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

orders of Court, she averred that the first petition had been served upon an aunt of the same name, and that she had never seen or heard of the petition for the sequestration of her estates or of the order for her personal attendance at the bar until her return to Scotland in May. She submitted herself unreservedly to the judgment of the Court, but prayed that her personal attendance might be dispensed with as she was in a delicate state of health and of a nervous and hysterical temperament. She expressed her willingness to communicate the address of the child to any person appointed by the Court, so that her real wishes might be ascertained to the satisfaction of the Court. She had paid all the expenses incurred by the father in the various petitions.

The father James Glen Edgar lodged answers in which he submitted that the sequestration having been originally laid on because of the petitioner's contempt of Court, ought not to be recalled until she had delivered the child to him. He averred that "the letter written by the said Evelina Burns Edgar to respondent dated from London on 28th May 1894, two days after she attained minority, which is founded on by petitioner, is not the voluntary and uninfluenced letter of the said child. Its terms are, along with those of respondent's answer thereto, referred to. The petitioner deliberately kept the child in her control and custody for the purpose of influencing her against her father with the view of getting her when she reached minority to say that she did not wish to live with her father but with the petitioner, and the views and wishes now attributed to the child are truly not hers but the petitioner's, and are opposed to the real wishes of the child and to her best interests. The respondent respectfully submits that his said daughter is not entitled now to insist that her own residence should be away from him, and that she ought to be restored to his custody."

The Court appointed Mr Charles C. Maconochie, advocate, curator *ad litem* to Evelina Burns Edgar, that he might make inquiries into the circumstances of the case, ascertain his ward's true wishes, and report.

The curator reported "that on Monday, July 16th, he had a meeting with the ward, who had been brought to Edinburgh at his request. The child was under the charge of the petitioner, with whom she is now living. She is tall for her age, and slight, but looks well and happy. She was neatly and suitably dressed, and altogether looked well cared for.

"The curator first saw the ward alone, and then in the presence of the petitioner. Throughout the interview she gave her answers frankly and with every appearance of truthfulness. She seems above the average in intelligence, and the curator has satisfied himself that her education has been, and is being, well attended to by her aunt. She stated to the curator that she always attends the Protestant Church with her aunt in whatever place she may be living.

"The ward was most distinct and emphatic in the expression of her wish to remain with her aunt, to whom she is evidently genuinely attached. This attachment is, it seems to the curator, the main cause of her wish to live with the petitioner; but she also seems to be satisfied that she would be more comfortable and well cared for in her aunt's house than in that of her father. For her father she seems to feel little or no affection. She would not say that he had ever been unkind to her, but says that she knows little about him, and her main objection to going to live permanently in his house appeared to be that in doing so she would be leaving 'home' and going to live in a strange place.

"The curator may mention that the ward told him that she not only went back to the petitioner's house voluntarily in September 1893, but that it was she who asked her cousin Archibald Fisher to take her home; she also stated that the letter of 28th May 1894 was a genuine expression of her wishes, that it was not inspired by anyone, that the petitioner was absent from London when it was written, and that she only received some slight assistance in writing it from a lady with whom she was then staying.

"The view of the curator, that the ward is quite a free agent in the matter, was, if possible, strengthened by what he saw of the manner of the ward and petitioner towards one another during the time when both were in the room. He is satisfied that they are much attached to one another, and that the petitioner has used no other influence than that of affection and kindness to induce the child to express her wish to remain with her.

"On the whole matter, the curator has no hesitation in stating it as his opinion that it would be a real grief to the ward, and directly contrary to her genuine wishes, were she taken away from the petitioner's house and sent to live with her her father."

Argued for the petitioner—A minor was entitled to choose her residence apart from the wishes of the curator, even although the curator was her father—Bankton, i. 6, 4; Fraser on Parent and Child, 65; *Harvey*, June 15, 1860, 22 D. 1198; Simpson on The Law of Infants, 141, and cases there cited. The opinion of Stair on the father's power was extreme, and had not been accepted as the law—see More's Notes, xxxi. No doubt the Court would protect a girl of twelve against herself, if the surroundings of her chosen residence were detrimental to her moral and general welfare, but here the curator had reported that she would be better with her aunt than with father.

Argued for respondent — The *patria potestas* gave a father far greater powers than any other curator—Stair, i. 5, 6, &c. More's Notes were based on cases of curators other than fathers. It was absurd to say that a father could not make his son of fourteen live with him and go to school. Of course the child's wishes were an ele-

ment to be considered, and to which more weight would be given the nearer he or she approached majority. The real question was the welfare of the child. Here it would be much better for her to live with her father and play with her step-brother and sister than live alone with a solitary unmarried lady, who on her own showing was nervous and hysterical. *Harvey's* case was exceptional, for there the father's moral character was bad; nothing in this case was suggested against the father's fitness for the charge of this girl. The Lord Justice-Clerk's opinion in that case was in his favour, also Ersk. Inst., i. 6, 53, &c., and *A* v. *B*, February 3, 1870, 42 Jurist, 224.

At advising—

LORD PRESIDENT—It may be convenient first to consider the question which arises on the respondent's demand that this sequestration should not be recalled unless the child Evelina Edgar be delivered over to him. Now, from the report of the curator *ad litem* it is quite clear that the girl has a preference, and an intelligent and distinct preference, for residing with her aunt, and that she is opposed to being removed from the society in which she has lived for a number of years, and being taken to her father's house. That being so, I suppose we have before us the primary consideration which has to be regarded, and there is no statement on the part of the respondent that this girl is being treated otherwise than with kindness in the home in which she has now for some time lived. Accordingly, so far as the interests and welfare of the child are concerned, it seems to me that they coincide with her wishes, because if she is well where she is, it would at all events, *prima facie*, be against her interests that she should be taken to a house with which she is not familiar and to which at present she has a strong disinclination to go. Now, the father asserts his right to have the child returned to him, and that upon a purely legal ground. I cannot say that we have here anything to show that the father has so high a right as to override the choice of his minor daughter when the choice is quite sustained by the general well-being of the child. Therefore I think the claim of the father cannot be given effect to.

As regards the sequestration, Miss Fisher has certainly been, to say the least, unfortunate in the predicament in which she has found herself placed, and it is to be regretted that her information about the steps which were being taken with regard to the child had not been more precise. We had to take against her the strong step of sequestrating her estates and withholding any payments from these estates so long as she did not submit herself to the judgment of the Court in the matter of this child's custody. But she has done so now, and that unreservedly, and her counsel have stated considerations which I think are sufficient to make it proper that we should not insist upon her personal presence at the bar. The statements of counsel are responsibly made, and must be regarded as her own. That being so, I think she has sufficiently purged her contempt to enable us to recal the sequestration, and it would seem that the factory should follow the fate of the sequestration.

LORD ADAM—I entertain a strong opinion that the best place for a child is its father's house, and unless there be exceptionally strong circumstances I should be very unwilling to place a child in the custody of any other person. But I think with your Lordship that the circumstances here are sufficient to overcome that objection, and to lead us to do what would otherwise have been a matter of reluctance on my part. In point of fact this child has for several years past been brought up by the aunt—at least by the grandmother and the aunt—the grandmother is now dead—and the result, and the very natural result of that is as we see from Mr Maconochie's report that this child has acquired a very strong affection for her aunt, and it would be a matter of grief, and probably at her age of lasting grief, to her to be now separated from her aunt, to go back to her father's house where she has practically never lived, and to reside with her father, for whom, although he appears to be kind enough, she does not entertain any such affection as she probably would have entertained had she lived with him during her earlier years. In these circumstances the question comes to be—are we to overrule the strongly expressed wish of the child, who is a minor, to stay with her aunt? I am not prepared to do that in this case, and therefore I concur with your Lordship.

LORD M'LAREN—In considering this case we approach the question from this point of view, that the powers of a father over his minor child are certainly less than those which he possesses with reference to his pupil child, and are also, I think, higher than those of a mere curator chosen by the child after the father's death. It is plain enough that if the child has independent means, and at a suitable age desires to go to a college or school or to be apprenticed to a business, the father could not insist on keeping the minor at home to dig in his garden, which seems to be Lord Stair's measure of a father's right, at least to the age of twenty-one. Without carrying the notion of *patria potestas* so far, I for one can subscribe to all that the late Lord President, when Lord Justice-Clerk, said in the case of *Harvey*, and I should be unwilling to suggest any doubt as to the legitimate control which a father must always have on the conduct, residence, and upbringing of his child during minority. But his powers are not absolute; they are liable to be restrained on an application to the Court on good and sufficient grounds, among which the reasonable wishes of the child are a material element. Now, here we begin with this state of circumstances induced by the act of the father himself. He had himself, after the death of his first wife, acquiesced in his daughter residing with her aunt, and now that his daughter

has been brought to look upon her aunt's house as her home, the father seeks to alter this arrangement, apparently without good reason, and against the wishes of his daughter. In these circumstances I agree with your Lordship, there being no pecuniary question involved, that we cannot support this extreme exercise of the father's powers. We granted the prayer which he asked when the child was a pupil, but she has now attained minority, and that of course introduces a new element into the case, and entitles us to consult the wishes of the daughter herself. I agree that Miss Fisher, if she has not cleared herself of the imputation of having neglected to obey the orders of the Court, has at least so submitted herself to the authority and judgment of the Court as to be entitled to have the sequestration which was formerly granted as a compulsitor against her, recalled, and the factory terminated.

LORD KINNEAR concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioner—Lees—Salvesen. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Respondent—Dickson—Christie. Agents—Simpson & Marwick, W.S.

Thursday, July 19.

FIRST DIVISION.

DOWIE AND OTHERS *v.* HAGART.

Judicial Factor—Petition for Appointment of Judicial Factor to Administer Estate Settled upon Children by Marriage-Contract—Allegations of Facility and Undue Influence—Competency.

A widow having made certain pecuniary advances to her youngest son out of the capital of her estate, of which she had been in uncontrolled possession for over twenty years, her other children presented a petition for the sequestration of her estate and the appointment of a factor to administer it, on the grounds (1) that by the terms of their parents' antenuptial contract and a mutual settlement executed by them, they had a *jus crediti* in their mother's estate, entitling them to equal shares thereof at her death, and that the gifts made to the youngest son were in fraud of their rights; and (2) that their mother's faculties were impaired by age, that she was facile, and that her youngest son had acquired a dominating influence over her which he exercised to his own pecuniary advantage. The petition was opposed by the mother, who denied the allegations on which it proceeded.

The Court *dismissed* the petition, in respect (1) that they were not satisfied that the deeds upon which the petitioners founded conferred upon them the rights which they claimed; and (2) that the other averments made by the petitioners did not afford a competent ground for the appointment craved.

Observations by Lord M'Laren upon the kind of case in which the Court will appoint a judicial factor.

Marriage-Contract—Mutual Settlement—Provisions to Children—Conveyance of Property then Belonging or which should Belong to Spouse at Time of Death—Conveyance of Acquirenda.

Observations by Lords M'Laren and Kinnear upon the case of *Wyllie's Trustees* v. *Boyd*, July 10, 1891, 18 R. 1121, and upon the effect of a conveyance of *acquirenda* in a marriage-contract.

Mr and Mrs Hagart were married in 1833. Mrs Hagart was then institute of entail in possession of the entailed estate of Glendelvine.

By antenuptial contract of marriage Mr Hagart assigned and disponed to Mrs Hagart in liferent, in the event of her surviving him, and to the children of the marriage, excepting the child who should succeed to Glendelvine, the whole estate, heritable and moveable, that might belong to him at the time of his death, subject to a power of apportionment reserved to himself, and failing such apportionment, then equally among them. These provisions Mrs Hagart accepted as in full of her legal rights, and they were declared to be in full of the legal rights of the children of the marriage. In consideration of the said provisions Mrs Hagart granted certain provisions in Mr Hagart's favour by way of annuity out of the entailed estate, in the event of his survivance, and she also granted certain provisions out of that estate to the children who should not succeed to her therein. Mrs Hagart further assigned and disponed to Mr Hagart in liferent, in the event of his surviving her, and to the children of the marriage in fee, the whole estate, heritable and moveable, that might belong to her at the time of her death, excepting always the rents of Glendelvine.

In 1861 Mr and Mrs Hagart executed a mutual trust-disposition and settlement. By this deed Mr Hagart conveyed to trustees, of whom Mrs Hagart was a *sine qua non*, his whole estate, heritable and moveable, in trust, after payment of debts and expenses, for payment to Mrs Hagart of the free revenue of the residue of his estate for her liferent use allenarly during her life, and to his childen equally among them in fee, excepting the child succeeding to Glendelvine. Mrs Hagart on her part, in addition to the annuity and provisions secured to her husband and children out of the rents of Glendelvine, disponed to Mr Hagart in the event of his surviving her, whom failing by his predeceasing her to their said children equally amongst them in fee, excepting always the child who should succeed to Glendelvine, her whole estate, heritable and moveable, then be-