

own is not entitled to have it accumulated, while his maintenance and education is borne as a burden by his father. The income falls, in the first instance, to be devoted to this purpose. The surplus, if any, is to be accumulated, there being no other fair way of dealing with it for the child's benefit. The contention of the father is, that he is entitled to supersede the trustees as regards the income of the trust-estate. I am clear he is not, but I am equally clear that he is entitled to such an allowance out of that income as will relieve him of the maintenance and education of his son. With regard to the amount of the allowance, that question, in the first instance, is for the discretion of the trustees.

The other Judges concurred.

Declaratory finding in terms of the foregoing opinion.

Agent for Stewart's Trustees—Alex. J. Napier, W.S.

Agents for John Stewart—Duncan, Dewar, & Black, W.S.

Tuesday, February 21.

SMITH v. SMITH.

*Agent—Sist—Expenses.* In an action of separation and aliment at the instance of the wife, she returned to her husband's house, and discharged her action before any proof had been led. Motion by the wife's agent, to be sisted as a party in order to recover expenses, refused.

This was an action of separation and aliment by a wife against her husband, on the ground of cruelty. The Lord Ordinary (GIRFORD) allowed the pursuer a proof, and thereafter pronounced this interlocutor:—"The Lord Ordinary having called the cause, and no appearance being now made for the pursuer to proceed with the proof, the defender's counsel moved for absolvitor, and counsel having appeared for John A. Gillespie, S.S.C., the pursuer's former agent in the cause, and craved to be allowed to sist him as a party to the effect of recovering his expenses from the defender, continues both motions till to-morrow."

The following Note was then given in for John A. Gillespie:—"The said John Adam Gillespie, agent disburser for the pursuer in this action, stated that the conclusion of this action had been obviated, and could not now be insisted in, by an arrangement come to between the parties themselves, under which the pursuer has returned to live in family with the defender. He therefore moved, and hereby moves, the Court to find him entitled to his expenses in said action, and for that purpose, if necessary, to sist him as a party to this action, and to remit to the auditor to tax his account of expenses, and to report; or to do otherwise in the premises as may seem fit."

The Lord Ordinary pronounced the following interlocutor:—

"18th November 1870.—The Lord Ordinary having heard the counsel for John A. Gillespie, S.S.C., and for the defender in the action, and considered the record and the note for Mr Gillespie, No. 8 of process, sists the said John A. Gillespie as a party to the process, to the effect of enabling him to maintain his claim for expenses against the defender; and before further answer, and on the motion of the said John A. Gillespie, allows him

a proof that the expenses claimed by him were incurred by him on reasonable grounds, and to the defender a conjunct probation: Appoints the proof to proceed before the Lord Ordinary on Friday, 2d December, at one o'clock afternoon, and grants diligence against witnesses and havers.

"*Note.*—In a proper consistorial cause like the present, it seems plain that a wife cannot deprive her agent of his claim against the husband for expenses merely by condoning or becoming reconciled to her husband. On the other hand, if the action has been from the first an utterly groundless one, and if this should have been known to the agent, or if the agent had, at his own hand, knowingly continued the litigation after the reconciliation of the spouses, this may deprive the agent of his claim for expenses. Now, on all these points the parties are directly at issue, and however unwilling the Lord Ordinary may be to get into a proof merely about the question of expenses, he feels it impossible satisfactorily to dispose of that question without some kind of evidence. The evidence, however, may and ought to be very short indeed, for the Lord Ordinary certainly will not, in the absence of the wife, try the proper merits of the action."

The defender reclaimed.

DUNDAS GRANT for him.

CAMPBELL SMITH for respondent.

At advising—

LORD BENHOLME—This case comes before us on a reclaiming note against an interlocutor by which the Lord Ordinary sists Mr Gillespie as a party to the process "to the effect of enabling him to maintain his claim for expenses against the defender," and the Lord Ordinary has allowed him a proof that the expenses were incurred on reasonable grounds. This is not a proof on the merits of the case, but a strange and anomalous proceeding to allow an agent to prove that he had reason to believe that his client had a good case. He might have reasonable grounds for so believing even though his client should be unsuccessful. I think such a proposal is out of the question. The only cases where an agent has been sisted were those where an interlocutor had been pronounced finding expenses due, or where something had been done which necessarily inferred that expenses must follow. It has never been done in order to raise a new litigation or to determine a question not already tried. This case never came to a decision, and the Court have never had an opportunity of determining whether expenses should be given. The matter which is proposed to be determined by the proof is not the merits of the case. I am clearly of opinion that we must recall the Lord Ordinary's interlocutor, and refuse to sist the agent.

The other Judges concurred.

Agent for Pursuer—John A. Gillespie, S.S.C.

Agent for Defender—James Barton, S.S.C.

Wednesday, February 22.

SECOND DIVISION.

SPECIAL CASE—IRVING.

*Entail—Bond of Provision.* Under the terms of a deed of entail held that after one heir of entail had burdened his estate with a bond of provision for a sum equal to three years' rents