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

estate included a mortgage for the sum of £3000, dated 7th July 1904, by the Corporation of the City of Glasgow in favour of the deceased and his executors and assigns, repayable on 15th May 1909, but renewed by minutes of renewal dated 12th March 1909, 26th September 1913, and 28th September 1917, to Martinmas 1924, and bearing interest from its date. The question upon which the case is reported arose out of a claim by Mrs M'Wiggan for one-third of the moveable estate, including the sum in the mortgage, in respect of *jus relictæ*.

The mortgage was in the following terms:—"By virtue of the Glasgow Corporation Loans Acts 1883 to 1903 the Corporation of the City of Glasgow, in consideration of the sum of three thousand pounds sterling paid to the registrar appointed under the provisions of the said Acts by Thomas M'Wiggan, sausage skin merchant, 805 Gallowgate, Glasgow, for the purposes of these Acts, grant and assign unto the said Thomas M'Wiggan and his executors and assigns such proportion of the lands, properties, buildings, works, assessments, rents, rates, profits, charges, revenues, and moneys arising, accruing, or leviable under or by virtue of the said Acts and of the several Acts therein specified or referred to, as the said sum doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said lands, properties, buildings, works, assessments, rents, rates, profits, charges, revenues, and moneys, or any of them; to hold to the said mortgagees and aforesaids from the twenty-fourth day of May One thousand nine hundred and four, until the said sum with interest thereon at the rate of three pounds ten shillings per centum per annum (payable half-yearly as per coupons or interest warrants delivered herewith) shall be fully paid and satisfied (the principal sum to be repaid on the fifteenth day of May one thousand nine hundred and nine). . . ."

The Lord Ordinary (ASHMORE) pronounced this interlocutor—"Finds . . . (2) as regards the claim for Mrs Isabella Johnston or Nairn or M'Wiggan that the mortgage for £3000 by the Corporation of the City of Glasgow in favour of the testator is heritable as regards the *jus relictæ* of the widow of the testator, and that the said claimant is not entitled to *jus relictæ* in respect of the said mortgage: Continues the cause for further procedure, and grants leave to reclaim."

Opinion—"Two questions are raised for my determination. . . . . .

"The second and only other question relates to the claim of the widow of the testator that in computing her *jus relictæ* the amount of a certain mortgage which formed part of the testator's moveable estate ought to be included.

"The mortgage is for £3000. It was granted in 1904 by the Corporation of the City of Glasgow in favour of the testator and his executors and assignees repayable in 1909. It was renewed for the period up to 1924, and it bore interest from its date.

"*Prima facie* therefore it is heritable as regards the *jus relictæ* in accordance with the Statute of 1661, cap. 32.

"For the widow, however, it was maintained that it had been made moveable and subject to *jus relictæ* by reason of the provisions of the Glasgow Corporation Order Confirmation Act (5 Edw. VII, cap. 127), sec. 85, to the effect that the mortgage and all money lent thereunder 'shall be moveable or personal estate and transmissible as such, and shall not be of the nature of heritable or real estate.'

"The contention for the widow seems to me to be untenable. I base my opinion to that effect on the following considerations:—(1) The provision in the Private Act referred to has no application in this question between the widow and her husband's representatives—Maxwell on Statutes, 6th ed. (1920), pp. 72 and 149. Moreover, the principle underlying the decision in *Stewart's Trustees* v. *Battcock* (1914 S.C. 179) applies in this case. (2) The argument in support of the widow's claim is based on the assumption that the provision of the Statute of 1661 has been rendered nugatory by the terms of the Private Act. The assumption seems to me to be inconsistent with principle and authority.

"Whether the mortgage is or is not heritable as regards the widow's *jus relictæ* depends on whether it is or is not a mortgage for a loan for a tract of time bearing interest payable before the arrival of the term of payment—*Downie* v. *Downie's Trustees*, 1866, 4 Macph. 1067, Lord President Inglis at p. 1170; *Dawson* v. *Dawson's Trustees*, *per* Lord Kinnear, 23 R. 1009.

"It follows in my opinion that the mortgage is heritable as regards the *jus relictæ*, and that Mrs M'Wiggan is not entitled to claim *jus relictæ* in respect thereof, and I shall find accordingly."

The defender Mrs M'Wiggan reclaimed, and argued—The effect of section 85 of the Act of 1905 was that the mortgage was moveable by origin and creation apart from the provisions of the Scots Act 1661, cap. 32, and the application of the Act of 1661, and of such decisions as *Downie* v. *Downie's Trustees*, 1866, 4 Macph. 1067, 2 S.L.R. 204, and *Dawson's Trustees* v. *Dawson*, 1896, 23 R. 1006, 33 S.L.R. 749, which admittedly would previously have applied, was excluded. To hold that the mortgage was not subject to *jus relictæ* would mean that it was heritable and would be directly in face of the Act which created it. The intention of section 85 was not merely to regulate transmission but was to prevent spouses being deprived of their legal rights where funds were invested in mortgages created in virtue of the Act. The exclusion of the operation of the Act of 1661 by a private Act which enacted that the security should be moveable property was not a violation of the principle that a private statute could not be held to alter the law of the land unless it expressly so declared—Maxwell, Interpretation of Statutes, pp. 72 and 149. The principle which should be applied was that adopted in *Downie* v. *Downie's Trustees*, *sup. cit.*, and in *Newlands* v. *Chalmers' Trustees*, 1832, 11 S. 65, where the liability of moveable estate to

jus relictæ was decided according to the law of the country in which it was situated. In *Stewart* v. *Battcock's Trustees*, 1914 S.C. 179, 51 S.L.R. 183, *per* Lord Dundas at p. 181, the words which were said to make the security moveable were too vague and were not found in a statute. Further, the Companies Clauses Act 1863 (26 and 27 Vict. cap. 118), section 23, was not referred to at the hearing. It had been decided in the Sheriff Court that mortgages of the Glasgow Corporation were subject to *jus relictæ* —*Hutcheson* v. *M'Farlane*, 1916, 32 S.C.R. 158.

Argued for the pursuers and real raisers —Section 85 of the Act of 1905 was merly a conveyancing section intended to prevent the mortgages of the Corporation from going to the heir-in-law and from being treated as heritable in conveyancing. It was not intended to alter the general law of the land established by the Act of 1661. Had that been intended the section would have expressly said so—*River Weir Commissioners* v. *Adamson*, 1877, 2 A.C. 743, *per* Lord Blackburn at p. 762. The onus of showing that the section was intended to alter the general law was on the reclaimer. Further, a claim for *jus relictæ* was the claim of a creditor—*Inglis* v. *Inglis*, 1869, 7 Macph. 435, 6 S.L.R. 271, whereas section 85 was not concerned with claims of creditors. Although the section declared that the mortgage was moveable that declaration must be interpreted in accordance with the general law of the land.

At advising—

LORD PRESIDENT—The question is whether the sum of £3000 in a mortgage granted by the Corporation of Glasgow under and by virtue of the Glasgow Corporation Loans Acts is subject to *jus relictæ*. The Loans Act of 1883 incorporated the Commissioners Clauses Act 1847 with respect to mortgages, with certain exceptions, and in Part II it conferred power to borrow on mortgage, the form of which was provided for in section 63. The Loans Acts form part of and are comprehended within "the Glasgow Corporation Acts" as defined in the Glasgow Corporation and Police Act 1895, by which the powers of the Glasgow Police Commissioners and of the several municipal trusts of the city were transferred to the Corporation—*vide* section 4 and the First Schedule to the Act. The latitude of the expression "the Glasgow Corporation Acts" has been subsequently extended so as to include each new accession of statutory power and authority granted by Parliament to the Corporation. The mortgage was originally granted on 7th July 1904. Under it the £3000 was repayable on 15th May 1909. Before the arrival of that date the Glasgow Corporation Order Confirmation Act 1905 had been passed, and that Act became another constituent of the comprehensive group of "the Glasgow Corporation Acts." By section 85 of the last-mentioned Act it was enacted that "all mortgages granted or renewed after the passing of the Act . . . 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 persona estate, and transmissible as such, and shall not be of the nature of heritable or real estate." By successive minutes of renewal, dated 12th March 1909, 26th September 1913, and 28th September 1917, the mortgage for £3000 was renewed for various periods, the last renewal being for seven years ending Martinmas 1924.

Prior to the passing of the Glasgow Corporation Order Confirmation Act 1905 the Glasgow Corporation Acts had contained no provision defining the quality of the sums in Corporation mortgages as either heritable or moveable estate. At any rate we have not been referred to any enactment of that character. If that be so the quality of the £3000 as being heritable or moveable estate as regards the rights of the mortgagee's widow would, in the event of the mortgagee's death during the currency of the original mortgage, have had to be determined according to the ordinary rules of law; and the parties seemed to be at one regarding the case of *Downie* v. *Downie's Trustees*, (1866) 4 Macph. 1067), as applicable in the circumstances figured.

But the terms of section 85 of the Glasgow Corporation Order Confirmation Act 1905 are undoubtedly applicable to all the renewals of the mortgage, and particularly to the renewal which was current when the mortgagee died. In considering the effect of that section on the heritable or moveable quality of the £3000 I see no difference between an original mortgage dated after the 1905 Act and a renewed mortgage similarly dated. Both of them are equally contracts which depend for their validity and effect on Act of Parliament, and one of the qualities bred in them by the original and statutory source of their very existence is that they are moveable or personal estate and transmissible as such, and that they are not of the nature of heritable or real estate. The Lord Ordinary considered that the question of the heritable or moveable quality of the £3000 in the renewed mortgage is affected by the Act 1661, cap. 32. My difficulty is to see how the renewed mortgage could ever come within the operation of that statute. Even in 1661 there were some contracts and obligations for sums of money containing clauses of annual-rent which were moveable, and these remain so for all purposes, including *jus relictæ*, notwithstanding the Act (Ersk. Inst. ii, 2, 13). *A fortiori*—as it appears to me—this particular piece of estate, which is the creation of a statute *declaring it to be moveable*, must be regarded as being just what the statute made it. It never had nor could have any heritable quality about it, and so never could come within reach of the Act of 1661. The *jus relictæ* attaches to it simply as part of the moveable estate

of the deceased mortgagee in the same way as it attaches to any other part of that estate. If this reasoning be well founded it seems clear that the case of *Stewart's Trustees* v. *Battcock*, 1914 S.C. 179, on which the Lord Ordinary relies, has no application to the present case.

LORD MACKENZIE — I am of the same opinion and upon this ground—if the Act of 1661 is required to make the bond moveable, then the statutory condition will attach and *jus relictæ* will be excluded; but if, as here, by the creation of the security the bond is *sua natura* moveable, and therefore never could fall within the Act of 1661, then the condition excluding *jus relictæ* does not attach.

The LORD PRESIDENT intimated that LORD SKERRINGTON, who was not present at advising, concurred in his opinion.

LORD CULLEN—The form of the mortgages granted by the Glasgow Corporation, one of which is here in question, is that of a charge on, *inter alia*, lands. The granters, in consideration of a certain sum paid to them, grant and assign to the mortgagee "such proportion of the lands, properties, buildings, works, assessments, rents, rates, profits, charges, revenues, and moneys arising, accruing, or leviable under or by virtue of the" Glasgow Corporation Loans Acts "and of the several Acts therein specified or referred to as the said sum doth or shall bear to the whole sum which is or shall be borrowed upon the credit of the said lands, buildings," &c., to hold to the mortgagee until the sum, with interest at a specified rate, shall be fully paid and satisfied, the principal sum being to be repaid on a specified date. The form of the mortgages is I think relevant to the question raised.

In the argument submitted to us the decision in the case of *Downie* (4 Macph. 1067) was accepted by the parties, and it was common ground that that decision is applicable to the mortgage here in question, so that the mortgage falls within the class of contracts or obligations for sums of money containing clauses for payment of annual rent and profits which are made moveable bonds by the Act 1661, cap. 32.

Prior to that Act such contracts or obligations were heritable after the first term for payment was past, or where the date of payment of the principal was distant or uncertain. Not being in nature immoveables, they were heritable in this sense that they descended to the heir-at-law and not to the executor by the law of intestate succession. Subject to two defined exceptions which have no relation to the present question such contracts and obligations were by the Act stripped of the character of heritable estate and declared to be "moveable bonds," no longer descending to the heir but to be confirmed by the executor and to appertain to the nearest of kin, executors, or legators of the defunct. The two express exceptions were (1) bonds containing an express obligation to infeft, and (2) bonds conceived in favour of heirs and assignees, secluding executors. In these two excepted cases the bonds are expressly ordained by the Act to be heritable and to pertain to the heir.

While, subject to these exceptions, the bonds were thus converted from heritable to moveable quality, the Act went on, by particular enactment, to avert certain special consequences which otherwise would have ensued from this conversion. It is declared that, as formerly, such bonds are not to fall to the fisc under the single escheat, "nor shall any part thereof pertain to the relict *jure relictæ* where the bonds are made to the husband, nor to the husband *jure mariti* where the bonds are made to the wife."

The result of the Act thus is that the bonds thereby made moveable are a species of moveable estate from which the widow's claim is excluded.

It is of course quite common to speak of them as being, under the statute, heritable *quoad* the fisc, *jus relictæ*, and *jus mariti*, but this while it may be convenient is hardly accurate, seeing that their original heritable quality, which consisted in their descending to the heir, is entirely taken away by the statute, as much in these cases as in the general case, and the executor and not the heir is in all cases *in titulo*.

Accordingly to predicate of a particular bond with a clause of annual-rent or interest that it is moveable estate does not, *prima facie*, do more than ascribe to it the qualities which it possesses under the Act of 1661.

Such being the position of the mortgage here in question according to the law of Scotland as contained in the Act of 1661, the case for the reclaimer is rested on section 85 of one of the Glasgow Corporation Private Acts called the Glasgow Corporation Order Confirmation Act 1905. This section, which is quoted on record, is the only special enactment there founded on. It occurs in a Private Act dealing with various subject-matters, and in itself forms part of a series of Acts or enactments promoted and obtained by the corporation for empowering and regulating the borrowing of money by them for municipal purposes.

Prior to this enactment in section 85 the position, *ex hypothesi* of the argument, was that the mortgages were not subject to claims of *jus relictæ*. The reclaimer's contention accordingly involves that this private enactment is to be understood as having been promoted by the corporation and approved by Parliament for the purpose, solely or in part, of restricting the testamentary powers of mortgage-holders who might die leaving widows or widowers, so as to enlarge the legal claims of these latter, in the case of all mortgages granted or renewed after the passing of the Act.

The section in its terms makes no specific reference to the legal rights of relicts. It enacts in general terms that mortgages granted or renewed after the passing of the Act shall be moveable or personal estate and shall not be of the nature of heritable or real estate, and shall be transmissible as the former. The question is, what is the true effect and meaning of this general ascription to the mortgages of the character of

moveable estate, and the negation of the character of heritable or real estate, in the light of the context of the private legislation in which it occurs? For it appears to me to be legitimate and necessary to keep in view the general objects and purposes of these private Glasgow Loan Acts, as already stated, in construing the section, and I do not think that the language used, which is the language of the promoters, ought to be construed so as to give it an effect which is entirely foreign to these purposes, unless no other reasonable reading of it which is in keeping with them, and will satisfy it, can be arrived at.

As has been pointed out, these mortgages not only possess the quality of containing an obligation for payment of interest, but also that of being in the form of a charge on and conveyance of lands and interest in lands. Now whether the legal effect of this latter quality would or would not have been to attract to the mortgages the need for complying with the more cumbrous forms applicable to landed rights, it was plainly desirable to provide, so as to put the matter beyond doubt, that the mortgages should "not be of the nature of heritable or real estate," but should be moveable, and be transmissible *a morte* or *inter vivos*, as such. Such a provision was in the interest both of the promoters of the private enactment and of mortgage holders, and was quite germane to the general objects and purposes of the private legislation in question. And it is perfectly clear that it was at least *a* purpose of the enactment in section 85 to make provision for the transmissibility of the mortgages as moveable estate. The section expressly says so. This being so, I think the section is thereby sufficiently satisfied, without any need for going on to attribute to its promoters and to the Legislature an intention to operate by means of it a restriction on the testamentary powers of mortgage holders who might die leaving relicts, and an enlargement of the legal rights of such relicts beyond what the general law of Scotland accords to them. The Glasgow Corporation had no conceivable interest as borrowers in obtaining an enactment enlarging the legal rights of relicts in their mortgages, and it was in no way to the interest of, or attractive to, lenders that their powers of testamentary disposition over mortgages taken out by them should be so restricted.

In so far as section 85 does not specifically provide for the transmissibility of the mortgages as moveable property, although charges on land, it only uses general language declaring their moveable quality. In this it does no more than, *ex hypothesi* of the argument, does the Act of 1661 in its main enactment which makes them "moveable bonds." The mortgages are "born" equally under both statutes. The general Act of 1661 goes on to provide that such bonds, although moveable, shall not be subject to *jus relictæ*. The private enactment in section 85 of the Glasgow Corporation Act of 1905 does not say expressly anything to the contrary. And, for the reasons which I have indicated, I am unable to read it as implying a provision so foreign to the objects and interests of its promoters. If an enactment so arbitrary in character from the point of view of its promoters had been intended by them and approved by the Legislature I think it would have appeared in express terms instead of being concealed in a general affirmation of the moveable quality and negation of heritable or real quality of the mortgages in a section expressly dealing with the subject of their transmissibility.

I agree with the conclusion arrived at by the Lord Ordinary, and am of opinion that his interlocutor should be adhered to.

The Court pronounced this interlocutor—

"Alter said interlocutor by substituting the word 'moveable' for the word 'heritable,' and by deleting the word 'not,' all occurring in head (2) thereof: *Quoad ultra* adhere to the said interlocutor: Remit to the Lord Ordinary to proceed as accords, and decern."

Counsel for the Pursuers and Real Raisers and certain Claimants — Mitchell, K.C. — Ingram. Agent—Walt. M. Murray, S.S.C.

Counsel for Defender and Reclaimer — Sandeman, K.C. — Keith. Agents—Arch. Menzies & White, W.S.

Counsel for Claimant Graham M'Wiggan —Duffes. Agents—Arch. Menzies & White, S.S.C.

Counsel for Claimant George Kinsey Stewart—Mitchell, K.C.—Patrick. Agents —Bowie & Pinkerton, S.S.C.

Wednesday, February 22.

SECOND DIVISION.

ROBERTSON'S TRUSTEES *v.* MAXWELL.

Succession — Husband and Wife — Jus relicti — Act 1661, *cap.* 32 *— Bonds and Debenture Stock — Whether Heritable or Moveable quoad Jus relicti.*

A testatrix conveyed her whole means and estate, heritable and moveable, to trustees for certain purposes, but made no provision in favour of her husband. The trust estate included (*a*) a bond for £1500 by the Trustees of the Clyde Navigation, (*b*) £410 North British Railway Company 3 per cent. debenture stock, and (*c*) £200 Caledonian Railway Company 4 per cent. debenture stock. In a question with the husband's trustee as to whether these securities fell to be included in the personal estate of the testatrix, and consequently taken into account in the computation of *jus relicti—held* that the securities in question formed part of her moveable estate in accordance with the provisions of the Clyde Navigation Consolidation Act 1858, under which the bond was issued, and of section 23 of the Companies Clauses Act 1863, to which the debenture stock was subject.