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

refused to act, and had succeeded in having him removed, there would have been no incompetency in entertaining an action at his instance. I am quite willing to hear what the parties may have to say.

LORD ARDMILLAN—The general rule is that we will not sist a new pursuer against the wish of the defender. We have here three trustees — the debtor, the debtor's brother, who declines to be a party to the action, and Mr Morison. The original pursuer was thus only one of three trustees. Under these circumstances a judicial factor has been appointed. Now, I don't think that we could allow the judicial factor to be sisted so as to do away with Mr Morison. But the defender will be entitled to be heard on the question, whether the action has been so badly laid that it cannot be made a competent action by sisting the judicial actor. Mr Morison could grant no proper discharge, but the judicial factor could grant a discharge. I think we should allow the judicial factor to be sisted as a party concurring with the pursuer.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"In respect that the judicial factor on the trust-estate of the deceased Walter Gowans has now been sisted as a party concurring with the pursuer, Alexander Morison; recall the interlocutor of the Lord Ordinary reclaimed against, and remit to his Lordship to proceed with the cause, reserving all questions of expenses: With power to the Lord Ordinary to dispose of the expenses in the Inner House with the other expenses in the cause."

Counsel for Mr Morison—J. G. Smith. Agent—Alexander Morison, S.S.C.

Counsel for Mr Gowans—Trayner and A. Taylor-Innes. Agents—Lindsay, Paterson, & Hall, W.S.

B., Clerk.

Tuesday, November 4.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

RUTHERFORD *v.* EDINBURGH CO-OPERATIVE BUILDING CO. (LIMITED).

Contract—Reduction— Essential Error — Misrepresentation.

The purchaser of a house finding the cellar, owing to local circumstances, damp, brought an action, after the lapse of more than a year, against the sellers, to have the contract of sale reduced; he founded upon (1) essential error and (2) misrepresentation, and further claimed damages. *Held* that there was no ground of action relevantly stated, as the purchaser had bought the house after satisfying himself as to its condition, and that there might have been a good ground of action for the expense incurred in rendering the cellar available for ordinary purposes.

This case came up by reclaiming note against he interlocutor of the Lord Ordinary.

The summons contained reductive conclusions, and continued as follows:—"The defenders ought and should be decerned and ordained by decree foresaid to repeat and pay to the pursuer the foresaid sum of £520, being the price of said subjects, with interest thereon from the date of citation till payment, at the rate of five per centum per annum. As also the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of £150 in name of damages on the premises, together with the sum of £50 sterling, or such other sum, more or less, as our said Lords shall modify, as the expenses of the process to follow hereon."

The pursuer, Rutherford, is a spirit dealer in Leith, and the defenders an association formed for building purposes, carrying on business in Edinburgh. Early in 1871 the pursuer had a correspondence with the manager of the defenders' company in regard to the purchase of the shop No. 8 Walker Terrace, Dalry Park, Edinburgh, then in the course of erection, and the contract of sale was finally arranged in the month of March 1871. The contract was embodied in a disposition, dated 1st May 1871, of which reduction was now sought. Shortly after April 1871 Mr Rutherford obtained possession of the shop, and found that the cellar was not at all properly drained; on the contrary, water to the depth of about three feet accumulated therein. He averred that he had (Cond. 4) recently learned the reason why water accumulated in the cellar, which was that the floor of the cellar was about 3 feet below the level of the street drain; and further (Cond. 5) that the defenders, or at least their manager, who acted for them, knew at the time they sold the shop that it was intended to use it as a spirit shop, and that it was essential to have a cellar in which to store liquors; also, that they knew that the cellar was under the level of the street drain, and that it could never be dry, or fit for the purpose for which it was sold; and that they unduly and fraudulently concealed this fact. And (Cond. 6) that if he truly bought a cellar of the kind furnished, he was under essential error when he did so, induced by fraudulent misrepresentations or undue concealment on the part of the defenders. The pursuer further stated that he had suffered damage to the extent of £150, and that by certain operations at a cost of £50 the dampness might to some extent be remedied.

The defenders, in answer, stated that certain things at the time of the purchase were pointed out by the pursuer, and these were all attended to. No complaints were made by him as to the state of the premises until more than a year after his entry. They did not know his expectations or intentions, nor did they sell the premises for any particular purpose, the pursuer in purchasing having stipulated that he should be at liberty to use them as he chose. The defenders were unaware of anything defective, and believed the premises to be properly constructed; of their condition Mr Rutherford had as good opportunity of judging as they themselves.

The pursuer pleaded—"(1) The contract of sale sought to be reduced having been entered into when the pursuer was under essential error in regard to a material particular affecting the value of the subjects sold, the contract ought to be set aside. (2) The contract sought to be reduced having been entered into when the pursuer was under essential error as to the subject sold, induced through misrepresentation or fraudulent misrepresentation or