

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 relictæ—Act 1661, cap. 32—Bonds and Debenture Stock—Whether Heritable or Moveable quoad Jus relictæ.*

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 relictæ*—held that the securities in question formed part of her moveable estate in accordance with the provisions of the Clyde Navigation Consolidation Act 1853, under which the bond was issued, and of section 23 of the Companies Clauses Act 1863, to which the debenture stock was subject.

The Clyde Navigation Consolidation Act 1858 (21 and 22 Vict. cap. cxlix), sec. 61, is quoted *infra*.

The Companies Clauses Act 1863 (26 and 27 Vict. cap. 118) enacts—Section 23—“Debenture stock, with the interest thereon, shall be a charge upon the undertaking of the company prior to all shares or stock of the company, and shall be transmissible and transferable in the same manner and according to the same regulations and provisions as other stock of the company, and shall in all other respects have the incidents of personal estate.”

Samuel Maxwell and others, the trustees acting under the trust-disposition and settlement of Mrs Janet Drysdale or Robertson, Dunfermline, *first parties*; Captain Robert Maxwell, 2/73 Malabar Infantry, India, and others, the residuary legatees under the testator's trust-disposition and settlement, *second parties*; and Robert Robertson Forrester, solicitor, Broxburn, as trustee and executor acting under the general disposition and settlement of the deceased James Robertson, retired stationmaster, who resided at Gray's Mill Farm, Slateford, Midlothian, *third party*, presented a Special Case for the opinion and judgment of the Court.

The Case stated—“1. The deceased Mrs Janet Drysdale or Robertson, who resided at Plane Tree House, Torrie, Dunfermline (hereinafter referred to as the truster), died on 9th June 1920 survived by her husband, the now deceased James Robertson, retired stationmaster, who resided at Gray's Mill Farm, Slateford, Midlothian. . . . 2. . . . The said trust-disposition and settlement contained no provisions in favour of the truster's husband, the said James Robertson. . . . 3. The said James Robertson died on 21st April 1921 leaving a trust-disposition and settlement dated 1st, and registered in the Books of Council and Session 26th April 1921, by which he appointed Robert Robertson Forrester, solicitor, Broxburn, to be his sole trustee, executor, and administrator, and assigned, disposed, and bequeathed to him the whole heritable and moveable estate wherever situated which should belong to him or over which he might have power of disposal in trust for the purposes therein specified. . . . 4. The first parties gave up an inventory of the personal estate of the truster, and were duly confirmed as executors foresaid conform to testament testamentar in their favour dated 14th October 1920. The amount of the personal estate as given up in said inventory after deducting debts and funeral expenses is £8733. 5. The following bond and debenture stock form part of the truster's estate, viz.—(a) Bond for £1500 dated 7th March 1893 by the trustees for the Clyde Navigation in favour of the truster (then Miss Janet Drysdale), repayable 15th May 1900, bearing interest at the rate of 3½ per cent. per annum, subsequently increased to 5 per cent., payable half-yearly. The bond was renewed from time to time, and by the last minute of renewal, dated 2nd October 1917, the principal sum is repayable on 11th November 1922. By the Clyde Navigation

Consolidation Act 1858, section 61, it is provided that ‘All bonds to be granted by the Trustees and all monies to be advanced and lent on the security of the rates, works, lands, and properties of the Trustees, shall be moveable or personal estate and transmissible as such, and shall not be of the nature of heritable or real estate.’ . . . (d) £410 North British Railway Company 3 per cent. debenture stock. (e) £200 Caledonian Railway Company 4 per cent. debenture stock. With regard to these last two mentioned stocks, the security for repayment of the principal sums is the whole undertakings of the respective companies, comprising heritable and moveable subjects. Interest on the stock is payable half-yearly, but there is no fixed date when the stock is redeemable. . . . 6. The third party, as representing the said James Robertson, has claimed *jus relicti* out of the estate of the truster, and in connection with said claim questions have arisen as to whether the various securities above mentioned are heritable as regards the rights of the husband of the truster, and accordingly do not fall to be taken into account in the computation of the *jus relicti*, or whether they are moveable as regards said rights and fall to be taken into account, and it has been found necessary to have these questions judicially determined. 7. The first parties do not think it necessary to submit any contention. 8. The second parties contend that the various investments above referred to are heritable as regards the rights of the husband of the truster, and are not subject to *jus relicti*. 9. The third party contends that the various securities above mentioned are moveable as regards the rights of the husband of the truster, and as such fall to be taken into account in the computation of *jus relicti*, payable to the third party as representing said husband the now deceased James Robertson.”

The following *question of law* was submitted for the opinion and judgment of the Court—“Do the following items of the truster's estate, or any and which of them, fall to be taken into account in the computation of the *jus relicti* payable to the third party as representing the deceased James Robertson:—(a) The said bond by the Trustees of the Clyde Navigation . . . (d) The said £410 North British Railway Company 3 per cent. debenture stock; and (e) The said £200 Caledonian Railway Company 4 per cent. debenture stock?”

Argued for the second parties—*Jus relicti* was not payable out of bonds with clauses of annual interest, for such bonds remained heritable *quoad* the rights of husband and wife—Act 1661, c. 32; Ersk. Inst. ii, 9, 10, *Stewart's Trustees v. Battock*, 1914 S.C. 179, 51 S.L.R. 183 (where cited as *Stewart's Trustees v. Stewart*), was a binding authority. In that case, although the stocks were expressly declared to be personal estate, it was held that that was not sufficient to alter the law. The provision in section 23 of the Companies Clauses Act 1863 (26 and 27 Vict. cap. 118) that debenture stock should “have the incidents of personal estate,” effected no more than this, that

these bonds were to be transmissible like moveable estate, and it ought not to be construed as cancelling the provisions of the Act of 1661. *Stewart's Trustees v. Battcock* had been followed in *Ross's Trustees*, 1916, 2 S.L.T. p. 31, and by Lord Ashmore in *M'Wiggan's Trustees v. M'Wiggan, supra*, p. 215. In regard to the railway debentures the case of *Breatcliff v. Bransby's Trustees*, 14 R. 307, 24 S.L.R. 233, was in point as an authority for the proposition that a railway mortgage was a real security in which trustees under a deed which authorised investment on real security were entitled to invest trust funds. So far as the Clyde Trust bond was concerned, the presumption was that a private Act of Parliament did not any more than a private deed alter the general law except in so far as it expressly declared such an alteration to be therein effected; and therefore it must not be presumed to alter the law of succession.

Argued for the third party—The Clyde Trust bond was not ruled by the Act of 1661, c. 32. The Clyde Trust Act was self-contained and decided the point in issue, for it expressly declared that bonds granted by the Trustees were to be moveable or personal estate—Clyde Navigation Consolidation Act 1858 (22 and 23 Vict. cap. 149.) The railway debentures were subject to the provisions of section 23 of the Companies Clauses Act 1863, which enacted that they were to be transmissible like other stock of the company and were to have the incidents of personal estate. All these securities had had the character of personal estate stamped upon them by the statutes in virtue of which they had been created, or to which they were subject, and could not therefore fall within the scope of the Act of 1661. They must therefore be treated as moveable *quoad jus relictii*.

At advising—

**LORD JUSTICE-CLERK**—This Special Case relates to several classes of obligatory documents, but the third parties in the end insisted in their contention only in so far as the Clyde Navigation Trust bond (a) and the two railway debenture stocks (d) and (e) referred to in statement 5 are concerned.

The Clyde Trust bond, which was dated 7th March 1893, is subject to this statutory provision—"All bonds to be granted by the Trustees and all moneys to be advanced and lent on the security of the rates, works, lands, and property of the Trustees shall be moveable or personal estate, and transmissible as such, and shall not be of the nature of heritable or real estate." The railway debenture stocks are subject to the provisions of section 23 of the Companies Clauses Act 1863, which is in these terms—"Debenture stock with the interest thereon shall be a charge upon the undertaking of the company prior to all shares or stock of the company, and shall be transmissible and transferable in the same manner and according to the same regulations and provisions as other stock of company, and shall in all other respects have the incidents of personal estate."

Both the Clyde Navigation Trustees and the railway companies are the creatures of statute and cannot go beyond their statutory powers, and bonds and stock issued by them must be subject to any statutory provisions conditioning their issue or creation, or their character and quality when they are created or issued. Parliament was complete master of the situation, and could make such conditions and provisions as it thought proper. Now the Clyde Trust statute clearly provides that the Clyde Trust bonds shall be moveable or personal estate and transmissible as such, and shall not be of the nature of heritable or real estate. As to the railway debenture stock, it is enacted that it is to be transmissible just as other stocks of the respective railway companies, and shall in all other respects have the incidents of personal estate. These provisions are quite clear and precise and without any qualification or limitation.

The position of the second parties is expressed thus—"The second parties contend that the various investments above referred to are heritable as regards the rights of the husband of the truster, and are not subject to *jus relictii*." This contention is founded on the provisions of the Scottish Statute of 1661. The bond and stocks in question, however, are created and issued in virtue of the special statutes and subject to the special provisions before referred to and quoted. In my opinion these special statutes and provisions negative the contention of these parties. I see no sufficient ground for saying that the Statute of 1661 cannot be affected or repealed by the statute of the nineteenth century to which I have referred.

In my opinion the question, so far as the securities I have referred to are concerned, should be answered in the affirmative.

**LORD ORMDALE**—It is with reference to three only of the five items specified in the case that we are now asked to answer the question of law, viz., (a) the bond by the Trustees of the Clyde Navigation, and (d) and (e) the debenture stocks of the North British and Caledonian Railway Companies.

1. The Clyde Navigation Trust bond is issued subject to the Clyde Navigation Consolidation Act 1858, sec. 61, which provides that all bonds granted by the Trustees shall be moveable or personal estate and transmissible as such, and shall not be of the nature of heritable or real estate. That is a perfectly explicit and unqualified enactment, but it is contended that its quite general terms fall to be construed in a special sense, and that their intention is that while the bond which is *sua natura* heritable is to be treated not as heritable but as moveable or personal estate, that does not mean to all intents and purposes, but only to the same effect and extent as the contracts and obligations for sums of money dealt with by the Act of 1661, cap. 32, and subject therefore to the limitation that no part of it is to pertain to the relict *jure relictii*. But the terms of section 61 are too absolute to warrant such a construction,

and while it may be that it was not within the contemplation of the promoters of the Act of 1863 to affect or alter in any way the testamentary powers of the bondholders, it seems to me that from the moment of its coming into existence by virtue of the Act this bond was impressed with the quality of moveable estate for all purposes, and that it falls therefore to be taken into account in the computation of the *jus relictii* payable to the third party as representing the deceased Mr Robertson.

2. The debenture stocks of the two railway companies are also in my opinion moveable estate for all purposes. Parties are agreed that the provisions of section 23 of the 1863 Act are applicable to them. If so, then they are to be transmissible like the other stock of the companies, and "shall in all other respects have the incidents of personal estate." One of the incidents of personal estate is that it is subject to the claims of a relict, unless the words "personal estate" are to be read and understood in a special and limited sense as meaning estate made personal by the Act 1661, cap. 32. There seems to me to be no warrant for so reading them, or for giving them any meaning other than personal estate at common law.

I do not think that in coming to this conclusion I am in conflict with the judgment of the Court in *Stewart's Trustees v. Battcock* (1914 S.C. 179), in which words not precisely the same but not very dissimilar were thought by Lord Dundas to be too vague to warrant the view that I have expressed. The circumstances of that case were different, and what was under construction was a clause in a trust deed. Section 23 of the Companies Clauses Act 1863 was not before the Court, and it is on a construction of that section that I reach the same conclusion as your Lordship.

The LORD JUSTICE-CLERK intimated that LORD BLACKBURN, who was absent at the advising, concurred.

The Court answered the question of law with reference to the three items specified in the affirmative.

Counsel for the First Parties—D. M. Wilson. Agent—W. T. Forrester, Solicitor.

Counsel for the Second Parties—D. P. Fleming, K.C.—A. R. Brown. Agents—Laing & Motherwell, W.S.

Counsel for the Third Party—Hon. W. Watson, K.C.—Maclaren. Agent—James G. Bryson, Solicitor.

Friday, March 3.

SECOND DIVISION.

[Lord Sands, Ordinary.

ROSS v. M'CALLUM AND OTHERS.

*Reparation—Negligence—Licencee—Obligation of Owner of Premises to Take Reasonable Precautions for Safety—Act of Third Party—Relevancy.*

In an action of damages by a father for the death of his son against the owner of a garage the pursuer averred that his son, a lad of eighteen, during his spare time frequented along with certain others the defender's garage with his knowledge and permission, and helped as a volunteer in the work that was being done there; that on the date in question one of the deceased's companions requiring water to replenish the acetylene lamp of his bicycle requested another lad to pour water into the lamp from a pail which to their knowledge usually contained water for filling radiators, but which on this occasion contained petrol; that the latter did so, with the result that the lamp took fire and ignited the petrol in the pail, which the lad dropped, thereby causing the flames to spread through the garage and to set fire to the clothes of the pursuer's son, who sustained injuries from which he subsequently died; that the defender was in fault in allowing the pail, which he knew to be filled with petrol, to stand on the floor of the garage without taking precautions to warn persons frequenting the garage of the danger, or to prevent them mistaking the petrol for water; and that in the case of the pursuer's son this constituted a trap. The defender pleaded that the action was irrelevant. The Court (*diss.* Lord Salvesen) affirmed the judgment of the Lord Ordinary allowing an issue.

Alexander Ross, oncost worker, Forth, pursuer, brought an action against Peter M'Callum, carriage and motor hirer and contractor, Forth, whose trustees and executors were afterwards in the course of the action sisted as *defenders* in his place, for payment of £1000 in name of damages for the death of his son.

The pursuer averred, *inter alia*—" (Cond. 2) The said Alexander Ross junior, who at the time of his death was eighteen years of age, was a pit bottoomer, but during his spare time with the knowledge and permission of the defender he frequented in the evenings the defender's garage in Main Street, Forth, where occasionally he was employed by or assisted the defender in the work of repairing motor cars. (Cond. 3) On the evening of the 10th day of November 1920 the pursuer's said son was in the defender's garage. There were also present certain other young men, who like the pursuer's son were accustomed, with the knowledge and permission of the defender, to go there during the evenings and to assist