

The argument although ingenious is in my opinion unsound. In the first place it may be argued that the words "or other property" must be read as *ejusdem generis* of the word "wall" which immediately precedes; but assuming it to be otherwise I think it is plain that the exception takes effect, for the site of this advertisement is land fronting a public street. It was argued that you must construe "fronting" as excluding the surface of land which fronts the sky, but I think that this is much too subtle a view. A piece of land which adjoins a public street undoubtedly in any ordinary sense has a frontage to the street, and the use of the word "site" for advertisements seems to be just as appropriate to a level piece of ground adjoining a street on which advertisements may be erected whether with or without a hoarding as a wall to which the advertisements may be affixed. A steep embankment adjoining a street, although belonging to a railway company, which without any other structure would be a useful site for advertisements would obviously fall within the enactment. So would a wall or hoarding erected by a railway company. How, then, can a Railway Company give the appellant a right to exhibit advertisements on a hoarding erected by the company he represents which they themselves do not possess? The appellant appears to me to be on the horns of a complete dilemma. If the hoarding in question is the property of a Railway Company on whose land it is erected, then it is struck at by the clause which limits the Railway Company's exemption. If, on the other hand, it is to be treated as the property of the company themselves, it is struck at by the general prohibition. I accordingly reach the conclusion that this objection fails.

LORD ORMIDALE concurred.

The Court found in answer to the first question in the case that it was not competent to libel as an aggravation in the complaint the conviction obtained against Messrs David Allen & Sons' Billposting, Limited, in its corporate capacity, answered the second question in the negative, sustained the appeal, and quashed the conviction.

Counsel for the Appellant—Constable, K.C.—Sandeman, K.C.—Mackenzie Stuart. Agent—Ferguson Reekie, Solicitor.

Counsel for the Respondent—Cooper, K.C.—MacRobert. Agent—Thomas Hunter, W.S.

COURT OF SESSION.

Friday, December 9.

SECOND DIVISION.

[Lord Cullen, Ordinary.

ABERDEEN TOWN COUNCIL v. BRITISH LINEN BANK.

Police — Streets — Roads — Assessments — "Owner" — "Person for the Time Entitled to Receive" Rent—Superior Holding Decree of Poinding of the Ground—Aberdeen Municipality Extension Act 1871 (34 and 35 Vict. cap. cxli), sec. 6.

The Aberdeen Municipality Extension Act 1871, sec. 6, enacts—"The following words where they occur in this Act . . . or the Acts amending the same, shall have the meanings hereby assigned to them—the word "owner" used with reference to any lands or premises in respect of which any work is required to be done, or any assessment is to be levied under . . . this Act, means and includes the person for the time entitled to receive, or who, if such lands or premises were let to a tenant at a rack-rent, would be entitled to receive the rack-rent from the occupier thereof, or who shall be in the actual receipt of the rent of such lands or premises. . . ."

The mid-superiority of a plot of ground, partly built on and partly un-built on, having been conveyed to a bank by a bond of cash-credit and disposition in security, and the feu-duty effering to the mid-superiority and payable to the bank having fallen into arrear, the bank obtained decree in two successive actions of poinding of the ground. These decrees were not followed by execution, but the tenants of the houses on the built-on portion paid to the bank sums of money equal to their rents, which sums the bank applied towards payment of the over-feu-duty and public burdens of the whole plot of ground and the upkeep and management of the houses upon the built-on portion. There was no return from the un-built-on portion. After some years the Town Council, having paved the street *ex adverso* of the plot of ground, called upon the bank *qua* "owner" in the sense of the Aberdeen Municipal Acts, to pay the assessment necessary to defray the cost, which assessment was calculated according to frontage. The bank tendered the amount due in respect of the built-on portion of the ground only.

Held that the bank was not liable for the amount of the assessment due in respect of the un-built-on portion of the ground as it was not "owner" thereof.

Question if the bank need have paid the amount due in respect of the

built-on portion, the moneys which it received from the tenants not being rent but feu-duty.

The Aberdeen Municipality Extension Act 1871 (34 and 35 Vict. c. cxli), sec. 6, is quoted *supra in rubric*.

On 3rd March 1908 the Lord Provost, Magistrates, and Town Council of the City and Royal Burgh of Aberdeen brought an action to recover from the British Linen Bank the sum of £676, 4s. 2d. This sum was the amount of an assessment levied to defray the expense of paving the Great Northern Road, Aberdeen, *ex adverso* of a plot of ground situated therein, the assessment being calculated according to the frontage of the plot abutting on the road paved. The plot of ground was partly built on and partly unbuild on, but was held under one title with unallocated feu-duty, and the unbuild-on portion was not rent-producing.

The defenders, who tendered the amount due for the built-on portion, pleaded—“(3) The defenders not being owners of any of the subjects in Great Northern Road, Aberdeen, referred to, are entitled to absolver with expenses; *et separatim*, that not being owners of the unbuild-on area, are not liable beyond the amount of their tender.”

The facts are given in the opinion of the Lord Ordinary (CULLEN), who on 13th January 1910 pronounced this interlocutor—“Decerns against the defenders for payment to the pursuers of the sum of £160, 3s. 1d., with the legal interest thereof from 11th August until payment: *Quoad ultra* assolvies the defenders from the conclusions of the summons,” &c.

Opinion.—“The pursuers, who are the Lord Provost, Magistrates, and Town Council of the City and Royal Burgh of Aberdeen, by a resolution dated 1st February 1904 resolved to causeway a portion of a street within the city called Great Northern Road, under the powers contained in the statutes mentioned on record. The resolution was duly published in terms of the statutes [*Aberdeen Municipal Acts*] and the work thereafter carried through. The cost of the work is recoverable by the pursuers from, *inter alios*, those who are—within the meaning of the statutes—‘owners’ of lands abutting on the street in proportion to the respective frontages thereof; and the question raised in this action is whether the defenders, the British Linen Bank, are liable wholly or partly for that part of the cost which corresponds to a certain area of ground having a total frontage to the street of 722 feet. The defenders, *ex concessis*, are not the ‘owners’ of the said area of ground, or of any part of it, in the proper legal sense, but it is maintained by the pursuers that they are the owners of the whole, or at least of a part, within the meaning of the 6th section of the Act of 1871, which defines the word ‘owner’ as follows—. . . [*quotes, v. sup. in rubric*] . . .

“The relation of the defenders to the foresaid area of ground is as follows—In 1898 the ground was feued by George

Godsman to John Ogg at a feu-duty of £123, 15s. In 1900 Godsman, by bond of cash credit and disposition in security, conveyed his estate of superiority to the defenders in security of a cash credit for £3000, under which there is a debt due to the defenders. On 14th January 1903, and again on 5th March 1904, the defenders obtained decrees of poinding of the ground. These decrees were not followed by execution. By the joint minute of admissions, however, it is admitted ‘That since Whitsunday 1904 the defenders have regularly uplifted the rents of the houses situated on the built-on portion of the said feu, and applied the same towards payment of the over-feu-duty and public burdens of the whole of said area included in the bond and disposition in security in their favour, and embodied in the said decrees of poinding of the ground, and the cost of the upkeep and management and insurance of the said houses.’

“In this position of matters it is clear that the defenders are not and never have been the parties having a legal title to draw the rents of the ground, and accordingly the pursuers’ claim against them comes to be rested on their receipt of the rents of the houses *de facto*. If the defenders are to be treated as having been in actual receipt of the rents of the houses at the time when the statutory character of owner falls to be ascertained, it is hardly disputed by the defenders, and it seems to me to be clear, that they are liable for the proportion of the work corresponding to the 171 feet of frontage of these houses. They say, however, that the statutory character of owner falls to be determined as at 1st February 1904, before their receipt of the rents of the houses began. They further maintain that *esto* they are liable in respect of the 171 feet of frontage of houses as having received the rents of the houses they are not liable in respect of the remaining portion of the feu, which is unbuild on, on the ground that they are not in possession of it and have drawn no rents from it.

“As regards the first of these questions—the liability of the defenders as receivers *de facto* of the rents of the houses for the proportion of the cost corresponding to the 171 feet of frontage—I am of opinion that the pursuers’ claim is well founded. The defenders were in receipt of the rents when the work was done, and when the pursuers’ claim for payment for the completed work emerged and was demanded, and on a due construction of the statutes the defenders are, in my opinion, the ‘owners’ of the portion of the ground in question liable in repayment to the pursuers. The defenders’ contention that the party liable is the owner as at the date of the pursuers’ resolution of 1st February 1904 is, I think, unsound. Under the definition of ‘owner’ contained in section 6 of the Act of 1871, and already quoted, the liability is thrown on the owners ‘for the time,’ and on a due construction of the section this appears to me to refer to the time when the assessment is levied. The

cost of this part of the work amounts to £160, 3s. 1d. Prior to the raising of the action the defenders offered payment of it to the pursuers, and in their defences they repeated this tender with expenses to date.

“The remaining question is whether the defenders, by reason of their receipt of the rents of the built-on portion of the feu, are liable not merely for the part of the cost of the work corresponding to its 171 feet of frontage, but are also liable for that part of the cost corresponding to the frontage of the unbuilt-on portion of the feu. I am of opinion that they are not so liable. The pursuers’ claim, as already stated, is rested on a *de facto* receipt of rents by the defenders. I do not think that the artificial statutory definition of ‘owner,’ in its application to persons who are to be held as owners by reason only of a *de facto* receipt of rents, carries any further liability than that which corresponds to the subjects for which the rents are paid. In the present case the rents received by the defenders were the rents of certain definite and separable parts of the whole subjects. The remainder, which consists of vacant ground, yields no rent, and the defenders have had no possession of it, and occupy no relation towards it save that of disponees of the superiority entitled to exact payment of the feu-duty of £123, 15s. by the remedies competent to a superior. A superior, however, is not an ‘owner’ within the meaning of the Act of 1871. The pursuers’ contention is that the whole area of ground, viewed as a feudal estate, is a *unum quid*, and that this unity must be held to be maintained in any question of liability arising under the definition in the sixth section of the Act of 1871. Thus, if there were one house only erected on a feu, occupying however small a part of it, any person who *de facto* received the rent of it would be thereby subjected to liability in respect of the frontage of the whole feu. The pursuers do not maintain that if the defenders had *de facto* received the rents of one or two out of the whole number of houses erected on Ogg’s feu they would be liable in respect of the whole frontage of the feu. They say, however, that as the defenders have drawn the rents of all the houses they have received the whole yield of rent from the feu. This is true in the sense that the remainder of the feu yields no rents. The rents received by the defenders, however, are not payable in respect of tenancy of the whole feu, but in respect of tenancy of certain defined portions of it. The sixth section of the Act of 1871 does not present the matter of liability from the point of view of feudal unity of estates, but from the different standpoint of rent and tenancy. The ‘lands or premises’ referred to in the section are, in my opinion, the lands or premises in respect of which the rents *de facto* drawn are due—that is to say, in the present case, the defined areas occupied by the houses.

“I am accordingly of opinion that the defenders are liable in respect of that part of the cost corresponding to the 171 feet

of frontage of the built-on portion of the feu, but that they are not liable in the part of the cost corresponding to the frontage of the remainder of the feu. The defenders have not challenged the conclusion for interest contained in the summons.”

The pursuers reclaimed, and argued—The question was whether the defenders were “owners” within the meaning of the Aberdeen Municipality Extension Act 1871 (34 and 35 Vict., ch. cxli), sec. 6. The policy of the Act was to give to the pursuers a first charge on rent against the person who collected it, without their having to take into consideration nice questions of ownership. If a person was either *de facto* or *de jure* entitled to receive rent he came within the definition. The defenders were *de facto* in receipt of the rents of the whole property. The built-on and unbuilt-on portions of the stance were a *unum quid*. The feu-duty not having been allocated the defenders had no several title to the different parts, but in virtue of a title which did not distinguish between them were in receipt of the rents of the whole area. Moreover, the decree of pointing dated 5th March 1904 was applicable to the whole stance. The defenders were therefore liable for the cost of paving in respect of the whole frontage of the feu.

Argued for the defenders—The defenders were not entitled to receive rents. There was no procedure whereby a superior could go directly against a tenant for rent—*Prudential Assurance Company v. Cheyne*, June 4, 1884, 11 R. 871, 21 S.L.R. 606. Pointing of the ground only gave the superior a right to the moveables on the ground, restricted no doubt in the case of the tenant’s moveables to the amount of the rent due by them. What the defenders had got, therefore, was not rent but the moveables on the ground, and they had got these in name of feu-duty—*Royal Bank v. Dixon and Others*, July 3, 1868, 6 Macph. 995, 5 S.L.R. 636. In any event, if they got rent at all, it was only from the part of the ground which was built on. (Counsel explained that the tender for the sum due in respect of the built-on portion was made because the pursuers had power under the Municipal Act to recover the cost of paving directly from tenants, who were then entitled to deduct from their rents the amount so recovered.)

At advising, the opinion of the Court (the LORD JUSTICE-CLERK, LORDS ARDWALL, DUNDAS, and SALVESEN) was delivered by

LORD DUNDAS—In this case the pursuers, the Corporation of Aberdeen, seek to recover from the defenders, the British Linen Bank, the sum of £676, 4s. 2d. with interest, as the proportion of cost incurred by the pursuers in causewaying part of a street, exigible (as they allege) from the defenders as “owners” of certain property fronting the street, within the meaning of a local Act or Acts referred to on record. The necessity for proof was avoided by a joint-minute of admissions adjusted by the parties. The somewhat peculiar facts of

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 point 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 mails and duties against tenants for recovery of his feu-duty—*Prudential Assurance Company, Limited v. Cheyne*, 1881, 11 R. 871—and though he may bring a pointing 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 (prob-

ably 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 & Kernack, 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