the ship or for the persons to whom the cargo of coal was at the time being shipped, the points expressly raised by the appellants being that either the Leith Dock Commissioners, on the one hand, were the actual employers of the respondent within the meaning of the Workmen's Compensation Act, or that the respondent as a member of a trimming squad was in the employment of the head of the squad, neither of which contentions was proved. These being the only points raised before the Sheriff-Substitute, he was not much to blame for sending the former case up in the shape he did, but the important point raised before us led us to have it amended. Now as amended I entirely agree with your Lordship that there can be no doubt about the question. It was said that the appellants did not select the men. There was selection in the way which was arranged for the benefit of the public by the Dock Commissioners, and to say that there was no selection by the appellants because they got people better qualified than themselves to select the men seems to me to be something very like nonsense; it does not matter what means were taken for the selection of the workman if the appellants acquiesced in the way in which he was selected.

In the next place it was said that the appellants had no power of dismissal. That is not said in the case from beginning to end, and I think it pretty clear that if the appellants had wished a man to be dismissed he would have been at once dismissed by the gaffer.

Then it was said that the appellants had no power of control or superintendence. This argument is disposed of by the findings in the amended case where it is stated that the appellants did in fact give instructions for the loading of the coal, and that they superintended the work.

Last of all it was said that the appellants did not pay the wages of the men, and it is suggested that the shipowners paid the wages because it came somehow out of their pockets on a balancing of accounts between them and their agents. It would be quite as correct to say that Endemann & Co. paid the wages. In questions of this sort it is perfectly ridiculous to go into the question of where the money ultimately came from that paid the wages of a particular workman. It is perfectly clear that in fact they were paid by the appellants and by nobody else. Of course the appellants took credit for these wages in their accounts with the shipowners, and they in a sense recovered them from the charterers by receiving an increased freight, an arrangement entered into for the convenience of everybody. In that state of matters it seems to me that in a question with the respondent the appellants here were not agents at all. They were principals, and were the parties who in every sense of the word were the employers of the respondent. The shipowners had nothing whatever to do with the shipment of coals except as having an interest in the freight under deduction of all expenses as appearing on an accounting between Messrs George Gibson & Co. and Messrs Endemann & Co., Messrs George Gibson & Co. being the only persons who had anything directly to do with loading the coal on board this vessel, as appears from the contract between them and Messrs Endemann & Co. annexed to the amendment to the case.

On the whole matter I have no doubt whatever that we ought to answer the questions in the stated case to the effect that the respondent was a workman, that the appellants were his employers, and that they are liable in compensation.

LORD DUNDAS was absent.

The Court answered the second and third questions in the affirmative.

Counsel for the Appellants — Hunter, K.C.—Spens. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Respondent—G. Watt, K.C.—Aitchison. Agent—J. Stuart Macdonald, Solicitor.

Tuesday, March 8, 1910.

SECOND DIVISION.

STARK'S EXECUTOR *v.* STARK AND OTHERS.

Succession—Heritable and Moveable—Promissory-Note — Jus relictæ — Act 1661 *cap.* 32.

A promissory-note was granted in the following terms:—"3rd January 1907—One year after date I promise to pay to Daniel Stark, Esq., Burnbank Cottage, Kilsyth, the sum of One hundred pounds sterling, with interest at 5 per cent. per annum, for value received. JAMES M'CUBBIN." After the lender's death, ten months after the note became due, neither principal nor interest having been paid, *held* that the promissory-note was moveable *quoad jus relictæ*.

Succession — Heritable and Moveable — Receipt—Jus relictæ—Act 1661, *cap.* 32.

A receipt duly signed was granted in the following terms:—"Town Clerk's Office, Kilsyth, 14th November 1905—Received by us on behalf of the Provost, Magistrates, and Councillors of the burgh of Kilsyth, from Mr Daniel Stark, Burnbank Cottage, Kilsyth, the sum of Six hundred pounds sterling as a temporary loan, repayable with interest at the rate of three and three quarters per centum per annum." After the lender's death on 30th October 1908, interest having been paid half yearly up to that event, *held* that the receipt was moveable *quoad jus relictæ*.

Robert Stark, clothier, Kilsyth, a brother and the executor-dative of Daniel Stark, who resided at Burnbank Cottage, Kilsyth,

of the first part; Mrs Mary Kerr or Stark, his widow, *of the second part;* and Mrs Isabella Stark or Stark, wife of John Stark, grocer, Kilsyth, with consent of her husband as her curator and administrator-at-law together with the remaining beneficiaries under the will of the said Daniel Stark, *of the third part*, presented a special case to have it decided whether (1) a promissory-note for £100 granted by James M'Cubbin, Kilsyth, and (2) a receipt for £600 granted by the Magistrates of Kilsyth, both in favour of the said Daniel Stark, were heritable or moveable *quoad jus relictæ*.

Daniel Stark died on 30th October 1908. He left a holograph settlement dated 8th December 1904, by which he provided that his widow was to get "the share of any estate allowed to her by law." In addition to certain specific legacies he also left a number of pecuniary legacies to relatives which exhausted the free residue of his estate.

The terms of the promissory-note in question are given *supra in first rubric.*

The terms of the receipt in question are given *supra in second rubric.*

The Case stated, *inter alia*—"6. The promissory-note for £100 was granted in exchange for a loan of that amount by the deceased to the said James M'Cubbin. The note was not paid when it fell due on 6th January 1908, nor was any interest paid thereon prior to the deceased's death, but the £100 therein contained, and interest from the date of the document, have since been paid to the first party.

"7. The acknowledgment or receipt for £600 was granted on 14th November 1905, in acknowledgment of a loan or deposit of that amount by the deceased to the burgh of Kilsyth. Thereafter the deceased received payment from the burgh at each half-yearly term up to Whitsunday 1908, being the last term before his death, of interest on said sum at the rate mentioned in said document. Said loan was outstanding at the date of deceased's death, but has since been repaid to the first party.

"8. The circumstances in which said loan of £600 was given were as follows:—Kilsyth is a police burgh subject to the provisions of the Burgh Police (Scotland) Acts, 1892 to 1903. . . . In 1905 the Town Council required funds for the completion of a water reservoir then in course of construction. On two previous occasions money had been borrowed under the provisions of section 374 of the Burgh Police (Scotland) Act 1892, for the construction of the reservoir, and bonds in terms of section 376 of said Act, assigning the water assessments in security, granted therefor. On 10th November 1905, the sums borrowed on bond having been spent, the Town Council agreed to take steps to borrow other £4000, and instructions were given for the advertisements required by section 374 of the said Act. Meantime, as a payment was due to the contractors, it was agreed at a meeting of the Town Council, held on 13th November 1905, to borrow on temporary loan the amount immediately required, the minute of the meeting bearing:—'The meeting agreed to accept the following temporary loans—£600 from Daniel Stark at 3¾ per cent. £600 from the trustees of the Model Building Society at 3½ per cent. repayable on six months' notice. The meeting authorised the Provost and Bailie Grindlay and the Clerk to sign the temporary receipts.' The £600 was advanced by the said Daniel Stark on 14th November 1905, and the acknowledgment or receipt before referred to was granted therefor. . . . Up to said 13th November 1905 the requirements of section 374 of said Act as to advertisement had not been complied with, but before the next monthly meeting of the Town Council, held on 11th December 1905, this had been done, and it was then formally agreed to borrow £4000 on security of the water assessment. At the same meeting bonds in favour of other lenders for two sums of £750 and £650, to form part of said £4000, were submitted and signed. These bonds were in the form given in section 376 of said Act, and assigned the water assessment in security, and they were duly entered in the register of bonds kept in terms of section 378 of the Act. The Town Council did not then succeed in borrowing the whole of the £4000 on bond, and the two loans of £600 from the said Daniel Stark and the said Model Building Society were accordingly not then repaid, but they continued to be treated by the Town Council as temporary loans, and were not entered in said register of bonds. With the exception of said minute there are no other documents or writings bearing on said loan."

The *questions of law* submitted were—"1. Is the debt of £100 contained in said promissory-note heritable or moveable in a question with the second party? 2. Is the debt of £600 contained in said acknowledgment by the Provost, Magistrates, and Councillors of the burgh of Kilsyth heritable or moveable in a question with the second party?"

Argued for the first and third parties—These loans were heritable at common law, and, under the Act of 1661, c. 32, they were still heritable *quoad fiscum* and *quoad* the widow. There were three *indicia* of their heritable character—(1) an obligation to pay, (2) a clause of annual interest, (3) a fixed period for repayment—*Downie* v. *Downie's Trustees*, July 14, 1866, 4 Macph. 1067, 2 S.L.R. 204; *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. 590, 44 S.L.R. 486. Payment of interest was an essential criterion of a heritable bond—Erskine's Institutes, ii, 2, 9. These conditions were fulfilled in the case of the documents in question. The promissory-note contained an express obligation to pay, and annual interest was expressly stipulated for. Where there was no such express stipulation as to interest a bill of exchange was held to be moveable, and interest due subsequent to the date of payment was due as damages—Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61), secs. 47 and 57. But where there was a stipulation for interest, interest was due,

not as damages but as part of the debt—*Hudson* v. *Fosset*, 1843, 13 L.J., C.P. 141; Biles on Bills, 16th ed., p. 439. The clause of interest here indicated an intention to treat the promissory-note as an investment, and the fact that the money was not called for when due confirmed this. It was impossible to read the words "with interest at 5 per cent. per annum" as a stipulation for interest up to the date of payment, and as damages after that date. In *Gilhagie* v. *Orr*, 1738, M. 1421, founded on by the second party, the question of heritable or moveable was not decided. The second document was also heritable. Here too there was a definite obligation to pay, a clause of annual interest, and the term of payment was at a distant or uncertain day. This was analogous to *Dawson's* case, *cit. sup.* Even if the document were insufficiently stamped it might be looked at for a collateral purpose—Grierson on Stamp Duties, p. 42; *Macfarlane* v. *Johnston*, June 3, 1864, 2 Macph. 1210; *Matheson* v. *Ross*, 1849, 6 Bell's App. 374; *Durie's Executrix* v. *Fielding*, January 26, 1893, 20 R. 295, 30 S.L.R. 371; *Birchall* v. *Bullough*, [1896] 1 Q.B. 325, where the use of the document was to decide whether the amount was heritable or moveable *quoad* succession.

Argued for the second party—The rule under which personal bonds were heritable *quoad* the widow was a well-defined exception, and should not be extended to points beyond which it had already been carried. The present case would carry it beyond previous cases and beyond the reason of the rule. The ratio was that what yielded annual profits, or was treated as an income-producing subject, was regarded as heritable, because that was the intention of the deceased. The main consideration was how the testator proposed to deal with the subject. For the first time the Court was being asked to treat a promissory-note as heritable. Here the promissory-note was not treated by the deceased as an interest-bearing subject, he was not at his death in receipt of an annual return from it. This annual return made the income analogous to the return from lands, and was essential to give a heritable character. There was nothing on the face of the document to indicate an intention to treat it as a revenue-bearing subject. Principal and interest were treated together, and this distinguished it from the cases cited, where there was a distinct stipulation for periodical payment. Erskine, ii, 2, 9, made the yielding of fixed yearly profits the criterion in such cases. In *Gilhagie* v. *Orr*, *cit. sup.*, it was held that a similar document fell under the *jus mariti*. In *Downie's* case, *cit. sup.*, there was an express clause for payment of periodical interest. In *Dawson's* case, *cit. sup.*, the document showed that it was intended to be an interest-bearing subject. In *Bennett's* case interest was payable half-yearly. The loan to the burgh of Kilsyth was a temporary loan repayable on demand, and principal and interest were to be repaid together. Further, the document was insufficiently stamped—Stamp Act 1870 (33 and 34 Vict. cap. 97), sec. 49; *Thomson* v. *Bell*, October 26, 1894, 22 R. 16, 32 S.L.R. 16; *Scott's Trustees* v. *Garden's Trustees*, 1905, 12 S.L.T. 724; *Mortgage Insurance Corporation, Limited* v. *Inland Revenue*, 1888, 21 Q.B.D. 352. In this view the money was not due under the deed, but was found money and was moveable.

At advising—

LORD SKERRINGTON—The questions in this special case are whether (1) a sum of £100, and (2) a sum of £600, which formed part of the executry estate of the late Daniel Stark, ought to be treated as heritable in fixing the amount of his widow's *jus relictæ*. The affirmative is maintained by the third parties, who are the legatees under Mr Stark's will. The negative is maintained by the second party, who is his widow.

The £100 above referred to was due under a promissory-note, dated 3rd January 1907, by which a Mr M'Cubbin promised one year after date to pay Mr Stark £100 "with interest at 5 per cent. per annum." This promissory-note was granted in consideration of a loan by Mr Stark to Mr M'Cubbin. It was not paid when it fell due on 6th January 1908, nor was any interest paid thereunder prior to the death of Mr Stark on 30th October 1908. The principal sum and interest have since been paid to the executor.

The third parties maintain that this promissory-note is a contract or obligation containing a clause "for payment of annual rent and profit" of the kind referred to in the Act 1661, cap. 32; that it falls within the exception specified in that Act; and that the money due under it is heritable at common law, according to the principle explained by Erskine in his Institutes, ii, 2, 9, from and after 6th January 1908, the date of maturity.

The first thing which strikes one about this argument is that the promissory-note in question was not well suited for the purpose of constituting a *feudum pecuniæ*, by which I mean an investment carrying fixed yearly or termly profits. The principal and interest are repayable together at the end of the year, and there is no undertaking on the part of the debtor to pay interest prior to that date. Further, there is no stipulation that the debtor shall continue to pay interest in the event of the principal sum not being repaid at the end of the year. In the event of the bill being dishonoured at maturity (as it was in point of fact) the creditor would be entitled to such interest by way of damages as the Court might think fit to award him—see 45 and 46 Vict. cap. 61, sec. 57 (1) and (3), sec. 47 (1), and sec. 87 (1). An uncertain claim of damages seems the very reverse of a fixed yearly return. Interest from the date of dishonour has been due *ex lege* on bills since the Acts 1681, cap. 20, and 1696, cap. 36, and on promissory-notes since the Act 12 Geo. III, cap. 72, sec. 36; but Erskine in the passage cited is at pains to point

out that liability for interest *ex lege* does not make a debt heritable. On principle, therefore, I am of opinion that the argument fails.

As regards the authorities, the case of *Porteous* v. *Veitch & Hay*, 1627, M. 5463, is an express decision to the effect that a bond for a sum to be paid at a specified term "with so much for the annual rent thereof from the time of the borrowing to the time of payment, and bearing no other clause of payment of annual rent thereafter," is not a heritable bond but is moveable. Another decision exactly in point is *Gilhagie* v. *Orr*, 1738, M. 1421, which related to a bill at twelve months with a clause for payment of interest from its date. This bill was held to be valid and to fall under the *jus mariti* of the drawer's husband. It is surprising to discover even a single decision on this branch of the law relating to bills of exchange, seeing that until the end of the eighteenth century it was considered doubtful in Scotland whether a clause in a bill providing for payment of interest from its date did not vitiate the whole instrument. The decisions were conflicting, but Erskine thought that such a clause was inconsistent with the nature of a bill and so inferred a nullity (iii, 2, 38). Accordingly he mentions promissory-notes and bills as examples of debts which are moveable because they contain no clause of interest (ii, 2, 9).

In the case of *Sword* v. *Blair*, 1790, M. 1433, it was finally decided in Scotland that a bill with a stipulation for payment of interest from its date was valid and effectual, and sec. 9 of the Act of 1882 is to the same effect. For the reasons already indicated I do not think that the clause of interest in the promissory-note under consideration has the effect of making the debt heritable even after the date fixed for repayment of the principal. It may happen hereafter that the Court may have to consider bills or notes with clauses of interest expressed in other terms, and the question will then arise whether a bill of exchange or promissory-note can ever be regarded as creating a *feudum pecuniæ*. Now that *jus mariti* has been abolished and that *jus relictæ* is compensated by *jus relicti*, it deserves serious consideration whether the time has not come for repealing the exception contained in the Act 1661, cap. 32.

The second question relates to a sum of £600 contained in an acknowledgment granted by the Provost, Magistrates, and Councillors of the burgh of Kilsyth in favour of Mr Stark on 14th November 1905. It acknowledges the receipt of £600 "as a temporary loan repayable with interest at the rate of 3½ per centum per annum," and it is signed over a 1d. stamp. This document looks very like an informal promissory-note payable on demand according to the decisions which are conveniently summarised in Mr Hamilton's Commentary on the Bills of Exchange Act, p. 182. If the document is void for want of a proper tamp I do not see how it can be held to create a heritable right. It is, however, doubtful whether it can be regarded as a promissory-note, seeing that the amount of interest payable thereunder cannot be ascertained without going outside the writing. (See *Lamberton* v. *Aiken*, 1899, 2 F. 189, *per* Lord M'Laren, p. 191.) Accordingly it is safer to assume that the acknowledgment is sufficiently stamped. Upon this assumption I have come to the conclusion that the £600 in question is moveable, and that substantially for the same reasons as in the case of the £100. The principal and interest are repayable once for all and both together on a single date, viz., on demand, and there is no stipulation to the effect that interest is to be paid prior to the date when repayment is demanded, or after that date if the debt remains unpaid. No doubt the debtor and the creditor may agree that interest shall be paid at regular or irregular intervals so long as the principal remains unpaid, and in the present case it is stated that Mr Stark received the interest at each half-yearly term. But these payments were made not in terms of the written obligation but rather in spite of it. Accordingly, although the date of repayment of the principal is in a sense uncertain, I am of opinion that the clause of interest is not such as makes the debt heritable. I was not referred to, and I have not discovered, any decision with reference to a writing at all like that under consideration. The three latest cases are *Downie* v. *Downie's Trustees*, 1866, 4 Macph. 1067; *Dawson's Trustees* v. *Dawson*, 1896, 23 R. 1066; and *Bennett's Executrix* v. *Bennett's Executors*, 1907 S.C. 598. In the first two there was a clear obligation for the payment of interest periodically and separately from the principal. In *Bennett's* case the writing contained the words "We propose to pay interest on this half-yearly, which we presume will be agreeable to you." The Court—Lord Ardwall doubting—construed this as an obligation to pay interest half-yearly. These cases seem to me to be a complete contrast from the present one. I have looked at the earlier cases, but none of them appears to help the argument of the third parties' counsel.

I accordingly advise that both sums should be held to be moveable in a question with the widow.

The Lord Justice-Clerk and Lord Ardwall concurred.

The Court pronounced this interlocutor—

> "Answer the two questions of law . . . by declaring that the two debts of £100 and £600 are moveable and subject to the *jus relictæ* of the second party. . . ."

Counsel for the First and Third Parties—Lorimer, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second Party—Chree. Agents—Young & Falconer, W.S.