intestate; I think it most material on the question of her credibility. But my brother Lord Craighill, before whom she gave her evidence, having this conspicuous fact distinctly in his view, believes her, and discredits the evidence which not merely suggests but directly asserts that her account is untrue, and that she acted criminally to save her interest. I am unable to differ from him. I think the evidence shows that the deceased died in the belief that his will had been destroyed, as he desired it should be, and that he consequently died intestate. I have alluded to without dwelling on the change in his circumstances, which fully and satisfactorily accounts for his wish that his successor should be governed not by the will but by the law of intestacy. His declarations that he would destroy his will, and that he had destroyed it, and that the failure of the City of Glasgow Bank had made a will for him, show his intention clearly enough. The failure of the bank made his will for him by bringing his intentions into accord with the law of intestacy, which he of course knew would give the reduced fortune which remained to him to his only child without the necessity of any written instrument of his. In these circumstances I cannot reject Mrs Ireland's testimony as untrustworthy and set up as the last will of the deceased an instrument which I am satisfied, on I think sufficient evidence, was destroyed at his desire, precisely because he wished to die intestate, as he in fact in his last moments of conscious existence believed that he did.

Lord Rutherfurd Clark—I have found this case to be one of very great difficulty, but upon the whole I have come to concur in the opinions that have just been delivered.

Lord Justice-Clerk—I entirely concur in the judgment proposed, and on the grounds of that judgment which have been stated. We are much indebted to Lord Craighill for the full and very satisfactory exposition of the proof which was led before him, without which I own the case would have presented a more complicated appearance.

I do not intend to say anything further. There is no question of law here raised. It is a pure question of fact; and that depends entirely on the question of credibility; and after what has been said I have nothing to add, except that I entirely concur.

We therefore assoilzie the defenders with expenses.

The Court assoilzied the defenders from the conclusions of the action.

Counsel for Pursuers—Mackintosh—J. A. Reid. Agents—Philip, Laing, & Co, S.S.C.

Counsel for Defenders—Trayner—Strachan. Agents—Boyd, Macdonald, & Jameson, W.S.

Friday, March 16.

FIRST DIVISION.

[Dean of Guild of Dundee.

PHILIP *v.* SPEED.

Burgh—Dean of Guild—Jurisdiction.

A person having proceeded with certain internal alterations on a tenement in a burgh, was, at the instance of the Procurator-Fiscal of the Dean of Guild Court of the burgh, interdicted from further proceeding with his operations, and fined by that Court, on the ground that the operations complained of formed part of more extensive operations which were shown by the plans, and which required the authority of the Dean of Guild. *Held* that the operations executed not being such as to affect conterminous proprietors, and there being nothing to show that any public danger resulted from them, the petition was unnecessary, and ought to have been dismissed.

This was a petition presented in the Dean of Guild Court at Dundee by Alexander Speed, Procurator-Fiscal of Court for the public interest, against William Philip junior, joiner, Dundee, one of the magistrates of the burgh "to interdict, prohibit, and discharge the respondent and all others acting under him, or by his authority, from proceeding further with the operations in taking down and altering a tenement of buildings in Seagate, Dundee, or near thereto, and belonging to him, or in altering or interfering with any part of said tenement, or in building up other buildings or erections on the site thereof, as mentioned in the statement of facts, until he shall obtain from your Honour legal warrant for so doing: Further, to appoint, if necessary, a visitation of what is complained of, to take place in presence of your Honour, and upon again advising this petition, with or without answers, to declare the said interdict perpetual aye and until your Honour's warrant be obtained in due form for the operations complained of." Further, the petition concluded that the respondent should be fined £10, less or more, for breach of the regulations of the burgh and of the Dean of Guild Court by having proceeded with the operations complained of without warrant of the Dean of Guild.

The averments upon which the petition proceeded, which are given in detail in the opinion of the Lord President, *infra*, were to the effect that the respondent was engaged without the Dean's warrant in altering or interfering with the tenements, by pulling down walls or part of the walls thereof, and that his operations were to the danger of the lieges and the injury to conterminous proprietors; that no intimation had been given to conterminous proprietors, and that information had been lodged with the petitioner by one of them named Robertson; that by the rules and regulations of the burgh and of the Dean of Guild Court the authority of that Court ought to have been applied for.

The respondent stated that his plans had been approved by the Commissioners of Police, to whom they had been submitted in terms of the Dundee Police and Improvement Consolidation Act 1882; that all he had done was to take out certain partition walls within his own tenement, and not being

walls abutting on the street or on the property of any neighbour, and that he did not contemplate making operations of the latter kind without judicial authority; that he had shown his plans to Mr Robertson, and informed him that he intended to obtain judicial authority in the usual way.

After a visitation of the premises the Dean of Guild on 3d February 1883 pronounced this interlocutor:—"Repels the whole defences and pleas of the respondent: Finds and declares the interim interdict granted by the interlocutor of 29th January last to be perpetual, all in terms of the prayer of the petition: Finds and amerciates the respondent in the sum of £10 sterling, payable to the petitioner, to be applied as law directs, in terms of said prayer," &c.

"*Note.*—The respondent admits that he recently submitted plans and sections of certain proposed alterations on his property in Seagate to the Police Commissioners, and obtained their approval, and in his answers he alleges that he has not proceeded with the proposed works 'but has merely taken out some partition walls and flooring of his buildings,' and contemplates seeking judicial authority for executing part of his works. On referring to the plans and sections very extensive alterations on the respondent's buildings are shown, including the rebuilding of the tenement fronting Seagate Street, and at the visitation it was seen and admitted that the respondent had already made very extensive alterations when stopped under this application. These may be recorded as follows, viz.:—The building fronting the Seagate Street had the flooring, ceiling, and partitions removed, being in fact gutted, as well as the facing boards on the north wall to the Seagate Street removed; the lath and plaster and flooring above the pend next said street had been torn down; the outer north wall of an adjoining large building, known as the granary, had been slapped, and an iron beam introduced close to the conterminous property on the west; one floor had been lifted, and a stone stair and an inside stone wall taken down, and other portions strengthened or rebuilt. As these alterations, which form part of the larger scheme sanctioned by the Police Commissioners, have been admittedly proceeded with by the respondent without other authority, and without a warrant from this Court, and as it appears from the process and the statements of parties that a conterminous proprietor seeks to raise questions of possessory right or disputed boundaries, the Dean has felt constrained, following the authority of *More* v. *Bradford*, November 22, 1873, to grant the prayer of the petition. If the respondent means to proceed further with his alterations, and contemplates applying for judicial authority, as he alleges, it seems to be no great hardship that he should be compelled to do so at this stage."

The respondent appealed, and argued—All that he had proceeded with at the date of the petition were merely inside alterations. By sections 121 and 124 of the Dundee Police Act 1882 the Police Commissioners may grant warrant for such alterations as these. The Procurator-Fiscal should not have interfered; if a private party wished to vindicate his rights he should have done it himself—*More* v. *Bradford*, Nov. 22, 1873, 1 R. 208; *Milne* v. *Melville*, Nov. 27, 1841, 4 D. 111, 14 Jur. 48.

The petitioner replied—When a party discloses an intention to encroach on the rights of conterminous proprietors he must get a warrant from the Dean of Guild. The jurisdiction of the Dean of Guild was privative—*Adamson* v. *Masterton*, July 21, 1631, Durie's Decisions, 599; Bankt. Inst. iv. 20, 2; Ersk. Inst. i. 4, 24, ii. 9, 9; *Magistrates of Stirling*, M. 7584; *Tainsh* v. *Magistrates of Hamilton*, January 24, 1877, 4 R. 315; *Lamont* v. *Cumming*, June 11, 1875, 2 R. 784—Lord Deas, p. 789; Juridical Styles, i. 580; M'Glashan's Sheriff Court Practice, p. 13; *Stewart* v. *Blackwood*, Feb. 3, 1829, 7 S. 362; *Donaldson* v. *Pattison*, Nov. 14, 1834, 13 S. 27; *Hunter* v. *Ponton*, Dec. 22, 1821, 1 S. 223; *Edinburgh and Glasgow Railway Company* v. *Dymock*, Nov. 27, 1847, 10 D. 158.

At advising—

Lord President—I agree with Mr Keir that this is a question of some importance, but the question is of importance, for this reason, that it is necessary in giving judgment upon it to take care not to interfere in any way with the wholesome jurisdiction of the Dean of Guild in royal burghs. Therefore, although the opinion of the Court is against the judgment of the Dean of Guild in this case, nothing contained in it will in any way interfere with the well-recognised jurisdiction of that magistrate.

The case is a peculiar one, and in order to arrive at a right conclusion it is necessary to attend to the averments which the Procurator-Fiscal makes in his petition. He says in the second article of his statements—"The respondent has commenced and is in the course of carrying out certain operations in altering and interfering with said tenements by pulling or taking down certain of the walls thereof, or parts of said walls, and he has begun, or contemplates beginning, to build on the site of said tenements without your Honour's warrant or authority; or the respondent is otherwise altering or interfering with said tenements to the danger of the lieges and the injury of conterminous proprietors in or to said tenements, and he is by said operations encroaching on the rights of conterminous proprietors, and the respondent is so carrying on said operations without your Honour's warrant or authority, notwithstanding that said tenement of buildings is within your Honour's jurisdiction." He then goes on to say that the conterminous proprietors had received no intimation of the respondent's intention to make alterations on his buildings, and in the fourth article of his statements he says—"A formal information has been made to the petitioner, as Procurator-Fiscal of Court, in the public interest, of said operations, by Mr James Robertson, wine merchant, a conterminous proprietor, who believes his rights are in danger of being assailed and interfered with by said operations, conform to information by him of date 27th January 1883."

That is the substance of the Procurator-Fiscal's complaint. He is acting on the information or in the interest of Mr Robertson, one of the conterminous proprietors, for the protection of his interests, but he also says that he is acting in the interest of the general public in order to protect the lieges from danger. This latter averment would be important if it appeared in what way the danger would be caused, but the mere use of words imports no relevancy unless there be an explanation of what danger was to be apprehended. If, indeed, a man were pulling down

his outside walls, and taking no measures to protect the lieges from danger, and doing all this without the authority of the Dean of Guild, I think an averment containing such a statement would be enough. But what was the nature of the operations which are here complained of? The appellant informs us that he went to the Police Commissioners to get authority for what he has done, and that he received it. I do not say that the obtaining of that authority exempted the appellant from the necessity of getting a warrant from the Dean of Guild whenever it should be necessary at common law, but it shows that he has satisfied the Police Commissioners that his operations, so far as he has gone at present, are not of such a kind as to threaten the safety of the lieges. The appellant then says that "notwithstanding of the approval of said plans and sections the respondent has not proceeded with the proposed works thereby sanctioned, but has merely taken out some partition walls and flooring of his buildings. These operations are entirely within the limits of his own property, and not near any of the boundaries thereof, nor situate where any question of possessory right or disputed boundaries could possibly be raised or involved; further, the respondent has not taken down or interfered with any building or walls, so far as abutting on any street, or bounding any conterminous proprietor, and he has not any intention of doing so, and will not and never contemplated doing so without first obtaining judicial authority."

Turning to the Dean of Guild's judgment, I find confirmation of that, for he visited the premises, and describes what he saw there, which clearly proves that the operations were within the outside walls of the appellant's house; and it is also to be kept in mind that before this interdict was served there had been communications between the appellant and Robertson, and it is only Robertson's interest that is here represented, for there is nothing on the face of these proceedings to show that there was any danger threatened to the lieges.

In regard to Robertson, the appellant explains that before he lodged his information with the Procurator-Fiscal the appellant showed him the plans of his proposed alterations, and told him that he would do nothing requiring authority without first obtaining it. This explanation, however, is mere statement, and we cannot take it as proof. But fortunately for the appellant he wrote a letter to Robertson's agent at the time as follows:—"I think it right to say that I intend to take judicial authority for what I am now going to do, and Mr Robertson will receive due intimation of this." That letter is dated on the 26th of January 1882. On the 27th Robertson's information was lodged with the Procurator-Fiscal, and on the 29th the Procurator-Fiscal presented this petition for interdict. All that was done after the Procurator-Fiscal and Robertson had been extra-judicially made aware that what Philip had then done could quite well be done without a Judge's warrant, but that when he came to execute that part of his alterations which did require a warrant he would then apply for judicial authority. I think there was no good ground for this petition, and I am of opinion that the operations explained by the Dean of Guild are operations not requiring the sanction of the Dean of Guild or anyone.

If the interdict was directed against operations of a such nature as to cause danger to the public or to the neighbouring proprietors, then the Dean of Guild could exercise his jurisdiction, and I should not in such a case be inclined to interfere, but we have no such case here. It appears to me that this application was not in the circumstances justifiable, and that Philip had done nothing to subject him to this complaint.

The terms of the interdict are very peculiar. The prayer is to interdict the respondent "from proceeding further with the operations in taking down and altering a tenement of buildings in Seagate, Dundee, or near thereto, and belonging to him, or in altering or interfering with any part of said tenement, or in building up other buildings or erections on the site thereof . . . . until he shall obtain from your Honour a legal warrant for so doing." Now, in the first place, an application for interdict against "altering or interfering with any part of said tenement" is a great deal too wide, and never would be justified in a case of this kind." In the second place, the interdict is craved against the respondent "until he shall obtain from your Honour a legal warrant for so doing." This, in the circumstances of the present case, is a very improper application, for it is just an attempt to foreclose a question which has been mooted, and is in course of being tried, namely, whether the jurisdiction of the Dean of Guild is privative or concurrent with the Burgh Court.

On that point I give no opinion. It may perhaps come before us in another shape. But it is out of the question, when that issue has been fairly tabled and is in course of discussion, that interdict should be granted in such terms as to shut out the question whether Philip could not obtain judicial authority for his contemplated operations without going to the Dean of Guild.

On the merits, however, without reference to that question, I think this complaint is ill-founded, and that the interlocutor of the Dean of Guild should be recalled and the petition dismissed.

Lord Deas—I never doubted that in royal burghs the Dean of Guild has jurisdiction over all buildings, and unless there be some statutory authority to the contrary that jurisdiction is exclusive. But that jurisdiction does not apply to every operation, however harmless, which a man may perform in his own house, and the people of Dundee are not prevented from making alterations in their houses. But if it is found that these operations, though within the house, are likely to cause danger to the public, then, after visiting the place, the Dean of Guild is entitled and bound to stop them until a warrant has been obtained. In this case I cannot see that there is any room for dispute on either side, and the whole matter has dwindled down to a most insignificant question. The report of the visitation shows that there was no danger threatened to the public. All that the one party said was, "Your operations will infringe the rights of the neighbouring proprietors;" and the answer was, "I admit that these operations if carried through may require the warrant of a competent Court, but before carrying them out I mean to get a proper warrant." The dispute, then, is just whether it was imperative to get a warrant before the outside operations were begun, or whether Mr Philip

was not entitled to wait. It is a very paltry question on the one side or on the other, and raises no general question at all as to the extent of the Dean of Guild's jurisdiction.

The question whether there are in Dundee two Courts with jurisdiction to grant warrants in such cases has not been competently raised here. If it is worth while to raise it we will decide it, but I give no opinion on that point at present.

Lord Mure—I concur, that in the circumstances of the case there was no sufficient ground for presenting this petition. It was presented after the respondent had been informed that the appellant was going to apply for authority whenever it was necessary. That information was given on the 26th, and this application was made about the 29th of January. Before the latter date it has not been shown, either by the admissions of the appellant or by the Dean of Guild's note, that the appellant had done anything necessarily requiring a warrant from the Dean of Guild. I should have been of that opinion as to the taking down of the partition wall apart from the terms of the Dundee Police Act, but having these in view, I certainly think the appellant was entitled to proceed with these inside operations before going to the Dean of Guild. After giving authority to the Police Commissioners to grant warrants in certain cases the Act proceeds—"Nothing contained in this Act shall prejudice or affect any jurisdiction now competent to the Dean of Guild of the royal burgh of Dundee in preventing encroachments upon the property of the public, or upon the property of any proprieter within the burgh, or in entertaining or disposing of possessory questions; but where no question of possessory right or disputed boundaries is or may be raised or involved, and subject to appeal as by this Act allowed, it shall not be necessary for any proprietor or person to apply for or to obtain any other approval or warrant than that of the commissioners before erecting or altering any building within the burgh." Apparently this Act means something; it grants authority to persons, with the sanction of the Police Commissioners, to do the things we have here described, and to do them without the warrant of the Dean of Guild, provided no question of possessory right or disputed boundaries is involved.

But in the report by the Dean of Guild there is no evidence of anything having been done to interfere with the neighbouring properties. All that the appellant had done was what he admits on record, and he duly gave notice to the Procurator-Fiscal and to Robertson that for his further alterations he intended to get judicial authority.

Lord Shand—If it had appeared from the averments in this complaint, or from the report of the inspection and the interlocutor of the Dean of Guild, that these operations were dangerous to the lieges, or that the respondent intended to go on without first obtaining a warrant, then I think it would have been competent. But both these elements are wanting. The building is only twenty feet in height, and the operations are all internal, causing no danger to the lieges. The only other question is whether there is danger to the neighbouring proprietor, and the interlocutor and note of the Dean of Guild make it clear that there is not. The appellant intimated to Robertson that he would apply to a competent Court for a warrant when it became necessary, and in that state of the case I think this petition was unnecessary and incompetent. Nothing that we say in the present case will interfere with the Dean of Guild's right and duty to put a stop to operations on buildings within burgh which are likely to cause danger to the lieges.

The Court recalled the interlocutor of the Dean of Guild, and dismissed the petition.

Counsel for Respondent (Appellant)—Mackintosh—Pearson. Agent—J. Smith Clark, S.S.C.

Counsel for Petitioner (Respondent)—Keir—Salvesen. Agent—William Lowson, Solicitor.

Friday, March 16.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

MACFARLANE & COMPANY *v.* OAK FOUNDRY COMPANY.

Copyright—Trade Advertisement—Entry at Stationers' Hall—Alleged Infringement of Copyright — Fraudulent Misrepresentation — Relevancy.

A trading company prepared and circulated gratuitously among its customers an illustrated catalogue containing designs of articles manufactured and sold by them. This catalogue was entered at Stationers' Hall. In an action of suspension and interdict brought against a rival company for alleged infringement of copyright by the reproduction of large portions of the complainers' catalogue in one issued by the respondents—*held* that the catalogue being copyright was entitled to protection, and that averments that a number of articles in it were alleged to be patent or registered, whereas in truth they had either never been patented or registered, or such protection was subject to objection or had expired, were not relevant as a defence to proceedings for infringement of copyright.

Observations (*per* Lord President) on the nature of the fraud or improper representation which deprives anyone who may have obtained copyright of a work of the benefits of its protection.

This was a process of suspension and interdict at the instance of Walter Macfarlane & Company, ironfounders, Glasgow, against William Binnie, David Allan Arnot, David Hutchison, and Alexander Hutchison, all ironfounders in Glasgow, the partners of the Oak Foundry Company.

The complainers averred that for thirty-two years they had carried on a large business in Glasgow as architectural, sanitary, and artistic ironfounders, and that the iron-work coming from their "Saracen Foundry," Possilpark, Glasgow, was well known in the trade in all parts of the world.

They further averred that in connection with their business they had caused to be prepared, at great expense, an illustrated catalogue of drawings or designs of their various castings of iron-