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

off the pier and proceeded to move his vessel by using the propeller. His vessel was then afloat. The propeller became entangled with the wire rope and the vessel was damaged. *Held* that the owner of the ship was entitled to recover damages in respect that the piermaster was negligent in failing to warn the shipmaster of the presence of the wire rope.

Observations per Lord Hunter (Ordinary) on the duty of the piermaster towards vessels berthed at the pier.

William Robertson, owner of the s.s. "Cornelian," *pursuer*, brought an action against the Portpatrick and Wigtownshire Joint Committee, *defenders*, concluding for £3500 in name of damages for injuries alleged to have been sustained by the s.s. "Cornelian" through the fault of the defenders while his ship was moored at their pier at Stranraer.

The defenders *pleaded*—"2. The pursuer not having suffered any loss or damage through the fault of the defenders, the defenders are entitled to be assoilzied. 3. The pursuer's loss and damage having been caused, or at least materially contributed to, by his own fault, the defenders are entitled to be assoilzied.

On 28th May 1918 the Lord Ordinary (HUNTER), after a proof, repelled the pleas-in-law for the defenders, and decerned against them for payment to the pursuer of £2149, 11s. 6d., with interest in full of the conclusions of the summons.

Opinion, from which the *facts* of the case appear:—"In this action the pursuer, who is the owner of the s.s. 'Cornelian' of Glasgow, sues the proprietors of the railway pier at Stranraer for damages in respect of injuries sustained by that vessel in the following circumstances:—On 30th December 1916 the s.s. 'Cornelian' arrived at Stranraer in order to take in bunker coals. The master of the vessel was directed by one of the defenders' officials to move his vessel to a berth on the east side of the railway pier. An interview took place between the master of the vessel and the stationmaster, who acts as piermaster. The latter explained that the berth was required for a destroyer which was expected to arrive during the night, and informed the shipmaster that he would require to shift about seven o'clock. As the intention of the master of the vessel was to execute some slight repairs upon the condensers of the engine as well as to take in bunkers he asked the harbourmaster if he might remove his vessel to a berth lower down the harbour. Permission to do this was given by the piermaster. There is a discrepancy between the evidence given on the two sides as to what passed at this interview. I saw no reason in the demeanour of the witnesses to assume that intentionally dishonest evidence was given on either side. The piermaster says that he distinctly informed the master of the vessel that if he moved his vessel to a lower berth the latter would accept all risk of any injury being sustained by his vessel. The master of the vessel says that risk was not referred to at the interview, but that he was told that the vessel might ground, and that owing to the construction of his vessel he did not anticipate any untoward result from this. Whatever the exact form of words employed by the piermaster may have been, I am satisfied that what both parties had in mind was the ordinary risk or liability of the vessel taking the ground. The harbourmaster did not call the attention of the master of the vessel to any special risk which the vessel would run from occupying a lower berth from that opposite the crane for loading coals, and the master of the vessel did not contemplate any other risk than that of taking the ground on what was understood to be a soft bottom.

"The vessel was not moved as soon as it was anticipated that she would be. The master of the vessel went into the town upon business, and the harbourmaster made a visit to the ship about eight o'clock. He made complaint that the vessel had not been shifted. The vessel, however, had grounded, and he was informed of this, and also that the master had not returned to his vessel. The master had an interview with the harbourmaster at his office, and promised that the vessel would be moved when the state of the tide allowed of this being done. On returning to his vessel the master gave instructions that the vessel should be shifted as he had promised and then retired to rest. I think that the recollection of the piermaster as to what occurred at his interview with the mate in the master's absence and subsequently with the master is in fault, and I accept the account given by the representatives of the ship as being substantially accurate.

"About two o'clock in the morning the vessel was moved to the lower berth by warping her along the pier. A request for this had been previously made by a representative from the destroyer, who was accompanied by the piermaster's deputy. The act was, however, done in fulfilment of the previous instructions given by the defenders' piermaster. At a later hour, about 5 a.m. on the morning of the 31st December, a further request was made from the destroyer that the 'Cornelian' should further alter her berth. By this time the 'Cornelian' had taken in her bunkers and completed the repairs that had to be made. It was therefore resolved that the 'Cornelian' should leave the berth and proceed to anchor in the bay with a view to resuming her voyage as soon as possible. After steam was got up the mooring ropes of the 'Cornelian' were cast off and her engines were used to enable her to leave the pier. This was about 7 a.m. Shortly after the engines of the 'Cornelian' were started they came to a standstill through some manilla rope and wire cable getting entangled in her propeller. It was found impossible to get the obstruction removed at Stranraer, and the vessel was towed to Bowling where the damage which she had sustained from her propeller being fouled was repaired.

"The material which fouled the 'Cornelian's' propeller was part of certain moorings which stretched from the pier to a fluke anchor situated in the bay a little

distance from the pier. Approximately the moorings consisted of three fathoms of chain, next the anchor, three fathoms of wire rope, and about three fathoms of manilla rope. The rope is for convenience in pulling up the wire rope and cable which should lie on the bottom. The wire rope is not as heavy as the chain. The wire rope will tend to roll up and may not be entirely on the bottom although the chain is.

"The pursuer maintains that the defenders are liable to him in damages in respect that their piermaster was negligent in allowing the 'Cornelian' to go to lower berth without informing her master of the presence of the moorings and of the consequent risk she ran of fouling the propeller if he started his engines. The obligation imposed upon the managers of a harbour is, as explained by Lord President Inglis in *Thomson &c.* v. *Greenock Harbour Trustees*, 1875, 3 R. 1194, at 1200, 13 S.L.R. 155, to use reasonable diligence to prevent the occurrence of injuries to vessels frequenting the harbour. In my opinion the harbourmaster of the defenders failed to use such reasonable diligence. In cross-examination he was asked 'Isn't there a risk of fouling your propeller if you go into an area where there are wire ropes about?' His answer was that the shipmaster 'did not need to work his propeller at all.' Then he admitted that it is dangerous for a ship to work its propeller in a region where there are wire ropes and that he knew that the region was dangerous for the master of the 'Cornelian' if he worked his propeller. His only justification for not telling the master of the 'Cornelian' not to work his propeller or that the ropes were there was that it was the shipmaster's business. That seems to me to be an unjustifiable position to take up, particularly as he had no reason to suppose that the master knew of the presence of the moorings or of their nature.

"The defenders maintained that they were not liable to the pursuer because there was a special arrangement made between their piermaster and the shipmaster whereby all risk for any injury which the 'Cornelian' might sustain from removing to the lower berth was to be on the ship. In *Pyman Steamship Company* v. *Hull & Barnsley Railway Company*, 1915, 2 Q.B. 729, the owners of a graving dock contracted with the owners of a vessel for the use of the dock upon the footing that the latter should use the dock at their own risk, it being expressly provided that the owners of the graving dock should not 'be responsible for any accident or damage to a vessel . . . whilst in the graving dock, whatever may be the nature of such accident or damage, or howsoever arising.' Owing to the negligence of the dock owners the blocks upon which the keel of a vessel rested were uneven in height and in consequence she suffered damage. In an action brought by the owners of the vessel to recover the amount of this damage from the owners of the dock it was held that the latter were not responsible in consequence of the terms of their contract. The defenders maintained that what passed at the interview between their piermaster and the master of the s.s. 'Cornelian' amounted to a special contract similar to that which existed in *Pyman's* case. In my opinion, however, there was no such contract concluded in the present case. All that occurred was that the captain understood that his ship was liable to ground on a bottom which in view of the construction of the ship exposed the vessel to practically no risk of damage.

"The defenders further contended that the pursuer could not recover, as the captain of his vessel knew or ought to have known of the presence of the moorings, and ought not to have used his propeller. If the captain had known of the moorings I think it would have been an imprudent act on his part to use his propeller at the time when he did so. I am satisfied, however, that he did not know of the existence of the moorings. He does not appear to have observed the rope attached to the railing, and it does not appear to me that if he had there was anything in the circumstance of a rope attached to the pier railing, and apparently dropping over the harbour wall into the water to cause him to suspect the existence of the moorings.

"A further point was taken by the defenders that the master of the vessel ought not to have left his berth at the pier upon his own steam but should have warped himself out. If the defenders had intended to make a point about this they should have made a definite case against the vessel upon record. I am therefore not entitled to give effect to this contention as argued to me, but I cannot think that it is imprudent seamanship on the part of a master to leave a tidal harbour by using his propeller. On the evidence it is proved that the vessel was afloat and not aground when the engines were started. I propose to repel the defences.

[*His Lordship then dealt with the question of damages.*]"

The defenders reclaimed, and argued—The evidence showed that there was a special contract between the defenders and the pursuer excluding the defenders' ordinary obligations and throwing the whole risk of his actings upon pursuer. But if there was no special bargain the danger in question was of such a nature as to be obvious to any competent shipmaster, and when he used his propeller in such circumstances he must be held to have taken the risk. In any event there was contributory negligence, for the shipmaster ought to have made inquiries and taken soundings, and should not have used his propeller, or if he did use it should have gone out at high water. The following authorities were referred to—*Pyman Steamship Company* v. *Hull and Barnsley Railway Company*, [1915] 2 K.B. 729; *Thomson* v. *Greenock Harbour Trustees*, 1875, 3 R. 1194, 13 S.L.R. 155; *s.s. "Fulwood" Limited* v. *Dumfries Harbour Commissioners*, 1907 S.C. 456 and 735, 44 S.L.R. 320 and 566; *Mackenzie* v. *Stornoway Pier and Harbour Commission*, 1907 S.C. 435, 44 S.L.R. 350; *Niven* v. *Ayr Harbour Trustees*, 1898, 24 R. 883, 34 S.L.R. 660, 25 R. (H.L.) 42, 35 S.L.R. 688; *Mair* v. *Aberdeen Harbour Commissioners*, 1909 S.C. 721, 46 S.L.R. 491.

Argued for the pursuer (respondent)—None of the arguments for the defenders were to be found upon the record, and they had not been dealt with by the Lord Ordinary. The pursuer had been invited by the defenders to go where he had gone, and if so it was their duty to take reasonable care to keep him safe. They had failed in that duty—*The Queen* v. *Williams*, 1884, 9 A.C. 418, at p. 423, and *per* Sir Richard Couch at p. 432 applied. *Pyman's* case was distinguishable.

At advising—

LORD PRESIDENT—In this case I agree with the conclusion reached by the Lord Ordinary, whose opinion so fully and accurately surveys the salient facts of the case and sets out the grounds of judgment that I think it unnecessary to resume them.

Indeed the reasoning of the Lord Ordinary's opinion was not very earnestly assailed or criticised before us, but we were invited to absolve the defenders from liability for the damage done to the pursuer's vessel on a ground not considered at all by the Lord Ordinary. It was argued that a wire rope lying on a soft bottom was no danger to a properly managed vessel, meaning thereby in this case a vessel whose propeller was not started until her keel was well clear of the ground, and that being so, that there was no duty on the part of the harbour authorities to warn the captain of the "Cornelian" of the presence of the wire rope in the new berth to which he was moved.

That seemed at first sight a very formidable defence, but unfortunately for the defenders, it is not averred upon the record, nor was the evidence in the case directed to it. The defence upon record, although very obscure, rambling, and indistinct, comes to this—that the presence of the wire rope was a danger, but a danger so obvious and manifest that the captain of the ship saw it, or ought to have seen it, and at all events that he deliberately and voluntarily took the risk upon himself when he shifted to the new berth.

Now that was the defence put forward I observe in the letter of the manager of the railway company to the pursuer when the first complaint was made of mischief done to the "Cornelian," and that it is so becomes manifest when one examines the evidence of the harbourmaster in the present case. I will read a few sentences from his deposition which will render that quite clear. He said—"It did not occur to me to mention anything about these cables to the master of the 'Cornelian.' (Q) Why not?—(A) Well, I thought it was part of the general risk that the ship would take if it moved along the pier. . . . I told him he would have to shift at least the length of his ship. If he did that, that necessarily took him across the wire cables, which in my knowledge were stretching out to the anchorage. I knew he would go over these. (Q) Why didn't you mention that?—(A) It did not occur to me to mention any details at all. (Q) Don't you know that if a vessel was going across ground where there were cables, these cables might foul his propeller?—(A) He accepted the risk of that. (Q) Don't you know that if he went back through a place where cables were stretched, there was a danger that his propeller might foul in these cables?—(A) I know that is quite possible. I knew the cables were there. I did not tell him because he did not discuss any details of the risk at all. . . . (Q) Didn't you know that the man was going back into a position which you admit was dangerous?—(A) I don't admit it is dangerous. (Q) Isn't there a risk of fouling your propeller if you go into an area where there are wire ropes about?—(A) He did not need to work his propeller at all. I know that it is dangerous for a ship to work its propeller in a region where there are wire ropes. I knew that this region was dangerous for him if he worked his propeller."

Now that evidence makes it perfectly clear that in the opinion of the harbourmaster there was a danger there, and if it was not manifest—and I hold it was not obvious—and if the captain of the ship did not make a bargain taking the risk upon himself—and I am certain he did not—then obviously the harbourmaster ought to have warned him of the presence of that wire rope.

That a wire rope lying on a soft bottom is not a danger to a vessel constructed like the "Cornelian" seems fairly obvious. If therefore it was a danger, the wire rope must have been well clear of the bottom at the place where the "Cornelian" was lying. And although our attention was not specially directed to the evidence bearing upon this point, a careful examination of the depositions of the various witnesses leads me to the conclusion that the wire rope *de facto* was not upon the ground where it passed under the "Cornelian's" keel, but was well off the ground, and was therefore a real source of danger.

The manilla rope which constituted the shore end of the cable stretching from the mooring to the quay was, according to the evidence given, about 3 fathoms long, or 18 feet, and it was plainly not of sufficient length to stretch from the rail to which it was fastened to the bottom at the place where the "Cornelian" was lying. For the evidence discloses that the distance from the rail to the coping of the quay was 6 feet. How much of the rope was expended on the rail to which it was fastened we are not told. Nor are we told what was the distance from the coping of the quay to the surface of the water at high-water mark, although I think that we may, without risk of exaggeration, assume that it was about 6 feet at least. But then the rise and fall of the tide, it is proved, was 10 feet, and from the chart of soundings before us it appears that the depth of water at low-water mark of ordinary springs, where the "Cornelian" was lying, was some 7 feet 10 inches. Now the rise and fall of the tide being 10 feet and the depth at low water in ordinary springs being 7 feet 10 inches or thereby, it is apparent that the whole length of the manilla rope would be exhausted in stretching from the surface of the water at high-water mark to

the bottom at the place where the "Cornelian" was lying, and it had yet to go the distance from the surface of the water at high-water mark to the coping of the quay and from the coping of the quay to the rail to which it was fastened.

These are undisputed facts in the case, and lead distinctly, I think, to the conclusion that the manilla rope was too short to stretch from the rail to the bottom, and accordingly that the wire rope must have been well off the bottom when the accident took place. If that be so, then the defenders were justified in taking it for granted that the wire rope, situated as it was, was a real danger, and that accounts for the nature of the defence averred in this record.

In my opinion, agreeing with the Lord Ordinary, that defence fails, and accordingly I think the pursuer is entitled to have the sum of damages which his Lordship has found due to him. I am for adhering to the Lord Ordinary's interlocutor.

LORD MACKENZIE—I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

In coming to this conclusion I am influenced by the position taken up by the defenders on record, and by the admissions of their harbourmaster. The case the defenders make on record is that the mooring cable was a danger, but that the master of the "Cornelian" saw or ought to have seen it, as the danger was obvious, and that the accident was due to his fault in moving his propeller in too shallow water. The harbourmaster admits that it was dangerous for the ship to work its propeller in the position she occupied, but says that was the ship's own business. In my opinion the harbourmaster was guilty of a breach of duty in not warning the shipmaster of a latent danger of the existence of which he was aware, but of which the shipmaster was ignorant. There was an attempt in argument to make out that what passed between the harbourmaster and the shipmaster amounted to a special contract that when the vessel moved back she did so at her own risk. This is not pleaded on record, and the proof does not support it. All that was in the mind of the two parties was the risk attending the vessel taking the ground and did not extend to dangers connected with the presence of the mooring cable.

If there was a duty on the harbourmaster to give warning of the moorings, and if there is not evidence of a special contract putting the risk on the shipmaster, the only other point the defenders had is that the shipmaster was guilty of contributory negligence in working his propeller when he did and so fouling the cable. There is great difficulty in understanding how he fouled the cable, and this is not cleared up by the evidence. The fact is that he did, and it is not necessary for judgment to form an opinion as to how it happened. I am unable to hold the master was guilty of contributory negligence. His evidence is clear to the effect that when the propeller moved he knew his ship was afloat, and he was quite safe in leaving when she was afloat; he never dreamt that there would be any cable at all at the pier. He says the vessel moved away from the quay quite freely. The master is corroborated in this by the mate and the second engineer. This displaces the suggestion that the master was negligent in not finding out what depth of water there was aft before he started, and also the evidence of the naval officer in command of the destroyer, who says he would not have used the propeller to move her at that time. A case was attempted to be made founded on the soundings taken on 29th March 1916. These soundings are admitted to be correct but prove nothing as to the state of the tide or the depth of water at the time of the accident on 30th December 1916. The defenders fail to prove what is the starting-point of their case on contributory negligence, viz., that the ship was aground aft when the propeller was started.

Looking to the case the defenders attempted to make, and to the admissions given and the evidence led, I am of opinion the pursuer is entitled to the decree the Lord Ordinary has given him.

LORD SKERRINGTON—I agree with your Lordships.

LORD CULLEN—I also agree.

The Court adhered.

Counsel for the Pursuer (Respondent)—Sandeman, K.C.—C. H. Brown. Agents—J. & J. Ross, W.S.

Counsel for the Defenders (Reclaimers)—Watson, K.C.—Gentles. Agents—Hope, Todd, & Kirk, W.S.

VALUATION APPEAL COURT.

Thursday, December 19.

(Before Lord Salvesen, Lord Cullen, and Lord Hunter.)

ASSESSOR FOR GREENOCK *v.* WILSON & CAMPBELL.

Valuation Cases — Expenses — Failure to Give Timeous Notice of Withdrawal of Appeal.

Where timeous intimation of withdrawal of an appeal has not been given, and the respondents have been thereby put to unnecessary expense, the Court will consider itself at liberty to make an award of expenses.

John Alexander, Assessor for the Burgh of Greenock, *appellant*, being dissatisfied with a decision of the Burgh Valuation Committee of Greenock whereby the entry to be made in the valuation roll for the year Whitsunday 1918 to Whitsunday 1919 in respect of certain premises in Hamilton Street, Greenock, belonging to Messrs Wilson & Campbell, sugar merchants, *respondents*, was fixed at a yearly rent or value of £300, appealed by Stated Case.

On 15th November 1918 a notice was given in the rolls of the Court of Session that the