extension, no doubt, consequent on the decision in *MacKnight* (1875, 2 R. 667) to the effect that a petition under section 14 at the instance of an assignee of the proper beneficiary under the trust was incompetent. In the present case, however, the petitioners do not, and as I think cannot, found on a derivative right of the kind referred to in section 24.

"For the reason which I have given I must refuse the remedy sought by the petitioners."

The petitioners reclaimed, and cited the cases of *MacKnight*, 2 R. 667, and *Trotter*, 1895, 3 S.L.T. 57.

At advising—

LORD PRESIDENT—The short method of completing title by a beneficiary under a lapsed trust which was provided by the now repealed provisions of the Trusts Act of 1867 is re-enacted in an altered form in the recent Act of 1921. The right to resort to it is by the new statute conferred upon, *inter alios*, any person "entitled to the possession for his own absolute use of" any property which stands in the name of the lapsed trust awaiting conveyance in his favour. The petitioners say that they are in a position to which this description applies; and so they are, unless the fact that they are themselves a body of trustees takes them out of it. They are the ultimate beneficiaries under the trust settlement of the testatrix, and they are undoubtedly entitled to the possession of the property which it will be their duty to apply to the purposes of the charitable endowment which they represent. The difficulty is to get over the words "for his own absolute use" which the draftsman of the statute has adjected to the expression "entitled to the possession." The M'Clymont trustees though beneficiaries in fee under the testator's settlement are not entitled to the possession of this property for their own absolute use, but for purposes defined by the settlor of the M'Clymont charity. It may be that these words are inserted only to mark the case provided for as being one in which the administrative purposes of the lapsed trust have been exhausted and nothing remains to be done but to denude in favour of the beneficiary ultimately entitled. I cannot myself see any reason in policy or in the sense of the thing why the benefits of the statute should be denied to such beneficiaries as the present petitioners. But whatever may have been the intention underlying the words "for his own absolute use," I agree with the Lord Ordinary in thinking that they make it impossible to include the petitioners within the description of persons entitled to use the statutory method of completing title.

LORDS SKERRINGTON and CULLEN concurred.

LORD MACKENZIE did not hear the case.

The Court refused the reclaiming note.

Counsel for Petitioners—Brown, K.C.—Aitchison. Agents — Bonar, Hunter, & Johnstone, W.S.

Saturday, May 20.

FIRST DIVISION.

ARDEN COAL COMPANY, LIMITED, PETITIONERS.

Company—Reorganisation of Share Capital — Resolution to Consolidate Different Classes of Shares — Whether Resolution Passed by Requisite Majority of Shareholders of Particular Class—"A Majority in Number of Shareholders of that Class Holding Three-fourths of the Share Capital of that Class"—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 68), *sec.* 45.

The Companies (Consolidation) Act 1908, sec. 45, provides that no preference attached to any class of shares shall be interfered with "except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class, and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed."

Held that a resolution passed by one-half of the preference shareholders who represented three-fourths of the share capital of their class did not comply with the provisions of the Act.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 45—"(1) A company limited by shares may, by special resolution confirmed by an order of the Court, modify the conditions contained in its memorandum so as to reorganise its share capital, whether by the consolidation of shares of different classes or by the division of its shares into shares of different classes: Provided that no preference or special privilege attached to or belonging to any class of shares shall be interfered with except by a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed, and every resolution so passed shall bind all shareholders of the class."

On 3rd April 1922 the Arden Coal Company, Limited, Glasgow, presented a petition under section 45 of the Companies (Consolidation) Act 1908 for confirmation of a special resolution reorganising the share capital of the company and modifying the company's memorandum of association.

At the date of the presentation of the petition there were issued preference shares (held by twelve members), ordinary shares, and founders' shares. At the first meeting at which the resolution for reorganisation was passed only six out of the twelve preference shareholders were present or represented. These six, however, held more than three-fourths of the share capital of that class, and unanimously agreed to the resolution, which was as follows:—"That the share capital of the company, amounting to

£12,000, consisting of 6000 preference shares of £1 each, 4500 ordinary shares of £1 each, and 1500 founders' shares of £1 each, be and is hereby reorganised by the consolidation of all the said three classes of shares into one class of 12,000 ordinary shares of £1 each." The remaining six preference shareholders had granted proxies favourable to the resolution, but these proxies arrived too late to be taken into account. At the subsequent meeting the whole of the preference shareholders were present or represented, and unanimously agreed to the confirmation of the resolution.

On 13th April 1922 the Lord Ordinary officiating on the Bills remitted to Robert Miller, Esq., S.S.C., to inquire into the regularity of the procedure and the facts and circumstances. In his report the reporter raised the question for the decision of the Court whether (the total number of the preference shareholders being twelve) a resolution passed by six preference shareholders holding more than three-fourths of the capital of that class was sufficient compliance with the provisions of section 45 of the Act.

No answers having been lodged counsel was heard on the petition and report. The following authorities were referred to—*California Redwood Company, Limited*, 13 R. 335; *in re Schweppes, Limited*, [1914] 1 Ch. 322, *per* Swinfen Eady, L.J., at p. 331; Stiebel's Company Law (2nd ed.), vol. i, p. 830, and the cases there referred to.

LORD PRESIDENT—The reporter has raised a question as to whether the preliminaries prescribed by section 45 of the Companies (Consolidation) Act 1908 have been complied with. The case is one of the reorganisation of a company's share capital which is divided into classes carrying various degrees of preference and priority; and the section prescribes that before the reorganisation can be carried out there must be, in the case of any class of shares so interfered with, "a resolution passed by a majority in number of shareholders of that class holding three-fourths of the share capital of that class, and confirmed at a meeting of shareholders of that class in the same manner as a special resolution of the company is required to be confirmed." The question arises with regard to the first of the two prescribed meetings. It was attended by exactly one-half of the total shareholders of the particular class affected and they represented three-fourths of the share capital of their class. They passed the resolution unanimously. But unless the expression "shareholders of that class" as used in relation to the first of the two meetings is to be read as having adjected to it some such words as "present at the meeting," it is obvious that the resolution was not passed by a majority at all. I think perhaps if the draftsman of the statute had put in before the words "shareholders of that class" the word "the," then the possibility of raising the contention which Mr Stevenson has made to us would have been precluded. In its absence it is perhaps just possible to maintain the view which he presented, although I think it is really untenable. The effect of the reorganisation is to alter the proprietary rights of a particular class of shareholders. If the statute had intended that the numerical majority at the meeting should be a majority only of those shareholders of the class who were present at the meeting either in person or by proxy—if proxies were admissible under the articles of association of the company—it is altogether incredible that the statute should not have said so in definite terms. It does so in other cases where that is the statutory intention. Accordingly it appears to me that the effect of the proviso in section 45 is not ambiguous. In the present case the first meeting did not comply with the terms of the proviso and the only course we can take is to give the petitioners an opportunity of convening the necessary meetings afresh and coming back to us before the petition can be disposed of.

LORDS MACKENZIE, SKERRINGTON, and CULLEN concurred.

The Court continued the petition.

Counsel for Petitioners—J. Stevenson. Agents—J. W. & J. Mackenzie, W.S.

Friday, May 26.

SECOND DIVISION.

THORNHILL DISTRICT COMMITTEE *v.* JAMES M'GREGOR & SON AND R. & C. H. DICKIE.

Sheriff—Jurisdiction—Appeal from Sheriff-Substitute to Sheriff—Competency—Road—Expenses of Extraordinary Traffic—Recovery by Road Authority—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 57, *as Amended by the Local Government (Scotland) Act* 1908 (8 *Edw. VII, cap.* 62), *secs.* 24 *and* 31.

In an action brought under section 57 of the Roads and Bridges (Scotland) Act 1878, to recover the expense, exceeding £50, of reparing damage done to a road by extraordinary traffic, *held* that an appeal to the Sheriff against a final judgment of the Sheriff-Substitute was competent.

The Roads and Bridges (Scotland) Act 1878, (41 and 42 Vict. cap. 51), section 57, enacts—"Where by the certificate of their surveyor or district surveyor it appears to the authority which is liable to repair any highway that having regard to the average expense of repairing highways in the neighbourhood extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same or by extraordinary traffic thereon, such authority may recover in a summary manner before the sheriff (whose decision shall be final), from any person by whose order the excessive weight has been passed or the extraordinary traffic has been conducted, the amount of