to say that the arguments pressed by Mr Constable appear to me of great weight—that so far from being prejudiced by the delay the feuars are in a better position, because, as your Lordship has put it, they have had their money, which they might have been called upon to expend nineteen years ago, in their pockets all the time, and the fact that they are called upon now to causeway the street puts them in no worse position, because the expense for doing it now has not been made greater by anything that has happened during the past nineteen years.

The Court answered the third question of law in the negative and the fourth in the affirmative; found it unnecessary to answer the other questions of law; recalled the judgments of the Sheriff and Sheriff-Substitute appealed against; and decerned.

Counsel for Appellants—Constable, K.C. —D. Anderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Respondents — Sandeman, K.C. — Burn Murdoch. Agents — Fraser, Stodart, & Ballingall, W.S.

Tuesday, October 22.

SECOND DIVISION.

[Lord Hunter, Ordinary.

HEATH *v.* GRANT AND OTHERS.

Succession—Husband and Wife—Heritable and Moveable—Jus relictæ—Bond Bearing Interest Payable to Grantee and Executors or Assignees—Assignation ex facie Absolute but Really in Security.

A granted an assignation, *ex facie* absolute, but really in security of advances, of a bond for £4000, to the extent of £2500, in favour of a bank. The bond was granted by a trust company in favour of A and his executors or assignees, and bore that interest should be payable half-yearly until repayment of the principal sum, which fell due five years after its date. A having died, *held*, in a question with his widow, (1) that the bond was heritable as regarded *jus relictæ*, and (2) that the widow was not entitled to claim *jus relictæ* out of the £2500 portion of the bond.

Succession — Husband and Wife — Jus relictæ—Ascertainment of Amount.

A bond, which was moveable as regards the testator's general moveable estate, but heritable *quoad* his widow, was assigned in part to a bank in security of advances. *Held* (1)—*approving Stewart* v. *Stewart*, December 10, 1891, 19 R. 310, 29 S.L.R. 907—that the amount due by the testator to the bank formed a charge upon the bond and did not diminish the fund available for payment of *jus relictæ*, and (2) that the debts affecting the moveable estate fell to be borne by the fund available for *jus relictæ*.

Mrs Mary T. G. Thom or Grant or Heath, wife of and residing with Charles J. Heath, Morningside Park, Edinburgh, with her husband's consent and concurrence, *pursuer*, brought an action against Mrs Jane E. Beattie or Grant, Baronhill, Forfar, and others, the trustees acting under the trust-disposition and settlement of her deceased husband William Grant, sometime farmer at Letham Grange, Arbroath, *defenders*, in which, *inter alia*, she craved that the defenders, the trustees, should be decerned and ordained to produce an account of their intromissions with the estate under their charge in order that the balance due to the pursuer in name of *jus relictæ*, terce, and otherwise might be ascertained, and failing production of such account that the trustees should be ordained to pay the sum of £4000, which in that case should be held to be the sum due to the pursuer in respect thereof. The trustees lodged an account showing the amount of the widow's legal rights, in which they deducted from the amount available for *jus relictæ* (1) a bond or debenture for £1000 of the Alliance Trust Company, Limited, bearing interest and repayable at Whitsunday 1912, or such subsequent day as might be mutually agreed on, to William Grant or to his executors or assignees, and (2) a similar bond for £4000 repayable at Martinmas 1912.

The pursuer lodged objections, in which she stated, *inter alia*—"Obj. 1 (2) The bonds p. £1000 and £4000 with the Alliance Trust Company, Limited, are moveable estate, and would have been moveable estate according to the law prior to 16th November 1641. They ought, therefore, to be added to the *jus relictæ* fund. Reference is made to the terms of said bonds. Obj. 1 (3) To meet the event of the said bonds p. £1000 and £4000 being held not *per se* to form part of the fund for the pursuer's *jus relictæ*, it is explained that the bond p. £4000 was on 7th July 1909 assigned to trustees for the Royal Bank to the extent of £2500 by absolute assignation. An advance of £1000 was granted by said bank to the deceased on the faith of said assignation, and the bank undertook to account to the deceased and his executors for the balance of the sum recoverable by them under said bond after deducting the amount of the advance and interest thereon. The total amount of said advance at the date of deceased's death with interest accrued thereon was £1000 and interest £2, 10s. This sum forms a deduction from the sum recoverable by the bank under the bond assigned, and does not therefore fall to be deducted from or to diminish the fund for *jus relictæ*. Further, the balance of £1497, 10s. being a claim by the deceased against said bank is moveable as regards the deceased's succession. Pursuer is entitled to her third thereof. Obj. 3. The pursuer objects that the debts affecting the moveable estate are charged against the *jus relictæ* fund entirely; as the result of which the general moveable estate is relieved entirely of the

debts which would naturally affect it. Pursuer claims that the debts which fall upon the executry fund should be borne by it proportionally, and that only a proportion thereof should be laid upon the fund which yields *jus relictæ*."

On 25th June 1912 the Lord Ordinary (HUNTER) pronounced the following interlocutor:—". . . (2) Finds that the bonds p. £4000 and £1000 respectively, granted by the Alliance Trust Company, Limited, in favour of the deceased William Grant, do not pertain to the pursuer *jure relictæ* to any extent: (3) Finds that the pursuer is not entitled to claim *jus relictæ* out of the £2500 portion of the bond p. £4000, which the deceased, on 7th July 1909, assigned in security of advances to trustees for the Royal Bank of Scotland, or out of the proceeds thereof in the hands of the bank or of the said trustees: (4) Finds that the said bank advanced to the deceased William Grant on the faith of said assignation £1000, and that the balance due by the deceased in respect thereof (after taking into account sums standing at the credit and debit of the deceased in the books of said bank), viz., £867, 15s., is a charge upon the portion of said bond p. £4000 assigned as aforesaid, and does not diminish the fund available for payment of *jus relictæ*. . . . (7) With reference to the third objection, finds that in a question with the pursuer the debts affecting the moveable estate fall to be borne entirely by the fund available for *jus relictæ*, and that exclusive of the said bonds p. £4000 and £1000 and all bonds and dispositions in security pertaining to the deceased William Grant; therefore repels said objection. . . ."

Opinion—". . . The second head of the first objection raised the most important point that has to be determined. Part of the estate of the late Mr Grant consisted of two bonds for £4000 and £1000 respectively, granted by the Alliance Trust Company, Limited, in favour of Mr Grant, his executors or assignees. The defenders have left these bonds out of their statement of the fund available for payment of *jus relictæ* on the ground that by the common law of Scotland such bonds are heritable, and that, although by the Act 1661, c. 32, they are made moveable for certain purposes, they remain heritable so far as the fisc and widow's claims are concerned. The pursuer, on the other hand, maintains that the bonds would have been moveable according to the law prior to 16th November 1641, the date taken in the Act 1661.

"The bonds are granted by a Scots company, and bear interest from their date, interest being paid periodically prior to the date stipulated in the bonds for repayment of the principal sums. Interest had in fact been paid on both bonds during Mr Grant's lifetime. According to the institutional writers—I quote from Erskine, ii, 2, 9—'Personal bonds bearing interest were, by a general rule of our ancient law, accounted heritable as *quasi feuda*, because by the fixed yearly profits arising from them they bore some degree of resemblance to rights properly feudal.' The author then points out that bonds payable on a determinate date are deemed moveable, as the creditor is presumed to have an intention of realising his bond upon that date. This rule also obtained where there was a stipulation for interest being paid along with the principal sum. 'But if the bond was so conceived as to make the term of payment of the interest prior to the term of payment of the bond the sum descended to the heir, if the creditor survived the period at which the interest fell first due, though he died before the principal sum was payable; because he was, after the first term of payment of the interest, presently entitled to a yearly profit on his bond, which was accounted sufficient to make the bond heritable.' These words appear to me to be entirely applicable to the two bonds in this case. The pursuer, however, relied upon the circumstance that the sums in the bonds are made payable to the executors or assignees of the creditor, no mention being made of heirs. He founded upon this as evidence that the creditor himself must be taken as having considered the sums in the bonds as moveable, and that therefore the rule as to their heritable character did not apply. I do not doubt that the ordinary destination in a personal bond was to A, and his heirs, executors, or assignees. But the not mentioning of heirs does not exclude them; and I do not see why the destination actually used should not be read as giving the property to the executors in the event of there being no heir. The law as to the heritable character of personal bonds has been fully considered in the three cases of *Downie*, 4 Macph. 1067; *Dawson*, 23 R. 1006; and *Bennets*, 1907 S.C. 598. In the first of these cases a mortgage by the Glasgow Water-works Commissioners in favour A B, his executors, administrators, and assigns, payable at a term three years after its date and bearing interest at 4 per cent. payable half-yearly, was held heritable as regards the rights of the creditor's widow. There was, it appears, no expressed obligation to repay. Although this was so, the Lord President held that the mortgage was plainly of the character of an obligation to repay. I think the obligation was to repay those in whose favour the mortgage was granted, and that therefore I am bound by that case to hold the bonds of £4000 and £1000 heritable as in a question with the deceased's widow claiming her legal rights.

"The pursuer, however, maintains that as regards a portion of the bond for £4000 it ought to go to increase the fund available for payment of *jus relictæ*. This argument arises in this way. On 7th July 1909 the deceased assigned this bond to trustees for the Royal Bank to the extent of £2500 by absolute assignation. Although in form absolute, the assignation was granted admittedly in security of advances to be made by the bank. At the date of his death the deceased was due a considerable sum to the bank. This sum was repaid by the defenders to the bank, who re-assigned the bond to them. The pursuer

says that the effect of the transaction with the bank was that the deceased, after assigning the bond, had merely a right to an accounting from the bank so far as the £2500 is concerned, and that this claim for an accounting is moveable. The defenders, however, cited to me an old case—*Bartlett*, F.C., 21st February 1811, and 27th November 1812, as an authority for the proposition, which I think is sound, that where a debtor grants his creditors security for a debt, he does not thereby alter the character of the succession to him in the security subjects, or rather in his reversion thereto.

"In the last place, the pursuer argued that the debt to the bank ought to be met out of the subjects assigned. The defenders place the whole of this debt on the fund available for payment of *jus relictæ*. No authority upon the question was cited to me by either party.

"By disponing the bond to the extent of £2500 and interest thereon absolutely to trustees for the bank, the deceased burdened the £4000 bond with payment of such advances as the bank might make to him. I think, therefore, that if he had made a special gift of the bond the legatee would have succeeded subject to the burden of payment, and would not have been entitled to call upon the executors to pay off the amount due to the bank.

"In Bell's Principles, S. 1936, the author says, 'The heir or executor paying a debt secured on a particular estate or laid on a particular heir is entitled to relief.' The cases referred to in support of this proposition appear to deal with debts secured on land. I do not, however, see why the same rule should not apply where a valid burden has been created over moveable estate. If this is sound, I think that the executor paying the secured debt out of executry funds must, in a question of the proper distribution of the estate among parties interested therein, place the debt upon the affected fund. I am, therefore, of opinion that what was due to the bank should, for the purpose of estimating the pursuer's *jus relictæ*, form a charge upon the proceeds of the bond for £4000 to the extent to which it was assigned to the bank. . . ."

"III. The pursuer complains that the defenders have charged the whole of the moveable debts of the deceased against the estate available to meet her claim of *jus relictæ*, and not against the general moveable estate. The result in the present case certainly seems hard upon the pursuer. The words of the Act 1661, c. 32, are, however, that no part of such bonds shall pertain to the relict *jure relictæ* where the bonds are made to the husband. I think that the defenders are right when they say that these words can only be given effect to by treating the bonds in a question of apportioning debt as though they were heritable. To apportion any part of the deceased's moveable debts upon the bond would have the effect, contrary to the Act, of increasing the widow's *jus relictæ*. I therefore repel this objection. . . ."

The pursuer reclaimed, and argued—The bonds were moveable *quoad jus relictæ*. The destination to executors or assignees showed the testator's intention that their proceeds should be treated as part of his moveable estate. *Esto*, however, that the bonds were heritable, the assignation to the bank of the bond for £4000 took away £2500 from it which the bank could have realised at any time. The owner's right, therefore, was simply to call for an accounting with the bank—*Downie* v. *Downie's Trustees*, July 14, 1866, 4 Macph. 1067; *Union Bank of Scotland, Limited* v. *National Bank of Scotland, Limited*, December 10, 1886, 14 R. (H.L.) 1, 24 S.L.R. 227. *Bartlett* v. *Buchanan*, F.C., February 21, 1811, November 27, 1812, was distinguishable, because in that case there was a back bond—M'Laren, Wills and Succession (3rd ed.), p. 767. Further, the whole estate should bear its debts proportionately, and if the bonds fell to be treated as moveable in all respects except *quoad* the widow and the fisc, they must bear their share of the moveable debt—Fraser, Husband and Wife, ii, 984

Argued for the defenders—The bonds were heritable as regards the widow's rights—*Downie* v. *Downie's Trustees* (*cit. sup.*); *Dawson's Trustees* v. *Dawson*, July 9, 1896, 23 R. 1006, 33 S.L.R. 749; *Bennett's Executrix* v. *Bennett's Executors*, 1907 S.C. 598, 44 S.L.R. 486; Erskine, ii, 2, 9, 10, iii, 9, 22; Stair, iii, 4, 24 and 8, 47. The case of *Stewart* v. *Stewart*, December 10 1891, 19 R. 310, 29 S.L.R. 907, which was apparently against defender's contentions, was only an Outer House decision. Pursuer's contention that the bonds were moveable in any event to the extent of £2500 was not supported by any practice known to the Court. What deceased had was a *jus in re*, and not merely a *jus actionis*, and the present case was not distinguishable from *Bartlett* v. *Buchanan* (*cit. sup.*)

At advising—

LORD CULLEN—The pursuer and reclaimer is the widow of the late William Grant of Baronhill, Forfarshire, and the questions raised under the reclaiming note relate to the ascertainment of the amount of her *jus relictæ*.

Mr Grant at the date of his death held two bonds for £1000 and £4000 respectively, granted by the Alliance Trust Company, Limited, in favour of him and his executors or assignees. The date of the bond for £1000 is 15th May 1908, and the term of repayment under it Whitsunday 1912. The date of the bond for £4000 is 26th November 1907, and the term of repayment under it Martinmas 1912. Each bond contains an obligation for interest payable half-yearly until repayment of the principal sum.

The bond for £4000 was in 1909 assigned by Mr Grant to trustees for behoof of the Royal Bank of Scotland to the extent of £2500. The assignation was *ex facie* absolute. There was no formal back-letter. But it is common ground that the assignation was granted in security of advances by the bank to Mr Grant. After his death

his trustees and executors paid up the debt due to the bank and redeemed the security.

The first question raised is whether the two bonds in question fall to be treated as part of the deceased's moveable estate in the computation of the pursuer's *jus relictæ*. The Lord Ordinary has answered this question in the negative, and I agree with him. Under each of the bonds the principal sum is repayable after a term of years, and there is an obligation for payment of interest half-yearly during that period. I think it is clear on the authorities that money so laid out on bond and bearing interest falls to be treated as heritable in a question with the widow, and excluded from computation in ascertaining the amount of her *jus relictæ*. The pursuer sought to make a point to the effect that the bonds were taken in favour of Mr Grant and "his executors or assignees" and not in favour of his heirs, executors, and assignees. I see nothing in this. The same element was present and founded on in argument in the case of *Downie*, referred to by the Lord Ordinary. The bonds in question are by statute moveable save *quoad fiscum* and *jus relictæ*. They thus pass to the executor for distribution, although the distribution is governed by a rule different from that which applies to other parts of the moveable estate.

The next question relates to the transaction with the bank regarding the bond for £4000. To the extent of £2500 this bond was assigned by Mr Grant to the bank by way of security. It was redeemed by his trustees and executors on payment by them of the amount of the debt due to the bank. The pursuer maintains that, *esto* the bond was originally heritable *quoad jus relictæ*, the effect of the security transaction with the bank was to render it moveable to all effects to the extent of the balance of the £2500 after meeting the debt to the bank. The ground advanced for this contention was that as Mr Grant had divested himself of the bond by an *ex facie* absolute assignation to the bank, there remained nothing *in bonis* of him but a money claim to the said balance. This appears to me, as it did to the Lord Ordinary, to be an untenable contention. The position at Mr Grant's death was that he was the radical owner of the bond for £4000, which he had encumbered with a security in favour of the bank. The right to the bond belonging to him and thus encumbered passed on Mr Grant's death in the same way as would have passed the unencumbered bond had no security been created over it in favour of the bank.

The next question (raised under the reclaiming note by the defenders and respondents) is whether the foresaid debt due to the bank falls to be charged against the £4000 bond on part of which it was secured, or against the moveable estate in which the pursuer is interested. The Lord Ordinary has held that it falls to be charged against the bond, and I agree with him. Had the security given for the debt to the bank been heritable, there is on the authorities no room for question that the heritage so burdened would have descended to the parties entitled to it in the succession of the deceased *cum onere*. The principle on which these authorities proceed appears to me to be equally applicable to encumbrances which have been specially imposed on moveable property of a deceased, as was held by Lord Kyllachy in the case of *Stewart*, 19 R. 310.

The next question relates to the mode in which the general debts due by the deceased—that is to say, debts which *ex lege* fall on his moveable succession in a question *inter hæredes*—have been treated in the trustees' account. The trustees have deducted the whole of these debts from the amount of the gross moveable estate as ascertained for the purpose of computing the *jus relictæ*. The pursuer's contention is that a rateable share of the debts should be borne by the bonds above mentioned. Now in a question with the pursuer these bonds fall to be treated as heritable in the same way as they would have been prior to the Act of 1661, and the *jus relictæ* falls to be computed on that footing. That being so, it appears to me that as the Lord Ordinary has held, the trustees are right in stating their account as they have done. Were the pursuer's contention to be given effect to, it would result in the amount of her *jus relictæ* being increased by the addition of a part of the two bonds which in a question with her are heritable, and therefore excluded from computation.

[*His Lordship then dealt with another question on which the case is not reported.*]

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

LORD SALVESEN and LORD GUTHRIE were absent.

The Court adhered.

Counsel for the Pursuer (Appellant)—M'Lennan, K.C.—Ingram. Agent—R. Arthur Maitland, Solicitor.

Counsel for the Defenders (Respondents)—Cooper, K.C.—Smith Clark. Agents—J. & D. Smith Clark, W.S.

Tuesday, October 29.

FIRST DIVISION.

[Dean of Guild Court at Dunoon.

MASON *v.* RODGER AND OTHERS.

Burgh—Street—New Street—Burgh Police (Scotland) Act 1903 (3 *Edw. VII, cap.* 33), *sec.* 11.

The Burgh Police (Scotland) Act 1903, section 11, enacts—"Every person who intends to form or lay out any new street, or to widen, extend, or otherwise alter any street, shall present a petition for warrant to do so to the Town Council. . . . The Dean of Guild Court shall not grant warrant for the