fraud, which it was not before the amendment was made. This amounts of course to a very serious charge, and I do not think that amendments of so serious a character ought to be allowed except upon the condition of payment of expenses from the date of the closing of the record.

LORD ADAM concurred.

LORD M'LAREN—I am glad that your Lordship has called attention to the necessity for greater care on the part of counsel and agents at that stage of a process which consists in the closing of the record. I am aware that very little time is allowed by the statute for consideration of the pleadings prior to the closing of the record, but an application may always be made to the Lord Ordinary, and a reasonable postponement will always be granted. I rather think there may be too great a desire to minimise expense at the earlier stages of a process, and that this perhaps may account for what takes place.

LORD KINNEAR concurred.

The Court, on condition of the pursuers paying the defenders' expenses since the closing of the record, allowed the amendment to be made, and appointed the amended record to be printed and boxed *quam primum:* Allowed an account of the expenses as found due to be given in, and remitted the same to the Auditor to tax and report.

Counsel for the Pursuers—D.-F. Balfour —Guthrie. Agents—Henderson & Clark, W.S.

Counsel for the Defenders — Graham Murray—C. S. Dickson. Agent—J. Smith Clark, S.S.C.

Wednesday, December 10.

SECOND DIVISION.

GILLIGAN *v.* GILLIGAN.

Succession — Heritable and Moveable — Heritable Security—Jus Relictæ.

A truster directed her trustees "to hold, apply, pay, and convey" the residue of her estate equally among her three children, and also authorised her trustees to sell the whole or any part of the trust-estate, to invest the trust funds in the purchase or on the security of heritable property, and to realise and change her investments. The truster died survived by her three children, and the trustees divided her whole estate among the children, with the exception of £1500, the unuplifted portion of a sum of £2000 contained in a heritable bond and disposition in security, which the truster held at the time of her death. Thereafter one of the children of the truster having died intestate, a question arose as to the respective rights of his widow and only child in £500, his share of the sum contained in the heritable security.

Held that the deceased's right to a share of the sum contained in the heritable security was moveable, and that therefore his widow was entitled to *jus relictæ* out of the £500.

By section 117 of the Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101) it is enacted—"From and after the commencement of this Act no heritable security granted or obtained, either before or after that date, shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong, after the death of such creditor, to his executors or representatives *in mobilibus* in the same manner and to the same extent and effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor; . . . provided that all heritable securities shall continue, and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain . . . to the wife *jure relictæ* where the same is or shall be conceived in favour of the husband, unless the . . . relict has or shall have right and interest therein otherwise."

Mrs Ellen M'Grath or Gilligan died on 3rd April 1884 survived by three children—William Robert Gilligan, Archibald Robert Gilligan, and Susan Gilligan or M'Culloch. She left a trust-disposition and settlement, by which she conveyed her whole means and estate to trustees, and directed them, in the fifth place, "to hold, apply, pay, and convey the whole residue and remainder of my said means and estate to and for behoof of and equally among my said children."

She also thereby authorised her trustees "to sell, feu, and dispose of the whole or any part of the trust-estate, both heritable and moveable, and that either by public roup or private bargain," and . . . "to invest the trust funds in the purchase or on the security of lands, houses, feuduties or ground annuals, or other heritable property, and to call up, realise, and change the said investment from time to time."

The truster at the time of her death held, *inter alia*, a bond and disposition in security for £2000 by Patrick Boyle and Robert Curran, in favour of herself and her executors or assignees whomsoever, over property in Kirk Street and Risk Street, Calton, dated the 16th and recorded 21st March 1877.

The trustees entered on the management of the trust-estate. They did not realise the £2000 bond, but they received payment of £500 to account, thus reducing it to £1500. With the exception of this £1500

they divided the whole trust-estate among the beneficiaries.

William Robert Gilligan died intestate on 5th January 1888. He was survived by Mrs Marion Ellen Fraser or Gilligan, his wife, and Wilhelmina Gilligan, his only child, and in pupillarity. Thomas M'Lelland, writer, Glasgow, was appointed by the Court of Session judicial factor on his estate.

Thereafter the trustees wound up the trust by assigning the £1500 contained in the bond in equal portions in favour of Archibald Robert Gilligan, Mrs M'Culloch, and Thomas M'Lelland as representing William Robert Gilligan. Thomas M'Lelland thus received £500 of the sum contained in the bond.

In the course of M'Lelland's administration a question arose as to the manner in which the said sum of £500 fell to be apportioned between the widow and the daughter of the deceased William Robert Gilligan. Being unable to determine whether the £500 was subject to the widow's *jus relictæ* or terce, or either of them, Mr M'Lelland, without prejudice to the claims of Mrs Gilligan, assigned to Wilhelmina Gilligan the £2000 bond to the extent of £500, by assignation dated 18th December 1889 and recorded 2nd January 1890. On this footing Mr M'Lelland obtained his discharge as judicial factor on the estate of William Robert Gilligan.

In these circumstances this special case was presented for the determination of the above question by (1) Wilhelmina Gilligan and Henry Taylor, her guardian; and (2) Mrs Marion Ellen Fraser or Gilligan.

The first party maintained that the said bond and disposition in security for £2000, restricted to £1500 in the discretion of Mrs Ellen M'Grath or Gilligan's trustees, not having been realised, and the one-third thereof having been at the request of M'Lelland, as judicial factor, conveyed to him, and thereafter conveyed by him to the first party, the sum of £500 must be dealt with as if it were directly secured by a bond and disposition in security. In that case, under the 117th section of the Titles to Land Consolidation (Scotland) Act 1868, it did not to any extent pertain to the deceased's wife *jure relictæ*, but was heritable as regarded all right of terce competent to her; or otherwise, William Robert Gilligan not having been a creditor in said bond at the time of his death, the bond was heritable as regarded the sucession of William Robert Gilligan, and his widow had no claim thereto *jure relictæ*. The first party further maintained that as Mr Gilligan was not personally infeft in said heritable security at his death, no terce was due to his wife out of the security-subjects.

The second party maintained that Mr Gilligan was not a creditor in the security in the statutory sense above mentioned, but had, in respect of said bond and disposition in security, merely a claim to a sum of £500 as part of the residue of his mother's trust-estate, which claim was moveable as regarded his succession. She also alternatively maintained that if her husband was to be regarded as creditor in the security, she was entitled to terce upon the said £500.

The question of law was—"Whether the widow of the said William Robert Gilligan is entitled to *jus relictæ* or terce, or either and which of them, out of the said sum of £500?"

Argued for the first party — The bond was part of the heritable estate of the truster. The direction in the will "to convey" could alone apply to heritage. Three-fourths of the sum contained in the bond was never realised by the trustees. At the date of his death William Robert Gilligan had a right to a portion of this bond as heritable estate. His widow had therefore no claim *jure relictæ*. Section 117 of the Titles to Land Consolidation Act 1868 only applied to cases of intestate succession; it did not affect testate succession—*Hare and Another, Petitioners*, November 25, 1889, 17 R. 105. Even if that section applied, it specially excepted from its scope a widow's rights.

Argued for the second party—William Robert Gilligan was never a creditor in the bond. He could not have prevented the trustees from realising it. He had only a moveable *jus crediti* as a beneficiary. His widow was therefore entitled to *jus relictæ*, Section 117 of the Act of 1868 applied—*Guthrie, Petitioner*, October 23, 1880, 8 R. 34.

At advising—

LORD YOUNG—This case is between a mother and her only child, a daughter, and it is brought regarding one-third of a sum of £500. The question is whether this third is to go to the mother or to the daughter. The mother claims it as part of her *jus relictæ* out of her deceased husband's estate. She also makes an alternative claim to terce out of the £500. This £500 consists of so much of her deceased husband's deceased mother's estate to which he was entitled at the time of his death. He survived his mother, part of whose estate consisted of a bond for £2000 heritably secured. She left a trust-disposition directing her trustees to pay and convey her estate equally among her children, of whom there were three, the deceased father and husband of the parties to this case respectively being one. The trustees had power of sale of any of the property, and authority to uplift any investment which stood at the death of the testator. This particular investment of £2000 they did uplift to the extent of one-fourth, and the one-third of the remainder which was left standing is the £500 in question.

With respect to any claim on the widow's part to terce, that is out of the question, for one conclusive reason—and one is enough, though several might be stated—and that is, that the husband was not infeft.

Whether she is entitled to *jus relictæ* or not out of the £500 depends on whether the husband's right and interest in his mother's estate under the will of the latter was heritable or moveable. This question is not unattended with difficulty. There is a great

deal to be said in support of the view that it was heritable, that the trustees left the estate as they got it from the testator in this heritable form to the extent of £1500. But on the whole matter, after the best consideration I can give it, I think that his right was moveable.

I think the trustees uplifted the £500 as they might have uplifted the whole, and that the £1500 left was just an investment of the trust-estate, and that the right of the deceased father and husband of the parties to this case was just a personal right to £500 as part of the estate of his mother.

The result of that is that the mother is entitled to one-third of it as *jus relictæ*, and the daughter to the residue of two-thirds.

If your Lordships adopt this view, we will answer the question by saying, that the party of the second part — that is, the widow—is entitled to *jus relictæ* out of the £500.

LORD RUTHERFURD CLARK—I am of the same opinion. I think the estate of the truster was by the operation of the recent statute wholly moveable, and that the son, as a beneficiary of the trust, had merely a moveable *jus crediti*. He was not entitled to any share of the heritable bond, of which the trust-estate largely consisted, but his right was to a certain share of a moveable estate. His widow is entitled to one-third of his estate *jus relictæ*.

LORD JUSTICE-CLERK—I concur in the judgment proposed.

The Court found the widow of William Robert Gilligan entitled to *jus relictæ* out of the sum of £500.

Counsel for the First Party—M'Kechnie—Wilson. Agent—S. Greig, W.S.

Counsel for the Second Party—M'Lennan. Agents—Auld & Macdonald, W.S.

Wednesday, December 10.

SECOND DIVISION.

[Lord Trayner, Ordinary.

WYLLIE AND ANOTHER *v.* WYLLIE AND OTHERS.

Reduction—Deathbed—Heir—Title to Sue.

The trustees under an antenuptial contract of marriage were directed to hold the estate, which consisted wholly of property belonging to the wife, (1) for her liferent, (2) for the husband's liferent should he survive, and (3) for behoof of issue of the marriage, and after the death of the survivor to pay the estate to the issue in such proportions as either of the spouses might direct by a deed of appointment, and failing such an appointment, equally between them. Power was also reserved to the wife, whom failing the husband, to restrict the right of any of the children to the liferent of their provisions, and to secure the principal to their lawful issue. The share of each child was to vest and become payable on the death of the survivor of the marriage, and on each of the children becoming twenty-one or being married.

A daughter was born of the marriage. The reserved powers were never exercised.

Two years after the marriage, the wife being then on her deathbed, the spouses executed a mutual trust-deed and settlement, whereby they and each conveyed to the survivor "absolutely, and the heirs and assignees whomsoever of the survivor," the whole estate of the first deceaser. Six days thereafter the wife died, and following upon this deed the husband made up a title to his wife's property by notarial instrument, and thereafter sold or burdened the estate.

Thirty-two years after the date of the mutual settlement the daughter sought to have it reduced *ex capite lecti*.

Held that as under the marriage-contract the pursuer's right was only contingent, and could have been reduced to a mere liferent by the spouses or the survivor, she had no title to reduce *ex capite lecti*.

This was an action of reduction *ex capite lecti* brought under the following circumstances—James Wyllie and Margaret Gardner, who were married upon 20th December 1865, executed an antenuptial contract of marriage as prepared by James Dickie, solicitor, Irvine. Wyllie had no means. His intended wife disponed her whole estate to trustees, *inter alia*, (1) for the liferent use of herself, and (2) of her husband if he should survive her, but always under the burden of the education and maintenance of the children of the marriage; "Lastly, For the use and behoof of the child or children who may be procreated of the body of the said Miss Margaret Gardner, declaring that after the death of the survivor of the said James Wyllie and Margaret Gardner the said trustees shall pay over or assign the trust funds and estate to the lawful child or children of the said Margaret Gardner in such proportions, at such time, and under such conditions as she shall by any deed under her hand direct, and failing such deed and in the event of the said James Wyllie surviving the said Margaret Gardner, as he shall by any deed under his hand direct, and failing such direction by either, then the said trustees shall divide and apportion the trust funds and estate among the children of the said Margaret Gardner equally, share and share alike; and it shall be lawful and competent to the said Margaret Gardner, whom failing to the said James Wyllie, to restrict, if she or he shall see cause, the right of any of the said children to the liferent merely of their provisions, and to secure the principal to their lawful issue, or failing such issue to the other children of the said