notice at the proper time, and that the position and power of the second respondent was such as to render a charge against him competent. The 16 sect. of the Summary Procedure Act, which does away with the necessity for a record of evidence in the inferior court, precludes our entering into questions turning on the evidence. We must repel the objection, and hold that the evidence disclosed a competent case against both of the parties. I don't consider it necessary to inquire whether the same principles apply to the case of "making." That is a distinct offence. It is provided for by separate terms, and the penalty applicable to it is also different. As to the offence charged here, that of "keeping," I have no doubt as to the competency of the complaint as laid in this case against both the manufacturer and manager.

With regard to the next objection, relating to forfeiture, it is not necessary for me to add to what your Lordships have already said. Under the terms of the section I have no doubt that the forfeiture took place when the unlawful act was committed, and was not postponed until judicially declared. The fact of the gunpowder having been exploded cannot obliterate the consequences to the offenders. I doubt, indeed, whether the fact of explosion is not just one of those facts which we cannot inquire into. But supposing it is not so, it certainly cannot prevent the enforcement of the farther penalty.

The remaining objection was that there is no prayer for "forfeiture." It is true that there is no prayer in so many words for forfeiture, but there is a prayer for *all* penalties imposed by the Act. I think that was a prayer sufficient to authorise the Sheriff in pronouncing an interlocutor in the terms of the one before us.

I think the objections must be repelled, and the bill refused.

The LORD JUSTICE-GENERAL, LORD ARDMILLAN, LORD NEAVES, and LORD JERVISWOODE concurred.

Bill of Suspension refused.

Agents for the Suspenders—J. & R. D. Ross, W.S.

Agents for the Respondent—Murray, Beith, & Murray, W.S.

Tuesday, November 1.

FIRST DIVISION.

WALKER *v.* WALKER.

Res noviter. In order that a condescendence of *res noviter* should be allowed, the fresh statements must be specific and important, as well as indicating a distinct line of evidence from that taken in the original record. Circumstances in which, the original tenor of proof in an action of divorce having been to infer adultery from a long series of general conduct, statements alleging specific acts were admitted, while a statement merely of the same general conduct as was admitted to proof on the original record was rejected. The question, whether the facts are really *res noviter?* is a matter for evidence just as much as the truth of the facts themselves.

In this case of divorce, brought by the pursuer Mr Walker against his wife Mrs Jane Ann Fraser or Walker, on the ground of adultery with Mr James Grant, proof had been led in the Outer House, and an interlocutor pronounced by the Lord Ordinary (ORMIDALE), finding the adultery proved, and pronouncing decree of divorce. Against this interlocutor Mrs Walker reclaimed. Before the reclaiming note came on for hearing, the pursuer Mr Walker moved to be allowed to put in a condes cendence of *res noviter*. The statements which he desired leave to add to the record were as follows—"(1) On a night in the month of October or of November 1869, or of September immediately preceding, or of December immediately following, the pursuer being unable more specifically to state the date, the defender and James Grant, novelist, Edinburgh, referred to in the closed record, did go together in a cab, then belonging to Henry Henderson, cab proprietor, now or lately residing in No. 6 Blenheim Place, Edinburgh, from the Theatre Royal, Edinburgh, to the toll-bar at or near Coltbridge, Murrayfield, near Edinburgh, they being alone in the cab, and they did therein on the way to Murrayfield have carnal connection and intercourse with each other. The said Henry Henderson, who was driving said cab, had his attention attracted by noise coming from the inside of the cab, and looking in, saw the defender and the said James Grant in the act of having carnal connection, the naked thighs of the defender being seen by him; (2) On the 3d day of January 1870, or on one or other of the days of that month, or of December immediately preceding, or of February immediately following, the defender and the said James Grant did have carnal connection and intercourse together in a field on the south side of the back Dean Road, and in or near the corner of the said field, which is bounded by said back Dean Road on the north, and Skinner's Loan on the east, in the corner of which there are several trees and some grassy ground below them. They were seen by John Law, residing at Hermitage, Murrayfield. The said John Law was riding on horse-back in said back Dean Road at the time, and his attention being attracted to the south side of the wall near said corner, he looked over and saw the defender and the said James Grant close together, and close up to the wall, the under linen of the defender being visible. They immediately endeavoured to hide their faces, and the said James Grant tried to conceal the front part of his dress, and he and the defender displayed great confusion by their conduct, and the said John Law was at the time, and still is, in the belief that they were in the act of having carnal connection, or had just had carnal connection with each other; (3) On one or other of the days of July 1869, or of June immediately preceding, or of August immediately following, the pursuer being unable to fix the date more particularly, the defender and the said James Grant did together enter a park or field near Murrayfield House, and sat down together at a place about 100 yards from Murrayfield House, and they there behaved with improper and indecent familiarity towards one another, and did repeatedly kiss one another, and the said James Grant sat for a considerable time, not being less than half-an-hour, with one arm round the defender's neck, and his other hand placed upon her bosom. These acts were seen by Patrick Tansay, a labourer now or lately residing at Myreside, Edinburgh, who also saw them together on several occasions in that neighbourhood in the months of June, July, August, and September 1869. (4) The foregoing facts only came to the knowledge of the pursuer after he

proof was closed. The pursuer's agents used as much diligence in procuring evidence as they possibly could. But they did not hear of the foregoing facts in time to be available in the proof, and there was nothing in the evidence suggesting them, or suggesting inquiries to be made at the parties named. The evidence, as it was daily taken, was published in the newspapers, and it was believed that this induced the persons who can give evidence as to these facts to speak upon the subject, and thus they were learnt by the agents for the pursuer.

MACDONALD for the pursuer and respondent.

BALFOUR for the defender and appellant.

At advising—

LORD PRESIDENT—The admission of additional evidence, more especially in actions of divorce, is a matter of great delicacy, and the competency of the new averments must be strictly judged. In this case I have no doubt of the admissibility of the matter contained in articles 1 and 2 of the condescendence before us. The allegations in the record, as originally made up, were general. They averred a course of continued adultery with Grant extending over nearly a year. These averments were supported not by proceeding to prove any single act of adultery, but the case was constructed on the basis of inferring adultery from a long train of facts and circumstances, and the pursuer excused himself from taking this course by saying that he did not know when the particular acts of adultery were committed. In articles 1 and 2 of the condescendence of *res noviter* the pursuer sets out specific acts of adultery. I greatly doubt whether it would have been competent to prove these allegations under the record as it formerly stood. To render such proof competent either at the trial or now it was necessary to add a condescendence.

The question still remains, is the pursuer entitled to have the record opened up in order that he may add matter which ignorance prevented him from founding on in his former record, and which is now well and relevantly averred? I am prepared to admit the first two articles, and to proceed to make up the record of new by allowing the defender to answer them, and thereafter to close the record, and allow additional evidence.

As to the third article of the new condescendence, I entertain a different opinion. That is an allegation of facts which falls within the sixth article of the original record. The facts here set forth might have all been proved under the original record, and just amount to additional facts and circumstances from which to infer adultery. I do not think that we can admit the averments in that article to proof. I am therefore for admitting the first two articles and rejecting the third.

LORD DEAS—There is more delicacy in admitting a condescendence of *res noviter* in a case of divorce for adultery than in any other. This action is still undecided, and it is a point in favour of the pursuer that the only judgment that has been pronounced is in his favour. Still I should not be inclined to admit them unless the fresh statements are both *specific* and *important*. Now, nothing could be more specific or more important than the statements in articles 1 and 2 before us; so important are they, indeed, that if established they would substantiate his case independently of the evidence already led. We must of course be specially on our guard against the admission of false evidence. If we see anything palpably like an attempt to defeat justice by the introduction of false evidence we are bound to refuse to admit it. I see nothing of that sort here, and I agree with your Lordship that we should admit these two first articles; but, on the other hand, that we should reject the third for want of those conditions which I have just insisted upon.

LORD ARDMILLAN—The pursuer is in a position which, according to recognised usage, entitles him to get added to the record anything which is properly *res noviter.* Looking to the two first articles of this condescendence, and to the original record, I think that these are averments which he should be allowed to add. Of course the question whether they are really *res noviter venientes ad notitiam* is one which remains to be inquired into on the evidence, just as much as the truth of the averments themselves.

LORD KINLOCH concurred.

The Court accordingly "allowed the record to be opened up, and the first and second articles of the said condescendence of *res noviter* to be added to the record; refused to allow the third article to be added to the record," &c.

Agents for Mr Walker—Henry & Shiress, S.S.C.

Agents for Mrs Walker—J. B. Douglas & Smith, W.S.

Tuesday, November 1.

M'INTOSH, PETITIONER.

Messenger-at-Arms — Execution of Service. The Messenger's execution of service of this petition bore that he had "passed and in Her Majesty's name and authority," &c. Whereas the fact was, that his warrant was only an order or interlocutor of this Court.

The Court commented on the irregularity, but they allowed the execution to stand, on the ground that the real warrant was properly set forth, and that it was more or less true that the Messenger did "pass in Her Majesty's name and authority," as he was a Messenger-at-Arms, and acted under the authority of this Court, to which Her Majesty's was delegated.

Tuesday, November 1.

SMITH *v.* CRAIK & CO.

Jury Trial—Damages—Expenses. Where a jury give substantial damages, though only a portion of the random sum claimed, the rule is that expenses are carried; and, unless there is any glaring misconduct of the case, the Court will not go into the proof to see whether every part of the evidence was necessary for the success of the pursuer.

This case came before the Court upon a motion of the pursuer, to apply the verdict which had been given in his favour. On his afterwards moving for expenses, the defenders objected to his getting full costs of suit, on the grounds (1) that he had only got a verdict for a portion of the sum claimed; and (2) that he had led much irrelevant and unnecessary evidence, particularly as to the character of a certain road.