referred to in support of this view. But the Lord Ordinary cannot see how the pursuer's claim to the interest or income in question can again revive, and neither can he see the application of the case of *M'Alister*. There is only a very short report of that case, from which it appears that the only contested point was the right of the offending wife, not to any marriage-contract provisions in favour of herself, but to exercise a certain power of division of provisions constituted in favour of her children. The Lord Ordinary must therefore hold that no question as to the pursuer's rights under the marriage-contract can arise, except as regards his eventual claim under the fifth head of the marriage-contract, as referred to in article 3 of the pursuer's condescendence; but, in regard to such claim, it does not appear to the Lord Ordinary that the pursuer was under any disability to assign the same to his creditors by the disposition *omnium bonorum* now challenged. (2) As to what the pursuer called his second ground of reduction, viz., the contraint under which he says, in article 10 of the condescendence, he acted in granting the disposition *omninm bonorum*, the Lord Ordinary thinks it is obviously quite untenable, his allegations amount to nothing more than that he was obliged, before being liberated from prison, to do what every debtor similarly situated is legally bound to do. (3) The only thing else on which the pursuer founded in support of the reduction was his statement in article 11 of his condescendence; but clearly that statement does not entitle the pursuer to have the disposition *omnium bonorum* cut down and set aside. Possibly Mr Ligertwood may not have properly discharged his duty as trustee under that deed, and if so, the pursuer may have his remedy, but certainly not by reducing the deed itself."

The pursuer appealed.

BALFOUR for him.

HALL in answer,

The Court unanimously adhered.

Agent for Pursuer—John Shand, W.S.
Agents for Defender—Tods, Murray, & Jamieson, W.S.

Saturday, March 18.

FIRST DIVISION.

CORNWALL AND MESSRS CRAWFORD & GUTHRIE, S.S.C., HER AGENTS, *v.* WALKER.

Process—Expenses—Agent and Client—Writers' Hypothec on Costs—Compromise of Case. Circumstances in which it was *held* (affirming the judgment of Lord Ormidale; *diss.* Lord Kinloch) that the parties having come to a private and extrajudicial settlement of the case, after the proceedings had reached a point which necessarily and legitimately inferred a subsequent finding of expenses in favour of the pursuer, and the pursuer having immediately thereafter left the country, the pursuer's agents were entitled to sist themselves as parties to the cause, with a view to recover their expenses from the defender.

This was an action in which Matilda Cornwall, having previously obtained a divorce from her husband James Walker, sought to recover from him the amount of terce and *jus relictæ* due to her upon the dissolution of the marriage. She pleaded —"(1) The pursuer having obtained decree of divorce against the defender is entitled to be paid her legal provisions out of his estate in the same way as if he were naturally dead. (2) The pursuer is entitled to an accounting with the estate of the defender for the purpose of ascertaining the amount payable to her out of the same; and failing the defender rendering such accounting, the pursuer is entitled to decree for a sum sufficient to cover the amount of her provisions."

The defender pleaded—"(1) The defender is not liable to the claims of the pursuer. (2) The defender not being possessed of heritable and moveable estate, liable to the pursuer's claims, of the value stated, the pursuer is not entitled to decree as concluded for. (3) In the whole circumstances the defender is entitled to absolvitor with expenses."

Upon closing the record, the Lord Ordinary (ORMIDALE) appointed the defender "to lodge a state of the heritable and moveable estate belonging to him at the date of the dissolution of the marriage." He thereafter pronounced the following interlocutor:—

"*10th January* 1871.—The Lord Ordinary having heard parties' procurators, decerns against the defender to make payment to the pursuer of an interim sum of £40 sterling, and remits to Mr Wm. Ross, C.A., Edinburgh, to examine the process, and to report upon the value of the heritable estate, and the amount of the moveable estate of the defender at the date of dissolution of the marriage, with power to the reporter to meet with the parties, and receive their explanations, and to call for and recover all books, vouchers, and other writings that may appear to him to be necessary, and, if necessary, to examine havers, and receive their productions; and grants diligence at the instance of each of the parties for citing havers, and recommends the reporter to make his report with as little delay as possible."

While the case was before the accountant, the parties came to an extrajudicial compromise, in which the pursuer's agents were not consulted, and accordingly, upon 21st January, the defender put in the following minute craving to be assoilzied in respect of this compromise—"Lorimer, for the defender, stated to the Lord Ordinary that the parties had agreed about the sum to which the pursuer would be entitled in full of her claims under the present action, and that she had of this date received from the defender the sum of £600, and had executed a discharge in his favour of the action, and of all claims. Said discharge is herewith produced, and the counsel for the defender craved that in respect thereof his Lordship should pronounce decree of absolvitor, and find neither party entitled to expenses."

Upon 31st January 1871, the agents for the pursuer in the case, Messrs D. Crawford and J. Y. Guthrie, put in a minute craving to be sisted as parties in the action. After narrating the circumstances of their employment, and the different proceedings which had taken place in the case, this minute proceeded as follows—"While these proceedings were depending, the said Matilda Cornwall, without any communication to her agents, the said D. Crawford and J. Y. Guthrie, and without their knowledge, received proposals from the defender or his agents for a settlement of her claims under this action. The defender's agents did not communicate with the agents for the pursuer, and did not inform them that these proposals

for a settlement had been made. The result of these negotiations was that the pursuer agreed to accept a sum of £600 as in full of her claims under the said action. A discharge was accordingly prepared by the agents for the defender, which was not communicated to the agents for the pursuer, but was revised by an agent employed only for that purpose, and who had not previously acted for the pursuer. This was done in order that the agents for the pursuer might be kept in ignorance of the proposed settlement. The discharge, which has now been lodged in process by the defender, was signed on 17th January 1871. While the negotiations for a settlement of the pursuer's claims were in progress the case proceeded in the Court, and considerable expense was incurred, the defender and his agents having, until the discharge was signed, carefully withheld from the said D. Crawford and J. Y. Guthrie the information that these negotiations were going on. The compearers have been informed by the agents for the defender that the pursuer has left this country for America. In these circumstances, the said Messrs D. Crawford and J. Y. Guthrie move your Lordship to find them entitled to the expenses incurred to them in the said proceedings, and for that purpose, if necessary, to sist them as parties to this action, and to remit to the auditor to tax the accounts thereof and to report, and to decern against the defender for the taxed amount thereof."

This minute the defender was allowed to answer, and the Lord Ordinary then pronounced the following interlocutor:—

"*Edinburgh, 28th February* 1871.—The Lord Ordinary having heard counsel for the parties on the minute and answers, Nos. 29 and 33 of process, and having considered the argument and proceedings—Sists the pursuer's agents, as craved in said minute, as compearers in this case: Finds them entitled to the expenses incurred by them as agents for the pursuer prior to the date of the settlement or compromise referred to in the minute; and finds them also entitled to the expenses incurred by them in connection with their minute of appearance: Allows them to lodge an account of said expenses; and remits it, when lodged, to the auditor to tax and report.

"*Note.*—There are two grounds on which the agent of a party litigant may be sisted as compearers to the effect of getting decree for the expenses incurred to them, notwithstanding a settlement of the action as between the litigants themselves—1st, On the ground that the settlement has been fraudulently and collusively effected for the purpose of defeating the agent's claim for expenses; and 2dly, On the ground that, when the case was settled, an interlocutor had been pronounced either expressly finding expenses due, or by fair and reasonable presumption inferring that expenses were due. In regard to the first of these grounds, the compearers did not at the discussion appear to place much, if any, reliance, and the Lord Ordinary is not satisfied that, on their own showing, it could be established. But he thinks that the second ground is, in the circumstances, sufficiently well founded. The pursuer concludes for £150 a-year of terce, 'or such other sum as shall be ascertained by our said Lords to be the amount of the same.' And she also concludes for what might be found to be due to her *jure relictæ*. Prior to the institution of the action, the pursuer had been unable to obtain from the defender any materials for ascertaining or determining the true extent of her claims; and when the action was brought, in place of at once furnishing a full and particular state of his property, the defender put in defences, the first plea in which is to the effect that he 'is not liable in the claims of the pursuer,' although at the same time he admits, in his answer to condescendence 5, that his heritable property liable for terce to the pursuer amounts in value to £150 a-year. The record having been closed, and the defender ordained to lodge a state, he did so; and that state, which is No. 25 of process, shows his heritable property liable in terce to the pursuer to be worth £228, 18s. 8d. a-year, in place of £150 only. The Lord Ordinary then gave interim decree to the pursuer for £40, and at the same time remitted to an accountant to ascertain and report on the nature and extent of the defender's property. It was at this stage of the proceedings, and after the accountant had ordered the defender to lodge a state, that he settled the action with the pursuer herself by paying her £600. Now, supposing the action had terminated in Court at the date when it was remitted to the accountant, in place of being extrajudicially settled, the Lord Ordinary cannot doubt that an award of expenses to the pursuer would have been pronounced as a matter of course: And if so, he thinks, on the principles recognised and given effect to by the Court in *Macgregor & Barclay* v. *Martin*, 12th March 1867, 5 Macph., 583, that the compearers are entitled to the decree now pronounced in their favour."

Against this interlocutor the defender reclaimed.

LORIMER for him.

J. A. CRICHTON for the respondents.

Authorities referred to—*Maclean*, 29th June 1824, 3 S. 190 (N.E. 129); *Murray* v. *Kyd*, February 14, 1854, 14 D. 501; *Macqueen* v. *Hay*, November 29, 1854, 17 D. 107; *Macgregor & Barclay* v. *Martin*, 12th March 1867, 5 Macph. 583.

At advising.

LORD ARDMILLAN—The point raised is one of great practical importance in the conduct of business in this Court. We are within a well understood limit in all questions of allowing agents to take up cases and prosecute them to obtain their expenses. The case of *Maclean* lays down a conclusive rule. If there has been a decision in the case awarding expenses, there can be no doubt. If there has been one from which reasonably and legitimately a finding of expenses must necessarily follow, there too the agent is entitled to sist himself, and proceed. So, also, where a collusive compromise has been made. Now, I am of opinion that the present case comes under the second category. The Lord Ordinary's interlocutor of 10th January amounted to the repelling of all the defender's pleas which could lead to absolvitor. That leading and most important circumstance must be kept in view, as it is quite conclusive of the agents' right in this matter to appear and prosecute the case for their expenses. The statement by the pursuer of the defender's means and estate was held incorrect, as it could hardly help being, so the Lord Ordinary gave an interim award, and ordered an investigation by an accountant. But all this could only end in a final judgment, and order for payment in the pursuer's favour. The result, therefore, of the Lord Ordinary's interlocutor must have been ultimately a finding of expenses in favour of the pursuer, and I am therefore of opinion that her agents are now entitled to be sisted, and go on with the case to obtain a finding of expenses in their own name.

LORD DEAS concurred in the opinion of the LORD PRESIDENT and LORD ARDMILLAN.

LORD KINLOCH—My opinion is different from that now expressed. The question is an important one, for whilst giving full effect to the just rights of the agent in the cause, we must take care that we throw no impediment in the way of any litigant making a fair settlement with his adversary.

In the present case the defender settled with the pursuer by paying a sum of £600 in full of all claims, and of expenses. By the Lord Ordinary's interlocutor he has been found liable, over and above, to pay to the pursuer's agents the amount of the pursuer's expenses. The question is whether the Lord Ordinary has been right in so holding.

I think it clear, as a general principle, that the agent in a cause has no higher right to expenses against the opposite party than belongs to his client. If expenses have been found due, the agent is entitled to decree for these in his own name, and of this right he cannot be deprived. It has been thought equitable to hold the same result to follow where an award of expenses was a necessary consequence of the previous proceedings; in other words (for so I think the principle must be interpreted), where it is in all fairness to be held that an award of expenses was on the point of being pronounced, and was prevented going out by the settlement. Beyond this I do not think the right of the agent can be carried.

In any question of this sort, what must be regarded is what was actually done, or on the point of being done in the previous proceedings; not what we may now think on the question of expenses. It is not what we would do, but what was actually done, or on the point of being done, that we must consider. To appeal to our present opinion on the question of expenses is to put the question on a false issue.

I am of opinion that nothing was done, or on the point of being done in the previous proceedings entitling the pursuer's agent to sist himself, and to obtain an award of expenses in his own favour against the defender. The action was one by a wife against a husband, whom she had divorced, for her terce and *jus relictæ*. Substantially there was no question involved except the amount due. The wife claimed £150 per annum for terce, and £3000 for *jus relictæ*. The process never came to an end by judgment. Nothing more happened than that the Lord Ordinary remitted the case to an accountant, pronouncing *interim* decree for £40. And here the process dropped, the wife taking a sum of £600 in full of all demands, and in full of expenses—a most favourable bargain for the defender, and his entering into which did not imply, and is not said to have implied, any collusion to defraud the pursuer's agents. There was no judicial finding of expenses against the defender. Nor can I say that such a finding was so necessary a consequence of the previous proceedings as to warrant me in holding that it was about to be pronounced, and only precluded by the settlement. A great deal of litigation might have taken place before the accountant and otherwise, and what the end would have been, either on merits or expenses, and whether the pursuer might not, to some extent, have been subjected in expenses in place of getting them, I do not find myself in a condition to pronounce. To allow the pursuer's agents, after this settlement between the parties, to appear in process, and to take an award of expenses in their own favour against the defender, is, I think, to go farther in favour of agents than we have hitherto gone; and I do not feel prepared to take the step.

LORD PRESIDENT—I agree with the majority of your Lordships. In those cases where expenses have been found due before a compromise, there is no difficulty whatever. There are a number of such cases reported. But there are other classes of cases in which an agent is entitled to insist for his expenses as the reclaimers are doing here. These are either cases of collusion, or cases where, as in that of *Maclean*, the finding of expenses follows as a necessary consequence from an interlocutor already pronounced. Lord Kinloch has introduced a new expression into our phraseology on this point. He says that an agent is not entitled to insist unless the expenses were "*on the point of being found due.*" That expression is quite an invention of to-day; I do not know exactly what it means; and I am very jealous of admitting it. I like the expression used in *Maclean's* case much better, though even that may not be very accurate, as the finding of expenses never is a necessary result or consequence—it is always in the discretion of the Court, and depends more or less upon how the litigation has been carried on. The true rule is that the agent is entitled to sist himself and prosecute the case to obtain a finding of expenses in his favour, where such a finding of expenses is the legitimate consequence of what has been already done. I think, however, that it is not of much importance here whether we call it the legitimate or the necessary consequence, for I am of opinion that in the present case a finding of expenses is both a legitimate and a necessary consequence of the procedure that has already taken place in the case. This lady came into Court asking nothing but what she was legally entitled to. She had got her divorce, and she came into Court to obtain her terce and *jus relictæ*. No one could doubt that she was entitled to this; it is too obvious. There could be no good defence against her action. Yet the defender did state a defence. He pleaded that he was "not liable to the claims of the pursuer," in fact, he claimed absolvitor simply from the conclusion of the action. No doubt he did state a second plea, that he was not possessed of property to the value alleged by the pursuer, and that therefore he was not liable to her claims as stated. Whereupon a remit to an accountant became necessary. This was no fault of the pursuer. It was quite fair and proper that the amount of his estate should be investigated, but at his own expense. And the whole expenses of this case, except those of raising the summons and bringing the defender into Court, are the expenses of that investigation. Were we to hold that the pursuer's agents were not entitled to get into this process, the whole expense of that investigation must fall upon them, which would be productive of the grossest injustice. Could it be shown that the pursuer was chargeable with any fault in the conduct of the litigation it might be otherwise. She has indeed compromised her claim, and, for all that we know, perhaps not unreasonably; but this is not an objection of any avail against the claim of her agents in the circumstances of the case. When the Lord Ordinary pronounced his interlocutor of 10th January last decerning for an interim sum, and remitting to an accountant, he to all practical effect pronounced

judgment on the merits of the case in favour of the pursuer, for he therein assumed that she was entitled to what she claimed, only subject to questions of accounting. On the whole, therefore, I think it is the clearest case possible for holding that the finding of expenses in favour of the pursuer was a necessary consequence of the proceedings which had already taken place.

The Court adhered, and refused the reclaiming note.

Agent for the Reclaimer—D. J. Macbrair, S.S.C.
Agents for the Respondents—D. Crawford & J. Y. Guthrie, S.S.C.

Saturday, March 18.

DOWIE *v.* DOWIE OR BARCLAY.

Process—Reduction—Decree of Confirmation—Executor—Next of Kin—18 *Vict. c.* 23, § 1. Where a niece had been decerned executrix "*qua* one of the next of kin" to her uncle, there being no competition or opposition to her service; and where another uncle, brother to the deceased, afterwards sought to reduce the decree on the ground that the defender had obtained confirmation under an erroneous description, the Moveable Succession Act, 18 Vict., c. 23, § 1, only entitling her to succeed or be confirmed as "a descendant of a predeceasing next of kin"—it was *held*, affirming the judgment of Lord Jerviswoode, that she had been rightly decerned executrix, there being no competition; and that, though the description in the decree of confirmation was not quite accurate, it was not sufficient to render the confirmation null, nor a ground upon which it could be reduced.

Agent for the Pursuer—James Barton, S.S.C.
Agent for the Defender—Alex. Gordon, S.S.C.

Friday, March 17.

SECOND DIVISION.

MRS HELEN BRINE OR GORDON, PETITIONER.

Register — Warrant to Transmit — Recorded Deed. Warrant granted by the Court to transmit a contract of marriage, registered in the Sheriff-court Books, to Edinburgh by registered post-letter, for the purpose of having an additional stamp impressed at the Inland Revenue Office.

Mrs Gordon presented a petition to the Court, setting forth that an antenuptial marriage contract had been entered into in 1852, between her and her late husband, Alexander Gordon of Newton, Aberdeenshire, which was recorded in the Sheriff-court Books of Aberdeenshire at Aberdeen, on 4th April 1856; that the executors of her late husband were entitled to a return of a portion of the inventory duty, paid on her husband's personal estate, but that the Board of Inland Revenue refused to repay the same, in respect that their marriage contract was insufficiently stamped; and that she had an interest in the said marriage contract, which contained various provisions in her favour, including an annuity of £400, and sundry provisions respecting her own fortune. The petition prayed for service on the Sheriff, Sheriff-Substitute, and Sheriff-Clerk of Aberdeen, and for warrant to the Sheriff-Clerk or his Depute at Aberdeen "to transmit the said principal contract of marriage by registered post-letter, to the Clerk of Court in this petition, that he may present the same at the office of Inland Revenue in Edinburgh, and obtain it duly and sufficiently stamped, and thereafter retransmit the said contract of marriage, also by registered post-letter, to the said Sheriff-Clerk or his Depute at Aberdeen," or to do otherwise &c.

Service was ordered, and answers appointed to be lodged within three days, in consequence of the Session being near a close, and intimation in the minute book was dispensed with.

On the calling of the case in the Summar Roll, no appearance having been made for the Sheriffs or Sheriff-Clerk, the prayer of the petition was granted.

Agent for Petitioner—John Auld, W.S.

Saturday, March 18.

SPECIAL CASE—EWEN MENTEITH TOD AND GENERAL TOD'S TRUSTEES.

Trust—Clause—Powers of Trustees—Annuity—Alimentary. Terms of a settlement which were *held* not to import an imperative direction to trustees to invest a fund in an alimentary annuity for a son of the truster; and *observed*, that even if they did, as the truster's intention of securing an alimentary annuity could not be made effectual by following the directions of the deed, the trustees were entitled to pay over the capital of the fund to the son, as the sole party interested in the same.

General Suetonius Tod died in September 1861, survived by a widow and two sons. Mrs Tod died in April 1866. In 1859 General Tod executed a trust-settlement of his whole estate. After certain provisions in favour of his widow, the trust-deed proceeded:—"*Fourth*, I direct and appoint my said trustees to divide the residue of my said means and estate among my two sons, Suetonius Macdonald Tod and Ewen Menteith Tod, equally between them or the survivor of them, in manner following, viz.:—Should my said trustees consider it prudent and proper to advance to each of my said sons, for the purpose of setting them up in business, or of advancing their prospects in life, such a sum as shall not exceed the one-half of the share of the free residue of my said means and estate, to which each of them might be entitled in the event of my death, and the other half or balance of the said free residue shall be invested when my said trustees shall consider it proper and prudent to do so, in the purchase of two separate annuities for each of my said sons, or the survivor of them, declaring that, as said annuities are intended by me solely for their respective aliment and personal support, the same shall not be assignable, arrestable, or affectable, for the debts or deeds, legal or voluntary, of the said Suetonius Macdonald Tod or Ewen Menteith Tod." General Tod left no heritable estate. The value of his moveable estate was about £12,000, one-half of which the trustees paid over to the two sons absolutely in equal portions, and the other half stood invested in the name of the trustees, who paid the interest to the sons. Mr Ewen Tod, who was now about thirty-two years of age, was desirous of entering into business, and accordingly requested payment of the remaining capital of his share of