judgment pronounced in accordance therewith exhaustive of the cause, and also that parties may be heard on the question of expenses of process." And thereafter, on 29th October 1871, this interlocutor:—"The Lord Ordinary having heard parties' procurators with reference to the interlocutor of 28th July last, in the conjoined processes—Finds that upon the sum of £1316, 8s. 2d. sterling, consigned by Robert Stewart (the defender in the original action) with the Royal Bank of Scotland, as specified in his answers 9 and 10 in said action, being made forthcoming, with all bank interest which shall have accrued thereon, to the North British and Mercantile Insurance Company, and on payment being also made to them by the said Robert Stewart of the sum of £19, 16s. 8d. sterling, being the premium mentioned in said action, which fell to be paid on the day of May 1870, with interest on said sum of £19, 16s. 8d. from the said May last, and till payment, at the rate of £5 per centum per annum, the said Insurance Company are bound to grant and deliver to the said Robert Stewart a certificate or policy of insurance, in terms of the second alternative conclusion of the counter action at the instance of the said Robert Stewart against the said Company, and accordingly ordains the said Insurance Company to execute in regular form, and deliver such policy to the said Robert Stewart on payment being made by him to the said Company of the foresaid sum of £19, 16s. 8d. and interest, and on said completed policy being delivered to the said Robert Stewart, grants warrant to, and ordains the Royal Bank of Scotland to make payment of the foresaid consigned sum and interest to the said Insurance Company, and decerns: Finds Robert Stewart entitled to expenses in the conjoined actions, and also previous to the processes being conjoined, but subject to modification, the extent of such modification to be determined after the taxation of the account."

The Insurance Company reclaimed.

LEE, for them, pleaded—"Standing the discharge of the policy, the pursuer cannot maintain the present action. The conditions and provisions stipulated in the original policy not having been observed and performed by the pursuer, the said policy has lapsed, and the defenders are not bound to restore or revive the same, or to issue a new policy to the same effect." He contended that the policy had lapsed, in respect that at the time, in 1868, when the sum contained in it was paid, the premiums were half a-year in arrear.

MACDONALD in answer.

The Court unanimously adhered. They held that there had been essential error on the part of both of the contracting parties, for which no one was to blame, and therefore there must be *restitutio in integrum*, and the policy must be revived on payment of arrears of premiums.

Agents for Reclaimers—Mackenzie, Innes & Logan, W.S.

Agents for Respondent—Thomson, Dickson & Shaw, W.S.

Tuesday, February 21.

FIRST DIVISION.

SPECIAL CASE—STEWART'S TRUSTEES AND JOHN STEWART.

Trust—Pupil—Parent and Child—Accumulation—Aliment. Trustees were directed to hold property (to the value of about £160 per annum) for behoof of a pupil, to be paid to him when he should reach majority. *Held* that the father of the pupil was not entitled, as administrator in law for his son, to claim payment from the trustees of the whole annual income, but that he was entitled to such an allowance out of the same as should relieve him of the maintenance and education of the pupil, the amount of the allowance being a question, in the first instance, for the discretion of the trustees.

The parties to this Special Case were—(1) The trustees of the late Mrs Isabella Wallace or Stewart, formerly residing in Perth; (2) John Stewart, wine and spirit merchant in Glasgow, as administrator in law for David Stewart, only child of the marriage between the said John Stewart and the now deceased Mrs Elizabeth Stewart, daughter of the late Mrs Isabella Stewart.

Mrs Isabella Stewart died in 1854, leaving a trust-disposition and deed of directions by which she directed her trustees to hold her estate for payment of the free annual produce to her daughter, Elizabeth Stewart, during her life, and for the use and behoof of the children of her daughter, until the whole of the said children should have attained majority, or their mother have died, whichever of these events should last happen, then to be divided equally among the children, share and share alike.

Elizabeth Stewart was married in 1853 to John Stewart, and died in 1869, survived by her husband and by an only son, still in pupillarity.

Mr Stewart, as administrator in law for his son, claimed that the whole free annual produce of the trust-estate (about £160) should be paid over to him for behoof of his son. The trustees, on the other hand, claimed to retain and accumulate the free annual produce. It was stated that Mr Stewart was in fair circumstances, and able to aliment and educate his son.

The question submitted to the Court was as follows:—

"Whether the free annual produce of the truster's estate, which has accrued since the death of the foresaid liferentrix, her daughter, and which may yet accrue, belongs to the pupil the said David Stewart; and (if so) whether the trustees are bound to pay over the same as it has been or may be received by them, or any, and what part thereof, to the said John Stewart, as administrator in law of the said David Stewart, for behoof of the said David Stewart, during his pupillarity, and thereafter during his minority to the said David Stewart himself, with consent of his said administrator in law or curator for the time being?

MACLEAN, for John Stewart, referred to the following cases:—*Campbell* v. *Reid*, 12th June 1840, 2 D. 1084; *Ogilvy* v. *Cumming*, 27th June 1852, 14 D. 363.

MACKINTOSH for Stewart's trustees.

At advising—

The LORD PRESIDENT—There can be no doubt as to the way in which we should dispose of this case. The estate has vested in the child, and the income also belongs to him. There is no direction to accumulate in whole or in part. The child's father is in fair circumstances, but there can be no doubt that a child who possesses an income of his

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 (GIFFORD) 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:—

"18*th 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