case goes deeper than the mere question of title to sue. The case relates to the child of a married woman, and the child of a married woman is *prima facie* her husband's. He is entitled to have it, and he is bound to support it. What he may establish in order to relieve himself of his obligation in regard to it it is not *hujus loci* to consider. He is not here to establish anything at all, or to part with the rights or free himself of the liabilities of a husband. It is a proposition new to me that if a husband desired to have a child delivered over to him which was the offspring of his lawful wife, another man could come forward and say, "No, I have right to it, for I begot it;" or that the mother can hand over the child to another man than her husband and say, "It is yours." It is not *hujus loci* to consider what a husband may establish in order to get rid of a wife who has misconducted herself, or of the obligation to support a child of which it is impossible that he should be the father. All we know is, that the child is that of a married woman, and there is no reason to hold that the husband is trying to get rid of the burden of supporting it. So, irrespective of the merits of the case, I am of opinion that the action is not maintainable.

The Court dismissed the appeal.

Counsel for Appellant—Nevay. Agent—W. R. Skinner, S.S.C.

Counsel for Respondent—A. J. Young. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, November 9.

SECOND DIVISION.

SPECIAL CASE—JOHNSTON AND OTHERS.

Succession — Trust — Residue — Constitution of Trust.

A testator disponed to and in favour of the residuary legatee of his moveable estate the whole residue of his heritable estate, "always with and under the conditions and provisions hereinafter inserted." Thereafter the disponee was "directed to dispose of, either by private bargain or public sale, as may be considered most advantageous, my whole heritable estate other than that specially above conveyed, and that within three years of my death, and invest the free proceeds in Government stock" for certain persons in liferent and their representatives in fee. *Held* that the residuary legatee was constituted a trustee for all concerned, the period of three years being allowed for the advantageous realisation of the estate, and was therefore not entitled to the rents accruing while the estate remained unsold.

By his trust-disposition and settlement, dated 17th September 1868, and registered in the Books of Council and Session 17th April 1877, Mr John Kennedy disponed in favour of his niece Elizabeth Kennedy Tweedie, in liferent for her liferent use only, and for her children in fee, a house and ground in Newton-Stewart, and in favour of Kennedy Drynan, a nephew, certain heritable property in the village of Colmonell. The rest of his property, heritable and moveable, Mr Kennedy conveyed as follows—"And I do hereby also give, grant, assign, and dispone to and in favour of the said Elizabeth Kennedy Tweedie, and her assignees whomsoever, all and sundry other lands and heritages, of what kind or denomination soever, or wheresoever situated, at present belonging or that shall pertain or belong to me at the time of my death." Miss Tweedie was then directed to pay out of the personal estate the deceased's debts and certain annuities. Then followed this provision—"And the said Elizabeth Kennedy Tweedie is hereby directed to dispose of, either by private bargain or public sale, as may be considered most advantageous, my whole heritable estate, other than that specially above conveyed, and that within three years after my death, and invest the free proceeds in Government stock for behoof of the following parties in liferent, and their representatives in fee, and that in the following proportions:—To my sister the said Catherine Kennedy or M'Lellan, 3-20th parts; to my brother William Kennedy, 6-20th parts; to my sister the said Matilda Kennedy or Hamilton, 3-20th parts; to Robina Kennedy or Drynan, my sister, 3-20th parts; and to the said Elizabeth Kennedy Tweedie the remaining 5-20th parts, the principal sums at the death of each of the said parties to be payable equally between their children, whom failing their legal representatives." Mr Kennedy died on 9th January 1877. Thereafter Miss Tweedie married Mr Johnston, post-master at Newton-Stewart. Mrs Johnston sold part of the heritable estate within three years after the testator's death. A part, however, remained unsold at the expiry of that period.

In these circumstances questions arose between Mrs Johnston, the liferenters of the sums of Government stock which Mrs Johnston was directed to purchase with the proceeds of the heritage falling under the general conveyance, and their children, the fiars of that stock, as to the right to the rents of the heritable property between the testator's death and the purchasers' entry as regarded that part of it which was sold within the three years allowed for realisation, and for the whole period of three years as regarded that part which was unsold when the three years expired. Mrs Johnston claimed to be entitled to those rents during those periods, on the ground that the settlement disponed the heritable estate to her absolutely, under burden only of selling the subjects within three years and accounting for the price to the persons for whom she was directed to invest it in Government stock. As an alternative she claimed them in respect that under the deed the whole moveable estate was conveyed to her absolutely, and that the heritable estate being constructively made moveable by the direction to sell, fell to her under the gift of personal property, under burden of an obligation to account as above stated.

The liferenters of the stocks to be purchased, on the other hand, maintained that they were entitled to the rents, in respect that the heritable estate included in the general conveyance was disponed to Mrs Johnston, as a trustee for all concerned, as from the date of the testator's death, and that she was given three years in which to realise it advantageously for the various beneficiaries. They claimed the rents in question as falling under the gift of liferent to them.

The fiars maintained that the rents in question formed part of the free proceeds of the heritable estate directed to be invested in Government stock, and therefore fell to be applied, along with the price obtained for heritable estate, in the purchase of Government stocks. They did not, however, insist in this claim at the debate.

In these circumstances this Special Case was presented to the Court. Mrs Johnston and her husband, as her administrator-in-law and for his interest, were the first parties. The second parties were Mrs Johnston, as one of the liferenters, the other surviving liferenters, and Mrs Catherine M'Lellan or Drynan, daughter of one of them who predeceased the testator. The third parties were the fiars of the stock.

The questions proposed to the Court were—"(1) Is the said Elizabeth Kennedy Tweedie or Johnston alone beneficially entitled to the rents of the said heritable estate falling under the general conveyance of heritage, so far as sold within the period of three years from the testator's death, for the period from the date of the testator's death to the respective dates of the purchasers' entry thereto, and, so far as unsold, for the period of three years from the testator's death? (2) Are the surviving liferenters, and Mrs Catherine M'Lellan or Drynan, parties of the second part, beneficially entitled, along with Mrs Johnston, to the rents of the said heritable estate during the said periods in proportion to their respective shares specified in the settlement? (3) If Mrs Johnston be not held entitled exclusively to the said rents, do they fall to be paid to her and the surviving liferenters, and Mrs Catherine M'Lellan or Drynan, parties of the second part, unconditionally; or do they (with the exception of Mrs Catherine M'Lellan or Drynan's share thereof) fall to be invested, in terms of the disposition and settlement, along with the proceeds of the subjects sold (after deducting Mrs Catherine M'Lellan or Drynan's share of said proceeds), for behoof of the survivors of the liferenters therein named in liferent, and their children, whom failing their legal representatives, in fee?"

At advising—

Lord Gifford—This is a short point, and there is no substantial difficulty. The testator had made his settlement in a rather peculiar form, but I think there can be no doubt that he intended Mrs Johnston to be his trustee. He made special conveyances of two properties—one in favour of Mrs Johnston, the other in favour of his nephew Mr Kennedy. These subjects he disposes out and out. Then he disponed the whole residue of his estate to Miss Tweedie, now Mrs Johnston, and by a disposition *ex facie* absolute; he does not say it is "for purposes after mentioned." The reason for that was that she was to be the residuary legatee of the moveables. He says, however, that the heritable property is to go to her "always with and under the conditions and provisions hereinafter inserted." These conditions are [*reads the direction as to the heritage above quoted*]. Mrs Johnston is directed to dispose of it within three years, and invest the price for certain persons named. This is, therefore, substantially a trust, and not a right of property. There is no virtue in the use of the word "trust" if it is clear that a mere trust is intended, and I think a trust is constituted just as much as if the word had been used. The time for the disposal of the heritable estate is "within three years." It is not "at the end of three years," in which case there might be a question, but "within three years." It is not intended to give the trustee any interest to postpone the sale. It is a trust for sale, and the words used stamp the heritable property as subject to the same purposes before it is sold as after the sale. It cannot be maintained that Mrs Johnston was entitled to postpone the sale in order to benefit herself. I think she was bound to sell the estate directly an advantageous opportunity occurred. It would be a strong thing to hold that Mrs Johnston could make a profit here by not selling the property for three years. Therefore, as this is a trust to sell, I think we should answer the second question in the affirmative.

Lord Young—I am of substantially the same opinion. It is clear that under that part of this disposition and settlement with which alone we are here concerned, the first party is a mere trustee, with no intention on the part of the disponer that she should have any beneficial interest beyond a share of the price of the heritable subjects after they were sold. She is a trustee for purposes expressed, and it would be against the policy of the rule of this branch of the law to say that the trustee to whom is given a latitude in point of time for selling the estate should, by postponing the time of sale, be entitled to benefit himself or the other beneficiaries at will. The period is presumably given for the advantageous sale of the property, and it would be passing strange if this trustee were entitled to let a good time of selling go past, because she would thereby benefit herself. "Within three years" this trustee is to exercise her discretion as to the most profitable period at which to sell, and if she postpones the sale it must be presumed that she does so, not to benefit herself, but to benefit the trust. I concur in thinking we should answer the second question in the affirmative.

The Lord Justice-Clerk concurred.

The Court answered the first question in the negative; the second question in the affirmative; and the first alternative of the third question in the affirmative.

Counsel for First Party—H. J. Moncreiff. Agents—W. & J. Cook, W.S.

Counsel for Second Party—J. C. Lorimer.

Counsel for Third Parties—J. A. Reid. Agents for Second and Third Parties—Ronald & Ritchie, S.S.C.