sense of the person in whom the fiduciary fee is created." Even if I am mistaken in this reading of the judgment in *Colvile's* case, it would still, I think, be impossible to resist the application of the doctrine, for it undoubtedly applies to the surviving niece, and it is unthinkable that her fiduciary fee should have been called out of the blue, as it were, when Miss White predeceased her. The fiduciary fee must have resided in the two nieces conjunctly while they both survived.

My opinion is accordingly that Mrs Devlin, the first party, is not entitled as fiduciary fiar to grant a valid disposition thereof to the second party. Whether she will find any difficulty in getting the necessary power if she applies for it is another matter.

LORD MACKENZIE—I am of the same opinion. In reaching the conclusion thas the true construction of this conveyance it that it carries only a liferent with a fiduciary fee, I think we are merely applying the principles laid down in the case of *Watherstone* (M. 4297), which in its turn applied the principles of the earlier case of *Newlands*, M. 4289. These were recognised and applied in the case of *Bryson* v. *Munro's Trustees*, 20 R. 986. The use which is made of the case of *Cumstie* (3 R. 921) is to extend to heirs the principles which were contained in the earlier cases with regard to children. There is only one sister surviving, so the possible difficulties which might have given rise to argument at an earlier period do not arise. I do not think that there would have been difficulty in reconciling the position of the fiduciary fiar when both sisters were alive with the expression of opinion by Lord Dunedin in the case of *Colvile's Trustees* (1908 S.C. 911), because his Lordship there limited his observations to the case where the fiduciary fee is being held for a person not a child nor an heir in any sense of the holder of the fiduciary fee.

LORD ASHMORE concurred.

LORD SKERRINGTON and LORD CULLEN were not present.

The Court answered the question in the negative.

Counsel for the First Party — Duffes. Agent—Peter Clark, S.S.C.

Counsel for the Second Party—Macgregor Mitchell. Agents—J. & R. A. Robertson, W.S.

Thursday, February 23.

FIRST DIVISION.

[Sheriff Court at Airdrie.

LIVINGSTONE *v.* SUMMERLEE IRON COMPANY, LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 2 (1)—*Delay in Giving Notice*—"*Mistake . . . or other Reasonable Cause.*"

A workman sustained an abdominal injury on 22nd December 1920. Although suffering from a painful and increasing swelling on his left side which prevented him doing his full amount of work and necessitated assistance being given him, he continued at work until 31st December 1920, in the hope that the rest which he would obtain from the ensuing New Year holidays would better his condition. Being compelled to take to his bed on 3rd January 1921 he gave formal notice of the accident to his employers on 11th January 1921. In an arbitration under the Workmen's Compensation Act 1906 the arbitrator found that the want of notice was not due to mistake or other reasonable cause. *Held* that the facts proved entitled the arbitrator to arrive at that conclusion, and that accordingly the Court could not interfere with his view of the facts.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 2, enacts—"(1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable. . . Provided always that (*a*) the want of . . . such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not or would not, if a notice . . . were then given and the hearing postponed, be prejudiced in his defence by the want, . . . or that such want . . . was occasioned by mistake . . . or other reasonable cause. . ."

In an arbitration under the Workmen's Compensation Act 1906 between James Livingstone, drawer, Cleland, *appellant*, and the Summerlee Iron Company, Limited, *respondents*, the Sheriff-Substitute (MACDIARMID) refused compensation, and at the request of the claimant stated a Case for appeal.

The *facts* as stated by the Sheriff-Substitute were as follows—"1. That on 22nd December 1920 the pursuer and appellant was injured by accident arising out of and in the course of his employment with the defenders and respondents by being struck on the left side of the abdomen by the buffer of an empty hutch with which a runaway hutch had collided. 2. That he was totally incapacitated. 3. That his average weekly earnings were £4, 10s. 4. That he worked on until the pit closed for the New Year holidays on 31st December 1920. 5. That while working from said 22nd to 31st December 1920 he suffered pain;

that he was aware of a swelling on his left side, which increased in size and became harder as the days passed, and that he had to be assisted in his work. 6. That on or about 3rd January 1921 he had to take to his bed, and that on or about 20th January 1921 he was operated upon and an abscess at the site of the pain of which he complained, and involving the abdominal wall, was opened and drained. 7. That notice of said accident was given on his behalf to the defenders and respondents on 11th January 1921. 8. That said notice was not given as soon as practicable after the happening of the said accident. 9. That the defenders and respondents were prejudiced in their defence by the said want of notice in respect that their medical men were unable to see the pursuer and appellant, while evidence of his having sustained a blow from the said hutch might have been present. 10. That from the date of said accident the pursuer and appellant was aware that he had sustained injury which was so serious as to prevent him doing his full amount of work, and that he worked on to the holidays in the hope that the rest he then should have might result in an alteration for the better in his condition."

The Case further stated—"In these circumstances I found that said want of notice was not due to mistake or other reasonable cause, and accordingly refused the prayer of the petition and dismissed the same. I found the pursuer and appellant liable to the defenders and respondents in expenses."

The *question of law* for the opinion of the Court was—"In the circumstances stated was I entitled to find that the failure of the pursuer and appellant to give timeous notice was not occasioned by mistake or other reasonable cause?"

Argued for the appellant—The delay in giving formal notice of the accident and consequent prejudice to the employers was due to mistake or other reasonable cause on the part of the appellant. The workman in the present case did not appreciate at the time that his injury was as serious as it eventually turned out to be. In the circumstances it was reasonable for him to continue at his work for the few remaining days until the pit closed for the New Year holidays in the hope that the rest they would afford him would restore him to health. The delay in giving notice was very short in the present case, and shorter than in the following cases, which were all decided in favour of the workman—*Rankine* v. *Alloa Coal Company, Limited*, 1904, 6 F. 375, 41 S.L.R. 306; *Brown* v. *Lochgelly Iron and Coal Company, Limited*, 1907 S.C. 198, 44 S.L.R. 180; *Ellis* v. *The Fairfield Shipbuilding Company, Limited*, 1913 S.C. 217, 50 S.L.R. 137; *Flood* v. *Smith*, 1915 S.C. 726, 52 S.L.R. 471; *Millar* v. *Refuge Assurance Company, Limited*, 1912 S.C. 37, 49 S.L.R. 67. There was no real divergence between these authorities and the English cases on this point. The fact that the workman abstained from making a claim until he realised that his injuries were serious was a reasonable cause for the delay in giving notice—*Ellis* (*cit. sup.*), *per* Lord President Dunedin at p. 224, and Lord Kinnear at p. 225, and *Flood* (*cit. sup.*), *per* Lord President Strathclyde at p. 731, and Lord Mackenzie at p. 733. Counsel also referred to *Snelling* v. *Norton Hill Colliery Company, Limited*, (1913), 6 B.W.C.C. 506; *Clapp* v. *Carter*, (1914), 7 B.W.C.C. 28; *Potter* v. *Welch & Sons, Limited*, (1914), 7 B.W.C.C. 738; *Lingley* v. *Frith & Sons, Limited*, (1921), 1 K.B. 655; *Egerton* v. *Moore*, (1912), 2 K.B. 308; *Webster* v. *Cohen Brothers*, (1913), 6 B.W.C.C. 92.

Argued for the respondents—The arbitrator was justified in finding that the delay in giving notice of the accident was not occasioned by mistake or other reasonable cause. The workman had six months within which he might consider whether to lodge a claim for compensation or not, but unless his injury was of a trivial nature there was a duty upon him to give notice of any accident that might overtake him to his employers at once. He was not entitled to delay doing so in the hope that his injury might turn out to be a trifling one and that he might get better soon. The period that might elapse between sustaining an injury and giving notice might in different circumstances vary from a few hours to several months, but in the present case there was no excuse for delay in giving notice as the injury was apparent and considerable. Counsel cited the following cases—*Egerton* (*cit. sup.*); *Webster* (*cit. sup.*); *Snelling* (*cit. sup.*); *Clapp* (*cit. sup.*); *Potter* (*cit. sup.*); *Lingley* (*cit. sup.*); *Wassell* v. *Russell & Sons*, (1915), 8 B.W.C.C. 230.

LORD PRESIDENT—The accident to the workman in this case consisted of a blow in the abdomen from the buffer of a hutch, and the consequence which flowed from the accident was an internal injury to the abdominal wall which resulted in the formation of an abscess. The only question in the case is as to whether the delay of the workman in giving notice of his accident was or was not occasioned by mistake or other reasonable cause.

A cloud of precedents has collected round the provisions of section 2 (1) (*a*) of the Workmen's Compensation Act of 1906 both in this country and in England. From that long series of cases I think two criteria of the timeousness of a workman's notice can be gathered; and they might be formulated thus—(1) As soon as, according to the circumstances of the accident and of the workman's personal condition, he ought to know that something serious has happened to him, he must give notice at once, and it is no excuse that he is sanguine about the prospects of recovery. (2) If, on the other hand, according to the circumstances referred to, the workman might reasonably believe that nothing serious had happened to him, he will be held in time in giving his notice if he gives it as soon as he discovers that he is really injured. I do not think that there is any difference between the law as explained in Scotland and the law as it has been explained in the English Courts—at any rate any difference which affects these two criteria. The question, of course, which

always lies behind is the application of them to the particular facts found, and it is nothing surprising that differences of opinion should disclose themselves in making that application.

The facts found here are contained in the case, and I decline to look at the learned arbitrator's note of opinion unless there be found something ambiguous in any of the findings which can only be cleared up by reference to it. The position is this— The blow on the workman's abdomen was followed by pain and swelling; during nine days (between the 22nd December when the thing happened, and the 31st December when the pits closed) the swelling progressively increased and hardened, making the man unable to do his work unassisted; three days later than that (viz., on the 3rd January 1921, during the Christmas and New Year Holiday) the workman found himself compelled to take to his bed; it was not until eight days later still that notice was given. Now the question that we have to ask ourselves is this and this only—in those circumstances could the learned arbitrator reasonably arrive at the conclusion that the man ought to have known before the expiry of that period that something serious had happened to him?

I admit that if I had had to decide that question myself I should have been not only reluctant to arrive at the arbitrator's conclusion, but I doubt very much whether I should have reached it. But that has nothing to do with the question. The learned arbitrator is not shown to have misdirected himself, and the facts found by him were such as entitled him to draw from them the conclusion which he formed. Accordingly I think we have no alternative except to answer the question put to us in the affirmative.

LORD MACKENZIE—I am of the same opinion. There are two questions in a case such as this that we have to consider. In the first place, Did the arbitrator misdirect himself in point of law? He appears to have addressed himself to the proper question—Ought the workman to have realised that the circumstances arising out of the accident were such as to put him under a duty to give notice on an earlier date than that on which he actually did give notice. That I think is the law to be extracted from the various cases to which we have been referred and with which we are familiar in this Court.

If that was the question to which he had to address himself, was there legal evidence upon which he was entitled to come to the conclusion that the workman had failed in the duty so put upon him. It is here, I confess, I come with reluctance to the conclusion I have reached, because had I to consider and judge of the evidence in this case I think I should have arrived at a conclusion different from that arrived at by the arbitrator. But it has been laid down in recent cases in the House of Lords that these are matters upon which the arbitrator is the judge. From the findings as detailed in the case, eked out I think with only one item from the note to which your Lordship has already referred, viz., that the workman required assistance in enabling him to carry on his work down to the closing of the pit, it is not possible to say as matter of law that there is not sufficient to entitle the arbitrator to reach the conclusion he did. Accordingly we are powerless to interfere with his view of the facts.

LORD ASHMORE concurred.

LORD SKERRINGTON and LORD CULLEN did not hear the case.

The Court answered the question of law in the affirmative.

Counsel for Appellant—Solicitor-General (Murray, K.C.)—Keith. Agents—Simpson & Marwick, W.S.

Counsel for Respondents — Sandeman, K.C.—Marshall. Agents—W. & J. Burness, W.S.

Saturday, February 25.

FIRST DIVISION.

[Lord Ashmore, Ordinary.

M'WIGGAN'S TRUSTEES *v.* M'WIGGAN.

Succession — Husband and Wife — Jus relictæ — Mortgage Declared by Private Act "to be Moveable or Personal Estate" — Whether Heritable or Moveable quoad Jus relictæ—Act 1661, *cap.* 32.

The Glasgow Order Confirmation Act 1905 (5 Edw. VII, cap. cxxvii) enacts—Section 85—"All mortgages granted or renewed after the passing of the Act confirming this Order by the Corporation as administrators of the Common Good Fund and property of the city, or under the authority of the Glasgow Corporation Acts 1855 to 1904, and this Order and any other Act or order passed during this or any future session of Parliament or any of them, and all money advanced and lent on the security of the property and works of the Corporation or the rates and assessments authorised to be levied by them, shall be moveable or personal estate and transmissible as such, and shall not be of the nature of heritable or real estate."

Held (*diss.* Lord Cullen) that a mortgage granted under the Glasgow Corporation Loans Acts 1883 to 1903 to a husband and his executors and assigns, and renewed in 1909, was moveable estate out of which his widow was entitled to *jus relictæ*.

Thomas M'Wiggan junior and others, the testamentary trustees of the late Thomas M'Wiggan, *pursuers and real raisers*, brought an action of multiplepoinding against Mrs M'Wiggan, his widow, and others, *defenders*, for the determination of certain questions in connection with the distribution of the deceased's estate.

At the date of his death the deceased's