

both parties. It is important that we should follow this course; for the decision may affect status as well as patrimonial interests.

LORD DEAS was of the same opinion. It had been quite settled for more than half a century that by the law of Scotland recrimination could not be pleaded in answer to an action of divorce for adultery, whatever the law might be in England. And it had been equally settled, though not for so long a time, that in mutual actions decree might go out against both.

LORD ARDMILLAN thought the course proposed right, but he reserved his opinion on the point whether both parties could get decree. Divorce was the remedy of an innocent party, and this view was sanctioned by some of the highest consistorial authorities in England.

LORD KINLOCH agreed with his Lordship in the chair as to the proper course to be followed. He would not express a contingent opinion on the result. If he did, it would be probably not the same with that last indicated. But it was at present unnecessary to say anything on the point.

Agent for Mr Brodie—Lindsay Mackersy, W.S.
Agent for Mrs Brodie—James Barton, S.S.C.

Friday, June 11.

SECOND DIVISION.

SPECIAL CASE — THE NEW DUMBARTON STEAMBOAT CO. AND THE TRUSTEES OF THE CLYDE NAVIGATION.

Shipping Dues Exemption Act 1867—Clyde Navigation Consolidation Act—Private Trading Company—Resident Burgesses of Dumbarton—Clyde and Harbour of Glasgow Rates. Held (1) that the exemption in favour of resident burgesses of Dumbarton from payment of rates leviable in the Clyde and at the Harbour of Glasgow was a personal privilege; (2) that a private trading company, although composed entirely of resident Burgesses of Dumbarton, was not a person or body corporate in the sense of the Shipping Dues Exemption Act; (3) that the compensation provided under that Act was claimable only by the individual partners of the private company, and to the extent of the average amount of profit drawn by them severally from the exemption during the statutory period; and (4) that the compensation when fixed continues to be payable until one or other of the events occurs by which its endurance is determined.

This is a Special Case for the opinion and judgment of the Court, adjusted between the New Dumbarton Steamboat Company and the individual partners thereof, and the Clyde Trustees. The following are the mutual statements in the case:—
“1. The said trustees are the trustees appointed and constituted under and by virtue of ‘The Clyde Navigation Consolidation Act 1858,’ for carrying into effect the provisions of the said Act. 2. By section 97 thereof it is made lawful for the said Trustees ‘to levy on and in respect of all vessels entering or using the River (Clyde) or Harbour (of Glasgow), the rates specified in the Schedule (G) to this Act annexed: and all such rates shall be paid by the owner, agent, master, consignee or other person in charge of such vessels.’ 3. Prior to the passing of the said Act the resident bur-

gesses of Dumbarton were entitled to exemption from certain rates leviable in the River Clyde and at the Harbour of Glasgow. 4. These exemptions were saved as provided in the said Act by section 108, whereof it is enacted that ‘whereas certain exemptions from payment of rates leviable on the River Clyde and at the Harbour of Glasgow and at the Harbour of Dumbarton are conferred on the resident burgesses of Dumbarton and Glasgow respectively by the 44th, 45th, 46th, 47th, and 48th sections of the fourth recited Act (*i.e.* 6 Geo. IV., c. 117, 1825), the 62d section of the fifth recited Act (*i.e.* 3 and 4 Vict., c. 118, 1840), and the 15th, 16th, and 17th sections of the sixth recited Act (*i.e.* 9 Vict., c. 23, 1846), which are saved by this Act to the effect mentioned in this section; and whereas it is expedient that the said exemptions should be continued during the lives, and should on the terms hereinafter mentioned be extinguished upon the deaths of the existing burgesses: Be it enacted that the said exemptions shall extend to the several rates imposed by this Act, so far as contained in the schedules (G) and (H) hereunto annexed (except the rates for the use of docks) as fully as if the said sections were contained in this Act and applied to the said several rates: but such exemptions shall apply only to the persons who were burgesses of Dumbarton and Glasgow respectively on the 10th day of June 1858, and at such times as such burgesses respectively are actually resident in the said towns respectively: and all such exemptions and all immunities conferred on or claimed by such burgesses under the above recited sections of the recited Acts, or the contract therein mentioned, shall be suspended so long as such burgesses respectively shall not reside within the said towns respectively, and shall wholly cease and determine upon the deaths of the said burgesses respectively.’”

The Special Case then recites the history of a copartnership entered into in December 1863 by burgesses of Dumbarton who held that character on 10th June 1858, for the purpose of owning and employing steam vessels between Dumbarton and Glasgow, and sets forth that the interest in that Company is now held by John Macmillan, William Whyte, and William Paterson, who are the sole partners. The Special Case then contains the following statements:—“The said Company commenced business a short time after its formation. The said Company acquired three steam vessels (the ‘Leven,’ the ‘Lennox,’ and the ‘Lochfyne’), which were registered in name of certain of the partners as trustees for behoof of the Company, and not in a certain number of 64th parts or shares as individual owners. These vessels respectively began to ply between Glasgow and Dumbarton on the following dates, viz:—‘Leven’ (passenger steamer), 31st May 1864; ‘Lennox’ (passenger steamer), 15th June 1864; ‘Lochfyne’ (luggage steamer), 21st January 1864. The Leven and Lennox ceased to ply between the said places on the following dates, viz:—‘Leven,’ 10th November 1866; ‘Lennox’ 27th December 1866. These vessels were sold by the said Company, the bills of sale thereof having been executed on the 27th December 1866, and registered on 2d January 1867. The dues leviable by the Trustees of the Clyde Navigation, under the said schedule (G), annexed to the Clyde Navigation Consolidation Act 1858, in respect of the Leven and Lennox, were not exacted for the periods prior to the following dates in virtue of the exemption contained in the be-

fore-recited section 108 thereof:—‘Leven,’ 10th November 1866; ‘Lennox,’ 27th December 1866. By ‘The Shipping Dues Exemption Act 1867’ certain exemptions from the payment of local dues on shipping and goods have been abolished. By this Act it is enacted that ‘The following words and expressions shall, in this Act, have the meanings hereby assigned to them, unless there is something in the context inconsistent with such meanings, that is to say:—‘The word “dues” shall include all tolls, rates, taxes, duties, and imposts levied on ships, or on goods carried in ships, except any duties levied by the Commissioners of Customs for the use of Her Majesty.’ By section 4 of the said Act, it is further enacted, that ‘After the commencement of this Act (1st August 1867), no exemption from dues shall be allowed in the United Kingdom on account of, *inter alia* any one or more of the following reasons, that is to say—‘On account of any ship or goods being the property of, or being consigned by or to, any particular person or body corporate.’ Provision is further made for the compensation of those who were entitled to profit by any such exemption abolished as aforesaid, as follows: ‘Where a person or body corporate who would, if this Act had not passed, be entitled, in his or their own right, to derive profit from any exemption from dues abolished by this Act, has derived pecuniary profit from such exemption during the year preceding the 1st of February 1867; in that, but in no other case, the person or body corporate entitled to receive the class of dues in question (in this Act referred to as ‘the receiver of dues’), shall pay to the person or body corporate so entitled (in this Act referred to as ‘the claimant’), by way of compensation, an annuity equal to the average annual amount of profit so derived during the three years next preceding the 1st of February 1867, or during so much of those three years as is subsequent to the date at which the claimant commenced to derive such profit.’ ‘Provided that no compensation shall be payable or paid (except so much as may previously have accrued), after any of the following times, viz:—‘1. After the expiration of ten years from the commencement of this Act. 2. After the time of the death of the claimant. 3. After the time at which the dues from which the claimant was exempted cease to be levied. 4. After any time when, from any reason whatever, the claimant ceases or would cease (if the exemption from dues for which compensation was granted then existed), to have a right to such exemption, or to be in a position to derive profit from it.’

“During the parts after specified of the said year preceding the said 1st of February 1867, the said three vessels were regularly employed by the said Company in trading between Dumbarton and Glasgow, viz.:—The ‘Lochfyne’ during the whole year; the ‘Leven,’ up till 10th November 1866; the ‘Lennox’ up till 27th December 1866. And during the said respective periods the said Company was exempted by the said trustees from payment of the rates contained in the said schedule (G) annexed to the said Clyde Navigation Consolidation Act 1858, or otherwise the said dues were not exacted by the Clyde Trustees, in virtue of the exemption contained in the before recited 108th section thereof, and the said Company derived pecuniary profit from the said exemption. During the three years next preceding the 1st of February 1867 all the partners of the said New Dumbarton Steamboat Company were resident within the

burgh of Dumbarton, and the average annual amount of exemption or profit so derived, as aforesaid, by the said Company, from the said exemption, was—

In respect of the ‘Leven’ and ‘Lennox,’	£394 17 6
In respect of the ‘Lochfyne,’	72 5 7
	£467 3 1

and the same is detailed in the claim for the said Company hereinafter mentioned. During the said three years the average annual amount of exemption or profit so derived, as aforesaid, by the said John Macmillan, William Whyte, and William Paterson, from the said exemption, as partners of and in proportion to their interests in the said Company was as follows. That is to say—

By the said John Macmillan, in respect of the ‘Leven’ and ‘Lennox,’	£84 7 0
In respect of the ‘Lochfyne,’	15 6 0
	£99 13 0

By the said William Whyte, in respect of the ‘Leven’ and ‘Lennox,’	£42 3 6
In respect of the ‘Lochfyne,’	7 13 0
	£49 16 6

By the said William Paterson, in respect of the ‘Leven’ and ‘Lennox,’	£42 3 6
In respect of the ‘Lochfyne,’	7 13 0
	£49 16 6

“The said trustees refused to entertain the said claim, on the grounds, *inter alia*, that the said New Dumbarton Steamboat Company was not a person or body corporate, and so not entitled to compensation under the before recited 5th section of the said Shipping Dues Exemption Act 1867, and also, separately and specially, that they had ceased to have a right to such exemption, and were not in a position to derive profit from it in respect of the vessels ‘Leven’ and ‘Lennox,’ which had been sold before the passing of the Act.

“The questions for the opinion of the Court are:—

- “1. Whether the said New Dumbarton Steamboat Company is entitled as a Company, and under the claim made by the said Company, to compensation from the said trustees, under the said Shipping Dues Exemption Act 1867, and if so, to what extent and amount, and for what period? or
- “2. Whether the said John Macmillan, William Whyte, and William Paterson, as partners of the said Company, or as individuals, are entitled to compensation from the said trustees, under the said Shipping Dues Exemption Act 1867; and if so, to what extent and amount; and for what period?”

SHAND and MACLEAN for the first parties.
SOLICITOR-GENERAL and WATSON for the second parties.

At advising—
LORD COWAN—The exemptions from payment rates, “saved” or continued as provided in the Act of 1858, were in favour of the resident burghesses of Dumbarton and Glasgow, and these exemptions

were declared to continue only during the lives of the existing burgesses as on 10th June 1858, and for so long and at such times only as such burgesses were actually resident in the said burghs respectively. From the provisions of the statute, it does not seem to me doubtful that the privilege thus continued had reference to individuals, and that no associated body, unless composed entirely of individuals possessing the necessary qualifications, could be entitled to the exemption conferred by the statutes. An association or company might nominally be recognised as within the privileged class; but this could be only because of its whole members being individually qualified to claim the exemption. Strictly speaking, the claim was one to be vindicated by the individual partners, and not by the company, who could in no proper sense be called a resident burgess on the death or non-residence of whom the statutory privilege was to cease.

This being so, the provision contained in the recent general Act abolishing the exemption (1867), and providing for compensation, admits of easy construction. It is only a "person or body corporate" that would have been entitled in his or their own right to profit from the exemption, had the Act not passed, who is declared to be entitled to claim the compensation provided for by the 5th section. "In that, but in no other case" can the claim be competently made. What may have been precisely meant by the term "body corporate," which occurs for the first time in this compensation clause, might have required some investigation into the history and provisions of the several enactments referred to in the case, had we to deal with any body fairly within that denomination. But it certainly does not apply to a private trading company such as that formed by the claimants. This was not indeed contended, and it must be as persons individually or collectively that this can be maintained. For the reason I have stated, however, I am clear that it is not as a company but as individuals, that the claimants have right to claim. And this construction, and no other, appears to me to be consistent with the nature of the exemption saved to the parties by the Act of 1858, and done away with by the statute 1867, and with the terms of the proviso attached to the compensation section of that Act. I am therefore of opinion that the first question contained in the case must be answered in the negative, and the second question in the affirmative.

The question, however, embraces a further inquiry. It is asked, "to what extent and amount, and for what period" is the compensation exigible under the statute? The plain object of the statutory provision as to compensation was to indemnify the parties in the enjoyment of the exemption for their loss of profit through its abolition. Every person who has derived pecuniary profit from the exemption during the year preceding the 1st February 1867 is entitled to be a claimant; and I see no sufficient ground for thinking that, if otherwise qualified, it behoved that he should have been deriving profit throughout the whole of the year. The question simply is, whether, through the exemption, profit was derived by the individual from the exemption to which he was entitled? Assuming this to be so, his title is complete to "an annuity equal to the average annual amount of profit derived during the three years next preceding the 1st of February 1867," but as it might happen that the claim-

ant had not been enjoying profits from the exemption during the whole period of three years, it is added, "or during so much of those three years as is subsequent to the date at which the claimant commenced to derive such profit." Whatever difficulties might be felt in applying this provision to cases where the circumstances are different, I do not think it doubtful that in this case the extent of the claim competent to the individuals, the first parties hereto, is correctly stated in the 24th statement of facts in the case. The average amount of profit drawn by them severally from the exemption during the requisite period prior to 1st February 1867, is admitted to be the several sums there attached to their names respectively. Nor is it of any consequence,—the parties having continued to be during the whole three years within the privileged class,—that certain of the vessels of which they were owners have been sold during the period. It is the average or pecuniary profit derived from the exemption generally, and not its source, as derived from ownership of particular vessels. The annuities being thus fixed in conformity with the statute, will continue until one or other of the conditions attached to its endurance by the terms of the proviso quoted in the 19th statement shall take effect. It must terminate with the life of the claimant, and at all events, on the expiry of ten years from the commencement of the Act. It will also terminate should the dues from which the claimant was exempted cease to be levied; and also in the event of the fourth condition becoming operative, by the claimant ceasing from any reason whatever "to have a right to such exemption, or to be in a position to derive profit from it"—that is, if he ceases to be a burgess, or to be resident within the burgh, or to be connected with the ownership of vessels, or to be engaged in trade, in respect of which ownership or trading, had the Act of 1867 not passed, profit from the exemption would have accrued to the claimant.

LORD BENHOLME and LORD NEAVES concurred.

The LORD JUSTICE-CLERK delivered no opinion, being absent at the hearing.

Agents for First Parties—J. & R. D. Ross, W.S.
Agent for Second Parties—Jas. Webster, S.S.C.

Wednesday, June 15.

FIRST DIVISION.

THOMS, PETITIONER.

Deed—Clerical Error—Alteration of Testing Clause—Instrument of Disentail—Record—Officer of Court. An application for authority to alter the spelling of the name of a testamentary witness in the testing clause of a deed of disentail which had been recorded, *refused*, on the ground that it was a private deed, and that the clerical error had not been committed by an officer of court or public official.

This was an application to the Court to grant warrant to the petitioners to correct an instrument of disentail by altering the spelling of the name of one of the testamentary witnesses. The said deed had been recorded in the Register of Tailzies.

SHAND, for them, founded on *Hedde*, 1 D. 267; *Gilmour*, 1 D. 467; *Brown*, 2 D. 1467; *Rowe*, 1st March 1849, 21 Jur., p. 309.