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

of the estate, a subsequent heir of entail was entitled to grant a similar bond.

This is a Special Case submitted for the opinion and judgment of the Court by Mrs Margaretta Emilia Irving, widow of the Rev. Charles Irving, rector of Donoughmore, in county Donegal, Ireland, and Robert Nasmyth Irving, proprietor of the estate of Bonshaw, in Dumfriesshire. The question between the parties is as to the validity and amount of a bond of provision in favour of Mrs Irving, executed by her father, the Rev. John Irving, in 1839, while an heir of entail in possession of the estate of Bonshaw, and arises in the following circumstances:—The estate of Bonshaw was originally entailed by William Irving in 1775, by a deed of strict entail, which, however, contained the following reservation:—"And also reserving power to the said heirs of taillie to provide their children, besides the heir, in reasonable provisions, not exceeding three years' free rent of the estate, so far as the same shall be unaffected at the granter's death, and after deduction of the yearly interest of former debts and provisions." The entailer was succeeded by his son, John Robert Irving, who, in exercise of this power in the entail, granted, in 1837, a bond of provision in favour of his two daughters of £2945, or three years' free rent of the estate. That bond is still unpaid. John Robert Irving was succeeded in the entailed estate by the Rev. John Irving, Mrs Irving's father, who also, in exercise of the power in the entail, burdened the lands with a provision in favour of his daughter of £3000, or three years' free rent. In 1853 an arrangement was entered into by the Rev. John Irving and the succeeding heirs of entail, whereby the estate was disentailed, and a disposition granted of the estate in liferent to the Rev. John Irving, with a further destination under which the second party to this case became the fiar of the estate. By the disposition, the two bonds of provision above referred to were made real and preferable burdens on the lands "in so far as the said provisions do or may affect the said estate." A sum of money, amounting to £10,000, was agreed to be raised on the security of the estate when disentailed; and that and other sums to be paid by Mr Irving, although made real burdens, were postponed to the provisions above-mentioned. Mr Irving survived till 1870. In 1865 he had sold a part of the estate to the Solway Junction Railway Company for £1800; but at the period of his death that sum had not been uplifted, and brought interest at 5 per cent., or £90 per annum. Certain rent charges affect the estate, which were imposed under the provisions of the Act 9 and 10 Vict., c. 101, and other drainage Acts, and these rent charges for the year current at death amounted to £296, 14s. 3d.

R. V. Campbell, for Mrs Irving, maintained (1) that the second bond of provision in favour of Mrs Irving for £3000 was invalid, it being only competent under the power conferred by the entail to charge the lands with one provision of three years' free rent, and, as the first was still unpaid, a second could not co-exist along with it; (2) that assuming the bond to be valid, everything was to be deducted in ascertaining the free rental of the estate, which was only a burden on the rents, including the interest paid on the sum of £10,000 and other sums, and the rent charges. The rental could not be increased by the compensation money obtained from the railway company, that being interest, and not rent.

The Solicitor-General (Clark) and W. A. Brown, for Mrs Irving, on the other hand, maintained the validity of the bond in her favour, both under the entail and as confirmed by the deed of disentail in 1853, and contended that nothing should be deducted in estimating the free rental except public burdens and the interest of "former debts and provisions."

At advising—

Lord Cowan—The decision under this Special Case had reference to two questions—(1) The validity of the bond of provision granted by the Rev. John Irving in 1859, for £3000, in favour of his daughter, and the first party in this case; and (2) the amount of the debt thereby created, assuming its validity a burden on the estate rents as at the death of the granter in 1870.

The first of these questions depends mainly on the construction of the clause in the entail conferring the power in virtue of which it was granted. Certain arrangements were made by the party interested in the estate in 1853 to have it disentailed, and the disentail was accordingly carried through. The disposition of 3d August 1853 was the consequence under which the Rev. John Irving's right was converted into a liferent, and the fee conferred in fee simple on the second party to this case. But these intermediate proceedings were not intended to affect, and did not affect, the validity of the bond of provision. On the contrary, its subsistence was expressly provided for both by the agreement and by the disposition, and it is recognised as a subsisting estate "in so far as the said provisions do or may affect the said estate." It is vain therefore to contend that there was any innovation on the bond affected by the transaction of 1853, and as there was at no time any revocation by the granter, it remained in 1870 quite as valid as it was at its date, and hence the only ground for impugning its validity must be found in the want of power in the granter to create the burden, having regard to the fact that in 1837 the former heir in possession of the estate had executed a bond of provision for £3000, the full extent of three years' free rent, and which bond has all along been, and still is, a subsisting debt.

The argument is, that while the bond was unpaid there could be no exercise of the power to grant provision by any subsequent heir of entail. Was the power conferred on each heir succeeding to the estate, or was it a single power conferred on the heirs of entail as a class, which being once exercised was exhausted until the debt so created was in whole or in part paid off? The words are, I think, such as to show that each heir was to have the power of providing for his younger children.

The decisions referred to of *Corbett* and of *Craigie* are important as demonstrating the views entertained by the Court, that unless the contrary is fairly indicated by the words, the entailer will be held to have given this power to all the heirs as they successively come to possess the estate.

The second question regards the reductions to which the gross rental of the estate should be subject to get at the full rental in 1870, the date of the granter's death. The solution of this question will be found by allowing those deductions only which could competently have been made had the entail still subsisted. Hence, whatever burdens on the estate now can be traced to the transaction in 1853, and the disentail of the estate, are not to be taken into view.

The other Judges concurred.

Agents for Mrs Irving—Richardson & Johnston, W.S.

Agents for the Second Party—Maitland & Lyon, W.S.

Thursday, February 23.

FIRST DIVISION.

M'INTOSH *v.* FRASER.

Aliment—Bastard—Presumption. Circumstances in which the father of an illegitimate child was assoilzied from a claim of aliment, at the instance of a party who had subsequently married the mother.

Observed that where an action is brought for aliment alleged to have been furnished to an illegitimate child above seven years of age, the burden lies on the pursuer to prove that he made the disbursements, the presumption being that the child is able to do something for its own support.

This was an appeal from the Sheriff-court of Sutherland and Caithness. Neil M'Intosh, fisherman at Pulteneytown, Wick, sued Norman Fraser, gamekeeper at Kildonan, for the aliment of an illegitimate child, of whom the defender was the admitted father, and whose mother had been afterwards married to the pursuer. The child was born in March 1854. Catherine Sinclair, the mother, was married to the pursuer in November 1860, and died in January 1869. The pursuer claimed (1) aliment at the rate of £5 a-year, due to Catherine Sinclair for the child, in respect of the time previous to her marriage, to which debt he had succeeded *jure mariti*, credit being given to the defender for £14 paid to Catherine Sinclair to account; (2) the sum of £8 a-year from December 1860 to December 1868, for aliment, books, and education alleged to have been furnished to the child during that period by the pursuer.

The defence was, that the defender had from time to time, during the first seven years of the child's life, contributed sums for its maintenance, amounting on the whole to more than £4 a-year, which was the usual rate payable by the father of an illegitimate child. In support of this statement receipts were produced, one signed by Catherine Sinclair for £13, and three others instructing payments to the amount of £10, not signed by the mother, but which the defender offered to prove were on her account. In addition to these the defender alleged that he had made further payments to the extent of £8, for which he got no receipts. In regard to the claim for aliment subsequent to that period, he averred that he had offered to take the child to his home and maintain him there; that the mother refused to part with the custody of the child, and consequently he pleaded that there was no further obligation on him to contribute to his support; *Adair*, 24th February 1860, 22 D. 897.

The Sheriff-Substitute (MACKENZIE) allowed parties a proof.

The pursuer stated in his evidence that his wife brought the boy to his house at their marriage; that during the time he lived in the house he did no work whatever, except for four weeks; and that with that exception his maintenance, clothing, and education had been entirely defrayed by the pursuer.

A number of letters were produced, written by the defender to Catherine Sinclair between March 1854 and November 1861. In these he expressed interest in the boy's welfare, begged her to treat him kindly and send him to school, referred to remittances which he had made through various channels, and frequently asked for receipts. The defender stated that soon after the birth of the child he had agreed with the mother that the aliment should be £4 a-year. Other evidence was led, more or less corroborating the defender's statement as to payments made to the mother. The evidence as to the defender's offer to take the child was not very distinct, but the letters showed that the mother was unwilling to part with the child. The boy himself was examined as a witness for the defender. He entirely contradicted the pursuer's statement that he had been at the sole expense of his upbringing from the time of his mother's marriage. The boy stated that for the first year of this period he had lived with his grandmother, and with regard to the rest of the period, he stated that his aunts had supplied him with clothing, and that from the age of nine he had earned considerable sums by his own industry.

The Sheriff-Substitute (MACKENZIE) sustained the defences, and assoilzied the defender.

The Sheriff (FORDYCE) altered, and found the defender liable for aliment at the rate of £5 a-year for the first period, and £6 a-year for the second period.

The defender appealed.

MACKINTOSH for him.

BUNTINE for pursuer.

At advising—

LORD PRESIDENT—I cannot concur with the Sheriff; and I am disposed to concur in the result arrived at by the Sheriff-Substitute. The claim divides itself into two parts, (1) aliment for the first seven years of the child's life; (2) aliment for the remaining period. It is a most remarkable circumstance that, though the mother was married in 1860, and survived till 1869, she never made any demand on the defender. The pursuer tells us in his evidence that his wife frequently asked him to prosecute the defender for the aliment of the child. Now, the wife died in January 1869, and this action was raised in March of that year. It is impossible to reconcile this fact with the pursuer's statement, that his wife was always urging him to prosecute the claim, and that he notwithstanding refrained. This gives a most unfavourable aspect to the pursuer's case in both its branches. I must hold it to be the fact, that during her life the wife not only never made, but never intended to make, any claim. As regards the first branch of the claim, I am not much concerned about the bargain said to have been made between the parents of the child, nor again about the exact sum of money that was paid by the defender. It is sufficient to find that during the seven years money was constantly and periodically passing between the defender and the mother, and that soon after the seven years the last payment was made, and no further payments made or demanded. The fair conclusion is, that the defender fulfilled his obligation of providing aliment for the child.

With regard to the second branch, the case is, if possible, still stronger against the pursuer. He claims for an account of £66, beginning with December 1860 and ending December 1868, for aliment, books, and education. This is a branch of the claim which the pursuer was bound to instruct