

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 awaiting 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 re-

muneration 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."

On 28th October 1884, on consideration of this letter, the directors "resolved that the minute of meeting of 7th instant, as to the remuneration of the engineers, be rescinded, and that such remuneration be fixed at 5 per cent. on the cost of the works, with the addition of such reasonable travelling expenses between London and Edinburgh as may be approved by this board."

The defenders pleaded, *inter alia*—(4) That the pursuers had not rendered any services as engineers; and (5), *separatim*, that they (the defenders) were only liable upon a *quantum meruit*.

A proof was allowed, from which, *inter alia*, the following facts appeared—The contract for the construction of the tramways was given to the Cable Corporation, Limited, in October 1884, but the work was not proceeded with till 1886, by which time Mr Eppelsheimer was in Germany, having left this country in the spring of 1885. Before going abroad he had prepared plans for the construction of the work, and some of them were subsequently used in the construction of the tramways. The contract with the Cable Corporation for construction of the line was modified by a second contract entered into in July 1886, and the work was thereafter satisfactorily executed under the superintendence of Mr Beattie and an engineer of the name of Colam, who was in the employment of the Cable Corporation. The first contract stated that the engineers of the company were Mr Beattie and Mr Eppelsheimer. The second only mentioned Mr Beattie. The further results of the proof appear, so far as material, from the findings of the Lord Ordinary.

On 25th June 1890 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor, which contained, *inter alia*, the following findings:—"Finds (1) that the Cable Tramway between Golden Acre and Princes Street was constructed on behalf of the defenders under two contracts entered into between the defenders and the Patent Cable Corporation Company of London, dated 24th October 1884 and 22nd July 1886; (2) that the pursuer William Hamilton Beattie superintended the construction of the said Cable Tramway as engineer in the employment of the defenders; (3) that he was employed to act as such engineer along with the pursuer William Eppelsheimer in October 1884, at a commission of 5 per cent. on the cost of the works; (4) that the construction of the said Cable Tramway did not then proceed, but proceeded under that contract and under the supplementary contract of July 1886; (5) that the said William Eppelsheimer, shortly after October 1884, prepared certain plans for the construction of the said Cable Tramway, but that thereafter he left this country, and took no part in superintending the construction of the said line; (6) that it was understood and agreed between the pursuer William Hamilton Beattie and the defenders that he should be paid the said commission of 5 per cent. on the cost of the works; (7) that the pursuer William

Eppelsheimer has deponed that he has assigned his claims in this action to the other pursuer; (8) that the cost of the construction of the said Cable Tramway—on which cost the pursuer William Hamilton Beattie is entitled to commission—amounts to £43,685, 5 per cent. on which sum amounts to £2184, 5s.; . . . (11) that a sum of £500 paid to account falls to be deducted; (12) that the amount due to the pursuers is £1891, 2s. 9d.: Therefore repels the defenders' pleas, and decerns in favour of the pursuers against the defenders for payment of the said sum of £1891, 2s. 9d., with interest as concluded for, and *quoad ultra* assoilzies them from the conclusions of the summons, and decerns, &c.

"*Opinion*.— . . . There has been a great deal of dispute as to the part played in the construction of the tramway by Mr Beattie and Mr Eppelsheimer, or rather by Mr Eppelsheimer's plans. It is maintained by the pursuers that the plans furnished by Mr Eppelsheimer were sufficient to enable the contractors to construct the railway, and Mr Beattie to superintend the construction; and Mr Beattie maintains that he gave assiduous, effective, and intelligent superintendence. Mr Eppelsheimer says that, in fact, the tramway has been constructed in accordance with his plans, with modifications which are of slight importance, and in some cases of doubtful benefit.

"The defenders, on the other hand, have endeavoured to show that the plans which Mr Eppelsheimer furnished were totally insufficient, and that he took essential plans with him to Germany, and retained them there. They affirm that Mr Beattie was quite unqualified and ineffective, from want of special technical skill; and that the tramway was not constructed from Mr Eppelsheimer's plans, but from the plans furnished by Mr Colam, which differed in very important particulars from those of Mr Eppelsheimer. The pursuers' view is that Mr Colam's plans were but modifications of Mr Eppelsheimer's, and that the alterations which he introduced were unimportant.

"It is not going too far to say that the half of this very long proof is occupied with that question. I do not go so far as to say that that evidence is immaterial, but I am satisfied that its importance has been greatly exaggerated. . . .

"The contract between the companies was greatly modified by the agreement of July 1886, when, *inter alia*, it was agreed that the corporation might construct one of the lines only, and not the other.

"That contract, I think, confirms Mr Beattie in his position as engineer.

"Mr Eppelsheimer is not mentioned in it, and the work contracted for was carried into effect under the supervision of Mr Beattie alone. Mr Eppelsheimer's services, after this second contract, were not offered or asked, and the question comes to be, whether it was the understanding of parties that Mr Beattie should be entitled to the whole 5 per cent., or whether the absence of his coadjutor should disentitle him to claim so much. On this point I am

inclined to think that the understanding was that Mr Beattie should be paid the full percentage. Mr Beattie performed what work he did under a contract by which the company agreed to pay 5 per cent. for engineering services. No reduction of the 5 per cent. was suggested. The company might, perhaps, have insisted on the services of Mr Eppelsheimer, but they did not do so, and did not take the smallest step to secure them, contenting themselves, as I think, with the services of Mr Beattie. If it had been meant to reduce the engineer's percentage, that, I think, should and would have been done expressly. I think, therefore, that Mr Beattie was entitled, if he fulfilled this contract, to 5 per cent. on the proportion of the contract price of the works applicable to Golden Acre. . . .

"Has Mr Beattie fulfilled his contract to act as engineer of the company in regard to the construction of the Golden Acre section? I am of opinion that he has. He was on the spot acting as the recognised engineer of the Tramways Company. The work has been done. The tramway is completed, and completed in a satisfactory manner. I confess I have never been able to understand how this company, which recognised him as engineer during the whole period of the construction of the line, can possibly now turn round and refuse to pay his commission on the ground that he was incompetent to fulfil his duty.

"A perusal of the correspondence impresses me with the idea that Mr Beattie did not neglect his duty. He watched over the work carefully, and his complaints of the delays of the sub-contractors were many and urgent. They may or may not have been well founded, but I cannot doubt that they were made in earnest.

"But then it is said, on the part of the defenders, that Mr Beattie really understood nothing of the special requirements of cable tramways; that Mr Eppelsheimer took to Germany essential plans, and that those with which he furnished Mr Beattie, and which were passed to Mr Colam, were quite insufficient; that the engineering work was really done by Mr Colam. Now, I entertain the opinion that it does not signify whether this was so or not. If Mr Colam did Mr Beattie's work, so much the better for Mr Beattie; but if the work was done, and well done, and if the Tramways Company have not been called on to pay Mr Colam for his services, I am unable to see their ground of complaint. . . .

"On the whole, I am of opinion that the pursuers are entitled to the sum of £2184, 5s., being a commission at the rate of 5 per cent. on £43,685, the cost to the defenders of constructing the Golden Acre Tramway, under deduction of £500 paid to account, and with the addition of £206, 17s. 9d. claimed, and, as I understand, not objected to. The amount for which decree must go out is, therefore, £1891, 2s. 9d."

The defenders reclaimed, and argued—This was a contract for joint-employment, and it had not been implemented by the pursuer. Mr Eppelsheimer was a specialist, and it was upon his services that

the defenders chiefly relied, as Mr Beattie had no knowledge or experience in so technical a matter. It was Mr Eppelsheimer who was expected personally to superintend the laying of the line, and not only did he fail to do this, but he carried away with him the plans and drawings which he had made, and which were essential to the work being properly executed. All Eppelsheimer's work had to be done over again, and as it was of no avail to the company it was unreasonable that they should be called upon to pay for it.

Argued for the respondents—Though not partners, Beattie and Eppelsheimer were associated for this joint-adventure. If a firm of engineers had been employed the services rendered would have been similar to these which were given here. No complaint was ever made to the respondent that the work was not being executed by the engineers in terms of the contract, and it was not alleged that the work had not been well and competently executed.

At advising—

LORD ADAM—The action is raised by Messrs Beattie and Eppelsheimer, to recover from the Edinburgh Northern Tramway Company the remuneration due to them as engineers for the construction of the company's tramway.

The pursuers claim 5 per cent. on the cost of the works in terms of a contract to that effect. The defenders contend that the pursuers are only entitled to remuneration on the principle of *quantum meruit*. It was maintained by the defenders that the contract had not been implemented by the pursuers because it was a contract for the joint-employment of Messrs Beattie and Eppelsheimer, whereas no joint-service had been rendered by them, Mr Beattie alone having acted as engineer, while Mr Eppelsheimer rendered no services as such. I do not think this plea is well founded. I see nothing on the face of the contract to indicate that provided the work was efficiently done, all or any of it might not be done by either of the engineers, and it is not said that the work was not efficiently done.

If Mr Beattie and Mr Eppelsheimer had been associated as members of an engineering firm, I do not suppose this plea would have been stateable. That they were associated as partners for this piece of work only does not appear to me to make any difference. It is not the fact that Mr Eppelsheimer did not render personal services as engineer. Although he did not personally superintend the construction of the tramways, he contributed various plans and drawings which were used in their construction. Besides, the defenders were perfectly satisfied with Mr Beattie alone. They never asked for further service from Mr Eppelsheimer, or made any complaint on the subject.

It is not disputed that the work was efficiently done by Mr Beattie, and while it is possible that he may have a ground of complaint against Mr Eppelsheimer for not having done his fair share of the work,

that is a question with which the defenders have no concern. I do not think, therefore, that there is any substance in this contention, and I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—H. Johnston—Burnet. Agents—A. & G. V. Mann, S.S.C.

Counsel for the Defenders—Graham Murray—Salvesen. Agents—Graham, Johnston, & Fleming, W.S.

Wednesday, July 1.

## SECOND DIVISION.

PARTICK, HILLHEAD, AND MARYHILL GAS COMPANY, LIMITED v. TAYLOR.

*Company—Sale of Undertaking—Reserve and Depreciation Fund—Distribution of Price.*

The articles of association of a company provided, that the directors should have power to set aside out of the profits a reserve fund and a depreciation fund, to be invested on such securities as the directors should think proper; that the reserve fund should be applied to such purposes as paying off debts, equalising dividends, and meeting contingencies; and the depreciation fund to the repair and renewal of the buildings and plant of the company. The directors from time to time carried part of the profits to these funds, but instead of investing them, and without having obtained the authority of the shareholders, applied the whole of the funds to the extension of works, and other capital purposes of the company. The company's undertaking having been sold, a question arose between the preference shareholders, who had always received their full dividend, and the company, as to the mode in which these funds should be dealt with.

*Held* that the ordinary shareholders were entitled to both funds, and that they should be deducted from the price of the works before a distribution among all the shareholders was made.

*Company—Sale of Undertaking—Expenses of Parliamentary Proceedings.*

A gas company incurred considerable expenses in Parliamentary proceedings, which finally resulted in an arrangement under which the company's undertaking was sold.

*Held* that these expenses should not be charged against the revenue of the year preceding the sale, but against the price obtained for the undertaking.

The Partick, Hillhead, and Maryhill Gas Company, Limited, was incorporated under the Companies Acts 1862 and 1867 on 2nd May 1871, with a capital of £50,000.

By article 6 of the company's articles of association power was given to the shareholders "to increase the capital of the company by the creation of new shares, whether ordinary, preferential, or special." By resolution passed on 29th October 1872 the ordinary share capital was increased to £100,000. On 22nd August 1873 the shareholders resolved to further increase the capital of the company "by the sum of £30,000, to be issued in 6000 preference shares of £5 each, these shares to be entitled to a preferential dividend" of 5½ per cent., and thereafter these preference shares were issued. From the date of the issue till 30th June 1890 the dividend of 5½ per cent. was duly paid on the preference shares, the average dividend paid on the ordinary shares during the same period being rather over 3½ per cent.

By the articles of association the directors were authorised to set aside a reserve fund and a depreciation fund, the clauses authorising these funds being as follows:—"13. Any part of the profits of the company may, at the discretion of the directors, be set apart as a reserved fund to be applied at their discretion—(a) For paying off debts of the company; (b) for equalising dividends; (c) for meeting contingencies; (d) for any other purposes of the company. 14. The reserved fund shall not at any time exceed in the whole £10,000. 15. Any part of the profits of the company may, at the discretion of the directors, be set apart as a depreciation fund, to be at their discretion applied to the repair and renewal of buildings, erections, vessels, plant, works, and other property of the company. 16. The depreciation fund shall not at any one time exceed 25 per cent. of the original cost to the company of the property, buildings, and machinery in respect of which that fund is formed. 17. The moneys carried to the reserve fund and the depreciation fund respectively shall be invested in the company's name on such securities as the directors think proper, and the income arising from such fund shall be added thereto until it reaches its limit, and shall thereafter be deemed earnings of the company."

The application of the earnings of the company was provided for by article 18, which was in these terms—"18. All the earnings of the company, including all their receipts properly carried to the account of revenue, shall every year be applied as follows—(1st) In payment of all taxes, rates, and rents, and other preferable charges payable in respect of the company's landed property or works, and all arrears, if any, thereof; (2nd) in payment of all management, working, and other current expenses of the company, and all arrears, if any, thereof; (3rd) in payments to the reserved fund and the depreciation fund; (4th) in payment to the preferential shareholders, if any, of their dividends, according to their respective priority; (5th)