were responsible in damages. It was in that action that the Money Order Bank was assoilzied.

In judging of a question of *res judicata* it is necessary to examine particularly the conclusions and the *media concludendi* of the previous action as well as who the parties were. The parties to that other action were not identical with these in this action, for though the pursuer was the same the defenders were not. There the defenders were the Money Order Bank, here they are the individual directors. What is more material is, that the ground of action there was an agreement, and the only ground of liability alleged against the defenders was that the pursuer had a claim against the Money Order Bank for breach of agreement. The defenders were assoilzied, and we are asked to sustain that judgment of absolvitor as *res judicata* here. I have come to the conclusion that we cannot sustain the plea, on the simple ground that the *media concludendi* here are different from the *media concludendi* in the other action. In order to sustaining the plea of *res judicata* there are three requisites--first, the pursuer must be the same; second, the *media concludendi* must be the same; and third, the defender must be the same. If these three do not concur the plea of *res judicata* cannot be sustained. Here, with respect to the second requisite, it is plain that the *media concludendi* are very different, because the pursuer here sues not in virtue of an agreement, but solely and simply as a shareholder, his allegation against the directors being that they were guilty of a breach of duty as such, and that he is therefore entitled to a remedy. I think, therefore, that the judgment of the Sheriff is not well founded.

Lord Young and Lord Craighill concurred.

Lord Justice-Clerk—When this case was heard my impression was that the Sheriff's judgment should be adhered to, but I am not prepared to dissent from the judgment proposed. The lines of demarcation are slender, and I incline to think that the Sheriff would have acted more judiciously if, without sustaining the technical plea of *res judicata*, he had left the result of the other action for consideration on the merits. I quite agree with the course proposed.

The Court sustained the appeal, altered the judgment, remitted the case to the Sheriff with instructions to repel the plea of *res judicata*, and to proceed.

Counsel for Pursuer (Appellant)—Party.

Counsel for Defenders (Respondents)—Nevay—M'Kechnie. Agents—Richardson & Johnston, W.S.

Thursday, May 28.

FIRST DIVISION.

SHIRER (FORMERLY DIXON) *v.* DIXON.

Process — Expenses — Expenses of Preliminary Investigations — Discretion of Court—A. S., July 15, 1876.

A woman who had been divorced from her husband presented a petition praying for access to her child. The application was opposed by the husband, who by means of an expensive investigation satisfied the Court that from her mode of life the petitioner was an unsuitable person to have access to her child. *Held* (*diss.* Lord Shand) that the application being to the discretion of the Court, and the interests of the child being concerned, the expenses incurred in supplying information enabling the Court to dispense with a public and formal inquiry ought to be allowed, and a remit made to the Auditor accordingly.

George Dixon, stockbroker, Glasgow, was upon 24th April 1878 married at Cheltenham to Alice Shirer. The parties thereafter cohabited as husband and wife, and on 7th April 1879 a son was born named George Clifford Dixon.

In an undefended action for divorce for adultery, at the instance of the husband against his wife, decree of divorce was pronounced by the Lord Ordinary on 2d August 1883.

On 14th August 1884 the divorced wife presented a petition to the Court of Session praying for access to her child (who was living with Mr Dixon, who had married again), under such restrictions and conditions as the Court might see fit to impose.

Answers were lodged by Mr Dixon, in which he narrated the circumstances of the adultery founded on in the action of divorce, which adultery had been committed frequently, and in his own house. He also averred that the petitioner had committed adultery with two other men not mentioned in the divorce proceedings, with one of whom she continued her immoral relation after decree of divorce was pronounced. The adultery he alleged to have been committed in London, and in various other parts of England which he named.

The Court refused the petition.

In taxing the respondent's accounts the Auditor disallowed all charges connected with the investigation of the petitioner's immoral relations with the man with whom she was alleged to have lived before and after the divorce. These included the respondent's agent's fees and travelling expenses in England while making these inquiries, and payment of a detective who had been employed. They also included a precognition of the agent, and copy correspondence with the petitioner and her agents.

The respondent lodged objections to the Auditor's report, and argued that in so far as the investigation had supplied the Court with information necessary to the disposal of the petition without proof the expense thereof should be allowed.

The petitioner replied that the Auditor had followed the ordinary rule of not allowing

any expenses for investigation conducted prior to an order for proof or issues.

At advising—

LORD MURE—This is undoubtedly a very peculiar case. I have not my papers beside me at this moment, but enough has been stated at the bar to satisfy me that the circumstances are very special indeed. It is not disputed that the inquiries, the expense of which is sought to be recovered, related to matters relevant to the question at issue, and accordingly I think that unless the allowance of these charges is directly struck at by the rule regarding precognition, this is a case in which something should be allowed towards the expense of these inquiries. The investigation related to the conduct of a divorced woman who had presented a petition for access to her child, and it was most pertinent to the disposal of this petition that the Court should know what the petitioner was doing at the time of her application. I should therefore be disposed to remit back to the Auditor to hear the parties, and to make such allowance for these inquiries as he thought suitable.

LORD SHAND—I have some difficulty about this case, and I cannot concur in remitting it to the Auditor. No doubt it turns out from these inquiries that the petitioner has been shown to have lived with her paramour since the divorce, but it is a settled rule of this Court that parties must make these preliminary inquiries at their own expense. This is a most salutary rule, and its observance prevents abuses. I think that the Auditor has acted properly, and that we should not depart in this case from the ordinary rule.

LORD ADAM—I am in this position, that I do not know anything about the early procedure in this case but from what I have heard to-day. I am inclined to agree with Lord Mure that this is an exceptional case, and ought not to fall under the general rule.

When this petition was presented it was undoubtedly the duty of the respondent to make himself aware of his wife's doings that he might be in a position to supply the Court with the necessary information. This is not a case of the usual kind in which a mere patrimonial interest is involved; the respondent here was only doing his duty in making these inquiries, and all reasonable charges ought to be allowed.

LORD PRESIDENT—I am also inclined to make this case an exception to the salutary rule referred to by Lord Shand, that a party is not entitled to take precognitions prior to an order for proof or for issues except at his own expense. The present case does not fall under that rule. It is an application to the discretion of the Court, and in such applications the Court tries to avoid as much as possible all public and formal inquiry. It tries to get its information as much as possible by explanations and admissions of parties, and in order to obtain these expense must be incurred and should be allowed for. It is clear that the present case might not have terminated as it did but for the inquiries made by the respondent, and it is quite obvious from the explanations which were made that the petitioner is not a suitable person to have access to her child.

In such circumstances it would not be fair to the party who has made these inquiries and obtained this result that he should not be relieved to some extent of the expense which he has thus incurred.

There is another consideration which weighs with the Court in cases of this kind, and it is this, that the interests of the child have to be considered. Our duty is sometimes a difficult one, and it is very desirable to avoid as much as possible in the interest of the child anything of the nature of a formal proof.

On the whole matter I think that this is a case in which the ordinary rule does not apply.

The Court remitted back to the Auditor to hear the explanations of parties, and to make such allowance of expenses as he thought fit.

Counsel for Petitioner — Lang. Agents — Paterson, Cameron, & Co., S.S.C.

Counsel for Respondent—Robertson—Dickson. Agent—Alex. Morison, S.S.C.

Thursday, May 28.

FIRST DIVISION.

[Lord Lee, Ordinary.

BRIMS *v.* REID & SON.

Reparation — Slander — Innuendo — Privilege — Issue—Malice.

A newspaper published an anonymous letter containing a libel, and refused to give the writer's name. *Held* that it thereby took on itself the responsibility of the writer, and was not privileged, and therefore that in an action of damages by the person libelled malice ought not to be put in issue.

Issue—Veritas—*Justification.*

A newspaper having published an anonymous letter which supported an innuendo that the person to whom it referred had acted corruptly for his own interest in the pretended exercise of his public position, proposed in an action of damages by him to take a counter issue whether the statements in the letter were true. The Court *refused* the counter issue on the ground that it was not a proper issue in justification.

This was an action of damages for £1000, as raised by William Brims, architect and Dean of Guild, Wick, against Peter Reid & Son, printers and publishers of the *John O'Groat Journal.* The pursuer had been for some years a member of the town council of Wick and Dean of Guild of the burgh.

The *John O'Groat Journal* of date 16th October 1884 contained a letter headed "Our Dean of Guild" and signed "Nemesis," but the publishers refused to disclose the name of the author of this letter. It was in these terms, and the pursuer complained of it as libellous:—

"OUR DEAN OF GUILD."

"To the Editor of the *John O'Groat Journal.*

"Sir—As our Dean of Guild is one of the members of the Town-Council who seeks re-election in November, I think it would not be amiss if a few remarks were made on his past term of office.