

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 omissa*. 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 omissa* 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

Merchant Shipping Act 1854, which in its 305th and following sections makes provision for the survey of passenger ships by surveyors appointed by the Board of Trade, the "Buenos Ayrean" was at various times, and in particular on or about 29th September 1879, surveyed by the defender Hannah (who was the shipwright surveyor appointed by the Board of Trade to survey the "Buenos Ayrean") in terms of the Act, and its whole requirements were found to be duly complied with. By the 309th section of the statute it is provided that "the owner of every passenger steamer shall cause the same to be surveyed, at the times hereinafter directed, by one of the said shipwright surveyors and by one of the said engineer surveyors so appointed as aforesaid; such shipwright surveyor being, in the case of iron steamers, a person who is in the judgment of the Board of Trade properly qualified to survey such ships; and such surveyors shall thereupon, if satisfied that they can with propriety do so, give to such owner declarations as follows:—The declaration of the shipwright surveyors shall contain statements of the following particulars (that is to say)—(1) That the hull of the ship is sufficient for the service intended, and in good condition;" and other particulars which it is unnecessary here to set forth in detail. If left to act upon his own judgment, Hannah would in due course have issued the above-mentioned statutory declaration, which is a condition of the granting by the Board of Trade of the certificate provided by the 312th and following sections of the statute. This certificate must be obtained by the owners (under heavy penalties) before a passenger vessel proceeds to sea. Proceeding, however, upon certain views as to their powers, for which the pursuers averred there was no warrant in the statute, the Board of Trade had lately issued instructions to their surveyors by which, *inter alia*, they are prohibited from issuing the statutory declaration wherever the soil and scupper pipe outlets attached to the sides of passenger ships are made of cast-iron or lead instead of other material. In respect of these instructions the defender Hannah felt himself debarred from granting the said declaration, except upon the footing of the pursuers altering the fittings of the vessel. The Board of Trade being applied to, adhered to the determination of refusing (through their surveyor) the said declaration. In consequence the "Buenos Ayrean" had to be sent to sea without a statutory certificate, and therefore without being in a position to carry passengers. The pursuers further averred—"The objection taken by the defenders to the cast-iron outlets in question is entirely fanciful, and has no warrant under the statute, from which alone the defenders' powers are derived. In particular, it has no relation to the sufficiency or good condition of the hull of the said vessel."

The Board of Trade denied that the objection taken to the cast-iron outlets was fanciful or unwarranted by the statute. They averred, on the contrary, that it was serious and well-founded, the defect complained of being one which in their judgment rendered the hull insufficient for the service for which the ship was intended, and that cast-iron attachments, in the opinion of the consulting staff of the Board of Trade, ran much more risk of fracture and other injuries than what are called metal attachments, and were a

source of danger that ought to be avoided in a passenger ship. They further averred—"Section 14 of the Merchant Shipping Act 1876 provides for appeal against such a refusal to a Court of Survey; and section 15 provides that on such appeal being taken, the question raised, if one of difficulty, may be remitted to and determined by scientific referees. The defenders are willing and anxious that the question that has arisen should be dealt with under one or other of those sections. Under the general rules made by the Lord Chancellor in terms of section 9 (and of which a copy is produced herewith), there is a Court of Survey for Glasgow, of which the Sheriffs and Sheriff-Substitutes of Lanarkshire, Renfrewshire, and Dumbarton are the judges; and that is the Court to which an appeal in reference to a vessel lying at Dumbarton is competent. But no appeal has been made to it either by Messrs Denny & Brothers or by the consenter and concurrent Mr Allan."

For the pursuers it was pleaded—" (1) Upon a sound construction of the statute libelled, the requirement made by the defenders as a condition of granting the said declaration is *ultra vires* and illegal. (2) The pursuers' steamship being constructed in full compliance with the statutory conditions and regulations, the defender Mr Hannah is bound to grant the statutory declaration, and the other defenders are not entitled to prevent or interfere with his doing so."

For the defender Hannah it was pleaded—"The defender, as a surveyor under the Board of Trade, is bound to act upon the Board's instructions in determining what is essential to the sufficiency of a ship's hull in the sense of the statute; and is bound to refuse a declaration when, in view of those instructions, he is not satisfied that he can with propriety grant it."

For the Board of Trade it was pleaded—" (2) The Merchant Shipping Act 1876 having authorised appeal to a Court of Survey when a shipowner feels aggrieved by the refusal of a surveyor to give a declaration, the jurisdiction of the Court of Session is excluded, unless there have been excess of power. (3) There having been no excess of power either on the part of the Board of Trade in issuing instructions to their surveyors for their guidance in determining, *inter alia*, what should be considered essential to the sufficiency of a ship's hull in order to entitle its owner to obtain a statutory declaration, or of Mr Hannah in following such instructions and refusing a declaration, the action ought to be dismissed, with expenses. (4) Otherwise, the hull of the ship being insufficient for the service intended, because of the defective construction of the outlets of the soil and scupper pipes, neither the pursuers nor the owners are entitled to a statutory declaration, and the defenders ought therefore to be assolvied, with expenses."

By section 307 of Act of 1854 it is provided "that the surveyors shall execute their duties under the Board of Trade, and such Board shall make regulations as to the manner in which the surveys hereinafter mentioned shall be made, and as to the notice to be given to the surveyors when surveys are required, and as to the amount and payment of any travelling or other expenses incurred by such surveyors in the execution of their

duties, and may thereby determine the persons by whom, and the conditions under which, such re-  
payment shall be made."

By section 13 of the Act of 1872 it is provided "that all duties in relation to the survey and measurement of ships under this Act or the Acts amended hereby shall be performed by the surveyors appointed under the fourth part of the Merchant Shipping Act 1854, in accordance with such regulations as may be from time to time made by the Board of Trade."

The Lord Ordinary (CURRIEHILL) dismissed the action and decerned, adding the following note:—

"Note.—[After narrating the circumstances as above, and reciting the clauses of the Merchant Shipping Act quoted above]—In pursuance of the powers conferred upon them by these Acts, the Board of Trade have since 1854 been in use from time to time to issue regulations containing, *inter alia*, instructions to 'shipwright surveyors' as to the survey of the hull, equipments, &c., of passenger steamships. The latest edition of these regulations was published in 1878, and it was not until then that the Board of Trade required the outlets of water-closet, soil, and scupper pipes, and the like, to be of metal other than cast-iron or lead.

"Such being the powers and duties of the Board of Trade under the Merchant Shipping Acts, the question raised by the pursuers as to the powers of this Court to review, alter, and annul the regulations is one of great importance, which, however, I do not think it necessary to determine. I shall only say, that assuming such power to be vested in the Court, it would require a very strong case of unreasonable and oppressive exercise of their power on the part of the Board of Trade to be averred and established to warrant any interference with the regulations made by the Board for the 'safety' (of passenger steamers) 'and prevention of accidents.' The Board has under the statute the duty to discharge of inquiring into all accidents to British shipping. The accumulated experience which must result from these inquiries cannot fail to furnish the Board with the best possible data for judging as to the materials and fittings best calculated to secure the safety of shipping, and as to what materials should be prohibited as likely to conduce to danger. And I cannot doubt that the regulations complained of have been framed as the result of large experience. It appears to me that no sufficient allegations have been made by the pursuers to justify the inquiry which they now demand, even assuming the competency of the inquiry.

"But even if the inquiry asked were competent and justified by relevant allegations, I think the pursuers are premature in invoking the aid of the Court. Before doing so it is clearly their duty to exhaust all the remedies provided by the Legislature for grievances caused to shipowners by the action of the Board of Trade and their 'shipwright surveyors.' It will be observed that the instructions as to the fittings of pipe-outlets contained in the regulations above recited are not absolute, and that a good deal is left to the discretion of the surveyor. Now, by the Merchant Shipping Act 1876, a Court of Survey for survey appeals is appointed, to consist of a judge sitting with two assessors; the appeal is to be heard in open court, and provisions are made for the judge and assessors surveying the ship by them-

selves, or by any competent person or persons whom the judge may appoint, and to order the ship to be released or detained. . . . .

"Now, it appears to me that the present is precisely a case for which an appeal to the Court of Survey was intended, and that the pursuers, if aggrieved by the refusal of the surveyor, ought to have appealed to that Court; and if it involves, as the pursuers apparently think it does, a matter of principle, they had it in their power to be heard before the scientific referees. I am of opinion that the right of appeal thus given, if it does not absolutely exclude all appeal to the Court of Session, certainly excludes it in the first instance. It is unnecessary to say whether, in the event of either the Board of Trade or the shipowner being dissatisfied, the decision of the referees could be reviewed by this Court. On that point I can give no opinion. I am of opinion, however, that on one or other or both of the grounds above indicated the present action ought to be dismissed with expenses."

The pursuers reclaimed, and argued—(1) The statute of 1854, in that part of it which related to 'safety and prevention of accidents,' exhaustively dealt with all the different requirements which must be complied with in order to enable a ship to pass the necessary survey and receive a declaration and certificate. But nowhere was authority conferred upon the Board to issue instructions to its surveyors such as these here complained of. In making their surveys under the Act the surveyors must be left free to exercise their own skill and judgment, and the Board was not entitled to fetter their surveyors' judgments by directions and instructions relative to matters upon which the statute was silent. Section 307 only conferred upon the Board power to issue regulations to their surveyors in relation (1st) to the manner in which the surveys shall be made, (2d) the notice required to be given to surveyors when surveys are required, and (3d) the amount and payment of the expenses incurred by the surveyors. And section 13 of the Merchant Shipping and Passenger Acts Amendment Act 1872 only authorises the issue of regulations relative to the matters specified in section 307 of the former statute. (2) Assuming that the Board of Trade and their surveyors are identical, then it was *ultra vires* of the Board of Trade to make requirements not mentioned in the statute. The Board was here passing beyond its powers as defined by the statute, and was attempting to legislate beyond its statutory authority. (3) The remedy provided by the Merchant Shipping Act 1876 was not applicable in the present case, because the Court of Survey created by that Act could not entertain a question as to the powers of the Board of Trade, which was the question here at issue. The Court of Session was the only *forum competens* in such questions.

Argued for the Board of Trade—(1) By virtue of the powers conferred upon them by the statute, the Board was entitled to issue instructions to its surveyors such as these complained of. By section 305 power was conferred on the Board to appoint surveyors for the purposes of the Act, and to fix their remuneration, and to remove them from time to time, as the Board saw fit; and by section 307 the inspectors were to perform their duties under the Board's directions. Further, by section 13 of the Merchant Shipping

and Passenger Acts Amendment Act 1872 express power to issue regulations to their inspectors was conferred upon the Board. (2) With regard to the subject-matter of the regulation here complained of, it related directly to the sufficiency of the hull of the ship, and that was one of the particulars regarding which the Act required that the inspector's declaration should contain statements. It was therefore not *ultra vires* of the Board to issue instructions upon this matter. (3) The surveyor having refused to grant a declaration here, the shipowner feeling aggrieved, and the refusal raising a question of construction or scientific difficulty, the remedy prescribed by the 14th section of the Merchant Shipping Act 1876 is directly applicable.

At advising—

**LORD PRESIDENT**—The pursuers of this action, Messrs Denny, the well-known shipbuilders at Dumbarton, complain of the manner in which they have been dealt with by the Board of Trade and one of their surveyors in regard to an iron passenger steamship which they have lately built, named the "Buenos Ayrean." They say that the shipwright surveyor after examining the hull refused to give them the statutory declaration of the sufficiency of the hull, not because of any real insufficiency in the hull itself, but because of the pursuers' failure to comply with a regulation made by the Board of Trade, and which regulation the pursuers contend the Board of Trade had no authority to enact. They say that if the shipwright surveyor—the defender Mr Hannah—had not been directed by the Board of Trade to refuse to give a declaration unless the shipbuilder complied with the regulation in question, the shipwright surveyor himself would have attached no importance to the subject-matter of that regulation, but would have issued his declaration in terms of the statute; and they say further that the opinion upon which this regulation is founded is a mere fanciful thing, and really has nothing to do with the sufficiency of the hull of the vessel. Now, all these things may be true enough. The Board of Trade may be very unreasonable, the shipwright surveyor may have taken this course only in obedience to the Board of Trade, and not in consequence of his own opinion, and the pursuers may be very unjustly treated in consequence. All that may be true, and yet there would be no ground for the interference of this Court, but for the allegation, which, however, is very distinctly made in this record—an allegation partly of fact and partly of law—that in issuing the regulation in question the Board of Trade exceeded their statutory powers.

The Board of Trade is a department of the executive Government, and in matters of this kind is acting purely in an administrative capacity, and its powers in the administration of this matter of passenger ships and their requirements are derived entirely from statute. And therefore if it could be made out that the Board of Trade had acted in excess of their statutory powers, there is no doubt that the pursuers would be quite entitled to come to this Court and have the Board of Trade restrained from committing such excess of power. It is not a question of jurisdiction as far as the Board of Trade are concerned. It is mere administration. But this Court have the power to restrain administrators from exceeding

their statutory authority, just in the same way as they have the power to restrain judicial bodies from acting in excess of their jurisdiction.

The question, therefore, and the only question, at present for our consideration is, whether the Board of Trade in issuing these regulations, and the shipwright surveyor in acting upon them, have exceeded their powers? Now, that depends upon a construction of the Merchant Shipping Act of 1854. The matter of passenger steamers is dealt with in the fourth part of the statute, beginning at section 303. There is there a definition of passenger steamers which is not of much consequence in the present question; but section 305 provides for the appointment of surveyors—"The Board of Trade may from time to time appoint such number of fit and proper persons to be shipwright surveyors or engineer surveyors for the purposes of this Act at such ports or places as it thinks proper;" and may also appoint a surveyor-general. Then these surveyors are vested with certain powers of inspection; and then follows section 307, which is of very great importance in the present question, but my remarks on which I shall defer until I have noticed the subsequent sections of the statute. The 309th section requires the owner of every passenger steamer to have the same "surveyed, at the times hereinafter directed, by one of the said shipwright surveyors and by one of the said engineer surveyors, such shipwright surveyor being, in the case of iron steamers, a person who is in the judgment of the Board of Trade properly qualified to survey such ships, and such surveyors shall thereupon, if satisfied that they can with propriety do so, give to such owner declarations as follows." Then there follows a specification of the particulars which are to be contained in the declaration both of the shipwright surveyor and of the engineer surveyor, and in some respects these articles are very much detailed in regard to the matter of boats, life-buoys, compasses, &c., and the number of passengers which the ship is to carry; and in a variety of other things of that sort the provisions for what the declaration shall set forth are very specific. But as regards the hull of the ship, all that is said is this—the declaration is to contain this statement, "that the hull of the ship is sufficient for the service intended, and in good condition;" and, of course, if the declaration contains that, it satisfies the requirement of the statute. Then it is provided, after giving these particulars, that the declarations are to be in such form as the Board of Trade may direct. I do not think that is material in the question. It goes no further than this—that the printed forms which are to be filled up are to be issued by the Board of Trade. We have specimens of them before us, and they really do not affect the present question. Then we have section 312, which provides for what is to be done after the shipowner has obtained the declarations of the two surveyors. The Board of Trade, upon receipt of the declarations, "shall, if satisfied that the provisions of the fourth part of this Act have been complied with, cause a certificate in duplicate to be prepared and issued to the effect that the provisions of the law with respect to the survey of the ship and the transmission of declarations in respect thereof have been complied with;" and the certificate shall state the limits beyond which the ship is not to ply, according to the statement

of the surveyor. Now, this is the form of proceeding in order to qualify a ship to ply as a passenger ship. The declarations must be obtained from the two surveyors, these must be sent to the Board of Trade, and the Board of Trade being satisfied that the provisions of the Act have been complied with, are to issue a certificate, which is to be the warrant to the ship to carry passengers. Now, how far the Board of Trade are entitled to control or instruct their surveyors according to this statute is the real question raised, and that depends upon the sections which I have already read, coupled with section 307. The surveyors are appointed by the Board of Trade, and seem to hold office during the pleasure of the Board of Trade. They are therefore the servants of that Board, certainly bound and entitled to exercise an independent judgment in making their survey, but undoubtedly acting as the servants and subordinates of the Board. Now, in connection with this, section 307 enacts—“The said surveyors shall execute their duties under the direction of the Board of Trade, and such Board shall make regulations as to the manner in which the surveys hereinafter mentioned shall be made, and as to the notice to be given to the surveyors when surveys are required, and as to the amount and payment of any travelling or other expenses incurred by such surveyors in the execution of their duties, and may determine the persons by whom, and the conditions under which, such payment shall be made.” Now, here we have two expressions, both of very great importance on this question. The surveyors are to execute their duties under the direction of the Board of Trade, and the Board of Trade are to make regulations as to the manner in which the surveys are to be made. It is very difficult to define precisely what additional powers are hereby conferred on the Board of Trade, but certainly there must be something more expected of them, and something more in the way of authority given to them, than merely a power of appointing and dismissing the surveyors; because the surveyors, if they are to act upon their own independent judgment entirely, can hardly be said to be acting under the direction of the Board of Trade. They would be acting merely by the appointment of the Board of Trade if after their appointment they were left entirely to themselves. Some meaning therefore must be given to these words; and there must also be something in the way of making surveys that the Board of Trade are entitled to regulate, because they are empowered to make regulations as to the manner in which the surveys are to be made. Now, the Board of Trade contend that in the regulation which is complained of they have not exceeded their powers under this section of the statute, but, on the contrary, are acting clearly within these powers. The regulation is No. 88 of the code called “Instructions as to the survey of the hull, equipments, and machinery of steamships carrying passengers;” and the provision is this—“In the case of the outlets of water-closets, soil, scupper, lavatory, and urinal-pipes which are below the weather deck, there should be an elbow of good substantial metal other than cast-iron or lead extending above the load water-line, and the pipe connected with this elbow should, if of lead, have a sufficient bend to provide for expansion in the pipe, or any movement from the

working of the ship.” Now, it was because the ship in question had not pipes of the description here required, or, in other words, had pipes made of cast-iron or lead, that the surveyor, under the instruction of the Board of Trade, refused to grant the declaration that the hull was sufficient.

Now, I am bound to say that I think this question, if it were necessary to consider it upon its merits, is a question of very considerable delicacy upon the construction of the statute, and perhaps there might be a difficulty, without more information upon the subject, in arriving at any very satisfactory conclusion as to whether in this regulation the Board of Trade are going beyond the powers conferred upon them by the 307th section of the Act of 1854. But it must be observed that the Board of Trade here are merely giving a direction or instruction to their surveyor, and the surveyor has simply acted upon that instruction. Now, if there were no mode of bringing under review what has been done by the surveyor, or under the instructions of the Board of Trade, probably we might require to consider and determine the nice question upon the statute which has thus been raised. But I think that we are entirely relieved from that difficult duty by the provision of the statute of 1876, which deals with the very matter that has here happened, in its 14th section. It runs thus—“Whereas by section 309 of the Merchant Shipping Act,” &c., there are certain enactments made, “and it is expedient to give in the said cases such appeal as hereinafter mentioned, it is therefore enacted, if a shipowner feels aggrieved by a declaration of a shipwright surveyor, or an engineer surveyor, respecting a passenger steamer under the above-recited enactments, or by the refusal of a surveyor to give the said declaration,” &c., the owner may appeal in the prescribed manner to the Court of Survey for the port or district where the ship for the time being is. “On such appeal the judge of the Court of Survey shall report to the Board of Trade on the question raised by the appeal, and the Board of Trade when satisfied that the requirements of the report and the other provisions of the said enactments have been complied with, may in the case of a passenger steamer give their certificate under section 312 of the Merchant Shipping Act 1854.” The other cases I do not think bear upon the present question. Then the 15th section provides that “if the Board of Trade are of opinion that an appeal under this Act involves a question of construction or design, or of scientific difficulty, or important principle, they may refer the matter to such one or more out of a list of scientific referees, from time to time approved by a Secretary of State, as may appear to possess the special qualifications necessary for the particular case, and may be selected by agreement between the Board of Trade and the appellant, or in default of any such agreement by a Secretary of State, and thereupon the appeal shall be determined by the referee or referees instead of by the Court of Survey;” and the referees are to have the same powers as the judge of the Court of Survey. Now, the very case which has occurred here is provided for by the 14th section of the statute. The shipwright surveyor has refused a declaration, the shipowner is aggrieved, and in these circumstances he is entitled to appeal to

the Court of Survey, or, if he pleases, and will find security for costs, he may have an appeal to scientific referees. Taking into view, therefore, the provisions of this later statute, it appears to me to be of no consequence whether the shipwright surveyor in this case has acted upon his own judgment or has acted upon the instructions of the Board of Trade, because he has upon one or other of these grounds refused the declaration; and every case of a refusal of a declaration is subject to an appeal to the Court of Survey or the scientific referees. The Board of Trade are just as much respondents in that appeal, so to speak, as the shipwright surveyor himself is—indeed he is their servant, acting under their instructions, according to their own theory, and they must justify the instructions they have given to him in this appeal to the Court of Survey. Now, that being so, it appears to me that the question which is here raised for our consideration is just one of the questions that is intended to be disposed of by this statute—intended to be disposed of by the Court of Survey or the scientific referees—and therefore I think we are precluded, at least at present, from interfering in this matter. If the instructions of the Board of Trade were final and conclusive, and there were no way whatever of getting the better of them, and if they could be demonstrated to be clearly in excess of their power, that would present a different case for the Court. But here the regulations seem to me to stand in no other position than this, that they are just the instructions given by an administrative department to one of its servants, and the merits of these instructions—the question whether they ought to have been given or no—is a subject of appeal to a court constituted for the very purpose of determining such questions. I am therefore of the opinion of the Lord Ordinary, and am for adhering to the interlocutor.

**LORD DEAS**—The instructions issued by the Board of Trade contain the clauses that are embodied in section 88, which has been read by your Lordship. It is not disputed that the hull of this vessel, so far as regards the pipes in question, is not constructed in terms of these instructions, and the question is, whether the Board of Trade had the power to issue these instructions? I am humbly of opinion that the Board of Trade had the power to issue these instructions, and that it was the duty of the surveyor to obey them. The Merchant Shipping Act, in certain sections quoted in the Lord Ordinary's note, declares the Board of Trade to be the department which is to undertake the general superintendence of matters relating to merchant ships and seamen, and it is authorised to carry into execution the provisions of the Act. They may appoint shipwright surveyors and engineer surveyors, and section 307 bears that these surveyors shall perform their duties under the direction of the Board of Trade, and that the Board shall make regulations as to the manner in which the surveys shall be made. Section 309 provides that the owner of every passenger steamer shall cause the same to be surveyed by one of the shipwright surveyors and by one of the engineer surveyors, and provision is made for their giving the declaration. Section 312 provides that upon the receipt of the declaration the Board of Trade may issue a certificate,

without which the steamer cannot proceed to sea so that the surveyor's declaration is not sufficient of itself—a subsequent certificate must be issued by the Board of Trade. Reading these enactments by themselves, it seems to me very difficult to hold that it is not within the power of the Board of Trade to make such regulations. The whole question at issue is the metal of which the pipes are to consist, and the manner in which they are to be fitted up; and I have the greatest difficulty in seeing why the Board of Trade should not have power to regulate that if they have power to regulate anything at all. But the subsequent statute seems to take away all difficulty, for it bears that all the duties of the surveyors are to be performed in accordance with such regulations as may from time to time be made by the Board of Trade. Now, if anything is to be done according to regulations of the Board of Trade, one would think that the metal of which these pipes are to be made and the mode in which they are to be fitted must be comprehended. Now, here the surveyor has withheld his declaration owing to the pipes being made of cast-iron. It seems to me that the surveyor must act in accordance with his instructions, and I see nothing to show that these instructions are otherwise than in accordance with the powers conferred upon the Board of Trade. I say this without reference to any remedy that the shipowner may have by appeal to the Court of Survey; but certainly it makes the present objection the more unreasonable that there is another remedy, as your Lordship has pointed out, and that the shipowner may appeal to that Court of Survey. I wish to give no opinion about that. I think all we have to do with is that this regulation is one which it was in the power of the Board of Trade to make.

**LORD MURE**—I agree with your Lordship that the question whether the Board of Trade has exceeded its power in issuing the regulations of 1878 is one of considerable delicacy and importance. The 307th section of the Act provides that the surveyors shall execute their duties under the direction of the Board of Trade, and therefore I think it is plain that the Board of Trade, constituted for the very purpose of regulating these matters, must have power to issue regulations such as that here complained of. But it is argued that the provision that the Board should make regulations as to the manner in which the surveys should be made was a restriction on the general power of the Board to make regulations, and that it was confined to the manner in which the surveyor should set about his business, leaving it to his discretion to deal with the build of the ship and the other matters he required to survey as a skilled man, and to say whether he could issue a declaration or not. I was very much struck with the argument by counsel for the claimer upon that part of the section. But regard must be had to the 13th section of the Act of 1872 (35 and 36 Vict.), which makes the general provision that all duties in relation to the survey and measurement of ships under this Act, &c., shall be performed by the surveyors appointed under the fourth part of the Merchant Shipping Act 1854, in accordance with such regulations as may from time to time be made by the Board of Trade. Now, that certainly indicates that the Legislature intended that the Board of Trade

should have very large powers in this respect; and if we were to decide the abstract question now, of whether there was an excess of power on the part of the Board of Trade or not, the inclination of my opinion would be to hold that they were within their power. But I concur with your Lordship in thinking that it is not necessary to give a decided opinion upon that particular question as matters stand at present, because I think the power of appeal given by the 14th and 15th sections of the Act 39 and 40 Vict. c. 80, provides a perfect remedy, or at least as good a remedy as this Court could give, for dealing with a question of this description; for a party aggrieved by the proceedings of the surveyor may go in the first instance to the Court of Survey, or he may insist on having it referred to scientific persons to say whether or not this is a proper regulation.

Now, this being a matter peculiarly fitted for the Board of Trade in the first instance to deal with, and there being a Court of Appeal provided against the Board of Trade, I agree with your Lordship that the interlocutor of the Lord Ordinary is well founded, and ought to be adhered to.

**LORD SHAND**—This case undoubtedly raises a question of very considerable importance, but I have latterly had little, if any, difficulty in coming to the conclusion that the Board of Trade in issuing the instructions complained of, and particularly the 88th section of these instructions, has not exceeded its powers. I am further of opinion that the surveyor has acted rightly in giving effect to the instructions as binding on him.

The contention of the pursuers practically comes to this, that the surveyor under the statutes occupies a position entirely independent of the Board of Trade, and that the Board is not entitled to issue instructions to be followed by surveyors in giving or withholding a declaration under the statute as to what shall be deemed requisite in order to the sufficiency and good condition of the hull of a ship. We are dealing with the case of a passenger steamship, and the result of sustaining the pursuers' contention would be that in regard to the hull of such ships the surveyor would have nothing to guide him in granting his certificate, but would be entitled to follow his own notions of what might be sufficient. Having regard to the provisions of the statute of 1854, and particularly those contained in the 305th, 306th, 307th, and 309th sections, and also to the 13th section of the Act of 1872 referred to by Lord Mure, I am of opinion that the argument is not well founded. Under the Act of 1854 there is vested in the Board as an administrative body the general superintendence of matters relating to merchant ships and seamen, and the duty of carrying into execution the provisions of that Act and of all others relating to shipping.

The Board has the power not only of appointing and dismissing surveyors, and of fixing their remuneration, but also the power and function of directing them in the execution of their duties, and of prescribing by regulations the manner in which the surveys under the statutes are to be made. Under that statute for a number of years prior to 1872 the Board of Trade was in use to issue instructions by way of directions to the surveyors as to certain particular require-

ments about the hull of a ship on which they should insist as a condition of granting certificates or declarations of sufficiency. That circumstance I think is not unimportant with reference to the statute passed in that year, in which we find there is a provision that all duties in relation to the survey and measurement of ships under the Act of that year or the Acts amended thereby should be performed by the surveyors "in accordance with such regulations as may be from time to time made by the Board of Trade." It appears to me that the result of these provisions as a whole is that the Board of Trade is entitled to prescribe such general conditions as they think right, to be kept in view by the surveyors in giving a certificate that the hull is sufficient for the service intended and in good condition. The argument against this seems to me to rest upon much too limited a view of one of the sections of the leading statute of 1854. It was maintained that section 307 limits the Board of Trade to making regulations as to the manner only in which surveys shall be made. But I think the earlier words of that section providing that the surveyors, who are practically the servants of the Board, dismissible at their pleasure, shall perform their duties under the direction of the Board, give a much wider power. The surveyors are to execute their duties under the direction of the Board. It seems to me that the natural meaning of such a provision as relating to surveys is that the Board may direct the surveyor as to such requirements in the hull of a ship as they deem essential to its sufficiency. The unqualified terms of section 13 of the Act of 1872, requiring surveyors to perform all duties in relation to the survey of ships in accordance with such regulations as may be made by the Board, leads to the same conclusion, and this all the more clearly that for years before the date of that enactment the Board had been in use to issue instructions of the general nature of those now complained of.

And I must say I think it would be unfortunate if it were otherwise, because if the surveyors had nothing but their personal knowledge and experience to guide them in carrying out the provision of the statute, which merely prescribes that they shall issue a declaration that the hull is sufficient for the service intended, and in good condition, the result would be that each surveyor at the different seaports in the country would simply adopt his own view of what was sufficient, and there would be no uniform standard, and no requirements that an individual surveyor might not disregard. It must be observed that the statute merely requires the surveyor to communicate to the Board of Trade his certificate or declaration without giving the materials upon which it is founded, or any specification of the requirements which he has thought proper to enforce; and therefore the Board has to issue the statutory certificate under which the ship may at once sail as a passenger-carrying vessel. That I think would be a very unfortunate state of matters, and if the true reading of the statute led to that result I think an immediate remedy would be required. The other view, which I think is consistent with what we find in the statute, is this, that as the Board of Trade, in the course of inquiries into wrecks and accidents and otherwise, is constantly receiving reports from every part of

the kingdom as to the requirements of ships, particularly in regard to the hull in all its parts, including the deck, hatches, skylights, ports, and the like details, they have the best means of ascertaining what is desirable and necessary in order to make a ship sufficient for her service. The Board of Trade is the great centre of experience in regard to shipping, and it is obviously most important that they should have under their general powers of superintendence—what I think the statute gives them—the power to issue regulations to be observed in the course of surveys, having in view the security of lives and property on board ship. It was explained by the counsel for the Board of Trade—whether the explanation be admitted or not it is sufficient to illustrate what I mean—that the Board from recent occurrences have learned that where cast-iron bends or elbows have been used in connection with the pipes referred to in section 88 of the instructions, they are liable to be broken by any concussion which may affect the hull, and the liquid running from water-closets, soil, and urinal pipes thereby comes into direct contact with the hull of the ship and injures its security. Now, that is an illustration of a matter as to which surveyors at particular ports may very likely be in ignorance, and as to which it seems most desirable that the Board should give them guidance and instructions. There are other rules of the same class which seem to me to be equally important—as, for example, section 22, which deals with combings, skylights, scuppers, ports, and gratings (matters of the greatest importance in a passenger ship), and section 56, which specifies particular requirements in regard to the decks and floors, companions or hatches, and the like. It appears to me it would be most undesirable to leave matters of such importance to the will or fancy of individual surveyors at the various ports of the kingdom without giving them the benefit of the latest experience and the directions of the Board of Trade, whose servants they are. But I do not think that the statute has left matters in that position. On the contrary, I think the statute vests in the Board of Trade the power of directing the surveyors in regard to such matters.

After the best consideration I could give to the case, I should have been disposed to adopt this view irrespective of the recent statute which gives the shipowner a power of appeal; but it is satisfactory to know that if the Board should in their instructions make requirements oppressive and unnecessary and capricious in their nature, there is a power of appeal. The recent amendment of the law in this respect is probably to be accounted for from the circumstance that the Legislature had seen that without some such power of appeal the provision of the previous statutes might possibly produce some hardships against shipowners and shipbuilders; and it is worthy of notice as bearing on the general argument that the questions which may arise are treated as matters between the shipowner and the Board, not between the surveyor (the Board's servant) and the shipowner. It was not maintained by the counsel for the Board of Trade that the instructions were final, so that a Court of Survey could not deal with them, or that the skilled referees appointed under the recent statute could not deal with them. On the contrary, it was conceded that if the instructions were in any respect open to objection

there was an appeal under the statute. It appears to me that is a sound view. If the pursuers in this case are right in saying that this is a capricious and fanciful requirement on the part of the Board of Trade, they have the remedy of appealing to the Court of Survey, or under the section of the statute which gives them an alternative course they are entitled to require that skilled referees shall give an opinion upon the matter in dispute, and upon that opinion I should think the Board of Trade would be bound to act.

On these grounds I am of opinion that the contention of the pursuers of this action is not well founded.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Kinnear—Mackintosh. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders (Respondents)—Solicitor-General (Balfour), Q.C.—Muirhead. Agent—David Turnbull, W.S.

Friday, June 25.

## FIRST DIVISION.

[Sheriff of Aberdeenshire.

RENNIE AND OTHERS (DUGUID'S TRUSTEES)  
v. URQUHART.

*Bill—Sexennial Prescription—Writ.*

Where a letter of a defender is founded on as establishing the subsistence of a debt due under a bill of exchange which is prescribed, it is competent to refer to the letter to which the writ founded on is an answer, even when that letter is not addressed to the defender.—Circumstances in which the subsistence of such a debt held to have been proved.

The pursuers in this case were the trustees of the late William Duguid, farmer, Udney, Aberdeenshire, who died on the 29th November 1875, and the defender was Alexander Urquhart, farmer, Lyne of Skene, in the same county. The question related to a bill of exchange for £52, 1s., accepted by the defender along with a Mrs Rae in favour of Duguid. The bill was dated "Ardmore, 1st April 1870," and admittedly fell under the sexennial prescription. The pursuers, however, founded on the following writ of the defender, being a letter by him to W. Giles, one of the pursuers, as establishing that the debt was resting—owing:— "*Lyne of Linton, 13th May 1878.*

"Dear Sir,—Mrs Rae got your letter regarding the Ardmore money. I would ask you for a favour to let it lie with us just now. I am quite willing to pay interest for it, as I know off a farm that will be to let between this and the next term, and I am to get the first offer of it, and I cannot get money for my crop until the fiars are struck in March. I had a farm taken (the end of a lease), and the factor satisfied with me for tenant. Then the outgoing tenant and the factor quarreled about bad farming, and he must finish his lease himself. That is the reason how I am selling off. It is only the cattle and horses and some of the farming implements that is to be sold. Miss Duguid has been written about it. I trust you