entitled to Outer House expenses. What then of the Inner House expenses? We have adhered to the interlocutor reclaimed against, and in accordance with the well-known rule in such cases we must find Dr Clark entitled to the expenses of the reclaiming-note simply because the reclaiming-note is refused.

LORD ADAM—I agree. I think that your Lordship's statement of the principle which regulates expenses in such circumstances as we have here is correct. This is not a case in which the expenses follow the merits. Mr Jameson's position is this. He says—*esto* that the Lord Ordinary is right on the merits, he is wrong on the question of expenses. That is a substantive ground for reclaiming against the interlocutor, and should have been opened on.

LORD M'LAREN — I think it is a fair question for consideration whether, when a respondent in a petition of this kind confines himself to fair cross-examination of the witnesses and criticism of the evidence, he is not entitled to get expenses on the ground that he appears in the interests of the general body of electors to assist the Court in scrutinising the evidence. If this point had been taken in reclaiming against the Lord Ordinary's finding with regard to expenses, I should have been prepared to give it favourable consideration, but as the point was not opened on we cannot deal with it.

The expenses of the reclaiming-note are in a different position, because I am inclined to think that the integrity and purity of elections are sufficiently vindicated if the questions are submitted to the judge of first instance. The reclaimer would appear to have persisted rather in the interests of party than in the interests of the constituency as a whole.

The Court refused the motion and adhered to the interlocutor reclaimed against with expenses.

Counsel for Petitioner — Ure — Cooper. Agents—M'Naught & M'Queen, S.S.C.

Counsel for Respondent—A. Jameson—Crole. Agents—A. & S. F. Sutherland, S.S.C.

Friday, March 19.

FIRST DIVISION.

[Edinburgh Dean of Guild Court.

LORD SALTOUN AND OTHERS, PETITIONERS.

(*Ante*, July 3, 1896, 33 S.L.R. 694, 23 R. 956.)

Burgh—Dean of Guild—Edinburgh Police and Municipal Amendment Act 1891 (54 *and* 55 *Vict. cap. cxxxvi.*) *secs.* 49 *and* 50.

Section 49 of the above Act provides that on a petition being presented to the Dean of Guild Court for the alteration of the structure of any existing house or building the burgh engineer shall report to the Court, "and the Dean of Guild may decline to grant warrant until the Court is satisfied that the plans provide suitably for . . . light, ventilation, and other sanitary requirements."

In a petition for warrant to build a room over an existing lobby, the burgh engineer reported that "This place is already sufficiently built on, having regard to the light and ventilation of existing buildings." No objections were made to the sufficiency of light and ventilation in the proposed addition. The Dean of Guild refused the prayer of the petition.

Held that the provisions of the section as regards light, ventilation, and other sanitary requirements applied only to the proposed additions and not to existing buildings, and that accordingly the judgment of the Dean of Guild fell to be *recalled* and the warrant granted.

Section 49 of the Edinburgh Municipal and Police Amendment Act 1891 provides that "The Clerk of the Dean of Guild Court shall forthwith, on receiving" a petition for the erection of any house or building, or the alteration of the structure of any existing house or building, "give notice to the Burgh Engineer, who shall, before such petition is heard, report to the Court whether in his opinion the plans are in conformity with the provisions and requirements of the Edinburgh Municipal and Police Acts: And the Dean of Guild Court may decline to grant warrant for the erection of any house or building, or for the alteration of any existing house or building. until the said Court is satisfied that the plans provide suitably for strength of materials, stability, mode of access, light, ventilation, and other sanitary requirements, and are otherwise in conformity with the provisions of the Edinburgh Municipal and Police Acts."

Section 50 of the Act, as amended by section 34, sub-section 7, of the Edinburgh Improvement and Municipal Police Amendment Act 1893 (56 and 57 Vict. cap. 144), enacts that "Every new house, and any building altered for the purpose of being used as a house," shall have at the rear thereof a specified amount of open space, "provided also that in the case of the erection of houses with shops on the ground floor, or of the conversion of a house into a building to be used for business premises only, the Dean of Guild Court may sanction the erection of saloons upon such open space of such height and construction as to them shall seem proper, such saloons to continue so long only as such building is so used for business purposes, but where any building is to be used for business premises as much open space shall be required as in the discretion of the Dean of Guild Court shall be sufficient for the purposes of light and ventilation."

Lord Saltoun and others, the trustees of an order of Freemasons, proprietors of the premises No. 74 Queen Street, presented a

petition in the Edinburgh Dean of Guild Court for "warrant to construct a room over a portion of the flat roof of present building which now forms the lobby connecting No. 74 Queen Street with the hall at the rear." In the course of the proceedings the Burgh Engineer appeared on behalf of the Corporation of Edinburgh and made verbal objections to the petition. The Dean of Guild refused the warrant "in respect that all the open space presently existing is required for the proper lighting and ventilation of the premises in question," and the petitioners having appealed to the Court of Session, answers were then submitted on behalf of the Corporation. The First Division on July 3, 1896, allowed the answers to be received and remitted the cause to the Dean of Guild to proceed.

The petitioners averred that the only persons who had any interest in the ground in question were themselves, Messrs Aitchison & Son, whose property bounded theirs on the west, and the Merchant Company on the east, the other boundaries being Queen Street and a stable lane; and that these two proprietors who had been called as respondents were satisfied that their property would not be prejudicially affected, and had made no appearance.

They stated that having purchased the tenement they had erected a masonic hall on the area behind, and that the proposed building was intended to be used as a ladies' cloakroom, as they were in the habit of letting out their hall for social entertainments. They averred (Cond. 4) that "It is not proposed to encroach in the least degree upon vacant space, but to erect the room upon the flat roof above part of the building. The addition does not interfere in the least with either the ventilation or the lighting of the petitioners' property."

They averred—"(Cond. 6) The respondents found upon the Edinburgh Municipal Police Amendment Act 1891. Section 3 of that Act defines the word 'house' to mean a dwelling-house. The tenement No. 74 Queen Street is not in any part of it a dwelling-house. The lower flat consists of a kitchen used in connection with the hall. There is in it a room belonging to the caretaker, but it is to the front of the house and looks into Queen Street. The second flat consists of the dining-room, also used in connection with the hall. The drawing-room flat is used as law offices, and the upper flats as schoolrooms belonging to the respondents the Edinburgh Merchant Company. No part of the building is a dwelling-house, and no inhabited-house-duty is paid or could be exacted in respect of any part of it."

They pleaded—"(2) The respondents have neither right nor title to appear and oppose the granting of the warrant, and they should be found liable in the expenses of their opposition."

The respondents averred—"(Stat. 4) A small portion of this back court, of 17 superficial yards in extent, has been left unbuilt upon, and is the only open space in connection with the property of the petitioners. All the remainder of the petitioners' property is occupied by buildings. The back ground immediately to the east of that of the petitioners' is entirely occupied by buildings, but proper provisions have been made for light and ventilation. The proposed new erection is an additional storey to that part of the intermediate building which abuts upon the gable of the hall. The addition will raise this part of the building 12 feet higher than at present. The gable of the hall is at present 23 feet from the south wall of the street tenement. The result of the proposed addition will practically be to bring the building of the hall within 10 feet of the back windows of the first floor of the street tenement. The proposed addition, if erected, would have the effect of seriously and prejudicially diminishing the light and ventilation of the street tenement. (Stat. 5) The Burgh Engineer reported to the Dean of Guild Court on the plans of the petitioners, to the effect that the 'place is already sufficiently built on, having regard to the light and ventilation of existing buildings.' The Court thereupon appointed a visit of the members to the ground. (Stat. 6) The Dean of Guild Court visited and inspected the ground on which the petitioners ask warrant to construct the proposed building, and were unanimously of opinion that the open space at present existing was required for the proper lighting and ventilation of the premises already on the ground."

The Dean of Guild on 10th December 1896 repelled the petitioners' second plea, and of new refused the prayer of the petition.

Note.—"After a consideration of the petitioners' plans, the terms of a report by the Burgh Engineer, and an inspection of the subjects by the Dean of Guild and his Council, the Dean of Guild is of opinion that the operations proposed by these petitioners do not provide suitably for light and ventilation."

The petitioners appealed, and argued—(1) The 49th section of the Act did not justify the refusal of the warrant, because under it the Dean of Guild had only to be satisfied that the plans provided suitably for light, ventilation, &c. Obviously, the question submitted to him under this section was whether the new room was properly ventilated and lighted, but his interlocutor and the report of the burgh engineer referred not to the new room but to "existing buildings," *i.e.*, to the hall and street tenement. Nothing was said against the light and ventilation of the proposed addition, and accordingly the section did not apply. Moreover, the Burgh Engineer had not given his report till after the first interlocutor, and his endorsement of the plan was not the kind of report required by the statute. (2) Section 50 did not apply because this was not a case of erecting a new house, or of converting "a house" into "a building to be used for business purposes only." They had not applied for sanction for the erection of a "saloon" when putting up the hall, and accordingly

that part of the section did not apply either. Nor was it open space upon which they intended to build.

Argued for respondents—They had a title to appear to restrain an individual in the interest of the public. This was a proposal for the alteration of an existing building, and the arrangements as to ventilating, &c. were matters in the discretion of the Dean of Guild; they were a practical question to be decided by practical men, with whose judgment the Court would be loth to interfere—*Pitman* v. *Burnett's Trustees*, January 26, 1882, 9 R. 444. (1) Under section 49 the procedure had been complied with by the Burgh Engineer first making a verbal report and then endorsing the plans. The section referred to other provisions of the Municipal and Police Acts, and the Burgh Engineer had reported that, having regard to light and ventilation of "existing buildings," the plans were unsatisfactory. The Dean of Guild was entitled to look at existing buildings, not only at the proposed alterations, and accordingly the requirements of the section were satisfied. (2) But the case also came under section 50. There had been a conversion of a house into business premises. The petitioners had erected a saloon, for the hall fell under that denomination—*Scott's Trustees* v. *Shaw*, June 19, 1892, 19 R. 895; *Blakeney* v. *Rattray's Trustees*, July 19, 1886, 13 R. 1151. This supplemental building added to the saloon would prejudice its light and ventilation, and the matter was one for the discretion of the Dean of Guild.

At advising—

LORD M'LAREN—This is an appeal from an interlocutor of the Dean of Guild of Edinburgh, refusing an application for authority to make a small addition to a building in Queen Street, Edinburgh. The facts are not in dispute, and the question which we have considered is whether the refusal of the warrant is justified by the terms of the statute upon which the Dean of Guild Court has professed to act.

The petitioners are trustees for the council of one of the Orders of Freemasons, and they set forth in their petition that they purchased the tenement No. 74 Queen Street for the purpose of building a hall on the area behind the building, and that, after obtaining the necessary warrant from the Dean of Guild Court, a masonic hall was built on the vacant ground. The petitioners, it is stated, had originally intended that the hall should be appropriated to their own uses exclusively, but that they had found it convenient to let the hall occasionally for private social entertainments, and with the view of making it more suitable for that purpose they proposed to make an addition to the building in the shape of an apartment placed over the corridor which connects the hall with the house in Queen Street. The corridor, it may be explained, is of less elevation than the hall, so much so that the corridor and the proposed apartment (intended to be used as a lady's cloak-room) do not together exceed the height of the hall.

The case was first considered by the Dean of Guild Court *ex parte*, and the warrant was refused for reasons which I shall afterwards consider. On an appeal to this Court the Magistrates and Council of Edinburgh appeared in support of the interlocutor and gave in answers to the petition. By interlocutor dated 3rd July 1896 this Court allowed the answers to be received, and remitted the cause to the Dean of Guild Court for further procedure. After a further hearing the Dean of Guild Court adhered to its opinion, and of new refused the prayer of the petition. From this judgment, which is dated 10th December 1896, the petitioners have appealed, and the whole case is now before the Court.

It is not disputed that the Court has jurisdiction to review the judgments of the magistrates of royal burghs on the merits, and if necessary for determining the true question in issue, we have power to allow a proof, or to obtain a report from skilled persons. But according to the constitution of the Court of the Dean of Guild, the magistrate and his council are entitled to act on their own professional knowledge with the assistance of the burgh engineer, whose duty it is to examine the plans of any proposed building, and to report as to whether the statutory requirements as to drainage, lighting, and ventilation are satisfied by the plans. The jurisdiction of the Dean of Guild to a large extent involves the exercise of personal judgment and skill, and I believe that your Lordships would be very unwilling to interfere with the judgment of the Dean of Guild Court on a purely practical question. The present case, however, raises a question on the construction of the 49th section of the Edinburgh Municipal and Police Amendment Act 1892. With respect to the 50th section, which was also founded on, I shall only say that it has no application, because this is neither the case of the erection of premises nor of the conversion of a house into a building, adapted for business purposes, but is the case of an alteration of an existing building not involving the appropriation of any unbuilt-on area.

By the 49th section the Burgh Engineer is to report to the Dean of Guild Court whether in his opinion the plans (that is, the building plans for which a warrant is sought) are in conformity with the provisions and requirements of the Edinburgh Municipal and Police Acts, and then, it is added, the Dean of Guild Court may decline to grant a warrant for the erection of any house or building, or for the alteration of any existing house or building, until the said Court is satisfied that the plans provide suitably for strength of materials, stability, mode of access, light, ventilation, and other sanitary requirements.

This is a very important, and, I do not doubt, a very necessary power, but it is perfectly clear that if a warrant is refused or delayed in the lawful exercise of this power, it must be because of the failure to

make provision in the plans of the proposed building, or proposed alteration of a building for something which ought to be there. I am unable to see how the refusal of the warrant in the present case can be supported consistently with the statute.

The report of the Burgh Engineer indorsed on the building plan is in these terms—"This place is sufficiently built on, having regard to the light and ventilation of existing buildings." The first interlocutor refusing the petition is just a paraphrase of the Burgh Engineer's report, because the petition is refused "in respect that all the open space presently existing is required for the proper lighting and ventilation of the premises in question." By "premises in question" I understand either the masonic hall, or the masonic hall and the tenement in Queen Street taken together, because the meaning cannot be that all the open space is required for the lighting and ventilation of the ladies' cloak-room. But then the question referred to the Dean of Guild Court under the 49th section is the sufficiency of the provisions for lighting and ventilation shown in the plans—in other words, the lighting and ventilation of the new apartment; and this question is not at all considered in the Dean of Guild's interlocutor. I grant that in the matter of ventilation it is necessary to consider the adjacent buildings, and if it had been found in fact that the new apartment could not be ventilated by reason of its proximity to other buildings, the judgment would have been relevant. But I do not suppose that this was intended; in any case, it is not said.

Again, I do not quite understand what is meant by the finding that all the open space existing is required for the proper lighting of the premises in question. As regards lighting the only question is, whether the new apartment is sufficiently lighted by the windows shown on the plans, and the interlocutor says nothing to the contrary.

Passing to the interlocutor of 10th December in which the petition is of new refused, the note to the interlocutor merely states "that the operations proposed by these petitioners do not provide suitably for light and ventilation." If this was meant to indicate anything different from the ground of judgment expressed in the previous interlocutor, I should expect to find the difference explained. I assume that the ground of judgment is the same, the variation being merely verbal. I am of opinion that the appeal should be sustained and the case remitted with an instruction to grant the prayer of the petition.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court sustained the appeal and remitted the case to the Dean of Guild with an instruction to grant the prayer of the petition.

Counsel for the Petitioners — Sol.-Gen. Dickson, Q.C. — Clyde. Agent — Lindsay Mackersey, W.S.

Counsel for the Respondents — Comrie Thomson—J. Boyd. Agent—Thomas Hunter, W.S.

Thursday, March 11.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* NORTH BRITISH GRAIN STORAGE AND TRANSIT COMPANY; *et e contra.*

Railway—Undue Preference—Jurisdiction—Railway and Canal Traffic Act 1854 (17 *and* 18 *Vict. cap.* 31), *secs.* 2, 3, 6—*Regulation of Railways Act* 1873 (36 *and* 37 *Vict. cap.* 48), *sec.* 6—*Railway and Canal Traffic Act* 1888 (51 *and* 52 *Vict. cap.* 25), *secs.* 2, 8, 12, 18 (1).

In an action by a railway company against a trader for rates due for the carriage of goods the latter pleaded that the rates charged, when compared with those charged to other traders, constituted an undue preference in their favour within the meaning of the Railway and Canal Traffic Act 1854, section 2.

Held (*aff.* the judgment of Lord Kyllachy) that the defence could not be entertained by the Court, exclusive jurisdiction to deal with the matter of undue preference, under the Railway and Canal Traffic Act 1854, section 2, having been conferred upon the Railway Commissioners by the Regulation of Railways Act 1873, section 6, and the Railway and Canal Traffic Act 1888, sections 8, 12, and 18 (1).

Railway—Authorised Rates—Deduction for Carriage of Goods in Traders' Own Waggons—Railway Rates and Charges, No. 25 (*North British Railway, &c.*) *Order Confirmation Act* 1892 (55 *and* 56 *Vict. cap. lxiii*), *Schedule of Maximum Rates and Charges, section* 2.

The Railways Rates and Charges, No. 25 (North British Railway, &c.) Order Confirmation Act 1892 provides, by the Schedule of Maximum Rates and Charges, section 2, that where goods are carried for a trader in his own waggons, the rates authorised to be charged by the railway company shall be reduced by a sum to be determined (in the event of difference between the parties) by an arbiter appointed by the Board of Trade.

In an action by a railway company against a trader for rates for the carriage of goods, the latter maintained that he was entitled to a deduction under the above provision in respect