had no warrant for cancelling the bargain.

LORD ADAM—I am of the same opinion. The offer was made on 26th March, and was accepted on the 28th. The purchaser refused to implement his bargain on the 30th, on the ground that the pursuer had been unable to give him immediate possession. The evidence, however, of the tenants in possession is, that they could have cleared out of the premises by Saturday. That being so, entry might and could have been given on 30th March, and I cannot doubt on the proper construction of the contract that that is immediate possession. I think Mr Morton was led astray by the letter which the tenants had written to the pursuer's agents. He seems to have thought it binding on all parties, and that consequently he could not get possession for ten days, whereas he could have got possession if he had asked for it.

LORD M'LAREN—I think the Lord Ordinary's judgment is entirely consistent both with sound principle and the justice of the case, and I do not desire to add anything to it. I conceive, however, that his interlocutor of 26th November must be adhered to with the variation suggested, namely, the omission of the words in which reference was made to the conclusions for damages.

The Court recalled the interlocutor of 26th November so far as it reserved to the pursuer to move for decree in terms of the further conclusion for damages in the event of the defenders' failure to implement the decree therein pronounced within one month from the date of the said interlocutor, and reserved to the defenders their defences thereto: *Quoad ultra* refused the reclaiming-note, and adhered to said interlocutor, and to the interlocutor dated 8th January 1890, and decerned.

Counsel for the Pursuers (Respondents)—Murray — Baxter. Agent — T. G. Martin, W.S.

Counsel for the Defenders (Reclaimers)—Asher, Q.C.—Low—Ure. Agents—Dove & Lockhart, S.S.C.

Thursday, January 30.

SECOND DIVISION.

COCHRANE AND OTHERS (HALDANE'S TRUSTEES) *v.* LIVINGSTONE (SHARP'S TRUSTEE).

Succession — Trust — Vesting Excluded — Discretionary Powers of Trustees—"Heirs in mobilibus" Construed.

A testator directed his trustees "to hold and retain, or pay, invest, or apply, in manner after mentioned," the residue of his estate for behoof of his mother's brothers and sisters, equally among them, share and share alike, declaring that the issue of predeceasing beneficiaries should be entitled to their parent's share, and "further declaring that the provision hereinbefore conceived in favour of the said brothers and sisters, and the issue of any deceased brother and sister of my said mother, shall not be held to have vested in them, or any of them, so as to give such residuary legatee power to assign his or her share, nor shall the same be assignable or arrestable or affectable by the diligence of their or of any of their creditors, . . . the said provisions being intended by me as purely alimentary, and not alienable by the said residuary legatee's acts or deeds."

The management and disposal of the shares were left to the absolute discretion of the trustees, "and in the event of any residue or portion of the capital or of the income arising therefrom of the share of any of my said residuary legatees remaining in my trustees' hands at the period of the death of the recipients thereof, then my trustees shall be bound to account for and pay over the same to such deceased legatee's heirs *in mobilibus*, and take their discharges therefor.

One of the residuary legatees survived the truster, but died leaving in the trustees' hands a balance of his share of the testator's estate. He left a trust-disposition and settlement.

Held that the share had not vested in him, and that it was not carried by his settlement, but fell to be paid to his heirs *ab intestato*.

Robert Haldane, druggist in Stirling, died on 9th December 1882 leaving a trust-disposition and settlement dated 7th September 1875, whereby he directed his trustees to deal with the residue of his estate as follows:—"And lastly, whatever rest, residue, and remainder there may be of my said whole estate, after said expenses and the foresaid legacies have been paid, I direct and appoint my trustees to hold and retain, or pay, invest, or apply in manner after mentioned, for behoof of the whole brothers and sisters of my late mother, equally among them, share and share alike; but declaring always that if any of the said brothers and sisters of my said mother have already predeceased or may yet predecease me leaving lawful issue of his, her, or their bodies, then such issue shall be entitled to take and receive their deceased parent's share, equally amongst them, share and share alike; and further declaring that the provision hereinbefore conceived in favour of the said brothers and sisters, and the issue of any deceased brother and sister of my said mother, shall not be held to have vested in them or any of them so as to give such residuary legatee power to assign his or her share under these presents, nor shall the same be assignable or arrestable or affectable by the diligence of their or any of their creditors, or the creditors of the husband of any female residuary legatee who may be married, for debts contracted or which may be hereafter contracted by them; nor shall the same be subject to the *jus mariti* or right of administration of

such husband, all such rights and claims being hereby excluded and debarred, the said provisions being intended by me as purely alimentary, and not alienable by the said residuary legatee's acts or deeds: And I hereby give my trustees the most full and ample control over and discretionary power in regard to the disposal of the shares falling to my residuary legatees before specified for their behoof, and either to pay over the capital of the shares at once to them or any of them, and to take their, his, or her discharge for the same, which shall be a complete exoneration to my trustees, or to invest such shares in their own names for behoof of all or of such of my residuary legatees in regard to whose shares they may think it most prudent to adopt this course, and when so invested, pay and apply the annual income or interest derived therefrom for or on their account, either yearly or half-yearly or otherwise, or to purchase in some respectable and responsible life assurance company annuities with the principal sums of said shares, to be taken in the name or names of said residuary legatee or legatees, or to pay or apply the money forming such shares for behoof of such residuary legatee or legatees in such way and manner as they may deem prudent or consider judicious in their circumstances: And as to the expediency and extent of such payments, and manner of making the same, my trustees shall, and they are hereby declared to be the sole judges, without any interference being competent by any of such residuary legatees: And in the event of any residue or portion of the capital or of the income arising therefrom of the share of any of my said residuary legatees remaining in my trustees' hands at the period of the death of the recipients thereof, then my trustees shall be bound to account for and pay over the same to such deceased legatee's heirs *in mobilibus*, and take their discharges therefor."

George Sharp, one of the residuary legatees, survived the testator, and was entitled to one-eighth of the residue of his estate. The trustees, in exercise of the power given them, did not pay the share to Sharp at once, but made advances to him out of capital and income. Sharp died unmarried and without issue upon 5th June 1886, and at the date of his death the unexpended portion of his share in the hands of the trustees amounted to £782, 8s. 4d. He had no estate other than his interest in this residue. He left a trust-disposition and settlement, by which he directed his trustees, after paying his debts, to make payment of certain legacies.

In these circumstances this Special Case was presented by (1) Haldane's trustees, and (2) Sharp's trustee, and the following questions were submitted for the opinion and judgment of the Court—"First, Is the unexpended balance of the share of the late Robert Haldane's trust-estate which fell to the deceased George Sharp, and which at the date of death of the said George Sharp remained in the hands of the trustees of the deceased Robert Haldane, conveyed by the trust-disposition and settlement of the said George Sharp, and does it now fall to be paid to the second party to be administered by him in terms of the trust-disposition and settlement of the said George Sharp? Or, second, Are the heirs *in mobilibus* according to the law of intestate succession to moveable estate of the said George Sharp now entitled to payment of said unexpended balance from the trustees of the said Robert Haldane? Or, third, Are the legatees mentioned in the trust-disposition and settlement of the said George Sharp now entitled to payment of said unexpended balance from the trustees of the said Robert Haldane, and that in equal shares?"

The first party argued—The provision in Haldane's settlement clearly suspended vesting in the beneficiaries unless the sum due was actually paid over to them. The trustees had power to refuse to pay over anything to Sharp, and they had refused, and therefore nothing had vested in him—*Smith's Trustees* v. *Smith*, July 11, 1883, 10 R. 1144; *Paterson's Trustee* v. *Paterson*, January 29, 1870, 8 Macph. 449. Heirs *in mobilibus* in the first of the deed was equivalent to heirs *ab intestato*.

The second party argued—There was vesting *a morte testatoris*. Discretionary powers of trustees had never been held to postpone the period of vesting—*Scott, &c.*, v. *Scott's Executrix*, January 27, 1877, 4 R. 384. The only purpose for which it could be maintained that vesting was prevented in this case was to prevent the beneficiaries assigning his share to his own prejudice. As regarded the question of whether the heirs *in mobilibus* spoken of in the last clause of Haldane's trust-deed were heirs *ab intestato*, or the heirs under Sharp's trust, the latter was the proper reading. It was simply an invocation to the law of intestacy. The word "remaining" only related to what had not been disposed by Sharp's testament—*Dalgleish's Trustees* v. *Bannerman's Executors*, March 6, 1889, 16 R. 559.

At advising—

LORD JUSTICE-CLERK—The late Mr Haldane left the residue of his estate to trustees for behoof of the brothers and sisters of his mother. His settlement is peculiar in some respects. It expressly declared that no right was to vest in any of the beneficiaries, they being expressly excluded from power to test upon their shares, and these are not to be "alienable by their acts or deeds." The management and disposal of the shares is left to the absolute discretion of the trustees. And it is directed that whatever sum there should be, either of capital or increase on capital, in the trustee's hands on the death of any recipient, that the trustees are to "account for and pay over the same to such deceased legatee's heirs *in mobilibus*."

The expression "heirs *in mobilibus*" is one distinct and clear in itself. It means in plain English those persons to whom the moveables will go if the succession is to be

regulated by law and not by contract or by testament. If it is to have any other meaning it must be by special direction given.

The question in this case is, do the terms of the deed cause the words "heirs *in mobilibus*" to mean a different class of heirs from those who are heirs *in mobilibus* by law. The facts are these—George Sharp was one of the persons favoured by Mr Haldane's will. He died after receiving the benefit of his share in the discretion of the trustees, and there remained in their hands at his death a sum of about £830. He left a settlement disposing of his estate, and there is now a competition between his legal heirs and those to whom he has left his estate for the sum in the hands of Haldane's trustees.

My opinion is, that Mr Haldane having expressly and effectually excluded vesting in Mr Sharp, and debarred him from testing, the sum in question is disposed of by the destination in Mr Haldane's settlement, and that Mr Sharp had no power to dispose of it. Accordingly it must go to those who according to the construction to be given to the words heirs *in mobilibus* in Haldane's settlement are entitled to succeed to it. These words as here used are in my opinion to be read in their ordinary sense as meaning those heirs who would succeed by law to Mr Sharp's moveables, unless these moveables were removed from the operation of law competently. Mr Sharp had no power so to remove the moveables which Mr Haldane left for his benefit, and therefore it is to Mr Sharp's heirs *at intestato* that this fund must go under the destination in Haldane's settlement.

I would therefore move your Lordships to answer the first and third questions in the negative, and the second in the affirmative.

LORD LEE—By the terms of the settlement Mr Haldane's trustees were directed "to hold and retain, or pay, invest, or apply in manner after mentioned" for behoof of the whole brothers and sisters of his mother, equally among them, the residue of his estate. But this direction was subject to a declaration that no right should be held to have vested in them or any of them, "so as to give such residuary legatee power to assign his or her share under these presents, nor shall the same be assignable or arrestable or affectable by diligence," &c. . . . "the said provisions being intended by me as purely alimentary, and not alienable by the legatee's acts or deeds." Further, the trustees are given the most absolute discretion as to the disposal of the shares for behoof of the residuary legatees, and the mode of applying both income and capital, and it was provided that "in the event of any residue or portion of the capital or of the income arising therefrom of the share of any of my residuary legatees remaining in my trustees' hands at the period of the death of the recipients thereof, then my trustees shall be bound to account for and pay over the same to such deceased legatee's heirs *in mobilibus*."

George Sharp, one of the brothers who survived Mr Haldane, died in 1886, and there was then in the hands of the trustees a residue of his share amounting, with interest, to £831, 2s. 4d. He died unmarried and without issue, but leaving a settlement, and the question is, whether this unexpended balance is carried by his settlement to his trustees, or is carried by the above destination to his heirs *in mobilibus* according to the law of intestate succession?

My opinion is, that vesting being expressly excluded, the heirs *in mobilibus* of George Sharp must take under Mr Haldane's destination, and that these heirs, according to a sound construction of the term as used in this deed, are the heirs provided by the law of intestate succession, and not the heirs named or appointed by George Sharp.

It is unnecessary to go over the authorities. The cases which I think rule this are *Graham* v. *Hope*, M. App. Legacy, No. 3; *Bell* v. *Cheape*, 7 D. 614; *Maxwell*, 3 Macph. 318; and *Cockburn's Trustees*, 2 Macph. 1185.

The case of *Manson*, 1 R. 371, is plainly distinguishable as the case of a marriage-contract provision held by the spouses in conjunct fee and liferent.

How the case would have stood if the destination had been to "heirs and representatives whatsoever" it is unnecessary to consider. The expression is "heirs *in mobilibus*," and there is no authority for construing that as including in a case where no right had vested executors-nominate.

LORD KYLLACHY—I have had an opportunity of reading Lord Lee's opinion, and I concur in the judgment proposed.

The Court pronounced this interlocutor:—

"Answer the first and third of the questions therein stated in the negative, and the second in the affirmative: Find and declare accordingly, and decern."

Counsel for the First Party—J. A. Reid—Craigie. Agents—Philip, Laing, & Company, S.S.C.

Counsel for the Second Party—Dewar. Agent—William White, S.S.C.

Saturday, January 11.

FIRST DIVISION.

[Commissariot of Edinburgh.

CRANSTON AND ANOTHER, PETITIONERS.

Process — Commissary Court — Executor-Nominate — Confirmation — Holograph Writ.

There was found in the repositories of a deceased a holograph settlement extending to nine pages written on three sheets of paper bookwise, and unstitched, but expressly bearing to be written by the granter. The document was duly dated, but was signed upon the last page only. *Held*, following the