

the charge was made to the police constable and inspector, and these were the proper persons to whom the defender was entitled to make such a charge if she believed it. Privilege being thus disclosed, the mere statement of malice on record was not enough to make the case relevant; there must be facts averred from which malice could be inferred—*Farquhar v. Neish*, March 19, 1890, 17 R. 718; *Reid v. Moore*, May 18, 1893, 20 R. 712, opinion of Lord Trayner; *Douglas v. Main*, June 13, 1893, 20 R. 793. There was no case in the books where a charge made to a police constable had been the subject of a jury trial without there being averments on record plainly showing malice.

Counsel for pursuers were not called on.

LORD JUSTICE-CLERK—The first issue should be allowed. The pursuers have averred on record that the defender represented to a constable that they had stolen an ink-bottle belonging to her, and that she repeated the accusation to the police inspector, and that the statements so made were quite unfounded, and were false, calumnious, and malicious, and without probable cause. I think in a case like this such a general averment of malice is quite relevant. There are exceptional cases, as when public officials in discharge of their duty are charged with slander, in which facts and circumstances from which malice can be inferred must be set forth on record. Mr Watt referred to the case of *Douglas v. Main*. I can only say that I think that case directly in point in favour of this issue being allowed.

LORD TRAYNER—I think the pursuers are entitled to the issues as proposed by them. I should have contented myself with saying so if the defender's counsel had not maintained that the pursuers in order to make their case relevant required not only to set forth on record a general averment of malice but also specific statements of fact from which malice might be inferred, and referred to my opinion in the case of *Reid v. Moore* as supporting that view. I wish to say that my opinion in the case cited (which perhaps has been misunderstood) gives no support whatever to the general proposition maintained by the defender here.

LORD MONCREIFF—I also think that the issue should be allowed. I do not wish to indicate that I differ from your Lordships as to the cases in which a bare statement of malice is sufficient, but I am content to hold that the facts and circumstances stated on record are such as malice might be inferred from. A charge was made against these two men, both evidently in respectable positions, that they had stolen an ink-bottle, and the defender was very persistent in pressing the charge and in calling on the police to search the houses and persons of the pursuers. A jury might hold that this if proved established malice.

LORD YOUNG was absent.

The Court approved of the issues proposed by the pursuers.

Counsel for the Pursuers—Shaw, Q.C.—Maclennan. Agents—Mackenzie & Black, W.S.

Counsel for the Defender—Crabb Watt. Agents—Miller & Murray, S.S.C.

Tuesday, January 30.

SECOND DIVISION.

(Sheriff-Substitute of Lanarkshire.)

MALCOLM v. M'MILLAN.

Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), secs. 1 (1), 4, and 7 (1) and (2) — "Undertaker" — "Employer."

"Undertakers" as defined by the Workmen's Compensation Act 1897, section 7 (1) and (2), are alone liable to pay compensation under that Act, and no other employers are so liable.

A workman in the employment of the occupier of an ironfoundry was sent in the course of his employment to do some work in a soap-work, and while engaged in this work fell from a scaffolding and was killed. His widow claimed compensation under the Workmen's Compensation Act 1897 from her husband's employer, the ironfounder.

Held (1) that the ironfounder was not an "undertaker" within the meaning of the Act, and (*diss.* Lord Trayner) that, as he was not an "undertaker," he was not liable to pay compensation under it.

This was an appeal upon a case stated in the matter of an arbitration under the Workmen's Compensation Act 1897 between Jane Buchanan or Malcolm, widow of the deceased William Malcolm, blacksmith or fitter, Glasgow, and his children, claimants and appellants, and James M'Millan, ironfounder and forger, Vulcan Iron Works, Glasgow, respondent.

Proof was led and the Sheriff-Substitute (STRACHAN) found in fact—“(1) That the deceased, who was a blacksmith or fitter, and at the time of his death had been in the employment of the respondent for forty years, was on 17th March 1899, in the course of his employment as a workman to the respondent, engaged in the soap-works of Messrs Ogston & Tennant, Limited, Tennant Street, St Rollox, Glasgow, repairing from a scaffolding certain steam pipes connected with the soap vats, when he fell from the scaffolding to the ground and was killed. (2) That the appellants are the widow and children of the deceased. (3) That the earnings of the deceased during the three years preceding his death amounted to £241, 17s. 10d.”

The Sheriff-Substitute found “(1) that the defender was not liable as an employer in respect that there is no liability in that

capacity except in the cases specially provided for in the Act, and of which this is not one. (2) That the soap-works of Messrs Ogston & Tennant, Limited, is a factory within the meaning of the Workmen's Compensation Act 1897. (3) That the occupants thereof were Ogston & Tennant, Limited, and (4) that the respondent was not an 'undertaker' as defined by section 7, sub-section 2, of said Act."

He accordingly dismissed the application and found the appellants liable in £2, 2s. of expenses.

The questions of law for the opinion of the Court were—" (1) Was the respondent an undertaker within the meaning of the Workmen's Compensation Act, and as such liable in compensation to the appellants? (2) Is the respondent as the employer of the deceased liable to the appellants in compensation under the Act?"

Argued for the appellant—(1) The respondent here was an "undertaker" within the meaning of the Workmen's Compensation Act 1897, section 7 (2). He was *pro tempore* the occupier of a portion of Ogston & Tennant's factory. He was therefore liable to pay compensation under the Act to the appellants. (2) Further, the respondent was an "undertaker" in respect of his occupancy of his own factory which was an ironfoundry. An ironfoundry was a "factory" within the meaning of the Act—Workmen's Compensation Act 1897, section 7 (2) "Factory;" and Factory and Workshop Act 1878, Fourth Schedule, Part I, Non-Textile Factories (12). The deceased workman was therefore injured while employed by an "undertaker" at work on, in, or about a factory, viz., Ogston & Tennant's factory. (3) Apart from this, however, liability under the Act was not confined to "undertakers." It was contemplated that "employers" who were not "undertakers" should be liable. If this were not so, there was no intelligible reason for the frequent mention in this Act of employers as persons liable to pay compensation, and section 1 was rendered practically nugatory by section 7. "Employment to which this Act applies" meant employment not excluded by section 8. It was plain from the terms of section 4 that the Act contemplated a liability upon an "employer" who was not an undertaker, and for injury to a workman who was injured while working not in the premises of the "employer" but in the premises of an "undertaker" other than the "employer." Where a workman was in the course of his employment employed to work for behoof of an "undertaker," that is to say, in this case, to work in a "factory," his own employer was liable in compensation if he was injured while so working. This interpretation of the Act had the advantage of giving effect to all the provisions of the Act, and in particular to both sections 1 and 7. Here there were (1) Ogston & Tennant "undertakers" as occupiers of a factory, and (2) the employer of a workman who in the course of his employment was working in that factory, and who was injured while so working. In these circum-

stances his representatives the appellants were entitled to claim compensation under the Act from his employer.

Argued for the respondent—The effect of the Workmen's Compensation Act 1897 was to make certain employers, and certain employers only, viz., "undertakers" as defined in section 7 (2), liable in compensation under the Act. No other employers were so liable. It was undoubtedly the intention of the Act to confine the benefits which it conferred to the case of persons injured while engaged in certain specified employments (the "employments to which the Act applies" referred to in section 1 and section 4) and to such persons only. These employments were enumerated in section 7. There was no other enumeration of the employments to which the Act applied except that contained in section 7, and all the employments there enumerated were employments by "undertakers" as defined by the Act. Here it was plain that the respondent was not an "undertaker." If that were so, the appellants had no case, as only undertakers were liable. Here there was no employment by an undertaker on, in, or about a factory occupied by him. Counsel knew of no case in which any employer not an "undertaker" had been held liable.

At advising—

LORD JUSTICE-CLERK—The important question in this case is the second question, for I cannot think it doubtful that the tradesman who was asked to send a workman to repair some pipes in the soap-works of Messrs Ogston & Tennant was not the "undertaker" in the sense of the Act. Therefore unless he is liable as the deceased's employer, although not an undertaker, he cannot be liable at all.

The wording of the Act is such as certainly to create difficulty, but after much consideration I have been unable so to read it as to answer the second question in the affirmative. The Act cannot, I think, be held to refer to all employers. Its whole framework indicates that it was intended to be limited in its application to certain particular cases. The opening words of sections 1 and 4, which are the principal enacting sections, speak distinctly of its limited character, the words being in the one case "If in any employment to which this Act applies," and in the other "Where in an employment to which this Act applies." It is therefore directly indicated that in some other part of the Act the employers to whom it does apply will be set forth, and I think it follows that when the words "employed," "employment," or "employer" are used in the Act these words must be held to be applied only to the restricted class to which it may be found by the context that the Act is made applicable. Now, if the Act is searched for the purpose of finding what are the employments to which it applies, it will be found that only in section 7 is any indication given upon that matter. That clause begins thus:—"This Act shall apply only to employment by the undertakers as herein

defined on or in or about a railway, factory," &c., and "undertakers" is defined in a later part of the clause in regard to the different classes of works before referred to, the definition applicable to the present case being that the undertaker in the case of a factory means "the occupier thereof within the meaning of the Factory and Workshops Acts 1878 to 1891." Taking this section alone, it appears to be very definite and to limit the operation of the Act to employment by an undertaker as there defined, and to exclude all except such persons from its scope. It was maintained that the word "only" was not intended to limit the class of undertakers, but only to limit the liability incurred under the Act by those included in it. But it was well pointed out, if this were the restriction intended, and if it were only for the protection of undertakers, and if employers not being undertakers were intended to be made liable for compensation under the Act, then the liability of employers who were not undertakers as defined would extend to all kinds of work. It is impossible to suppose that this was the intention of the Act, and such a construction would be, in my opinion, a strained and not a natural construction.

The real difficulty of the case is created by the latter part of section 4. By that clause it is intended, where undertakers give out sub-contracts of portions of the work they are doing, to confer on any contractor's workman a right to obtain his compensation for an injury from the undertakers, and this whether the compensation be under the Act or be compensation in respect of any negligence or wilful fault by the contractor or those for whom he is responsible.—[His Lordship read the section, which will be found quoted ante page 329.]

It is the words "under this Act" which create the difficulty, for they seem to imply that a sub-contractor who is not the undertaker may be liable under the Act. It is very difficult to find a meaning for these words where they occur, or to reconcile them with the rest of the statute. I will only say that if these words are to be read as meaning that the Act applies to any employer, and not to an undertaker being the employer as defined by the Act, a great part of the Act becomes in my view quite inexplicable.

I have therefore found it impossible to hold that it is a true reading of the statute that an employer can be liable under it to compensate a workman unless he be an undertaker, and as in this case the respondent was not an undertaker as defined by the Act, the Sheriff has rightly held that the petition should be dismissed, and that the questions put in the special case should be answered accordingly.

LORD YOUNG concurred.

LORD TRAYNER—The second question put to us for determination in this case raises, in my opinion, a question of considerable importance. It is attended, in my mind, with difficulty, and before

expressing my opinion upon it I desire to make one or two observations upon the Act under which the case is presented.

It appears to me that the primary purpose of the Workmen's Compensation Act was to provide that workmen who were injured accidentally in the course of their employment should be compensated therefor by their employers. By accidental injury I mean an injury arising from a cause which cannot be attributed to the fault of anyone. The difficulty is whether the Act has so provided.

The first clause of the Act provides that where "in any employment to which this Act applies" a workman receives personal injury by accident arising out of and in the course of the employment, his employer shall be liable in compensation, subject to certain conditions to which I need not here refer. On the other hand, section 7 of the Act provides, "This Act shall apply only to employment by the undertakers as herein-after defined," &c., and an opinion has been expressed that the effect of that provision is to limit the application of the Act to employment by "undertakers" in the several employments enumerated in the seventh clause.

I cannot concur in that opinion. If that opinion is sound, then all the provisions in the Act in regard to the liability of employers as such are struck out of the Act, and what I regard as its primary purpose is defeated. It does not obviate the difficulty to say that "undertaker" may include employer, because even if that were so, the liability would be an "undertaker's" liability not an employer's. But I cannot regard the words "undertaker" and "employer" as synonymous, nor the one as included in the other. I think they represent persons standing to the workman in different relations; and that this is made tolerably clear by a consideration of the provisions of the Act. Take, for example, the second sub-section (b) of the first clause. It provides that the injured workman may, "at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act." What proceedings were open to a workman before the commencement of this Act against an "undertaker"? Take also clause 4 in which an "undertaker" is first mentioned. How can that clause be read consistently with the notion that employer and undertaker are the same, or that there is only liability on the one and not the other, when it provides for a right of relief at the instance of the undertaker against the employer. There is no difficulty in ascertaining who is the employer of a workman; there may be more in ascertaining who is the undertaker as defined by the Act. But, in my view, both are separately and independently dealt with by the Act. I have already pointed out in *M'Gregor v. Dansken*, 1 F. 536, what I think was the class intended to be included in the word "undertaker," and the reason why, in my opinion, that class was put under liability by the statute. That opinion I have seen no reason to

change. I accordingly am of opinion that both employer and undertaker have liability imposed upon them by the Act—not the same liability, for I think the employer's is, or may be, a more extended liability than an undertaker's, that is, may cover a greater number of cases and arise in many circumstances in which an undertaker would not be liable.

The opening words of the 7th clause, as I have indicated, create the difficulty, because they may be read (and have been so read) as excluding the application of the Act to anything but employment by an undertaker. I do not think the difficulty is insuperable. On the contrary, I think (keeping the purpose of the Act in view) that it is possible to give all effect to section 7 and yet to retain clause 1 as an effectual provision. As thus: I read clause 7 not as relating to the immediate employment by an undertaker of workmen in certain enumerated occupations, but as the employment of workmen by their employers on behalf or in the interest of an undertaker in these occupations. That makes the undertaker immediately liable to a workman in compensation for injury sustained by him in the course of such employment, it being a part of the undertaker's business that was being executed or carried on, with relief to the undertaker against the actual master or employer of the workman. That enables me to read clause 1 as imposing liability on the employer where no undertaker intervenes. But clause 1 only imposes liability on the employer when the employment is one "to which this Act applies." Now, I think the Act applies, or may reasonably be held to apply, to the dangerous occupations enumerated in clause 7. Accordingly, when a workman is accidentally injured in the course of his employment in any of the enumerated occupations, I think he has a claim for compensation either against his employer or the "undertaker" with whom the employer has contracted. I feel the difficulty of reaching this conclusion having regard to the language in which the 7th clause of the Act is expressed; and my view is open to criticism on that account. But the Act is a remedial one and entitled to a liberal construction, and I prefer any construction which will make the remedy the Act was intended to provide available to a construction which would destroy it.

Turning now to the case before us, I think the first question should be answered in the negative. I think the respondent was not an undertaker in the sense of the Act. The second question I would answer in the affirmative. The respondent was the employer of the workman (represented by the appellants) who sustained personal injury which resulted in his death while in the course of his employment. The Sheriff-Substitute holds that the respondent is not liable as employer because the employment was not one to which the Act applied. I suppose he would have decided otherwise if he had been of opinion that the employment was one within the provision of the Act. Now, I think the employment in

question is one to which the Act applies. The respondent is designed as an "iron-founder and forger, Vulcan Iron Works," and an iron foundry is a factory within the meaning of the Factory Acts. It does not appear to me material that the accident which caused the injury occurred outside of the respondent's own premises. The deceased was employed on the premises; they were the seat of his labour; and that he was sent outside of them to do work for and on the order of his employer does not make the employers' liability the less. The workman was still engaged "in the course of his employment."

In my view the Sheriff's judgment should be recalled, and the case remitted to him to find the respondents liable in compensation to the appellants and to fix the amount of such compensation. I am aware that this view is contrary to what has been decided by the English Court of Appeal in the case of *Francis v. Turner Brothers*, December 16, 1899 [1900] 1 Q.B. 478, a case in all its material features the same as this. The ground on which the decision in that case proceeded was that the injury to the workman had not been received on, in, or about a factory. Now, if there is no liability for accidental injury imposed on anyone but an "undertaker" as defined by section 7 of the Act, then the judgment of the English Court is right, because liability under that section is restricted to cases where the injury is sustained "on, in, or about a factory." But if employers are liable (as apart from "undertakers") then I venture to think the judgment referred to is not sound. It was as employers, not undertakers, that the defenders in *Turner's* case were sought to be made liable, and employers are made responsible by the Act for injury to a workman "arising out of and in the course of the employment," which was the fact in *Turner's* case as it is here. The restricting words "on, in, or about a factory" are used only with reference to undertakers.

LORD MONCREIFF—The first question of law does not present any difficulty, because the respondent was undoubtedly not an undertaker in the sense of the Workmen's Compensation Act. The undertakers were *Ogston & Tennant, Limited*, the occupiers of the factory, who are not parties to this case.

The second question, however, raises a point of difficulty and importance in the construction of the Workmen's Compensation Act, viz., whether the respondent is liable under the Act as the immediate employer of the deceased workman. It may be that it was intended that the Act should apply to all employers of labour whose workmen are employed and injured in the dangerous undertakings specified in the 7th section of the Act, whether the employers are the proprietors or occupiers of such works (styled "undertakers" in statute), or sub-contractors who take or send their workmen to the premises in order to execute a sub-contract therein.

But the Act is so framed that I find it

impossible to give it that effect without doing undue violence to the language used.

The first and leading section of the statute is qualified by the words with which it commences—"If in any employment to which this Act applies." It is thus notified at the outset that the Act does not apply to all employments, and we are referred to some later part of the Act for a definition of the kind of employment to which the Act does apply.

The 4th section begins with the same words—"Where in an employment to which this Act applies."

The 7th section contains the only definition or limitation of the application of the Act. It commences with these comprehensive words—"This Act shall apply only to employment by the undertakers as hereinafter defined," and the word "undertakers" is confined in the case of a railway to the railway company; in the case of a factory, the occupier thereof within the meaning of the Factory and Workshops Acts, and so forth—definitions which exclude sub-contractors who contract for the execution of part of the work in such undertakings.

The meaning and scope of this definition appears very clearly if it is paraphrased so as to apply to the facts of the present case. Read thus, the 7th section enacts that "as regards factories this Act shall only apply to employment by the occupier of the factory"—a definition which excludes the respondent.

It has been suggested that the 7th section was introduced simply in order to limit the liability of undertakers. What seems to me to be a conclusive answer is that if this were so the liability under the Act of an employer who is not an undertaker would extend to all kinds of employment without restriction, and that is certainly not the intention of the Act.

The main difficulty arises from certain words which occur in the 4th section of the Act. From the rest of the Act so much is clear that "undertakers" as defined in the 7th section who are employers of labour are liable under the Act to the workmen immediately employed by them. The 4th section (which properly should have followed instead of preceding the 7th) extends their liability to this extent that if they give off any part of their business or work to be executed by a contractor, and in the course of the execution of the work one of the contractors' workmen sustains personal injury in the course of his employment, the "undertakers" are liable if called on by the injured workman to make him compensation although he was not directly employed by them. The compensation which in this case the undertakers are bound to pay is "any compensation which is payable to the workman (whether *under this Act* or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies." With the exception of the three words "*under this Act*" which I have

italicised, this passage is quite intelligible. The compensation to be paid by the "undertakers" is such compensation as the contractor would have been bound to pay if he had been sued at common law or under the Employers Liability Act. So far there is no difficulty. Take next the concluding words "or would be payable if such contractor were an employer to whom this Act applies." If these words were synonymous with "every employer of labour" they would be superfluous, because in the case provided for in the 4th section it is assumed that the contractor is the injured workman's employer. Therefore "an employer to whom this Act applies" (which it is assumed the contractor is not, the word "if" being used) is someone other than an ordinary employer. Where there is no sub-contract the undertaker is the employer, but if he is liable this is not merely because he is an employer but because he is also an undertaker.

I confess that I am unable to assign a meaning to the words "under this Act" in section 4. I cannot find in any other part of the Act liability fixed upon an employer of labour who is not an undertaker. Besides, these words cannot stand alongside of the expression "if such contractor were an employer to whom this Act applies," which is superfluous and unmeaning if a contractor is liable as employer "under this Act."

In support of the appellants' view it was maintained that under this section the contractor is bound to indemnify the "undertaker," and it was argued that this indicates that the contractor is necessarily liable under the Act. But I may point out that the Act does not say that in all cases the contractor shall indemnify the undertakers.

The 4th section contains this proviso—"Provided that the undertakers shall be entitled to be indemnified by any other person" (not necessarily the contractor) "who would have been liable *independently of this section.*" This, the only express provision as to indemnification, seems to indicate that the contractor is not bound to indemnify the undertaker unless he would have been liable to compensate his workmen on some ground not contained in the 4th section. Now, as I have said, I see no ground except liability at common law or under the Employers Liability Act. No ground of liability is to be found in the rest of this Act.

Some confusion is caused by the use of the word "undertakers" in some parts of the Act and "employers" in others. The word "undertakers" is not, however, used in contradistinction to "employers to whom this Act applies;" on the contrary, I think the expressions are interchangeable.

I am therefore unable to hold that the respondent is liable as an employer. The Act may have been intended to reach such a case. But on the other hand it is at least equally possible (and this is my opinion) that it was only intended to throw liability, in the absence of fault, upon those large employers of labour

for whose benefit and on whose premises the work is being done in the course of which injury is sustained by the workmen; the scheme of the Act being that they shall be liable whether the workman is employed by themselves or (under section 4) by a contractor, but in the latter case with right to indemnification if the contractor himself is liable in respect of personal or imputed fault.

I would therefore answer both questions in the negative.

The Court pronounced this interlocutor:—

“The Lords having heard counsel for the parties on the stated case, Answer the questions of law therein stated in the negative: Therefore affirm the dismissal of the claim and decern: Find the respondent entitled to his expenses of the stated case on appeal, and remit,” &c.

Counsel for the Appellants—Craigie—
Bartholomew. Agent—James Russell,
S.S.C.

Counsel for the Respondent—Younger.
Agents—Simpson & Marwick, W.S.

Tuesday, January 30.

SECOND DIVISION.

HONEYMAN'S TRUSTEE v. DONALDSON.

Succession—Next-of-Kin—Whether Next-of-Kin includes Mother.

A testatrix in a formal deed directed her trustees, on the occurrence of events which happened, to pay and convey the capital of her estate to her “next-of-kin.”

She was survived by her mother and a paternal uncle and aunt.

Held that the mother had no claim, not being one of the next-of-kin of her child, and that the paternal uncle and aunt were entitled to the estate.

Isabella Euphemia Donaldson, only child of George Donaldson and Mrs Isabella Stirling or Donaldson, was married to Robert Honeyman junior in 1890. By the antenuptial contract of marriage, dated 11th March 1890, Miss Donaldson, in contemplation of her marriage, conveyed to trustees various estates or effects then belonging to her or that might subsequently belong to her.

The purposes of the trust were (1) to secure to herself the life interest alimentary use of the said estate and effects; (2) on her death survived by Robert Honeyman junior, and by a child or children of the said intended marriage, she directed her trustees to hold, retain, and manage the said estate for behoof of Robert Honeyman junior for his life interest alimentary use, and to pay and make over to him the free annual income and produce thereof during all the days of his life, and upon his death to pay to or for

behoof of said child or children equally, share and share alike, the annual income or produce of said estate till they respectively should attain majority, when the trustees were directed to pay or divide the fee or capital of said estate to said child or equally among said children.

By the third trust purpose she directed as follows:—“*Third*, In the event of there being no child or children of the said intended marriage alive at the dissolution thereof by the death of the said Isabella Euphemia Donaldson, survived by the said Robert Honeyman junior, the trustees shall pay to the said Robert Honeyman junior the annual income or produce of said estate from and after said dissolution, and that during all the days of his life, and upon his death the trustees shall pay or convey the capital of the said estate to the next-of-kin of the said Isabella Euphemia Donaldson.”

Isabella Euphemia Donaldson or Honeyman died intestate on 1st September 1893. After her death the income of the trust-estate was paid, in terms of the third trust purpose, to Robert Honeyman junior until his death, which took place on 15th April 1899. No children were born of the marriage.

The nearest relatives of Mrs Honeyman who survived her were (1) her mother Mrs Isabella Stirling or Donaldson, and (2) James Thomson Donaldson, a paternal uncle, and Mrs Jane Donaldson or Henderson, a paternal aunt.

Thereafter questions arose with reference to the disposal of the trust-estate, which amounted to £650. For their settlement a special case was presented by (1) the marriage-contract trustees; (2) Mrs Donaldson the mother; and (3) James Thomson Donaldson and Mrs Henderson.

The questions of law were—“(1) Is the second party entitled to take in virtue of the destination to ‘next-of-kin’ in the third trust purpose of said antenuptial contract of marriage? (2) In the event of the foregoing question being answered affirmatively, is the second party entitled to (a) the whole of said estate, (b) one-half thereof, or (c) one-third thereof?”

Argued for second party—It was contrary to reason to think that the intention of the daughter was to prevent her mother succeeding to her estate in preference to her paternal uncle and aunt. On the contrary, it was clearly her intention to benefit her mother in preference to relatives so remote in degree. A mother was now one of the heirs *in mobilibus* of her child under the Intestate Moveable Succession Act 1855. The bequest might, if the Court were satisfied as to the intention of the testator, be construed as a bequest to heirs *in mobilibus*—*Tronsons v. Tronsons*, Nov. 21, 1884, 12 R. 155, or as a bequest to the nearest relatives of the testator—*Gregory's Trustees v. Alison*, April 8, 1889, 16 R. (H.L.) 10; *Young's Trustees v. Jones*, Dec. 10, 1880, 8 R. 242. In the words of Lord Deas, in the case of *Muir*, Nov. 3, 1876, 4 R. 74, “it is no great stretch to say that a mother is one of the next-of-kin of her children.”