quay. This would be, not a definition, but only an illustration of its use.

Before leaving the Act of 1895 I ought to say that the argument that the word "dock" includes ships in the dock seems to me entirely untenable, and much that has already been said applies to it. But I find it difficult to see how this reading can be reconciled with the argument about machinery or with the structure of the 23rd section, which in the words "loading or unloading therefrom or thereto" seems plainly to imply that the ship is something external to the dock as that word is there used.

Accordingly, having examined the Factory Act of 1895 from the point of view of a Factory Act, I come back to the Workmen's Compensation Act, and I find in it a somewhat striking confirmation of the conclusion arrived at. I refer to section 7, sub-section 3, which says that a workman employed in a factory which is a shipbuilding yard shall not be excluded from the Act by reason only that the accident arose outside the yard in course of his work upon a vessel in any dock, river, or tidal water near the yard. To my thinking this plainly implies that *prima facie* the man's being employed on board a ship put him out of the Act, and that to bring him within the Act he requires to explain that he and his employment are not, so to speak, of the ship. The *locus* of the accident is not conclusive—and this is very well illustrated by the recent case of *Woodham*, where the accident occurred on the ship, the machinery being quay machinery, and the employment being therefore within what I hold to be the true confines of the Act.

In my opinion, we ought to answer the question of law in the negative. As it appears on the face of the case that the Sheriff has decerned in favour of the respondent for the sum claimed, that decree must be cleared away, and under the Act of Sederunt we have power to make such order arising out of the answer as we think necessary. Accordingly, I think we should recal the decree granted, and remit to the Sheriff to dismiss the petition.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the decree granted, and remitted to the Sheriff to dismiss the petition.

Counsel for the Appellants—Campbell, Q.C.—Morton. Agent—F. J. Martin, W.S.

Counsel for the Respondent—Sym—W. Brown. Agents—Henry & Scott, W.S.

Friday, March 17.

FIRST DIVISION.

THE WESTERN RANCHES, LIMITED v. NELSON'S TRUSTEES.

Company — Resolution to Alter Memorandum of Association—Extension to New Business—Petition for Confirmation by Court—Companies Act 1890 (53 *and* 54 *Vict. cap.* 62), *sec.* 1, *sub-sec.* (*d*).

A company was incorporated for the purposes of acquiring a cattle ranch and of buying, grazing, breeding, and selling cattle and other live stock in the United States of America.

A petition was presented by the company for confirmation of a special resolution altering its memorandum of association so as to enable it to carry on along with the original business the business of lending money on the security of moveable property, including cattle and other live stock, and of certain stocks and shares, or on the personal obligation of persons or corporations engaged in the live stock business in America. As ancillary to these objects it was proposed to give the company power to borrow on debenture money to be employed in the increased prosecution of the lending business.

Answers to the petition were lodged by certain dissentient shareholders.

The Court, after a proof, *refused* the prayer of the petition, *holding* that while the new business proposed was likely to be profitable, it would depend for its success on the management of the local agent of the company, and would not be sufficiently under the control of the directors of the company, and that consequently it was not such an extension of the primary business of the company as could be forced on dissentient shareholders.

The Western Ranches, Limited, was incorporated under the Companies Acts and registered upon 29th January 1883 with a capital of £112,000, divided into 22,400 shares of £5 each, fully paid up, and having its registered office in Scotland. The capital was subsequently reduced to £78,400, divided into £22,400 shares of £3, 10s. each.

The objects for which the company was established were set forth in the third head of the memorandum of association as follows:—"(1) To adopt and give effect to a minute of agreement for the acquisition of a cattle ranch in the territory of Dakota, United States of America, and the cattle thereon. (2) To buy, breed, graze, and sell cattle, sheep, hogs, horses, or other live stock in the United States of America or elsewhere. (3) To acquire by purchase or lease land or other real estate, or an interest therein, in the United States of America or elsewhere, and to sell or lease the same. (4) To break up, cultivate, and occupy land. . . . (5) To borrow money from time to time in such manner as the directors shall

think fit on the security of the whole or any part of the real or personal property of the company, wherever situated, and including the uncalled capital of the company, and to execute mortgages or other deeds over the same for securing such borrowed money, and to issue debentures, debenture stock, or other obligations of the company, as the directors shall think fit. (7) To advance money by way of mortgage, or by way of purchase of mortgages, or of the balance of the price remaining unpaid under any contract of sale of land, and to re-sell such contracts or mortgages. (12) To do all matters or things whatsoever incidental or conducive to any of the aforesaid objects."

The company on its formation acquired the cattle ranche referred to in the memorandum of association, and carried on their business, possessing a herd of about 20,000 cattle and other property to the value of about £74,000.

At an extraordinary meeting of the company held on 18th March 1897, and confirmed by another meeting held on 2nd April 1897, the following special resolution was passed—"That advantage be taken of the powers contained in The Companies (Memorandum of Association) Act 1890 (53 and 54 Vict. c. 62), and subject to the approval of the Court in terms thereof, that the following alterations be made on article 3 of the memorandum of association, which sets forth the objects of the company, viz.—(*a*) That the words 'as the directors shall think fit' be deleted at the end of sub-section 5 of head 3, and the following substituted in place thereof—'for such consideration and at such premium or discount as to the company may seem fit, and to confer such preference or priority and such special security on the several classes of debentures or debenture stock in relation to any other class or classes of debentures or debenture stock, or in relation to other obligations of the company, as to it may seem fit.' (*b*) That sub-section 7 of head 3 be deleted, and the following sub-section substituted in place thereof—'To lend money in the United States of America or Dominion of Canada, or in any of the British dependencies in North America, upon the security of any moveable or personal property, including cattle, sheep, and other live stock, and grain and produce of all kinds, or on the security of incorporeal moveable or personal property, including stocks, shares, or obligations of corporations or companies, registered or incorporated under the laws of the United States of America or of the Dominion of Canada, or of any of the British dependencies in North America, or of the United Kingdom of Great Britain and Ireland, or on the security of real or heritable estate in any of these countries, or to lend money to persons, corporations, or companies engaged in the business of farming, or breeding, grazing, or dealing in cattle, sheep, and other live stock in the United States of America or Dominion of Canada, or any of the British dependencies in North America, on personal obligation, or to invest the funds of the company in the purchase of any of the above-mentioned properties, obligations, or securities (other than the stocks or shares of the companies referred to in sub-section (8) of this head), or in the purchase of the Government stock of the United Kingdom, or of the United States, or Canada, or of any of the British dependencies in North America, or in obligations of states, provinces, or municipalities in the United States, or Canada, or in any of the British dependencies in North America, or in the United Kingdom of Great Britain and Ireland.'"

A petition was presented by the company craving the Court to confirm the alterations of the memorandum of association with respect to the objects of the company passed at these meetings.

The petitioners founded upon sub-section 5 of section 1 of the Companies (Memorandum of Association) Act 1890, which provides that "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—(*d*) to carry on some business or businesses which under existing circumstances may conveniently or advantageously be combined with the business of the company."

Answers to the petition were lodged by the trustees of the late Mr Thomas Nelson, an original shareholder of the company, and a director from its inception to the time of his death. The trustees were holders of 1720 shares, representing £6020 out of the £78,400 nominal capital of the company.

The respondents submitted that the prayer of the petition should be refused.

The Court remitted to Mr Logan, W.S., to report on the questions in the petition and answers.

The following extract from Mr Logan's report sets out the reasons submitted by the petitioners for granting the petition and the grounds of the respondents' objections:—"The main business of the company is cattle ranching, that is, the purchasing of cattle, the grazing of them on extensive tracts of country, and thereafter selling them. It has been explained to me that these tracts of country are not the property of the company. They are free ground on which anyone is entitled to graze cattle, and although a certain expanse of ground may be taken possession of by the company, other cattle owners are equally entitled to put cattle on the ground. The grazing is very precarious, depending greatly on the water supply and the growth of the pasture, and also on the number of cattle which may be turned out on the ground. There are consequently great fluctuations in the profit, for while one year a very large herd may be successfully pastured, the following year, from want of rain or other natural causes, there may be great losses both in the numbers and in the quality. The petitioners therefore state that it is very difficult, if not impossible, to keep the whole of their capital safely invested every season on the ranche, and

that during seasons in which it would not be prudent to so invest the whole of their capital, it is very desirable, and would be advantageous to the company, to have some other means of utilising their funds. The mode suggested, and which is contemplated by the principal addition proposed to be made to the memorandum of association, is that the company should have power to lend money on temporary loans on the security of personal property, including cattle, sheep, and other live stock, and grain and produce of all kinds as well as on the security of incorporeal moveables, including stocks and shares of companies, &c. It has been explained to me that in the farming districts of the United States an extensive money-lending business is conducted on such security. Farmers purchase cattle, sheep, or hogs, and in order to pay the price they borrow on the security of the stock by way of a recognised form of mortgage, which is filed or registered in the office of the clerk of the county in which the animals are located. The loans are generally paid up within nine months, when the cattle are sold at a profit, and interest generally at 8 per cent. per annum is paid to the lender. The amount of the loan varies, sometimes being for the whole price paid, and sometimes only for a proportion, depending on the personal credit of the borrower and the discretion of the lender. It has been represented to me that the form of security is found in practice to be very safe, as the cattle are generally branded, the brand being referred to in the mortgage; the mortgage is published by registration, and the penalties on any attempt to remove or dispose of the cattle without the mortgagee's knowledge are very serious. The petitioners contend that such a mode of investment would be a very safe and convenient means of turning to account, for longer or shorter periods, such portion of their capital as they cannot profitably use in the business of cattle ranching. . . .

"In the answers lodged for Mr Nelson's trustees they object to the powers being granted chiefly on the following grounds:—(1st) That the original purpose of establishing the company was the acquisition and carrying on of a cattle business, and that the other objects of the memorandum of association were all necessary and ancillary to that purpose, except that by the seventh head the restricted power of lending money on the security of landed estate was conferred. 2nd, That the business of cattle ranching has been successfully carried on by the company since its constitution. 3rd, That the whole share capital of the company stands invested in cattle and ranche improvements, and that the respondents believe that the lending of money on 'chattel mortgages' over cattle and on personal advances to dealers is not a safe or profitable business, and they state that the late Mr Nelson, the truster, invested considerable sums in that way, which has resulted in heavy losses. 4th, That the resolutions submitted for confirmation embody a scheme not merely for providing an outlet for the company's balances, but for turning the company into a cattle-credit bank, and for engrafting on the original enterprise of cattle raising the totally distinct and unconnected business of money-lending, subject to the single limitation that the borrower must be connected with farming or stock raising. 5th, That the scheme is not one so much for the benefit of the company as for the agents in America, and that from the nature of the cattle-credit lending business, which involves great expedition in transactions, the board of directors in this country could not effectually control it, but would have to depute the management to its agents in the United States. The respondents averred further that the agents in America were Messrs Clay & Forrest, of which Mr John Clay was senior partner, and that he was also senior partner in the firm of Clay, Robinson, & Company, cattle salesmen. 6th, That the respondents, being trustees, are precluded from participating in the new issue of shares which they consider will be a necessary concomitant of the proposed scheme, and if it is carried out their holding would suffer a heavy depreciation. 7th, That the proposed alterations are not within the scope of the statute."

Mr Logan further reported—"It humbly appears to me that while some of the objections stated by the respondents may be very relevant and important considerations for the shareholders in judging of the proposed additional powers, they are hardly such (with the exception of numbers 4 and 7) as affect the grounds on which your Lordships are empowered to confirm the resolutions. The success of the additional powers of investment will depend entirely on the prudence and discretion with which they are carried out, and in regard to that it will be for the shareholders to control the directors in such manner as they see fit. In the exercise of the proposed powers the company will necessarily depend very much upon their agents in the United States, but that applies in an equal degree to all concerns, the practical business of which is carried on in a foreign country, and over which therefore a board of directors in this country can exercise only a partial control. It is to be presumed that all these considerations were fully before the shareholders at the two meetings at which the resolutions were passed and confirmed. The respondents explain in their answers that before the resolutions were proposed they strongly pressed upon the directors their objections to the scheme, but that they did not take part in the meetings of shareholders, which were ostensibly unanimous, merely writing to the managing director intimating their dissent. The letter of dissent was read to the meeting of shareholders of 18th March 1897, at which the special resolution was passed, and the dissent is recorded in the minutes." Mr Logan reported that the procedure had been regular, and suggested that if the Court should confirm the resolution a change should be made in the name of the company to indicate the new form of business to be undertaken.

The Court on 20th October 1897 allowed the parties a proof of their averments.

It is unnecessary, in the view of the petition taken by the Court, to state the result of the evidence further than is indicated in the opinion of Lord Kinnear, *infra*.

Argued for petitioners—In considering the question whether a new business could be conveniently or advantageously carried on, the Court would have to regard the experience of traders engaged in the business, and if that was strongly in favour of the convenience and advantage, the Court would not go into minute speculations as to the likelihood of success. That would be left to the directors controlled by the shareholders. The petitioners had discharged their onus by showing that the new business could be carried on conjointly with the other, that there was such a business, and that it had been carried on successfully. — *The Scottish Accident Insurance Company*, March 12, 1896, 23 R. 586; *Scottish Employers Liability, &c., Assurance Company*, July 11, 1896, 23 R. 1016; *Young's Paraffin Company*, January 16, 1894, 21 R. 384; *Glasgow Tramway Company* v. *Magistrates of Glasgow*, March 13, 1891, 18 R. 675; *Foreign and Colonial Government Trust Company*, L.R. [1891], 2 Ch. 395; *Alliance Marine Insurance Company*, L.R. [1892], 1 Ch. 300; *Governments Stock Investments Company*, L.R. [1891], 1 Ch. 649. It was said that the directors would have no control over this business, and must depend wholly on the agents. That would apply also to mortgages on land. Moreover, there must be a large discretion in the agents in purchasing cattle. There was a more speculative element in ranching than in a cattle-credit business. 2. The word "mortgage" in article 7 had no technical English meaning which would exclude these cattle loans from being covered by it. —Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 43; Buckley (7th ed.) p. 184. It was frequently used in America to cover this sort of loan, and therefore persons investing their money in business to be carried on in America must expect this interpretation. If that were so, all the petitioners asked was conveyed by their memorandum, except the power to lend on personal obligation, and the respondents had no interest to resist their powers being made explicit. The Court had power if they thought fit to grant the petition in whole or in part.

Argued for respondents—This was not a new branch of the business, but a new business altogether—a very different matter from the loans of surplus capital which had been granted in the past. In no case had so great a change been authorised by the Court, and the Act was not intended to cover the case of a business foreign to the original purpose of the company.—*National Boiler Insurance Company*, L.R. [1892], 1 Ch. 306; *Glasgow Tramway Company* v. *Magistrates of Glasgow*, *supra*; *Alliance Marine Insurance Company*, L.R. [1892], 1 Ch. 300; *Speirs & Pond, Limited*, L.R. [1895], W.N. 135, 2 Manson, 596. One element which the Court took into account was whether there was a company already in existence doing the business; here there had been no evidence adduced of the existence of any such company. It had never been contemplated by the shareholders when investing their money that the company would start an entirely new line of business such as this, and when they came forward to oppose such a divergence from the original objects of the company the Court should not compel them to allow their capital to be so diverted. 2. "Mortgage" could not be read in the wide sense for which the petitioners contended, but even if it were held to cover cattle loans, the purpose in article 7 of the memorandum was ancillary to the main purpose of the company, viz., cattle ranching. If the Court were of opinion that the surplus capital of the company might be advantageously used in this method, the petition should be at any rate restricted to the use of such surplus capital, and the Court should not assent to the proposed doubling of the capital. The unlimited power which would be put in Mr Clay's hands was another very strong argument against granting the petition.

At advising—

LORD KINNEAR—I have come, not without considerable difficulty, to the conclusion that these resolutions ought not to be confirmed. The main object for which this company was established was to acquire a cattle ranche in the territory of Dakota, in the United States of America, and the cattle thereon, and to buy, breed, graze, and sell cattle, sheep, and other live stock in the United States of America, or elsewhere, and the purpose of the special resolutions which we are asked to approve is to enable the company to carry on along with that business the separate business of lending money on the security of moveable property, including cattle and other live stock, or of incorporeal moveable and personal property, including stocks, shares, and obligations of American and Canadian companies, or on the personal obligation of corporations or persons engaged in the business of farming, or breeding, grazing, or dealing in cattle and live stock in the United States; and secondly, and as ancillary to these objects, to enable the company to borrow on debenture money which is to be employed in the increased prosecution of this lending business. It is said by the petitioners that this business may be conveniently and advantageously carried on in combination with the business of ranching, because it appears that in the conduct of the latter business, which is their proper and original business, the company generally find that they have in their hands very considerable sums of money during the time, between October, when they receive the produce of their sales, and June or July, when they have to pay for their young cattle, and that this money cannot be invested in any other way so advantageously as in loans on cattle mortgages, because their agent in

America is extremely well versed in this kind of business, and because their ability to lend in this way would prove very attractive to their customers. I think that these points are very fairly supported by the evidence adduced by the petitioners, and that they have ground for saying that they have already shown that a business of this kind could be profitably carried on by them, because they have been in the habit of using surplus funds in their hands in this way. And I agree further with an observation of the Solicitor-General, that if the question is whether it will be advantageous for them to employ their capital formally and directly for this purpose, and to raise additional capital for the same object, the experience of those who are actually engaged in the business is of very great value, and that we could hardly set against their judgment and experience any speculation of our own as to the probability of the new trade being profitable. I assent to that observation of the Solicitor-General. But then on the other hand the respondents, who are very large shareholders in the company, say that whether the surplus funds of the company might be profitably employed in this way or not, the proposal we are asked to confirm is one, not for providing an outlet for the company's balances, but for turning the company into what they call a cattle-credit bank, and for engrafting on the enterprise of cattle ranching the totally distinct and unconnected business of money-lending, subject only to the qualification that the money is to be lent to persons who are engaged in dealing with cattle and in grazing cattle. Further, they say that this new business is of a highly speculative kind, and that it is to be carried on by the company's agent in America who has himself engaged in a business of the same kind on his own account, and who may therefore have interests sometimes conflicting with those of the company, if the company engage in the business also, and further that it is a business of a kind which can only be carried on by a person on the spot, and that the directors at home could have no efficient control over the management of such a business at all. I think these objections are established by the proof as being well founded in fact. I am very far indeed from saying that there is anything before us to show that the business could not be profitably carried on if well managed, and still further from suggesting that the confidence of the company in their agent in America is not perfectly well deserved. But still the fact remains that it is a speculative business depending for its success upon its management in America, over which the directors could have no efficient control, and especially it is a business altogether distinct from that which the company was established to carry on. I do not think it is any answer to the respondents' objections to say that the original business was also very speculative or even more speculative in its character than the business which the company now propose to embark in, because it was for the persons who became shareholders to consider whether they would embark their money in the particular speculation disclosed by the company's memorandum of association, and their resolution to embark in that business certainly did not involve an obligation to carry on any other business merely because it was more speculative or less speculative than the business in question. On the whole, therefore, I have come to the conclusion, that whatever may be said in favour of the proposed enterprise as in a question between shareholders, it is not an enterprise which ought to be forced on dissentient shareholders who have stated serious objections to the practical proposal for carrying it on, and who have never undertaken to embark their money in any such enterprise. For these reasons we cannot confirm the resolution.

LORD ADAM, and LORD M'LAREN concurred.

The LORD PRESIDENT was absent.

The Court refused the prayer of the petition, and found the respondents entitled to expenses.

Counsel for the Petitioners—Sol.-Gen. Dickson, Q.C.—Lorimer. Agents—Pringle & Clay, W.S.

Counsel for the Respondents—Guthrie, Q.C.—Grainger Stewart. Agents—Millar, Robson, & M'Lean, W.S.

Friday, March 17.

FIRST DIVISION.

[Lord Low, Ordinary.

FENTON LIVINGSTONE *v.* WADDELL'S TRUSTEES AND FENTON LIVINGSTONE.

Marriage-Contract — Provisions to Wife and Children—Protected Right of Succession — Fiduciary Fee — Completion of Title.

By antenuptial contract of marriage the wife's father, in consideration of provisions made by the husband, disponed the estate of A, under reservation of his own liferent, to his daughter in liferent and to the heirs-male of the marriage other than the heir-male of the marriage succeeding to the estate of B (the husband's entailed estate) in fee, whom failing to the heir-female of the marriage, whom failing to his (the granter's) own heirs and assignees, whom failing to his daughter's heirs and assignees.

Held that the provision was pactional, and that whether the wife was fiar of the estate or not the right of the heir-male of the marriage to whom the destination referred could not be defeated by her gratuitous deed. *Held* further (*dub.* Lord Kinnear), that a conveyance of the estate of A by the wife (with consent of the husband), and