

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 Rutherford 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 Rutherford 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 dispose. 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 Rutherford 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,