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

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.