the case thus admitted are so far as material summarised by the Lord Ordinary, and I need not repeat or detail them. His Lordship in the result decerned against the defenders for payment of £160, 3s. 1d. with interest in respect of their ownership (within the meaning of the Acts libelled) of the said property so far as built on, but assoilzied them from the demand for payment in respect of the unbuilt-on portion of the property. I entertain no doubt about the soundness of the interlocutor so far as it assoilzies the defenders or the reasoning in the Lord Ordinary's opinion in support of that view. As regards the other part of the interlocutor which decerns against the defenders for payment, their counsel Mr Macphail did not see his way at our Bar to reclaim against it, but he indicated that in his view the Lord Ordinary was mistaken in law in holding the defenders to be "owners" of the built-on part of the feu as being in the actual receipt of the rents. I confess that I think a forcible argument of this sort might have been originally presented by the defenders, for it seems clear that though the moneys they receive from the tenants are equal in amount to the rents due by the latter, it is not truly as rent that the defenders do or can legally exact these sums. What the defenders do is to poind the ground; and the tenants, rather than lose the goods so attached, are willing to hand over to the defenders what is really the feu-duty to which the defenders have right, but only up to the amount of the respective rents due by the tenants. It is quite settled law that a superior cannot pursue an action of maills and duties against tenants for recovery of his feu-duty—*Prudential Assurance Company, Limited* v. *Cheyne*, 1884, 11 R. 871—and though he may bring a poinding of the ground to recover his feu-duty, such action is not in any correct sense the assertion of a claim to the rents or a diligence to attach them—*Royal Bank* v. *Dixon*, 1868, 6 Macph. 995, *per* Lord Barcaple, p. 997. It seems worth while to state these propositions lest any observation made by the Lord Ordinary in this case should hereafter be supposed to lend countenance to the view which I am sure his Lordship would be the first to refute, that a superior can attach the rents of tenants for recovery of his feu-duty. But one need not consider whether or not the present defenders might have succeeded in this particular argument upon the branch of the case which the Lord Ordinary decided against them, for the defenders did not reclaim, and one can understand why they did not do so. In the first place the joint-minute of admissions contains a statement that "since Whitsunday 1904 the defenders have regularly uplifted the rents of the houses situated on the built-on portion of the said feu." This perhaps incautiously worded admission might probably have been overcome by a reference to the legal position of the defenders, otherwise evidenced. But it is conclusive to observe that the defenders before the action was raised offered (probably for good reasons of which I am not in possession), without prejudice, to make payment of the portion of the sum now sued for applicable to the street frontage of the built-on part of the subjects, and that this offer was repeated by tender in the defences. The interlocutor reclaimed from will be adhered to with additional expenses.

The Court refused the reclaiming note and adhered to the Lord Ordinary's interlocutor.

Counsel for the Pursuers—The Solicitor-General (Hunter, K.C.)—Chree. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Defenders — M'Clure, K.C. — Macphail, K.C. — F. C. Thomson. Agents—Mackenzie & Kermack, W.S.

Saturday, December 10.

SECOND DIVISION.

JOHN T. CLARK & COMPANY, LIMITED, PETITIONERS.

Company—Reduction of Capital—Extraordinary Resolution—Statutory Majority—Declaration of Chairman that Resolution Carried—Refusal of Petition for Confirmation of Reduction—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 69, (1) *and* (3).

The Companies (Consolidation) Act 1908 enacts, section 69 — "(1) A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given. . . . (3) At any meeting at which an extraordinary resolution is submitted to be passed . . . a declaration of the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution."

C. & Co., Limited, brought a petition for confirmation of reduction of capital. An extraordinary resolution in favour of the proposed reduction was passed at a meeting at which twelve shareholders who were entitled to vote were present. Of these eight voted for the resolution, two against it, and two did not vote at all. No poll was demanded, and the chairman declared the resolution carried.

Held, in a petition for confirmation that the extraordinary resolution had not been duly passed, in respect that the prescribed majority of three-fourths of the members entitled to vote who were present at the meeting had not

voted in its favour, and that the chairman's declaration that the resolution was carried did not legalise the proceedings, it being apparent *ex facie* of them that the statutory requirements had not been complied with.

Company—Reduction of Capital—Petition for Confirmation of Reduction—Omission of Words "and Reduced"—Competency of Petition.

The Companies (Consolidation) Act 1908 enacts, section 48—"Where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, then on and from the presentation of the petition for confirming the reduction the company shall add to its name, until such date as the Court may fix, the words 'and reduced,' as the last words in its name, and these words shall, until that date, be deemed to be part of the name of the company: Provided that where the reduction does not involve either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court may, if it thinks expedient, dispense altogether with the addition of the words 'and reduced.'"

C. & Co., Limited, having passed and confirmed a resolution for reduction of capital, presented a petition to the Court for confirmation of the proposed reduction. The company did not, on and from the presentation of the petition, add the words "and reduced" to its name. The Lord Ordinary, when ordering intimation and service, dispensed meantime with the use of these words.

Held that the petition was incompetent, in respect that the company had failed to comply with the terms of the statute.

On 11th October 1910 John T. Clark & Company, Limited, incorporated under the Companies Acts 1862 to 1900, and having their registered office at 22 Bridge Street, Aberdeen, presented a petition to the Court for confirmation of reduction of capital resolved on by special resolution, and for dispensiug with the words "and reduced" as an addition to the name of the company. The petition was presented under the Companies Acts 1862 to 1908, and more particularly under secs. 46 to 56, both inclusive, of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69). On 26th October 1910 the Court remitted to Mr Charles Young, W.S., to inquire and report as to the regularity of the proceedings, and whether the proposed powers should be granted. The proceedings are narrated in Mr Young's report, which stated—"The proposal is to reduce the capital of the company from £20,000 to £18,500 by cancelling 1500 shares. The shareholder who offers to surrender these 1500 shares was the vendor to the company, and he received as the price of the goodwill of his business 2000 ordinary shares, which were deemed to be fully paid up. The directors have entered into an agreement with him to cancel 1500 of these shares, so that the goodwill will in future appear at £500. While no reason for this depreciation is given in the petition, it was presumably on account of being to that extent not represented by available assets, and the petitioners' agents confirm this. The articles of association of the company only authorise the company to reduce capital by paying off capital, or cancelling capital which has been lost or is unrepresented by available assets.

"The resolution passing and confirming the proposed reduction of capital was passed at properly called meetings. At the first meeting at which the resolution was said to be passed, there were present nine shareholders, two of whom produced proxies, and one voted on a power of attorney, so that in terms of the statute there were twelve members present entitled to vote—on the assumption that a power of attorney is a proxy within the meaning of the Companies Act and the company's articles of association. This latter is, however, a point which your Lordships might consider. The reporter draws your Lordships' attention to the number of members present, as it does not appear to him that the proper statutory majority to pass the special resolution was got. As stated in the petition, the vote was eight to two, which was brought about by two members not voting, but it must be borne in mind that they were present and entitled to vote, therefore it would appear that it would require a majority of nine to pass the resolution. Even if a power of attorney is not a proxy which would entitle one shareholder to vote for another, the majority of eight to two is still less than the necessary three-fourths, as there would then have been eleven present.

"The minute of meeting bears that the chairman declared the resolution carried, and that one of the objecting shareholders had thereafter expressed himself satisfied with the ruling. The petitioners' agents call attention to the provisions of section 69, sub-section 3, of the Companies Act 1908, which states that a declaration on the part of a chairman that a resolution is carried is conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the resolution. The reporter cannot think, however, that this section can possibly override the first subsection of section 69, which requires that an extraordinary resolution must be passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed). A special resolution must be passed in the same way (section 2).

"The reporter would further point out that the company has not used the words 'and reduced' as part of its name. This omission has been very frequent in similar petitions, and while the practice of not using the words has crept into use, the Act

of 1908 makes it obligatory in a case like the present from the date of presenting the petition until such time as the Court grants an interlocutor dispensing with it. The Lord Ordinary officiating on the Bills in this case, when ordering intimation and service, dispensed meantime with the use of these words, but the statute directs that they should have appeared before that.

"If your Lordships are of opinion that the special resolution has been properly passed, and that it was unnecessary for the company to have used the words 'and reduced,' the reason for the proposed reduction of capital is one of which your Lordships may approve, and you may be pleased to pronounce an interlocutor granting the prayer of the petition."

Argued for the petitioners—(1) The three-fourths majority prescribed by sub-section 1 of section 69 of the Companies Consolidation Act 1908 (8 Edw. VII, c. 69) was after all merely a question of form. There was no opposition to this petition. All the shareholders were of opinion that the reduction was desirable. The majority was more than a three-fourths majority of those who voted. Moreover a poll was not demanded, and accordingly the declaration of the chairman was conclusive—section 69 (3). There was no conclusive evidence under the hand of the company as to what proportion of those entitled to vote actually did vote. This case was accordingly distinguishable from *Cowan* v. *Scottish Publishing Co.*, February 4, 1892, 19 R. 437, 29 S.L.R. 375, where it was held that as the minute showed that the resolution had not been passed by the requisite statutory majority the resolution could not receive effect. *In re Indian Zoedone Co.*, 26 Ch. D. 70, was referred to. (2) The words "and reduced" was as a matter of practice usually omitted in petitions of this kind. The petitioners had merely followed the bad usage that had been established. The Court could by section 48 dispense with the words altogether. This was eminently a case where the Court should exercise its power and retrospectively dispense with them.

LORD JUSTICE-CLERK—I am afraid that both the points which have been brought before us are such as to prevent us from granting the prayer of this petition. At the meeting at which the resolution was dealt with, it was not passed by the requisite statutory majority. There were twelve shareholders present, of whom eight voted for the resolution, two against, and two did not vote at all. The statute requires a three-fourths majority of such members as are present in person or by proxy, so it is quite plain that its requirement was not fulfilled in this case. The provision in subsection 3 of section 69 that a declaration of the chairman that the resolution is carried shall (I quote the provision shortly) be conclusive evidence of the fact, does not legalise the proceedings if it is plain upon the face of them that no such thing has happened.

Upon the second question I think there is no doubt whatever. Section 48 of the Act requires that "on and from the presentation of the petition for confirming the reduction, the company shall add to its name, until such date as the Court may fix, the words 'and reduced' as the last words in its name." No doubt there is a proviso that "the Court may if it thinks expedient dispense altogether with the addition of the words "and reduced," but in order to be dispensed with the words must be there. Usually the Court does dispense with the use of the words, and at an early stage, for the obvious reason that they are apt to be misleading to people who have dealings with the company in its new position. It is also true that the matter is of no consequence in this particular case, but I fear that is no excuse for the irregularity. We are here dealing with a statute which prescribes a course of procedure, and as it is laid down that these words are to be added, and are to be removed only with the permission of the Court, I am quite clearly of opinion that a petition which does not contain the words at all is not a competent petition.

LORD ARDWALL—I entirely concur. The Court is very averse to refusing a petition of this description when no substantial interests are involved, but we are at present dealing with proceedings under a statute which has been passed in the interest not of one company but of the whole public, and it would be very unfortunate if the Court were to sanction any irregularity on the ground that in this particular case no harm would result. I may add that there is no necessity for the carelessness and negligence which is often shown in these and similar petitions; and I think it would be a good thing if agents and secretaries of companies acted more frequently under the advice of counsel, as is the practice in England.

LORD DUNDAS—I quite agree. We are here in a purely statutory region, and I think we are bound to see that the statutory requirements are properly carried out.

LORD SALVESEN—I agree. The result of our decision will be that the company must begin *de novo*, but I think the decision will be a useful one in correcting the laxity of practice which seems to have crept in.

The Court refused the prayer of the petition.

Counsel for the Petitioner—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.