Gardner and Logan being employed to wind up his affairs, they shall only be entitled to charge one-third of the usual professional fees and commission for doing that business."

Mr Scott left a trust-disposition and settlement by which he nominated William Watson, John Clanachan Gardner, and David Cunningham Logan, trustees for carrying out the purposes therein set forth. The trustees accepted office, and employed the firm of Scott, Gardner, & Logan as law agents in the trust. Prior to 28th March 1890 the said trustees had realised, ingathered, and nvested the whole estate. Thereafter the trust subsisted only for the following purposes—the payment of certain annuities and provisions, and the accumulation of the balance of income for behoof of the residuary legatee until he attained twenty-five years.

This special case was presented (1) by the trustees, and (2) the residuary legatee, in which the following questions were submitted for the determination of the Court:—"(1) Did the clause in the contract of copartnery, and the relative provision in the trust-disposition and settlement, as to the payment of Messrs Gardner and Logan, cease to be operative as on 28th March 1890? (2) Assuming that the said John Clanachan Gardner and David Cunningham Logan continue to act as trustees and also as law agents in the trust, will they be entitled to charge and be paid out of the funds of the trust fees and commission for work done subsequent to 28th March 1890, and if so—1st, Will they be entitled to charge and be paid full fees and commission; or 2nd, Merely one-third thereof? (3) Assuming that the said John Clanachan Gardner and David Cunningham Logan resign office as trustees, and continue to act as law agents in the trust, will they be entitled to charge and be paid full fees and commission from the date of said resignation, or merely one-third thereof? (4) In the event of question No. 1 being answered in the negative, will the restriction as to fees and commission continue to be operative beyond 18th June 1893, being five years from 18th June 1888?"

After hearing argument on the competency of the Special Case.

At advising—

LORD PRESIDENT—I do not think that this is a case which we can possibly entertain under the 63rd section of the Court of Session Act, which provides that where parties are interested either personally or in some fiduciary or official character in the decision of some question of law, and are agreed upon the facts, and dispute only on the law applicable thereto, it shall be competent for them to present a special case setting forth the facts upon which they are agreed, and the question of law upon which they desire to obtain the opinion of the Court.

It is to be observed that it is not sufficient that the parties should be agreed upon the facts, but it is also essential that they should have a direct and immediate interest in the question of law.

In the present case the questions are entirely hypothetical, and are suited for the opinion of counsel and not for the decision of the Court.

LORDS ADAM and KINNEAR concurred.

LORD M'LAREN was absent.

Counsel for the First Party—Dickson—Abel. Agent—D. Lister Shand, W.S.

Counsel for the Second Party—M'Kechnie—Aitken. Agents—Carmichael & Miller, W.S.

Wednesday, June 3.

SECOND DIVISION.

[Sheriff of Lanarkshire.

LIFEBOAT COMPANY, LIMITED *v.* CHAMBERS BROTHERS & COMPANY.

Patent—Validity of Patent—Prior Publication.

Letters-patent for a boat suitable for use as a lifeboat with collapsible canvas gunwale rendering its stowage easy were taken out in November 1887. In September and October the patentee had exhibited such a boat in the basin at one of the shipbuilding yards at Glasgow, at the Royal Albert Docks London, and at Portsmouth. Invitations were issued to these exhibitions by the inventor, no precautions were taken to secure secrecy, and accounts of these exhibitions with a description of the boat exhibited appeared in the public press. *Held* that these exhibitions and descriptions amounted to prior publication, and were such as to invalidate the letters-patent.

Upon 5th November 1887 Robert Chambers, shipbuilder, and William Liddell, agent, both of 2 Oswald Street, Glasgow, applied for and obtained a grant of letters-patent for "'improvements in the construction of lifeboats,' their invention being the combination in a boat, suitable for use as a lifeboat, of a lower part or shell or hull, constructed of iron, steel, or wood, or other material, and an upper part of a flexible material attached by its upper edge to the rail and by its lower edge to the shell or hull, the boat being by preference fitted with water-tight compartments, so that when not in use the upper part may be folded down, and when in use it may be raised by self-locking or self-supporting stays; also the use in such a boat of folding mechanism made of jointed stanchions and jointed stays for the purpose of enabling the upper flexible part to be raised or lowered, and fixed or retained in either position, and further, the employment of the upper rail with rowlocks all as described in the said letters-patent."

The Lifeboat Company, Limited, 205 Hope Street, Glasgow, acquired right to the said letters-patent conform to assigna-

tions in their favour registered 13th September 1889, and in December 1889 brought an action in the Sheriff Court at Glasgow against Chambers Brothers and Company, boatbuilders, Dumbarton, to have them interdicted and restrained from infringing the said letters-patent.

The defenders pleaded, *inter alia*—"(1) The invention described in the letters-patent and specification founded on was not novel at the date of the application for same, and was publicly known and used prior to said date."

A proof was allowed, from which it appeared that a boat constructed on principles similar to those described in the specification of said patent, was publicly exhibited by Robert Chambers at Glasgow on the 2nd of September 1887 in the basin at the shipbuilding yard of Messrs D. & W. Henderson, shipbuilders, Glasgow, before a number of Board of Trade officials, shipowners, and others, and the construction of the boat was fully described in the *Glasgow Daily Herald* and *North British Daily Mail*, both published in Glasgow, in the issues of 1st September 1887. The boat was also exhibited and tried publicly at the Royal Albert Docks, London, on 15th September 1887 before a number of shipowners, &c., and a report of said trial along with a description of the boat appeared in the newspaper *Invention* of 24th September 1887. A description of the boat also appeared in the *Lennox Herald*, published in Dumbarton on 3rd September 1887. It also appeared that an exhibition had taken place at Portsmouth in October 1887, as described in the *Lennox Herald* of 15th October 1887.

The nature of these exhibitions is fully set forth in the note of the Sheriff-Principal.

Upon 17th April 1890 the Sheriff-Substitute (GUTHRIE) repelled the defences, found that the defenders had infringed the pursuer's patent, and granted interdict as craved.

"*Note.*—The pursuers—who are in right of Messrs Chambers and Liddell, the original patentees—claim to be patentees of an invention for constructing lifeboats in such a way as to allow of their being stowed on the deck of a sea-going ship in a limited space, and the method consists in the combination of a lower part or shell or hull, constructed of iron, steel, wood, or other material, and an upper part formed of a flexible material attached by its upper edge to a rail and by its lower edge to the shell or hull, as described and shown in drawings. . . .

"The respondents plead that the letters-patent are void in respect (1) of prior publication. . . .

"The prior publication, on which the pursuers found, consists of publications of accounts of the invention in the *Glasgow Herald* and other periodicals in connection with experimental trials made at Partick and London, and of the disclosure to the public made at those trials themselves. . . .

"The question whether Robert Chambers excluded himself from the benefit of patenting his contrivance by the exhibitions made at Partick and London, is in my view a very narrow and delicate question, and it is only with difficulty that I am able to sustain the validity of the patent. I do so because I do not think that those who are assailing the patent have satisfactorily proved that all or any who witnessed the experiments or trials were thereby made so acquainted with the construction of the vessel that they could have built one similar. I confess, however, that I am doubtful of this fact, and that the trials, especially the double trials in Partick and London, are more like advertisements than experiments. Even so regarded, however, it may be admitted that an advertisement is not necessarily a disclosure to the public of the idea and method of carrying out a new invention. It is clear that the descriptions in the public prints do not disclose the nature of the invention in the sense necessary to defeat the patent." . . .

The defenders appealed to the Sheriff (BERRY) who on 15th December 1890 pronounced the following interlocutor—"Recalls the interlocutor appealed against: Finds under reference to note that in November 1887, when the letters-patent founded on by the pursuers were applied for, the invention to which they relate had been published and made known in this country and was not novel; therefore finds that said letters-patent are invalid: Refuses the prayer of the petition: Assoilizes the defenders therefrom, and decerns, &c.

"*Note.*—. . . The application for the patent was made on 5th November 1887. Various defences are stated on behalf of Chambers Brothers & Company. The only one with which I think it necessary to deal is that embodied in their first plea, that 'the invention described in the letters-patent and specification founded on was not novel at the date of the application for same, and was publicly known and used prior to said date.'

"In September 1887 the invention was not provisionally protected. On the 1st of that month a paragraph headed 'New Patent Lifeboat' appeared in the *Glasgow Herald*, giving a description of the boat with various particulars of its construction, and intimating that there was to be a trial of it in Glasgow on the following day. It was said, 'The boat is 26 feet long, 7 feet wide, 3 feet 4 inches deep, with a displacement of 11 tons, and gives accommodation to 40 people. The depth of the boat is 14 inches, but above that is a canvas washboard fitted with galvanised iron stanchions and rails, and hinged to the gunwale of the boat. When lifted up perpendicular the washboard locks itself into position with self-acting stays.' The notice goes on to give further details and concludes that 'the new lifeboat merits inspection.' The *Lennox Herald*, a newspaper published at Dumbarton, contains in its issue of 3rd September a description of the boat in the same terms as that in the *Glasgow Herald*. As intimated in the notice in the *Glasgow Herald*, a test, or (as several witnesses term it) an exhibition of the boat took place on

2nd September in the slip dock of Messrs D. & W. Henderson, shipbuilders, at the mouth of the Kelvin, the boat having been brought up the Clyde for the purpose from Dumbarton, where it had been built. What purports to be a description of the trial or exhibition is given in the *Glasgow Herald* of 3rd September. The proof shows that the boat was filled with about forty men from the shipyard, was rowed up and down the basin in presence of a number of spectators, and was rolled from side to side to test its stability; and also that full opportunity of examining it was given to all who were present. Mr Liddell says that invitations to various persons to witness the trial were given by Mr R. Chambers. Certainly no attempt was made to keep it secret. Among those present were officials of the Board of Trade and of the Admiralty, and gentlemen connected with or interested in shipbuilding. Several of them have been called as witnesses in the case, and among these Mr David White, a boatbuilder in Glasgow, who appeared as a witness for the pursuers, said, on cross-examination, that after he saw the boat on the Kelvin he would have had no difficulty in constructing one like it. He says, indeed, that he paid a second visit to Messrs Henderson's dock on the following day, and looked at the boat very particularly. But he seems to have done so without any special leave being asked for, and apparently without any obligation, express or implied, of secrecy. While the boat was in the dock there seems to have been nothing to prevent any of the workmen or officials in the yard from examining her and obtaining full particulars as to her construction. John M'Culloch, dock foreman, shipwright in Messrs Henderson's yard, says that the boat lay in the yard for one, if not two days, that they gave her some small repairs, and that while she was there everybody had an opportunity of examining her who cared to look at her. Subsequently the boat was removed to London, and there a second exhibition of a similar nature to that in the Kelvin took place in the Royal Albert Dock on 15th September, when different scientific men and representatives of the Board of Trade and the Admiralty were present. Mr Liddell gives as a reason for this public exhibition (as he terms it) in London, that 'we thought it desirable to do so there, because it was in the centre of the kingdom, the centre where we could work from, the Board of Trade and the Admiralty being both in London, and their chief surveyors, and so on.' An account of the exhibition, with a statement of the dimensions of the boat and other particulars, similar to those previously given in the *Glasgow Herald*, appears in the newspaper *Invention* of 24th September. Mr Cruickshank, a patent agent, who was examined for the defenders, says that from the description in *Invention* he could make a boat with collapsible sides, although it might not be similar to the model of the pursuers' boat. Evidence much to the same effect with reference to the information to be obtained from the description in the *Glasgow Herald* is given by Mr Mitchell, a shipbuilder in Glasgow, who was called as a witness for the pursuers. Such generally was the position in which the evidence as to publication of the invention prior to the application for a patent stood when the case was before the Sheriff-Substitute. It seems to me difficult to say that, as the case was then presented, there was not shown to have been such a publication as was sufficient to deprive the invention of novelty, and invalidate the patent subsequently obtained. In that view it was perhaps unnecessary to have further evidence taken. . . . On consideration I came to be of opinion that the additional evidence asked for ought to be allowed. . . . The additional evidence thus obtained confirmed the view I had already formed regarding the question of prior publication. Mr R. Chambers was referred to a newspaper paragraph in the *Lennox Herald* of 15th October 1887, professing to give an account of a 'testing' of the boat in the previous week in the Admiralty dockyard at Portsmouth, and he said that the account was, as far as he recollected, correct; the boat is stated to have been tested in presence of certain officials of the dockyard whose names are given. She was filled with forty men from the dockyard, was tried in various ways, and in some respects, as Mr R. Chambers puts it, the trial was more practical than the previous trials at Glasgow and London.

"The conclusion to which a consideration of the evidence as a whole seems to me to point is, that there was such a publication of the invention prior to the application for a patent as to strike at the validity of the subsequent patent. So far from any attempt being made to keep the invention secret, pains were taken to exhibit it in different parts of the kingdom to persons whose approval and patronage were likely to be valuable. It also appears from the evidence that from the newspaper descriptions and the exhibitions which took place, persons moderately skilled in boatbuilding would have been able to make a practical use of the invention by constructing a collapsible boat similar to that for which a claim is made in the specification. In these circumstances the patent must, I think, be held to be invalid."

The pursuers appealed to the Court of Session, and argued—No doubt the boat was exhibited to a few persons on three separate occasions for the purpose of testing it—on the last occasion before Government officials in the hands of trained men—but there was no such publication that an ordinary skilled workman could have made the boat after seeing it and reading the newspaper reports unless he had been employed, as in this case members of the defenders' firm had been, in the patentee's workshop. And no one who saw these exhibitions appeared to say he could have made it after seeing them. There had therefore been no such prior publication as was necessary to invalidate a patent. The newspaper accounts did not amount to publication to the world by description, and the exhibitions were not "user." "No

prior publication ought to invalidate a patent unless you could make the thing from the description"—see Jessel, M.R., p. 567, in *Plimpton* v. *Malcolmson*, 1876, L.R., 3 C.D. 531 (roller skates), following upon *Neilson* v. *Betts*, 1870, L.R., 5 H. of L. 1; *Hill* v. *Evans*, 1862, 4 De. G. F. & J. 288; *Betts* v. *Menzies*, 1862, Clark's H. of L. Cases 117; *Stonor* v. *Todd*, 1876, L.R., 4 C.D. 58; *Lewis* v. *Marling*, 1829, 1 Webster's Patent Cases 493. *In re Adamson's Patent*, April 19, 1856, 25 L.J. Ch. 456, there had been not merely testing but complete dedication to the public—contrast *Bentley* v. *Fleming*, 1844, 1 Carrington & Kirwan 587; *Newall* v. *Elliot & Glass*, 1858, 27 L.J.C.P. 337.

Argued for respondents — There had plainly been prior publication (1) by exhibitions and (2) by descriptions in the public press. These exhibitions had been public, and it was absurd to say that the boat required such frequent testing in different parts of the country. When the letters-patent were taken out there was nothing left to communicate to the public. It was unnecessary to say whether exhibition by itself was enough. Here people who saw it could make it, and here also there was full description in the newspapers—*Pickard & Curry* v. *Prescott*, July 9, 1890, 17 B. 1102. *King, Brown, & Company* v. *Brush Electric Light Corporation Limited*, July 18, 1890, 17 R. 1266—which was a much stronger case than the present, inasmuch as the article patented was far harder to make—*Betts* v. *Neilson*, 1868, L.R., 3 Ch. Ap. 431 (Lord Chelmsford); *Hill* v. *Evans*, 1862, 31 L.J. Chan. 457 (Lord Westbury p. 463); *Carpenter* v. *Smith*, 1841, Webster 530; *Patterson* v. *Gas Light & Coke Company*, 1877, L.R. 3 App. Cases 239; *Croysdale* v. *Fisher* (patent cases), 1884, 17; *Philpott* v. *Hanbury* (patent cases), 1885, 33 and 153; *Blank* v. *Footman, Pretty, & Company* (patent cases), 1888, 653; *Harris* v. *Rothwell*, 1887, L.R. 35 C.D. 416.

At advising—

LORD JUSTICE-CLERK — The complainer here took out a patent in November 1887 for improvements in the construction of lifeboats, and the general character of the alleged improvements was the combination of a lower part or shell or hull constructed of iron, steel, wood, or other material, and an upper part formed of a flexible material attached by its upper edge to a rail and by its lower edge to the shell or hull. A folding mechanism was provided made of jointed stanchions and stays for the purpose of enabling the upper flexible part to be raised or lowered and fixed or retained in either position with a view to easy stowage on to a ship when not in use, and a high gunwale when in the water. The canvas gunwale when raised enabled the boat though light and easily stowed to keep out the water.

The complainer seeks to interdict some relatives of his from making such a boat without leave or licence from him.

The respondents state various pleas-in-law, and they attack the validity of the complainer's patent on various grounds.

It is, in the view which I take of the case, only necessary to consider one of these grounds, viz., whether the invention which the complainer founds upon as his own was published to the world before he took out his patent for it.

The case I may say in passing is a lamentable one, for it is being fought between relatives who appear to be all interested in the general success of the invention, which appears to be a useful one, and has been adopted by some of the companies which have fleets of ocean-going steamers. They were urged by the Court to endeavour to settle the case, but they have not come to any agreement, and the result is that I fear whatever good there may be in the invention will now fall to the public without any charge whatever, to the loss of both parties. That is to be regretted, but we cannot help it. The parties must suffer for their own obstinacy.

The history of the case is shortly this. While the patent was taken out on the 5th November 1887, two months before, *i.e.*, in September, there appeared in Glasgow and in other places public announcements in the newspapers which gave a general and perfectly clear description of the complainer's boat. I am not sure that after reading these accounts a person of intelligence could not have made a boat with the specification.

But that was not all which was done, because these announcements had the effect of attracting the public to the place where the boat was to be exhibited, and undoubtedly the evidence shows that the boat was exhibited to the public in the Kelvin near Glasgow. There was no concealment attempted, and indeed the exhibition was not of the nature of a trial, but rather of the nature of an exhibition to many persons. But further, the boat after trial lay in the yard for several days for all and sundry to see and examine as they liked. That of itself would have gone a long way, if it was not absolutely sufficient, to amount to a publication of the invention two months prior to the time when the specification was taken out. Then again, the boat was shortly after placed openly upon a railway train and taken to London and there exhibited again in the Royal Albert Docks and in the presence of the officials of the Board of Trade and of the Admiralty and other persons, and the whole exhibition was recounted in the newspapers. It was a third time exhibited at Portsmouth in one of the Royal dockyards, the exhibition being also recounted in the ordinary and scientific public prints.

In these circumstances it is impossible to hold anything else than that prior to 5th November 1887 all that was practically contained in the specification was well known to the public. That being so, the law is clear. The complainer is not entitled to a patent for his boat, the details of which were already known to the public.

That ground of judgment is sufficient. It is the one upon which in the Court below the learned Sheriffs proceeded, and I think your Lordships should adhere to the judgment pronounced there by the Sheriff-Principal.

LORD YOUNG—I am of the same opinion. I think there was here prior deliberate and ostentatious publication, and that the patent cannot be sustained.

I join in the regret expressed by your Lordship that the parties did not see their way to settle the case for their own sakes as they were urged to do by the Court.

LORD RUTHERFURD CLARK—I agree.

LORD TRAYNER—I give no opinion as I was not present at the hearing.

The Court adhered.

Counsel for Pursuers and Appellants—H. Johnston—Salvesen. Agent — Alexander Morison, S.S.C.

Counsel for Defenders and Respondents — Dickson — Ure. Agents — Martin & M'Glashan, S.S.C.

Thursday, May 28.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

STEEL *v.* KIRK SESSION OF ST CUTHBERT'S.

Church — Churchyard — Extension of Church—Interdict.

The kirk-session of a parish having resolved to enlarge the parish church, selected plans for that purpose, which were approved by the heritors and presbytery. These plans involved an encroachment upon a part of the common burying-ground of the parish, which had been in frequent use for purposes of burial until sixteen years previously, when it was closed by order of the Sheriff.

In an action at the instance of a heritor against the kirk-session to prevent the proposed encroachment, it was proved that human remains interred in the ground upon which it was proposed to build were from the nature of the soil resolved into bones and dust in about eight years; that the egresses of the church were unsafe, the ventilation very defective, the air space per sitter insufficient, and that there was no vestry; that the only satisfactory remedy for these defects lay in an extension of the church, and that the necessary ground for the extension could only be obtained in the proposed direction.

Held (1) that it was competent for a kirk-sesion with consent of the heritors and presbytery to encroach on part of the parish churchyard for the extension of the church, provided a sufficient case of expediency were established; (2) that the kind of expediency necessary to justify such encroachment would vary according to circumstances; and (3) that a sufficient case of expediency had in the present case been established.

Opinion by the Lord President that a person who succeeds to the estate of a heritor by purchase does not thereby acquire any right in the ground assigned as a burying place to that heritor and his family.

The Kirk-Session of St Cuthbert's Parish Church, Edinburgh, resolved to alter and enlarge the church, and selected plans for that purpose, which were approved by the Presbytery. The church was situated within the old parochial churchyard, and the scheme of reconstruction involved an encroachment on part of the old burying-ground.

The present action was raised by James Steel, a heritor, against the kirk-session to have it found and declared that the defenders were not entitled (1) to build over the burying-grounds of the parish or any portion of them, (2) to encroach upon and destroy or change the original and natural use and purpose of said burying-grounds, and (3) to open up or remove any of the soil or earth of the graves of said burying-grounds, or of the remains of bodies interred therein. These conclusions were followed by conclusions for interdict.

The pursuer's main grounds of action were that the scheme of reconstruction proposed by the defenders involved an unlawful encroachment on a portion of the old common burying-ground of the parish, which had been dedicated for centuries to the purposes of sepulture; had been in use until 1874 when it had been closed by order of the Sheriff as a nuisance under the Public Health Act 1867, and was crowded with human remains; that the proposed scheme also involved an interference with the tomb belonging to the family or estate of Dean now the pursuer's property; that no sufficient necessity for the proposed encroachment had arisen; and that the decision of the heritors' meeting which decided in favour of the proposed scheme was inept, in respect that several heritors had been improperly refused liberty to vote at said meeting, and that this refusal had affected the decision of the meeting.

The defenders maintained that a sufficient case of necessity or at any rate strong expediency had arisen to justify the proposed encroachment.

The Lord Ordinary before answer allowed parties a proof of their averments, and the pursuers having reclaimed, the First Division adhered to the Lord Ordinary's interlocutor.

Proof was thereafter led, the material results of which were as follows—During the twenty years preceding 1874 (when the common burying-ground was closed by order of the Sheriff), a large number of bodies had been interred in the portion of ground over which the defenders proposed to build. The pursuer's calculation, which the Lord Ordinary accepted as fairly accurate, was that the enlarged church would enclose ground in which about 400 bodies had been interred during the twenty years