

stipends. This being an express partial repeal of their privilege of exemption, was held to imply that it should in other respects continue to subsist, and they have enjoyed the benefit of the implication ever since. Such privileges, which are necessarily enjoyed at the cost of others, are in their nature invidious, and are regarded with disfavour in these days, and the wonder is, not that all but this have disappeared, but that this has been so long lived. The demand now is for its extension, and although irrespective altogether of its invidious character I can find no good grounds for the demand, I think it proper to say that *in dubio* I should deem it the duty of the Court to reject any construction of a modern statute which implied the extension of a class privilege of exemption from taxation, provided the language reasonably admitted of another interpretation.

In my opinion, the interlocutor of the Lord Ordinary ought to be reversed and the defenders assoilzied from the action with expenses. Had any expense been occasioned by the defender's objection to the competency of the action, I should have recommended it to be taken account of by allowing a modification, but plainly it only somewhat prolonged, without adding to the expense of, the one debate in the Outer House and here which necessarily took place. The expense of a separate appearance for the school board ought not in my opinion to be allowed. They, as the statutory trustees of the ratepayers under the Education Act, ought clearly to have concurred in a common defence with the parochial board, who are mere collectors. Neither board had more interest than the other, *i.e.*, neither had any interest at all except the discharge of a public duty, to see that a question of interest to the ratepayers was fairly tried. Separate appearances were quite unwarrantable.

The LORD JUSTICE-CLERK was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied both defenders.

Counsel for Pursuer (Respondent)—Trayner—J. A. Reid. Agent—A. Rodan Hogg, Solicitor.

Counsel for Defenders (Reclaimers)—Asher—Millie. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Tuesday, June 22.

SECOND DIVISION.

[Sheriff of Midlothian.

SMITH AND OTHERS *v.* SMITH.

Executor — Incomplete Inventory — Remedy of Next-of-Kin where Deceased Intestate — Confirmation.

Where an executor-dative of a person who has died intestate has omitted from the inventory given up for confirmation effects belonging to the deceased, it is competent for the next-of-kin as being creditors—(1) To confirm to such effects as executors *ad omnia*; or (2) to bring an action against the executor for the value of the effects omitted, if his intrusions therewith can be proved.

Robert Smith, baker in Edinburgh, died intestate in June 1879, and his youngest son Robert Smith was decerned executor-dative to him. The inventory given up by him specified estate to the value of £6. For some years previous to his death the deceased was blind, and resided with his son Robert. In December 1879 an elder son Richard Smith, for himself, and as factor and attorney for his brother Peter Smith, miner in Pennsylvania, and a daughter Mrs Ann Smith or Anderson, with consent of her husband Thomas Anderson, raised this action against their brother Robert, as executor of their father, in the Sheriff Court of Midlothian, for production of his executry accounts, and for payment of the sum of £40 to each of the three pursuers, which they alleged was due to them as next-of-kin of their father on a true accounting of his estate. Alternatively they concluded for payment of a sum of £50 each in the event of failure to account. They alleged that Mrs Catherine Smith or Anderson, a widow, their sister, who had died on 8th January 1879, had left a will under which the defender was appointed executor, whereby she bequeathed her whole estate, excepting a certain legacy to her father, to her brothers and sister in equal shares; and that the defender had obtained not only his own share of one-fifth of this estate, but had also appropriated that of his father, who had, as above mentioned, lived in the same house with the defender. This share of Mrs Anderson's estate, as well as a quantity of household furniture, belonged, the pursuers alleged, to their father at his death, and ought to have been accounted for by the defender. The defender stated in defence that the burden of his father's maintenance for several years before his death had fallen upon him and that his father had handed to him on its receipt his share of the deceased Mrs Anderson's estate in part payment of the cost of his maintenance. The defender produced an account of his intrusions, and also an account between himself and the deceased, bringing out a balance due to him of nearly £300.

The Sheriff-Substitute (HALLARD) on 4th February 1880 dismissed the action, adding this note—

“*Note.*—This is an action at the instance of two brothers and a sister against their brother, the defender, as executor-dative of their father the late Robert Smith, who died intestate on 27th June last. The inventory discloses an estate amounting to £6.

“The pursuers' complaint is that this sum by no means truly represents the estate which the deceased died possessed of, and which truly fell into the hands of the defender as his executor. Except on one point their averments are very vague. The one point on which a definite issue is joined between the parties is as to a certain share which fell to the deceased from the inheritance of a daughter who predeceased him, a Mrs Catherine Smith or Anderson, whose settlement is in process. The defender was executor-nominate under that settlement, and had also produced his confirmation and relative inventory in that capacity. He distributed that estate in terms of that settlement, and there is no dispute on that point, the pursuers' discharges as parties interested therein being also produced in process. A part of that estate fell to the father of the parties. The defender says it was more than ab-

sorbed by his maintenance, the old man having lived and died in the defender's house. The pursuers dispute that statement, and this is the substantial issue between them.

"That is an issue which is not decided by the foregoing interlocutor. It is thought that the pursuers have mistaken their remedy. In substance, their contention is that the old man's share of his deceased daughter's executy should have been set forth in the inventory upon which the defender has obtained confirmation as executor dative. That may be so. But if it is, the proper course, and the only competent course, is to get themselves, as next-of-kin, decerned and confirmed executors *ad omnia*. A creditor has his choice of remedies (Bell's Com. ii. p. 81, M'Laren's ed.). But these pursuers are not in the position of creditors. There was no proposal to set the defender's confirmation aside by way of reduction. Standing the confirmation, it is the only measure of responsibility between the executor and the next-of-kin."

The pursuers appealed to the Sheriff (DAVIDSON), who adhered.

The pursuers appealed, and argued—It is competent for next-of-kin, as it is for creditors, in cases where the executor has omitted or undervalued part of the estate in his inventory, to bring an action against the executor for the estate omitted if intrusions with it could be proved. The Sheriff was in error in holding that a choice between that course and confirmation *ad omnia* was only available to creditors. In such a question next-of-kin are in the same position as creditors.

Authority—*Inglis v. Bell*, Jan. 24, 1639, M. 2737, 2 Bell's Com. (7th ed.), p. 81.

At advising—

LORD JUSTICE-CLERK—I think the Sheriff is wrong, and that the action is quite competent if it be relevantly laid. The ratio of the Sheriff's judgment is that the pursuers here being next-of-kin are not in the position of creditors. That I think is an entire mistake. They are creditors and nothing else, and therefore this interlocutor cannot stand. We shall send the case back to the Sheriff that it may be proceeded with.

LORDS ORMDALE, GIFFORD, and YOUNG concurred.

The Court sustained the appeal, and remitted the case to the Sheriff for further procedure.

Counsel for Appellants — Rhind — Baxter. Agent—D. Howard Smith, S.S.C.

Counsel for Respondent — Solicitor-General (Balfour)—Dundas Grant. Agent—D. Turner, S.L.

Friday, June 25.

FIRST DIVISION.

[Lord Curriehill, Ordinary.]

DENNY & BROTHERS AND ANOTHER v.
HANNAH AND THE BOARD OF TRADE.

Ship—Board of Trade's Powers under Merchant Shipping Acts 1854 (17 and 18 Vict. c. 104), 1872 (35 and 36 Vict. c. 73), and 1876 (39 and 40 Vict. c. 80).

Held (1) (*deb.* Lord President and Lord Mure) that the Board of Trade, under the powers conferred by the Merchant Shipping Act 1854, and subsequent statutes, is entitled to issue instructions to the surveyors of passenger ships appointed under section 305 of that Act, controlling their judgment with reference to the various requirements compliance with which is necessary in order to their granting a declaration as to the sufficiency of the hull of the vessel, which declaration is required by the Act as a necessary condition of the issue of a certificate by the Board; and (2) that in the event of shipowners feeling aggrieved at the refusal of the surveyor to issue a declaration, or of the Board to grant a certificate, the proper remedy is an appeal under section 14 of the Merchant Shipping Act 1876 to a Court of Survey or a scientific referee.

This was an action raised at the instance of Messrs William Denny & Brothers, shipbuilders, Dumbarton, with consent of Alexander Allan, shipowner, Glasgow, managing owner of the s.s. "Buenos Ayrean," against the Board of Trade, and Walter Hannah, one of the surveyors in Glasgow appointed by the Board of Trade, under the 305th and following sections of the Merchant Shipping Act 1854, to survey passenger steamships. The object of the action was to have it declared that the defender Walter Hannah "was not and is not entitled to withhold from the pursuers the shipwright surveyor's declaration applicable to the said steamer 'Buenos Ayrean,' provided in the 309th section of the statute, upon the ground that the soil and scupper pipe outlets attached to the ship's sides of the said steamer are connected to the sides of the said vessel by iron castings; and . . . that the defenders the Board of Trade were not and are not entitled to impose, whether by way of instruction to their said surveyor or otherwise, the said or any similar condition as preliminary to the granting of the said declaration; and . . . that the pursuers' said vessel complies with the whole requirements of the said 309th section of said statute; and that the pursuers were and are entitled to a surveyor's declaration applicable to said vessel, in terms of said section; and the defenders, and in particular the defender the said Walter Hannah, ought and should be decerned and ordained . . . to grant such declaration accordingly."

The pursuers Messrs Denny averred that they lately completed the building of an iron steamship called the "Buenos Ayrean," on the order of the pursuer Alexander Allan. The vessel was intended to be a cargo and passenger ship for the Messrs Allan's American trade. In terms of the