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

errors specially condescended upon. 2. Held by Lord Kinloch (and acquiesced in), that although the books kept by the Inspector had not been so complete or satisfactory as they should have been, he was entitled to expenses in the cause, the investigation having resulted substantially in his favour.

This was an action brought by the former and insisted in by the present inspector of poor for the parish of Denny, against the defender, who had filled that office from 1845 to 1858. The conclusions of the action were for count and reckoning with respect to the defender's intromissions during the tenure of his office, and for payment of £2000 as the alleged balance due by him thereon. The accounts of the defender had been from time to time audited by committees of the parochial board of the parish. After the defender ceased to hold office, a demand was made upon him to account as of new, to which he declined to accede in respect of the audits. The board then brought this action in 1860. The defender offered in his defences to explain and correct any error in his accounts which was pointed out. The board also brought a reduction of the audits, which was thrown out on the ground of irrelevancy, and the defender contended that the audits ought to protect him from any challenge of his accounts except as regarded *errores calculi*. The Lord Ordinary and the Second Division of the Court held that he could not plead the audits to this extent, but that the pursuer was bound to specify by minute the errors which he alleged to exist in the defender's accounts. The pursuer did so, and was allowed an investigation before an accountant upon several heads and relative items of alleged errors. In particular he was allowed an investigation in regard to alleged items of (1) sums received from other parishes not entered or accounted for, or only partly accounted for, and not disclosed to the auditing committees; (2) sums not credited to the board in making remittances to other parishes deducted from such, and not disclosed as aforesaid; (3) sums received on behalf of the board, and not credited or disclosed; (4) sums received from the sale of the effects of deceased paupers and not credited; (5) sums entered twice to the credit of the defender; (6) sums erroneously entered to the debit of the board; and (7) erroneous credits for interest, discount, bill stamps, &c. The pursuer was refused an investigation, with regard to a variety of particulars upon which he claimed a right to inquiry—viz., in respect of (1) alleged failure to account for the amount of assessments levied on the parish; (2) payments unvouched, or entered at larger sums than vouched; (3) payments to paupers said to have been dead; and (4) payments to medical men, for duties for which as alleged they were paid a fixed salary—excessive payments to paupers, and payments to himself for law expenses. The audits were held to preclude an investigation upon these matters.

An elaborate investigation was gone into before an accountant to whom the matters allowed to be investigated were remitted. The procedure subsequent to what is above given before the remit, during it, and the result of the accountant's investigation, are sufficiently detailed in the portions of the note to the Lord Ordinary's interlocutor given below. Both parties lodged objections to the accountant's report, which were repelled. The Lord Ordinary has further, for the reasons given below, found that the defender is entitled to absolvitor with expenses, upon accounting for the sums contained in the deposit-receipts referred to in the note. *Inter alia*, his Lordship says:—

"The defender was for nearly thirteen years--viz., from September 1845 to August 1858—inspector of poor for the parish of Denny. His accounts were from time to time subjected to audit by a committee of the Parochial Board, the examination going to such extent as was thought right by the committee. The succeeding inspector, however, or those whom he represented, were not satisfied with the accuracy of the defender's accounts; and on 9th April 1860 an action was raised against him concluding for an accounting for the whole period of thirteen years, and for an alleged balance on his intromissions, stated at a random sum of £2000.

"On the summons so raised a litigation of more than six years has supervened. The pursuer averred on the record that the accounts of the defender were false, if not fraudulent, and he set forth in specific detail, a variety of items in which he averred the accounts to be inaccurate. The amount of these errors he alleged (Cond. 14) would extend to between £1000 and £2000.

"The Court held that to a certain extent the inquiry was precluded by the audit of the committee. But, affirming an interlocutor of the Lord Ordinary, of date 10th June 1863, they considered that on certain points specially condescended upon an investigation was still open; and they confirmed the Lord Ordinary's remit to Mr Ralph Erskine Scott, accountant, to inquire into these points, and report. The errors to be so inquired into involved some hundred pounds.

"Before going to the accountant, the defender discovered a sum of £16, 0s. 7d., which he had by mistake entered twice to his credit; and on 11th July 1863, his agent wrote to that of the pursuer, tendering payment of the sum. On payment being refused to be taken, the sum, with interest (£21, 13s.), was consigned in bank on a deposit-receipt, dated 1st August 1863, to meet the demand of the pursuer.

"Again, in the course of the proceedings before the accountant, there were some small sums, amounting altogether to £4, 7s. 1d., which the defender said he would pay rather than have any controversy about them. And payment being again refused to be taken, the amount, with interest (£6, 5s. 5d.) was consigned on a deposit-receipt, dated 10th January 1865.

"The accountant's report, a document of vast bulk and elaborateness, was returned on 27th April 1866. Its conclusion was that, besides handing over the deposit-receipts, the defender was due to the pursuer a sum of £12, 10s. 11d., making with interest to 19th April 1860 a sum of £16, 8s.

"But by this time a further error had been discovered, which this time the defender had made against himself—viz., the error of twice debiting himself with a sum of £11, 18s. 7d. (or £13, 19s. 8d. with a certain sum of interest) on 25th October 1851. The pursuer not admitting this error to have occurred, a second remit, limited to this special point, was made to the accountant.

"The second report, returned on 2d January 1867, was in favour of the defender; and giving effect to the correction of this error (with interest calculated to the same date of 19th April 1860), the conclusion of the whole matter was, that in place of any balance being due by the defender to the pursuer, he was creditor of the pursuer in a sum of 11s. 8d. Into this lame conclusion this great process of accounting sank, after the litigation of six years.

"It appears to the Lord Ordinary that justice would not be done to the defender, were he not found entitled to expenses of process. After the audits of the committee, and with no reason to doubt the good faith of the defender, such an action as the present ought never to have been raised. In the course of thirteen years' administration of matters involving a great deal of minute accounting, it would not be wonderful if some errors should have occurred in the details. But the mere suspicion of such being found formed no good grounds for throwing on the defender the *onus* of accounting as from the beginning for thirteen years' intromissions. If the new inspector, or his board, seriously thought that the accounts required investigation, they ought to have put them into the hands of an accountant of their own, or an accountant named in concert with the defender; and requested explanations from the defender, such as the defender from the first professed himself willing to afford. If in place of following this course, they recklessly involved the defender in an expensive litigation of years, on a rash offer to prove specific allegations of error, and in the end have utterly failed, it is nothing but bare justice that this should be at the cost of the unsuccessful pursuer, and not of the successful defender.

"On the other hand, it has not been disputed that the books kept by the defender were not of the full and satisfactory character which they ought to have possessed, and which, if they had exhibited, the accountant reports that the extent of the inquiry might have been materially lessened. The Lord Ordinary at first doubted whether on this account he ought not to impose a modification on the expenses found due to the defender. He ultimately settled in the conclusion, that the circumstance formed no justification either of the action being brought, or of its being persisted in to the effect of going to issue on alleged specific errors in the offered proof of which the pursuer has so signally failed. The committee of the board, and the Parochial Board through them, were, during the period of the defender's continuance in office, satisfied with the books as they were kept. The trivial clerical errors found out in the course of the inquiry and admitted as soon as pointed out, would most likely have all been discovered by the exercise of a little fair dealing. If, in place of following this course, the Parochial Board entered on the speculation of attempting by means of a law-suit, to fix on the defender liability for one or two thousand pounds, of which no part has turned out to be due by him, it is only right and fitting that they should have thrown on them the risk and cost of the adventure."

The interlocutor of the Lord Ordinary has been acquiesced in by the Parochial Board.

Counsel for Pursuer—Mr Fraser and Mr Scott. Agents—Wotherspoon & Mack, S.S.C.

Counsel for Defender—Mr Mackenzie and Mr MacLean. Agent—William Miller, S.S.C.

(Before Lord Ormidale)

KNOX *v.* YOUNG AND M'LEOD.

Expenses—Trustee in Bankruptcy. A pursuer of an action having been found liable in a sum of expenses, the decree for which was extracted, and having been thereafter sequestrated, the trustee on his estate sisted himself as a party to the action. Held (per Lord Ormidale and acquiesced in) that the trustee had not, by sisting, rendered himself liable for the expenses which had been decerned for.

In this case a question of fact was tried before the Lord Ordinary in regard to which the defenders were successful, and they were found entitled to expenses, which were taxed at £65, 6s. 3d. For this sum decree was pronounced on 18th July 1866 against the pursuer. This decree was extracted. But notwithstanding the settlement of this question, there were other points in the case left over for decision, and before they came to be discussed the pursuer was sequestrated. Intimation of the dependence of the process was made to the trustee, who sisted himself as pursuer. The defenders then moved that the trustee should be found liable in the expenses which had been decerned for, on the ground that by sisting himself he had become liable in all expenses, past as well as future, incurred in the action.

The Lord Ordinary (Ormidale), after hearing parties, pronounced the following interlocutor refusing the motion:—

"*Edinburgh, 11th December* 1866.—The Lord Ordinary having heard counsel for the parties on the motion for the defenders, that Mr Samuel Edgar Trotter, the trustee on the pursuer's sequestrated estate, sisted as a party to this action by interlocutor of the 4th instant, should be held liable, and decree given against him for the £65, 6s. 3d. decerned for against the pursuer by interlocutor of 18th July last: refuses said motion, and finds the defenders liable to Mr Trotter in the expenses incurred by him in relation to the present discussion, and modifies the same to the sum of £5, 5s., for payment of which to the said Mr Trotter decerns against the defenders.

"R. MACFARLANE."

"*Note.*—An elaborate argument was submitted to the Lord Ordinary in support of the defenders' motion, and the case of Torbet *v.* Borthwick, 23d February 1849, 11 D. 694, was cited as an authority in point. But in the opinion of the Lord Ordinary that case, and the principle which it illustrates, have no application to the circumstances in which the present motion has been made. It may be quite true, and taken as a settled principle, that a trustee sisted in the place of a bankrupt pursuer or defender is liable for the expenses of the process in which he is so sisted, incurred by his adversary, whether before or after the sisting, for the reason that he adopts the process, with all its risks, as regards expenses, so far as not previously determined, and nothing more was settled by the case of Torbet. That, however, is quite a different thing from holding a trustee liable for a sum of expenses for which decree was pronounced and extracted, as in the present instance, before he was sisted or became connected with the process at all. It was only to the depending process that the trustee, Mr Trotter, was sisted as a party; but for the £65, 6s. 3d. in question, decree having been pronounced and extracted, and diligence admittedly done before the sisting took place, there was no longer any depending process *quoad* that sum. Moreover, it would be incompetent and unprecedented to give a second decree in the same process for the same sum for which decree had been already pronounced and extracted. The Lord Ordinary being therefore of opinion that the defenders' motion is untenable, as well in reference to technical form and competency as sound legal principle, has had no hesitation in refusing it, with expenses, which, in order to save the ex-