defender liable to the pursuer in the expenses of the reclaiming-note, and remit," &c.

Counsel for the Defender and Reclaimer—J. C. Watt. Agent—John Robertson, Solicitor.

Counsel for the Pursuer and Respondent — Wilton. Agent — David R. M'Cann, S.S.C.

Saturday, January 25.

FIRST DIVISION.

KING LINE, LIMITED, PETITIONERS.

Company—Memorandum of Association—Alteration—Companies (Memorandum of Association) Act 1890 (53 *and* 54 *Vict. c.* 62)—*Steamship Owners.*

The Companies (Memorandum of Association) Act 1890 enacts as follows:—Section 1—"(1) Subject to the provisions of this Act a company registered under the Companies Acts 1862 to 1886 may by special resolution alter the provisions of its memorandum of association or deed of settlement with respect to the objects of the company, so far as may be required for any of the purposes hereinafter specified, . . . but in no case shall any such alteration take effect until confirmed on petition by the Court which has jurisdiction to make an order for winding-up the company . . . (5) The Court may confirm, either wholly or in part, any such alteration as aforesaid with respect to the objects of the company, if it appears that the alteration is required in order to enable the company . . . (*b*) To attain its main purpose by new or improved means or . . . (*d*) To carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company. . . ."

A company which had been formed for the purpose of carrying on the business of steamship owners in all its branches, by special resolution altered its memorandum of association by adding clauses in which they took power to carry on the business of ship owners, ship brokers, insurance brokers, managers of shipping property, lightermen, warehousemen, wharfingers, ice merchants, refrigerating storekeepers, and general traders, and to make and carry into effect arrangements for amalgamation with any other companies having similar objects.

On a petition by the company under the Companies (Memorandum of Association) Act 1890, the Court *confirmed* the alteration.

Counsel for the Petitioners—Tait. Agents—Davidson & Syme, W.S.

Thursday, January 30.

FIRST DIVISION.

LORD HAMILTON OF DALZELL *v.* CHASSELS.

Superior and Vassal—Casualty—Composition — Payment of Casualty — Special Stipulation — Implied Entry when Fee Full—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

A feu-contract was executed in 1781 by which subjects were feued to be held "expressly of" the superior and his heirs and successors, "and not otherwise." The *reddendo* clause provided for payment by the vassal of one year's feu-duty at the entry of each heir, "and one full year's rent of the subject according to the value thereof at the entry of every singular successor to the said subject, and that within one year and one day of the heir or singular successor succeeding or acquiring right thereto."

In 1884 a body of trustees who were the vassals infeft in the subjects paid a casualty. In 1900 a singular successor acquired the subjects under a duly recorded disposition. The superior having claimed a casualty, the singular successor refused to pay it in respect that the fee was full, one of the trustees being still alive, and that consequently in virtue of the proviso contained in the Conveyancing (Scotland) Act 1874, sec. 4 (3) he was not liable.

Held that prior to the Conveyancing Act of 1874 the superior could not under the provisions of this feu-contract and the law as it then stood have compelled a singular successor to enter while the fee was full; that there was no obligation imposed upon a singular successor by the feu-contract to pay a casualty irrespective of entry; and that consequently the superior was not entitled to payment of a casualty.

Opinion (*per* Lord M'Laren) that even if there was in the original feu-contract an obligation upon every disponee to take entry and pay a casualty within a year and a day, such an obligation was not binding on a singular successor who had not by any express stipulation in his title made himself a party to the original contract.

By a feu-contract dated in 1781 entered into between Captain John Hamilton of Dalzell and Robert Brownlie, Captain Hamilton sold and in feu-farm and heritage perpetually let to Robert Brownlie certain subjects therein described, now part of Windmillhill Street, Motherwell, for payment of the feu-duty and casualties and on the conditions therein expressed.

The feu-contract contained, *inter alia*, the following clauses:—"The said Captn. John Hamilton binds and obliges him, his heirs, and successors, to infeft and seize the said

Robert Brownlie and his foresaids upon their own proper charges and expenses in the said lands, to be holden expressly of the said Captn. John Hamilton and his foresaid, and not otherways, for payment and performance of the yearly feu-duties and other casualties, obligations, or provisions and declarations hereinafter expressed. . . . For the which causes, and on the other part, the said Robert Brownlie binds and obliges him, his heirs, successors, and assigneys whomsoever, to content and pay" the stipulated feu-duty, . . . "as allso to make payment to the said Captn. John Hamilton and his foresaids of the sum of six shillings and one penny half-penny sterling at the entry of each heir, and one full year's rent of the subject, according to the value thereof, at the entry of every singular successor to the said subject, and that within one year and one day of the heir or singular successor succeeding or aquiring right thereto, or of the succession opening to them or agreement made with them, and that over and besides payment of the yearly feu-duties before expressed."

In the precept of sasine the superior desired and required sasine to be given to the said Robert Brownlie of the lands "within feued, lying, bounded, and described in manner within mentioned, and to be holden expressly in manner within expressed, and not otherways (all which to be particularly ingrossed in every Instrument of Seisine to follow hereupon, otherways the same to be null and void)."

In 1901 Lord Hamilton of Dalzell, the great-grandson of the said Captain Hamilton, was heir of entail in possession of and infeft in the lands and estate of Dalzell, and as such the immediate lawful superior of the subjects feued by the foresaid feu-contract; and Mirrlees Chassels was the proprietor of and infeft in the subjects described in said feu-contract, which he held of the first party as his immediate superior.

The last casualty paid to the superior of the subjects was a year's rent paid to the father of Lord Hamilton on 30th August 1884 by the proprietors, who were then the trustees of the deceased William Smellie, who were infeft in the subjects conform to notarial instrument in their favour recorded on 21st May 1884. One of the trustees was still alive. These trustees (who paid the casualty immediately after the death of their author, William Smellie, who was expressly entered in the subjects) disponed the subjects to James Smellie, who was infeft therein on 9th December 1884. James Smellie disponed the subjects to the said Mirrlees Chassels conform to disposition dated 14th and 15th May and recorded 19th June 1900.

Lord Hamilton claimed a casualty of one year's rent from Mr Chassels in respect of his acquisition of the subjects, and maintained that said casualty was exigible in terms of the feu-contract.

Mr Chassels maintained that the superior was not entitled now to exact a casualty in respect of said subjects.

A special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) Lord Hamilton of Dalzell, and (2) Mirrlees Chassels.

The question submitted for the opinion and judgment of the Court was—"Is the first party now entitled to enforce payment of the casualty of one year's rent which he now claims against the second party?"

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. c. 94) enacts as follows:—Sec. 4—"When lands have been feued, whether before or after the commencement of this Act . . . (2) Every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate register of sasines, duly entered with the nearest superior whose estate of superiority in such lands would according to the law existing prior to the commencement of this Act have been not defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice . . . (3) . . . but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could, by the law prior to this Act or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering."

Argued for the first party—The *tenendas* clause contained what was clearly intended to be a provision against subinfeudation. "Expressly" in that clause must be construed as meaning "directly" of the superior. Then the *reddendo* clause went on to show the reason for this stipulation being inserted, viz., that there was to be payment of one year's rent if the subjects were sold or alienated to anyone who would be a singular successor if he entered. It was clear that it was intended payment should be made within one year after the singular successor had acquired a right to the subjects, and after such payment it would be assumed that he had entered. Accordingly, though there was an entered vassal still alive, the superior was entitled to take advantage of the special stipulations in the feu-contract and enforce payment of the casualty—*Dick Lauder* v. *Thornton*, January 23, 1890, 17 R. 320, 27 S.L.R. 455. The superior could enforce this condition by a real action against the land—*Morrison's Trustees* v. *Webster*, May 16, 1878, 5 R. 800, 15 S.L.R. 559; *Stewart* v. *Gibson's Trustees*, December 10, 1880, 8 R. 270, 18 S.L.R. 140. He could insist in any action for the purpose of protecting his superiority, and it was not necessary to fence the prohibition against subinfeudation by any clause of irritancy, though if such clause were needed it was in fact to be found in the precept of sasine—Bell's Conveyancing, i. 619; Ersk. ii. 5, 1; *Laird of Lagg*, 1624, M. 13787; *Marquis of Breadalbane* v. *Campbell*, February 12, 1851, 13 D. 647. The superior could also take action for the casualty in respect that the vassal

had intromitted with the rents—Stair, ii. 4, 7; Ersk. ii. 5, 2; Bell's Pr., sec. 700; *Marquis of Abercorn* v. *Grieve*, December 16, 1835, 14 S. 168; *Hyslop* v. *Shaw*, March 13, 1863, 1 Macph. 535; *Prudential Assurance Company* v. *Cheyne*, June 4, 1884, 11 R. 871, 21 S.L.R. 606.

Argued for the second party—There was no obligation to pay this casualty arising out of the special terms of the feu-contract. It contained no such prohibition against subinfeudation as was asserted by the first party. All that was meant was that it was to be a *de me* holding—Juridical Styles, 3rd ed., i. 33. Moreover, the words "acquiring right thereto" in the *reddendo* clause referred to the entry, not to the subjects, and the stipulation as to payment of a year's rent was really conceived in the vassal's favour. The payment was only to be made "at," *i.e.* in respect of, entry. But there could not be entry since the fee was full. Before 1874 the superior could not have insisted in an action of non-entry, and under the Act he could not claim a casualty sooner than he would have been entitled to claim it under the old law—Conveyancing Act 1874, sec. 4, sub-sec. 3; *Dick-Lauder* v. *Thornton*, *supra*, at pp. 328 and 332; Bell's Conveyancing, i. 619. Moreover, a composition was not a *debitum* till it was demanded, and accordingly the superior could not have enforced it by a real action, and the case of *Morrison's Trustees* v. *Webster* had no application. A vassal's intromission with rents did not entitle the superior to proceed against him for payment of a casualty such as this.

LORD ADAM—The question in this case is, whether the first party, the superior of certain lands, is now entitled to enforce payment of a casualty of one year's rent from the second party, who is the proprietor of the *dominium utile*, and is impliedly entered with the superior by the Act of 1874. The answer to that question depends, in my opinion, upon the 4th section of the Act, which provides for an entry by force of the statute, but under this condition, "provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right have required the vassal to enter or to pay such casualty irrespective of his entering."

That takes us back to consider the state of the law prior to 1874. As to the facts in this case, they are that prior to the implied entry of the second party there was an existing vassal, for we are told that in 1884 certain trustees were duly infeft and paid a casualty, one of whom is still alive. Accordingly, under the law prior to 1874 there was a vassal entered in the fee of the subjects, and that being so, we have to ask whether the superior could by the law prior to the Act or by the conditions of the feu-right have required the second party to enter or to pay such casualty irrespective of his entering. It is clear that, the fee being full, the superior could not have done so or demanded payment of a casualty under the law prior to the Act of 1874. The next question is, could he have done so by virtue of the conditions of the feu-contract? These conditions are very brief. The deed which, as has been remarked, is not very artistic in some of its features, provides that the lands are "to be holden expressly of the said Captn. John Hamilton and his foresaid, and not otherways, for payment, &c." It appears to me that this means nothing more nor less than that the lands are to be held of Captain Hamilton and his foresaids on a *de me* tenure. There is no express prohibition of subinfeudation, and nothing to prevent the vassal disponing the lands to someone else to be held of him.

The *reddendo* clause is in the following terms—[*His Lordship quoted it*].

It was maintained to us that the words "acquiring right thereto" mean acquiring right to an entry. I cannot assent to that view. "Thereto" refers to the subjects and nothing else, and the clause lays upon singular successors an obligation to pay at entry one year's rent within a year and a day of acquiring a right to the subjects. What is he bound to pay?—A year's rent of the subjects according to the value thereof. He is to pay "at entry" and at no other time. That is just "in respect of his entry." If that is the proper construction of the contract, how can it be said that under that clause the superior can compel an entry when the fee is already full, or require the vassal or singular successor to pay a casualty for his entry. It appears to me to be quite impossible to give effect to such a contention. I think that is the whole case, and that as prior to the Act of 1874 the superior could not have required the vassal to enter or to pay a casualty irrespective of his entry, the question must be answered in the negative.

LORD M'LAREN—I am of the same opinion. On the first point in the case I agree that the meaning of the *tenendas* clause is no more than if it had been said "to be holden of Captain Hamilton and his foresaids," which is equivalent to a *de me* holding and no more. It is impossible by construction or implication to derive from a clause in such terms a prohibition against subinfeudation.

It has been argued (and this is a distinct point) that even if there is no prohibition of subinfeudation, a sub-vassal must within a year and a day have his title confirmed, or in some way must take out an entry from the superior. That is said to arise out of the clause as to payment of a full year's rent. I have some doubts as to whether the meaning of the clause is that every disponee is to be compelled to enter immediately, but if that be the meaning, we must consider whether the intention of the superior and of the original disponee has been so expressed as to enable the superior and his successors to have their right made effectual. It is said that it is matter of contract that an entry must be taken out within the year, but if it be a contractual and not a feudal relation it will not bind

anyone but the original grantee and his heirs. In order that a singular successor shall be bound he must become a party to the contract and agree to take it over with its conditions. If that had been done; if, for example, Mr Chassels in the deed of sale to him had been taken bound to enter with the superior within a year and a day, it may be that the superior would have had a title to enforce the obligation against Chassels. It is unnecessary to offer an opinion on this, because it must be conceded that the second party did not agree to take over the contract by any words in his title, and there is no law putting him in such a position in default of agreement. I cannot see how a right to compel entry and payment of the casualty pertaining thereto can be enforced against a person who has a right to the lands but has never agreed to take an entry, and whose defence is that he is not bound to take an entry while the last-entered vassal survives and the fee is "full."

LORD KINNEAR—We have heard a very interesting discussion in this case and a great many points of more or less importance have been raised, but the question resolves into a very narrow one. I think it depends entirely on the point stated by Lord Adam, and I agree with what his Lordship said about it. The two parties are a superior and his vassal infeft in a certain parcel of land. There is no question that the relationship of superior and vassal exists between them. If this were not quite clear—as I think it is—on the titles, it is made matter of express averment by the parties to the case, for they say "the second party is the proprietor of and is infeft in the subjects described in said feu-contract, which he holds of the first party as his immediate superior." I apprehend therefore that there is no question that the second party is liable for all the obligations and conditions prestable to the superior under the feu-contract arising either from the tenure or from the express stipulations of the contract itself, and that he became liable so soon as he succeeded in constituting the relation of vassal and superior by obtaining and recording in the register of sasines a conveyance of the subjects, which has under the Act of 1874 the effect of entering him with the nearest lawful superior. But then the claim of his immediate superior is for a casualty at entry, and the condition on which the statute has entered the vassal is that the superior's rights are reserved entire, but subject to this proviso—[*His Lordship quoted section* 4 (3).] The question therefore is, whether the condition as to payment of a casualty which the contract stipulates for is one which the superior under the old law could have enforced by requiring the vassal either to enter or to make payment of the casualty irrespective of his entering.

It is plain, as regards the first alternative, that under the law prior to the Act the superior could have made no such demand, because the time when he could have called upon the vassal or purchaser to enter was when the fee was empty, and it is admitted that the fee is full. The alternative condition is that by the prior law the superior could by the conditions of the feu-right have required the purchaser or vassal to make payment of the casualty irrespective of his entering.

That therefore sends us to the feu-contract to see whether there is any such right in the superior. The stipulation is that the lands are to be held for certain payments, one of which is "payment of one full year's rent of the subject, according to the value thereof, at the entry of every singular successor to the said subject, and that within one year and one day of the . . . singular successor . . . acquiring right thereto or of the . . . agreement made with them." It was suggested that the meaning of this clause was that the singular successor was to have a year and a day to make up his mind to pay, and thus it was a stipulation in favour of a purchaser. I am not disposed so to read the clause. I think that the clear meaning is that the singular successor is to make payment within one year and one day of his acquiring a right to the subject. But the payment is to be made in respect of his entering. This was admitted by the counsel at the bar to be the meaning of the words "payment at the entry;" and the only question is, whether that answers the description of the statute of a payment made irrespective of the vassal's entering. I think that it is only necessary to compare the language of the statute with that of the feu-contract to see that they provide for two entirely different and inconsistent events. The one assumes a payment to be exigible irrespective of entry, and the other provides for a payment as a condition of entry. It may be that the superior has stipulated that a purchaser shall enter and pay the casualty within a year and a day of his purchase. But under the law prior to the Act payment could not be demanded until the lands were in such a position that the superior could have required the purchaser to enter or to submit to a declarator of non-entry; and I am unable to see by what means under that law the superior could have compelled the purchaser to fulfil the obligation to enter or to pay the casualty without entering him; and of course there could be no entry till the fee became vacant. He would have had a perfectly effectual remedy if there had been a clause of irritancy or forfeiture which enabled him to resume the possession and property of the lands. But there is no such clause of irritancy. There is nothing but a bare stipulation that the purchaser was to make payment within a year and a day. There are no means that I know, and none were suggested, by which the superior under the old feudal law could enforce that stipulation against a purchaser who had not come into any feudal or contractual relation with him.

The second party has no doubt, by virtue of the statute, come into such a relation,

but he has done so under this condition, that the claim for the casualty cannot be enforced against him sooner than it could have been enforced against him under the law prior to the statute. It was said that there is an irritancy in the feu-contract which is effectual to enable the superior to enforce the stipulation in question. I cannot agree with that view. The only irritancy is in the precept of sasine, and its only effect is that the instrument of sasine following upon that precept is to be bad if it does not contain every particular that is set out in the precept. That can have no operation against a singular successor who might obtain infeftment upon the vassal's precept, to which no objection could be taken. The assumption of the whole case is that the title is in order.

The LORD PRESIDENT concurred.

The Court answered the question in the negative.

Counsel for the First Party—C. N. Johnston—Chree. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Second Party—Craigie. Agents—Alexander Morison & Company, W.S.

Thursday, January 30.

SECOND DIVISION.

[Sheriff of Orkney.

MAXWELL *v.* HORWOOD'S TRUSTEES.

Sheriff—Jurisdiction—Contract—Lease—Defenders resident outwith sheriffdom and not personally cited within it.

Held that a sheriff has no jurisdiction *ratione contractus* over a defender who is not resident in the sheriffdom unless he has been cited personally within the sheriffdom; and that this rule applies even where the contract relates to the tenancy of heritage belonging to the defender which is situated within the sheriffdom.

Ownership of heritage situated within a sheriffdom does not by itself confer jurisdiction upon the sheriff over the owner.

Thomas Maxwell, farmer, Swanbister, in the parish of Orphir and county of Orkney, brought an action in the Sheriff Court of Orkney at Kirkwall against the Reverend Faulknor Russell Horwood, Vicar of Aldernaston, near Reading, in the County of Berkshire, and John Patrick Wright, W.S., Edinburgh, the trustees acting under the antenuptial contract of marriage between the late Colonel Horwood of Scar House, Sanday, Orkney, and Mrs Jane Hughes or Horwood, presently residing at Scar House aforesaid, and as such trustees proprietors of the farm of Howe in the Island of Sanday.

The pursuer craved decree for payment of the sum of £204, 2s. 11d., which he claimed as being due by the defenders in respect of their obligations as landlords to him as tenant of the said farm of Howe. The pursuer had been tenant of that farm, first under a lease for nineteen years from Martinmas 1879 entered into between him and the marriage-contract trustees, and after its expiry by tacit relocation until Martinmas 1899, when he quitted possession of the farm.

Warrant of citation was granted in the present action upon 12th December 1900. Neither of the defenders was resident in the Sheriffdom of Caithness, Orkney, and Shetland, and neither of them was personally cited within the sheriffdom.

The defenders entered appearance and lodged defences.

They pleaded, *inter alia*—"(1) No jurisdiction."

By interlocutor dated 17th June 1901 the Sheriff-Substitute (COSENS) sustained the first plea-in-law for the defenders and dismissed the action.

Note...—"The defenders plead, *inter alia*. 'No jurisdiction.' I think that the pursuer, in his petition, or at least at the adjustment, after the defenders had raised the plea of no jurisdiction, should have averred his reasons for bringing this action into this Court, and mentioned his grounds for maintaining this Court had jurisdiction. See *Goodall* v. *Robb*, 26th Nov. 1900 (Perthshire), 17 Sh. Ct. Rep. 162, and remarks by Sheriff Jameson, p. 164.

"I have found nothing in the record to indicate the pursuer's reasons. I endeavoured to ascertain at the debate on the plea of no jurisdiction what he relied on as founding jurisdiction. From his argument, I understood him to contend—(1) that the defender had heritable property in the county; (2) that it was a question relating to heritable right or title; and (3) that there was jurisdiction *ratione contractus*.

"The first and second of these arguments I think can be shortly disposed of. It appears to me that it has been clearly decided that the mere possession of heritable property in a county does not of itself found jurisdiction there, personal service being necessary. See *M'Bey* v. *Knight*, 22nd Nov. 1879, 7 R. 255, where Lord Gifford says, at p. 258—'Mere proprietorship of heritable subjects has never been held to subject the owner to the jurisdiction of a Sheriff, he not being personally cited within the county, and possibly never having been within Scotland in his life. It is in this sense that the Supreme Court is the *commune forum* of all persons residing abroad and who must be edictally cited as such.'

"The second argument also appears to present no difficulty.

"I have already indicated the nature of the action, and it is clearly not one of 'heritable right or title' in terms of sec. 8 of the Sheriff-Court Act of 1877, 40 and 41 Vict., cap. 50. I have carefully considered the cases of *Mouat* v. *Lee*, 6th June 1891, 18 R. 876; *Thomson* v. *Wilson's Trustees*, 5th July 1895, 22 R. 866; *Commissioners of Pollokshaws* v. *M'Lean*, 17th November