second bondholder Hill, who is entitled, I think, to have effect given to this assignation.

I think therefore that the Sheriff-Substitute has acted rightly.

The Court refused the appeal.

Counsel for the Appellant—Guthrie—Craigie. Agents—Welsh & Forbes, S.S.C.

Counsel for the Respondent—Strachan—Patten. Agents—M'Neill & Sime, W.S.

Friday, February 8.

FIRST DIVISION.

[Exchequer Cause.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY AND OTHERS, AND THE NORTHERN ASSURANCE COMPANY AND OTHERS *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Income-Tax—Property and Income-Tax Act 1842 (*Act 5 and 6 Vict. cap.* 35), *Schedule D, First Case—Insurance Company, Fire and Life—Profits or Gains.*

The Income-Tax Act 1842, Schedule D, Case 1, Rule 1, provides—"The duty to be charged in respect of" (trades, &c., not embraced in any other schedule) "shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade . . . upon a fair and just average of 3 years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade . . . shall have been usually made up."

A company carried on the business of fire and life insurance, including the sale of annuities, and from time to time realised its investments when an opportunity offered of its doing so at a profit. *Held*, in assessing to income-tax, (1) that the nett profits and gains from the two branches of the business were to be massed as one undivided income, assessable according to the rules applicable to Case I. Schedule D; (2) that in estimating the profits and gains of the company, interest on investments which had not suffered deduction of income-tax at its source must be taken into account, as also fire insurance premiums for the year of assessment, or an average of 3 years (less losses by fire in that period, and ordinary expenses), and gains made on investments realised during either of these periods; (3) that the profits and gains of the company on its life business could only be ascertained by actuarial calculation, proceeding upon the result of the statutory quinquennial investigation, or of the usual periodical investigation in companies established before the statute, or of the triennial investigation prescribed by Schedule D of the Income-Tax Acts

The Income-Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, Case 1, provides—"Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act." Rule First provides—"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade . . . upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade . . . shall have been usually made up." . . .

At a meeting of the Commissioners of Income-Tax for the County of Midlothian for hearing and determining appeals, held at Edinburgh on 27th October 1886, the general manager of the Scottish Union and National Insurance Company appealed against an assessment made on the company under Schedule D of the Income-Tax Acts for the year 1885-86. The assessment was appealed against by the company, *inter alia*, on the ground of the decisions of the English Courts on the appeal case of *Last* v. *The London Assurance Corporation*, 14th July 1885, L.R., H. of L. App., vol. x. p. 438, it being contended that according to such decisions, after taking into account the income-tax paid by way of deduction from interests and dividends on the company's invested funds, there remained no balance of profit for direct assessment.

The following were the facts:—1. The appellants were incorporated under a special Act of Parliament, 41 Vict. cap. 53, and they carried on the business of fire and life insurance, including the sale of annuities and other ordinary branches of the said businesses within the limits defined by the said special Act. The results of their business in all departments, so far as their shareholders were concerned, were thrown together into one account, called the profit and loss account, and dividends to the shareholders were declared out of the balance of profit shown upon this account, and not out of profits made in any particular department. 2. The profits of the appellants' fire insurance business were ascertained from year to year. In respect of the premiums in hand at the end of each year, risks were still running under existing policies, which risks might be taken as equivalent on an average to one-third of the premiums received during the preceding year. It had been the custom for many years to reckon the profits of fire insurance business with reference to income-tax upon a seven years' average, but the appellants were satisfied to accept the ruling of the Commissioners, and reckon these profits upon a three years' average. 3. The whole interest, dividends, rents, and other revenue from invested funds received by the appellants were divided into two portions, one of which, being the proportion of the whole which was earned from the investment of the paid-up capital and reserves belonging to the shareholders, passed to the credit of their profit and loss account, and formed a portion of their yearly profits. The remainder of the interest, dividends, and other revenue from invested funds was earned from the investment of the accumulated life and annuity premiums, and went to provide for the company's obligations under its life assurance and annuity policies. 4.

In carrying on the business of life insurance the appellants issued policies upon lives in return for payment of a premium or premiums. Such payments were made in one sum, or in sums spread over a few years, or in sums spread over a whole lifetime, and by the said policies the appellants undertook to pay certain sums upon the death of the person assured, or on his attaining a certain age, or on the happening of other contingencies connected with human life. 5. The liabilities of the appellants to the holders of their life and annuity policies were discharged partly out of the premiums received and partly out of the interest or other annual returns arising from the investment of the premiums. These liabilities embraced an obligation not only to pay the specific sums named in the policies but to account to the policy-holders for any surplus that might arise in the business, and to appropriate nine-tenths of that surplus by way of bonus to the policy-holders. This surplus was popularly known as "profits," but as regarded the application of nine-tenths of it, it formed, so far as the appellants were concerned, a debt due by the company to its policy-holders equally with the sums named in their policies. The appellants, however, admitted, for the purposes of this case, that income-tax fell to be calculated on all such "profits."

The Commissioners, on 1st February 1887, issued the following deliverance—"The Commissioners having considered the arguments adduced at last meeting are of opinion that the insurance companies should be assessed on their nett revenue, including therein premiums, untaxed interests, and profit from investments, and giving credit for all payments under policies, expenses, and losses, such revenue to be determined on the average of three years, if that be the only legal course, but the Commissioners would suggest that the parties and the Crown should arrange that the average should be determined by the number of years adopted by each respective office as the period of its investigation, and they remit to the surveyors and insurance companies to adjust the figures on this basis. The result to be reported to the Commissioners. In the event of its being found that the profits of life assurance companies must be determined by actuarial valuation, the Commissioners are of opinion that the Crown ought not to be bound by the rate of interest or other elements arbitrarily adopted by the companies themselves to the effect of reserving profits for future distribution."

Additional information was supplied to the Commissioners, who cited the Company to attend at an adjourned diet, when it was contended for the company—1st. That they were only liable to pay income-tax under Schedule D on the actual gains and profits arising to them from the whole departments of their business, including therein their life business, their fire business, and the interest on invested funds so far as belonging to shareholders. 2nd. That the amount of said profits fell to be calculated and ascertained—(*a*) As regarded interest, by taking the average of the amount of interest belonging to the shareholders on capital and reserve as appearing in the appellants' profit and loss account for the three years immediately preceding the year for which the assessment for income-tax was to be imposed; (*b*) As regarded fire business, by taking the average of the fire profits for the three years immediately preceding the year in which the assessment for income-tax was to be imposed; (*c*) As regarded life business, by taking the proportion applicable to one year of the amount of life profits as ascertained at the last periodical investigation into the company's life business made in terms of the statutes. These statutory investigations were made on well recognised principles, under competent scientific advice, and with a view to ascertain what surplus or profit might be reckoned on as having already been realised, as distinguished from any profits which might or might not arise in the future working of the business. Before any realised profit could be reckoned on, provision had to be made for the whole liabilities of the company, on certain assumptions as to the rate of mortality, the rate of interest, and the amount of expenses likely to be experienced in the future. These assumptions were made by all the insurance offices which had regard to their future solvency, not on the principle suggested by the Commissioners, that the business of insurance was a system of wagering—a suggestion which the appellants regarded as unfounded and mischievous—but with the express view to the certainty that they would be realised. The importance of these estimates could not be exaggerated, as it depended on their soundness whether the company would be in a position in the future to meet its obligations, or whether the expectations of its policyholders would be disappointed, as it was impossible to predict with certainty what the future rates of mortality or of interest would be; and as the rate of interest in particular was likely to be much lower in the future than it had been in the past, it was necessary to make assumptions on these subjects within the limits of safety; but if, as might be hoped, the experience of a company proved more favourable than had been assumed, the surplus or profits thence arising would, at future investigations, come into account, and be assessable for income-tax. 3rd. That calculating the amount on which income-tax fell to be assessed for the year 1885-86 on the principles above contended for, the assessable income of the appellants, under Schedule D, for that year amounted to £94,134, but that, as the appellants had already paid income-tax for that year (calculated upon an average of the three immediately preceding years) on a sum of £105,409, they ought not to be assessed for any further payment. 4th. That the principle introduced for the first time into the mode of assessment of insurance companies by the Commissioners' deliverances of 1st February 1887 and 20th May 1887 was erroneous. That principle appeared to be that the appellants were assessable for income-tax under Schedule D, not on their gains and profits, but on their gross revenue for an average of three years, subject to deduction of their gross outgoing for the same three years. An account of profits could not be made out on this principle without leading to erroneous and absurd results. Thus the returns made by the Board of Trade to Parliament for 1885 showed that the premium income of the whole life assurance companies of the United Kingdom for that

year was £12,555,797
While the amount paid for claims, cash bonuses, surrenders, commission, and expenses of management was 13,919,792
Showing a deficiency for the year of £1,363,995

which was only provided for out of interest received, which amounted to £5,918,058. Thus if income-tax were charged against the whole life offices together, upon the principle laid down by the Commissioners, there would be no balance of profit which could be assessed, whereas there could be no doubt that a large amount of aggregate profit was earned by these companies during that year. The appellants therefore submitted that by this method it was impossible to arrive at the profits truly made by the appellants in their business, more particularly in connection with their life business and the funds appropriated thereto. Their annual gross revenue, so far as their life business was concerned, consisted partly of life assurance premiums and partly of interest arising on their life fund. Life assurance premiums were in no sense a gain or profit either to the company which receives them or to the policyholders. So far as the company was concerned each premium carried with it a corresponding obligation of a postponed and contingent character, but quite definite and capable of scientific measurement. So far as the policy-holders were concerned the premiums paid by them were in effect an investment out of their savings, to be repaid to them or their heirs on the emergence of whatever contingency was stipulated in the policy. The individual insurer, or his heirs, might receive more or less than he had paid according as he lives a shorter or longer time, but the policyholders, as a body, practically received back what they had paid, with the interest of it. Under the Income-Tax Acts persons were under certain conditions not liable to be charged with income-tax upon the amount of such premiums, but if the principle contended for by the Commissioners was sound one of the purposes of these Acts would be defeated, for all insurers of lives would practically be compelled to pay income-tax on their premiums of life insurance.

It was contended for the Surveyor of Taxes—1. That if the company invested their accumulated funds from premiums, &c., in heritable property, or in the acquisition of mortgages by taking transfers to them, or otherwise, income-tax would be assessed under Schedule A on the heritable property. It would be deducted in the payment of the interest on the mortgages. These were tradings with the money, and the profits arising would bear the income-tax according to their nature and amount. If the company entered with the accumulation of premiums, &c., into other trades, if profits were made such would be assessed to income-tax. 2. That interest on foreign securities was liable to assessment to income-tax, Schedule D, No. 4. This was trading also, and the profit received in this country was liable to assessment without deduction. 3. That bank interest on the company's current account and other interest received, where the income-tax was deducted, was also assessable to income-tax, Schedule D, No. 3. 4. That the profits of the fire and life assurance business were chargeable under Schedule D, No. 1. The income-tax was assessed in respect of the profits of the year of assessment. The year of the assessment in the present case is the year 1885–86. The profits of the year of assessment are ascertained by estimate—Trade Schedule D, No. 1; Profession Schedule D, No. 2, on an average of three years. (Professions, 16 and 17 Vict. c. 34, sec. 48). Profits of uncertain amount, such as interest not being annual interest, Schedule D, No. 3, on the preceding year. Foreign securities, on the amount which had been or would be received in the current year, Schedule D, No. 4. The income-tax on annuities and yearly interest of money was paid by way of deduction from the payments by the person making the payments, if such person's income, out of which the payments are made, has been assessed. By section 102 provision was made for the case where the income was not assessed from which the payments were made. Section 52 provided that the income-tax return or statement, which all persons were required to make, should be exclusive of the profits and gains from annual interest of money, &c. That it was the profits in the year of assessment which were in question was evident from section 133. By that section, if the actual profits fell short of the computation, provision for relief was made. There was no provision for correction if the profits turned out to be more than computed. The same company or person might have these various descriptions of profits, and have to pay tax upon each of them. The payment of the tax upon one could not be set against the other. By the statutes there was a grant of duty on each of them, and the payment of the duty on one was no reason why it should not be paid on the others. In this case there was sufficient income in each of the three years upon which the assessment for the year 1885-86 was based to pay all the claims and expenses of management, and leave profit from the premiums and bank interest without the application of any part of the accumulated or invested funds to such purpose. The materials for assessment on the company for 1885–86 were made up on the principle of leaving altogether out of the reckoning the accumulated or invested funds or the income from them. This was in accordance with the Statute 5 and 6 Vict. cap. 35, sec. 52. The result brought out was the same as the finding of the General Commissioners. The Commissioners took in the income from investments on one side, but they deducted it on the other. The contention of the company was that they had right to place against the tax on, for instance, the profits from the fire insurance business, the tax they had paid by way of deduction on the income from investments.

On 20th May 1887 the Commissioners pronounced the following deliverance:—"Find that on the average of the three years 1882, 1883, and 1884 the total annual incomings of the appellants' business in the two departments of fire and life insurance have amounted to £598,356, and that the total annual outgoings of these departments on the average of the same period have amounted to £452,743, the surplus of the annual incomings therefore over the outgoings of the business has on the average of the same period been £145,613. The Commissioners further find that the appellants have paid income-tax by way of retention thereof from interest or dividends received by them, amounting on the average of the same three

years to £105,682, so that there remains a balance of annual incomings over annual outgoings still assessable to income-tax amounting to £39,931. To this there falls to be added the balance of annuities payable by the appellants, from which they have retained income-tax, amounting to £7290. The Commissioners therefore find that the sum assessable to income-tax for the year 1885–86 was £47,221, and they assess accordingly."

The Commissioners had assessed the company on the balance of profit arising from their incomings and outgoings on the average of three years under the rules contained in Schedule D of the Act 5 and 6 Vict. c. 35.

The company and the Surveyor of Taxes both intimated their dissatisfaction with the finding of the Commissioners, and desired them to state a Case for the opinion of the Court of Exchequer.

The preceding narrative is taken from the Case so stated, and the questions which the Court were asked to determine were—"On what principle life assurance companies were to be assessed? and on what amount the assessment appealed against was to be made?"

The argument submitted to the Court applied also to the case of the North British and Mercantile Insurance Company, with whom and the Commissioners questions as to the principle and amount of assessment had arisen.

Argued for the company—The company treated its whole business as a unit, and for the purposes of assessment the fire and life business ought to be taken as one, the profits, if any, massed, the losses deducted, and tax paid on the balance; no good reason had been suggested by the Crown for separating the two businesses; the tax was on profits and gains, and the proper mode for ascertaining the gains and profits of an office such as this, was to take the profits as brought out at the quinquennial investigation, and apportion them to each year of the period. The company was a corporation, and it was, for the purposes of assessment, to be treated as an individual. The mode in which it was now sought to assess the company was a novelty, and when examined was absurd, and would lead to most fallacious results. What the Court were asked to determine was the principle of assessment, as that upon which the Commissioners had proceeded was unjust—*Lant* v. *London Assurance Company*, L.R., 12 Q.B. Div. 389, 14 Q.B. Div. 239, and 10 App. Cas. (H of L.) 438; *Carter* v. *The Clerical Assurance Company*, L.R., 21 Q.B. Div. 339; Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100; *The Scottish Mortgage Company of New Mexico* v. *The Commissioners of Inland Revenue*, November 19, 1886, 14 R. 98; *Smiles* v. *Australasian Mortgage Company*, July 12, 1888, 15 R. 872; Life Assurance Companies Act 1870 (33 and 34 Vict. cap. 61).

Argued for the Surveyor of Taxes—The principle of assessment fixed upon by the Commissioners was right, though the figure result was wrong. The Crown were entitled to tax interest which has escaped taxation at its source, as, for example, foreign securities, also profits arising from the realisation of investments at an advance over the purchase price. It was undesirable to mass fire and life profits, and the mode adopted by the Commissioners was not only simple, but more fair for the company. If the Court were of opinion that the Commissioners had proceeded upon a wrong mode of assessment, the only satisfactory method would be to set aside their finding, and remit to them to make a new assessment—Cases cited *supra*; *Brown* v. *Watt*, February 20, 1886, 13 R. 590; *Imperial Fire Assurance Company*, 35 Law Times, 271; Income Tax Act 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D.

The Northern Assurance Company, Aberdeen, appealed to the Commissioners of Income-Tax for the county of Aberdeen against an assessment made upon the company under Schedule D of the Income-Tax Acts. The principle of assessment was the same which had been adopted in the case of the Scottish Union and National Insurance Company, and the contentions of the company against, and of the Surveyor of Taxes in favour of, the mode of assessment, were substantially as above narrated. In the case of the Northern Assurance Company, the Crown, in estimating their liability for assessment to income-tax, assessed the company on, *inter alia*, investments realised. The company in their appeal maintained that profits upon investments realised were capital and not income; that their business was not that of buying and selling shares of other companies, but of fire and life insurance; that when they sold an investment at an enhanced price from that at which it was bought, this was not a transaction in the nature of their own business, but a capital transaction, and therefore that it did not come within the scope of the Income-Tax Act.

The Surveyor of Taxes contended that the company in their accounts treated profits on realised investments as income, that they brought the amount of such into their "profit and loss account" out of which they paid their dividends, and that it was thus income assessable to income-tax.

Argued for the company—The legitimate business of the company was that of fire and life insurance; that was their trade, and accordingly any profits which they realised from the sale of investments were not trade profits, and so were not liable for income-tax under Schedule D of 5 and 6 Vict. cap. 35, sec. 100.

Argued for the Surveyor of Taxes—Counsel adopted the argument submitted in the case of the Scottish Union and National Insurance Company. It was stated that the judgment in this case would be held to rule the case of the Scottish Provincial Assurance Company between whom and the Crown a similar question had arisen.

At advising—

Lord President—The Court are of opinion that the assessment as originally imposed cannot be sustained. But the mode of ascertaining the profits and gain of the company in the department of the life business adopted by the Commissioners is fundamentally wrong and quite inadmissible.

We shall therefore reverse the determination of the Commissioners, and remit the case to them with the following instructions, which sufficiently embody our reasons for differing both from the assessor and from the Commissioners, and may at the same time form a useful guide to revenue officers and the General Com-

missioners of Income-Tax in dealing with cases of this description.

1. In assessing to the income-tax the profits and gains of a company carrying on the businesses both of fire insurance and life insurance, the nett profits and gains from the two branches of the business must be massed together as one undivided income assessable according to the rules applicable to the first case under Schedule D — *Smiles* v. *The Australasian Mortgage Company*, 15 R. 872, as contrasted with *The Scottish Mortgage Company of New Mexico* v. *Inland Revenue*, 14 R. 98.

2. Interest on investments which has not suffered deduction of income-tax at its source, must be taken into account in ascertaining the assessable amount of profits and gains of the company.

3. Seeing that fire insurance policies are contracts for one year only, the premiums received for the year of assessment, or on an average of three years, deducting losses by fire during the same period, and ordinary expenses, may be fairly taken as the profits and gains of the company, without taking into account or making any allowance for the balance of annual risks unexpired at the end of the financial year of the company — *The Imperial Fire Insurance Company* v. *Wilson*.

4. That this rule is not applicable to the ascertainment of profits and gains on the life business. That life policies are contracts of most variable endurance, and the premiums are in many cases not annual payments. The contract may endure for the policy-holder's life, or for a certain number of years stated, or till the holder attains a certain age, and the company may be bound, on the expiry of the fixed number of years, or on the attainment of a certain age by the policy holder, either to pay a lump sum or an annuity for the remainder of the policy-holder's life.

The premiums paid for such insurance may be paid all in one sum or by instalments within a fixed number of years or annually during the holder's life, or during the subsistence of the policy. The premiums therefore do in no sense represent the annual profits and gains of the company. In like manner the amount of claims in any one year arising on the death of persons insured, or otherwise, as a deduction from the company's receipts for the year cannot afford any criterion for ascertainment of profits. A recently established company will receive a large amount of premiums, and have few or no claims to meet. The profits and gains can be ascertained only by actuarial calculation, and this actuarial calculation may be obtained by taking the result of the quinquennial investigation prescribed by statute of the periodical investigation in use in companies established before the statute, or by an investigation covering the three years prescribed by Schedule D of the Income-Tax Acts.

In the case of the Northern Insurance Company—(5) Where a gain is made by the company (within the year of assessment or the three years prescribed by the Income-Tax Act, Sched. D) by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the company.

The Court reversed the determination of the Commissioners, and remitted the case to them with instructions.

Counsel for the Scottish Union and National Insurance Company — Balfour, Q.C.—Jameson. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Commissioners of Inland Revenue—Lord Adv. Robertson, Q.C.—Young. Agent—D. Crole, Solicitor of Inland Revenue.

Saturday, February 9.

SECOND DIVISION.

[Exchequer Cause.

MACGREGOR *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Property and Income-Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 60, *Schedule A, Rules* 9, 10, *and* 14 *of No* 4—*Taxes Management Act* 1882 (43 *and* 44 *Vict. cap.* 19), *sec.* 60—*Assessment Doubly Charged—Superior and Vassal—Casualty—Composition.*

A vassal paid a casualty of composition to his superior, who made a return thereof and was assessed upon the same. The vassal claimed exemption from an assessment of the annual rent of his lands, on the ground that it had already been charged with duty in the hands of the superior. *Held* that as the composition was paid to the superior not as rent, but as the price payable for entry, the vassal was the proprietor of the rent for the year, and was liable to assessment thereof.

The Taxes Management Act 1880 (43 and 44 Vict. cap. 19), by section 60 provides—"*Double Assessments.*—Whenever it appears to the satisfaction of the Board that a person has been assessed more than once to the duties for the same cause and for the same year, they shall direct the whole or such part of such one or more of the assessments as appears to be an overcharge to be vacated, and thereupon the same shall be by such order vacated accordingly."

At a meeting of the Commissioners for the general purposes of the Income-Tax Acts, and for executing the Acts relating to Inhabited House Duties for the Cowal district of the county of Argyll, held at Dunoon on the 5th day of November 1888, Donald Macgregor of Ardgartan appealed against and claimed relief from an assessment of £659, duty £16, 9s. 6d., under Schedule A of the Property and Income-Tax Acts, made upon him for the year 1888-89, being the annual value of the lands of Ardgartan and others belonging to the said Donald Macgregor, and situated in the said district of Cowal, on the ground of having been called upon to pay and having paid to his Grace the Duke of Argyll, as superior of the lands, on 30th May 1888, a casualty of superiority amounting to a full year's rental of the lands, which he claimed to have deducted from or set against the assessment appealed against.

The appellant contended that he had derived