vol. xxiii. p. 829, when the Court dealt with an application by the Society of Solicitors in the Supreme Courts in Scotland against the same respondent.

The petitioners averred that they were incorporated by royal charter; that by the Law-Agents (Scotland) Act 1873, sec. 14, sub-sec. 1, it is provided that the name of any person may be struck off the rolls "in obedience to the order of the Court upon application duly made, and after hearing parties, or giving them an opportunity of being heard;" that the statements contained in the petition of the S.S.C. Society in the proceedings above referred to were true in point of fact, and that the Court in that application granted the prayer of the petition; that the respondent's name still stood on the roll of law-agents entitled to practise in the Court of Session, made up and kept under the provisions of the Law-Agents Act; and that in the circumstances the respondent was not a fit person to be allowed to continue to practise as a law-agent.

Answers were lodged for the respondent. He denied that he was a member of the Incorporated Society of Law-Agents in Scotland, or that it had any jurisdiction over him or interest in the present matter, or that the Society had authorised the petition. He alleged that the re-opening of the matter by the present proceedings was unjust and oppressive, and that even assuming his guilt, which, however, he denied, he had already been sufficiently punished; that the Society had no title or interest to present the application; and that in any event punishment by expulsion as craved was excessive.

A memorial was presented, signed by 166 Writers to the Signet, Solicitors before the Supreme Courts, and law-agents, expressing their opinion that the respondent had been already sufficiently punished, and that his name should not be struck off the roll of law-agents.

Argued for the petitioners—The offence of which the respondent had been found guilty warranted the present application, and sec. 14 of the Law-Agents (Scotland) Act 1873 specified the procedure to be followed before the name of a member was struck off the roll. The procedure had been regular, and the prayer of the petition should be granted—*Solicitors of Elgin* v. *Shepherd*, February 16, 1881, 18 S.L.R. 303.

Replied for respondent—It was not desired to raise any technical points on the question of title, as the respondent desired to have the matter determined on its merits. The membership of the Society was 500, of whom only 17 were resident in Edinburgh, while of these 8 had signed the memorial for the respondent. The respondent had already, in any view, been sufficiently punished.

At advising—

Lord President—[who delivered the judgment of the Court]—The Lord Advocate, on behalf of the respondent, has withdrawn the objection to the title of the petitioners to make the present application, and therefore it is not necessary for the Court to dispose of the points raised in the answers affecting the title. I think it right to say, however, that I should be very slow indeed to reject the title of any person having an interest to make an application of this kind to the Court. The jurisdiction of the Court in this matter is not created by the Law-Agents Act. It is altogether independent of it, and the title to make a complaint of this kind is sufficient if the person who makes the complaint is himself an enrolled law-agent, and thus has an interest to see that the roll is kept pure.

With regard to the merits of this application, and the statements made in answer, the duty of the Court is undoubtedly a delicate one. We have to consider, among other things, what effect ought to be given to a statement which has been put into process signed by 166 gentlemen known to the Court as practitioners.

In some cases in a certain class of offences I do not think the Court would be inclined to listen to any such statement, because there are offences of such a description as would completely disqualify the person who committed them from acting in the profession of a law-agent in future, and no concurrence of opinion or sympathy with the party complained of could be allowed to interfere with the duty of the Court in putting an end to the connection between the Court, so far as concerns the right to practise before it, and the person so offending.

But the offence of which the respondent here was convicted is of a peculiar kind, and seeing that so many gentlemen who are practising in this Court, or at least following the profession of law-agent within this district of country, are desirous that the punishment already inflicted upon the respondent should be held as sufficient, and imply, although they do not expressly state, that they would be willing to associate with him in future as a professional brother, the Court has come to be of opinion that in the circumstances they will not strike the respondent's name off the roll, and further that they will not make any order in the matter of expenses.

Petition refused.

Counsel for Petitioners—Guthrie. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Respondent—Lord Adv. Macdonald, Q.C.—Rhind—Hay. Agent—Party.

Tuesday, December 7.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

HONEYMAN & WILSON *v.* ROBERTSON AND OTHERS.

Husband and Wife—Provision to Wife—Reservation by Husband—Competition between Widow and Creditors.

A husband while solvent purchased heritable subjects, and took the title in name of himself and his wife in conjunct liferent for her liferent use allenarly, and certain children of theirs in fee, but under a reserved power at any time during his life, and without the consent of his wife, "to sell, burden, wadset, and affect with debt, or even gratuitously dispone, the subjects as if he

were absolute proprietor of the same." *Held* that the terms of the destination left the absolute right of property in the husband, and that the provision in her favour was revocable at the instance of the husband's creditors.

The deceased James Robertson senior, lodging-house keeper, Wemyss Place, Edinburgh, died on 29th December 1884. By his deed of settlement he appointed certain trustees and executors, and he also conveyed to them as trustees the whole estate which should belong to him at the time of his death.

The only heritable property left by the said James Robertson was a portion of the eastmost tenement of houses in Darnaway Street, Edinburgh, which he acquired in 1872 from a person named Dick. The title to these subjects was taken to the deceased "James Robertson senior, and his wife Mrs Elizabeth James or Robertson in conjunct liferent for the said Elizabeth James or Robertson for her liferent use allenarly, and to the said Jemima Robertson, James Robertson junior, and Francis Robertson, their children," equally between them in fee, subject to a reservation, power, faculty, and liberty" in favour of James Robertson, which was thus expressed, viz., but under reservation of power to the said James Robertson at any time during his life, and without the consent of his wife, the said Jemima Robertson, "to sell, burden, wadset, and affect with debt, or even gratuitously dispone, the subjects as if he were absolute proprietor of the same."

Francis Robertson, the son of James Robertson senior, had, subsequently to the acquiring of the house by his father, been for a time in the employment of Honeyman & Wilson, pursuers of this action, in a position of trust, and James Robertson senior was his cautioner to the extent of £100. This was an action by Honeyman & Wilson to make good the cautionary obligation. They stated that Francis Robertson owed them more than £400; that it was necessary to proceed against his father, his cautioner; that it had been intimated to them that his executry would not yield that amount, and that it had thus become necessary to adjudge his heritage, and they therefore raised this action.

They concluded for payment of the £100 mentioned in the cautionary obligation, and for declarator that the "reservation, power, faculty, and liberty in favour of the said deceased James Robertson at any time of his life, and without the consent of his then wife, the defender the said Elizabeth James or Robertson, and his children the said deceased Jemima Robertson or M'Leod, the defender the said James Robertson, and the defender the said Francis Robertson, or any of them, to sell, burden, wadset, or affect with debt, and even gratuitously dispone, the subjects and others hereinafter described, and generally to do every other thing thereanent as if he were still absolute proprietor of the same," which reservation was contained in the title to the house above stated, "were duly and validly used and exercised by the said deceased James Robertson in favour of the pursuers the said Honeyman & Wilson by the contraction on the part of him, the said deceased James Robertson, of the obligation specified and contained in the foresaid cautionary obligation, and since become prestable, and the failure on the part of him, the said deceased James Robertson, to leave and provide sufficient funds otherwise to meet the same; at least that the foresaid reservation and others were so used and exercised to the effect of entitling the pursuers to have the said subjects and others adjudged to them for payment of their foresaid debt." While admitting that the heritable subjects were burdened with debt, the pursuers averred that the subjects were worth a sum which would extinguish both the heritable bond and their own debt.

The action was defended by Mrs Elizabeth James or Robertson, the widow. She stated that the trust-estate was exhausted in paying the truster's debts, and she averred that the destination to the heritage was taken by the truster, being then solvent, in the terms above set forth with the view of making a provision for her, his wife, in the event of her surviving him; that no other provision of any kind was made, and the deceased James Robertson having left no other estate than what is specified herein, she had no means of subsistence other than her liferent in the subjects; that the provision was a reasonable one.

The pursuers pleaded, *inter alia*—"(2) The said deceased James Robertson having contracted the obligation sued on, and not having left estate to meet the same otherwise, the reservation and others in favour of the said deceased James Robertson libelled must be held to have been used and exercised by him at least to the effect mentioned in the summons, and the pursuers are accordingly entitled to decree of declarator as concluded for. (3) The pursuers are entitled to have the subjects and others mentioned in the summons adjudged to them for payment of the debt due to them by the said deceased James Robertson."

Mrs Robertson pleaded, *inter alia*—"(1) The present defender Mrs Elizabeth James or Robertson is entitled to vindicate her right of liferent under the investiture in her favour as against the pursuers' alleged rights or claims. (2) Being feudually vested in the subjects mentioned in the summons long before pursuer's alleged debt was constituted or incurred, the defender cannot now be dispossessed by them. (3) In any event, if the subjects can be adjudged under this action, they must be burdened with the liferent right in favour of the defender. . . (4) The action is incompetent and irrelevant, in respect the liferent infeftment on the present defender's favour, if reducible, can only be set aside in a properly libelled action of reduction. (5) The deceased James Robertson senior having died without having exercised the reserved faculty or power in his favour condescended on, the pursuers are not entitled to the decree concluded for.'

The Lord Ordinary (Lord Kinnear) on 31st March 1886 pronounced the following interlocutor:—"Finds that the fee of the subjects libelled was vested in the deceased James Robertson; that the same are liable to be adjudged for payment of his debts, and that the liferent interest of the defender Mrs Elizabeth James or Robertson is not valid or effectual to her in competition with the creditors of the said deceased: Therefore repels the first five pleas-in-law for the defender, and continues the cause, reserving in

the meantime all questions of expenses: Grants leave to reclaim.

"*Note.*—The title to the subjects in question is taken to the deceased James Robertson and his wife, the defender, in conjunct liferent for her liferent use allenarly, and certain of their children in fee, but under reservation of power to the husband, at any time during his life, and without the consent of his wife or children, 'to sell, burden, wadset, and affect with debt, or even gratuitously dispone, the subjects as if he were absolute proprietor of the same.' There can be no question that this leaves the absolute right of property in the husband, and that the interest of the wife and children is nothing more than a hope of succession to the rights of fee and liferent conferred upon them respectively.

"It is said that the wife's liferent ought to be sustained as a reasonable provision since she is not otherwise provided for, and there would have been force in the contention were it not for the absolute right of the husband to dispone the subjects, either onerously or gratuitously, without the consent of the wife. But a widow cannot compete with the husband's creditors for a provision which may be revoked at the pleasure of the husband. The case appears to be a hard one, but I can find no sufficient reason for holding that the subjects are protected from the diligence of the husband's creditors.

"The case was argued on the assumption that there was a debt due, and that the only question was whether the defender's liferent could be affected by an adjudication at the pursuer's instance. But the amount is not proved by admission or otherwise, and decree of constitution cannot be given until this is done."

The defender reclaimed, and argued—It was a question of circumstances whether a declaration of this kind was to be viewed as a donation or a provision. Here the circumstances were in favour of a provision for the widow. The husband was solvent at the date of the infeftment in the heritable subjects, and though the deed contained the reservation in his favour of a right to burden, and even alienate, yet in the circumstances of the case it was clear that the husband intended the gift as a provision for his wife, and it was a reasonable provision.

Authorities—*Dunlop* v. *Johnston*, April 2, 1867, 5 Macph. (H. of L.) 22; *Galloway* v. *Craig*, 4 Macq. 272; *Wright* v. *Harley*, June 2, 1847, 9 D. 1151; *Donaldson* v. *Thomson*, January 25, 1873, 11 Macph. 347; *Rust* v. *Smith*, January 14, 1865, 3 Macph. 378.

Replied for the respondents—The question was whether the husband here had made a reasonable provision for his wife, for the reserved power in him was inconsistent with the wife's provision. Was this donation revocable or not? Clearly it was revocable, and that distinguished the present case from those cited on the other side. This provision in favour of the wife was purely testamentary.

Authorities—Bell's Prin. ii. 1944; *White's Trustees* v. *White*, June 1, 1877, 4 R. 786.

At advising—

Lord President—The Lord Ordinary says that the position of the widow here is a very hard one, and I agree with him, but we must take care that the hardness of the case does not lead us into bad law. By the deed upon which the widow's claims depend the title to the subjects in question was taken to the deceased James Robertson and his wife, the defender, in conjunct liferent for her liferent use allenarly, and certain of their childen in fee. Now, this is a destination which was the subject of construction in the argument. But the question to be decided depends upon a reservation in favour of the husband, which is thus expressed, viz., under reservation of power to the husband at any time during his life, and without the consent of his wife or children, "to sell, burden, wadset, and affect with debt, or even gratuitously dispone, the subjects as if he were absolute proprietor of the same."

The Lord Ordinary has held that the effect of this reservation is to leave the husband as free as regards this property as if he had made no attempt to provide for his wife at all, and that the only benefit which she could derive from the deed was that she would take a testamentary bequest if her husband did not exercise his power of revocation or burden his estate with debt. I have come to be of the same opinion as the Lord Ordinary.

The cases which were cited to us for the defender are all easily distinguishable from the present, and I may just refer, by way of example, to the well-known case of *Rust* v. *Smith* in 1865.

There Lord Deas, who delivered the judgment of the Court, showed in what way a provision such as we have here might be made effectual. In that case a husband bought heritable subjects, and took the disposition in name of his wife. She was not infeft in the subjects, but the disposition was granted, and there was no allegation that at the time of the purchase the husband was not quite solvent. As the deed was granted by a third party, it was not left to the husband and wife, by merely destroying the deed, to alter the state of matters, as they might have done if it had been a deed granted by the husband. But the husband having been at the time solvent, the provision was held not to be revocable either by him or by anyone in his right. Irrevocability there was the specialty; here, on the other hand, the provision is undoubtedly revocable, and that being so, I have no hesitation in concurring with the Lord Ordinary.

Lord Mure—I regret that I cannot come to any other conclusion than your Lordship has done. It is undoubtedly a hard case for the defender, and I carefully examined the various cases cited in order to see if no other result could be arrived at. To enable a wife to maintain a provision in her favour against her husband's creditors three conditions are essential. I take these from the opinion of Lord Chancellor Campbell in the case of *Craig* v. *Galloway* [*supra*] and they are as follows—First, there must be no antenuptial contract between the spouses; second, the husband must at the time he made the provision be solvent; and third, it must be the intention of the parties that the gift should operate as a provision to the wife.

In the present case there was no antenuptial contract, and there can be no doubt that at the time of the deed the husband was solvent, but when one comes to consider whether it was intended by the parties that this gift was to be of the nature of a provision, then I can see no

ground for saying so. On the contrary, the husband reserves to himself the right to dispone in the amplest terms, and so doing, he left the right of property in himself. In these circumstances I have no hesitation in coming to the same conclusion as the Lord Ordinary.

Lord Shand—I am of the same opinion, and I think the grounds of judgment are very clearly set forth by the Lord Ordinary. If this provision had stood upon the words of the dispositive clause alone, without any clause of reservation, then undoubtedly it would have been a good provision. The words are, "in favour of the said deceased James Robertson and the defender the said Elizabeth James or Robertson, his spouse, in conjunct liferent for the said Elizabeth James or Robertson, her liferent use allenarly." . . . A provision of this kind if reasonable would of course have received effect, but then the husband goes on to qualify the provision by these words. [*His Lordship here read the reservation above quoted.*]

It is impossible to view this as in any way an irrevocable provision, and that being so, the husband's creditors are entitled, in his place, to revoke the donation. The only effect of this deed was to secure a settlement upon the wife, which would come into operation after her husband's death, and in the event of his not having revoked it or incurred debt as he has done.

Lord Adam—No doubt the husband here retained the full beneficial enjoyment of his property during his lifetime, and what he was apparently trying by this deed to do was, to put it *extra commercium*, and at the same time retain for himself the full benefit of it—a state of matters which this Court will not consent to. Looking to the terms of the reservation, the effect of this deed was to create in the wife a testamentary provision, and that only.

Being so, it is open to the diligence of her husband's creditors.

The Court adhered.

Counsel for Pursuers—A. S. D. Thomson. Agents—Finlay & Wilson, S.S.C.

Counsel for Defenders — Scott — Gardner. Agent—D. Todd Lees, S.S.C.

Wednesday, December 8.

FIRST DIVISION.

[Lord Trayner, Ordinary.

TWEEDIE, PETITIONER.

Curator bonis—*Recal of Curatory—Jurisdiction of Junior Lord Ordinary—Petition.*

The Junior Lord Ordinary has jurisdiction to grant a petition for recal of the office of *curator bonis* on the recovery of the ward.

On 30th October 1885 James Tweedie of Quarter, Biggar, was appointed *curator bonis* to Miss Jane Macmaster, of Edinburgh. He thereafter duly entered on the duties of his office, and made up and lodged with the Accountant of Court an inventory of his ward's estate.

On 21st October 1886 the curator presented a petition to the Junior Lord Ordinary praying for discharge and delivery of his bond of caution, on the ground that the ward was now of sound mind and capable of managing her own affairs. Medical certificates to this effect were duly lodged. In these circumstances the petitioner applied, as above set forth, for discharge and exoneration, and for delivery of the bond of caution.

On 16th November 1866 the Lord Ordinary (Lord Trayner) appointed the petition and relative documents to be boxed to the Judges of the First Division of the Court.

"*Note.*—It appears to me that this petition, in so far as it prays for the recal of the curatory, is one with which I cannot competently deal—*Kyle*, June 10, 1862, 24 D. 1083; *Lockhart*, 24 D. 1086; *Sinclair*, 23 S.L.R. 737. I have therefore reported it to the Court. If the curatory is recalled I can dispose of the remaining part of the prayer of the petition."

Argued for the petitioner—The question here was whether, when the curator applied for discharge, it was competent for the Junior Lord Ordinary to recal the appointment—*Kyle*, June 10, 1862, 24 D. 1083. The difference between that case and the present was, that there the petition was for the appointment of a new curator; here that was unnecessary, because the ward had become sane. The recal of the curatory was merely ancillary to the curator's discharge in respect of his acts and intromissions, and the Lord Ordinary could grant that. The difficulty arose from there being no provision in the Distribution of Business Act (20 and 21 Vict. c. 56) for the recal of curatories. Authorities cited by the Lord Ordinary.

Appearance was also made for the Accountant of Court, who stated that ever since the decision in *Kyle's* case it had been customary for the Lords Ordinary to deal with the whole matter connected with such applications, and there was nothing so very special in the circumstances of the present application as to take it out of the ordinary rule.

The Court pronounced the following interlocutor:—

> "The Lords, on the report of Lord Trayner (Ordinary), and having heard counsel for the petitioner and for the Accountant of Court, remit to the said Lord Ordinary to recal the appointment of James Tweedie as *curator bonis* to Miss Jane Macmaster, and to proceed with the cause as may be just."

Counsel for Petitioner—Burnet. Agent—Knight Watson, Solicitor.

Counsel for Accountant of Court—Low. Agents—Mackenzie, Innes, & Logan, W.S.
