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

Margaret Gardner; declaring that the share of each child shall vest and become payable on the death of the survivor of the said James Wyllie and Margaret Gardner, and on each of the said children attaining the age of twenty-one years complete or being married." The deed was given into the hands of Dickie, who was one of the trustees and also law-agent of the trust, but was never intimated to the other trustees named. A daughter—Margaret Gardner Wyllie—was born of the marriage on 23rd September 1866. In 1868 Mrs Wyllie became seriously ill of consumption, and she died of that disease upon 10th May 1868. Upon 4th May 1868 Mr and Mrs Wyllie executed a mutual trust-disposition and settlement in these terms—"We, ... for the love, favour, and affection we bear to each other, do therefore, with mutual advice and consent, give, grant, assign, and dispone to and in favour of the survivor of us absolutely, and the heirs and assignees whomsoever of the survivor, and failing us both by death to the child or children of our marriage, all and sundry lands, tenements, and heritages, and also all debts, sums of money, and effects, and in general all estate, heritable and moveable, real and personal, wheresoever situated, now owing and belonging or that shall be owing and belonging to the first deceaser, with the whole writings, vouchers, and securities," &c. This deed was also prepared by Dickie. After his wife's death Wyllie took possession of the titles to her heritable property, and made up his title thereto by notarial instrument. He granted a bond for £500 to Miss Jane Boyd over part of the property. In 1879 he disponed another part to William M'Bride, Irvine, who in 1885 disponed a portion of the site so acquired to the Magistrates of Irvine for public purposes. The remaining portion of the property afterwards came into possession of William Wilson M'Bride, and was disponed by him to Charles Smith Macdougall, spirit merchant, Irvine.

In 1889 the daughter of the marriage, Margaret Gardner Wyllie, and Joseph Campbell Penney, C.A., Edinburgh, judicial factor on the trust-estate created by the antenuptial contract of marriage between the spouses, raised an action of reduction of the mutual trust-disposition and settlement of 4th May 1868, and all the deeds which had followed thereon, against the said James Wyllie, Jane Boyd, William Wilson M'Bride, and the Provost and Magistrates of the burgh of Irvine.

The pursuers averred—"This settlement was also a direct contravention of the terms of the before-mentioned antenuptial contract of marriage. It was executed by the spouses upon the 4th day of May 1868. The said Mrs Margaret Gardner or Wyllie was at the said date of execution ill of the disease of which she died upon the sixth day thereafter, namely, 10th May 1868. She was upon her deathbed, and was never present at kirk or market from the said date of execution until the day of her death, and she was induced by her husband to sign the deeds only by urgent pressure and solicitation acting upon her in her weak and dying state. . . . The pursuer has done nothing at any time to ratify or homologate the said mutual trust-dispositions and settlements sought to be reduced. But for the existence of these she would be entitled to succeed to the heritage aforesaid under the said antenuptial contract of marriage, and the said mutual trust-dispositions and settlements, as well as the other deeds enumerated in the foregoing summons, have been granted, and the said decree of special and general service has been pronounced, to the hurt, injury, and prejudice of the said Margaret Gardner Wyllie. The said mutual trust-disposition and settlement, upon which the defender Wyllie's pretended title is founded, is voidable *ex capite lecti*, the said Mrs Margaret Gardner or Wyllie having been at the time of execution ill of the disease of which she died six days thereafter, and never having been at kirk or market after its execution."

The pursuers pleaded — "(1) The said mutual trust-dispositions and settlements, being deeds first and second libelled in the summons prefixed hereto, ought to be reduced, on the ground, 1st, that it was *ultra vires* of the parties thereto to grant or execute the same in the circumstances set forth in the foregoing condescendence; and 2nd, that they were granted *in lecto*. (2) The remaining deeds libelled, proceeding as they do upon a deed which is void or voidable, are themselves reducible, and ought to be reduced as craved, with expenses as concluded for."

The defender Jane Boyd pleaded—"(3) The said bond and disposition in security having been taken on the faith of the records from a person having an *ex facie* valid title to the said subjects, and for an onerous consideration, ought not to be reduced. (4) The defender's author the said James Wyllie having an *ex facie* valid title to the said subjects followed by prescriptive possession, this defender should be assoilzied."

The defender M'Bride pleaded—"(3) These defenders having acquired their right to said properties for onerous considerations from a person having a valid title thereto *ex facie* of the registers, decree of reduction ought not to be pronounced. (4) *Separatim*—The defenders' author the said James Wyllie having a good title to the said subjects in virtue of the notarial instruments third and fourth libelled, followed by possession for the prescriptive period without challenge, the defenders should be assoilzied. (6) No title to sue."

The defenders the Corporation of Irvine pleaded—"(1) The Corporation having, in acquiring the foresaid piece of ground from Mr M'Bride, dealt and transacted with him *bona fide* on the faith of the records, according to which he had a valid title to the subjects as proprietor thereof, the grounds of reduction libelled by the pursuers are not pleadable by them against the Corporation. (2) The said piece of ground being now part of a public street vested in the Corporation under the foresaid Act of Par-

liament, the pursuers are not entitled to reduce the title of the Corporation thereto, or claim restitution of the said piece of ground."

The Lord Ordinary allowed a proof, from which the above-stated facts appeared.

Upon 18th June 1890 the Lord Ordinary (TRAYNER) pronounced this interlocutor—"Finds that the mutual settlements dated respectively 21st April 1868 and 4th May 1868, being the writs first and second described and called for in the conclusions of the summons, were executed by the late Mrs Margaret Gardner or Wyllie on deathbed, and that the said Mrs Margaret Gardner or Wyllie was labouring, at the dates of said deeds respectively, under the disease of which she died: Therefore finds, reduces, decerns, and declares in terms of the conclusions of the summons, with the declaration and qualification following, viz.—(1) That the mutual disposition between William M'Bride, with consent therein mentioned, and the Provost, Magistrates, and Town Council of the royal burgh of Irvine, dated 20th and 22nd May and 2nd June 1885, being the writ (seventh) called for and described in the conclusions of the summons, is reduced only so far as it consists of or imports a conveyance or disposition by the said William M'Bride with consent foresaid in favour of the said Provost, Magistrates, and Town Council of said burgh; (2) that the bond and disposition in security granted by James Wyllie in favour of Miss Jane Boyd, dated 23rd October 1868, being the writ (fifth) called for and described in the conclusions of the summons, is reduced only in so far as it consists of or imports a conveyance or disposition by the said James Wyllie in favour of the said Miss Jane Boyd of the heritable subjects therein described; and that the bond and disposition in security granted by Charles Smith Macdougall in favour of Mrs Jean Wilson or M'Bride, dated 17th March 1886, being the writ (eleventh) called for and described in the conclusions of the summons, is reduced only in so far as it consists of or imports a conveyance or disposition by the said Charles Smith Macdougall in favour of the said Mrs Jean Wilson or M'Bride of the heritable subjects therein described: Finds the defenders William Wilson M'Bride and Mrs Jean Wilson or M'Bride liable to the pursuers in the expenses occasioned by the adjournment of the debate upon the proof; modifies the same to £9, 2s. 8d., and decerns: Finds *quoad ultra* no expenses due to or by either party, and decerns.

"*Opinion.*— . . . . [*After stating the facts*]—At the date of the execution of that mutual settlement Mrs Wyllie was on her deathbed, as was well enough known both to Mr Wyllie and the law-agent. It was a mutual settlement only in form, for at its date Mr Wyllie had no estate to convey, and the sole purpose for which that deed was executed was to confer on Mr Wyllie a right to the estate which under the marriage-contract had been conveyed to trustees for behoof of his child. Following upon the foresaid mutual settlement Mr Wyllie made up a title to the heritable estate of his wife, and has disponed or burdened it by several writs mentioned in the summons.

"The pursuer Margaret Gardner Wyllie, the only child born of the said marriage, now seeks to set aside the foresaid mutual settlement *ex capite lecti* as being to her prejudice as heir of her mother, and heir of provision under the marriage-contract. There is no doubt about the fact that the deed in question was executed on deathbed, and that it is to the pursuer's prejudice. But there are two defences stated in bar of the pursuer's obtaining decree of reduction which have been urged upon me, and of which I have now to dispose.

"The first of these is that the pursuer has no title to sue, a defence only stated by the defenders M'Bride after the proof in the case had been concluded. The main argument submitted in support of this defence was, that the pursuer is not heir of provision under the marriage-contract, but only a beneficiary having a claim against the trustees, who are the disponees therein, and that the reduction of the mutual settlement would set up the conveyance in the marriage-contract in favour of the trustees to the exclusion of the pursuer. Of course, if the reduction of the mutual settlement had the effect of setting up a title in somebody else, which was adverse to and exclusive of the heir's right, the heir would have no title to reduce. But the reduction of the settlement, and consequent restoration of the conveyance under the marriage-contract, so far from being adverse to or exclusive of the pursuer, is, on the contrary, the restoration of her right. The trustees only hold for her, and are bound to convey to her at a certain time. Holding only for behoof of the pursuer, the trustees, in my opinion, are not the singular successors of the late Mrs Wyllie—at all events, as in a question with the pursuer. They are the medium through which Mrs Wyllie hands over her property to the pursuer; they have no right of property strictly at all which they could exercise to the pursuer's prejudice. To set up their title therefore as trustees is not setting up any title or right adverse to or exclusive of the pursuers. Nor is the pursuer a mere beneficiary under the marriage-contract in the sense in which a legatee is a beneficiary under a will. Her right is conferred by an onerous deed which destines the heritage thereby conveyed to her. The interposition of a trust does not make her any the less the heir of provision.

"It was pointed out that Mr Wyllie had the power to restrict the pursuer's right to a liferent and to confer the fee on her children. I do not regard this as of importance. Mr Wyllie, in point of fact, has not exercised this power, and may never do so. Whether he would now be allowed to do so after his attempt to defraud the heir under the marriage-contract may be a question. But as matters at present stand, no restriction has been placed on the right of fee

conferred on the pursuer by the marriage-contract.

"I am therefore of opinion that the plea of no title should be repelled.

"The other defence urged against decree of reduction to which I have alluded is this, that certain of the defenders having acquired the subjects in question from Mr Wyllie, and made meliorations thereon in *bona fide*, are entitled to repayment of these before reduction is decerned. I do not think the fact stated, assuming it to be true, is any bar to reduction. If the deeds mentioned in the summons are liable to reduction, the pursuer is entitled to have them reduced, but that will not impair the defender's right to insist on payment of any amount they may have expended in *bona fide* in improving the property.

"I think the burgh of Irvine stands in no more favourable a position than the other defenders. Had the burgh acquired the subjects in question under the compulsory powers in their Act, and made up a title under the Lands Clauses Act, the defect in their author's title would not probably have been of any consequence. But as the burgh acquired said subjects under a voluntary sale, a defect in their author's title affects them just as it would any other singular successor."

The defenders reclaimed.

M'Bride argued—The law of deathbed had now been abolished, so it was plain that the Legislature considered it opposed to the general policy of the law of Scotland, and the Court would be reluctant to push such a law to any further extent than the reported cases allowed, especially where, as here, the parties had all bought in *bona fide*, and had possessed for a long time without challenge. In the first place, it was important that the only person who could sue a reduction on the ground of deathbed was the heir of the person who had executed that deed. But the pursuer was not an heir of provision; she had merely a *jus crediti*. The pursuer had no vested interest in the marriage-contract estate, because her father was still alive, and could restrict her to a liferent in it. But even supposing she was an heir of provision, she had no interest, because her only right was as a creditor under the marriage-contract, and she could not use her title as heir to support any interest she might have in another capacity—Ersk. Prin. iii. 8, 98, 100; *Campbells* v. *Campbells*, December 16, 1738, M. 3195; *Irving* v. *Irving*, November 1738, M. 3180. The test of the character of heir was the question whether he could serve as heir. It was plain Miss Wyllie could not — *Shaw* v. *Campbell's Executors*, March 2, 1847, 9 D. 782; *Ker, &c.* v. *Ker's Trustees*, March 10, 1830, 8 S. 694. *On prescription*—Wyllie had got possession of the estate, and made up a title to it in 1868. Prescription therefore had run upon it. There might be a question whether, under the Conveyancing Act 1874 (37 and 38 Vict. cap. 94), sec. 34, it was not necessary for M'Bride to have had possession, either by himself or by his authors, for thirty years, as the pursuer was a minor when the disposition was given to M'Bride, but that was not necessary—*Black* v. *Mason*, February 18, 1881, 8 R. 497. The pursuer had not a vested right in this estate at all, because no right could vest in her, even supposing she reduced this deed, until her father's death. Up to that time the body of trustees was the *verus dominus* of the estate. The plea of *non valens agere* was not a sufficient answer to the positive prescription—Bell's Prin., 2023; *M'Neill* v. *M'Neill*, March 4, 1858, 20 D. 735. Although the granter of the disposition to an onerous third party had a bad title when he disponed the estate, that did not prevent prescription running upon it, especially as in this case the purchasers had possessed it as their own, and made numerous meliorations upon it — Bell's Prin., 2010; More's Notes to Stair, cccxvii.; *Her Majesty's Advocate* v. *Graham*, December 10, 1844, 7 D. 183. *On the question of vitium reale*—Fraud was not an inherent vice, and was no answer to a party who has bought in *bona fide* from a person who possessed a seemingly good title, although his title might be liable to reduction. The case of *Liviston* v. *Burn & Liviston*, December 18, 1697, could not be taken as an authority against the defenders' contention, because it was an old case, had never been followed in any other, and was not quoted in any of the institutional writers as an authority for the proposition the pursuer wished to found on it.

Counsel for the burgh of Irvine and for Jane Boyd adopted the above argument.

The respondents argued—The right of reduction of deathbed deeds existed and remained even although the property destined thereby had passed into the hands of a *bona fide* purchaser. In Sandford on Succession, i. 150, the objection was said to be a *labes realis* which attached to the property during the period of the long prescription unless the heir homologated the deed. Duff's Conveyancing, p. 183, stated that deathbed was one of the dangers to deeds which did not happen from the register, and that this ground of reduction affected a purchaser of the property. The same law was stated in Steuart's Answers to Dirleton, 183. *On the question of title*—The pursuer Miss Wyllie was truly the heir of provision to her mother's estate under the marriage-contract. The provision made by the mother for the child in that deed was not merely an obligation; it was an out-and-out conveyance by the mother. No doubt there was a power given to the husband to restrict the daughter to a liferent, but it had not been exercised up till now, and the Court would not in equity permit the father now to restrict his daughter's right for the purpose of preventing her making good her right to the estate which he had deprived her of by fraud. The pursuer had now a vested right in her mother's estate under the marriage-contract trust, and the question must be judged of on the footing of what was the present state of affairs. The present case was distinct from

the cases quoted to show that the pursuer had no title, because in those cases all that the pursuers had was an obligation; here the heir came forward expressly in that capacity—*Hepburn* v. *Hepburn*, February 25, 1673, M. 3177; *Porterfield* v. *Cant*, July 24, 1672, M. 3179. As regarded the interest, the pursuer's title and interest were both in the same capacity, viz., as heir to her mother. It was enough if the heir had a contingent interest—*Morison* v. *Morison*, February 12, 1808, Hume's Dec. 147. *On prescription*—The years of prescription had not yet run, because the heir was in minority during the greater part of the time, and all that portion must be deducted in counting the time during which prescription was pleaded. The case was distinguished from *Black* v. *Mason*, cited *supra*, because in that case an adverse interest existed in the person of the father of the pursuer; but here the sole vested interest was in the pursuer. In the criticism of *Livison's* case it was enough to say that that decision had never been questioned from the time it was decided until now.

At advising—

LORD JUSTICE-CLERK—James Wyllie and the now deceased Margaret Gardner or Wyllie, his wife, executed an antenuptial contract in 1865. By that contract the wife conveyed to trustees her whole estate then belonging to her or which she might acquire. The purposes of this conveyance by her were—her own liferent, excluding the husband's legal rights, the husband's liferent in the event of survivance of her, and lastly, "for the use and behoof of the child or children who may be procreated of the body of the said Miss Margaret Gardner." A power of appointment was reserved to Mrs Wyllie, and failing such deed to Mr Wyllie, and it was declared that it should be lawful to her, whom failing to him, to restrict the share of any child to a liferent, and it was also declared that the share of each child should vest and become payable on the death of the last survivor of the spouses.

The marriage was dissolved by the death of Mrs Wyllie in 1868. The only child of the marriage was the pursuer, who was born in 1866. Mrs Wyllie did not attempt to exercise any of the reserved powers. But it appears that a few days before she died, and when she was fatally ill, she was induced by her husband, in defraud of the marriage-contract, to execute along with him a "mutual disposition and settlement," by which each conveyed "in favour of the survivor of us absolutely, and to the heirs and assignees of the survivor, and failing us both by death to the child or children of our marriage," the whole estate of the first deceaser.

It is a remarkable fact that this mutual settlement was prepared by the same agent who prepared the antenuptial marriage-contract, and it is a fact not very creditable to that agent. Proceeding in virtue of that mutual disposition, Mr Wyllie, after her death, made up a title to the heritable estate which had belonged to his wife, and subsequently he proceeded to dispose of that property. It has now been in possession of others, who purchased it, for a considerable time.

One of the questions which at the outset appeared to be raised by the defences was, whether this reduction was not excluded by prescriptive possession on the part of the defenders, but I think that in the course of the argument it came to be agreed that that defence was untenable.

The question whether the pursuer can prevail in this reduction depends, in the first place, upon her legal position under the antenuptial contract of marriage. The doctrine of the law of deathbed was, that the heir of the person who granted a deathbed deed had a right to set it aside on the ground that it was to his prejudice in his character as heir. But it has never been held that a person had the power to reduce *ex capite lecti* who had only a possible fee in the event of the proprietor dying without executing a deed by which it was in his power to deprive him of that fee. Now, what is the pursuer's right from which she derives her alleged title to reduce *ex capite lecti?* It depends upon the marriage-contract. But under that contract her right in the trust funds might be reduced to a liferent by her father and her mother together, or by either of them which might survive the other. The right is one which is contingent. In these circumstances I think therefore she had no title to reduce *ex capite lecti* the deeds which she seeks to reduce, and therefore that it is not competent to her to insist in this action. I move your Lordships therefore to recal the interlocutor of the Lord Ordinary and assoilzie the defenders.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—This is probably the last judgment that will be given on the law of deathbed deeds. I concur in the opinion expressed. I acknowledge the title to pursue, but I think that the pursuer's interest has been excluded by the marriage-contract, because that marriage-contract entirely destroyed the rights of the heir.

The Court recalled the Lord Ordinary's judgment.

Counsel for the Reclaimers — Graham Murray — Salvesen. Agents—Sturrock & Graham, W.S.

Counsel for the Defender Miss Boyd—Craigie. Agent—J. Russell, S.S.C.

Counsel for the Burgh of Irvine—Strachan—Macfarlane. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondents—H. Johnston—Burnet. Agent—James Drummond, W.S.