remuneration for his work. The writs and papers of which delivery is sought in the present process are not in that position. On none of them have the defenders executed any operation which can be assimilated to an act of manufacture or repair. They are mere instruments handed over for a certain purpose, and of these the petitioner, as trustee for the insolvent's creditors, now demands restitution.

"An order for delivery as prayed for would at once have been made, but it appears from the record that parties are not at one as to the precise list of papers and documents in question. That matter therefore remains over."

On appeal the Sheriff (DAVIDSON) affirmed the Sheriff-Substitute's interlocutor, and added the following note:—

"*Note.*—The defenders call themselves 'Accountants and Business Agents.' They belong to no established or known body of authorised legal practitioners. That was admitted at the bar. If the defenders are entitled to claim the right of lien, any person whatever who chooses to assume a designation to which he is not legally entitled might equally claim privileges belonging only to recognised bodies. But, further, there is no authority for holding that an accountant can plead the hypothec of a law-agent. That right is a special rule against the general rule of law; and for some years there has been a strong feeling against extending the privilege beyond the strict rules which practice has allowed to certain persons. It certainly cannot be extended to persons in the assumed position of the defenders."

The defenders then appealed to the Second Division of the Court of Session.

The authorities quoted to the Court are all referred to in the Sheriff-Substitute's note.

At advising—

LORD JUSTICE-CLERK—I do not think this is properly a question of lien or retention in the sense of the cases we were referred to. It is certainly not a case of law-agent's retention, which extends to the general balance the client is due. The real question is, whether when documents or any other article is put into the hands of a professional man to enable him to do any particular piece of business, he is bound to part with those documents or articles until he is paid for having done the work? and that is a question with the person who employed him. The possession is not passed without doubt, but the articles and documents come under the term of a special contract, and the obligation on the one party is as strong as the obligation on the other. The question of property does not arise. The man was simply employed to do a piece of work for which the possession of these documents was necessary, and we have to say whether when he had done the work he was bound to hand back those documents before he was paid for the work. I do not think these circumstances raise a general question of lien. It is a plain case of counterpart of employment.

LORD GIFFORD—I concur on the special ground your Lordship has stated. If I thought that the decision would extend the general doctrine of lien or retention, I would require a great deal more argument and consideration before agreeing to it. This is not a case of lien proper. It is a case of delivery of books under a special contract—the one party is not bound to restore the books till the other party pays.

LORD YOUNG—I concur. There is here no suggestion of a general lien. It is, as I am disposed to call it, a special lien. All lien arises out of contract, and is the right of one to retain till his claims under the contract are satisfied. I do not even follow the views of the Sheriff. They appear to go on a misconception of the question. The right to retain possession of what has come into your hands by contract does not depend on designation, but on the terms of the contract. I am not disposed to speak slightingly of accountants. They are carrying on lawful business, although they do not belong to any established or known body of persons. All people carrying on lawful trade in the course of which the property of others comes into their possession are, in accordance with common law, entitled to retain possession until paid what is due to them under the contract. This is a case of that kind. The parties here are not bound to part with the possession of the books which they got under the contract until their claim under the same contract is satisfied. There is a counterpart to this—the men of business would not be entitled to get their money until they delivered the books. These are the obligations *hinc inde*.

The Court sustained the appeal and assoilzied the defenders.

Counsel for (Pursuer) — Guthrie. Agent — James F. Mackay, W.S.

Counsel for (Defender)—Rhind. Agent—A. Nivison, S.S.C.

Saturday, November 6.

FIRST DIVISION.

[Sheriff of Midlothian.

LATTIMER *v.* WIGHT AND OTHERS.

Multiplepoinding—Double Distress—Competency.

L. owed £150 to A., who had agreed to pay him on 23d June. On 23d March a bill for £100, dated three days previously, and bearing to be drawn by A. on L. in favour of W., payable three months after date, was presented to L. for acceptance. He refused to accept it lest he should endanger his rights, W. on the one hand representing that the bill operated as an assignation in his favour of the sum due by L., while A., whose estates had been sequestrated, and who had subsequently agreed with his creditors to wind up the estate by arrangement, reserved in that deed of arrangement his right to challenge the bill on the ground that it had been improperly filled up. In these circumstances L. raised a multiplepoinding in the Sheriff Court. *Held* that he had shown a relevant case of double distress, and that the action was competent.

Henry Lattimer, butcher, raised a multiplepoinding in the Sheriff Court of Midlothian, as pursuer and real raiser, against Peter Anderson,

ham and bacon merchant, and against George Wight, draper, and Livingstone & Weir, mercantile agents, creditors or pretended creditors of Peter Anderson, to have it found that he was liable only in once and single payment of a sum of £108, 14s. 10d., which formed the sum *in medio*.

The circumstances were as follows:—In March 1880 Lattimer bought from Anderson a going business of ham and bacon-curing then carried on by the latter in Edinburgh, with goodwill, stock-in-trade, and current lease of the premises, for £600, of which £350 was paid down in cash and £150 more by a bill, the remaining £150 to be payable on 23d June 1880. The pursuer averred —(Cond. 5) "Upon 26th March 1880 a bill for £100, dated 23d of same month, and bearing to be drawn by the defender the said Peter Anderson upon the pursuer in favour of the defender the said George Wight as payee, and payable three months after date, was presented to the pursuer for acceptance. The pursuer refused to accept said bill, in respect that his doing so would endanger his rights, and the pursuer understands that thereafter the same was unwarrantably protested for non-acceptance. The said defender, on the one hand, maintains that the presentation of said bill operated at the date of the presentment as a transfer to him of the funds belonging to the other defender, the said Peter Anderson, then in the pursuer's hands, to the extent of the amount of the bill, and so created a preference in favour of him, the said George Wight, for the amount thereof upon the fund *in medio*; while, on the other hand, the defender, the said Peter Anderson, as the pursuer understands, maintains that by the sequestration of his estates under the Bankruptcy Acts, as after mentioned, within less than sixty days of the date of said bill and presentment thereof, the pretended preference claimed by the defender the said George Wight has been rendered null and void, the said bill having been granted for a debt subsisting prior to its date. The pursuer denies that said bill was in his knowledge drawn by the said Peter Anderson in favour of the said George Wight, as stated by the latter."

On 19th April 1880 the defenders Livingstone & Weir used arrestments in the hands of the pursuer on dependence of a Sheriff Court action at their instance against Anderson, to attach all money, &c., belonging to the said Peter Anderson to amount not exceeding £50 in value. On 20th May 1880 Anderson's estates were sequestrated, proceedings in the process being subsequently sisted in consequence of his creditors at their first meeting having resolved to wind up the estates by deed of arrangement.

In these circumstances Lattimer raised the present action, the fund *in medio* being the above-mentioned balance of £150 of price due by him to Anderson, under deduction of various small sums which he had incurred on Anderson's account.

Answers to the condescendence were lodged for the defender Wight, who pleaded—"(1) No double distress. (2) The arrestments libelled having been cut down by the sequestration as condescended on, there is no double distress, and the action should be dismissed. (3) In respect the bill libelled operated a transfer as at the date of presentment thereof of the funds in the hands of the pursuer to the extent of the amount of the bill, this action *quoad* the defender Wight, and the sum in the bill held by him, is incompetent and ought to be dismissed."

On 28th July 1880 the Sheriff-Substitute (Hallard) found "that there is no double distress to justify this process of multiplepoinding," sustained the defences to that effect, and dismissed the action. This note was added—

"*Note.*— . . . . . In this situation it is thought that there is no double distress. The assignation implied in the presentation of Wight's bill introduces no conflict upon the fund in Lattimer's hands. To that extent Anderson is divested of his claim against Lattimer, and that is all. The debt is divided between the original creditor and his assignee by virtue of the presented draft, but one portion of a debt split in two does not conflict against the other. Lattimer runs no danger against which he needs the protection of a multiplepoinding. If an action be brought against him on the bill, he is safe behind the maxim *assignatus utitur jure auctoris*. As already mentioned, Weir & Livingstone's arrestments are out of the field."

On October 4th the Sheriff (Davidson) adhered.

Lattimer appealed to the Court of Session.

By the deed of arrangement which was executed in June and July 1880 between Anderson and his creditors he expressly reserved right to challenge the alleged preference obtained by Wight by the bill of 23d March.

At the discussion in the Court of Session a letter was produced, of date October 14, 1880, from Mr Turner, Anderson's cautioner, to the law-agents of Lattimer, in which he informed them that should Lattimer pay the money to Wight, Anderson would call for second payment of it to himself, and that as soon as he was reinvested in his estates he intended to lodge a claim in the multiplepoinding, and, if necessary, to bring a reduction of the bill, on the ground that though he admitted having subscribed a blank bill stamp, it was on the footing that it was simply constituting the balance of £100 due to Wight, and that he gave no authority for filling up the bill as had been done.

The appellant argued—There was here a relevant case of double distress, and Lattimer was not in safety to pay the money away in the face of this bill and of the arrestments. A *nexus* had been created over the fund, and Lattimer's only safe course was to raise a multiplepoinding.

The respondent replied—There was no proper case of double distress. There was not reasonable ground for belief on Lattimer's part that he would be called on for double payment.

Authorities quoted—*Russell* v. *Johnston*, June 1, 1859, 21 D. 886; *Connell's Trustee* v. *Chalk*, March 6, 1878, 5 R. 735; *Mitchell* v. *Strachan*, Nov. 18, 1869, 8 Macph. 154.

At advising—

Lord President—I am unable to agree with the Sheriff-Substitute and the Sheriff in holding this action to be incompetent. I throw out of view the arrestments; but it appears to me that the 5th article of the condescendence is a relevant statement of double distress. That statement is that—[*reads as above*]. It is quite true that under ordinary circumstances the drawing of this bill would have operated as an assignation to Wight

of the sum in the hands of Lattimer to the extent of £100. But Lattimer goes on to say, that while Wight may be entitled to have this sum as assignee, he understands that Peter Anderson contends that this bill is invalid. No doubt the pursuer now alleges a reason for this which is only stated by Anderson now, and which does not appear upon the record,—but that does not make the statement less relevant. If Anderson is maintaining on any ground that the bill does not in fact operate as an assignation of the fund, or that he has good ground for cutting down that assignation, then Lattimer is not entitled to pay to one of these two parties. The allegation in the 5th article of the condescendence might have been made more distinct and satisfactory, and the form in which it is stated has led the Sheriffs to disregard the substance. But we are better informed, because we have seen the deed of arrangement. Anderson's contention is of this nature:—that this bill was made in this way—he signed a blank bill stamp, and he intended that it should be filled up as a promissory-note; but Wight converted it into a draft by Anderson upon the pursuer; and this blank stamp, which was signed for the purpose merely of constituting a debt as between Wight and Anderson, has been converted, without the knowledge or consent of Anderson, into an assignation of the fund in thehands of the pursuer. If that is true, there can be little doubt about its relevancy; and this right to challenge the draft, which is reserved in the deed of arrangement which Anderson made with his creditors under the composition arrangement, is fairly vested in Anderson. If Anderson's claim had been a mere pretence, I do not say the Court would have been entitled to be influenced by it; but Anderson is serious, and he will claim in the multiplepoinding; and there will then be two competing claims, which will be double distress if anything is double distress in the world.

Lords Deas, Mure, and Shand concurred.

The Court recalled the interlocutors of the Sheriff-Substitute and the Sheriff, repelled the objection to the competency of the action, and remitted to the Sheriff to proceed further with the cause.

Counsel for Appellant — Kinnear — Millie. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Respondents—J. Campbell Smith. Agents—Horne, Horne, & Lyell, W.S.

Tuesday, November 9.

SECOND DIVISION.

[Sheriff of Rosshire.

WILKINSON *v.* BAIN.

Husband and Wife—Wife's Title to Sue without Consent of Husband.

A married woman brought an action without consent and concurrence of her husband, for aliment for an illegitimate child of which she alleged the defender to be the father. There was no evidence to the effect that her husband was dead or that his consent could not be obtained. *Held* (*per* Lords Justice-Clerk and Young) that she had no title to sue, and that the action was not maintainable.

Grace Helen Stewart or Wilkinson, a married woman, brought an action in her own name, and without consent or concurrence of her husband, against Peter Bain, preventive man of Inland Revenue, in the Sheriff Court of Rosshire at Stornoway, in which she concluded against him for aliment at the rate of £8 sterling for ten years from 1st November 1879, for an illegitimate female child born on that date, of which she alleged him to be the father. The petition also concluded for a sum of inlying expenses. The pursuer was the daughter of an innkeeper at Garrynahine in the island of Lewis. The defender resided at Stornoway, and in the course of his duties as an officer of Inland Revenue had occasion to be sometimes at the pursuer's father's inn at Garrynahine.

The pursuer stated that she was married in London in 1871 to George Joseph Wilkinson, a cabman there, that she was deserted by him there in 1876, and that in that year she came home to her father's house in Lewis, and that for four years she had not seen or heard of him. In these circumstances she pleaded—"(1) The pursuer's husband being dead, or otherwise having deserted her, she is entitled to pursue this action in her own name and grant a valid discharge for the sum sought to be recovered."

The Sheriff-Substitute (Spittal) on 3d July 1880, after a proof, assoilzied the defender, and on 12th August 1880 the Sheriff adhered.

The pursuer appealed.

There was no evidence to show that the husband was dead and that his consent could not be obtained.

At advising—

Lord Justice-Clerk—(*After expressing concurrence with the Sheriffs on the facts*)—There is a preliminary question which was not raised by the defender, but which is of so great importance that I do not know that it is not our duty to give an opinion on it. The pursuer is a married woman, and this is an action for payment of money brought without her husband's consent, and without any evidence that her husband's consent cannot be obtained, and the question is, whether she has any title to sue? Whether she could sue without that concurrence with a *tutor-ad-litem* is another question; but I am certainly not aware of any case where it has been held that a married woman can sue an action for a money payment without the concurrence of her husband.

I am not sure that there is not another and greater question in the case, and that is, whether the wife has not to discharge the burden of showing that her husband could not have been the father of the child? On that I give no opinion, but I am not satisfied that the pursuer has any title to sue this action, particularly when I consider the terms of her first plea-in-law.

Lord Gifford concurred on the merits of the case, and gave no opinion on the question of competency.

Lord Young—The interesting and important feature of this case is that to which your Lordship in the chair last adverted. My view of the