the word "and" been used instead of "or," for there is considerable authority for the view that "and" may be read as meaning "whom failing" and as marking equally with "or" a proper conditional institution. Here, however, the use of the word "or" displaces controversy as to the alternative character of the bequest in favour of Alexander Andrew Bruce's heirs in heritage.

The argument in support of the view that vesting took place *a morte testatoris* in Alexander Andrew Bruce is founded on the well-known rule of construction, formulated by Lord M'Laren in the case of *Hay's Trustees*, 1890, 17 R. 961, 27 S.L.R. 771, relating to bequests where legatees of the second order are described as the children or issue or heirs of the institute (there being no ulterior destination) and on earlier decisions from which Lord M'Laren purported to extract it. I think that the said rule of construction according to which bequests otherwise similarly couched fell to be read in different ways according to whether legatees of the second order were called by a class denomination, or were called *nominatim*, was a purely arbitrary one, proceeding not on ordinary methods of construing language used but on the assumption of insight into the intention of testators independent of the application of such methods. It might, notwithstanding, have come to be authoritatively and finally established. But it was brought under consideration of the House of Lords in the case of *Bowman's Trustees*, 1899, 1 F. (H.L.) 69, 37 S.L.R. 959, and its soundness was there distinctly negatived by Lords Watson and Davey in terms which need not be here repeated. I have always regarded the pronouncements of these noble and learned Lords as a sufficiently authoritative displacement of it although not embodied in actual decision, but in any case I respectfully adopt them. And an application of them to the present case leads to the result that the calling of the heirs in heritage of Alexander Andrew Bruce as legatees of the second order in the bequests in question created an effectual conditional institution in their favour, and that vesting *a morte* in Alexander Andrew Bruce was thus excluded.

On this footing the further question which arises is whether, on the one hand, the said conditional institution imported vesting at the death of Alexander Andrew Bruce in Alexander Montgomery Bruce, his eldest son, who survived him and was thus his heir in heritage in the primary and direct sense, but who died before the period of distribution, or whether, on the other hand, vesting was postponed until the period of distribution, and then took place in the second party to this case, Lewis Campbell Bruce, the second son of Alexander Andrew Bruce who answered to the description—in a secondary sense recognised in the descent of heritable property—of the heir in heritage of Alexander Andrew Bruce at that period. On this question I am in favour of the second party. Vesting *a morte* being excluded, the more natural and probable alternative period to look to for vesting is the period of distribution, particularly in the case of bequests embodied in directions to trustees to then pay and convey. Further, it is to be observed that the conditional institution here is conceived in favour of the "*heirs* in heritage" of Alexander Andrew Bruce. Now, if the intention of the testator had been to confine the benefit of the conditional institution to the person who might be the heir in heritage of Alexander Andrew Bruce in the primary sense, that is, as at his death, it would have been in accordance with the ordinary use of legal language to call the "heir in heritage." He calls, however, the "heirs in heritage." This use of the plural terms seems to me to be significant and intended to reflect the well-enough-recognised legal conception in heritable succession which admits of an heir in heritage, in a secondary sense, to a defunct being ascertained at some period subsequent to his death. According to this conception the second party answered to the description of the heir in heritage of Alexander Andrew Bruce at the period of distribution. Combining what I think is the presumption in favour of the period of distribution for vesting, where vesting *a morte* is excluded, with the fact that the testator calls the "*heirs* in heritage" of Alexander Andrew Bruce, I think that in the case of events such as have happened the testator's intention was that the bequests in question should fall to the person answering the description of heir in heritage of Alexander Andrew Bruce, in the sense above referred to, at the period of distribution.

I am accordingly of opinion that the first two questions in the case should be answered in the negative, and that the third should be answered in the affirmative.

The Court answered the first and second questions of law in the negative and the third in the affirmative.

Counsel for the First and Second Parties—Constable, K.C.—Leadbetter. Agents—Blair & Cadell, W.S.

Counsel for the Third Parties—Chree, K.C.—J. H. Millar. Agents—Mylne & Campbell, W.S.

Counsel for the Fourth, Fifth, Sixth, and Seventh Parties—Christie, K.C.—Gentles. Agents—Thomson, Dickson & Shaw, W.S.

Tuesday, January 7, 1919.

SECOND DIVISION.

(EXCHEQUER CAUSE.)

NORTHERN NAVIGATION COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue—Excess Profits Duty—Ship—Finance Act 1916 (6 *and* 7 *Geo. V, cap.* 24), *sec.* 47.

A single ship company sold their ship in September 1912 and purchased another ship in October 1914. The company having been assessed to excess profits duty under the general provisions contained in the Finance (No. 2) Act

1915 (5 and 6 Geo. V, cap. 89), applied to the Commissioners of Inland Revenue to have the pre-war standard of their new ship transferred to them under section 47 of the Finance Act 1916. That section provided that the provisions therein contained "shall, if the Commissioners of Inland Revenue so require, be applied." The Commissioners of Inland Revenue having declined to apply the section they appealed to the Commissioners for General Purposes, who adhered to the determination of the Commissioners of Inland Revenue on the ground that the matter was not within their jurisdiction. *Held* that the words in question implied an absolute discretion in the Commissioners of Inland Revenue with which the Commissioners for General Purposes could not interfere.

The Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), Fourth Schedule (sec. 40), Part II, rule 6, enacts—"It is hereby declared that where any business or trade is confined to the management of any particular assets, but power exists to substitute other assets for these particular assets or any of them, such a substitution shall not be deemed, for the purposes of Part III of this Act, to constitute a change of ownership of the business, but where any such substitution has been carried out by the sale of assets and the purchase of other assets the capital of the trade or business shall be taken to be increased or decreased, as the case may be, only by the amount of the difference between the price of the assets purchased and the price obtained for the assets sold, and the capital representing the assets purchased shall be estimated on the same basis for all purposes of Part III of this Act."

The Finance Act 1916, sec. 47, enacts—"Where any ship has been sold since the 4th day of August 1914 in such circumstances that the profits of the sale are not the profits of a trade or business, the following special provisions shall, if the Commissioners of Inland Revenue so require, be applied in the computation of the liability to excess profits duty in respect of the profits arising from the use of the ship. (*a*) The pre-war standard of profits of the purchaser as respects the ship shall where the standard of the trade or business of the vendor is a profits standard be calculated by reference to the profits arising from the use of the ship during the pre-war trade years, and shall be ascertained in accordance with the provisions of the principal Act, but calculated, where necessary, as if the use of the ship were a separate business; and where that standard is a percentage standard the pre-war standard of profits as respects the ship shall be the same as if the ship had not been sold, or in the case of a ship which was used for the first time after the 4th day of August 1914 shall be calculated by reference to the capital represented by the ship at the date when it was first used; and the pre-war standard of profits of the trade or business of the vendor and of the purchaser shall respectively be reduced and increased as the case may require, with any adjustments which may be necessary to meet the case of borrowed money or unpaid purchase money or other similar matters. . . ."

The Northern Navigation Company, Limited, *appellants*, being dissatisfied with an assessment to excess profits duty for the accounting period from 1st September 1914 to 31st August 1915 in the sum of £3557, 10s. made under section 38 of the Finance (No. 2) Act 1915, appealed by Stated Case in which S. James Hender, surveyor of taxes, was *respondent*. They claimed that under section 47 of the Finance Act 1916 the pre-war standard of the s.s. "Mountfields" (renamed s.s. "Blairmore"), purchased on 27th October 1914, should be substituted for that of the s.s. "Benedick," which was sold on 27th September 1912.

The Case stated—"1. The following facts were proved or admitted, viz.—(1) The appellants (whose company was formed in 1909) were the owners of a single ship—the s.s. "Benedick"—which was acquired on 1st September 1909 and sold on 27th September 1912. (2) The appellants owned no ship from 27th September 1912 until 27th October 1914, when they purchased the s.s. "Mountfields" (renamed s.s. "Blairmore") from the Doughty Shipping Company, Limited, which is not a single ship company. (3) In accordance with the manager's statement that the company was carrying on a continuing business, the income-tax assessments under Schedule D for the period when the company had no steamer were made on the average profits of the three preceding years. (4) The excess profits duty assessment was made in accordance with Rule 6 of Part II of the Fourth Schedule of the Finance (No. 2) Act 1915. (5) The pre-war standard was based on the average profit of the two years to 31st August 1913, and the duty on the deficiency of the first accounting period to 31st August 1914 was set off against the duty on the excess of the second accounting period to 31st August 1915. (6) The appellants made application to the Commissioners of Inland Revenue to have the pre-war standard of their present steamer (the s.s. "Blairmore") transferred to the new owners under section 47 of the Finance Act 1916 but the Commissioners of Inland Revenue declined to make the transfer. . . .

"4. After considering the whole of the facts and arguments the Commissioners were unanimously of opinion that the question raised was not one within their jurisdiction as the application of section 47 of the Finance Act 1916 was entirely within the discretion of the Commissioners of Inland Revenue, who had declined to apply it, and accordingly the General Commissioners refused the appeal."

Argued for the appellants—The purpose of the excess profits duty was to treat a business as a continuing one, and therefore a fair comparison could only be made by taking the pre-war standard of the same ship as earned the profits brought into assessment. There was no instance where it had been put in the absolute power of the Commissioners of Inland Revenue to select the standard that suited them best. Reference was made to the Finance (No. 2) Act

1915 (5 and 6 Geo. V, cap. 89), sections 35, 40, 45 (5), Fourth Schedule, Part II, rules 5 and 6.

Argued for the respondents—Unless the Commissioners of Inland Revenue had the discretion claimed the words of the section (Finance Act 1916 (6 and 7 Geo. V, cap. 24), section 47) would be rendered nugatory. The intention of the Legislature was that the section should be applied against the taxpayer and not when it was in his favour, and its whole object was to catch the enormous profits made on the sale of ships. It implied an absolute discretion in the Commissioners of Inland Revenue, and from their decision there was no appeal. A similar discretion was given in the Finance (No. 2) Act 1915 (5 and 6 Geo. V, cap. 89), Fourth Schedule (section 40), Part I, rule 5. A similar discretion had also received judicial interpretation in *Macfarlane* v. *Commissioners of Inland Revenue*, 1859, 22 D. 266, and in relation to the present Act in *Williamson Film Printing Company, Limited* v. *Commissioners of Inland Revenue*, 1918, 34 T.L.R. 545, *per* Sankey, J. In England no mandamus would be competent against the Commissioners of Inland Revenue for refusal to apply the section.

LORD JUSTICE-CLERK—I think this appeal must fail. In my opinion the judgment of the Commissioners for General Purposes was right, and was put on precisely the correct ground, as is stated in article 4 of the appeal, that "the Commissioners were unanimously of opinion that the question raised was not one within their jurisdiction, as the application of section 47 of the Finance Act 1916 was entirely within the discretion of the Commissioners of Inland Revenue." That seems to me precisely in accordance with the terms of section 47, which says that if the Commissioners of Inland Revenue —who are an entirely separate and distinct body from the Commissioners for General Purposes under the Income Tax Acts—desire a certain plan or scheme to be adopted for assessing they can ask the income tax authorities to adopt that plan or scheme, and the income tax authorities must do so, but if the Inland Revenue Commissioners do not so require, then there is no other person, according to the statute, who can require that to be done. That seems to me to be the ground on which the Commissioners for General Purposes proceeded. I think it is the right ground and that their judgment was sound, that they had no jurisdiction to decide the appeal in favour of the appellant.

LORD DUNDAS—I am of the same opinion. With the equity of applying one or other method of assessment to the appellants' profits we are not here concerned. The question seems to be one of jurisdiction—jurisdiction of the General Commissioners to hear the appeal that was presented to them. Now I think that the General Commissioners had no jurisdiction under section 47 of the Act of 1916, and that the appeal to them was not competent. Section 47, in my judgment, is only applicable when the Commissioners of Inland Revenue so require, and in this case they have refused to apply it. The words of the section are that "the following special provisions shall,"—not may—"if the Commissioners of Inland Revenue so require, be applied." That seems to me to be final. The argument for the appellants appears to me to be in effect a crave for a mandamus that the Commissioners of Inland Revenue be ordained to apply section 47, they being unwilling to do so. I think that such a demand is out of the question.

LORD SALVESEN—I concur.

LORD GUTHRIE—I concur. The appellants state that "there is nothing in common justice to prevent the taxpayer making an appeal to the General Commissioners of the district" That nebulous contention was not insisted on. In a question turning on the sound construction of statutes it is manifestly irrelevant in law, and I am not satisfied it has any foundation in fact.

The Court affirmed the determination of the Commissioners.

Counsel for the Appellants—Constable, K.C.—Scott. Agent—Campbell Faill, S.S.C.

Counsel for the Respondents—Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Wednesday, January 8.

FIRST DIVISION.

[Lord Hunter, Ordinary.

ROBERTSON (OWNER OF S.S. "CORNELIAN") *v.* PORTPATRICK AND WIGTOWNSHIRE JOINT COMMITTEE.

Harbour—Ship—Reparation—Negligence—Duty of Piermaster towards Ship Berthed at Pier with Reference to Latent Danger.

The master of a ship, when she was received into a berth at a pier, was informed by the authorities at the pier that he would require to leave the berth he was occupying and go to another nearer the shore to make room for a destroyer. He was warned that at that other berth there was a risk of his vessel going ashore, which risk he agreed to take. The vessel was warped along the pier to the other berth, where a number of moorings stretched from the pier to a fluke anchor. Those moorings consisted of three fathoms of manilla rope, three fathoms of wire rope, and three fathoms of chain next the anchor. The master was not warned of the presence of the wire rope, which was admittedly dangerous to a vessel using its propeller, and he was not aware of its presence, the only part of the moorings above water being the manilla rope. The destroyer having requested the vessel to move still further towards the shore her master resolved to anchor