must either be held that the testator has cancelled the protection from creditors by his own act, or else that the bequest is altogether inoperative to alter or affect the alimentary right.

But, however that may be, I agree with Lord Rutherfurd Clark that the husband's will does not purport to relieve the wife of the conditions or deprive her of the protection attached by contract to her liferent right. The estate which he could dispose of by will consisted of the fee under burden of the liferent. That appears to me to be all that is carried by the will. There could be no question either as to the construction of the words of bequest or as to their legal effect if the will had been in favour of a stranger, and I think it makes no difference that it is in favour of the wife. It would have made a very material difference if the bequest of the fee in favour of the liferenter carried with it by necessary implication the determination of all conditions and limitations affecting her liferent enjoyment. But I think it must be taken as settled law that when a person who is vested in an alimentary liferent acquires the fee by a separate title, the two rights are not merged as in the case of a simple liferent, but co-exist in the same person as separate and distinct rights. I agree with what Lord Rutherfurd Clark has said as to the case of *Duthie*, and as to Lord Watson's observations upon that case in *Hughes* v. *Edwardes*. The distinction that has been taken between these cases and the present is no doubt just so far as it goes. They do not decide that. The persons who have imposed a restriction by contract may not remove it by mutual consent. But they decide that an alimentary right which is effectually protected by a trust may still subsist under the conditions by which it was originally limited, notwithstanding that the liferenter has acquired an absolute right in the fee. Now, there is nothing in the will we are construing to affect the alimentary character of the liferent except the absolute terms of the bequest. If that does not by itself merge the liferent in the fee, and give the wife the whole estate by a new title, there is nothing from which it can be inferred that the testator intended to deprive his wife of the protection provided by the marriage-contract, or that he had adverted at all to the conditions attaching to her rights under the marriage-contract in bequeathing to her, in addition to what was secured to her by contract, all the estate he had power to dispose of by will. I think the word "absolutely," upon which so much stress was laid in argument, has no reference to the liferent, with which the will has no concern, but only to the estate which the testator had power to dispone. The legatee's right in that estate is to be absolute and unlimited. But that does not affect the separate right, which he had no power to give or take away. I do not see that the case raises any question of election. I think the wife shall take the liferent by virtue of her marriage-contract, as she would have done if the fee had been bequeathed to a stranger, and that she takes nothing under the will except the fee already burdened by her liferent right.

LORD TRAYNER—I concur in the opinion of Lord Rutherfurd Clark.

The Court answered the question in the negative.

Counsel for the First Party—J. A. Reid—Howden. Agent—Thomas White, S.S.C.

Counsel for the Second Party—Guthrie—Walton. Agents — Drummond & Reid, S.S.C.

Friday, July 20.

FIRST DIVISION.

ROMANES (LIQUIDATOR OF THE SCOTTISH HERITABLE SECURITY COMPANY, LIMITED), PETITIONER.

Process — Process Lost in Hands of the Clerk of Court—New Process Made up by the Use of Copies.

A note was presented by the liquidator in a liquidation under supervision of the Court in which the process had gone amissing in the hands of the Clerk. The Court *allowed* the note to be dealt with as a separate process, copies of the original petition and of the interlocutor sheets being lodged.

Counsel for Petitioner — Maconochie. Agents—Mackenzie, Innes, & Logan, W.S

Friday, July 20.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

AUCHINCLOSS *v.* DUNCAN.

Agent and Client — Employment of Law-Agent by Curator for Benefit of Minors—Action of Damages for Alleged Professional Negligence—Relevancy.

A father who borrowed money from his minor children, with consent of his wife, directed a law-agent to prepare a bond and disposition in security in their favour over certain heritable subjects belonging to her, but to which she had only a personal title. The bond was prepared and executed, but was not at once recorded. The title was not completed, the property was afterwards sold, and the bond was subsequently found to be invalid as a real security. The children thereupon brought an action of damages against the law-agent for professional negligence inasmuch as he had failed to make the security in their favour valid and effectual.

Held that the action was irrelevant,

as it was not averred that the law-agent was authorised to complete the title and record the bond. *Held* by Lord Wellwood, and not dissented from in the Inner House, that the action was irrelevant as it was not averred that there had been any contract of employment between the law-agent and the pursuers.

In 1852 John Auchincloss senior used £65 which belonged to his three children then in minority, and with concurrence of his wife instructed William Duncan, S.S.C., Edinburgh, to prepare a bond and disposition in security in their favour for that amount over certain heritable property belonging to Mrs Auchincloss but which she held only on a personal title. The bond was prepared and executed but was not recorded until November 1860. Mrs Auchincloss's title was never feudalised, and the property was sold in April 1860. In March 1893 the First Division of the Court of Session decided that the bond gave no real security over the subjects. In November 1893 John Auchincloss junior and his sister, who were the minor children in 1852 (the third having died) brought an action against the said William Duncan for payment of £130, being two-thirds of the sum of £65, with interest from 1852. They averred:—"(Cond. 3) On 13th April 1852, when the pursuers and their now deceased sister were in minority, their father without any consultation with them borrowed the amount of their shares of their grandfather's estate. He, however, as curator for the pursuers and their said sister, employed and instructed the defender to draw up a bond in favour of the pursuers and their said sister for the sum borrowed, and further he and his wife directed the defender to prepare for behoof of the pursuers and their said sister in security a disposition of certain subjects at 71 Rose Street, Edinburgh, belonging to Mrs Auchincloss. The defender prepared a bond and disposition in security, as directed, in favour of the pursuers and their said sister. The pursuers' father in employing the defender to draw up the said deed was acting as the natural guardian of the pursuers, and his instructions to the defender were given for and on behalf of the pursuers and their said sister. (Cond. 4) It was the defender's duty, acting on behalf of the pursuers and their said sister, who were at the time minors, and utterly ignorant of what was being done with their money, to take care that a good title was obtained for them to the property disponed to them in security for the loan to their father. This he entirely failed to do. The pursuers' father did all he could to give the pursuers a proper security for the money he had borrowed. The property given in security was of adequate value, and the pursuer's failure to recover the sum due to them was attributable solely to the neglect and fault of the defender. (Cond. 10) The defender, as law-agent employed for the pursuers, then minors, was under the obligation to see that the security granted for their money was made valid and effectual. This he failed to do. He first delayed for eight years to record the bond in the Register of Sasines, and then he recorded it ineptly. The pursuers have consequently lost the sum now sued for through the negligence of the defender." They explained that they had only become aware of the existence of the bond in 1889.

Pleaded for pursuers—"(1) The pursuers having lost the sum sued for through the negligence of the defender, decree should be granted in terms of the conclusions of the summons. (3) The defender having been employed as law-agent on behalf of the pursuers by their natural guardians during their minority, is liable to them in damages for loss sustained by them in consequence of his failure to perform properly his duties in that capacity."

Pleaded for the defender—"(3) No relevant case stated. (6) The defender not having acted as agent for the pursuers, he ought to be assoilzied.

Upon 1st March 1894 the Lord Ordinary (WELLWOOD) sustained the third plea-in-law for the defender and dismissed the action.

"*Opinion.*—In this action the pursuers seek to hold the defender, who is a Solicitor before the Supreme Courts, personally liable for alleged professional negligence, of which he is said to have been guilty upwards of forty years ago, in having failed to take care that a good title was obtained for them to certain heritable subjects for which a bond and disposition in security in their favour was granted by their father and mother in the year 1852. Amongst other defences, the defender pleads that the pursuers' averments are irrelevant, and also, '(6) That not having acted as agent for the pursuers, he ought to be assoilzied.' I am of opinion that the pursuers have not relevantly averred that the defender was employed by them or on their behalf.

"It seems from the pursuers' statement that a legacy was left by James Mowat, the pursuers' maternal grandfather, to the children of the marriage of the pursuers' father and mother. The pursuers' father obtained possession of the shares which fell to the pursuers, and apparently used them for his own purposes. The pursuers' statement is that he borrowed the amount of their shares while they were in minority; but they also say—and that is part of their case—that they were not aware of this until recently, and that they were not consulted in the matter at all. When he thus appropriated—I do not use the word in a bad sense—or used the shares, the pursuers' father, being anxious that the pursuers should have some security for the money, instructed the defender to prepare a bond and disposition in security in their favour over certain heritable subjects to which the pursuers' mother had right. The bond was prepared by the defender, and executed by Mr and Mrs Auchincloss. The complaint is that whereas Mrs Auchincloss held the subjects disponed in security on a personal title only, the defender failed

to complete her title as he was bound to do, and did not even record the bond until November 1860, by which time the property had been sold by Mr and Mrs Auchincloss to a Mr Findlay, the result of which was that it was ultimately held by the Court that the bond gave the pursuers no real security over the subjects. I assume on the question of relevancy that the defender was negligent in the respects alleged.

"The question is, whether the pursuers have relevantly averred that the defender was employed by them or on their behalf; in other words, whether in order to support an averment of employment by or on behalf of a minor it is relevant and sufficient to aver that the agent was instructed to do the work in question by the minor's curator without the minor's knowledge, and for the purpose of giving security for a sum of money belonging to the minor, the use of which the curator had taken also without the minor's knowledge and permission.

"I do not think that such an averment is relevant. The powers of a father as administrator-in-law for his children are not in this respect different from those of any other guardian. A minor acts with consent of his curator; the curator cannot act by himself without the minor. Further, a curator cannot legally lend the curatorial funds to himself. Therefore when Mr Auchincloss instructed the defender to prepare the bond, it cannot be said with propriety that he gave instructions for and on behalf of the pursuers in the sense that in so doing he was acting as their curator. He was really acting as their debtor, and endeavouring to give them security for the money of which he had taken the use without their knowledge.

"If it had been averred that the pursuers' father employed the defender with their knowledge and consent, there might have been a case for inquiry. But the pursuers' case is that they knew nothing about it; that they were kept in the dark. There is thus no room for implying authority from them to employ the defender. Such implied authority is negatived by their own statement.

"No doubt the defender was employed to prepare the bond for their benefit, but that is not enough. It was necessary that the pursuers should aver and prove that the defender was employed by them or by their authority. This is clearly settled by the decision of the House of Lords in the leading case of *Robertson* v. *Fleming*, 1861, 4 Macq. 167. In that case there were facts alleged which apparently warranted an issue as to whether the agent was employed by or by the authority of the appellants. This appears from the terms of the judgment and remit—4 Macq. 214. But the facts alleged were very different from those stated in the present case. A person named Hamilton being desirous to raise money, applied for an advance to certain moneylenders, who agreed to make it on the borrower obtaining three cautioners. The three respondents agreed to become cautioners, being aware that Hamilton had leasehold property which if properly secured for their benefit would keep them safe. Their statement was that Hamilton agreed to complete the necessary security over this property, and that he employed Robertson, the agent, for their behoof. The issue sent to the jury was whether Robertson was employed by Hamilton 'for behoof of' the cautioners. The House of Lords held that the issue was improperly worded, on the ground that the words 'for behoof of' meant 'for the benefit of,' and were not equivalent to the words 'by the authority of.'

"Now, in the present case, as I read the pursuers' averments, it cannot be inferred from them that the defender was employed by them or by their authority, and on that short ground I think the case must be dismissed.

"It appears from the pursuers' own statement that the value of the three *pro indiviso* shares belonging to them and their sister was only £65, and I think the probability is that much more than that small sum was expended by the pursuers' father on their upkeep and education."

The pursuers reclaimed, and argued that they had stated a relevant case. 1. They had averred that the defender, the family lawyer, was instructed to prepare a disposition in security. That meant a valid and effectual security, not a mere form on a sheet of paper. 2. They averred that the father in instructing the defender was acting as his children's curator and on their behalf. He was giving them a bond for onerous considerations, and it was the agent's duty to see that they got a good security by completing the mother's title and recording the bond—*Lang* v. *Struthers*, 1827, 2 W. & S. 563; *Haldane* v. *Donaldson*, 1836, 14 S. 610; *Robertson* v. *Fleming*, 1861, 4 Macq. 167; *Cann* v. *Willson*, 1888, L.R., 39 C.D. 39.

Argued for respondent—1. He had no instructions to record the deed, and would not have been justified in doing so or in completing the title. This was a family arrangement intended to give the children a claim during minority. The father and mother might not wish to be hampered with a recorded deed. As it happened, when the children reached majority the property was sold. 2. There was no privity of contract between the defender and the pursuers. He was employed by their father, and not by them. To make him liable to them, even if there had been negligence, the averments as to employment would have required to be far more specific—*Tully* v. *Ingram*, November 10, 1891, 19 R. 65.

At advising—

LORD M'LAREN—In this case the pursuers, who sue in the character of creditors in a debt due by their father, claim damages from their father's solicitor, on the ground of professional negligence in that the defender being employed by the father to prepare a deed of security in their favour failed to perfect the title by sasine.

The Lord Ordinary has held, following

the case of *Robertson* v. *Fleming*, 4 Macq. 167, that the action fails for want of relevancy, because it is not averred that the defender was employed by the pursuers (that is, the minor children of the debtor) or by their authority.

In such a case, if the father is under an obligation to grant a good security to his children, and is in circumstances which enable him to fulfil that obligation, I cannot doubt that his authority as administrator-in-law for his children would extend to the giving the necessary authority to a solicitor to see to his children's interests in the matter, and to take care that they got a good security. In the case supposed, the solicitor has the authority of the children as well as of the parent to act for them, and he would of course be responsible to the children in case of negligence resulting in loss to them. If the action is not relevantly laid, it is only because it is not distinctly averred that the father's instructions to his solicitor were given in the exercise of his powers as their administrator-in-law.

As the record stands, and in the absence of any offer of amendment, I do not dissent from the Lord Ordinary's view. But there is another defence—a defence of a more substantial character on which I should prefer to rest my opinion. The averments in Cond. 3 are (1) that the defender was employed "to draw up a bond in favour of the pursuers and their sister," and (2) that he was employed "to prepare for behoof of the pursuers and their sister a disposition of certain subjects" (described) belonging to Mrs Auchincloss, the pursuers' mother. It is further explained that at the time when these instructions were given, the title to the subjects to be conveyed in security was incomplete, and it is not averred either that the defender was instructed to pass infeftment on the disposition in security or to complete the title of Mrs Auchincloss, without which completion an infeftment of the disponee in security would of course be unavailing.

This point, however, has not escaped the attention of the pursuers' advisers. Being unable (as I assume) consistently with the facts of the case, to aver that the defender was instructed to perfect the security, it is set forth in Cond. 4 that it was the defender's professional duty (that is, independent of instructions) to perfect the security.

Now, I am unable to follow the pursuers in this statement or deduction from the facts of the case as set forth by themselves. The property to be disponed in security was the property of Mrs Auchincloss, who is not said to have been a debtor in the obligation, and she was under no obligation to complete her title and to pass infeftment in favour of her disponees. A person who interposes as a cautioner may mean to give a perfect or an imperfect security, but if he or she instructs his solicitor to prepare a deed of security which still leaves the granter a certain control over his estate, I know of no rule of law which would require or even justify the solicitor in perfecting the security without instructions from his client.

In the present case we have no reason to know that Mrs Auchincloss would have agreed to infeft her children in her property in security of her husband's obligation, and her solicitor clearly had no right to pass infeftment without instructions from his client. It may be said that the disposition was a very poor security unless infeftment passed upon it. That may be, but a debtor who takes security from a cautioner must be content with such security as the cautioner is willing to give. I think we should adhere to the interlocutor.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for Pursuers—A. S. D. Thomson—Craigie. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Defender—Abel. Agent—W. A. Hartley, W.S.

Friday, July 20.

FIRST DIVISION.

FISHER *v.* EDGAR.

(*Ante*, pp. 76, 244.)

Parent and Child—Father's Right to Custody of Minor Child—Minor's Right to Choose Residence.

Held that the wishes of a minor child as to his or her place of residence, if consistent with his or her general welfare, will be given effect to even against those of the father.

Sequestration—Sequestration Granted to Enforce Compliance with Order of Court—Recal of Sequestration.

The estates of a lady who had removed her niece out of the jurisdiction of the Court, and had failed to obey an order ordaining her to appear personally at the bar, were sequestrated to enforce compliance with said order. Upon her submitting herself absolutely to the judgment of the Court, the sequestration was *recalled* without requiring her personal attendance.

Sequel to case of *Edgar, Petitioner*, reported *supra*, pp. 76, 244.

Miss Margaret Brown Fisher presented a petition for recal of the sequestration of her estates and of the factory and appointment of Mr John M. M'Leod as judicial factor on said sequestrated estates and also as factor *loco tutoris* to Evelina Burns Edgar.

She explained that the said Evelina Edgar returned to her upon 3rd September 1893 voluntarily, that Evelina attained minority on 26th May 1894, that she was most desirous of continuing to live with her, and had written to that effect to her father on 28th May. With regard to the