and stables, or either of them, upon the "stable ground." I may further point out that, even if the feu-charter had bound the vassal and his successors in the feu to erect coach-houses and stables on the ground in question, it imposes no obligation to use the buildings as coach-houses and stables, and contains no prohibition against the use of them for other purposes. Therefore again applying the strict rule of construction which obtains in such cases, the vassal might have used the buildings for other purposes if he thought fit. Assuming, however, that this is so, the question remains whether the defender is entitled to erect the building which he proposes to erect or is erecting upon the stable ground. The feu-charter contains no prohibition against erecting any buildings other than coach-houses and stables on the ground in question, and again applying the settled principles of strict construction already referred to, I am of opinion that the defender is not effectually restrained by the titles from erecting the building in question upon the "stable ground."

The second question depends upon the construction and effect of the words in the charter "with liberty to erect buildings on the back ground" (that is, the ground between the back of the defender's house and the "stable ground") "provided they do not exceed the height of one foot above the level of the dining-room floor." The pursuers maintain that the defender is not entitled to erect any building upon that ground exceeding the height of one foot above the level of the floor of the dining-room of the defenders' house, while the defender maintains that, as used in the charter, the words "dining-room floor" mean dining-room flat, and that consequently he is entitled to build one foot above the level of that flat, whatever that level may be. It is true that the term "floor" is sometimes used as equivalent to "flat," but I concur with the Lord Ordinary in thinking that it is not used in that sense in the charter under which the defender holds his house. The words "one foot above the level of the dining-room floor" seem to designate a definitely ascertained or definitely ascertainable level, such as the floor of a dining-room is, while if the word floor was intended to mean flat it would be very difficult to decide what the particular level was above which the back building was not to rise more than one foot. I understood that the defender's counsel were not disposed to accept the view that the point from which the foot was to be measured was the ceiling of the dining-room, or that it was the floor of the bedroom flat, which could not with any propriety be described as part of the dining-room flat, and if so, the foot would require to be measured from some point between that ceiling and that floor, but I did not quite gather from the argument submitted to us from what point of that intervening structure the defender's counsel maintained that the measurement should be made. Reference was made to the case of *Greenhill v. Forrester and Others*, 3 S. 325, November 26, 1824, which was decided a little more than seven months prior to the date of the charter under which the defender holds his house, and in which it was held that a provision that the "roofs of any buildings on the back area of the houses shall not be higher than the joists of the parlour floor," did not entitle the proprietor to erect buildings on the back area to a height equal to the level of the beams of the roof of the parlour storey. The language of this clause is not identical with that of the defender's charter, the words "joists of the parlour floor" giving a more definite standard than that given in the present case, but the decision tends to support the view that the term "floor" is to be construed in its natural sense unless there is something in the context to show that it was intended as an equivalent for flat. It may also be said that the case indicates that at that time it was the practice of superiors in Edinburgh to limit the height of back buildings to one foot above the floor of the dining-room or parlour.

For these reasons I consider that the Lord Ordinary's interlocutor should be adhered to, and that the case should be remitted to his Lordship to dispose of the other questions raised on record.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Complainers—Dundas, K.C.—Blackburn. Agent—Hugh Patten, W.S.

Counsel for the Respondent—Clyde, K.C. —Chree. Agents—W. & F. Haldane, W.S.

Tuesday, March 4.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

NEILL *v.* DOBSON, MOLLE, & COMPANY, LIMITED.

Bill of Exchange—Summary Diligence—Presentment for Payment—Presentment to Acceptor of Bill Accepted Generally—Diligence—Bills of Exchange Act 1882 (45 *and* 46 *Vict. cap.* 61), *secs.* 45 (4) (*b*), 47, 52 (1), *and* 98.

Section 52, subsection 1, of the Bills of Exchange Act provides that when a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable. Section 98 of the Act declares that nothing in the Act shall alter or affect the existing law and practice in Scotland in regard to summary diligence. *Held* that when a bill is accepted generally, no place of payment being specified, due presentment for payment in accordance with

the rules laid down in section 45 of the Bills of Exchange Act 1882 is necessary to render summary diligence upon the bill competent against the acceptor; and accordingly that where on a bill no place of payment was specified but the address of the acceptor was given, and payment had been demanded at the acceptor's place of business, but not at his address given on the bill, summary diligence following on this demand was incompetent.

This was an action at the instance of John Hay Neill, wholesale stationer, residing at 1A Morrison Place, Piershill, Edinburgh, against Dobson, Molle, & Company, Limited, wholesale stationers, St Clair Works, Albert Street, Edinburgh, in which the pursuer claimed damages for the wrongous use of diligence.

On 5th January 1901 the pursuer accepted a bill for £37, 5s. 6d., at six months' date, drawn upon him by the defenders. The bill was addressed "To Mr J. Neill, 1 Morrison Place, Piershill, Edinburgh." It was accepted generally, being merely signed by the pursuer as drawee without any additional words. No place of payment was specified.

This bill fell due on 8th July 1901. It was not presented for payment at that date or subsequently until 10th September 1901, when it was presented for payment at the pursuer's place of business in George Street, Edinburgh, and payment was refused. The bill was immediately thereafter protested, the protest narrating that payment had been demanded on that day, and on the same day a charge was given to the pursuer at his residence.

Thereafter, the defenders having threatened to present a petition to have the pursuer ordained to execute a disposition *omnium bonorum* for behoof of his creditors under the *cessio* Acts unless the amount contained in the bill was sooner paid, the pursuer settled the defenders' claim in full, and on 11th October raised the present action.

The pursuer averred (Cond. 8)—. . . "In failing to present the bill at the proper place and on the proper date the defenders acted illegally and irregularly, and the diligence which they instituted was accordingly wrongful."

The pursuer pleaded—"(2) The defenders having wrongfully and illegally done diligence against the pursuer as condescended on, are liable in reparation as concluded for."

The defenders pleaded—"(4) The diligence done by the defenders being legal and regular they ought to be assoilzied."

The Bills of Exchange Act 1882 (45 and 46 Vict. cap. 61) enacts as follows—(section 45) "Subject to the provisions of this Act a bill must be duly presented for payment. If it be not so presented the drawer and indorser shall be discharged. A bill is duly presented for payment, which is presented in accordance with the following rules . . . (sub-section 4) A bill is presented at the proper place . . . (*b*) Where no place of payment is specified but the address of the drawee or acceptor is given in the bill and the bill is there presented." Section 46 sets forth certain cases in which presentment for payment is dispensed with. It was not contended that the present case fell under any of these. Section 47 enacts as follows—"(1) A bill is dishonoured by non-payment (*a*) where it is duly presented for payment and payment is refused or cannot be obtained, or (*b*) where presentment is excused and the bill is overdue and unpaid." Section 51, sub-section 7, provides that a protest must specify "(*b*) the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found." Section 52, sub-section (1), provides as follows—"When a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable." Section 98 of the Act enacts that nothing in the Act shall extend or restrict or in any way alter or affect the law and practice in Scotland in regard to summary diligence.

On 14th December 1901 the Lord Ordinary (Stormonth Darling) approved of an issue for the trial of the cause.

Opinion.—"This is an action of damages for wrongous use of diligence by protesting and charging on a bill of which the pursuer was acceptor, although the bill had not been presented for payment at the proper time and place. The defenders maintain that there is no issuable matter, because by sec. 52 (1) of the Bills of Exchange Act 1882, 'when a bill is accepted generally presentment for payment is not necessary in order to render the acceptor liable.'

"The fallacy of that argument, as an answer to the pursuer's demand for an issue, is that presentment for payment, though not necessary to render the acceptor liable on the bill, is necessary to found summary diligence against him. By section 98 of the Act the law and practice of Scotland in regard to summary diligence are preserved entire. Now, there can be no such diligence without a protest ('the protest,' says Mr Bell, Com. i. 437, 'is, in Scottish law, the sole foundation for summary execution'), there can be no protest without dishonour of the bill (sec. 51), and there can be no dishonour without due presentment for payment, except when presentment is excused on one of the grounds mentioned in section 46, none of which apply to the present case. Accordingly presentment for payment, according to the rules set out in section 45, becomes a necessity even in the case of an acceptor, if the holder desires to do summary diligence against him. And it is of wrongful use of diligence in respect of undue presentment that the pursuer complains.

"It was suggested in argument that by the combined force of sections 47 and 52 (1) a bill might be dishonoured without due presentment for payment, and without presentment being excused on any of the grounds mentioned in section 46, because section 52 is itself a sufficient excuse for non-presentment in the case of an acceptor. But if a protest is the 'sole foundation for

summary execution,' no protest could possibly be framed in accordance with the provisions of section 51 without reciting the fact of presentment for payment.

"I may observe that the case of *Bartsch* v. *Poole & Company*, 23 R. 328, 33 S.L.R. 233, which was a suspension of a charge on a bill, turned on the regularity of a protest taken by the drawers against the acceptors, and there was no suggestion from either bench or bar that diligence could be used against an acceptor without due presentment."

The defenders reclaimed, and argued—The defenders should be assoilzied. It was true there could be no protest of a bill without dishonour, but under section 47, sub-section 1 (*b*), and section 52, sub-section 1, of the Bills of Exchange Act the pursuer's bill, which was accepted generally, was dishonoured without presentment for payment, which was not necessary to render the acceptor liable. The principle of the Act was that a holder could only enforce the guarantee of an indorsee by adhering strictly to the statutory requirements, and it made presentment for payment a necessary step on the part of a holder; but it was not open to an acceptor to object that the drawer had not come to ask for his money at the right place; it was within the acceptor's knowledge that the debt was due, and the provisions as to presentment for payment had nothing to do with the relation of drawer and acceptor. Therefore in a question between the pursuer and defender this bill was dishonoured the moment a demand was made and the pursuer refused payment, the bill being then overdue and unpaid. The cases in which presentment for payment was dispensed with were not restricted to those specified in section 46. The pursuer's bill had been competently protested. The Lord Ordinary was in error in holding that no protest could be framed in accordance with the provisions of section 51 of the Act without reciting the fact of presentment for payment; the words "demand made" did not involve presentment for payment, these words were used instead of "presentment for payment" to provide for such a case as the present, where under sections 47 and 52 a bill was dishonoured without presentment for payment.

Argued for the respondent—The Lord Ordinary correctly laid down the law and practice in Scotland as to summary diligence, and it was preserved entire by section 98 of the Act. Section 47 had to be read together with section 46, which exhausted the cases in which presentment for payment was dispensed with. No place of payment being specified in the bill, presentment for payment at the drawee's address was necessary under section 45 (*b*). Sections 52 and 47 could not be read together to make summary diligence competent without presentment for payment, and so to contradict the rest of the Act.

LORD JUSTICE-CLERK—I am of opinion that the Lord Ordinary has arrived at the right conclusion in this case. The Bills of Exchange Act expressly provides in section 98 that nothing in that Act shall extend or restrict the law and practice in Scotland in regard to summary diligence. As to what the law and practice of Scotland is, I do not think it can be disputed, and no authority was quoted against the view of the Lord Ordinary.

The argument presented by Mr Clyde came to this, that summary diligence was competent although the bill was not presented at the proper place, which in this case was the address of the drawee according to the provisions of sub-section 4 (*b*) of section 45 of the Act, there being no place of payment specified. Now, here we are exactly in the circumstances contemplated by sub-section 4 (*b*), the address of the drawee being the only place specified in the bill. The bill was not presented there, and we have nothing to do with any question as to whether presentment was made at some other place. The question is, should it have been presented at the drawee's address? On that question of law I have no doubt that the Lord Ordinary's conclusion is right.

LORD ADAM—The question in this case is not whether the respondent is liable on the bill, but whether the summary diligence used against him was valid and proper. Now, the bill is in these terms—[*His Lordship quoted the terms of the bill*]—and I understand that Mr Neill accepted it.

On the question whether the acceptor is liable in summary diligence, I do not understand that there is any dispute that the existing law and practice as to summary diligence is preserved by the 98th section of the Bills of Exchange Act, and the reclaimer did not question the law laid down by the Lord Ordinary. But the answer made by the reclaimer is that in this case it is not true that there can be no dishonour on the ground that there was no due presentment, because either there was due presentment or presentment was excused. Now, there is no doubt under the Act as to where the place of payment was in this case, because section 45 gives rules in accordance with which a bill must be duly presented for payment, and sub-section 4 (*b*), which applies to this case, provides that where no place of payment is specified, but the address of the drawee is given in the bill, the bill must be presented at that address. Here there was no place of payment specified in the body of the bill, but the address of the drawee was given as "1 Morrison Place, Piershill, Edinburgh." That was the only place where presentment was to be made. It is not disputed that presentment was not made there, and the question is whether it was excused. Section 46 of the Act says where presentment may be dispensed with, and gives five cases which I think are the only cases in which presentment is excused or dispensed with. The question is, whether this case falls under any of these. If so, then section 47 provides (*b*) that a bill is dishonoured by non-payment "when presentment is excused and the bill is overdue and un-

paid." That raises the question, whether in this case presentment was excused. I do not think it was, and that being so, in my opinion the Lord Ordinary was right.

LORD MONCREIFF—I am of the same opinion. I think the case is governed by section 98 of the Act. It is admitted that under the older practice there would be no warrant for summary dillgence in this case. But for that section the reclaimer might have had a plausible argument on the sections cited, especially sections 45, 47, and 52 taken in combination, but as matters stand I agree with your Lordships and with the Lord Ordinary.

LORD YOUNG and LORD TRAYNER were absent.

The Court adhered.

Counsel for the Pursuer and Respondent —Watt, K.C.—Hunter. Agents — Pringle Taylor & Lamond Lowson, W.S.

Counsel for the Defenders and Reclaimers —Clyde, K.C.—Findlay. Agents—Davidson & Syme, W.S.

Wednesday, March 5.

FIRST DIVISION.

[Dean of Guild Court, Ayr.

YOUNG *v.* HILL.

Burgh — Dean of Guild — Alteration of Structure — "Habitable Room" — Room Intended to be Used as Box Room — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 172 *and* 173.

Section 172 of the Burgh Police (Scotland) Act 1892 provides that "every habitable attic room shall be at least eight feet in height from the floor to the ceiling through not less than one-third of the area of the room."

Section 173 provides that "every habitable room shall have at least one window, and the total area of glass in the windows shall be . . . at least one-tenth of the area of the room."

In a petition presented to a Dean of Guild Court for warrant to make certain alterations on a building, the master of works lodged objections to the formation of a proposed attic-room, 6 feet 6 inches in height over part of its area, with a floor space of about 160 square feet, and containing a fireplace and sky-light, on the ground that it was a habitable room which did not comply with the conditions of sections 172 and 173. The petitioner maintained in answer that the proposed room was not "habitable" in the sense of the Act, in respect that it was intended to be used as a box room.

Held that "habitable" meant "capable of being inhabited," irrespective of the immediate intention of the proprietor as to the use to be made of the room; that the room in question was "capable of being inhabited," and that the objection stated for the master of works must consequently be *sustained.*

Samuel Hill, Eastbourne, Ayr, presented a petition in the Ayr Dean of Guild Court, in which he called the Magistrates and Town Council of Ayr and others as defenders, and craved warrant to alter certain buildings to the effect of constructing an attic room in each of six houses in Fotheringham Road, Ayr, "to be used as box-rooms."

Objections were lodged by John Young, Master of Works, who averred—"(Obj. 1) The proposed alterations by the petitioner will be an infringement of section 172 of the Burgh Police (Scotland) Act 1892, in respect that a habitable attic room (with a floor area of about 162 feet 6 inches, and having a fireplace and skylight 30 inches by 18 inches) will be formed only 6 feet 6 inches in height for about one-fifth of the floor area in place of 8 feet in height for one-third of the floor area, as provided for in said section." The respondent further averred that the proposed alterations by the petitioner would be an infringement of section 173 of the Act, in respect that the skylight lighting the room was not one-tenth of the floor area, and also that the access to the room was by a trap ladder 22½ inches wide, which was too steep and presented a danger in its use.

The petitioner maintained that there could be no infringement of the Act, in respect that the room was a box room, and not a "habitable room" in the sense of the Act.

On 25th October the Dean of Guild repelled the objections of the Master of Works, and granted warrant to the petitioner to alter the buildings as craved in the petition.

The Master of Works appealed to the First Division of the Court of Session, and argued that the proposed room had a fireplace and window, and was accordingly capable of being inhabited, which was the meaning of "habitable" in the sense of the sections of the Burgh Police (Scotland) Act 1892, quoted in the rubric.

The respondent argued that as he only intended to use the room as a box room in its present condition, it was not "habitable" in the sense of the Act. He might be interdicted from using it as a living room in its present condition under section 180 of the Act, which provided for the inspection of new houses before occupation.

LORD PRESIDENT—Some of the provisions of the Burgh Police (Scotland) Act of 1892 are stringent, but they have received the sanction of Parliament, and our only duty and our only power is to construe the language which we find in them. The question submitted to us in this case depends on the construction of section 172. [*His Lordship read the section.*] The petitioner applied for authority to alter certain buildings to be used as box rooms in six houses, and the respondent objected on the ground that a habitable attic room