co-defender:—"She told me that she was a married woman, and that her husband resided in Edinburgh. She said his name was Richard Gray, and that he was a com-

mercial traveller to Cowan & Co., and had been in their employment for about thirteen years. She also said he had been in Coldstream several times till within five years. She showed me a document stating that she had an annuity of £40 from him. The date of this document was six or seven years ago." In the defences for Mrs Gray it was admitted that upon the 22d of May the pursuer and defender entered into a deed of separation, and that under this deed the defender enjoyed an annuity of £40 yearly. Some witnesses said that she was known in Coldstream as a Mrs Gray who lived with Mrs Fairbairn there, but Mrs Fairbairn was not called. This was the evidence of identification, and both its sufficiency and that of the evidence as to the *corpus delicti* were called in question at the debate before the Lord Ordinary. On 8th June 1866 his Lordship, without hearing the pursuer's counsel on the evidence, pronounced the following interlocutor :—

"*Edinburgh, 8th June* 1856.—The Lord Ordinary having heard parties' procurators and made *avizandum* and considered the proof adduced and whole process: Finds facts and circumstances proved sufficient to infer that the defender committed adultery with the co-defender, William Laidler or Laidlaw: Finds her guilty of adultery accordingly: Therefore, divorces and separates the defender from the pursuer, his society, fellowship, and company, in all time coming: Finds and declares in terms of the conclusion of the libel and decerns."

The defender reclaimed.

W. A. Brown, for her, on the question of identification—There is not here the slightest evidence, assuming, in the meantime, that adultery with the co-defender was committed by somebody, that it was done by the defender. The proof merely amounts to this, that the co-defender had carnal knowledge of somebody who said that she was the pursuer's wife, and, as such, had an annuity of £40 yearly. The mere citation of the defender as a haver, and her failure to appear, cannot in the least avail the pursuer to supplement his deficiency of proof; his remedy was to apply to the Court for an order for her attendance.

Thoms, in answer—The evidence of identification is certainly meagre, but it is sufficient. In the defence which the defender has put into the action she sets herself forth as the wife of the pursuer. The fact that the person who committed adultery with the co-defender said she was the wife of the pursuer would not have been sufficient, but the circumstance that the co-defender saw in this person's hands a bond of annuity for £40, which is just what the defender admits she had from her husband, is conclusive evidence as to her identity. The defender should not be heard to plead a failure in identification, seeing that the difficulty has arisen through her own fault in not obeying the citation served upon her.

At this stage of the argument, the Lord Justice-Clerk suggested that the pursuer might take time to see whether he could satisfy the Court that it was competent for them to open up the evidence with the view of enabling the pursuer to make his proof of identification complete. The case was continued for this purpose.

D. B. Hope, for the pursuer—The Conjugal Rights Act introduced no difference of principle in the way in which divorce cases were dealt with either before the Commissaries or when proof was taken on Commission from the Lord Ordinary. In several cases, involving the consideration of *status*, it has been held competent to follow the course which is here urged by the pursuer. It would be an act of manifest injustice to debar him from obtaining redress against such a grave wrong as he alleges to have been done to him—24 and 25 Vict., c. 86, sec. 13; Elder, 17th November 1829, 8 S. 56; Fleming *v.* Corbet, 21 D. 179.

W. A. Brown, for defender, answered—The analogy of cases involving questions of *status* does not apply. A divorce case has no more privilege than any other, and there are several cases where the Court have refused the indulgence asked. Further, the ground of action amounts to a criminal charge, and the defender having already "tholed an assize," she is not bound to answer in another libel. To grant this motion would be the introduction of a *mala praxis*, and would be *pessimi exempli*, for, if granted here, it might be granted in any other cause with the same reason.

At advising,

Lord Justice-Clerk—The first matter to be disposed of here is the motion made by the pursuer to be allowed to lead additional evidence. It is represented to us that the addition required is only to identify the defender as the person who is said to have had carnal connection with the co-defender Laidlaw in his house at Coldstream. Only to identify the accused party as the party who committed the offence is an odd form of expression. It appears to me to be the whole question, where such a charge is made; and your Lordships, who know the practice of criminal courts, are aware that it is the point most frequently in dispute before a jury. That obviously is a most important question in every case where such a charge is made, and it is immaterial whether it is made in one form or another. The circumstance that the charge of adultery is made in a consistorial cause does not appear to me to affect the question. Wherever the charge of a crime is made the allegation and the proof of it must be judged by the same critical eye. Even in ordinary civil causes, where a charge of forgery or fraud is made, nothing short of the precision of an indictment will be allowed in averment, and nothing in proof short of what is required in criminal courts. And it was only the other day, in an action of culpable homicide, where the representatives of a schoolmaster brought an action of damages against the heritors, on the allegation that his death had been brought about by his occupying an insufficient house, that we had occasion in this Court to express the same view. We intimated our unanimous opinion that such a charge requires to be made with the same accuracy as when preferred in a criminal Court. Therefore, it appears to me that, in disposing of this case, the conviction of adultery which the Lord Ordinary has pronounced proceeds upon a proof which must be judged upon its own merits, for the purpose of ascertaining if the proof is sufficient to convict the defender. If we were to allow a pursuer, whenever he discovers that his proof is not sufficient, to supplement it, there is no saying where it would end. I see no consideration in this case that would not be equally applicable in any other. The cases of Elder and Corbet are both cases of declarator of marriage which involve not only the *status* of the parties to the suit, but generally involve the *status* of persons who are not parties to it. And in these cases it was quite justifiable to lead further evidence. But these cases are plainly inapplicable here. I am of opinion, therefore, that we must reject the motion. And then the question is—What is the state of the evidence? There was a woman that had, on the occasion libelled, carnal

connection with the co-defender in Coldstream. Mrs Gray, the defender, was then in Coldstream, and a woman representing herself to be Mrs Gray was the woman who had the intercourse with William Laidlaw. She called herself Mrs Gray, and had a document with her showing that she was entitled to an annuity of £40. That is the whole evidence. I think no more is proved. The question whether that evidence applies to the defender depends on the question whether the person who made these statements was or was not the defender. If she was the defender then the statements were true; if she was not the defender, then they were not true. The sole value of the evidence is as showing whether the defender was that woman, and the pursuer has failed to prove that. This is not a mere slip, it is an omission of what is most essential, because, unless the defender is identified, it is impossible to say whether the pursuer is entitled to decree.

Lord COWAN—I cannot think that it is beyond the power of the Court to allow additional proof, and rather think it has been asked on the suggestion of the Court. But the question assumes a more serious aspect on account of the ground on which your Lordship has rested your judgment, because it implies that it is not competent for the Court to allow such additional evidence. It appears on the face of the proof, and it seems to have been taken for granted, that the defender Mrs Gray and the person who had connection with the co-defender Laidlaw were one and the same person. I don't see that the objection was stated before the Lord Ordinary. The case comes here, and then the question is raised, is there sufficient evidence to identify the defender? Assuming there is not, the pursuer asks for additional evidence to the limited effect of identifying the defender—he does not ask more. I think it is within the power of the Court to grant that motion. The Court have interfered where circumduction has passed. That they have power to do so has been laid down in the civil courts, and the question is whether they have not the same power in the criminal courts? A distinction may be taken between actions of declarator of marriage and actions of divorce. But see if this power has been recognised in questions of *status*. I apprehend that the cases of Elder and of Corbett are authorities to the effect that the Court have the power of opening up the evidence for the ends of justice. But it is said this is not an action of declarator of marriage; it is an action of divorce, and judgment cannot go out against the defender without finding that she has been guilty of a crime. This is true; but the case as presented to us only proposes to prove her guilty of adultery *ad civilem effectum*. Therefore, I cannot see that that restriction should prevent the Court from giving the pursuer a remedy for an unfortunate mistake either of his agent or counsel. I should be sorry if in this class of cases a remedy for such a thing should not exist. I do not assimilate this case to trial by jury; there the whole evidence must be led. But suppose a trial by a jury, and a motion made for a new trial on the ground that the pursuer had by some omission failed to identify the defender. I think it would be a question entitled to very grave consideration whether a new trial should not be granted. Having power then to grant the motion, and having read the evidence, which imports a very grave suspicion, if not a positive conviction, against the defender, I think it should be granted.

Lord BENHOLME—This is a case in which it is quite unnecessary for me to enter upon the power of the Court to grant this motion, for my opinion is formed on the circumstances of the case, and on the injurious effects that would follow if a party charging a crime should be allowed to take his judgment, and when he found it unfavourable, to obtain additional evidence. It would be contrary to all ordinary justice that an individual should be twice exposed to the burden of defending such a charge. Moreover, it would be a bad example. On the second point, I think it unnecessary to say anything more than that the proof as to identification is a perfect blank.

Lord NEAVES—I concur with the majority of your Lordships, and I should very much regret if any other judgment had been pronounced. An action of divorce is of a very peculiar kind. It is not a process intended to encourage divorce, or inquisition into private life and character; it is a remedy given to the injured spouse, but it is a remedy based on the allegation of crime on the part of the other spouse. "Therefore," the pursuer says in his summons, "the pursuer ought and should have sentence and decree of the Lords of our Council and Session finding and declaring the defender guilty of adultery with the co-defender, the said William Laidler or Laidlaw, and decreeing and separating her from the pursuer's society, fellowship, and company." This may be remedial, but it is also penal, for the summons adds—"And also declaring the defender to have forfeited all the privileges of a lawful wife, and that the pursuer is entitled to live single, or to marry any free woman, as if he had never been married to the defender, or as if she were naturally dead." It is said that the defender, though cited, did not appear. The pursuer had no right to expect assistance; his case must be determined by the ordinary rule, that the pursuer must prove his case. The pursuer has failed to do that, and he comes to us saying—"Let me have another chance." Cases of declarator of marriage arenot of this kind. This is not a process to declare *status*, but to destroy it. And there is a great deal in what your Lordship has said, that where a crime is the ground of action there must be the same precision of evidence as in criminal cases. In cases of slander and fraud, although occurring in the Civil Court, the law looks for the same precision in pleading and evidence that it does when raised in the Criminal Court. As to the analogy of the case of jury trial, I should be sorry to afford encouragement to any one who had failed to identify the defender by suggesting that he had any chance whatever of getting a new one.

The Court accordingly recalled the interlocutor of the Lord Ordinary, and found the adultery charged not proven.

Agents for Pursuer—Stewart & Wilson, W.S.
Agent for Defender—James Bell, S.S.C.

OUTER HOUSE.

(Before Lord Kinloch.)

MUIRHEAD *v.* LAING.

(Sequel of case Laing *v.* Laing, Jan. 17, 1862, 24 D, 1362.)

Poor—Inspector—Accounting—Audits—Expenses.

1. Audits of the accounts of an Inspector of Poor by Committees of a Parochial Board for a series of years, Held to preclude the Parochial Board from obtaining from the Inspector an accounting as of new, but not to bar inquiry with regard to certain items of alleged