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

evening of Saturday, 25th December 1897, the pursuer had occasion to go to the said well for water, and while doing so she stumbled against the said stone and fell violently upon the ground. The pursuer exercised due and proper care in going to the well. There was no light to show the stone, and her accident was entirely due to the fault of the defender in placing the said dangerous obstruction on a public footpath. . . . (Cond. 6) The injuries sustained by the pursuer were the direct result of the defender's fault in placing an obstruction of the nature condescended upon on the public footpath. The defender knew, or ought to have known, that by doing so he was causing danger to foot-passengers, but in disregard of his duty in the matter he placed or caused to be placed the stone as aforesaid, with the result that the pursuer was seriously injured thereby. Another person has been recently injured by falling over the said stepping-stone."

The defender pleaded, *inter alia*—"(1) No relevant case."

The pursuer proposed the following issue for the trial of the cause by jury:—"Whether on or about Saturday 25th December 1897, and on the footpath in front of the defender's property in Townhead, Auchterarder, the pursuer was injured in her person through the fault of the defender, to the loss, injury, and damage of the pursuer."

On 7th June 1898 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the adjustment of issues, Sustains the first plea-in-law for the defender: Therefore dismisses the action, and decerns," &c.

Opinion.—"The question is, whether the defender is liable in damages for having placed in front of his property a stepping-stone which projects on the pavement? It is to be observed that the pursuer resides in the immediate neighbourhood of the defender's property, and I think I am entitled to assume that she must have been well aware of the existence of this stepping-stone and its position. The defender avers that the pursuer passed the stone daily, and the pursuer is content with a general denial. Further, although the pursuer avers that the stone was recently placed there, she gives no specific date, and as the defender avers that the step has been there for a year, which is not specifically denied, I think I am entitled to assume that the stone had been there for a considerable time, and that the pursuer was well aware of it. The question is, then, whether such a thing as a stepping-stone placed on the pavement can be held in these circumstances to be a dangerous obstruction? There was no illegality in placing it there, unless it caused danger, and I am of opinion that a stepping-stone is not of the nature of a dangerous obstruction. I decide this case on the footing that there is no relevant averment of dangerous obstruction. A mere statement that this stepping-stone was a dangerous obstruction is not enough. The record must disclose what was the nature of the danger. There is not here a relevant averment of fault or anything done wrongfully. If it had been averred by the pursuer that the road was under the charge of the Commissioners of Police, it might have been said that the defender did a wrong in placing his stepping-stone there without their leave; but then it was placed on his own property according to the pursuer's statement. 'Wrongful' may mean illegal or disregardful of danger. But that takes one back simply to the question whether the putting of a stepping-stone on a pavement be an illegal and dangerous thing? One cannot help knowing that it is common enough to have such stepping-stones projecting on pavements, and seeing that pursuer lived in the immediate neighbourhood, I cannot see where the danger was to her. If it was so dark that she could not have seen where it was, she required to be exceedingly careful, but if it was not so dark but that she might have seen the stone which she knew about, she ought to have avoided it. In these circumstances this case cannot go on, for I think that even if all the averments of the pursuer were proved, the pursuer is bound to lose. I therefore dismiss the action with expenses."

The pursuer reclaimed.

Counsel for the pursuer was proceeding to argue that the pursuer's averments were relevant, when he was stopped by the Court.

Argued for the defender—A man was entitled to build a step like this on the pavement in front of his property, and it was matter of common knowledge that this was constantly done. At anyrate, the commissioners of a burgh might allow a proprietor to place such a step in front of his property, and it was not alleged that they had made any objection here. At most such a step could only be a source of danger at night, and then the danger was really due to the want of light, for which in this case the defender was not responsible. The pursuer must have known that the step was there, and if she tripped over it, that was plainly due to her own carelessness.

LORD JUSTICE-CLERK—I have no difficulty in holding that there must be inquiry in this case. I think we should recal the interlocutor reclaimed against and approve of the issue.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF—I think that if the pursuer succeeds in proving some of the averments on record, she must succeed in her action, and that there must therefore be inquiry

The Court recalled the interlocutor reclaimed against, approved of the issue, and found the pursuer entitled to expenses since the date of the Lord Ordinary's interlocutor.

Counsel for the Pursuer—Munro. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Defender—Guthrie, Q.C. — Graham Stewart. Agents — Mylne & Campbell, W.S.

Tuesday, July 19.

SECOND DIVISION.

NIXON *v.* HOUSTON.

Expenses—Jury Trial—Expenses Caused by Adjournment of Trial—Act of Sederunt 16th February 1841, *sec.* 25.

Upon the morning of the day appointed for a jury trial to proceed, which was a Monday, counsel for the pursuer moved for the adjournment of the trial on the ground that on the evening of the previous Saturday the pursuer had met with an accident, and was in consequence unable to be present at the trial. No explanation was given as to the nature or circumstances of the accident. The trial having been adjourned, the Court, upon the motion of the defender, found the pursuer liable in the expenses caused by the adjournment, and thereafter, the expenses having meanwhile been taxed, and no explanation even then being forthcoming as to the nature or circumstances of the pursuer's accident, *decerned* for the taxed amount of the expenses, and without deciding any general question as to the payment of expenses in such cases being a condition of again proceeding to trial, but in view of the special circumstances of this case, upon payment of the amount of the expenses as taxed, *allowed* the trial to proceed.

John Nixon, dock labourer, Glasgow, brought an action in the Sheriff Court at Glasgow against William Houston, stevedore, Glasgow, in which he craved decree for £234 under the Employers Liability Act 1880, as damages for personal injuries.

The Sheriff Substitute (SPENS), by interlocutor dated 11th March 1898, before answer allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

On 12th May the Court ordered issues, and on 20th May an issue was approved for the trial of the cause.

Monday 4th July was appointed as a diet for the trial of the cause before the Lord Justice-Clerk with a jury.

Upon that day, before the jury were empannelled, counsel for the pursuer stated that the pursuer had met with an accident on the night of Saturday 2nd July, and produced a medical certificate to the effect that the pursuer was not in a fit condition to attend at the trial. No explanation was given as to the nature of the pursuer's injuries or the circumstances under which he met with the accident. Counsel for the pursuer therefore moved that the trial should be adjourned. Counsel for the defender moved for the expenses caused by the adjournment, but the Lord Justice-Clerk intimated that he thought that question should be disposed of by the Court when the pursuer applied to have a new diet fixed for the trial. The trial was then put off.

Thereafter the pursuer gave notice for the sittings, whereupon the defender presented a note to the Lord Justice-Clerk craving that the pursuer should be found liable in the expenses caused by the adjournment of the trial, and that the trial should not be allowed to proceed until these expenses were paid, and meantime that the notice of trial given for the sittings should be discharged.

The Act of Sederunt 16th February 1841, regulating proceedings in jury causes, enacts as follows:—Section 25. "That until the jury is empannelled and sworn to try a cause, it shall be competent to apply to put off the trial on account of the unavoidable absence or sickness of a material witness, or for other sufficient cause to the satisfaction of the Court, and supported by oath or affidavit, if the Court shall so require, or, in vacation, by the Judge before whom motions are to be heard as before directed, upon payment of such expenses as shall have been incurred by the opposite party in consequence of the delay of the trial."

On 9th July counsel for the defender moved in terms of the prayer of the note, and stated that no explanation had yet been given as to the nature or origin of the pursuer's accident. Counsel for the pursuer was in attendance and stated that he had no information on that subject. He objected to the payment of the expenses of the adjournment being made a condition of the trial proceeding,

The Court intimated that they would dispose of that matter after the expenses were taxed.

The Court pronounced the following interlocutor of date 9th July 1898:—"The Lords find the pursuer liable to the defender in the expenses caused by the adjournment of the trial on the 4th inst.: Remit to the Auditor to tax the same and to report; meanwhile discharge the notice of trial for the ensuing sittings."

The account of expenses having been taxed, counsel for the defender moved for decree, and argued that the trial should not be allowed to proceed except upon payment of these expenses—Act of Sederunt, 16th February 1841, section 25.

Counsel appeared for the pursuer and stated that he had not been able to obtain any information as to the nature or circumstances of the pursuer's accident. Payment should not be made a condition of again proceeding to trial. The terms of the Act of Sederunt did not require such an order to be made.

LORD JUSTICE-CLERK—Without deciding the general question I think we can dispose of this case upon its own merits. In the absence of any information as to how this accident occurred, I think it is only fair that we should make it a condition of allowing the trial to proceed that the expenses caused by the adjournment should be paid. I prefer not to decide any general question.

LORD YOUNG—I agree. If there had been any creditable explanation of how this accident occurred, although naturally