"Find in fact that during the period when Robert Fulton or Hay was alimented by the pursuers, the said Robert Fulton or Hay was not a pauper and not a proper object of parochial relief: Find in law that the pursuers have no claim against the parish of settlement of the said Robert Fulton or Hay, and that it is unnecessary to determine whether that settlement is in Kilmarnock: Therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute of 26th January 1898; and dismiss the action."

Counsel for the Pursuers — Salvesen — Deas. Agents — Macpherson & Mackay, S.S.C.

Counsel for the Defenders — Guthrie, Q.C. — James Reid — Findlay. Agent — James M'Kie Thomson, S.S.C.

Tuesday, July 19.

SECOND DIVISION.

[Dean of Guild, Perth.

JACKSON *v.* MACDOUGALL'S TRUSTEES.

Police—Burgh—Height of Houses—"Habitable Room"—Theatre—Perth Harbour, City Improvement, and Gas Act 1897, *section* 86.

The Perth Harbour, City Improvement, and Gas Act 1897, section 86, enacts that "No dwelling-house or other house or erection of any kind shall be built in any existing street or court within the burgh which shall exceed in height, from the level of the pavement to the roof of the highest habitable room, one and a quarter times the width of such street or court, measuring from the front walls of the buildings or intended buildings on each side thereof." A petition was presented in the Dean of Guild Court for warrant to erect a theatre, the roof of the auditorium and of the highest dressing-room being shown on the plans as much higher than the breadth of a lane which bounded one side of the theatre. *Held* that as there was no room in a theatre which could be properly described as a "habitable room," there was no way of measuring the height as directed in the statute, that consequently the statute did not apply, and the petitioner was entitled to decree of lining as craved.

Edward Jackson, solicitor, Perth, as trustee for and on behalf of the promoters of a theatre company to be formed in Perth, presented a petition in the Dean of Guild Court there, in which he craved warrant to erect certain buildings to be used as a theatre.

The ground upon which it was proposed to erect the theatre was described in the petition as "situated between the High Street and Mill Street of Perth, and lying on the east side of the Cutlog Vennel."

Objections were lodged by Miss Isabella Macdougall's trustees, and by Messrs Leitham & Davidson, iron and general merchants in Perth, who were respectively proprietors of subjects opposite to but divided from that on which the petitioner proposed to build the theatre by Cutlog Vennel, which was a narow lane. The property of Miss Macdougall's trustees consisted of a tenement of dwelling-houses, and that of Messrs Leitham & Davidson consisted of lofts and stores. These parties were cisted as respondents by the Dean of Guild in deference to the judgment of the Court of Session in *Lawrie* v. *Jackson*, July 15, 1891, 18 R. 1154, although their properties were not conterminous with that which was the subject of the petition.

Objections were also lodged for the Master of Works, but he subsequently gave up his opposition.

Both of the sisted respondents had practically the same objections to the erection of the theatre. These were—(1) that the erection of such a large building opposite their properties in Cutlog Vennel—which was only 7 feet wide—would deprive them of light and ventilation, and so cause a nuisance; and (2) that the height of the proposed theatre would be a contravention of section 86 of the Perth Harbour, City Improvement, and Gas Act 1897. They also maintained (3) that the petitioner had no right or title to obtain a decree of lining, as he had not produced a valid title to the subjects on which he proposed to build the theatre.

The Perth Harbour, City Improvement, and Gas Act 1897, section 86, enacts as follows:—"No dwelling-house or other house or erection of any kind shall be built in any existing street or court within the burgh, which shall exceed in height from the level of the pavement to the roof of the highest habitable room, one and a quarter times the width of such street or court, measuring from the front walls of the buildings or intended buildings on each side thereof."

The plans showed that the roof of the auditorium and of the highest dressing-room of the theatre was much higher than one and a quarter times the breadth of Cutlog Vennel.

The first deliverance on the petition was dated 14th March 1898. On April 14th the petitioner lodged a mandate signed by certain persons designing themselves as "a majority and quorum of tho promoters of the theatre company to be formed in Perth." This mandate was signed on various dates between April 9th and April 13th 1898 inclusive. On the same day the petitioner also lodged missives of sale of the ground upon which he craved warrant to erect the theatre. These missives were dated 14th April 1898.

On 21st April 1898 the Dean of Guild issued the following interlocutor:—"Having heard the agents for the compearing respondents, the trustees of the late Isabella Macdougall, and Leitham & Davidson,

and the petitioner, and considered the closed record, sustains petitioner's pleas-in-law that the objections stated for the said compearing respondents and for the burgh surveyor are irrelevant: Therefore repels said objections and grants warrant as craved: Lines the boundaries of the petitioner's property and intended buildings in terms of his title-deeds, and as delineated on the plans signed by or for the clerk of court as relative hereto: Finds the compearing respondents, the trustees of the late Isabella Macdougall and Leitham, liable to the petitioner in expenses, of which appoints an account to be given in, and remits the same when lodged to the clerk of court *qua* auditor to tax and report, reserving to them their rights of relief against each other as accords of law, and decerns." . . .

Note.—[*After stating the facts and the contentions of the objectors*]—"This plea" (viz. the plea with reference to the petitioner's title) "may be dismissed with the remark that it is *jus tertii* to them.

"With reference to the first objection, which is that the proposed theatre will have an injurious effect on the light and ventilation of the respective properties of the objectors, the question seems to be, Is the petitioner on that ground alone—and none other is alleged—to be restricted in the legitimate use of his ground, and must he in erecting his building have regard to the light and ventilation of his neighbours' houses? I think not; and if the objectors are to have the light and ventilation of their premises preserved by restricting the height of the petitioner's building, they must show that they have a servitude or other legal right for that purpose.

"The second objection raised presents questions of some difficulty, and the first to be considered is, To what class of buildings does section 86 of the recent Act apply? The section has evidently been framed mainly for the purpose of restricting the height of certain buildings, and it provides that no building of the class to which it relates 'shall exceed in height from the level of the pavement to the roof of the highest habitable room,' one and a quarter times the width of the street or court on which the building shall be erected, and no other standard of height is provided. This being so, it appears to me that the section can only apply to buildings having habitable rooms; and the further question thus arises, Does a theatre contain habitable rooms within the meaning of the section? The plans show that the roof of the auditorium and of the highest dressing-room of the theatre are much higher than one and a quarter times the breadth of Cutlog Vennel, and the objectors argue that both auditorium and dressing-room are habitable rooms within the meaning of the section. I can give effect to neither contention. It seems to me that the expression 'habitable room' means a room to be occupied for the ordinary purposes of a human dwelling; and that the 'house or erection' contemplated by the section is one to be inhabited in the ordinary sense. This view is borne out by the fact that the 'highest habitable room' is mentioned, implying that there are several habitable rooms in the building.

"Even supposing that the section applied to such a building as a theatre, I do not think that the width of the Cutlog Vennel would form the standard of height under the section. The measurement of the width of the street or court is, under the section, to be 'from the front wall of the buildings or intended buildings,' and it seems to me that it would be very difficult to hold that what is shown on the plan as a side wall along the vennel is the 'front wall' of the building in the statutory sense. For these reasons I am of opinion that the objections stated cannot be sustained.

"I have not found Mr M'Killop, Master of Works, liable in expenses, as he gave up his opposition to the granting of the lining, although he did not formally withdraw his objections."

The objectors and respondents Miss Isabella Macdougall's trustees appealed, and argued—(1) The petitioner had no title to present this petition. At the date when he presented it he had not even the missives. Moreover, the missives were not sufficient even if they had been signed before the petition was presented. To entitle the petitioner to present this petition, he had to be, as he averred, proprietor of the ground, and if he was not proprietor when the petition was presented, nothing which was done subsequently could cure the defect—*Symington* v. *Campbell*, January 30, 1894, 21 R. 434. (2) *On the merits*—In view of the enactment contained in the 86th section of the Perth Harbour, City Improvement, and Gas Act 1897, the petitioner was not entitled to a lining. "Habitable" was not the same as "inhabited." Buildings intended for temporary occupation, such as churches, theatres, offices, shops, and warehouses were "habitable." The application of the section was not limited to "dwelling-houses," but extended to "other houses and erections." This showed that "habitable" was intended to have a wider signification than "inhabited," and "other houses and erections" must refer to buildings intended for temporary occupation. The dressing-rooms at least were "habitable" rooms. The narrower construction proposed by the petitioner would defeat the object of the statute, and such a construction was not to be adopted, if one which would give effect to the intention of the Legislature could reasonably be put upon the words used, as in this case by taking "habitable" as equivalent to "capable of being inhabited"—*Hogg* v. *Magistrates of Edinburgh*, July 7, 1894, 21 R. 958. The proposed building fronted Cutlog Vennel and not High Street. If so, then the decision in *Pitman* v. *Burnett's Trustees*, January 26, 1882, 9 R. 444, was in point.

Argued for the petitioner—"Habitable room" meant a room for dwelling in. That was its natural meaning, and any other construction involved great difficulties in the application of the section. There were plenty of buildings not exactly "dwelling-houses," which contained rooms for living

in. Hospitals and banks or warehouses with accommodation for caretakers were examples. These were the kind of other houses or erections referred to in the section. The object of the statute was to secure that houses which were intended to be lived in should have sufficient ventilation. The neighbours had no title to state the objection founded on the statute. The only person entitled to object was the Master of Works, and he had not persisted in his opposition. The petitioner's title was sufficient. Moreover, such an objection could not be disposed of by the Dean of Guild. If the objectors had any objection to the petitioner's title they must seek their remedy in a competent court. In a recent case—*Wilson & Sons* v. *Mackay's Trustees*, October 18, 1895, 23 R. 13—process was sisted by the Dean of Guild to enable an action with reference to the question of title to be raised in a competent court, and subsequently no such action having been raised, decree of lining was granted, and the Court dismissed an appeal against this interlocutor.

LORD JUSTICE-CLERK — This case turns upon the terms of section 86 of the Perth Harbour, City Improvement, and Gas Act 1897. That is a clause of a very extraordinary nature. Whatever may be meant by it, however, the only enactment in it as regards the height of buildings is contained in these words—[*His Lordship read the words quoted above.*] Now, here it is proposed to erect a theatre. It does not appear to me that in a theatre you can have a "highest habitable room," to the roof of which you can "measure" in terms of the Act. No doubt this is a bungled clause. It is very difficult to see what it means, but I am not disposed to differ from the view adopted in the Dean of Guild's interlocutor.

LORD YOUNG—I am of the same opinion. This is a blundered clause. Taking it as it stands, I do not think we can get anything out of it which would entitle us in this case to interfere with the common law right of a proprietor to do what he likes with his own property. I am therefore of opinion that there is no ground for interfering with the Dean of Guild's interlocutor.

LORD TRAYNER—I have come to the same conclusion. It is difficult to see what these words mean. But one thing is quite apparent, and that is that the height is to be measured between the pavement and the roof of the "highest habitable room." There is no such thing in a theatre as what is popularly known as a "habitable room." I am therefore of opinion that the section cannot apply here, and that the interlocutor appealed against should be affirmed.

LORD MONCREIFF—I am of the same opinion.

The Court pronounced the following interlocutor:—

"Dismiss the appeal, and affirm the interlocutor appealed against: Of new repel the objections, and grant warrant as craved, and remit the cause to the said Dean of Guild to proceed," &c.

Counsel for the Petitioner—Ure, Q.C.—Clyde. Agent—W. Croft Gray, Solicitor.

Counsel for the Objectors and Appellants—W. Campbell, Q.C.—Graham Stewart. Agent—Alexander Morison, S.S.C.

Tuesday, July 19.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SHEARER *v.* MALCOLM.

Reparation—Negligence—Duty to Public—Stepping Stone Projecting on to a Public Footpath.

In an action of damages for personal injuries the pursuer averred that the defender had placed a stepping-stone in front of his property, which protruded fully a foot beyond the defender's garden on to the public footpath leading to a public well which was used by the people of the neighbourhood; that this stepping-stone, particularly at night, constituted a dangerous obstruction to the public in their use of the footpath; that the pursuer having occasion to go to the well after dark on an evening in December, stumbled against the stepping-stone, and fell to the ground, and sustained injuries in consequence, and that these injuries were due to the fault of the defender in placing such an obstruction on the path. *Held* (*rev.* Lord Kincairney, Ordinary) that these averments were relevant.

This was an action at the instance of Mrs Lilian Morrison or Shearer, widow, residing at Townhead, Auchterarder, against John Butter Malcolm, Esq. of Castlemains, and residing at Auchterarder Castle, Auchterarder, in which the pursuer concluded for payment of the sum of £150 sterling as damages for personal injuries.

The pursuer averred—(Cond. 1) . . . "The defender is proprietor of two dwelling-houses with garden ground in front, which lie some 20 yards or thereby south-east of the pursuer's dwelling-house. (Cond. 2) About 3 feet or thereby from the south-east corner of the defender's said garden ground there is a public well, from which the pursuer and other inhabitants of the Townhead of Auchterarder obtain their supply of water. (Cond. 3) The defender recently and wrongfully placed or caused to be placed a stepping-stone in front of his said property. The stone protrudes fully a foot beyond defender's garden on to the public footpath between the entrance from the street to the pursuer's dwelling-house and the said public well, and, particularly at night, constitutes a dangerous obstruction to the public in the use of their said footpath. . . . (Cond. 4) After dark on or about the