the amount of the fares, which were due to the defenders for the journey performed in excess of that represented by the tickets delivered. There being no fraud on the part of the pursuer, it was an illogical and illegal view of his responsibility, and of the defenders' rights, to treat the pursuer as if he individually was travelling without a ticket, or a proper ticket, and in consequence to remove him from the carriage. But I demur entirely to the defenders' contention. It appears to me that if the defenders' ticket-collector accepted delivery of the tickets in slump from the pursuer, he thereby homologated the pursuer's actings in collecting the tickets, and that the pursuer thereafter could not be held responsible for any defect or deficiency which a subsequent examination of the tickets disclosed. It was the ticket-collector's right to have a ticket from each passenger, but by taking the whole tickets together from one passenger he waived that right, and if loss arises from his doing so, he or his employers must bear it. He could have declined to receive from the pursuer more than his own ticket, allowing each passenger to recover his own one, and deliver it himself. If any dispute arose among the passengers as to which ticket belonged to each respectively, the ticket-collector would not be interested therein, as each passenger is bound to deliver to him a ticket for the journey performed; the passenger, if any, who could not produce such a ticket would be the person responsible to the ticket-collector. But, that one passenger, to whom for convenience the other passengers have handed their tickets for delivery to the ticket-collector, should thereby incur any responsibility whatever (except that of handing them over as he received them to the ticket-collector) is a view which is not only novel, but to my mind unsound. The ticket-collector may, in my view, act strictly according to his right, and exact delivery of a ticket from each passenger, but failing his doing so, any consequence resulting from such failure must be borne by himself, and not by the passenger from whom he consented to receive the tickets of the whole passengers together.

The Court adhered.

Counsel for the Pursuer—Young—Craigie. Agent—George Jack, S.S.C.

Counsel for the Defenders—Asher, Q.C.—Cooper. Agents—Millar, Robson, & Company, S.S.C.

Tuesday, June 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DOWIE & COMPANY *v.* TENNANT.

Process — Foreign — Jurisdiction — Action against Proprietor of Scotch Heritage when after Interchange of Improbative Missives of Sale Disposition had been Signed but not Delivered—Forum non conveniens.

The proprietor of certain heritable subjects in Scotland, who was domiciled and living in America, after the interchange of improbative missives of sale with a person in this country, signed in favour of said person a disposition of the subjects, which had been prepared by agents in this country acting for both parties. After signing the seller posted the disposition to the agents on 12th, and it reached their hands on 23rd January 1891. In answer to a summons served upon him on 21st January, as a proprietor of heritage in Scotland, the seller pleaded no jurisdiction and *forum non conveniens.*

Held that these pleas fell to be repelled.

Messrs Peter Dowie & Company, merchants, Leith, brought an action in the Court of Session against Robert Gray Tennant, commission merchant, Chicago, United States of America, as being the owner of heritage in Scotland, for payment of £150 alleged to be due by him in respect of certain transactions in lard carried through in the Chicago produce exchange.

The summons was served upon 21st January 1891, and on the same day inhibition was used against the defender.

The defender pleaded—(1) No jurisdiction. (3) *Forum non conveniens.*

It appeared that the defender, although a Scotsman by birth, had become a domiciled American. Upon 19th December 1889 he became entitled, as heir-at-law to his mother, to certain heritable property in Leith. To this property he made up a title by service in October 1890, and at once proceeded to try and sell it.

Upon 19th November 1890 Captain John Parker, Leith, wrote to Messrs Dowie & Scott, S.S.C., Leith, agents for the defender, as follows:—"Dear Sirs,—I hereby offer you the sum of Five hundred and fifty pounds stg. for the house 191 Ferry Road, Leith, lately occupied by Mr W. G. Tennant; entry at once. This offer to remain open for acceptance for fourteen days.—I am, yours truly, J. PARKER. Adopted as holograph. J. PARKER."

Upon 25th November 1890 the following letter was written:—"Dear Sirs,—I hereby increase the sum offered in my foregoing offer to Six hundred pounds stg., all other conditions same as in my said foregoing offer.—Yours truly, *for* JOHN PARKER, AGNES PARKER." This letter was not holograph of Captain Parker's wife, by whom it was signed.

The following reply was sent:—

"46 *Constitution Street, Leith,*
"1*st Decr.* 1890.

"191 *Ferry Road, Leith.*

"Dear Sir,—As agents for and on behalf of the proprietor Mr R. G. Tennant, Chicago, we hereby accept of your offer, dated 19th and 25th ulto., to purchase this house at the price of Six hundred pounds stg.—We are, yours truly,

"DOWIE & SCOTT."

A disposition of the property in favour of Captain Parker was prepared by Messrs Dowie & Scott, who acted as agents for both parties, and despatched by them to Chicago, where it was duly signed by the defender upon 9th January 1891. He posted it upon 12th January addressed to Messrs Dowie & Scott, by whom it was received on 23rd January 1891, two days after the service of the summons.

The Lord Ordinary (KYLLACHY) repelled the first and third pleas for the defender.

"*Opinion.*—In this case I have come to be satisfied that the plea of no jurisdiction must be repelled.

"The question is whether a defender, feudally vested in heritable property in Scotland, ceases to be subject to the jurisdiction upon the execution of missives of sale not probative and not followed by *rei interventus*, but followed by the execution but not delivery of a disposition in favour of the purchaser?

"I am not able to answer this question in the affirmative. I consider that to do so would be to affirm that if this action had been directed against the purchaser, he would have been subject to the jurisdiction of the Scotch Courts simply in respect of his purchase. Now, although the decisions have gone a considerable way in sustaining the jurisdiction, wherever there is substantial ownership of heritable estate in Scotland, no case was cited to me where such substantial ownership has been held constituted by mere purchase, not followed by actual conveyance. Certainly no case has occurred in which the Court has recognised improbative missives, not followed by *rei interventus*, or a delivered disposition, as operating a transfer of property for the purpose of jurisdiction.

"I recognise in the case of a completed sale the force of Mr Constable's able argument, founded on the impossibility of inhibition after such completed contract of sale, and, on the other hand, on the possibility after such sale of an adjudication in implement. I quite recognise the force of that argument, and I by no means express an opinion adverse to it. All I say is that there is no decision which has as yet gone so far. But here I do not consider that the question suggested properly arises at all. This is not a case of a concluded and binding contract of sale. The missives are admittedly improbative. There was therefore *locus pœnitentiæ* until the disposition was executed and delivered, and there being *locus pœnitentiæ*, the result of course was that neither party was bound by the documents which had passed.

"It is said that the disposition having been executed by the defender and posted before the raising of the action, addressed to the joint agent of himself and the purchaser, that constituted delivery of the disposition, and amounted to divestiture. But I am unable to hold that, at all events until the deed reached the hands of the agent, it was beyond the power of the defender. He might, for example, I cannot doubt, have countermanded by telegram the completion of the transaction. That being so, the case is just where I put it as a case of an unconcluded contract of sale not binding upon the parties, and therefore not sufficient to operate in any sense a transfer of property.

"I shall therefore repel the plea of no jurisdiction, and with respect to the plea of *forum non conveniens*, I can discover no ground of convenience which might not be urged in the great majority of cases in which actions are brought in this Court on transactions with foreigners, or in which foreigners are interested.

"I shall therefore repel both pleas."

The defender reclaimed, and argued—Assuming that the missives passing between Parker and the defender's agents had been probative, jurisdiction would not have been established against the defender. (1) By the contract to convey the right of the seller was transformed into a mere right to a price, and the substantial right to the property passed to the purchaser, and the property could not have been attached by inhibition against the seller (*Livingstone* v. *Macfarlane*, 1842, 5 D. 1). The cases showed that the Court would not arrogate to itself jurisdiction on this ground, unless there was property attachable by inhibition against which its decree could be made effectual—*Ferrie* v. *Woodward*, 1831, 9 S. 854; *M'Arthur* v. *M'Arthur*, 1842, 4 D. 354; *Fraser* v. *Hibbert*, January 14, 1870, 8 Macph. 400; *Bowman* v. *Wright*, January 24, 1877, 4 R. 32. (2) Where there was a binding contract of sale, it was clear there would be jurisdiction against the purchaser; bare apparency had been held sufficient to found such jurisdiction (*M'Arthur* v. *M'Arthur*, *cit. supra*), and jurisdiction could not be founded against both seller and purchaser of the same property. The missives in the present case were not improbative. The second offer was the only letter which was not holograph, and the acceptance expressly applied to both offers. But assuming that there was informality, it did not affect the essence of the contract—(Lord President's opinion in *Walker* v. *Flint*, Feb. 20, 1863, 1 Macph. 417, and Lord Deas' opinion in *Emslie* v. *Duff*, June 2, 1865, 3 Macph. 854). The right to take advantage of such informality was, like a right of election, personal to the party to the contract, and it was not a right which a single creditor could exercise. The defender's case did not rest solely on the passing of the missives; by the despatch of a completed disposition the defender had done all in his power to divest himself of the property, and independently of constructive delivery he should

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