and the respondents a conjunct probation, and this proof was taken before Lord Shand on the 9th March. On the 15th March, after hearing counsel for the parties, the Court found that the respondents had each and all of them been guilty of a breach of the interdict of 6th July 1882.

The LORD PRESIDENT, in delivering the sentence of the Court, said — John Macpherson, Donald Macleod, and John Morrison, the most serious part of the charge against you in this petition and complaint is thus expressed—that "the persons upon whom the interdict was served, and after it was served, have, by means of a violent and illegal combination, and in breach of said interdict, prevented the petitioners from exercising their proper and exclusive rights of proprietorship over the said farm of Waterstein, and that they have molested and interfered with the servants of the petitioners in the exercise of their duties on said farm, and by violence and intimidation have prevented them from carrying into effect the orders of the petitioners, and clearing the ground of Waterstein of stock which had no right to be there. In all these proceedings the present respondents have actively participated." That charge we are all of opinion has been clearly proved against the whole of you. Fortunately such scenes of violent resistance to lawful authority are of very rare occurrence in this country in modern times. Scotland is a land of peace and order, and therefore of liberty; for without peace and order there can be no true liberty. But this happy condition of our country would very soon be reversed if any person or class of persons were permitted with impunity to take the law into their own hands, and for the purpose of promoting their own rights and interests, or what they believe to be their own rights and interests, to set at defiance the orders of a Court of Justice. It becomes necessary, therefore, to check such lawless proceedings at once, and the Court are, after consideration, unanimously of opinion that they must pronounce against each of you a sentence which, in the circumstances, may perhaps be thought too lenient, but which will yet sufficiently mark our sense of the serious character of the offence you have committed—a sentence of two months' imprisonment. We are all the more inclined to take this lenient course because we think you have been probably misled by very bad advice—the advice of persons who, if they are not evil-disposed and malevolent, are open to the charge of almost incredible folly. I would counsel you earnestly to shun such erring guides for the future if you would avoid much more serious consequences than you have experienced in the present. If anyone suffers a legal wrong the law will redress it, and the Courts are open to rich and poor alike. If the law is wrong, and ought to be altered, the only remedy is to be found in legislation; and in both Houses of Parliament there is no lack of men who will champion the poor man's cause and secure him justice. The one thing, above all others, that cannot be tolerated in a civilised community is resistance to the law and disobedience of judicial orders and decrees. This must be checked, if necessary, by far more severe penalties than the sentence we have now pronounced.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the petition and complaint, with the answers for the respondents, and the proof adduced, and heard counsel thereon for all parties, Find that the said respondents have each and all of them broken the interdict granted by Lord Kinnear on 6th July 1882: Therefore decern and adjudge the said respondents to be each imprisoned for the space of two months from this date, and thereafter to be set at liberty; and for that purpose grant warrant to officers of the Court to convey the said respondents from the bar to the prison of Edinburgh, thereafter to be dealt with in due course of law."

Counsel for Complainers—J. P. B. Robertson—A. Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents — D.-F. Macdonald, Q.C.—M'Kechnie—G. Wardlaw Burnet. Agent—Robert Emslie, S.S.C.

Thursday, March 15.

SECOND DIVISION.

BONTHRONES *v.* BONTHRONES.

Evidence—Proof of Mandate by Parole—Revocation of Will.

In an action of proving the tenor of a will of which the execution was admitted, *held* competent to prove by parole that the will had been destroyed by the person in whose custody it was, at the request of the testator.

Proving the Tenor—Trust-Disposition and Settlement—Casus amissionis.

Held, on a proof, that the will of a testator had been destroyed at his request, made with a view of revoking it, by the heir-at-law, in whose possession it was.

This was an action of proving the tenor of a trust-disposition and settlement which had been executed in 1868 by Mr John Bonthrone, a brewer and maltster in Auchtermuchty. By this deed he conveyed his whole heritable and moveable estate to trustees, with directions to hold it for behoof of his son and daughter (the latter being then married) equally in liferent, and their children, equally between the two families, in fee. In the event of both of his children dying without issue his trustees were to convey a certain heritable property to a nephew John Bonthrone, one of the pursuers in the present action, and thereafter to realise his whole other heritable and moveable estate and divide it equally amongst certain nephews and nieces, including the pursuers John Bonthrone and Mrs Morgan.

Mr Bonthrone died on 11th October 1881. After Mr Bonthrone's death no will was found. His son predeceased him unmarried, and his daughter, Mrs Ireland, who resided at St Andrews, took up her father's whole succession on the footing that he had died intestate, being served his nearest lawful heiress in general, and decerned his executrix-dative *qua* next-of-kin.

The present action was raised on 13th Septem-

ber 1882 by John Bonthrone and Mrs Morgan, the nephew and niece of the testator above mentioned. They called as defenders, *inter alios*, Alexander Bonthrone, a brother of the deceased, and Mrs Ireland.

The pursuers produced a draft, obtained from the deceased's law-agent, of the trust-disposition. Neither the execution of the deed nor the fact that it was in the terms set out in the draft produced were disputed by the defenders.

The averments of the parties with regard to the *casus amissionis* of the deed were as follow:—"(Cond. 3) The principal deed was retained in the possession of the truster himself, who continued till his death to reside in Auchtermuchty. The said trust-deed was kept in a box which contained the truster's private papers, which was constantly locked, and the key carefully kept by the truster himself. The box itself stood in a press in the truster's bed-room, and directly opposite the bed. (Cond. 4) The said box, containing said deed and other papers was in the press in the truster's bed-room at the date of his death on 11th October 1881. The pursuers have ascertained, and now aver, that the said box and its contents were removed from the truster's house a few days after his death by the defenders Mr and Mrs Ireland, and taken by them to St Andrews. The trust-deed cannot now be found, and the pursuers believe and aver that it has either been lost or destroyed. The present action has therefore been rendered necessary." (*Answer to articles* 3 *and* 4)—Admitted that the said John Bonthrone continued till his death to reside in Auchtermuchty. *Quoad ultra* denied. Explained that the said John Bonthrone was the holder of a large number of shares in the City of Glasgow Bank, and almost the whole of his estate, which amounted to about £ , was exhausted by the payment of calls. Some time after the failure of the bank he handed the trust-disposition and settlement which had been executed by him, along with certain title-deeds, to his daughter, the defender Mrs Ireland, who resides in St Andrews, at the same time saying to her with regard to the settlement, 'Take that away out of the road; it is my will.' On various occasions after that he spoke about executing a settlement, and on Mrs Ireland reminding him some time before his death that the one which had been executed by him was in her possession, he expressed surprise at hearing that it was still in existence, and said he thought she had 'put it out of the road.' Mrs Ireland proposed to bring it back to him, but he said 'No; it is of no use now; don't bring it back here; burn it.' Mrs Ireland stated that she would rather bring it back, and let him burn it himself; but he replied, 'No; I do not want to see it again.' Mrs Ireland then promised to burn it on her return home, and she accordingly did so in accordance with his instructions. After the failure of the City of Glasgow Bank the said John Bonthrone stated, on various occasions and to several persons, that he would not make any will, because he had then so little to leave, and that the defender Mrs Ireland was to succeed to all he had. At the time he said so he believed that the will referred to in the summons had been destroyed."

The pursuers pleaded—"In respect of the said trust-deed and settlement having been either lost or destroyed, the pursuers are entitled to decree as concluded for."

The defenders pleaded—"(1) The trust-disposition and settlement libelled having been destroyed during the lifetime of the said John Bonthrone, in accordance with his instructions to that effect, the present action cannot be maintained. (2) The pursuers' averments in regard to the said trust-disposition and settlement being unfounded in fact, the defenders are entitled to absolvitor from the conclusions of the action, with expenses."

The Lord Ordinary (ADAM) having made avizandum to the Inner House in common form, a proof before answer was allowed. The material facts disclosed at the proof are fully detailed in the opinion of Lord Craighill, before whom the evidence was led.

Argued for pursuers—The question of adminicles not being in dispute, there remained two heads of contention on the question of the *casus amissionis*—one of fact and one of law—(1) Whether the testator gave a verbal mandate to destroy his will? (2) Whether it was competent to prove such a mandate by parole? The *onus* of proving the mandate was on the defenders, and they had failed to discharge it, for the proof of the mandate rested only on the evidence of one witness, and she the most interested party, and the evidence of a person in this position should be open to no suspicion. Here it was not so, for the proof showed that she concealed the destruction of the will from everyone, even the testator himself and her husband. This was not a case of acting as the mere hand of the testator, but of acting *ex intervallo*. The revocation relied on was a nuncupative revocation of a formal will. There was no authority that a mandate of this kind could be proved by parole. It was an open question whether a verbal mandate to buy or sell goods of the smallest amount could be so proved. The revocation of a will was of much higher importance.

Authority—*Edmonstone* v. *Edmonstone*, June 7, 1861, 23 D. 995.

Argued for defenders—It being quite conceded that the *onus* of proving the mandate lay on the defenders, they had discharged it by the evidence they had led. There was a dearth of evidence on the point, but where the only available evidence was adduced it must be accepted, unless the credibility of the witnesses could be impeached. There was no authority that a mandate to revoke a will could not be proved *prout de jure*. In England it had been held that the contents of a missing will could be proved by the parole evidence of one credible witness.

Authority—*Sugden* v. *Lord St Leonards*, L.R., 1 P.D. 154.

At advising—

LORD CRAIGHILL—The present is an action of proving the tenor, the deed to be set up being a trust-settlement executed by the late John Bonthrone, brewer, Auchtermuchty. The pursuers are a nephew and a niece of the testator, and they were among the beneficiaries to whom, should his son and daughter die childless, the fee of his estate was to be conveyed by his trustees. The defender Mrs Ireland was also a beneficiary, but her interest was limited to a liferent. Her brother had predeceased the testator unmarried; she thus would have been sole liferentrix, and should she leave children they at her death would have inherited the whole succession.

These, stated generally, were the rights created

by Mr Bonthrone's will. In the case of its revocation or cancellation, failing the execution of another, Mrs Ireland as his only child would inherit all. Thus, though she had an interest, and a large interest, under the will, she not only would not be a loser but would be materially benefitted by her father's intestacy.

Mr Bonthrone prior to the failure of the City of Glasgow Bank in 1878 was a very rich man, but he held 23½ shares of the stock of that bank, and the consequence was that a large part of his fortune, which then amounted to about £100,000, was lost. For some time, indeed, it was doubtful whether all would not be swallowed up; but parties are agreed that from £10,000 to £15,000 was left untouched, and of this sum he was possessed at the time of his death.

Mr Bonthrone died on 11th October 1881. No will was produced, and Mrs Ireland proceeded to take up the succession as next-of-kin and heir-at-law; but her right so to do came to be challenged by the pursuers as contingent beneficiaries under the will of 1868, and as that will could not be discovered, they in September 1882 raised the present action in order that the tenor of the deed, which they say never was revoked or destroyed by the testator or with his authority, might be established.

In a case of this kind two things have to be proved—adminicles showing the terms of the deed, and *casus amissionis*. The former here are not in controversy, the draft of the will as executed having been recovered from Mr Oliphant, writer in Anstruther, by whom the will was prepared. The *casus amissionis*, consequently, is the sole subject of contention, and upon that parties joined issue on the record. The case of the pursuers on this point is set forth in articles 3 and 4 of their condescendence, and that of the defenders in the answer to these articles. The condescendence says—[*reads articles* 3 *and* 4 *quoted above.*]

Proof before answer was allowed, and evidence for both parties was led before me in terms of the interlocutor of the Court. They subsequently were heard upon the import of the proof; and this is the question which is now to be decided by the Court.

There are two grounds on which the pursuers contend that they are entitled to prevail—one is the incompetency of parole testimony to prove the mandate or authority of the testator for the destruction of the will; and the other, that even if such evidence be competent, that the proof which has been adduced is insufficient to prove the case of the defenders.

The first of these contentions is in my opinion erroneous. The ordinary rule is that mandate is proveable by witnesses, and it was conceded in he argument that if the defenders' case had been that the testator himself destroyed the will, or that it was destroyed by another acting on his authority in his presence, the evidence of witnesses would have been competent testimony. But there is no principle by which such a distinction can be supported. The logical result of the argument would be that the cancellation by the destruction of a will could, like its revocation, be proved only by writing under the hand of the testator. This, however, was not maintained, and the opposite rule has always been recognised, in proof of which reference may be made to two out of many cases that have been before the Court—*Falconer* v. *Stephens*, 12th July 1849, 11 D. 1338; and *Winchester* v. *Smith*, 20th March 1863, 1 Macph. 685--which were brought under my notice by your Lordship in the chair.

Coming now to the second of the propositions maintained on the part of the pursuers, the first thing for observation is, that there can be no legal insufficiency, for there are more than the requisite number of witnesses. The insufficiency, therefore, must be determined by the effect produced by the proof on the mind of the Court. That is the criterion for judgment. If Mrs Ireland, and those by whom material parts of her evidence are said to be corroborated, be believed, the case of the defenders is proved. If, on the other hand, the story of George Bonthrone, the principal witness for the pursuers, be believed, or if, though not producing conviction, it produces such an impression as to leave the Court in uncertainty, the pursuers will be entitled to judgment. There are thus two alternatives, on either of which the pursuers may prevail—the reason for which they may claim the benefit of the latter being that the *onus* in the circumstances rests on the defenders.

These being the conditions on which our decision of the case depends, the first thing for consideration is the evidence of Mrs Ireland, viewed apart from that of the other witnesses for the pursuers. Its tenor is familiar to all who are familiar with the case, and therefore for the sake of brevity I shall refrain from quotation. But it may be observed that by it the statement of the defenders on record is fully supported. Is she to be believed? My feeling is that her evidence has strong claims to credit—first, because the cancellation of the will of 1868 was natural and reasonable, and therefore probable in the circumstances; secondly, because her evidence is consistent throughout; and thirdly, because there is corroboration of material portions by apparently credible witnesses.

Taking these particulars in their order, the first at once suggests the consideration that in 1868 Mr Bonthrone was a rich man, and that in 1879, of the £100,000 which he had previously possessed, from £10,000 to £15,000 was all that remained. The liferent of the larger sum might reasonably be thought a sufficient, that of the latter with at least as much reason might be, and by most probably would be, thought an insufficient provision for Mrs Ireland, who was his only child. The change in his fortune could not but force on Mr Bonthrone the question whether there ought not to be a change upon his will, and this is not a thing which is left merely conjectural. There is clear proof upon the point. Mrs Ireland depones that she had heard her father say to Mr Fleming that he would never make another will, as the City of Glasgow Bank had made his will. She adds that she also heard her father say "I would get all that was left. This was after the bank had failed."

Mr Oliphant, the agent who prepared the will, gives evidence on the same subject. Being asked —"Had you any conversation with Mr Bonthrone with regard to his trust-settlement after the failure of the City of Glasgow Bank?—Depones, The first time I saw him after it, I stated to him that his circumstances were so altered that he should make a new deed. He said the deed was

now useless. I afterwards had a conversation with him on the same subject, which was after he had been charged to make payment of the second call, and after I had gone to Edinburgh and satisfied myself as to the state of his affairs. On that occasion I repeated to him my opinion that his former deed was now unsuitable, and that he should revoke it and make a new one His answer was, 'The City of Glasgow Bank has made my 'deed,' and that there was little over. Upon which I replied that the less there was over there was the more necessity for making a new deed, as his friends all knew the terms of the former one, and there would be a chance of a disturbance afterwards. He said he would either make a new deed or destroy the old one. I said that by destroying the old deed there might still be a disturbance, while the expense of a new deed would be more than covered by the saving on the inventory duty. I left him with the impression that he would either make a new deed or destroy the old one. I had no further communication with him on the subject." Here we have it proved not not only that Mr Bonthrone's agent, but that Mr Bonthrone himself, his circumstances being so altered, was sensible that the will he had made was unsuitable. The other particular of which we are informed by Mr Oliphant is not less important, for by it we are made aware that though revocation was suggested, the destroying of the will was also one of the ways by which the result desired could be, and more probably than by revocation would be accomplished. Revocation was the suggestion of the agent; but the destroying of the will, which was his own suggestion, was obviously that which Mr Bonthrone preferred.

On the second particular, the consistency of all parts of Mrs Ireland's evidence, no observations are required. The contrary was not made a point in the argument.

The third particular is by much the most important, and the first point on which there is some corroboration is the delivery of the will to Mrs Ireland on a visit to her father in the summer of 1879, and her bringing it to St Andrews, where, as she says, it was afterwards destroyed. What I refer to occurs in the evidence of Mr Ireland, where he depones—"I remember my wife coming home from Auchtermuchty on one occasion after the failure of the City Bank bringing some title-deeds with her. She told me she had brought them and her father's will too. (Q) Did she tell you what her father had said when he gave it to her. (A) To take it away because it was no use now, and he expected the agents of the liquidators through to see about his affairs. My wife did not show me the will. I told her I did not want to see the will, and gave her no encouragement whatever to show it to me. I assumed the same attitude then that I had taken formerly—that I wanted to know nothing about it. I cannot give the date when she brought these documents home; but it would be when the liquidators were about to come across and see about Mr Bonthrone's affairs."

The corroboration afforded by Mr Fleming is much more material. It appears that on 26th October 1881, which was only a fortnight after Mr Bonthrone's death, Mr Fleming wrote to Messrs Davidson & Syme, W.S., the agents of the liquidators of the City of Glasgow Bank, a letter, and in it he informs them—"Mr John Bonthrone, of Auchtermuchty, died recently, and I am advising Mrs Ireland, his only child. He has left no settlement, having burned the one he made, in disgust at having so little to leave. I have advised her to apply for the office of executor and serve heir to the heritage, and where he died uninfeft to do so with a specification."

Who told Mr Fleming that the will had been burned? Not Mrs Ireland; for up to this time there was no one to whom the fact had been communicated by her. Mr Fleming answers this question—"Mr Bonthrone also told me—I cannot say when—that the will he had made, and of which he had spoken, had been destroyed. I would not like to give the date of that, but I am convinced that he told me it had been burned—that is [as this witness inferred] burned by himself." The pursuers try to minimise the effect of this passage by a criticism. They say that at the time this statement was made to Mr Fleming the will, though according to Mrs Ireland's testimony it had been delivered to her, had not been destroyed. But Mr Bonthrone believed the contrary. He intended that the order he gave when the will was delivered to his daughter should be taken as an order to destroy it, and he was surprised when he afterwards heard that this order up to that time had not been obeyed. This is shown by what passed between him and her in July 1881, as related in the proof. We have thus the evidence of Mrs Ireland, and through Mr Fleming of Mr Bonthrone, as to the destruction of the will. The honesty of Mr Fleming and the sincerity of his belief are hardly open to question. His letter to Messrs Davidson & Syme is real evidence of the accuracy of his recollection and of the honesty of his testimony. This, at any rate, is my persuasion. Counsel for the pursuers also suggested that Mrs Ireland's story was more or less untrustworthy, because it was left so long untold. That she would have acted more wisely had she sooner communicated the burning of the will may be allowed; but her reserve appears to me to be no warrant whatever for discrediting her testimony. The pursuers also say that Mrs Ireland is an interested witness; and this is so no doubt; but so are all the Bonthrones who have been examined; and if there is to be a consequent deduction from her credibility, there must be a similar deduction from theirs. Thus the equilibrium is preserved.

And before leaving this subject it seems to me right to make another observation. Had she been unconcerned with the subject-matter of the suit, she could not have given her evidence in a way more calculated to win the confidence of the Court. She, as I thought, exhibited a desire to meet every question fairly, and to answer it honestly. Nor, as already noticed, was there any one part of her evidence in conflict with that to which she elsewhere had sworn. Entertaining these views, were there no more evidence than hers and that of the witnesses for the defenders, I could not doubt that the defenders were entitled to prevail. But there is more evidence, and its character and effect comes now to be the subject of consideration. That given by George Bonthrone is all which is really material. Without him—whatever it may be with him—the proof of the pursuers would in my opinion count for little in the decision of the question awaiting determination.

It will be remembered that Mrs Ireland swears

that her father's will was delivered to her in June 1879, and that thenceforward it never passed out of her keeping-place in St Andrews till it was destroyed. In contradiction of this statement George Bonthrone depones — "I read part of the will on one occasion, but not it all. That was about four days before the Whitsunday term of 1881. I remember that, because it was just about that term that my uncle was laid down with a severe illness. It was three or four days before that that I was in the box and saw the will." If this be true, the evidence of Mrs Ireland must be false. The statement by the one and the statement by the other cannot live together. Having already spoken of the credit apparently due to Mrs Ireland, let us see now what tests of credibility may be applied to George Bonthrone, and what results from their application.

In the first place, whatever else may be said of it, his story, as related in the passage which has been quoted, is highly improbable. The idea that he should go with his uncle to look for papers, that he should leave his uncle to make the search for which they had gone to the bedroom, and that in place of giving his assistance in the search he should take out his uncle's will from the box in which it was kept and read it before his face, are proceedings so extraordinary as to be well nigh if not altogether beyond belief. Nevertheless, George Bonthrone's opinion is that there was nothing in the least odd about it; upon which the least that can be said is that the moral sense of the man who so thinks of such an impropriety is not much to be trusted.

In the second place, what does he say about the will?—"I read part of the will on one occasion, but not it all. That was about four days before the Whitsunday term of 1881. I remember that, because it was just about that time that my uncle was laid down with a severe illness. It was three or four days before that that I was in the box and saw the will." He further says—"I had never seen it to learn anything of its contents until May 1881. (Q) What part of the will did you read on that occasion? (A) I just read as much as to know what it was—that it was my uncle's will. It was a long paper—how long I cannot say, but more than two pages long. I began at the beginning and saw it was his will, and then I went on to the end and saw it was his will. I cannot say how much I read. (Q) Did you read the first page through? (A) Yes, I think I would; indeed I am sure I did, but how long it would take me it is impossible to say. (Q) Why did you break off and go on to the end? (A) to see that it was his will. (Q) What was it at the end of the deed that showed it to be a will? (A) I saw the witnesses had signed it. I did not read any part of it except the signatures—I mean at the end. (Q) What was it in that document, so far as you read it, that informed you that it was a will? (A) The outside of it told me that it was a will—the backing." He mentions the destination of the testator's property which he says he saw in the deed, and then he thus depones—"I cannot say at what part of the deed I saw that provided for. I rather think it was in the middle of the deed. (Q) Why do you think that? (A) Because I read it over. I did not know to what part of the deed to look for the destination of his property. Still I repeat that in my cursory glance I discovered that provision. I was not many minutes at the will altogether. I cannot say how many, perhaps five or ten. We were in the room a good while. (Q) What led you to go to the end of the will? (A) I just glanced over the whole and read it. I had no purpose in looking at the end. I had no purpose in seeing who were the witnesses. I cannot say whether or not there was a signature at any other part of the deed than the end."

Let this evidence be scrutinised and see the result—(1) The witness says that he saw a long paper more than two pages long, then he says he read over the deed till he came to the destination of the testator's property, which he rather thinks was in the middle of the deed. Now, the will as shown by the testing-clause in the summons covered 15 pages, which from the length of the draft as printed must have been folio pages, and the destination could not be reached till ten or eleven of the 15 pages had been passed. Anyone who read or glanced at, or even turned over, so many pages, in the most part filled with descriptions of the heritages conveyed, must have recollected better than to describe the will as "a long paper—how long I cannot say—but more than two pages long." Even were there nothing more than this, it would be a reasonable thing to doubt whether George Bonthrone had seen and read the will. But there is more to raise a doubt upon the point; for (2) Being asked—"What was in that document that informed you it was a will?" he answered—"The outside of it told me it was a will." How can this be reconciled with his statement—"I cannot say what the title on the back was of the document I saw in May 1881. I cannot tell a word of it. I saw Mr Oliphant's name at the foot." If he learned from the backing that the paper was a will, he must have been able to give some of the words by which he was led to this conclusion; but, as he says, not one of these is in his recollection.

(3) Following the answer that the outside of it told the witness it was a will comes the question—"And in the inside?"—to which he replied—"That he was bequeathing his money first of all to his daughter, and then to the families of Alexander and James. That was not on the first page, but what page it was on I am unable to say. (Q) Did you read in it the words that he bequeathed the money to his daughter? (A) I looked over it cursorily. (Q) But you read those words in it, did you not? (A) Yes. (Q) Are you sure of those words—'bequeath,' for instance? (A) I cannot speak to the word 'bequeath.' (Q) What made you believe it was a will then? (A) I cannot tell; I read the will and saw what it was. It was the terms of it that made me believe it was a will. I mean that money was to go to Amelia Bonthrone during her life, and then it was to revert to the families of Alexander and James Bonthrone. I knew all that years before May 1881." All this appears to me eminently suspicious and unsatisfactory, for, in the first place, the words which he says he saw are not in the deed; in the second place, his representation of the provisions of the deed are erroneous; the destination is not to the children of James and Alexander Bonthrone on the death of Mrs Ireland and her brother, but it was to her and her brother's children, on whose failure only it was to go to nephews and nieces of the testator, children of his brothers James and Alexander. This, like other things in his evidence, coupled

with his manifest hesitation and vacillation, almost preclude the idea that the will was seen and read by Bonthrone.

(4) And there is yet another contradiction of what he says in one place by what he says in another, which seems to be fatal to his credit. He depones—"I cannot say when I first saw it; but it must have been before the failure of the City of Glasgow Bank. I saw it in a tin box like those lawyers use, which had his name on it, and lay in a box in a press upstairs. I had frequent occasion to be looking into that tin box on other errands, and in turning over the papers often saw the will." This is his account of the matter, but in answer to the counsel for the pursuers he swears—"I cannot charge my memory with having seen the tin box on any occasion previous to the one to which I have spoken. I may have seen it." No ingenuity can reconcile, no charity can palliate, this contradiction.

There are other statements in his evidence which suggest observations unfavourable to the credit of the witness; but on these I do not stop to comment, thinking that enough has been said to justify the conclusion at which I have arrived. At the close of his examination I was in doubt as to the truthfulness of his story. Further consideration of all he has said has produced on my mind the conviction that he is not to be believed. And with his credit the case of the pursuers falls to the ground.

For these reasons I am of opinion that the defenders are entitled to the judgment of the Court.

Lord Young—It is admitted that the deceased John Bonthrone on 26th September 1868 duly executed a trust-disposition and settlement of the tenor libelled, and that he had it in his custody for many years, and that on his death in October 1881 it was not forthcoming. So far the case is clear in point of fact, and if there were no more in the case—that is, if we had no further information about the deed—I apprehend that the law would be clear also. For as a man may effectually cancel or revoke his will by destroying it, when it is shown that a man duly executed a will and had it at the time in his custody, and it is not forthcoming at his death, the legal presumption, in the absence of evidence to the contrary, is that he destroyed it *animo revocandi*. This, indeed, is only to presume, in the absence of anything to the contrary, that what may have happened lawfully (the disappearance of the will) did not happen, and to decline without evidence to attribute it to any tortious act. If the law were otherwise, a man plainly could not cancel his will by merely destroying it or otherwise than by a written revocation—at least if there were available means of proving its contents.

But the case in hand is not left to the presumption of law applicable to the facts which I have noticed as admitted, although that presumption may be, and I think is, material in considering the evidence submitted to us on the issue of facts raised by the record. The pursuers aver that the box containing the will was removed from the house of the deceased a few days after his death by the defenders Mr and Mrs Ireland, and destroyed by Mrs Ireland without the deceased's authority. There is no doubt of the relevancy of this averment, and that proof of it would displace the presumption to which I have referred, and entitle the pursuers to have the will replaced and set up by a decree of proving the tenor. The defenders not only deny the averment, but on their own part allege that in June or July 1881 Mrs Ireland burned the will by desire of the deceased, who meant and intended so to cancel and revoke it. On the issue thus joined, evidence was led before Lord Craighill, and on that evidence we have now to decide whether we shall or not pronounce decree of proving the tenor.

Having positive although conflicting averments and evidence regarding the removal of the will from the deceased's possession, and its subsequent destruction, the presumption which would have prevailed in the absence of all information beyond the fact that a will once existing in the maker's possession had disappeared, loses much, although I think not all, of its importance. Without any averments or evidence conflicting with it, that presumption would indeed as I have said have been conclusive of the case. As it is, we have to determine on the evidence what is the truth of the matter? Was the will destroyed by Mrs Ireland in the lifetime of the deceased by his order, given *animo revocandi*, or was it not? I think our answer to this question depends on whether or not we credit Mrs Ireland's own evidence, not, of course, taking it as standing alone, but together with the circumstances which go to support it and confirm it on the one hand, and the testimony which goes to contradict it on the other. If we reject her testimony as untrue or unreliable, I have certainly no idea that it is allowable to fall back on the presumption which would have prevailed in the absence of any account of the disappearance of the deed. On the other hand, if we see reason to rely on the truth of the account which she gives of the matter, I think we must act upon it, for it does not contradict the presumption which must have prevailed in the absence of evidence, but is in perfect accord and harmony with it. In short, if Mrs Ireland tells the truth, the will was not tortiously removed from the deceased's possession, and tortiously destroyed, but was taken by her and dealt with according to his directions—in other words, everything was done rightfully and lawfully, which is exactly what the law would, in the absence of any evidence, have presumed. But her story, although not without support from pregnant circumstances, such as the serious diminution of the deceased's fortune, and consequent natural desire to give all he possessed to his only child, as the law of intestacy would do for him, and his expressed intentions to that effect, together with positive statements by him that he had consequently destroyed his will, is undoubtedly contradicted by the positive evidence of other witnesses. In these circumstances I think we must greatly rely on the verdict of Lord Craighill, before whom the witnesses were examined, and understanding from him that he credits Mrs Ireland's account of the matter and disbelieves the evidence of the witnesses who contradict her, and seeing no sufficient reason for differing from, but strong grounds, as I think, for agreeing with him, I must act accordingly, and so refuse decree of proving the tenor, which would import that the will subsisted unrevoked.

I need hardly say that I have not overlooked the fact that it was Mrs Ireland's interest to destroy the will, that is to say, that her father should die

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