verdict he was in the end an absolute loser. This leads to many defenders paying a substantial sum where there is no true case against them rather than run the risk of being subjected to large loss even if successful. I hold that in this case we should exercise our discretion under the Act of 1907 and remit this case to the Sheriff for proof.

LORD DUNDAS — I quite agree. The question to which the Court has to address itself is whether it thinks this case unsuitable for jury trial, and, looking to its general aspect as disclosed on the pursuer's record, I am of opinion that it is unsuitable. I understand that there has been no case decided under sec. 30 of the Act of 1907, but if authority were needed I agree that the case of *M'Nab* (6 F. 925), decided at a time when the statutory power of the Court was less explicit than it is now, is *a fortiori* of the present.

LORD GUTHRIE—I agree. In this case there are four points which weigh with me—(1) There is no averment of any serious physical injury; (2) there is no averment of any permanent injury other than the very guarded statement in cond. 4 that the accident will "probably" have a permanent effect on the pursuer's nervous system and "may" result in his earning capacity being permanently diminished; (3) there is no averment that medical attendance was made necessary by the accident; (4) the witnesses are all in Aberdeen, and much additional expense would be incurred by bringing them here if the case were tried before a jury. I agree that the views expressed in *M'Nab* (6 F. 925) are applicable in this case, and indeed in that case the averments of injury are even stronger than they are here.

LORD SALVESEN was absent.

The Court refused the pursuer's application for a jury trial in the Court of Session, and remitted to the Sheriff to proceed in the case.

Counsel for the Pursuer—A. M. Stuart. Agents—Balfour & Manson, S.S.C.

Counsel for the Defenders—R. S. Brown. Agents—Alex. Morison & Co., W.S.

Wednesday, January 15.

SECOND DIVISION.

MILLIGAN AND ANOTHER (HANNAY'S TRUSTEES).

Succession—Vesting—Fee and Liferent—Trust—Construction—Destination on Failure of Other Provisions to "my own heirs in mobilibus"—Period at which "heirs in mobilibus" to be Ascertained—Vesting subject to Defeasance.

A testator by his trust-disposition and settlement destined a part of the residue of his estate to his son and daughter in liferent in the proportions therein specified, and he directed that if either of his children should die without leaving issue, the share liferented by the deceased should "fall to my own heirs *in mobilibus*." The deed contained a clause which declared that "neither of my children shall have a vested right in the capital." The testator died survived by the son and daughter, who were his heirs *in mobilibus* at the date of his death. On the death of the daughter without issue a competition arose as to the parties entitled to the share liferented by her.

Held (*diss.* Lord Salvesen) that the parties entitled to succeed were those who were the heirs *in mobilibus* of the testator at the date of his death.

Muirhead's Trustees v. *Torrie*, November 12, 1912, 50 S.L.R. 182, *commented on.*

David Macbeth Moir Milligan and another, testamentary trustees of the deceased John Hannay, Southville, Dollar, *first parties;* Peter Hannay, only son of the testator, *second party;* and Miss Jemima Graham, executrix of the deceased Miss Elizabeth Harriet Caroline Hannay, only daughter of the testator, *third party*, presented a Special Case for the opinion and judgment of the Court of Session.

The testator died on 28th November 1901, leaving a trust-disposition and settlement, dated in 1898, whereby he conveyed in trust his whole estate of every kind belonging to him at the date of his death. The fourth purpose dealt with the residue of the trust estate, heritable and moveable. One-half thereof was directed to be given to his wife for her own absolute use and disposal, and with that the case was not concerned. With regard to the other half of the residue, the trustees were directed to hold it and pay to or apply for his wife during her life the free revenue and income to be derived from the same, and after her death, for the liferent use of the testator's son Peter Hannay and his daughter Miss Elizabeth Harriet Caroline Hannay in the proportions therein set forth. The deed contained a clause to the effect that "neither of my children shall have any vested right in the capital of said balance." With regard to the capital of the half of residue so to be liferented, the ultimate destination on the failure of the other purposes, an event which happened, was to the truster's own "heirs *in mobilibus*." The purposes which failed included a destination of the fee of the share of the residue liferented by Miss Hannay to her issue. Mr Hannay's widow survived him, but died in 1904. The son Peter survived. The daughter Miss Hannay died unmarried on 12th January 1911, leaving a settlement by which she appointed Miss Jemima Graham as her sole executrix and administrator.

Among the *questions of law* were the following:—"2. Do the testator's heirs *in mobilibus* fall to be ascertained as at his own death? or 3. Do they fall to be ascertained as at the death of Miss Hannay?"

Argued for the second party—The term "heirs *in mobilibus*" meant the persons who were the heirs *in mobilibus* of the testator at the date of Miss Hannay's death. The clause which excluded the children from taking any vested right in the capital was inconsistent with their taking the fee as heirs *in mobilibus* at the date of the testator's death. The following case was referred to—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 314.

Argued for the third party—The term "heirs *in mobilibus*" designated the class of persons who would have been entitled to succeed to the testator on intestacy at his death under the Moveable Succession (Scotland) Act 1855 (18 Vict. cap. 23). That was the natural meaning of the words, and the term must be interpreted according to its natural meaning—*Gregory's Trustees* v. *Alison*, April 8, 1889, 16 R. (H.L.) 10, *per* Lord Watson at p. 14, 26 S.L.R. 787, at p. 789. Moreover, the fee of the share of residue in question vested at the testator's death subject to defeasance in that class—*Steel's Trustees* v. *Steel*, December 12, 1888, 16 R. 204, *per* Lord President at p. 208, 26 S.L.R. 146, at p. 148; *Coulson's Trustees* v. *Coulson's Trustees*, 1911 S.C. 881, 48 S.L.R. 814, *distinguishing Johnston's Trustees* v. *Dewar*, 1911 S.C. 722, 48 S.L.R. 582. The clause which purported to exclude the children from taking a vested right was merely a clause which it was necessary to insert in order to keep the succession open to Miss Hannay's children if she should have any.

At advising—

LORD DUNDAS—[*After dealing with the facts of the case and with a question which is not reported*]—The second and third questions relate to the disposal of the balance of the fee of the share of the half of Mr Hannay's residue which was life-rented by his daughter. The succession to it opened upon her death to the testator's heirs *in mobilibus*. We have to decide whether these heirs are to be ascertained as at his own death or as at that of his daughter. This question is attended with considerable difficulty, and (though the sum here at stake seems to be a very small one) was, I think, worthy of a fuller and more careful argument than that to which we listened, but I have come to the conclusion that the former of the alternative views suggested is the correct one. The phrase "heirs *in mobilibus*," which in our older law was equivalent to next-of-kin, has acquired a specific and different meaning since the passing of the Intestate Moveable Succession (Scotland) Act 1855 (18 Vict. cap. 23) (see *Young's Trustees* v. *Janes*, December 10 1880, 8 R. 242, 18 S.L.R. 135; *Gregory's Trustees* v. *Alison* 1889, 16 R. (H.L.), 10, *per* Lord Watson at p. 13). It means the class of heirs who would be entitled under that Act to succeed to the moveable estate of one who died intestate. Now in *Mortimore* v. *Mortimore* (1879, 4 A.C. 448, *affg.* 7 Ch. Div. 322) the House of Lords, following *Bullock* v. *Downes* (1860, 9 H.L.C. 1), decided that where a will destined money to be paid on failure of certain issue to "such person or persons as will then be entitled to receive the same as my next-of-kin under the statute for the distribution of intestates' estates," the class of "next-of-kin" described the persons who filled that character at the time of the death of the testator. The Lord Chancellor (Cairns) said, in allusion to the words above quoted—"That is a class which, according to the statute, must be ascertained at the death of the testator, and as I took the liberty to mention during the argument, it is not an artificial class of next-of-kin to be created. The only other words are 'that the same be paid to such person or persons as will *then* be entitled to receive the same.' Now I am quite willing to look at the word 'then' as if it meant at the expiration of the preceding limitation, but then what does this amount to? Why this. At the expiration of the preceding limitation you are to find out the hands into which you are to pay the money, but you must do that by first ascertaining who were his next-of-kin at the time of his death." In *Johnston's Trustees* v. *Dewar* (1911 S.C. 722) the Court had to consider the period at which a testator's "nearest in kin" should be ascertained, and decided upon a construction of the will that his "nearest in kin" should be ascertained not at his death but at a later period. Lord Kinnear, in whose opinion Lord Mackenzie and I concurred, expressed the view that "There can be no presumption founded upon what is supposed to be the primary meaning of these words, because the words are descriptive of a class; they apply equally to the class of persons who answer the description of nearest in kin at one time, and to those who answer that description at another time. The body of a man's nearest relations must necessarily vary from time to time with the birth of new relations and the death of old ones; and the mere words 'nearest of kin' to my mind convey no significance whatever except that of propinquity of blood at whatever time it is necessary to look for the persons who answer the description." But his Lordship went on to point out the distinction between the case before him and such cases as *Mortimore*, and said—"Now if the words next-of-kin in our law implied any reference to a right of succession at all, I think the case of *Mortimore* v. *Mortimore* would be applicable, because although the words are not qualified by an express reference to the statute, if the testator means that the people who are to take benefit by his will are the people who take under the law of intestate succession, they according to the law must be fixed at the date of his death when his right passed by inheritance to them. But the words 'nearest of kin' have no such significance at all; on the contrary, they are specially distinguished by the statute which regulates moveable succession in Scotland from heirs *in mobilibus*." It seems to me that the present question is precisely covered by the words just quoted. I think the heirs *in mobilibus* must be found as at the testator's own

death, and not at any later period. The presumption to that effect is a very strong one. It may, of course, like other presumptions, be redargued if a contrary intention is expressed, or can be held upon sufficient grounds to be implied If a testator appointed his heirs *in mobilibus* to be his ultimate destinees, and added words indicating that he meant those persons who would answer that description if his death had happened at the time when the ultimate destination should come into operation, the legal presumption would be overcome by the plain language of the instrument. And short of such express declaration a contrary intention might well be inferred as matter of implication from the tenor of the deed as a whole. A very recent example of this may be found in *Muirhead's Trustees* v. *Torrie* (50 S.L.R. 182), where the First Division reversed the decision of the Lord Ordinary (Skerrington), but the case, in every way an extremely narrow and special one, is not, I think, likely to form a precedent in the future, and seems to me to have no application here. It is said that in the present case a contrary intention is sufficiently evidenced by the clause already quoted, that "neither of my children shall have any vested right in the capital of said balance" of residue. I do not think this is so. I read these words of exclusion as importing no more than that the original gift by the testator to his children of the capital of the balance of this share of his residue was one of liferent merely and not of fee to the donees, and I cannot see how this should prevent the latter from coming to share as members of the class or constituting the class—heirs *in mobilibus*—to whom the fee is destined on the failure of the prior purposes. (See *Bullock* v. *Downes*, *sup. cit.*, *per* Lord Campbell, L.C., at p. 13, and Lord Cranworth at p. 18). The anomaly, if anomaly there be, in the result I arrive at would not be removed if the contrary view were affirmed, for the testator's son Peter Hannay would in that event, as I read the settlement, receive the whole of the share of residue in question. I can find in Mr Hannay's trust-disposition nothing to rebut the ordinary legal presumption as inferring a contrary intention. I do not proceed upon the theory suggested at the discussion that the fee in question vested *a morte testatoris* in his children as his heirs *in mobilibus* at his death, subject to defeasance, further than to this extent, that, as everyone knows, a man's heirs-at-law, in heritage or in moveables, must take by inheritance so far as they are not ousted or defeated by his testamentary provisions. I read Mr Hannay's settlement as meaning that having made every provision he thought it necessary to make, he said in effect, "If and when these fail, let the law distribute the property." It seems to me that he intended, if the expressed purposes of his settlement proved ineffectual, to leave the balance of residue to be dealt with as if he had made no further disposal of it. His children, though in form they take the balance under the provisions of the deed, take it truly in their capacity of heirs in intestacy. I am therefore for answering the second question in the affirmative, and the third in the negative.

LORD SALVESEN—[*After dealing with a question which is not reported*] — The second question, while it is stated in general terms, has special reference to a share of the residue of John Hannay's estate. His trustees were directed to hold and invest this share of residue, and to pay the revenue thereof to his daughter Elizabeth Hannay during her lifetime. In the event of her dying without issue the fee was to fall to the testator's heirs *in mobilibus*. At what point of time are these heirs to be ascertained? For the third party it was said that the residue must be ascertained as at the death of the testator, and that as Miss Hannay was herself one of the heirs *in mobilibus* at that time, her estate falls to be enriched by one-half of the capital of the half share of residue liferented by her. The other view maintained by the second party is that the heirs *in mobilibus* fall to be ascertained as at the death of Miss Hannay. I am of opinion that this latter view is a sound one. The testator expressly declared that neither of his children should have any vested right in the capital of the balance of his estate. Are we to find notwithstanding this direction that the fee vested in these children to the extent of one-half of the provision destined to each? I am unable to assent to this view. The leading case of *Young* v. *Robertson* (4 Macq. 314) makes it clear that the presumption in favour of vesting *a morte* may be overcome by evidence of a contrary intention. I find such evidence here in the express declaration as to vesting already referred to. In the case of *Johnston's Trustees* v. *Dewar* (1911 S.C. 722) the Court decided in favour of the date of distribution as being the date of vesting, although there was no declaration, as in the present case, that vesting should not take place in the person of the liferenter. No doubt the ultimate beneficiaries in that case were the testator's "nearest in kin" and not his heirs *in mobilibus*, but it is just as easy to ascertain the testator's heirs *in mobilibus* at some time subsequent to his death as it is to ascertain his nearest in kin.

The facts of the present case appear to me to be stronger than those which came under the consideration of the First Division in *Muirhead's Trustees* v. *Torrie*, 50 S.L.R. 182. In that case there was no express declaration that the fund was not to vest until the expiry of the liferent, although on other grounds it was held not to do so. In other respects the circumstances were not unlike, except that the ultimate destination was to the heirs and executors whomsoever of Mrs Muirhead, and that it occurred in a marriage contract and not in a testamentary settlement. Both these differences appear to me to be immaterial. "Heirs and executors whomsoever" is just an equivalent expression for heirs *in mobilibus* when the estate happens to be wholly moveable. Lord Kinnear,

who gave the leading opinion, held that the question was one of intention, and that the granter did not intend that in the event which happened, namely, that she had a child who predeceased the liferenter, her money should go to the child's heirs because the child was her heir and executor at the time when she died, but that she intended it to go to her own heirs in the event of failure of children. It is plain that the testator here contemplated that the two children, to each of whom he gave a share of the residue of his estate in liferent, would survive him, and of course he must be taken to have known that at his death they would be his heirs *in mobilibus*. Suppose he had only one child and had given the whole residue in liferent to that one, and on the child's death without issue had directed that the funds should go to his own heirs *in mobilibus*, and at the same time excluded the child from taking any vested interest in the fund, is it possible to hold that his intention was that the child nevertheless should take such an interest (subject only to defeasance in the event of his having issue) and might divert it to strangers by a *mortis causa* deed? I confess that I cannot understand such a view. There is here no question of intestacy, in which case it sometimes happens that the fund goes to a testator's heirs through the operation of law, although he had plainly indicated that he did not desire it to do so. That result only happens where the testator has failed to dispose of the fund. Here he has not failed to do so, but has provided for the very circumstance which has occurred. If, then, as is shown by the cases of *Johnstone* and *Muirhead*, words descriptive of a class usually ascertained at the testator's death may in virtue of the presumed intention of the testator be held to refer to the later period when the gift actually takes effect, I do not think that apart from express declaration any case is likely to occur where the intention could be more clearly inferred than in the present. I am accordingly of opinion that the second question falls to be answered in the negative and the third in the affirmative.

LORD GUTHRIE—I concur in the result arrived at by Lord Dundas. On the second point involved in the second and third questions my opinion has varied. I still feel that there is great force in the views expressed by Lord Salvesen, founded on the clause "neither of my said children shall have any vested right in the capital of said balance," but on the whole, although with hesitation, I am not prepared to differ from the result arrived at by Lord Dundas, in which I understand your Lordship in the chair concurs.

The LORD JUSTICE-CLERK concurred.

The Court answered the second question in the affirmative and the third question in the negative.

Counsel for the First and Second Parties—R. S. Brown. Agents—Martin, Milligan, & Macdonald, W.S.

Counsel for the Third Party—C. H. Brown. Agents—Mackintosh & Boyd, W.S.

Thursday, January 16.

SECOND DIVISION.

[Sheriff Court at Perth.

SIEVWRIGHT (CROCKART'S TRUSTEE) *v.* HAY & COMPANY, LIMITED.

Bankruptcy—Illegal Preference—Retention—Act 1696, *cap.* 5—*Act in Ordinary Course of Business—Auctioneer Entrusted by his Debtor within Sixty Days of his Bankruptcy with Displenishing Sale.*

A firm of auctioneers made it a condition of the sales conducted by them that they should have a right of general lien over all goods and moneys coming into their possession for all debts due to them by the owner. They were employed by an insolvent farmer within sixty days of his bankruptcy to conduct a displenishing sale, but without knowledge on their part of his insolvency, and without intention on his part by so employing them to confer a preference on them over his other creditors. On the auctioneers claiming the right to retain out of the proceeds of the sale the amount of a debt due to them by the farmer, the trustee on his sequestrated estate pleaded that the handing over of the goods to the auctioneers for the purpose of the sale was struck at by the Act 1696, cap. 5, inasmuch as it had the effect of giving the auctioneers an illegal preference.

The Court *held* that the Act did not apply, as the transaction was in the ordinary course of business, and was not intended to create a preference.

William Barclay Sievwright, accountant, Perth, trustee on the sequestrated estates of John Crockart, formerly farmer, North Cassochie, near Methven, *pursuer*, brought an action in the Sheriff Court at Perth against Hay & Company, Limited, auctioneers, Perth, *defenders*, for £185, 12s. 9d., being the balance of the proceeds of the sale of the bankrupt's stock, crop, and implements carried out by them on 22nd October 1910. On 17th December 1910 the bankrupt's estates were sequestrated. The sale realised £321, 4s., after deduction of the defenders' commission and expenses, and out of this sum the defenders retained the sum sued for in payment of the balance of a debt due to them by the bankrupt.

The pursuer pleaded, *inter alia*—"(3) Said voluntary tradition of stock, crop, and implements within sixty days of Crockart's bankruptcy, in the circumstances averred, having disturbed the equality of division of Crockart's estate, is illegal (*a*) at common law, (*b*) under the Act 1696, chapter 5, and does not entitle defenders to retain the sum sued for. (4) In the circumstances, as the defenders cannot contract themselves out of the operation of the Act 1696, chapter 5, decree should be granted as craved, with expenses. (5) The defenders having obtained an undue and illegal preference over the