

The petitioner appealed to the Court of Session.  
At advising—

LORD JUSTICE-CLERK—If you throw back the water upon the road, you must come here prepared to show some better way of conveying it away. Until you do this you cannot prevent the Road Trustees removing the dam as they have already done; it may be that there are on record averments to the effect that there is a better mode of conducting the water away, but that is not sufficient; there must be a specific statement as to what that better way is. The Road Trustees are not merely entitled, but they are bound, to carry the water off the road, and this they have done. The appellants aver that this has now become a source of great loss and inconvenience to them, and that the Road Trustees must find another way of discharging their surplus water: This, no doubt, they would be quite ready to do, but no such way has been shown them; and as to the appellants taking the matter into their own hands, and putting up a dam to throw back upon the road this water, I am clearly of opinion that they had no right to act in this manner, and the Road Trustees were taking a perfectly legal step in causing this dam to be removed.

LORD COWAN—I entirely concur, and think there is no authority whatever for this application.

LORD BENHOLME—I am of the same opinion. The trustees cannot be called upon to suggest a better way of disposing of the water; the suggestion, and more than that, a specified plan, showing how they propose that the water should be carried off, must come from the appellants. The question, as it has come up, is not before your Lordships in a proper shape for consideration.

LORD NEAVES—I am quite of the same opinion. All the appellants practically say here is—“There is another and a better way of getting rid of this water; we know there is, but we won't tell you what it is; you must find that out for yourselves.” This will not do; the Road Trustees are not put to show another way, and the appellants must satisfy the Court that there is another and also a better mode of carrying off this water.

The Court dismissed the appeal, and affirmed the judgment of the Sheriff, with expenses.

Counsel for Appellants—The Solicitor-General (Clark), Q.C., and Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Respondents—Watson and Marshall. Agents—Cotton & Finlay, W.S.

Saturday, November 1.

## SECOND DIVISION.

SPECIAL CASE—JOHN COWAN (DICK'S  
FACTOR) AND DICK'S TRUSTEES.

*Succession—Marriage-Contract—Trust-Settlement—  
Double Provision.*

A, by his marriage-contract, bound himself to pay £1000 to the child of the marriage at the first term of Whitsunday or Martinmas after his death. By a posterior trust-settlement A directed his trustees to make over the

residue of his estate among his children equally in liferent, and their issue in fee,—  
*Held* that the provision of £1000 in the contract was in addition to the provision in the settlement.

The parties to this Special Case were John Cowan, as factor *loco tutoris* to Miss Isabella Jane Dick, younger daughter of the late Alexander Dick, of Lumloch, of the first part; and the trustees of the said deceased Alexander Dick, of the second part. The facts as stated in the case were as follows:—The said Alexander Dick died at Bridge of Allan upon the 10th day of September 1871, survived by his wife, Mrs Jane Geddes or Dick, who also died at Bridge of Allan upon 21st November 1871. The said Alexander Dick was twice married, and left two daughters, Charlotte Sarah Janet Dick, the sole issue of his first marriage with Mrs Charlotte Slater or Dick, and Isabella Jane Dick, the sole issue of his second marriage with the said Mrs Jane Geddes or Dick. The party of the first part was duly nominated and appointed factor *loco tutoris* to the said Isabella Jane Dick, who is still in pupillarity, conform to act and decree of the Lords of Council and Session in his favour, dated the 22d day of October 1872. By the contract of marriage between the said Alexander Dick and his first wife, mother of the said Miss Charlotte Sarah Janet Dick, dated 12th April 1855, he made certain provisions in favour of his said first wife, in the event of her surviving him, which, in consequence of her predecease, did not come into operation, but the contract did not contain any provision for children of the marriage, or any discharge of their legal rights. Any money which the said Alexander Dick derived or acquired through his first wife has merged in his general estate. By contract of marriage entered into between the said deceased Alexander Dick and the said also deceased Mrs Jane Geddes or Dick, and to which the trustees of her father, the late Archibald Geddes, Esq., merchant, Leith, were parties, dated the 11th day of July 1865, the said Alexander Dick bound and obliged himself in certain provisions in favour of his said spouse, and also bound and obliged himself, in the event of there being only one child of the said marriage, to make payment of the sum of £1000 to the said child, and that at and against the first term of Whitsunday or Martinmas after his decease, with a fifth part more of penalty in case of failure, and interest of the said sum at the rate of five per cent. per annum, from and after the term of payment during the not payment of the same. The said Alexander Dick further bound and obliged himself to aliment and educate the children of the marriage in a manner suitable to their station until the provisions in their favour therein contained should be paid or become payable, or until they should be otherwise provided for. It was further provided that the provisions contained in the said marriage-contract in favour of the child or children of the said marriage should be in full satisfaction to them of all bairns' part of gear, legitim, portion-natural, and executry, and everything else which they could claim by and through the death of the said Alexander Dick. The said Mrs Jane Geddes or Dick, by the said marriage-contract, conveyed the whole estate which should belong to her during the subsistence of the marriage, except her interest under the trust-deed of her brother, the deceased John Geddes, and her interest in the trust-estate of the said deceased Archibald Geddes, to the trus-

tees therein named, for, *inter alia*, the following purposes—*viz.*, (1st) For payment to the said Alexander Dick and Mrs Jane Geddes or Dick of the annual produce of the said property and estate during the subsistence of the said marriage; (2d) For payment of the same to the survivor, if there were a child or children of the marriage, at its dissolution; and at the death of the survivor the trustees were directed to pay and divide the capital of the said property and estate to and among the said child or children, or their issue who were then alive, such issue taking only the shares which their respective parents would have received if they had survived. By the said marriage-contract the trustees of the said deceased Archibald Geddes, in terms of the directions contained in the trust-disposition and settlement and codicils of the said Archibald Geddes, assigned, disposed, and conveyed to the marriage-contract trustees the share of the residue of the said Archibald Geddes' estate provided under his trust-disposition and settlement and codicils to the said Mrs Jane Geddes or Dick, under the declaration that they should hold the same for behoof of the said Mrs Jane Geddes or Dick, to the end that the liferent thereof should be secured to and enjoyed by her during her lifetime, and that the said trustees should hold the fee of the said share of residue for behoof of the lawful children of the said Mrs Jane Geddes or Dick, and declaring that if the said Mrs Jane Geddes or Dick should leave no children of the said marriage, it should be in her power to dispose of said share of residue; and failing issue of the said marriage, and failing the said Mrs Jane Geddes or Dick disposing of her said share of residue by testament, that the said share should be paid to the surviving child of the said deceased Archibald Geddes, and her lawful issue. The marriage-contract trustees, under the said conveyance from the trustees of Archibald Geddes, obtained and held funds amounting to £6755, 7s. 10d., and this sum, with the interest thereof from and after the 21st November 1871, the date of the death of the said Mrs Jane Geddes or Dick, has been received by the party of the first part as factor *loco tutoris* to the said Isabella Jane Dick. The said Alexander Dick left a trust-disposition and settlement, dated the 27th day of January 1870, and a codicil thereto, dated 7th September 1871, which were registered in the Books of Council and Session the 21st day of September 1871. By the said deed of 27th January 1870 he assigned, disposed, conveyed, and made over to and in favour of the parties hereto of the second part, and of the now deceased William Fleming, writer, Glasgow, and to the acceptor or acceptors, survivors or survivor of them, and to such other person or persons as should be assumed in manner therein mentioned, his whole estate, both heritable and moveable, for the purposes therein mentioned, being *inter alia* (*Third*), for investing the sum of £8000 for behoof of his eldest daughter, the said Charlotte Sarah Janet Dick, in the event of her surviving him, and paying and conveying the same for behoof of his said daughter in liferent, for her liferent alimentary use alienarily, and to and for behoof of her lawful children equally among them, and the survivors or survivor of them, share and share alike, in fee, payable and divisible to and among said children on the youngest of them, or survivor of them, attaining the age of twenty-one years, after the death of their said mother; but it was declared that, in the event of the said Charlotte Sarah Janet

Dick dying without lawful issue, or failing said issue before the period of division, the said principal sum of £8000 should revert to and become a portion of the said Alexander Dick's estate, and the interest or annual produce thereof, as well as the principal sum itself, should be payable to his other lawful children or their issue, and said provision in favour of his said daughter was declared to be in addition to the provisions after mentioned: (*Fourth*) For payment to the said Jane Geddes or Dick, his wife, during all the days of her life, of an annuity of £150, and that in addition to the annuity provided in the foresaid marriage-contract entered into between them: (*Fifth*) With regard to the residue of the estate of the said Alexander Dick, he directed his said trustees to hold and apply, pay, and convey the same to and for behoof of his whole children, equally among them, in liferent, for their respective liferent alimentary uses alienarily, and to and for behoof of their respective lawful issue, equally among them, and the survivors and survivor of them, share and share alike, in fee, payable and divisible to and among such issue, on the youngest of them, or survivor of them, attaining the age of twenty-one years after the death of their parent respectively; but declaring that in the event of any of his said children dying without leaving lawful issue, then the share of his said estate provided to such decessor should fall to and devolve upon the survivors of his said children and their issue, in equal shares and proportions, and the same should be held and applied, paid and conveyed, to and for behoof of such surviving children and their issue in the same way and manner, and subject to the same terms and conditions as to liferent and fee provided with regard to the original shares of residue provided to his said children. The accepting trustees and executors entered upon the possession and management of the personal and moveable estate of the said deceased Alexander Dick, gave up an inventory thereof, and were confirmed to the same, conform to testament-testamentary in their favour from the Commissary Court of Lanarkshire, dated 17th October 1871. The amount in the inventory of the said personal estate confirmed by the said executors was £38,072, 14s. 6d. In addition to the moveable estate included in the said inventory, the said deceased Alexander Dick possessed the estate of Lumloch, let as a farm at an annual rent of £185, and the minerals let at a fixed rent of £300 per annum. The personal debts due by the said Alexander Dick at the time of his death were of small amount.

The question submitted for the opinion of the Court was—Whether the party of the first part is entitled, on behalf of his ward, the said Isabella Jane Dick, to payment of the sum of £1000, with interest, under the contract of marriage second above mentioned, in addition to the provisions conceived in her favour by her father's trust-disposition and settlement and codicil? The party of the first part maintained that he was entitled to receive payment from the parties of the second part of the sum of £1000 sterling, provided to the child of the marriage by the said Alexander Dick, under the contract of marriage dated 11 July 1865, with interest at the rate of 5 per cent., from the term of Martinmas 1871, but the parties of the second part maintained that the provisions in favour of the said Miss Isabella Jane Dick in her father's said disposition and settlement and codicil must be held to be in satisfaction of the provision in her favour contained

in the marriage contract, and that consequently the party of the first part was not entitled to payment of the said sum and interest.

Cases cited—*Elliot's Trustees*, 10 Scot. Law Rep. 610; *Kippen*, 18 D. 1137, 3 Macph. 203.

At advising—

LORD COWAN—(After narrating the facts)—I think there is no good ground for maintaining that the provision in the settlement was in satisfaction of the provision in the marriage contract. At one time there was supposed to be a presumption in our law against duplicate provisions as there is in the Law of England, and in the case of *Kippen* all the authorities were quoted, and it was found there were no such presumption, and the question was reduced to one of intention. In this case I think there is no evidence of an intention to substitute one provision for the other. The provisions in the contract and in the settlement are not of the same kind or amount, the limitations of the two are different,—one is a specific sum to be paid to the child, the other an alimentary liferent of a share of residue. The effort of the truster seems to have been to establish an equality between his children, and if he had intended to discharge the claim under the contract, he would probably have included it in the clause of discharge, which refers only to legal claims.

LORD BENHOLME—I concur. The tendency of our law is to be jealous of any speculative arguments that one provision is to supersede another, and here there is no resemblance between the two provisions so as to make an absorption of the one by the other.

LORD NEAVES—I concur.

LORD JUSTICE-CLERK pronounced no opinion, having been absent at the discussion.

Counsel for First Party—J. D. Fordyce and J. B. Balfour. Agents—Jardine, Stodart & Frasers, W.S.

Counsel for Second Party—Solicitor-General and Watson. Agents—Webster & Will, S.S.C.

Saturday, Nov. 1.

## FIRST DIVISION.

[Junior Lord Ordinary.]

MORISON (GOWANS' TRUSTEE) v. GOWANS.

*Trust—Action against Co-Trustee—Title to Sue—Judicial Factor.*

In a case where one of three trustees brought an action against another of the trustees for recovery of the debt due by him to the trust-estate, to which action the third trustee refused to be a party,—*Held* that the pursuer had not sufficient title to sue. *Held* that sisting the judicial factor, who had been appointed by the Court on the motion of the pursuer, gave him a sufficient title.

The trustees on the estate of the deceased Walter Gowans were Mr Alexander Morison, S.S.C.; Mr James Gowans; and his brother, Mr Walter Gowans. Mr Morison raised an action against Mr James Gowans, concluding for payment of certain sums alleged to be due by him to the trust-

estate. To this action Mr Walter Gowans refused to be a party, and Mr James Gowans thereupon pleaded, as a preliminary defence, want of sufficient title to sue on the part of Mr Morison. The Lord Ordinary (SHAND) gave effect to this plea, and Mr Morison reclaimed; and at the same time presented a petition to the Lord Ordinary for appointment of a judicial factor. This application his Lordship reported to the First Division, who appointed Mr A. Gillies Smith, C.A., judicial factor on the trust-estate; and Mr Morison then moved the Court to sist Mr Gillies Smith as joint pursuer with himself. The defender opposed this motion.

At advising—

LORD PRESIDENT—This case is a very peculiar one, and I should be sorry, even for the sake of doing justice in this particular case, to trench upon the general rule, that you cannot sist a new pursuer without the consent of the defender. Now, the action was originally raised by one of three trustees against another as defender, and in this action the third trustee, who is the brother of the defender, declines to concur. The Lord Ordinary found that one trustee had not sufficient title to pursue, and the pursuer accordingly reclaimed. We thought that a judicial factor should be appointed to look after the trust-estate, but his appointment did not extinguish the trust, nor supersede the existing trustees. It was merely intended to meet an emergency, and we accordingly nominated Mr Adam Gillies Smith, C.A. The trust may come into active operation again as soon as the difficulty is at an end, and the trust in fact still exists. Mr Morison is not entitled, after the appointment of the judicial factor, to go on alone, for the judicial factor is now the party entitled to uplift the debts due to the trust-estate and to grant discharges for them; but I don't see why the benefit of the action, so far as it has gone, should be lost, and I think the safest way is, that the judicial factor should be sisted, not, perhaps, as a pursuer, but as concurring with Mr Morison, which will give the latter a perfectly good title; it will give just enough power to Mr Morison, and he will be in a position to grant a valid discharge. It may still be open to the defender to maintain the Lord Ordinary's judgment, and contend that the action is a bad one; but I think all that we can do just now is to sist the judicial factor.

LORD DEAS—I am not prepared to sanction any interference with the general rule, that a party ought not to be sisted as a pursuer against the wish of the defender. We ought not to bring into the process a party who has a different interest, and may be entitled to state different pleas. But here the judicial factor who asks to be sisted represents the trust-estate. The trustees have not been removed, nor has the trust-estate been sequestrated. The factor has simply been appointed to meet the present difficulty. Now this is very different from the usual case of sisting a new pursuer. I do not say that the defender may not still maintain that the action was incompetent from the beginning, and cannot be cured by bringing in the judicial factor. Suppose Mr Morison had raised an action against his co-trustee, who is the brother of the defender, or suppose he had been content to ask a decree that the trust-funds should be consigned, or if, with or without the concurrence of the beneficiaries, he had brought an action of removal against his co-trustee, on the ground that he had