

the ordinary use of language, in saying that their obligation is entirely implemented by laying down cross rails upon their own ground. A "level-crossing" must, I think, be held to mean one so constructed as to be capable of being used, and used with reasonable safety, and to include such accessory works or appliances as may be necessary to effect this purpose. It has been decided that a company bound by agreement to make an over-bridge were obliged to construct not only a bridge across their rails but the necessary approaches for affording a complete connection between the lands on either side of the line, though this of course involved operations *in alieno solo*—*Addie's Trustees*, 1906, 8 F. 1047. Still less, as already observed, are the defenders, in my judgment, entitled to insist that the crossing shall be on the square and not on the skew, if the latter mode would materially contribute to the safe and efficient construction of the crossing. It may be that if the crossing were skewed it would not be necessary to erect any adjuncts or appliances upon ground not belonging to the defenders. But whether this be so or not, I think that the defenders' obligation includes the construction, at their expense, not only of the actual cross rails, but of such adjuncts and appliances, *e.g.*, catch-points, signals, stop-blocks, &c., as the Board of Trade may consider necessary to secure the public safety, whether such adjuncts or others require to be constructed upon land belonging to the defenders or to the pursuers.

The proper course, therefore, in my judgment, will be to recall the Lord Ordinary's interlocutor . . . [*His Lordship gave the form of the interlocutor to be pronounced, v. infra*] . . .

The Court pronounced this interlocutor—

"Recal the interlocutor reclaimed against: Find that the defenders are bound, in order to carry out the interlocutor of Lord Low, dated 21st June 1905, to make and maintain at their own expense the level-crossing upon and across their said line of railway, together with all such catch-points, signals, stop-blocks, or other adjuncts or appliances as the Board of Trade may prescribe as necessary to secure the safety of the public and of the traffic on the railway, whether such adjuncts or others may require to be constructed upon the defenders' own land or upon land belonging to the pursuers, who are bound, if so required by the Board of Trade, to fulfil at their own expense their undertakings upon record to reduce the gradient of their mineral line on the west side to 1 in 1000, or to otherwise rearrange their approach lines: With the above finding, continue the cause in order that the matter may be laid by the parties or either of them before the Board of Trade, and the approval of that Board obtained, with all reasonable despatch, to the construction by the defenders, with a view to its use, of a level-cross-

ing with adjuncts or others as aforesaid; and give leave to either party to apply to the Court, if so advised, at any time, for any such orders as may be competent or proper," &c.

Counsel for the Pursuers (Respondents)—
Dean of Faculty (Dickson, K.C.)—Ramsay.
Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders (Reclaimers)—
Cooper, K.C.—King. Agents—Hope, Todd,
& Kirk, W.S.

Wednesday, January 27.

SECOND DIVISION.

(With Lord M'Laren, Lord Kinneair, and
Lord Pearson.)

[Dean of Guild Court, Dunblane.

ANGUS v. JEFFRAY.

*Dean of Guild—Procedure—Jurisdiction—
Civil or Criminal—Penalty—Appeal—
Act of Sederunt, 12th November, 1825,
Part III, cap. 1, sec. 1—Burgh Police
(Scotland) Act 1892 (55 and 56 Vict. cap.
55), sec. 209—Burgh Police (Scotland) Act
1903 (3 Edw. VII, cap. 33), secs. 37 and 41
(1) (c).*

On a complaint purporting to proceed under the Burgh Police (Scotland) Acts 1892 to 1903, a builder was charged before a Dean of Guild with a contravention of section 41 (1) (c) of the Burgh Police (Scotland) Act 1903 by deviating in the construction of a road from the plan authorised by the Dean of Guild Court. No record was made up, nor was any note of the evidence recorded. The builder was convicted and sentenced to pay a penalty. He appealed to the Court of Session. In a Court of Seven Judges (*dub.* Lord Pearson) held that the appeal was competent, and that the conviction should be set aside on the ground that the complaint and proceedings following thereon being in the form appropriate to criminal procedure were incompetent in the Dean of Guild Court, the jurisdiction of that Court being of a civil character.

The Act of Sederunt of 12th November 1825, relative to the forms of process in civil causes in Royal Burghs, enacts—Part III, Chap. 1, sec. 1—"Actions in the Dean of Guild Courts of Royal Burghs may proceed in the ordinary form of petition or complaint, answers, and replies. . . ."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 209, enacts—"Every proceeding before the Dean of Guild Court shall be subject to the following rules and regulations. It shall commence by an application in writing or in print, or partly in writing and partly in print; and, except where otherwise specially directed, the subsequent steps may be in writing or *viva voce*, as shall be ordered by the Court. In all other respects the proceedings before

the Dean of Guild Court shall be such as apply to the proceedings before the Dean of Guild Court in Royal Burghs in Scotland; and the judgments shall be subject to review as the judgments of such Dean of Guild are subject to review."

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 37, enacts—"Without prejudice to the use of any other competent form, the proceedings before the Dean of Guild Court may be in a similar form to those in civil processes in the Sheriff Court. . . ."

Sec. 41—"Every person who, contrary to the provisions of the Burgh Police Acts—(a) shall lay out or form, or begin to lay out or form, any street or part thereof, or erect or begin to erect any house or building . . . without having obtained warrant therefor from the Town Council or the Dean of Guild Court as the case may be; or . . . (c) in carrying out any of the operations aforesaid shall deviate from the plans sanctioned by the Town Council or the Dean of Guild Court, as the case may be, or contravene or fail to comply with any conditions contained in the warrant or other authority sanctioning the same, shall be liable to a penalty not exceeding fifty pounds."

William Macduff Jeffray, Burgh Prosecutor of the Burgh of Dunblane, presented a complaint in the Dean of Guild Court there against Charles Angus, builder.

The complaint, which purported to proceed under the Burgh Police (Scotland) Acts 1892 to 1903, set forth that Angus had constructed a road to be used as a new street within the Burgh of Dunblane otherwise than in conformity with a warrant (and plan signed as relative thereto) which he had obtained from the Dean of Guild on 13th June 1905, without having obtained warrant for any deviation therefrom from the said Dean of Guild or from the Burgh Surveyor, contrary to the Burgh Police (Scotland) Act 1903, section 41, sub-section (1) (c), whereby he was liable to a penalty not exceeding £50, besides being bound, if and in so far as required, to alter the said road in such a way as he should be directed so as to make it in conformity with the warrant and plan sanctioned by the Dean of Guild Court.

The prayer of the complaint was to grant warrant to cite Angus to appear to answer to the complaint, and thereafter to convict him of the offence, and to adjudge him to suffer the penalties provided by the Act, and to require him to alter the road. [The crave for the alteration of the road was subsequently withdrawn.]

On 30th March 1908 the Dean of Guild granted warrant to cite Angus "to appear personally" to answer the complaint on 14th April, and on that day Angus, having appeared, when called upon to plead, pleaded "not guilty." No record was made up, but minutes of procedure were noted. The appellant was ordained to appear personally at an adjourned diet on 5th May 1908, and on that day evidence was led, but no note of the evidence was recorded; and thereafter the Dean of Guild

pronounced this interlocutor or conviction—"The Dean of Guild, in respect of the evidence adduced, convicts the said Charles Angus of the contravention charged, and therefore adjudges him to forfeit and pay the sum of eight pounds sterling of penalty, and grants warrant to officers of Court to arrest all debts and sums of money owing to the said Charles Angus; and on default of payment within seven days to poind his goods and effects, and sell the same at the expiration of not less than forty-eight hours after such poinding, without further notice or warrant."

The respondent appealed to the Second Division of the Court of Session, maintaining that the procedure adopted was incompetent. The case was heard on June 13th 1908, but was continued in order that further information might be obtained as to the practice obtaining in burghs in Scotland in the recovery of Dean of Guild penalties. The case was again heard on 24th October 1908, when the Second Division directed that it should be argued before Seven Judges.

At the hearing before the Judges of the Second Division, with Lord McLaren, Lord Kinnear, and Lord Pearson, argued for the appellant—(1) The proceedings in the Court below by complaint with minutes of procedure were radically incompetent and should be set aside. The procedure adopted was of an entirely criminal character. The writ was a "complaint"; the appellant was twice called upon to "plead"; and he was after evidence "convicted." Proceedings ought to have been by petition and answers with a record, as the jurisdiction of the Dean of Guild Court was of purely civil character—A.S. 12th November 1825, Part III, Chap. 1, section I; Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 209; Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 37; *Fraser v. Downie*, June 4, 1901, 3 F. 881, 38 S.L.R. 639. The case of *Lang v. Allan & Mann*, February 3, 1869, 7 Macph. 473, 6 S.L.R. 301, could not be considered authoritative in view of *Fraser v. Downie (cit. sup.)*. The Dean of Guild, who was usually appointed because he was a builder, was not a magistrate—*Fraser v. Downie, cit. sup.*—and consequently the Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. cap. 62) was not available to the appellant—see sections 2 and 3. The appellant had a right of appeal unless his right was taken away by Act of Parliament, which was not the case. If, however, the procedure adopted in this case was proper the appellant would be precluded from appealing, even if the evidence had been recorded, as no record had been made up—see Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii.), section 277, and *Walker v. Lang*, June 13, 1891, 18 R. 928, 28 S.L.R. 720. (2) The proceedings were also incompetent because there was no minute or statement of the sederunt. The conviction was signed only by the Dean of Guild. It did not even appear on the conviction whether he was present at the sederunt. He might have signed the conviction subsequently.

If criminal procedure was adopted, then there should have been a sederunt as is required in criminal cases—see Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 504; also *Simpson v. Reid*, (March 20, 1902, 4 F. (J.) 62, 39 S.L.R. 512.

Argued for the respondent (complainer)—
(1) The appeal was incompetent and should be dismissed. There was no radical incompetency in the procedure adopted. The appellant could not found merely on irregularities, but must say there were no competent proceedings. No objection was taken in the Court below. The procedure was purely a matter of form, and the practice varied in different burghs. It was open to a Dean of Guild Court to adopt any form it liked—Burgh Police (Scotland) Act 1892 (*sup. cit.*), section 209. The form used here was that given at page 144 of Forms in Summary Procedure, a collection of forms made by the procurators-fiscal—see also Campbell Irons' Law and Practice of the Dean of Guild Court, at page 549. The Burgh Police Act of 1892 (*cit. sup.*), section 205, provided that the burgh prosecutor should be "the prosecutor" in the Dean of Guild Court. Accordingly the respondent, who had been appointed burgh prosecutor, was entitled to "prosecute" in the Dean of Guild Court. That showed that criminal procedure was contemplated. No doubt it was settled in *Fraser v. Downie* (*cit. sup.*), that the jurisdiction of the Dean of Guild was of a civil character, but he had the right of inflicting fines for disregard of his orders. It was admitted that there was a right of appeal if the proper steps had been taken, but there could be no inquiry into the facts of this judgment, because there was no record. That was the appellant's own fault, for he could have made a motion to have a record made up, and if that had been refused there would have been an appeal on the refusal—*Walker v. Lang* (*cit. sup.*). There was, therefore, no possibility of injustice had the appellant taken the appropriate steps for getting an appeal on the facts. The appellant was just in the same position as if the case had been tried in the Sheriff Court. The Sheriff Courts Act 1907 (7 Edw. VII, cap. 51), section 8, provided that in a summary cause where the evidence had not been recorded the findings of the Sheriff in law only should be subject to review.
(2) As to the want of a sederunt, it was not necessary in civil proceedings to show what judges were present. Under the Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 38, a town council could prescribe the quorum necessary for the Dean of Guild Court. The Town Council of Dunblane had fixed the quorum at one. It was quite plain that the Dean of Guild was present, as there was an adjournment and he signed the interlocutor. Moreover, he signed the conviction, and it must be taken that the man who signed it was present. Further, it was a moot point whether anyone but the Dean of Guild could give judgment—*Wright v. Thomson*, December 16, 1904, 7 F. (J.) 18, 42 S.L.R. 205.

At advising—

LORD JUSTICE-CLERK—In this case the question relates to procedure in the Dean of Guild Court. The appellant has in that Court been found to have committed a contravention of a competent order by the Dean of Guild, and has been ordered to pay a fine. The procedure has been taken in the form of a complaint as for an offence under the summary jurisdiction powers conferred by the Burgh Police Acts of 1892 and of 1903, and it is contended on behalf of the respondent that the Dean of Guild not having recorded the evidence there can be no review by a superior court. That undoubtedly would be so in the case of an offence summarily tried before a magistrate. The evidence would not be recorded, and review could only take place on a stated case, in which the magistrate set forth the facts he found to be proved and what he decided in law upon those facts. The question is whether the law is the same when it is a case in the Dean of Guild Court which has to be dealt with. In other words, does the law applicable to summary cases of prosecution before a magistrate sitting in a police or burgh court apply to the case of a Dean of Guild sitting in the Dean of Guild Court?

In considering this question it is necessary to go back and to take account of what the general law of the land is with regard to the right of the citizen to have review of the judgments of inferior courts by the Supreme Court of the country. Now I think it cannot be disputed that the Supreme Court is open to every citizen who complains of wrong done in an inferior court. The party called upon to resist an appeal in the Supreme Court can exclude the appeal only if he can show that by statutory enactment the power of review of the Supreme Court is excluded. There are of course many classes of proceedings the decisions in which have been declared to be final and not subject to review, but this not by implication. It must be by exclusion.

If, then, review is to be excluded of decisions given by the Dean of Guild of a burgh, the party maintaining the exclusion must be able to found upon some definite enactment of exclusion, express or implied, which shall make the Dean's decision final when he, as in this case, imposes a penalty to be exacted by poinding and sale of a citizen's goods.

It is quite certain that appeal from a Dean of Guild's deliverances has been matter of common practice in this Court, the proceedings being taken in the ordinary forms used in the inferior civil court, and the evidence being recorded and considered by the Court just as in an ordinary civil action. It has been ascertained by inquiry that in many of the principal burghs of Scotland it is the practice to use these ordinary civil forms. Such forms are therefore competent in that court.

But it is said that there is an official appointed in the Dean of Guild Court under the Burgh Police Act who is called in the

Act the Prosecutor in the Dean of Guild Court, and that he may if he chooses proceed by Complaint, and that if he does so the Dean of Guild does not require to record the evidence, and can thus exclude review. I attach no importance to the use of the word "prosecutor." It is an appropriate word enough where there may be a suit for penalties, but it in no way can have the effect of altering the character of a proceeding so as to confer any right upon the Dean of Guild as regards the conduct of proceedings before him and the consequent exclusion of review if such a right does not exist otherwise by statute.

The matters with which a Dean of Guild has to do are not primarily in the nature of offences at all, either criminal or quasi-criminal. The citizen has to invoke his authority to do certain acts on his own property, the object being to protect others from encroachments or things being done in a way contrary to authorised municipal regulation. He is not a magistrate and has no magisterial powers. His jurisdiction is not for the Keeping of the King's Peace by the prevention and punishment of crime, or acts declared to be criminal or quasi-criminal. His powers are powers of regulation and control only, and of enforcing his powers by pecuniary fine where his orders are disobeyed. But in every respect he has to deal with matters which are in their essence civil and having nothing of association with criminal matters. I see that in this case, on an adjournment, the Dean of Guild ordained the party to appear personally at the adjourned diet. Unless he did this under some special clause of an Act of Parliament of which I am not aware, I do not think he had any right to order personal attendance. He certainly could not enforce it. I know of no law which requires a party in a Dean of Guild case to appear personally before the Court.

All this being so, I am unable to hold that, whatever may be the powers conferred on magistrates in summary prosecutions, and whatever may be the rules limiting appeals applicable to such prosecutions, they are to be held to apply to Dean of Guild proceedings. Even although certain forms may be permissible in instituting cases for convenience of procedure in a summary manner, that will not imply that where evidence is taken those who conduct the proceedings can oust the jurisdiction of this Court to review those proceedings by not making any record of it, if the cause is one to which the ordinary right of the citizen to appeal applies.

That a case in the Dean of Guild Court was open to review in the ordinary way before any of the recent burgh police statutes were passed is certain. That Court was just in the position of all courts, that a record must be kept to be reviewed by the Supreme Court, unless the keeping of a record was made unnecessary and review excluded by express enactment. I find nothing in any of the clauses of the statutes to which we were referred that could justify the Court in holding that a Dean of Guild could make his decision in a case

final upon the merits by failing to record the evidence upon which he proceeded. Such a thing cannot be justified by bringing proceedings in criminal form, which is quite inappropriate. The Dean of Guild's jurisdiction is primarily to give orders in civil matters *ad factum præstandum*, and therefore not the least akin to such matters as can be made ground of criminal prosecution. The power to inflict penalties for breach of orders issued by him in no way implies that the subject-matter of his jurisdiction is criminal and not civil. It cannot be both, and I have no doubt that the category into which it falls is civil and not criminal, and that proceedings taken which are in the forms appropriate to criminal procedure are not competent, and that the rules applicable to criminal court procedure do not apply.

I therefore hold that the appellant is entitled to have the proceedings in this case set aside.

LORD M'LAREN, LORD KINNEAR, and LORD LOW concurred.

LORD PEARSON—In this case we have to do with an offence created by the Burgh Police Act 1903, and specially dealt with in sections 41, 43, and 103 of that Act. Without going in any respect beyond the language of these sections, one may say we have before us the case of a guild offence, inferring liability to pay a penalty, and the sentence of a Dean of Guild Court imposing the penalty. But, notwithstanding the criminal or quasi-criminal suggestion in the language of the statute, it is (as I understand) common ground that the Dean of Guild Court procedure, even in dealing with penalties, is essentially a civil procedure; and review, in whatever form, can only be obtained in the civil court.

Now, if there is to be an appeal on the merits at all, the proceedings in the local court ought to fulfil two requirements. First, they ought to include in some form a statement and answers; and secondly, if evidence is led, there ought to be a record of the evidence. And I do not doubt that if the appellant here could show either that he had tendered answers which were refused, or that a motion to record the evidence was disregarded, he ought to succeed in his appeal. But he made no such application. The only objection which he took was to the want of specification of the particular date when the alleged contravention took place; and, that objection being repelled, he pleaded not guilty, and evidence was led at an adjourned diet.

I quite agree that there is something anomalous in grafting this procedure upon a complaint which is in form adapted to criminal process; and I also agree that it is high time this branch of procedure were taken in hand and regulated. My doubt is whether the proper way of doing that is not by Act of Sederunt, in the exercise of the administrative powers of the Court. The Act of Sederunt of 12th November 1825 (Part 3), regarding the Dean of Guild Court, supplies no forms; but while it enacts that actions in the Dean of Guild

Court may proceed in the ordinary form of petition or complaint, answers, and replies, it further prescribes that "in Dean of Guild processes also (particularly processes of lining) the action may proceed upon the original petition alone without any further written pleadings, the parties or their procurators being heard *viva voce*." Then in the Burgh Police Act 1892, section 209, it is enacted that every proceeding before the Dean of Guild Court shall commence by an application in writing or in print; and, except where otherwise specially directed, the subsequent steps may be in writing or *viva voce* as shall be ordered by the Court. Then comes the Burgh Police Act of 1903, which enacts the penalty here in question, and provides by section 37 that Dean of Guild proceedings may be in a similar form to those in civil processes in the Sheriff Court, "without prejudice to the use of any other competent form"—thus leaving open the choice of the less formal procedure of the Act of Sederunt of 1825, and of the 209th section of the Act of 1892. It is not unimportant to observe that, according to a list which has been laid before us, it is the practice of eighteen of the Scottish burghs to recover Dean of Guild penalties of the nature here in question by way of complaint with minutes of procedure. I do not mean to say that this has my approval. On the contrary, I think the sooner a change is made the better. My difficulty has been, and is, whether, standing the present regulations and having regard to the statutes, there is here any radical incompetency either in the initial writ or in the procedure which followed upon it. But having expressed this doubt, I am well content that the matter should be dealt with as proposed by your Lordship.

LORD ARDWALL—The first question raised by this case is whether the appeal is competently brought in the Court of Session, and the case of *Lang v. Allan & Mann*, February 3, 1869, 7 Macph. 743, was cited as an authority for the proposition that a petition to a Dean of Guild praying for the imposition of a fine for a guild offence, with the alternative of imprisonment, was of a criminal nature, and therefore could not be advocated to the Court of Session. That case differs from the present, inasmuch as imprisonment is not asked in the prayer of the present petition, but the question was not raised in that case whether the original proceeding was competent or not, and Lord Justice-Clerk Patton seems to have had great doubts in deciding the case as he did. His opinion apparently proceeds on the view that the Dean of Guild is a "magistrate of a burgh exercising jurisdiction." It appears to me that the decision in *Lang's* case cannot be regarded as authoritative in view of the decision and opinions in the subsequent case of *Fraser v. Downie*, 3 F. 881, where it was held that a Dean of Guild Court was a court of civil jurisdiction, that the Dean of Guild was not a "magistrate" within the meaning of the Summary Procedure Act, and that the Court of Session was the proper court of appeal in Dean of

Guild Court cases. I accordingly think that the appeal is competent; and I go further and say that in my opinion the Court of Session is the only competent court of appeal from judgments of the Dean of Guild Court.

It is true that if the only question raised had been one on the merits of the conviction, this appeal might have necessarily been dismissed for want of any notes of evidence. This happened in the case of *Johnstone v. Gardner*, July 12, 1907 (unreported), which is printed in the appendix for the respondent. In that case I may observe that no question of competency was raised. But in the present case the question of competency is raised, and it was maintained for the appellant that the whole proceedings in the Dean of Guild Court were irregular and incompetent, on the ground that the complaint and subsequent proceedings were in the form appropriate to criminal proceedings, and therefore incompetent in a court of civil jurisdiction. I am of opinion that this objection to the competency is well founded.

In the case of *Fraser v. Downie* it was clearly laid down that the Dean of Guild Court was a Court of civil jurisdiction, and it was there held that section 487 of the Burgh Police (Scotland) Act 1892, and section 28 of the Summary Procedure Act 1864, were inapplicable to that court. This being so, it appears to me to be incompetent to adopt the forms appropriate to criminal procedure in the Dean of Guild Court, and, so far as I know, there is no authority for such forms being adopted. The Act of Sederunt of 12th November 1825, Part iii, cap. 1, section 1, prescribes as the proper forms for Dean of Guild Courts the ordinary forms of petitions and answers, and directs the same rules to be observed as in the preparation of the summons, defences, and replies "in ordinary actions in the town or burgh court." Section 209 of the Burgh Police (Scotland) Act 1892 provides that "Every proceeding before the Dean of Guild Court . . . shall commence by an application in writing or in print, or partly in writing and partly in print, and, except where otherwise specially directed, the subsequent steps may be in writing or *viva voce* as shall be ordered by the court. In all other respects the proceedings before the Dean of Guild Court shall be such as apply to the proceedings before the Dean of Guild Court in royal burghs in Scotland, and the judgments of the court shall be subject to review as the judgments of such Dean of Guild are subject to review." Now it does not admit of doubt that at the date of the passing of the Police Act 1892 the forms of process in the Dean of Guild Courts in Royal Burghs were forms appropriate to civil proceedings, and that the judgments of that court were subject to the review of the Court of Session alone and not of the High Court of Justiciary.

I may further observe that the regular practice in Dean of Guild Courts in Scotland was that where thought necessary by the Dean of Guild a record was made up upon the original petition in the same way as in the ordinary Sheriff Court,

But it was only in very exceptional cases that it was ever necessary in practice to make up a record, any questions raised either by the Dean of Guild *proprio motu* or by comparing defenders being as a rule disposed of after a short *viva voce* discussion. The next enactment on the subject is to be found in section 37 of the Burgh Police (Scotland) Act 1903, which provides that "without prejudice to the use of any other competent form, the proceedings before the Dean of Guild Court may be in a similar form to those in civil processes in the Sheriff Court," and it is further provided that all decrees, warrants, &c., may be enforced to the same effect as any decree or warrant issued by any Sheriff Court in such processes. For the first time in the history of the Dean of Guild Courts that section authorises the decrees and warrants of these courts to be enforced outside the burgh as if they were Sheriff Court decrees. I pause here for the purpose of observing that not one of the enactments I have cited suggests, much less authorises, the use of the forms of criminal courts in the Dean of Guild Court.

It appears that of late years a practice has grown up in some Dean of Guild Courts of framing the initial writ in certain Dean of Guild Court proceedings in the form of a criminal complaint either in the forms contained in the Burgh Police Acts or the Summary Jurisdiction Acts. In my opinion this practice is incompetent, in respect that it involves the use of writs and forms only appropriate to courts of criminal jurisdiction in a court of civil jurisdiction. I may also point out that this practice is objectionable on other grounds. It may be used, and has been used, as a means of attempting to deprive the members of the public who are called before the Dean of Guild Court under such proceedings of their right of appeal by pleading against them the provisions of the Burgh Police and Summary Procedure Acts. In the next place, it is highly inconvenient to introduce the forms appropriate to criminal courts into a court of purely civil jurisdiction. The present is a very good example of that inconvenience, because in the petition in this case, before it was amended, there was not only a crave for conviction of an offence and imposition of penalties, but a crave asking the Dean of Guild to require the respondent to alter a road. Nothing could show more clearly the impropriety of adopting the form of a criminal complaint in a Dean of Guild Court proceeding. Accordingly, I hope that it will be understood that in future, proceedings in the Dean of Guild Court must commence with a petition in similar form to those used in civil proceedings in the Sheriff Court either before or after the passing of the recent Sheriff Court Act. If the Dean of Guild thinks that it is right that a record should be made up, he will order that to be done; if he thinks (as usually happens) that there is no necessity for a record being made up, it would still be open to any of the parties to the proceedings to move the Dean of Guild to have a record made up, and an opinion was

expressed in *Walker v. Lang* (18 R. 928) that the Dean of Guild would not be entitled to refuse such motion. Subsequent proceedings would be similar to civil proceedings in the ordinary Sheriff Court.

I am accordingly of opinion that in the present case we should sustain the appeal, find that the complaint and subsequent proceedings were incompetent, recall the interlocutor or conviction of 5th May 1908, and dismiss the whole proceedings, with expenses, against the petitioner.

LORD DUNDAS—The proceedings out of which this appeal arises were originated by a complaint to the Dean of Guild of the burgh of Dunblane under the Burgh Police (Scotland) Acts 1892 to 1903. From first to last the procedure was conducted in the form recognised as appropriate to a criminal and not to a purely civil process. The prayer of the complaint was to "convict" the present appellant of an "offence" under section 41 (1) (c) of the Act of 1903; he was called upon to plead, and pleaded "not guilty"; minutes of procedure were noted; and after evidence led, the Dean of Guild "convicted" him and adjudged him to pay £8 of penalty. All this seems to me to have been utterly wrong and incompetent. The Dean of Guild is not a magistrate, and his jurisdiction is exclusively of a civil character. But Mr Clyde, for the respondent, while admitting that the procedure in a Dean of Guild Court is purely civil, argued that mere error in form was immaterial, or, at all events, would not be a fatal objection, unless a party should suffer substantial injustice in consequence of such error, which he contended was not here the case. I think this appellant did suffer (or may have suffered) injustice from the erroneous method of procedure. No note of the evidence was recorded, and we are therefore unable to judge whether or not the "conviction" was warranted by it. Mr Clyde contended that if the appellant desired to have the evidence recorded he ought to have moved the Dean of Guild to record it, and that as he did not do so he cannot now be heard to complain. But if the whole procedure was, as I think it was, incompetent, I do not see that it was for the appellant to make any such motion. The procedure in Dean of Guild Courts is regulated by the Burgh Police Acts 1892 (particularly section 209) and 1903 (particularly section 37). Mr Clyde founded strongly upon the terms of section 209 of the earlier Act, which he said conferred upon the Dean of Guild an almost entirely free hand as to the forms of procedure in his Court; though he did, as I understood him, admit that if a respondent tabled a motion to have a record made up and a note of the evidence taken, the Dean of Guild, if he refused the motion unwarrantably, might be subject to review by the Court. I think this reading of the section is too wide. The section is somewhat loosely worded, but it seems to me that the second part is really the controlling member of it, and that the gist of the whole is that, unless in special circumstances, the

proper and normal procedure in Dean of Guild Courts is that which obtains in civil processes in the Sheriff Court. Mr Clyde also referred us to the Sheriff Courts (Scotland) Act 1907, which came into operation on 1st January 1908, and particularly to section 8 thereof. That section no doubt contains the latest word of the Legislature in regard to procedure in summary causes in Sheriff Courts, and would therefore, I apprehend, apply to a Dean of Guild Court petition concluding simply for a penalty exceeding £20 and not exceeding £50. But I do not think the section has any point in the present case, for this application was not, I apprehend, in any view, a "summary cause" (as defined by section 3 (i) of the 1907 Act), because, as originally brought, it included a conclusion *ad factum præstandum*. For the reasons stated, I am of opinion (1) that the procedure in the Dean of Guild Court was incompetent; and (2) that the normal procedure in Dean of Guild Courts in cases of this kind should be that of civil processes in the Sheriff Courts. It is desirable that substantial uniformity of practice should be observed throughout the country; and the information contained in Appendix I to the minute lodged in this case (which was further supplemented verbally from the bar) shows that in most of the larger burghs the practice in such cases has been to proceed by way of petition and answers with record, and not by way of complaint with minutes of procedure.

The Court pronounced this interlocutor—

"In conformity with the opinions of the Seven Judges, sustain the appeal, and recal the said interlocutor appealed against, as also the conviction of 5th May last and the interlocutors of 14th April 1908, and remit the cause to the said Dean of Guild to dismiss the complaint as incompetent, and decern," &c.

Counsel for the Complainer (Respondent)—Clyde, K.C.—Munro. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Respondent (Appellant)—G. Watt, K.C.—Mercer. Agents—J. & A. Hastie, Solicitors.

Saturday, January 30.

FIRST DIVISION.

DARLING'S TRUSTEES v. JOHNSTON AND OTHERS.

Succession—Faculties and Powers—Appointment—Exercise of Power of Appointment—Objects of Exercise—Persons who might Prove not to be Objects of the Power—Postponement of Division—Appointment of Liferent to an Object of the Power.

A testator gave a liferent of £2000 to his daughter, and directed that after her decease it should be paid to any one or more of his other descendants in such

shares as she might appoint, and failing such appointment to his descendants equally among them *per stirpes*. The daughter appointed a liferent to a niece, a granddaughter of the testator, and directed that on the capital being set free on her death it should be divided in certain proportions amongst certain persons (all of whom were amongst the descendants of her father), whom failing to their respective heirs *in mobilibus*.

Held (1) that the appointment was bad, because (a) the appointees might prove to be outwith the power, *i.e.* not descendants of the granter, and (b) the appointment postponed the period of division; and (2) that the £2000 fell to be divided *per stirpes* among the testator's descendants at the time of the death of the appointing liferentrix.

Opinions reserved as to whether where there was a power of appointment of a certain sum it was a good exercise of the power to appoint a mere liferent.

Succession—Liferent and Fee—Bona fide perceptio et consumptio.

Held that the doctrine of *fruges bona fide perceptæ et consumptæ* did not apply to a liferent paid in error to the wrong person.

Hunter's Trustees v. Hunter, July 6, 1894, 21 R. 949, 31 S.L.R. 837, so far as laying down any rule to the contrary, *disapproved*.

William Darling, farmer, residing at Abbey Bank, Kelso, died on 26th July 1867, leaving a trust-disposition and settlement dated 17th February 1863, and registered in the Sheriff Court Books of Roxburghshire 12th August 1867. By it he conveyed his whole estate, heritable and moveable, to trustees for the purposes therein mentioned.

The third purpose of the said trust-disposition and settlement provided—"That my trustees shall at the first term of Whitsunday or Martinmas after my death lay out and invest in such manner as they may deem advisable two sums of two thousand pounds sterling for the respective behoof of my two daughters, the said Margaretta Elizabeth Darling and Jane Darling, and annually pay the interest or annual produce arising from the said respective sums of two thousand pounds to each of them respectively during all the days of their respective lives: Declaring that the said interest or annual produce is purely alimentary and not assignable by them, nor shall it be subject to the *jus mariti* or right of administration of any husband either of them may marry respectively, nor affectable by his debts or deeds, nor liable to the diligence of his creditors, but shall be paid to each of my said daughters on their own respective receipts allenary, and declaring further, that after the decease of my said two daughters respectively the said sum of two thousand pounds so provided for behoof of each of them shall be paid by my said trustees to the child or children and descendants of each of my said daughters