interested position, and if his evidence had stood alone there might have been a difficulty in acting upon it. But I think that the written evidence, and the actings of the parties, are entirely corroboratory of that evidence; and upon the whole matter I think the Lord Ordinary's interlocutor ought to be adhered to.

LORD M'LAREN—I concur in the judgment proposed, and will merely indicate my view of the principle on which cases of this nature ought to be decided. It is a general principle in our law that every agent has a lien or right of retention against his principal for the balance due to him, and this right of retention is not confined to moneys collected such as rents and dividends, but may extend to securities, the precise extent of the lien being determined by the nature or character of the agency. The so-called banker's lien is an example of this rule of law, and in this case the decisions establish that a banker has a lien over all such negotiable securities of the customer as are lawfully in his possession, and are subject to his control, but this lien may be excluded by agreement, express or implied. If the bill or security is specially appropriated, this is equivalent to an exclusion of the lien, because in the case supposed the banker has received the instrument under instructions which are inconsistent with the supposition that he is to have a lien.

In the present case I hardly think that the question raised is one of special appropriation, but the argument submitted by the trustee for Robertson's creditors is to the effect that the lien which the Royal Bank would under other circumstances have acquired was excluded by agreement.

In considering the meaning of the expressions used in the receipts which were granted by the Royal Bank for these bonds, it is necessary to attend to the distinction between a right in security and a lien. A proper security can only be constituted by the acts of the parties, the debtor and the creditor in the series of transactions, and if a question of construction arises the creditor must establish affirmatively that a right of security was given to him. But a lien is something which the law gives to the creditor, or holds to arise to him from the mere fact of his possession of his debtor's property in the character of an agent, and where the relation of principal and agent or banker and customer exists, it is not necessary that the lien should be set up by proof; the party claiming adversely to the lien must show that by agreement the lien is excluded.

It appears to me that the expressions used in the receipts for these negotiable bonds are insufficient in themselves to exclude the banker's lien. The bonds are said to have been received for "safe keeping," and to be held "to the order" of Mr Robertson. If the Royal Bank had given notice of their intention to sell the bonds with the view of applying the proceeds in reduction of the overdraft, I do not doubt that this would have been a breach of contract, and that the sale might have been interdicted, because the terms of the receipt make it clear that the bank did not receive these instruments under a security-title. But the bank is only claiming a right to detain the bonds until its claims are satisfied, and this lesser right which results from the lien extends to all negotiable instruments which the bank may have received in the ordinary course of business, and not under a special trust exclusive of lien.

Even if the case were more doubtful on the terms of the receipts, the evidence appears to me to place the right of the Royal Bank beyond dispute. Their agent Mr Guthrie, in his letters to Mr Robertson's son, asserted his lien and asked for further deposits of a like nature to cover advances. These letters were communicated to Mr Robertson, who did not dissent from Mr Guthrie's interpretation of the rights of the bank. It is therefore established that Mr Robertson had no intention of excluding the lien, and there being no intention to exclude the lien, it cannot be said that the lien was excluded by agreement. There is also the circumstance that the advances were made concurrently with the deposit of the bonds, and apparently in reliance on the right of lien which would in ordinary course result from such deposit. I am accordingly of opinion that the Lord Ordinary's judgment is well-founded, and that the reclaiming-note should be refused.

The Court adhered.

Counsel for the Pursuer and Reclaimer—C. S. Dickson—W. Campbell. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Defenders and Respondents—Low—Fleming. Agents—Dundas & Wilson, C.S.

Thursday, October 30.

SECOND DIVISION.

EGLINTON CHEMICAL COMPANY, LIMITED *v.* M'JANNET.

Burgh — Dean of Guild — Jurisdiction — Erection within Burgh — Irvine Burgh Act 1881 (44 *and* 45 *Vict.*)

A duly constituted Dean of Guild Court of a burgh, in terms of its statutory powers, provided that "no building operations of any kind shall be allowed to be erected, added to, or altered within the burgh unless plans thereof have previously been submitted to and approved of by" the said Court. A company, who possessed ground of 100 acres within the burgh, erected a tannery thereon, 65 feet back from the boundary of their property, without the sanction of the Dean of Guild. On a petition of the Procurator-Fiscal of Court the Dean of Guild convicted the company of a contravention of the rules of Court, and fined them £5. This fine not being paid by the com

pany the respondent poinded certain of their effects. The company then brought an action of suspension and interdict in order to suspend the conviction and interdict a sale. *Held* (*dub.* Lord Young) that the company had no right to erect the tannery without having first submitted the plans to the Dean of Guild.

Burgh—Dean of Guild—Jurisdiction— Acquiescence in Jurisdiction.

A company presented a petition to the Dean of Guild Court of the burgh of Irvine asking for warrant to re-erect a cart shed, which had been blown down, on a piece of ground about an acre in extent belonging to them, situated within the burgh, and a few feet from a public street. Plans were lodged with the petition. This petition was dismissed by the Dean of Guild, as no one appeared before his Court in support of it. The company nevertheless proceeded to erect the cart-shed. Thereupon the Procurator-Fiscal to the Dean of Guild Court presented a petition to that Court charging the company with having contravened the bye-laws framed in virtue of the powers contained in the Irvine Burgh Act 1881 by erecting the cart-shed without plans having been previously approved of by the Dean of Guild Court, and without having obtained the Dean of Guild's sanction. The Dean of Guild convicted the company of the contravention charged, and fined them £5. This fine not being paid by the company, the respondent poinded certain of their effects. The company then brought an action of suspension and interdict to suspend the proceedings and interdict a sale. *Held* that the company by their actings were barred from objecting to the jurisdiction of the Dean of Guild, and, apart from acquiescence, they had no right to erect the cart-shed without having first obtained the warrant of the Dean of Guild Court.

The Eglinton Chemical Company sought to suspend two convictions obtained against them by W. D. M'Jannet, the Procurator-Fiscal of the Dean of Guild Court of the burgh of Irvine, for having on two separate occasions built a tannery and a cart-shed within the burgh without the warrant of the Dean of Guild.

Under a charter of Robert II. there is conferred upon the burgh of Irvine "the liberty of Guild as other burghs and burgesses of our kingdom have and were wont to have that liberty, and that they may appoint Guild brethren in the said burgh of Irvine, who shall enjoy, and shall be reckoned to enjoy, every liberty of Guild that others whatsoever burgesses of our kingdom hitherto have enjoyed."

By section 53 of the Irvine Burgh Act 1881 (44 and 45 Vict.) it is enacted—"The Dean of Guild shall, subject to the provisions of this Act, have and exercise within the extended burgh all the jurisdiction, powers, and privileges possessed or exercised by Deans of Guild in any royal burgh in Scotland, and all the jurisdiction, powers, and privileges conferred on him by this Act.

By section 54 of the said Act it is provided that all proceedings under the General Police Act as modified by the Irvine Burgh Act with respect to improving streets, removing obstructions, public sewers, &c., may be taken either before the Magistrates or before the Dean of Guild. Section 59 provides for the procedure before the Dean of Guild.

By section 65 of the said Act it is provided that the Dean of Guild may from time to time frame rules for the procedure before his Court, and byelaws for the enforcement of these rules by penalty or otherwise, provided always that none of these rules or byelaws shall have any force until approved of by the Corporation and the Sheriff of the county. In terms of this section the Dean of Guild framed byelaws, rules, regulations, and forms of the procedure, which were approved by the Corporation on 4th May, and by the Sheriff on 2nd July 1886. The second rule provides—"No building operations of any kind shall be allowed to be erected, added to, or altered within the burgh unless plans thereof have previously been submitted to and approved of by the Dean of Guild's Court of the burgh.

In November 1888 the complainers resolved to erect a tannery on a piece of ground belonging to them, and on which their works are built, extending to about 100 acres, all lying within the burgh of Irvine. Various tradesmen gave in specifications for the work, among them being the Dean of Guild of the burgh. His offer, however, was not accepted. The erection of the tannery was proceeded with, and completed on 20th December 1888. When completed the new erection measured 55 feet in length. The height of the front wall was 17 feet 6 inches, and the height from floor to ridge was 31 feet. In addition to this building there was a lean-to shed, extending 40 feet further in length. The tannery was at the nearest point 65 feet distant from the nearest boundary of the complainer's property. This boundary was a road which had not been taken over by the Police Commissioners of the burgh, but which was used by feuars and by the workpeople employed in the complainers' and neighbouring works. The complainers' works employed a large number of the townspeople of Irvine.

On 13th December 1888 the respondent presented a petition to the Dean of Guild Court charging the complainers with a contravention of the bye-laws and rules and regulations and forms of procedure for the Court made and approved of in terms of the Irvine Burgh Act 1881, in so far as they were in process of erecting the tannery without plans thereof having been previously submitted and approved of by the Court, or without having applied for or obtained the sanction of the Court to the said operations, and praying the Court, *inter alia*, to fine the complainers £5, or such other sum as the Court

might deem just for the alleged contravention. This petition was served on the complainers, but no answers were lodged by them. At a Court held on 27th December 1888 the Dean of Guild, on the ground of no appearance having been made for the complainers, and on the motion of the respondent, convicted the complainers of the contravention charged and fined them £5, and granted warrant in default of payment within seven days to poind and sell the complainers' effects. The complainers having declined to pay the fine, the respondent on 13th February 1889 caused a poinding to be executed of certain goods and effects belonging to the complainers in their chemical works. Thereupon the complainers raised an action of suspension and interdict against the respondent in the Court of Session, praying the Court to suspend the conviction of the Dean of Guild, and to interdict the respondent from selling any effects belonging to the complainers by virtue of the poinding.

The circumstances which gave rise to the cart-shed case were as follows—In the autumn of 1888 a cart-shed erected on a piece of ground extending to about an acre belonging to the complainers, and lying within the burgh of Irvine, was blown down. This cart-shed was situated a few feet from a gateway leading to a street under the charge of the Police Commissioners of the burgh, and adjoining the properties of neighbouring proprietors. On 22nd December 1888 the complainers lodged a petition with the Dean of Guild Clerk asking a warrant for the re-erection of the cart-shed blown down. Along with the petition plans were also lodged showing the proposed operations. Intimation was made to the complainers that some one would require to appear before the Dean of Guild Court to support the petition. As no appearance was made, the Dean of Guild on 5th February 1890 dismissed the complainers' petition. The complainers nevertheless proceeded to re-erect the cart-shed in accordance with the plans lodged. Thereupon on 22nd February 1889 the respondent presented a petition to the Dean of Guild Court alleging that the complainers had been guilty of a contravention of the bye-laws of the Court in putting up the cart-shed without the Dean of Guild's warrant, and praying the Court to interdict the complainers from proceeding with the building, and to fine them £5. On the same date the Dean of Guild granted warrant for serving the petition on the complainers, and interdicted them proceeding with the building. Service was made on the complainers, but no answers were lodged by them. A proof was thereafter allowed by the Dean of Guild, and was taken on 12th March 1889, the complainers not being represented. A fine of £5 was imposed on the complainers, and as the cart-shed was then completed the interdict was withdrawn. The complainers having refused to pay the fine, the respondent, on 23rd March 1889, carried out a poinding of certain of their effects. Thereupon the complainers raised an action of suspension and interdict against the respondent in the Court of Session, praying the Court to suspend the proceedings complained of, and interdict the respondent from selling any of the effects belonging to the complainers.

In both actions the complainers pleaded—"(1) The said Court having no jurisdiction over the complainers in reference to the buildings in question, the said decree was *ultra vires*, and the complainers are therefore entitled to suspension and interdict as prayed for."

The respondent pleaded—"(3) The proceedings in the Dean of Guild Court having been regular, and within its jurisdiction and power, the note should be refused with expenses. (4) The complainers are barred by their own actings from objecting to the jurisdiction of the said Court in the proceedings complained of in the tannery case."

On 10th April 1890 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Having considered the debate, together with the proof and whole process, sustains the third plea-in-law for the respondent: Repels the reasons of suspension: Finds the charge orderly proceeded, and decerns: Finds the respondent entitled to expenses, &c.

"*Opinion.*—. . . The present process of suspension is brought by the complainers, the Eglinton Chemical Company, Limited, for the purpose of having set aside a conviction or judgment pronounced by the Dean of Guild of the burgh of Irvine on the 27th December 1888, by which the Dean of Guild convicted the complainers of having contravened the rule just quoted, in so far as they erected a tannery or other building without plans thereof having been previously submitted to and approved of by the Dean of Guild Court of the said burgh, or having applied for or obtained the sanction of the Dean of Guild of the said royal burgh of Irvine to the said operations, and accordingly fined the complainers in the sum of £5 sterling of penalty.

"It was represented to me that the suspension was intended to raise a question of general interest and importance, viz., Whether the Dean of Guild's jurisdiction extends to buildings erected or to be erected wholly within the property of the complainers, and at a considerable distance from the verge of their property? and accordingly the proof and arguments were limited to that question.

"The parties at first lodged a minute of admissions with a view of obviating the necessity for proof, but I thought it desirable that there should be some parole evidence in explanation of the plans produced. From the plans and from the parole evidence we now know precisely the character and position of the tannery.

"It appears that in 1888 the complainers, who have large chemical works within the burgh of Irvine, were desirous of making an addition to them in the shape of a tannery. This involved the alteration of an existing building which had previously been used as a store, and the erection of a new building in continuation of it. The main part of the

new building as subsequently erected is 55 feet in length, 17 feet 6 inches to the top of the walls, and 31 feet from the floor to the ridge of the roof. In addition to this building there is what is called a lean-to, extending 40 feet further in length. In addition to the erection of the new building, the walls of an old building against which it was erected had to be underbuilt to a certain extent, an operation requiring some care. The new building is at the nearest point 65 feet distant from the nearest boundary of the complainers' property. The total cost of erecting and fitting up the tannery amounted to £405. The roof of the tannery is a distinct ridge from the roofs covering the other buildings shown on the plan. It will thus be seen that the building operations contemplated and carried out were considerable, and during the argument I did not understand it to be disputed that if those building operations had been conducted on the verge of the complainers' property the complainers would have required to obtain the sanction of the Dean of Guild. But they maintain that his sanction was not required in the circumstances, in respect that the buildings erected were not only entirely within their own property, but at such a distance from the boundaries that they could not possibly be regarded as encroaching upon the properties of neighbouring proprietors, or as threatening danger to the public—that is to say, the outside public as distinguished from the workmen employed in the complainers' works.

"Now, the proceedings of the complainers were undoubtedly in the teeth of the letter of the rules and regulations framed by the Dean of Guild, and approved of by the Corporation and by the Sheriff, and it may be doubted whether these rules and regulations can be challenged while standing unreduced. But assuming that the complainers could, without bringing a reduction of the rules and regulations, impugn them as being *ultra vires* of the Dean of Guild, they would have to show clearly and conclusively that it was not within the powers of the Dean of Guild of any royal burgh to insist that in the case of new buildings plans must be lodged and approved by him. This, I think, they have failed to do.

"The limits of the common law jurisdiction of the Dean of Guild of a royal burgh are not exhaustively defined by authority or decision. The statements of the institutional writers on the subject are scant, and the decisions of the law courts are comparatively few. Moreover, some of the later decisions are difficult of application, because they turn upon the construction of local statutes, under which no doubt to a certain extent the Dean of Guild's jurisdiction at common law is declared and defined, but which also contain supplementary provisions conferring powers which he does not possess at common law, and in some cases the questions raised were complicated by the Dean of Guild's powers and duties being divided between the Dean of Guild and Police Commissioners.

"Dealing with the authorities as they stand, I do not find grounds sufficient to support the complainers' contention. The tendency of decision has no doubt been to confine the Dean of Guild's jurisdiction to matters strictly within his own province. For instance, it has been held that he has no jurisdiction at common law in regard to obstructions in public streets or simple questions of nuisance. But the regulation of all buildings within burgh, both as to their erection and their maintenance, is peculiarly his function. I know of no authority for the contention that his sanction is not required for the erection of new buildings within burgh wherever situated. No *dictum* or decision to that effect was cited to me. According to general understanding the Dean of Guild has *prima facie* jurisdiction in regard to all buildings within burgh, and if any grounds for restricting his powers as to them had been supposed to exist I should have expected to have found some traces of the question having at least been raised before this.

"The complainers founded strongly upon those cases in which it was decided that the Dean of Guild's sanction is not required for internal operations, and they argued that if such operations, however dangerous, might be carried on without his sanction new buildings erected at a distance from the boundaries of a property should equally be regarded as internal operations, and as such exempted from his supervision. There is a good deal of force in this argument, because there is no doubt that alterations upon the internal structure of a house may be attended with as much danger as the erection of a new house, but I think that the complainers' contention carries them too far. It was not disputed in the cases referred to that if instead of altering existing buildings the proprietor had been erecting them for the first time he would have required the sanction of the Dean of Guild, although the erection of new buildings might not be so dangerous as the proposed alteration of existing buildings. And this, I think, shows the reason why the Dean of Guild's sanction is not required in the case of internal alterations is because the original building having presumably been erected with his sanction, and on lines approved by him, internal alterations are considered to be subsidiary matters with which it would be unnecessary and vexatious for him to interfere in ordinary circumstances.

"The passage from *Bankton* (iv. 20, 2) quoted by the complainers does not appear to me to assist them much. No doubt the main reasons given for the interference of the Dean of Guild are the prevention of encroachments on neighbouring properties, danger to the public, or the preservation of the amenity of the burgh. But I think that if the whole of the section is read, it will be seen that there is no limitation as to the character or position of the buildings with which he is empowered to interfere; and his powers are certainly not expressly confined to buildings erected on the verge of a property. For instance—'This Court has likewise the sole jurisdiction in regulating

buildings within borows, whether in repairing or taking down and rebuilding old buildings or erecting new ones.' And again —'Without their warrant, obtained upon citation of all parties having interest, no houses within borow can be built or demolished in whole or in part.'

"It must be kept in view that the question to be here decided is not whether the Dean of Guild would have been justified in refusing to sanction the erection of the building in question after seeing the plans proposed, but simply whether he was entitled as a preliminary to insist on having the plans submitted to him. Now, unless plans are submitted in the case of all new buildings proposed to be erected, it cannot be seen whether their erection will or will not result in encroachment on the property of the neighbours or danger to the lieges. The danger of a new building to the neighbours or to the public is a question of degree. A building erected 50 feet from the boundary might be safe in so far as neighbours or passers-by were concerned, while a building erected only at a distance of 20 feet might be dangerous. Much, again, would depend upon the height of the building, or, in the case of manufactories, on the height of the chimney. Now, all those things cannot be judged of properly without the production of plans, and I think it would seriously impair the utility of the Dean of Guild's Court if in each case a proprietor intending to build were allowed to judge for himself whether he should be required to lodge plans or not. As a matter of regulation and procedure it is right that such a Court should have power to order plans to be lodged in all such cases.

"Further, although this question is attended with greater difficulty, I am not prepared to assent to the proposition that where it is proposed within burgh to erect large public works, in which, as here, hundreds of the inhabitants will be employed, the Dean of Guild has no jurisdiction or right and duty of supervision in the interests and for the protection of the workmen employed. If the complainers' argument is to be carried to its logical conclusion, they would have been entitled to erect the whole of their works, excepting in so far as they abut upon neighbouring properties or public streets, without the sanction of the Dean of Guild.

"In the present case, so far as I can judge from the evidence, the tannery in question seems to have been properly and safely erected, and no danger to the public is to be anticipated; but this is judging *ex post facto*, and I do not think that this consideration affects the question which I have to decide.

"So far I have spoken solely of the Dean of Guild's powers at common law. But it is not immaterial to note that by the imported sections of the General Police Act he is given powers which might not be held to belong to him at common law.

"Another matter was referred to by the respondent in the course of the discussion as giving the Dean of Guild an interest and right to call for plans, viz.—the drainage of the new tannery. The complainers contended that that was a matter with which the Dean of Guild had nothing to do. Now, it is quite true that at common law the Dean of Guild is not entitled to interfere on the ground of nuisance alone. But I am disposed to think, in the first place, that where new buildings are to be erected it is a customary part of the Dean of Guild's duties and powers to satisfy himself as to the mode in which it is proposed to drain such buildings. In the present case it is not disputed that the drain from the tannery ultimately joins one of the public drains of the burgh; and this being so, the Dean of Guild might, in the interest of the public, be entitled to insist upon seeing the mode in which the tannery was to be drained, and in insisting that notice should be given to any of the inhabitants who might be injuriously affected by the discharges.

"Further, under the 54th section of the Irvine Burgh Act the Dean of Guild possesses wider powers than those which he possesses at common law in regard to such matters. See in particular sections 190-194 of the General Police Act 1862; and the 8th of the Rules and Regulations contains directions upon this very point.

"On the whole matter, I am of opinion that the reasons of supension are not well founded, and that the note must be refused."

In the cart-shed case on the same date the Lord Ordinary pronounced a similar interlocutor, and appended to it the following note:—

"*Opinion.*—In this case, as in the tannery case decided to-day, the complainers object to the jurisdiction of the Dean of Guild.

"I repel that plea on two grounds—*First*, The complainers are, in my opinion, barred from insisting in it by their own actings. They submitted themselves to the Dean of Guild's jurisdiction in the most practical way, by lodging a petition for decree of lining and plans, and asking for service on parties interested. But when the Dean of Guild issued repeated orders that the complainers, or some representative, should attend the Court and explain the plans lodged, the complainers constituted themselves the judges of what was required, and deliberately refused to attend. On the petition being refused in respect of their failure to appear they defied the Court by building without leave. I think the objection to jurisdiction comes too late.

"But, *secondly*, for the reasons assigned in my opinion in the tannery case, I think the Dean of Guild had jurisdiction. This indeed is a stronger case. The cart-shed, which replaces one which was blown down, is within a few feet of the gateway leading to Peter Street, and on the complainers' own showing its erection might have affected some of the neighbouring proprietors."

The complainers reclaimed against the interlocutors in both cases. The tannery case alone was argued in the Inner House, both parties agreeing that the cart-shed

case was based on similar arguments.

Argued for the complainers—The jurisdiction of the Dean of Guild only applied where the interests of private persons or the public were endangered. No such interests were affected here, the buildings being 65 feet back from the complainers' boundary. What was done was similar to internal alterations within the walls of a house. The Dean of Guild's decree was called a decree of lining, because he was only concerned with encroachments on public or private property. The byelaw on which the proceedings of the Dean of Guild were founded was invalid. The proposition of the respondents that no man could build in any circumstances within burgh without consent of the Dean of Guild was absurd—Erskine, i. 4, 24; Bankton, iv. 20, 2; *Speed* v. *Philip*, March 16, 1883, 10 R. 795; *Somerville* v. *M'Gregor*, November 7, 1889, 17 R. 46.

Argued for respondents—The byelaw is simply a publication of the common law. The cases quoted on the other side refer to non-structural alterations within the walls of a house. No good reason has been shown for the suspension. The Dean of Guild has to deal with the risk of fire and the question of nuisance as well as structural safety of the building — Bankton, iv. 20, 2; *Edinburgh and Glasgow Railway Company* v. *Dymock*, November 27, 1847, 10 D. 162, *per* Lord Justice-Clerk; *More* v. *Bradford*, November 22, 1873, 1 R. 208; *Paisley Provident Co-operative Society (Limited)* v. *Buchanan*, November 12, 1889, 17 R. 66.

At advising—

LORD JUSTICE-CLERK—This case relates to the powers of the Dean of Guild Court of the burgh of Irvine. The question for our decision is, whether the Dean of Guild of that burgh has a right to require every person building a new house or altering the structure of one already built within burgh to lay the plans before him, and obtain his warrant to proceed before beginning to build?

The complainers erected a building within the burgh without the warrant of the Dean of Guild Court. The Dean of Guild thereupon had a complaint brought before him and inflicted a fine on the complainers. It is this conviction that is brought under review. The fine, I take it, was inflicted not for the purpose of punishment but in order to vindicate the jurisdiction of the Dean of Guild Court.

The building erected by the complainer is admittedly within the burgh of Irvine. The Dean of Guild Court of that burgh is undoubtedly constituted under an old charter of Robert II., which confers on it "The liberty of Guild, as other burghs and burgesses of our kingdom have and were wont to have that liberty, and that they may appoint guild brethren in the said burgh of Irvine, who shall enjoy and shall be reckoned to enjoy every liberty of guild that others whatsoever burgesses of our kingdom hitherto have enjoyed." The office is further recognised by the Irvine Burgh Act of 1881, by which it is enacted that "the Dean of Guild shall, subject to the provisions of this Act, have and exercise within the extended burgh all the jurisdiction, powers, and privileges possessed or exercised by Dean of Guild in any royal burgh in Scotland, and all the jurisdictions, powers, and privileges conferred on him by this Act." It is therefore certain that the Dean of Guild Court of Irvine is a duly constituted Court of Guild.

The extent of the jurisdiction of the Dean of Guild is a different question. It is not disputed that his consent is required in the case of buildings about to be erected on the bounds of a property in order to prevent encroachment on neighbouring private property and on the public streets. But the complainers say that here they have no need of his consent, as the building in question is situated 65 feet back from the edge of their property. I do not see how this affects the question. If the complainers were able to show this to the Dean of Guild they would have got a warrant in their favour as a matter of course. To allow the parties themselves to settle the question whether it is necessary to get the consent of the Dean of Guild to a building within burgh is not in my opinion a sound way of dealing with the matter. The principle is clear that parties proposing to erect buildings within burgh must lay their plans before the Dean of Guild, and it is for him to decide whether the proposed erection interferes with public or private interests.

Even if there was no question of encroachment here, that does not settle the case, because a jurisdiction of this sort cannot be satisfactorily vindicated unless consent is asked before the work has commenced. It would be most unsatisfactory if the jurisdiction of the Dean of Guild was only to come into operation after the buildings were commenced. Such a state of matters would cause the greatest possible injury to public and private interests, and even to the parties desiring to build.

It was further argued that as the decree of the Dean of Guild is called a decree of lining, the only question before him is that of encroachment. I do not think so. Even if the Dean of Guild is satisfied on the subject of encroachment, it is not his duty to issue a decree of lining if there are any other circumstances in the case which would make it improper for him to do so. In the present case this is plain both from customary law and from statute. The common law has laid it down that the jurisdiction of the Dean of Guild extends to questions of public safety, including the safety of individual owners of property on either side of the buildings erected or proposed to be erected. Then by the Irvine Burgh Act of 1881 it is enacted that certain proceedings under the General Police Act with respect to setting buildings back from the street, party walls, drainage, and ventilation of buildings may be taken before the Dean of Guild. If all these matters are within his cognisance, it is plainly necessary to lay the plans before him before the buildings are erected. Nothing could be more inconvenient than that the Dean of

Guild should examine into such matters as drainage and party walls after the buildings were erected. In my judgment, therefore, it is the duty of the Dean of Guild Court to act in all cases where new buildings are erected or where old buildings are altered in their structure, and it is the duty of inhabitants to invoke the jurisdiction of that Court before commencing such operations.

The case appears to be treated by the complainers as if the Dean of Guild were an irresponsible tyrant, and as if they might be subjected to an injustice without any recourse. This is not the state of the case. The Dean of Guild has a responsibility to fulfil, and if he does anything oppressive or contrary to law his judgment can be brought under review and rectified. This argument is therefore of no weight.

The complainers seem further to hold the Dean of Guild to be a sort of detective officer whose duty it is to go about observing building operations, and if he finds anything wrong to stop the proceedings. This is not the function of the Dean of Guild. It is the duty of all citizens before beginning to erect buildings to lay their plans before him for his approval. His interference after building operations have commenced can only be to vindicate a jurisdiction that has been passed by.

The only cases quoted against this view of the jurisdiction of the Dean of Guild Court were two which, in my opinion, have no bearing on the points before us. They deal with points of a totally different kind. They do not relate to the erection of a new building but to alterations within the walls of an old building. If the case of *Speed* had decided that a person was entitled to take down everything within the four outer walls of a building without any municipal authority I could not have agreed with the decision. Because in every building of any size there are walls inside the building the taking down of which would necessarily weaken the structure. But in that case there had not been failure to apply to a municipal authority before commencing operations. It appears that in Dundee there had been a conflict for some time between the Dean of Guild and the Police Commissioners concerning the limits of their jurisdiction. The party in the case had applied to the Police Commissioners and had received their sanction to take down the parts of his building which he had removed. He had also given intimation that when he proceeded to build on his ground he would apply to the Dean of Guild for his warrant. In these special circumstances the Court thought that the party was not at fault. The case goes no further than this.

The only other case cited was a case of *Somerville* v. *M'Gregor*, which came before this Court last year. This case only dealt with lath and plaster internal alterations not interfering with and making no difference on the strength of the structure of the building. On that ground we held that there was no necessity to invoke the jurisdiction of the Dean of Guild.

Neither of these cases applies here. This is a case of an entirely new building.

On these grounds I have not the slightest hesitation in concurring in the judgment of the Lord Ordinary and in the opinions expressed in his elaborate and exhaustive note.

LORD YOUNG—This case is attended with grave and serious difficulty, and it is with some hesitation that I concur in the judgment of the Lord Ordinary. The jurisdiction of the Dean of Guild is, generally speaking, a common law jurisdiction, and is in many respects vague. I think therefore in such cases as the one before us all Dean of Guilds should take into consideration the question whether their interference is necessary for the public interests.

The Lord Ordinary in his note says "that he knows of no authority that the sanction of the Dean of Guild is not required for the erection of new buildings within burgh wherever situated." I cannot affirm this proposition that the Dean of Guild's sanction is required for the erection of every building within burgh wherever situated. Suppose a person possesses a villa in a park of 20 or 50 or 100 acres, all within burgh. The proposition is that the proprietor could not build a cart-shed or make an addition to his coach-house without resorting to the Dean of Guild, and perhaps submitting his plans to a tradesman whose offer to do the work he had formerly refused. This proposition does not commend itself to my mind. In the case supposed there are no neighbouring proprietors, and no one complaining, so I do not see how the Dean of Guild is to know what is going on inside the park walls unless he hears of it accidentally or turns himself into a detective. This is not according to our practice. Our practice is that everyone about to build within burgh must make application to the Dean of Guild where the intended erection is in the immediate vicinity of the public streets or the property of private neighbours. I think therefore that in all these cases judgment and discretion should be exercised by the Dean of Guild and his officials to begin with, and latterly by us to see that he acts reasonably and within his powers for the public interest.

I have put, by way of illustration, a case within burgh, and technically within the jurisdiction of the Dean of Guild, in which his interference would be outrageous. Here the circumstances are different, and I think we must consider whether the Dean of Guild has exercised the just judgment and discretion which justifies his interference. The Eglinton Chemical Company are the proprietors of 100 acres, all, I understand, within the burgh of Irvine. The greater portion of this land is within walls. The building in question is entirely within the walls, and 75 feet from the edge of the property. In such circumstances I think the most moderate course would have been for the Dean of Guild to have abstained from interfering. The only consideration for supporting his interference is that a large work, employing a great number of towns-

people, is carried on within the walls, and that the erection is near streets, although these streets, it would seem, are not kept up by the burgh. While therefore I have very grave doubts, I have come to the conclusion not to dissent from the Lord Ordinary's judgment.

LORD RUTHERFURD CLARK—I also think that the interlocutor of the Lord Ordinary should be affirmed.

The Court affirmed the interlocutors reclaimed against, with expenses to the respondent.

Counsel for the Complainers—Asher, Q.C. —Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondent — Comrie Thomson—W. C. Smith. Agent—James Russell, S.S.C.

HIGH COURT OF JUSTICIARY.

Monday, November 3.

(Before the Lord Justice-Clerk, Lord Wellwood, and Lord Kincairney.)

ROBERTS *v.* ATKINSON.

Justiciary Cases — Coal Mines Regulation Act 1887 (50 *and* 51 *Vict. cap.* 58), *secs.* 49 (*Rule* 1) *and* 50 — *Relevancy — Specification.*

The Coal Mines Regulation Act 1887, sec. 49, rule 1, provides—"An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of the mine, and the travelling roads to and from those working places, shall be in a fit state for working and passing therein."

A complaint against a mine manager alleged that he "did fail to constantly produce an amount of ventilation adequate to dilute," &c., quoting the words of the rule without further specification. *Held* that the complaint ought to have disclosed the nature of the defect in ventilation upon which it was founded, and that it was defective from want of specification.

This was an appeal in terms of 20 Geo. II. cap. 43, and relative statutes, by James Roberts, mine manager, Holmes, Uphall, in the county of Linlithgow, against a conviction obtained against him in the Sheriff Court at Linlithgow upon a complaint at the instance of John Boland Atkinson, Her Majesty's Inspector of Mines for the Eastern District of Scotland, the charge against the appellant being that "having on 10th June 1890 been manager at No. 2 mine, Holmes, Uphall parish, Linlithgowshire, occupied by the Holmes Oil Company, Limited, and as manager foresaid having been responsible for the due observance in said mine of the first rule contained in the 49th section of the Coal Mines Regulation Act 1887, did time above libelled fail to constantly produce an amount of ventilation in said mine adequate to dilute and render harmless noxious gases to such an extent that the working places in No. 6 level in said mine, and the travelling roads to and from said working places, should be in a fit state for working and passing therein, in consequence whereof an explosion of fire-damp or some other noxious gas took place in said level, whereby Hugh Gavin, drawer, Goschen Place, Uphall parish, aforesaid; James Higgins, miner, Broxburn, Linlithgowshire; Thomas Rafferty, miner, Holmes' Rows, Linlithgowshire; William Charteris, labourer, Uphall, Linlithgowshire; Robert Walker, miner, Dechmont, Linlithgowshire; David Young, miner, Holmes' Rows, aforesaid; William Gowan, miner, Holmes' Rows, aforesaid; and John M'Laughlan, miner, Broxburn, aforesaid, were severely burned in their person, and the said John M'Laughlan soon thereafter died in consequence of his injuries, and this the said James Roberts did contrary to the Act 50 and 51 Vict. c. 58, sec. 49, rule 1."

The Coal Mines Regulation Act 1887 (50 and 51 Vict. cap. 58), sec. 49, rule 1, provides—"An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of the mine, and the travelling roads to and from these working places, shall be in a fit state for working and passing therein." Section 50 provides—"In the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act, unless he proves that he has taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine to prevent such contravention or non-compliance."

Argued for the appellant—The complaint was defective from want of specification. Notice ought to have been given to the appellant of the defect in the system which was alleged.

Argued for the respondent—The duty of the appellant was a positive duty. Breach of it consisted in not doing enough to secure adequate ventilation. No doubt where a duty is negative—*i.e.*, a prohibition—the act amounting to breach must be specified. It was different with a positive duty. Further, section 50 made it enough for the prosecutor to show defective ventilation. The burden of exculpation was then thrown on the owner or manager.

At advising—

LORD JUSTICE-CLERK—I think the complaint here is defective in giving no statement whatever of the alleged defect in the system of ventilation, or more properly