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

with a floor area of about 162 feet 6 inches, and having a fireplace and skylight 30 inches by 18 inches would 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 required by section 172. The question to be determined is whether the room to which the dispute relates as drawn and depicted on the plans is or is not a habitable attic room? That expression might have been more clearly defined, but I take it that the meaning is a room which might be inhabited, or which might naturally or probably be inhabited. Every room, however small, is in a sense a room which might be inhabited so long as suffocation was not the consequence, but that is not the meaning of the statutory phrase. Here we have a room equipped with a window and a fireplace, and having space sufficient for a bed, as well as apparently such air space as would not lead to suffocation, though perhaps not adequate for health. Is this or is it not a habitable room? I think it is. It is called a box room, but we are not to hold ourselves bound by descriptions which architects or builders choose to inscribe on plans or insert in petitions. We must compare the thing itself with the provisions of the statute, and it seems to me that when we find a room of the dimensions mentioned equipped with a fireplace and a window it is a habitable room in the sense of the Act.

It is said that it is only reached by means of a trap stair, but I am afraid that many human dwellings are only reached by such stairs. This may be an inconvenient and even dangerous mode of access, but it does not make the room inaccessible, or any the less a room which may be inhabited.

Mr Hunter referred to section 180, but it does not meet the case made against the decision of the Dean of Guild Court. The section provides for the inspection of a house after it has been built, and if there is anything disconform to the decree or warrant obtained from the Dean of Guild Court, then the inspecting official would report it. But after the plans have been passed by the Dean of Guild Court it does not appear to me that there is anything in section 180 to warrant the authorities going back upon them.

LORD M'LAREN — I presume that the motive of the statutory enactment was to secure attention to the sanitary requirements of houses intended for habitation, and particularly to secure the supply of pure air in sufficient quantities to the occupiers. The Legislature has not thought fit to give much discretion in these matters to local authorities, but has prescribed the dimensions of rooms intended for habitation. It is difficult to resist the conclusion that "habitable room" means one adapted for and capable of being inhabited, but not necessarily fit for habitation in the view of the framers of the Act. I do not see how it is possible to determine whether a particular room is to be treated as habitable except by looking at the structure. If it is fitted with windows and a fireplace as in the present case, it is difficult to resist the conclusion that it is covered by the words of the statutory provision. I think that the Dean of Guild has fallen into an error in holding that this room is not so covered, and that he ought to have an opportunity of reconsidering the case on the footing that the apartment is "habitable." Of course, the builder will have an opportunity of proposing alterations to obviate the objections of the Master of Works, but he cannot consistently with the statute obtain a warrant for constructing a building containing a room such as is now proposed.

LORD KINNEAR—I concur. The statute no doubt imposes stringent and perhaps arbitrary restrictions upon the use of property, but we have nothing to do but see that the statutory conditions are complied with in accordance with our construction of their meaning. Accordingly, the only question is, whether this is a "habitable" attic room within the meaning of the statute, and if so, whether it satisfies the statutory provisions with reference to light and air. I agree with Lord M'Laren's construction that "habitable" in the statute means any room adapted by the structure of the house for habitation, and that it is intended to prevent such rooms being constructed so as to be capable of being inhabited although they are unfit for habitation according to the ideas of the Legislature. If that be the meaning of the term, I think the question whether any room satisfies the statutory conditions must depend on the plans which are submitted to obtain the authority of the Dean of Guild Court and not on the private intention of the person proposing to build. No Court can take into account this latter consideration, because it cannot dive into his mind to ascertain what was his real intention, and also because he cannot enforce compliance with it on anybody who may purchase or take a lease of his house, nor can he be prevented from altering his intention. The question to be considered by the Dean of Guild was not Mr Hill's intention but the intention of the structure shown upon the plans submitted to him, and if the plan shows an attic room which is marked by the ordinary characteristics of rooms intended for habitation, such as windows and fireplaces, I think it shows a habitable attic room, which ought not to be allowed if it does not satisfy the statutory conditions. I therefore agree in thinking that the objections of the Master of Works ought to have been sustained.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"Finds that the attic room proposed to be erected upon the premises in question as shown on the plan No. 2 of process is a habitable attic room in the sense of section 172 of the Burgh Police (Scotland) Act 1892, and is disconform to the provisions of said section: Therefore sustain the objections for the Burgh

Surveyor: Recal the interlocutor appealed against, dated 25th October 1901: Remit to the Dean of Guild to proceed in the event of amended plans being produced which conform to the provisions of sections 172 and 173 of said Act, and decern," &c.

Counsel for the Appellant—T. B. Morison. Agent—James Ayton, S.S.C.

Counsel for the Respondents — Hunter. Agents—Clark & Macdonald, S.S.C.

Friday, February 28.

FIRST DIVISION.

[Dean of Guild Court at Glasgow.

NEILSON *v.* BORLAND, KING, & SHAW.
NEILSON *v.* BORLAND, KING, & SHAW.

Police — Private Street — Maintenance — Public Right-of-Way — Road — Statute-Labour Road—City of Glasgow Act 1891 (54 *and* 55 *Vict. cap.* 130), *sec.* 35 (1)—*Glasgow Police Act* 1866 (29 *and* 30 *Vict. cap.* 273), *sec.* 318 — *Glasgow Building Regulations Act* 1900 (63 *and* 64 *Vict. cap.* 150), *sec.* 30.

The Glasgow Police Acts 1866-1900 give the Master of Works power to require the proprietor of lands or heritages adjoining and having access by any private street to repair such street.

The City of Glasgow Act 1891 extends the boundaries of the city. Section 35 (1) enacts—"All public roads, highways, streets, footpaths, lanes, and courts in the district added where vested in the several county councils, district committees, councils, commissioners, or authorities within the district added, or any of them, shall be and are hereby transferred to and vested in the police commissioners, and the same shall be subject to the provisions of the Police Acts."

Where a road in the district added was in use as a public road, and had been a public right-of-way, declared to be so by the Court of Session, but was not proved to have been vested in any of the authorities named in section 35 (1), or to have had statute-labour executed or statute-labour commutation money expended upon it, and had not been declared to be a public street, *held* that this road was not transferred to the police commissioners, and was not a public street, but that it was a private street, for the repair of which the adjoining proprietors were liable under the Glasgow Police Acts.

Police—Private Street—Maintenance—Culvert—The Glasgow Police Act 1866 (29 *and* 30 *Vict. cap.* 273), *sec.* 318—*The Glasgow Building Regulations Act* 1900 (63 *and* 64 *Vict. cap.* 150), *sec.* 30.

The Glasgow Police Act 1866, sec. 318, gives power to require the proprietors of lands or heritages adjoining a private street to repair and renew the causeway thereof, and the Glasgow Building Regulations Act 1900, sec. 30, gives power to require them to execute such repairs on such private street as the Master of Works may consider necessary. *Held* that such proprietors were bound to repair a culvert running below a private street, the roof of which had fallen in and caused damage to the surface of the street.

Police — Private Street — "Proprietors" — Glasgow Police Acts 1866-1900.

Under the Glasgow Police Acts the term "proprietor" includes factors to a proprietor. In the Survey Book of the city of Glasgow the proprietors of certain subjects were entered as "A *per* Messrs B" (a firm of writers in Glasgow).

Held, on an appeal, in an application by the procurator-fiscal to the Dean of Guild Court with regard to the repair of a private street, that as Messrs B, having been called as proprietors, had failed to plead specifically *in limine* that they were not proprietors, and to support that contention by evidence and argument in the Dean of Guild Court, they could not now maintain that defence at this stage, and that for the purposes of this case they must be taken to be "proprietors."

These were two petitions and applications presented to the Dean of Guild Court in Glasgow by George Neilson, Procurator-Fiscal of Court, under the Glasgow Police Acts 1866 to 1900, and particularly the Glasgow Police Act 1866, sections 318, 321, 322, 325, and 337, and the Glasgow Building Regulations Act 1900, sections 30, 132, and 133.

The questions raised by the petitions were—(1) Whether certain portions of certain roads within the boundary of the City of Glasgow were private streets in the sense of the Glasgow Police Acts 1866 to 1900, (2) whether, if they were "private streets," Messrs Borland, King, & Shaw, writers, Glasgow, were the "proprietors" of certain subjects adjoining and having access to said private streets, and so liable to repair them, and (3) whether, if they were so bound to repair the streets, they were bound to repair a culvert below one of them.

The Glasgow Police Act 1866 (29 and 30 Vict. cap. 273), sec. 318, is in the following terms:—"The Master of Works may, by notice given in manner hereinafter provided to the proprietor of every land or heritage adjoining to and having a right of access by any private street, require him, so far as not already done, to causeway in a suitable manner, and from time to time to alter, repair, and renew the causeway of such street, and may require any proprietor of a land or heritage adjoining to and having a right of access by any private street or court, so far as not already done, to form in a suitable manner, with openings at convenient distances for fire-plugs, and from