not be held subject to the jurisdiction of the Scotch Courts.

At advising—

LORD PRESIDENT—It appears that the defender was by origin a Scotsman, but is now a domiciled American; after he became so domiciled he succeeded to certain heritable property in Scotland, to which he made up a title by service as heir to his mother. If he still holds that heritable property the question of jurisdiction is at an end, because he is then proprietor of heritage in this country, and accordingly subject to the jurisdiction of this Court. But it is alleged by the defender that he immediately proceeded to sell the subjects to which he had succeeded, and certain missives are referred to to show that the sale was completed in December 1890. Now, these missives are obviously improbative, and there is no allegation of anything of the nature of *rei interventus* having taken place. They must therefore be thrown out of consideration. But it is said that the property passed from him to a person in Leith by force of the delivery of a disposition of the heritable subjects. The state of the facts seems to be this—a disposition of the subjects was sent to Chicago, where it was signed by the seller, and despatched with the view of being delivered to and accepted by the purchaser in Leith, but when this action was raised it had not reached the purchaser, and there is nothing to show that even if it had reached his hands he would have accepted delivery. He was quite free to refuse, and then the defender would have had nothing to fall back upon to enforce implement but the improbative documents to which I have referred.

I think therefore we should adhere to the Lord Ordinary's interlocutor.

LORD ADAM—The summons in this case was served upon 21st January 1891, and the question raised is, whether in point of fact the defender was at that date proprietor of heritable property in Scotland? That he had been so at one time is beyond dispute. It is said that he had ceased to be so by virtue of certain missives of sale passing between him and the alleged purchaser in November and December 1890, followed by the preparation of a disposition which was sent out to America, where it was signed by him and despatched to his agents in this country, whom, however, it did not reach until 23rd January, two days after service of the summons. The question is, whether in that state of the facts the defender was still proprietor of heritable estate in Scotland at that date. I agree with your Lordship that the missives founded upon were entirely improbative, and I do not think they constitued any contract. No doubt they were followed by a disposition signed by the seller, but then it was never delivered, and until actually delivered into the hands of the purchaser it could have been recalled by the seller by telegram. Further, there was no obligation upon the grantee to take delivery unless he chose. I therefore entirely concur with your Lordship and with the Lord Ordinary.

LORD M'LAREN—The question of jurisdiction depends upon the opinion we may form as to whether the defender continued proprietor of heritage in Scotland notwithstanding the missives of sale referred to, followed by the disposition executed and posted, but which had not reached the grantee when the action was brought. I agree with the Lord Ordinary that the missives were informal and improbative, being neither holograph nor tested, and that they could not divest the defender of the property of the heritable subjects in question. The question of the posting of the disposition is a more delicate one. In all cases where something has to be delivered by one person to another in order to effect an alteration of legal rights, that involves the consent of both parties as well as the proper observation of the mere form of transference. Thus, where heritable property is to be itself delivered as it may still be, infeftment by registration of the disposition being only optional, it is necessary not only that the seller or his bailie should offer the symbols of earth and stone, but also that the purchaser or his procurators should accept delivery. It would not do for the seller's bailie merely to heave a clod at the purchaser's agent. It is the same in the case of delivery of deeds. Although the post office, after delivery to them, in most cases is considered to hold for the grantee, yet till the granter has consented to accept it holds for the granter.

LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers and Respondents—H. Johnston—Sym. Agent—John Latta, S.S.C.

Counsel for Defender and Reclaimer—Constable. Agent—Andrew Wallace, Solicitor.

Friday, June 26.

FIRST DIVISION.

BURNESS AND ANOTHER (MILLAR'S TRUSTEES) *v.* RATTRAY AND OTHERS.

Trust—Vesting—Term of Payment—Postnati.

A testatrix directed her trustees to realise and convert her whole estate into money, and to divide the residue equally among, *inter alios*, the children of J, "of whom there are ten, and in the event of any of the said children dying before payment without leaving issue, the division shall be made as if they had not been born among the survivors jointly with the issue of any who may have died leaving children, such issue always succeeding equally

to the share which their parent would have received if alive: . . . With power to my trustees to make such advances as they may deem suitable before the period of distribution (being the complete realisation and scheme of division of my whole estate, which shall be the period of vesting when not otherwise provided) to any of the said children, or to their father or mother respectively for behoof of all the members of a family, jointly, if not stated in the receipt to be for any one in particular."

One of the beneficiaries died on 24th April 1890. The estate was not finally realised until after that date.

Held (1) that a share of the residue did not vest in him; (2) that the words "of whom there are ten" did not exclude three children of J who were born after the date of the settlement, and before the death of the testatrix.

Mrs Mary Rattray or Millar died on 16th May 1889, leaving personal estate to the amount of £1300, and heritable estate to the value of about £470.

By a trust-disposition and settlement she directed her trustees (12th) "To realise and convert my whole estate into money, and divide the free residue equally among the children of my late brother Andrew Rattray, whose widow continues his farm at Portersize, County Kildare, Ireland, of whom there are nine; the children of my said brother John Rattray, of whom there are ten; and the children of my said brother James Rattray, of whom there are seven, who may survive me; and in the event of any of them dying leaving issue, such issue shall be entitled equally among them to the share which their parent would have received if alive; and in the event of any of the said children dying before payment without leaving issue, the division shall be made as if they had not been born among the survivors jointly with the issue of any who may have died leaving children, such issue always succeeding equally to the share which their parent would have received if alive, the original division to be in as many equal shares as there are children alive, or dead but leaving husband or wife or family, such husband or wife likewise representing the deceased member either in their own right or for their children, and counting as one in the division: With power to my trustees to make such advances as they may deem suitable before the period of distribution (being the complete realisation and scheme of division of my whole estate, which shall be the period of vesting when not otherwise provided) to any of the said children, or to their father or mother respectively for behoof of all the members of a family, jointly, if not stated in the receipt to be for any one in particular, such advances to bear interest at the rate of 5 per cent. per annum, so as to make all equal; but such advances to any one who may die without leaving husband, wife, or family shall be held as vested at the time of payment and be regarded as special legacies, but the share of any one who may be a minor shall be payable on attaining majority, or in the case of females on being married, whichever event shall first happen."

The truster was survived by the nine children of Andrew Rattray mentioned in the settlement. One of these children, Peter Millar Rattray, died within a year of the testator, viz., on 24th April 1890, unmarried but testate. At the date of his death the trust-estate had been realised with the exception of certain heritable subjects in Dunkeld, and a debenture by a foreign land company which did not mature until 1893. The heritable subjects were sold on 4th April 1890, and the price was received on 15th May 1890.

The truster was also survived by the ten children of John Rattray mentioned in the settlement. Subsequent to the date of the settlement and prior to the date of the truster's death three other children of the same marriage of John Rattray were born, who at the date of the present case were in pupillarity.

The truster was also survived by the seven children of James Rattray referred to in the settlement.

Questions having arisen (1) as to whether Peter Millar Rattray having died upon the complete realisation and division of the whole estate, any share of the residue vested in him, and (2) whether the three children of John Rattray who were born subsequent to the date of the trust-deed were entitled along with their brothers and sisters to share in the residue, the present special case was presented, and the following questions were submitted for the opinion of the Court:—"(1) Did a share of residue vest in the deceased Peter Millar Rattray? (2) Are the said William Rattray, Jane Ann Rattray, and Richard Rattray entitled to participate in the division of residue?

Argued for the beneficiaries of the deceased Peter Millar Rattray—This was an estate easy of realisation, and six months was ample time for the trustees to have realised and divided it among the beneficiaries. This was a case in which the Court upon equitable grounds would presume that to have been done which ought to have been done. The heritage was actually sold before Peter's death, and, though the price was not paid until May, yet it was fixed, and could have been entered in any scheme of division—*Maclean's Trustees* v. *Maclean*, July 19, 1889, 16 R. 1095. In the circumstances upon equitable grounds the Court would hold that Peter's share had vested. On the second question —As the children were born prior to the death of the testatrix, if she had desired the three youngest to participate, she could easily have said so, and in the absence of any such direction the share of residue must be restricted to the ten—*Shearer*, 4 Brown's Chan. Rep. 54; Theobald on Wills, 228; *Bryce's Trustees*, March 2, 1878, 5 R. 722.

Argued for the children of John Rattray —Looking to the nature of the estate, there was no undue delay in the realisation of the property. The period of vesting was

clearly indicated by the testatrix, and could not be anticipated; the case was ruled by *Howat's Trustees* v. *Howat*, Dec. 17, 1869, 8 Macph. 337, and *Macdougall* v. *Macfarlane's Trustees*, May 16, 1890, 17 R. 761. On the second question—The words "of whom there are ten" were demonstrative, not taxative. The bequest was to the children of John, and the power of making advances to the parents showed that the bequest was to the whole children—*Bogle*, Hume, 274; *Wood* v. *Wood*, January 18, 1861, 23 D. 338; *Ross* v. *Dunlcp*, May 31, 1878, 5 R. 833.

At advising—

LORD ADAM—Two questions are raised by this special case, (1) Whether a share of residue vested in the deceased Peter Millar Rattray? and (2) Whether William Rattray, Jane Ann Rattray, and Richard Rattray are entitled to participate in the division of residue?

The facts which raise these two questions are very simple, and may be very shortly stated. Peter Millar Rattray was a son of Andrew Rattray, who was a brother of the testatrix. Now, this Peter Millar Rattray died unmarried on 24th April 1890, and the testatrix had died eleven months before. He left a settlement by which he conveyed to certain parties therein named his share of Mrs Millar's estate. If his share of this estate had vested in him, then of course it was carried by his settlement; if, on the other hand, it had not vested, then it was not so carried.

The first question then which has to be determined is the period of vesting; or, in other words, when did the shares of Mrs Millar's estate vest in the various beneficiaries? Now, the testatrix has expressed in so many words the time at which she desires that vesting shall take place. No doubt it is contained in a parenthesis, but the expression of her intention on the matter is not the less clear upon that account; it is in these terms—"being the complete realisation and scheme of division of my whole estate, which shall be the period of vesting when not otherwise provided." It is not suggested that there is any other provision as regards the share of Peter Millar Rattray, and therefore the period of vesting of this share must be the period of the complete realisation and division of the testatrix's whole estate. If, then, Peter Millar Rattray died before his share of Mrs Millar's estate had vested in him, then the following clause of the deed applied to him—"and in the event of any of the said children dying before payment without leaving issue, the division shall be made as if they had not been born, among the survivors jointly with the issue of any who may have died leaving children, such issue always succeeding equally to the share which their parents would have received if alive." . . .

Now, this is the event which has happened, for Peter Millar Rattray died before the period of payment had arrived, and his share therefore goes to the surviving children of Andrew Rattray.

It was urged that though realisation had not actually taken place, this had arisen from undue delay; and that we therefore should hold that to be done which ought to have been done. But I do not see any room for such a suggestion when we consider the date at which the testatrix died. She left personal property worth about £1300, and heritable property worth about £470. This property would take some time to realise advantageously, and I cannot say, looking to the nature of this estate, that there has been here any undue delay. When the testatrix has fixed a time for vesting, whether we think it a judicious arrangement or not, all that we can do is to give effect to it.

I am therefore for answering the 1st question in the negative.

As regards the 2nd question, the three children referred to in it are children of John Rattray, and their position is that they were not born at the date of the settlement, but prior to the testatrix's death. The question therefore is, whether or not they are included in the gift to the children of John? Now, the testatrix by the 12th purpose of her settlement directs her trustees to divide the free residue of her estate among the children of her brothers, and among others between "the children of my brother James Rattray of whom there are ten." Are these words, "of whom there are ten" to be held as limiting the number of those who are to share in this bequest? I do not think that this was the intention of the testator, and I reach this result on a construction of one of the clauses in this 12th purpose, which is in these terms—"With power to my trustees to make such advances as they may deem suitable before the period of distribution . . . to any of the said children or to their father or mother respectively for behoof of all the members of a family jointly if not stated in the receipt to be for anyone in particular.". . . . I think that the language of this clause shows that the testatrix intended her gift to be shared in by all the children of her brother John.

I am therefore for answering the second question in the affirmative.

LORD M'LAREN—Upon the first question I have no difficulty in coming to the same conclusion as that arrived at by Lord Adam, while as to the second, though it is somewhat more difficult, I am on the whole prepared to concur.

The law upon this subject is well determined. A legacy to the children of A confers upon all the children who may be born a right to participate in the bequest, whereas a bequest to the N children of A limits it to the children who happen at the time to be in existence, and the reason of this is, that you could not admit *post-nati* to share in the bequest without doing violence to the testator's language. Whenever the language of the deed permits the admission of *post-nati* to share in a bequest, then they ought to be admitted; and in the present case I consider the words used

in the 12th purpose not taxative but merely demonstrative.

LORD KINNEAR—I agree upon both points. With regard to the term of payment, a difficulty sometimes arises in ascertaining the testator's intention on this matter, but any such difficulty is awanting in the present case, as the term of payment is clearly expressed in this 12th purpose as is also the period of vesting. The power of the trustees to make advances also shows that a wide discretion was given to them by the testatrix. Still I think that we must construe this deed in such a way as to carry out what we understand to be her intentions. As regards the second question the testatrix gives the residue of her estate to the children of her three brothers, not to the individuals who compose these three families, but to the families themselves. If a legacy is given in general terms to a class, the inference arising from such a gift must not be narrowed, unless there is a clear expression or implication of an opposite intention. In the present case the testatrix's intention is made clear by the terms of the 12th purpose.

The LORD PRESIDENT concurred.

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

Counsel for the Second Parties—Graham Stewart. Agents—Lyle & Wallace, Solicitors.

Counsel for First and Third Parties—Gillespie. Agents—W. & J. Burness, W.S.

Friday, June 26.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

BEATTIE AND ANOTHER *v.* THE EDINBURGH NORTHERN TRAMWAY COMPANY.

Contract—Remuneration under Contract—Joint-Employment.

An agreement was made by the directors of a cable tramway company on the one hand, and B, an architect, and E, an engineer, on the other, that B and E should be the engineers of the company, to superintend the construction of the tramways, and that they should receive 5 per cent. on the cost of the works.

E, who was a specialist in the construction of cable tramways, prepared various plans and drawings, but in consequence of the work not being proceeded with at once, he went abroad, and took no further part in the construction of the line, and the work was subsequently completed by B, in conjunction with another engineer.

In an action by B and E for remuneration under the agreement—*held* that it was not a contract for joint-employment, and that so long as the work was efficiently done, it could competently be executed by either of the associated parties.

This was an action by Mr Beattie, architect, Edinburgh, and Mr Eppelsheimer, C.E., residing at Kaiserslautern, in Germany, against the Edinburgh Northern Tramway Company, incorporated by statute dated 7th August 1884, for recovery of the remuneration due to them as engineers employed to superintend on behalf of the defenders the construction of the Cable Tramways between Princes Street and Golden Acre.

The pursuers founded on a contract which was contained in the following minutes of the directors of the Tramways Company, and the letter addressed to them by the pursuers.

By the first minute, dated 7th October 1884, "it was resolved that Mr Beattie and Mr Eppelsheimer be the engineers of the company, and that their remuneration as such engineers be a commission of 3½ per cent."

On 25th October Messrs Eppelsheimer and Beattie wrote to the directors—"Mr Mann has informed us of the view of the board, that the remuneration of the engineers should be restricted to a commission of 3½ per cent. on the cost of the works and plant. We beg respectfully to say that we do not see our way to accept the appointment on such terms. When negotiations were entered into with the Cable Corporation to undertake the working out of this Act of Parliament they made it a stipulation that Mr Eppelsheimer should be associated with Mr Beattie as engineer in the construction of the lines, and it was arranged that their joint remuneration should be the usual commission of 5 per cent. As Mr Eppelsheimer is at present greatly engaged on the Continent in cable tramway work, and will require to travel back and forward repeatedly between the Continent and Scotland, it was further agreed that while he should pay his own expenses to London, his travelling expenses in England were to be paid to him, and the same in the case of Mr Beattie when he requires to travel on the Northern Tramway business. We beg to draw the attention of the board to the fact that a cable tramway is not like a horse tramway or a railway. It requires a much greater amount of thought and scientific knowledge, and the responsibility is far more serious. The number of plans and detail drawings required is very large, and the usual remuneration of 5 per cent. is by no means liberal for this class of work, which is to a considerable extent a designing of a large machine, with numerous sub-divisions and minor mechanical arrangements, for conveying the public. We trust that on a consideration of these facts you will confirm the original agreement with the engineers, so that the works may be prosecuted. Mr Eppelsheimer is at present in England, and awaits your decision."