Then she provides as follows—"and should any one of my said nieces die unmarried before my niece Christina Purves attains the age of twenty-one, then said share shall be divided equally between the surviving sisters." What she means is, that if any niece shall die before a particular event happens, what would have come to that niece if she had survived the event is to be divided equally among those nieces who survive the event. That that is a survivorship clause I think there can be no doubt. It is so expressed. What happened was that Christina died unmarried without attaining the age of twenty-one. It therefore became impossible for the event which the testator mentioned (any niece dying unmarried before Christina attained 21) ever to happen. That having become impossible, I think that what Christina would have taken had she survived fell to be divided among the other nieces. I am, therefore, of opinion that the Lord Ordinary was right in the conclusion at which he arrived.

It was urged that Christina was specially favoured by the testatrix, and that it was not to be readily presumed that the special benefit which she got should pass to her sisters rather than be shared in by the whole family. I do not think this is necessarily so. The testatrix might quite well have thought that the nieces would require more of her means than the nephews, who were presumably able to make their own way in the world, and while she favoured Christina specially, if she lived to mature years, that is quite consistent with her specially favouring her other nieces if Christina did not live to enjoy her bequest.

I think the interlocutor of the Lord Ordinary should be affirmed.

LORD YOUNG—I am of the same opinion. The testatrix intended that if any of her nieces died unmarried before Christina attained twenty-one, everything which she bequeathed to that niece should be divided among the other nieces. The residue which was given to Christina must therefore be divided among the surviving nieces.

LORD MONCREIFF — I am of the same opinion. It is probable that the testatrix did not contemplate that her youngest niece Christina Purves would not attain majority, and that she framed her will on that assumption. But the clause of survivorship applies in terms to Christina's case as well as that of the other nieces. At one time I thought it might be possible to distinguish between the legacy of £600 to Christina and the gift of residue. But I am satisfied that that cannot be done. Christina's "share" in the sense of the will was the legacy of £600, plus the silver plate, plus the residue, and must all be dealt with as *unum quid*. She died unmarried before reaching majority, and therefore under the survivorship clause her "share" goes to her surviving sisters.

I concur with the Lord Ordinary in thinking that suspension of vesting ceased on the death of Christina.

LORD TRAYNER was absent.

The Court adhered, with additional expenses to the whole parties to the cause.

Counsel for the Claimant Christina Purves' Executor — Salvesen — A. S. D. Thomson. Agent—Henry H. Meik, W.S.

Counsel for the Claimants Isabella Purves and Others—Guthrie, Q.C.—Cullen. Agents—Kinmont & Maxwell, W.S.

Counsel for the Claimants Peter Jolly Purves and Others — Sym — Constable. Agents—Purves & Barbour, S.S.C.

Wednesday, July 6.

FIRST DIVISION.

[Lord Pearson, Ordinary.

LESLIE'S TRUSTEES *v.* MAGISTRATES OF ABERDEEN.

Superior and Vassal—Redemption of Casualties—Separate Holdings—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 15.

By feu-charter dated 1730 a superior feued out to a vassal two subjects, consisting of the lands of Calsayseat, and a piece of muir ground, described as adjoining the said lands.

The two subjects were separately described in the feu-charter, but the muir ground was declared in the *tenendas* and other clauses of the charter, as well as in the precept of sasine, to be part and pertinent of the said lands of Calsayseat. In the *reddendo* clause the vassal was taken bound to pay to the superiors "for the said lands of Calsayseat and pertinents thereof, and the said piece of muir ground now annexed thereto as part and pertinent thereof, the sum of £14 Scots money (viz., £6 for the said lands of Calsayseat and £8 for the said piece of muir annexed thereto) . . . doubling the said feu-duty at the entry of every heir to the said lands with the pertinents."

In an action raised for redemption of casualties effeiring to the muir ground alone, by the successor to the original vassal in both subjects, under sec. 15 of the Conveyancing Act 1874, *held* (1) that the two subjects did not form separate holdings, and (2) that the vassal was not entitled to redeem the casualties incident to one part of his feu only.

This was an action at the instance of the trustees of the late Miss Helen Leslie and Miss Jane Leslie of Powis House, Aberdeen, against the Magistrates of Aberdeen, concluding for declarator that on payment to the defenders of the sum of £113, the pursuers, as proprietors of "All and haill that piece of muir ground adjacent to the lands of Calsayseat, feued off by Alexander Frazer . . ." were "entitled to be discharged of all liability for casualties exig-

ible by the defenders in respect thereof in all time coming." The pursuers were also proprietors infeft under the defenders as superiors of the lands of Calsayseat referred to in the summons, the two subjects having been feued out to their predecessors by the Magistrates of Aberdeen in 1730.

The defenders pleaded—"(4) The pursuers not having offered to redeem the casualties incident to the feu, or estate of property, held by them, and exigible by defenders, the defenders are entitled to absolvitor from the petition as laid."

The averments of the parties and the terms of the charter of 1730 upon which they founded their contentions were set out by the Lord Ordinary as follows:—"The pursuers are proprietors, infeft under the defenders as superiors, of two pieces of ground near Aberdeen. These are distinguished in the titles as—*first*, the lands of Calsayseat or Calsie-end; and *second*, a piece of muir ground adjacent. The entry is untaxed.

"The pursuers seek in this action to exercise the right to redeem future casualties payable in respect of the muir ground, in terms of the Conveyancing Act of 1874. The defenders reply that they must redeem the casualties of the whole feu, if at all, and that the feu includes Calsayseat. The interest of the parties in the question lies in this, that Calsayseat is already built on, while the muir ground is not.

"The two subjects are 'adjacent,' as the titles bear. Whether they are contiguous is not so clear, for the point of contact is the apex of the two angles. But the plan which was exhibited seems to show that they have at all events the breadth of a road as a common boundary; and I was requested to decide the case on the footing that the subjects were contiguous, as indeed they are described in the Act of Council of 8th August 1730, where the ground is referred to as 'that piece of muir ground contigue to the lands of Calsie-end,' the latter being apparently another name for Calsayseat.

"They were not feued out originally at the same time. Calsayseat was feued out prior to 1727 for a feu-duty of £6 Scots. In that year Alexander Fraser agreed to feu the adjacent piece of muir ground at £8 Scots; and being desirous to transfer both to his son, he and his son petitioned the Town Council, as superiors, desiring that the purchase of 1727 should be transferred to the son, and that the muir ground should be declared part and pertinent of Calsie-end. The Council on 8th August 1730 passed an Act of Council by which they transferred the previous Act of Council (of 29th November 1727) in favour of the son, and 'declared and hereby declares the said piece of muir ground to be part and pertinent of the said lands of Calsie-end, and annexes the same thereto, and appoints one charter to be expede thereupon, the said Mr Alexander Fraser younger being always lyable in payment of the haill casualtys and feu-duties that were formerly payable for the said piece of muir ground.'

"The charter was granted on 14th August 1730, and it forms the foundation of the pursuers' title. It describes the two pieces of ground separately; but the description of the muir ground begins thus—'As also All and haill that piece of muir ground adjacent to the said lands of Calsayseat, lately feued off by the said Mr Alexander Fraser elder, annexed to the said lands of Calsayseat, and declared to be part and pertinent thereof, lying,' &c. There is included in the charter a half net of salmon fishing upon the Don. The grant is made under the conditions and others contained in the old rights and infeftments, and in the records and Acts of Council of the burgh, 'which we hereby declare to be of as great strength and force as if they were expressly insert in this present charter.' The two Acts of Council passed in 1727 and 1730 relative to the muir ground are fully recited. The *tenendas* clause opens thus—'To be holden and be held, the said lands of Causyseat, with the houses, biggings, parts, and pertinents thereof, with the said piece of muir ground now annexed thereto, and declared part and pertinent thereof, &c.' The *reddendo* clause is expressed on the same lines" [the terms of it were "Giving and rendering . . . for the said lands of Calsieseat and pertinents thereof, and the said piece of muir ground now annexed thereto as part and pertinent thereof, the sum of Fourteen pound Scots money"] "but the *reddendo* of 'the sum of £14 Scots money' is followed by this parenthesis—'viz., £6 for the said lands of Causyseat, and £8 for the said piece of muir annexed thereto.' Then follows the provision for the entry of heirs, thus—'doubling the said feu-duty at the entry of every heir to the said lands, with the pertinents.' There is an entirely separate *reddendo* for the half net salmon fishing. The precept of sasine desires infeftment to be given in 'All and haill the said portion of land above mentioned of the commonty of the said burgh of Aberdeen, called Causyseat, and that piece of muir ground now annexed thereto, above mentioned, with the houses, biggings, yards, and pertinents thereof.'

The Lord Ordinary (PEARSON) on 14th December 1897 pronounced an interlocutor sustaining the defender's fourth plea, and assoilzieing them from the conclusions of the action.

Opinion.—[*After narrating the circumstances of the case as above set out, his Lordship proceeded*]—"In my opinion, this presents a clear case of a union of holdings, admitting of sasine being taken on any part of the lands, and uniting the two subjects into one tenement. Possibly the subordination of the muir ground to the other subject, implied in the description of it as part and pertinent of Calsayseat, would of itself have been sufficient to unite the two holdings, without words of union or annexation. But words of annexation are used, and although the clause is not the ordinary full clause of style, that is obviously because the intention to annex is already sufficiently manifested by the Act of Council, on which, so far as the immediate

parties were concerned, the annexation depended. The intention to unify the holdings is clear, and, in my opinion, the words are quite sufficient. From that date they are no longer separate tenements. Doubts have indeed been expressed as to whether a clause of union is effectual, unless it either occurs in a Crown title or relates to lands which are part of a larger subject already united and annexed by authority of the Crown. But the weight of authority seems to acknowledge the right of a subject-superior to unite tenements, though he cannot create baronies. This question was, however, not argued before me, it being assumed that the Town Council could effectually unite the holdings if so minded.

"It was suggested that the surrounding circumstances furnish a sufficient explanation of the clause of annexation, apart altogether from feudal requirements. It is pointed out that the destination in the charter is to Alexander Fraser, 'burgess of our burgh, his heirs-male and assigneys, being burgesses, brethren of gild, and actual indwellers within the said burgh, using and frequenting the trade and interchange of merchandise within the same, and to none others.' Further on there is a declaration that 'it shall not be in the power of the said Mr Alexander Fraser younger, or his aforesaids, to enjoy for future two lands or two fishings, or one whole nett of salmon fishing holden of us at one and the same time.' The suggestion is, that the whole matter was regarded from the guild's standpoint, and that as both guild and burgh were interested in the dues paid by each new burgess, it was to their advantage that the members should not suffer diminution by uniting separate holdings. Hence the necessity for the vassal petitioning the Town Council for the annexation of two holdings, this being granted by the town as a favour, which the vassal could at any time renounce. I can only say that this suggestion, plausible though it be, does not seem to me an adequate explanation of the language used in the charter.

"Now, I understand that the possession and the title have ever since been in conformity with the charter. There has been no severance of the holding. The pursuers are infeft in the whole, and the charter of 1730 is the foundation of their title.

"The pursuers, however, maintain that even on this assumption they are entitled to redeem the casualties of a part of the holding, on the principle recognised in the case of the *Edinburgh Roperie Company* (1877, 4 R. 1032; 6 R., H.L. 1). That was a very different case. The Leith Roperie Trustees had obtained a writ of confirmation from the superiors in 1862 of the entire original feu, excepting some pieces which had been previously sold. In 1867 they conveyed a small part to the Police Commissioners, who however, did not take infeftment, so that in a question with the superior the Roperie Trustees remained undivested proprietors of that part. Then in 1876 the Roperie Trustees conveyed the remainder to the pursuers, who took infeftment, and were thus impliedly entered with the superiors. The pursuers maintained successfully that they were entitled to redeem the future casaulties effeiring to their own portion of the feu, without offering to redeem the future casaulties of the whole feu. But then they were not proprietors of the whole feu, nor infeft in the whole feu, as the pursuers in the present case are. It is not decided by the case of the *Edinburgh Roperie Company*, and it is not the law, that one who is infeft in a single holding can select a part of that holding, and claim to redeem the casaulties of the selected portion under section 15. Various devices were suggested in the argument whereby the end might be obtained in a circuitous way, as by disponing part to an interposed person who takes infeftment. I express no opinion as to whether such devices would be successful. But it is not so clear that they would succeed as to lend any weight to the argument that what can be done circuitously may be done directly."

The pursuers reclaimed, and argued — There were two clauses of *reddendo*, and accordingly they were entitled to separate the two parts of the feu, and call for the redemption of the casualties effeiring to one of the parts. The annexation had only been granted as a favour, and the vassal could renounce it at any time. There was in fact only an indication of an intention to carry out an annexation, an intention which had never been properly carried out. If it had been, either the muir ground, after being identified, would have been conveyed as a part and pertinent only, or there would have been a new description of the lands by their boundaries. But in point of fact the subjects, in titles subsequent to the 1730 charter, continued to be described separately with their own boundaries, thus excluding the idea that the muir ground was a pertinent. The superiors might have sold the superiority of this part, although the two parts were combined under one charter, and accordingly, *vice versa*, the reclaimers were entitled to redeem the casualties effeiring thereto, since the purchaser of such part would have been clearly entitled to redeem—*Lamont* v. *Duke of Argyll*, June 23, 1813, F.C., Feb. 8, 1819, 6 Paton's App. 410; *Magistrates of Edinburgh* v. *Edinburgh Roperie Company*, November 12, 1878, 6 R. (H. of L.) 1. It was laid down in Menzies' Conveyancing (2nd ed.), 638, that even though the two portions were included in one charter, yet if they were described separately and had distinct clauses of *reddendo* the superior could dispose of them separately. It was possible here to obtain a separate description and a separate feu-duty, so that the schedules of the 1874 Act would be complied with. Moreover, it was possible for the reclaimers to attain their object in a circuitous method, such as by disponing this part to an interposed person, who would take infeftment and claim to redeem. Why not therefore grant it directly?

Argued for respondents—The real question was whether the charter created two separate estates, or one undivided estate, which had always been treated as such. That the Lord Ordinary's view was the correct one was clearly demonstrated. The muir ground had never been a separate holding at all. There was a personal right to demand a feudal title, but only under the 1730 charter did it become a feu. In the case of *Lamont* v. *The Duke of Argyll* was seen the minimum in a charter which would serve to keep the estates separate, and the reclaimers' title did not come up to that. There was a well-known style for the allocation of feu-duty, and the *videlicet* clause did not effect such an allocation, being merely a narrative as to how the sum was made up. Conjecture as to the motives for including the subjects in one charter was of no importance for the present question.

Lord Kinnear—I think the judgment of the Lord Ordinary is right, and that the pursuers are not entitled to redeem the casualties of a portion of their feu as if it were a separate estate. They must take into account the whole casualties of the entire estate.

Upon the question of the construction of the charter I cannot say that I have any doubt whatever that it creates one holding, and not two. The charter sets out that the superiors have granted to a certain Alexander Fraser of Powis a portion of the land of the commonty of the burgh of Aberdeen, which is specifically described, and then, after that description, it proceeds—as also a piece of muir ground adjacent to the said portion, which is declared to be part and pertinent thereof, and which piece of muir is described fully in the charter. And it goes on to say—as also a salmon-fishing. Now, the narrative which follows the previous history of these two pieces of land appears to me to be not very material to the purpose of the present inquiry except in so far as it makes perfectly clear what it was that the granters intended to do, and what that was is quite clearly set forth, when they say that there had been an Act of Council by which the piece of muir ground had been annexed to the first parcel of the lands disponed, and declared to be part and pertinent of the same. Then in the *reddendo* clause the vassal is required to pay to the superiors—that is, "to us and our successors and treasurers of our said burgh, or collectors of the feu-maills thereof for the time, for the said lands of Calsayseat and pertinents thereof and the said piece of muir ground now annexed thereto as part and pertinent thereof, the sum of fourteen pound Scots money." That seems to me, if the matter rested there, to quite clearly set forth that the estate which is now constituted by the junction of a piece of land formerly muir land to another, is one estate, which shall pay one feu-duty to the superiors. But then it goes on to make it perfectly clear that the entry of heirs is to be upon the same terms, doubling the said feu-duty at the entry of every heir to the said lands with the pertinents thereof. Now, the collocation of the words leaves no doubt at all that the feu-duty doubled upon the entry of every heir is the feu-duty of fourteen pounds Scots, and it makes no difference that the granters go on to describe in a parenthesis how that sum of fourteen pounds Scots is made up. That is the narrative, and that narrative might be useful in possible cases. It would afford a very easy means of determining the proper allocation of the feu-duty if the lands came to be separated. But in the meantime it does not in the least derogate from the previous terms of the charter by which one estate is to be held for one single and entire feu-duty, which was to be doubled upon the entry of every heir. I apprehend there can be no question at all that if an heir had come forward demanding an entry upon the terms of his paying twice the sum of six pounds Scots for the lands of Causewayend, and not paying the double of the other sum of eight pounds Scots for the muir ground, the superiors would have been entitled to refuse him entry on these terms, and to insist on his taking in the entire estate. I think the same principle would apply in the ascertainment of the composition payable on the entry of a singular successor. The measure of that duty must be the yearly rent of the whole estate, and not a part of it only, and the same rule must necessarily be followed in the application of the provision of the statute by which the vassal is entitled to redeem his casualties. The casualty to be redeemed is the composition payable from time to time on the entry of singular successors to the entire estate. It is the casualties incident to "the feu," which the vassal is entitled to redeem; there is only one feu, and the casualties incident to that one feu must be measured by the duty payable on that particular estate, and no other. What might be the rights of the parties if the estate were divided by the sale of part of it or otherwise is a different question. But we have nothing to do with that. In the meantime the pursuers are entered by the implication of the statute as vassals in one individual estate, and in the present state of the title they cannot require the superior to recognise any other estate as "the feu" to which his casualties are incident.

Lord M'Laren—There is, of course, a substantial interest in having this question determined, because we see that the lands of Calsayseat proper have been feued, and that the trustees who are now vested in these lands paid a large sum—I think over £900—for renewal of the investiture in this estate on the footing that the entry is untaxed. They very naturally wish, if they can, to redeem the casualty on what was originally muir land which seems not to have been built upon, and it is, of course, to their interest to get rid of the obligation in perpetuity to pay a year's rent on the entry of a singular successor.

The question is, whether these two subjects are so separate in title as to allow of this being done, because the Act of Parlia-

ment speaks of the redeeming of the casualty of a feu, meaning, it is conceded, that where there is one feu then the casualty of superiority must either be redeemed in whole or not at all. Looking to the structure of this deed, I entertain no doubt that there is only one subject in the feudal sense. The charter of 1730 not only conveys the old lands of Calsayseat which the disponee inherited from his ancestors, but also a piece of muir land which was then given over for the first time, and it provided that the muir land should be a pertinent of the lands of Calsayseat. As Lord Kinnear has pointed out, if it were not for the parenthetical clause in which it is explained how the fourteen pounds is made up—six pounds for the old lands and eight pounds for the new—there could be no question that this is one estate and held under one condition of feu. But while there is this explanation of how the feu-duty was arrived at, I think it is impossible to look at the feudal clauses without seeing that, for any feudal purpose, the subjects are to be taken as one undivided estate. In the *tenendas* clause, the lands to be held are described as the lands of Calsayseat, with the piece of muir ground now annexed thereto and declared part and pertinent thereof, and the salmon fishing. We have the same expression in the *reddendo* clause. Then there is the provision for the entry of heirs, and, lastly, the clause of warrandice is to the effect that the Provost, Bailies, and community of Aberdeen bind and oblige themselves and their successors to warrant, acquit, and defend to the said Mr Alexander Fraser younger of Powis, his heirs-male and assignees, the said lands of Calsayseat and piece of muir ground annexed thereto, and haill pertinents thereof within the bounds and marshes specified. Again, in the precept of sasine, infeftment is to be given in relation to the whole lands. Now, nothing has been done since 1730 to change the position of matters; the title stands on the old description. Even if there had been a variation, yet as this is a question between contracting parties into which prescription does not enter, it is always competent to go back to the original charter to ascertain how the subjects are held. Whether it be possible by dividing the lands to accomplish the object which the pursuers desire I do not know. I think the Lord Ordinary has rightly held that this is not a process in which we can determine that question. In the actual state of the titles I agree that the proposal to relieve part of the lands of this casualty is not in accordance with the statute.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuers—Rankine, Q.C. —Macfarlane. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Defenders—Balfour, Q.C. —Kennedy. Agents—Gordon, Falconer, & Fairweather, W.S.

Thursday, July 7.

SECOND DIVISION.

[Sheriff-Substitute of Inverness-shire.

M'NEILL *v.* MACKINNON.

Slander — Privilege — Malice — Statement Made at Meeting of Dissenting Religious Body.

A was employed as a catechist in connection with a Free Church congregation. His affairs became embarrassed and his salary was arrested. Many of the people among whom he worked thereupon requested the collectors for the funds of the Free Church to give their contributions to A for his own use instead of handing them to the church treasurer, and the collectors did as requested by these contributors. An inquiry was held into this matter, and in consequence of his action in accepting the money, and also of other things which were not approved of in his conduct, A was dismissed from the office of catechist but was allowed to remain an elder. As the result of this an estrangement arose between A and B, also an elder, who had been active in the investigation, and had voted for his dismissal. A secession from the Free Church having taken place, and a new body having been formed with which A desired to become associated, and of which B was a member and office-bearer, A, more than two years after his dismissal, applied to the members of the presbytery of the new body by letter to effect a reconciliation between him and B. At a meeting of the presbytery A's letter was read, and the parties were given leave to speak, whereupon, in the course of conversation upon the matter, B said—"Have you [meaning A] kept the money that should have gone to Edinburgh." No record of this part of the business appeared in the minutes, and the members of presbytery had agreed beforehand not to treat this matter as formal presbytery business, but it was allowed to be taken up between the parties themselves "as Christian brethren." A brought an action of damages for slander against B, and averred that by the words used upon the occasion referred to, B meant that A had received money belonging to the Free Church which he should have remitted to Edinburgh, but that he had instead retained it for his own use—thus persisting in a charge which he knew to be false.

Held (1) that the occasion upon which the words were used was privileged; (2) that the words did not bear the innuendo libelled; (3) that malice was not proved; and that consequently B was entitled to decree of absolvitor.

Observed by Lord Moncreiff that malice might have been inferred from