p. 482; *Cribbes* v. *Ross*, July 15, 1851, 13 D. 1369, Lord Ordinary Rutherfurd at p. 1370. The A. S. of 14th December 1805 was an enabling Act, and provided for cases where there was *bona fide* doubt as to the whereabouts of the person to be cited, but, looking to the pursuer's knowledge, this was an unfair use. The Judicature Act 1825, section 53, prescribed the method in cases where the defender had constructively left Scotland, viz., edictal citation, and that applied here where there was actual knowledge. The Sheriff-Substitute was right, and the action should be dismissed. [Counsel for the defenders were not called upon to reply to the first branch of the argument for the pursuer.]

LORD PRESIDENT—[*After narrating the facts, quoted supra*]—The question raised is a double one—(1) Whether the citation is good under the circumstances apart from the specialties arising out of the position of the pursuer. The answer to that question depends on section 3 of the Citation Amendment Act, which provides for citation by registered letter on the person to be cited at "his last known address if it continues to be his legal domicile or proper place of citation."

There is no question that the pursuer's house was Dr Vallance's "last known address;" the question is whether it continued to be "his legal domicile or proper place of citation." That depends on section 1 of the Act of Sederunt of 14th December 1805, which provides . . . (*quotes supra*) . . .

It was argued for the pursuer that the effect of that section is that after a person goes from his last known place of residence in Scotland, his domicile of citation remains for forty days at that residence. On the other hand, it is argued for the defenders that this is so only if there is a doubt in the mind of the pursuer whether the person to be cited has gone from Scotland or not, but that if the pursuer knows for a fact that he has gone from Scotland then the citation must be edictal even within the forty days.

The point does not seem ever to have been decided, and there are conflicting dicta. On the one side there is the dictum of Lord Jeffrey in *Brown* v. *Blaikie*, 11 D. at p. 482; on the other, that of Lord President Robertson in *Corstorphine* v. *Kasten*, 1 F. at p. 293. I do not think it is necessary to decide this point, though, as far as my own view is concerned it coincides with the dictum of Lord President Robertson and not with that of Lord Jeffrey.

(2) Assuming the citation is good apart from the specialties of this case, the question arises whether it is good in view of those specialties. I am of opinion that it is not, and that the pursuer is barred by her own acts from pleading that the citation is good under the Citation Amendment Act. If she had refused to take in the registered letter it would in terms of the Act have been returned to the Sheriff-Clerk, and decree in absence could not have been got without certain further procedure. The pursuer by taking in the letter constituted herself an agent for the defender without any right to do so. She had no right to take in the summons, but having done so was bound to see that the defender got it. She cannot be heard to say that the defender did get it, so on the specialties of the case I am of opinion that the citation was invalid.

The argument of the pursuer based on section 12 (2) of the Sheriff Courts Act 1876 is obviously unsound, because the party here appearing, *i.e.*, the executors, are not stating an objection to the regularity of the service as against themselves, but as against another person, *i.e.*, the deceased; and in this sense an executor is not *eadem persona cum defuncto*.

LORD M'LAREN—I agree with your Lordship's opinion as to the validity of the service and as to the conduct of the pursuer.

LORD KINNEAR—I agree on the special ground on which your Lordship proposes to decide this case.

On the question as to which of the conflicting dicta, by Lord Jeffrey and Lord President Robertson, is sound, I reserve my opinion until the question is raised in a case in which it is necessary to decide it.

LORD PEARSON—I concur with what your Lordship has said.

The Court affirmed the judgment of the Sheriff-Substitute and dismissed the action.

Counsel for the Pursuer (Appellant)—Orr, K.C.—D. P. Fleming. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders (Respondents)—The Dean of Faculty (Campbell, K.C.)—Grainger Stewart. Agents—W. & J. L. Officer, W.S.

Tuesday, June 4.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED *v.* INLAND REVENUE.

Revenue—Income Tax—Insurance Company—Insurance other than Life—Profits—Deductions—"Unexpired Risks"—Property and Income Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *Sched. D, First Case, Rule* 1.

A company carrying on the business of accident, fire, &c., insurance (as distinguished from life insurance), is not entitled, in arriving at the yearly amount of its assessable profits, to deduct or make any allowance for unexpired risks. *Scottish Union and National Insurance Company* v. *Inland Revenue*, February 8, 1889, 16 R. 461, 26 S.L.R. 330, *followed*.

The Property and Income Tax Act 1842, Schedule D, First Case, Rule 1, enacts—"The duty to be charged in respect thereof" (*i.e.*, in respect of any trade, &c., not contained in any other schedule of the Act) "shall be computed on a sum not less than

the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern, 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, manufacture, adventure, or concern shall have been usually made up. . . ."

At a meeting of the Commissioners for the general purposes of the Income Tax Acts, held at Perth on 15th December 1905, the General Accident Assurance Corporation, Limited, Perth, appealed against an assessment for the year ending 5th April 1906 on the sum of £20,950 (duty £1047, 10s.) imposed under Schedule D of the Income Tax Acts in respect of the profits of its business, on the ground that in arriving at the assessable profits no deduction had been allowed to meet losses on unexpired risks.

The assessment was made under 5 and 6 Vict. c. 35, s. 100, First Case, 16 and 17 Vict. c. 34, s. 2, and 5 Edw. VII, c. 4, s. 6; and the sum assessed was the amount, on an average of the three years ending 31st December 1904, arrived at by reference to the company's revenue accounts as follows:—

Year ending 31st December 1902.		
Balance of Revenue Account . .	£25,659 10 7	
Less balance brought forward from previous year's account . . .	3,694 7 5	
	£21,965 3 2	
Add sums debited in Revenue Account and not allowable as deductions .	1,071 19 4	
	£23,037 2 6	
Deduct interest and rents of properties already taxed, and the annual value of the company's offices . .	6,199 14 2	
Amount of profit .	£16,837 8 4	
Year ending 31st December 1903.		
Amount of profit (after making similar addition and deductions as above) .	22,503 6 8	
Year ending 31st December 1904.		
Amount of profit (after making similar addition and deductions as above) .	23,509 18 2	
Total profits for three years .	£62,850 13 2	
One-third whereof is .	£20,950 0 0	

The company claimed a deduction from the total premium income of each year to meet the estimated losses on risks unexpired at the end of each year, as shown by the following statement:—

Surplus income—Year to 31st December 1902	£16,837 8 4	
Add for unexpired risks at 31st December 1901, 33⅓ per cent. of total premiums (£170,338, 8s. 2d.) .	56,779 9 4	
	£73,616 17 8	
Deduct for unexpired risks at 31st December 1902 33⅓ per cent. of total premiums (£231,354 14s. 10s.)	£77,118 4 11	
Loss .	£3,501 7 3	
Surplus income—Year to 31st December 1903	£22,503 6 8	
Add for unexpired risks at 31st December 1902	77,118 4 11	
	£99,621 11 7	
Deduct for unexpired risks at 31st December 1903 33⅓ per cent. of total premiums (£262,479, 8s. 3d.)	87,493 2 9	
Profit .	£12,128 8 10	
Surplus income—Year to 31st December 1904	£23,509 18 2	
Add for unexpired risks at 31st December 1903	87,493 2 9	
	£111,003 0 11	
Deduct for unexpired risks at 31st December 1904 33⅓ per cent of total premiums (£306,258, 2s. 6d.)	£102,086 0 10	
And 50 per cent. of one month's monthly payment premiums (the total amount of which for this year is £52,940 12s. 3d.)	£2,205 17 2	
	£104,291 18 0	
Profit	£6,711 2 11	
Summary—Year 1903—*Profit* . .	£12,128 8 10	
„ 1904—*Profit* . .	6,711 2 11	
	£18,839 11 9	
„ 1902—*Loss* . .	3,501 7 3	
	£15,338 4 6	
One-third whereof being .	£5,112 14 10	

was the amount on which the company claimed to be assessed.

The Commissioners being of opinion that the assessment had been made "in accordance with the instructions given by the Court in the case of the *Scottish Union and National Insurance Company and Others* v. *Inland Revenue*," 16 R. 461, dismissed the appeal.

The company appealed.

The case stated—"The following facts were admitted or proved:—1. The company was incorporated on 23rd February 1891 under the Companies Acts as a company limited by shares. . . . 2. The objects of the company as set forth in the third article of its memorandum of association then in force were, *inter alia*:—'(*a*) To undertake and carry on the business of accident, employers' liability, fidelity, guarantee, third party, burglary or theft, fire, marine, vehicle, plate glass, and mortgage, or other investment insurances, or any of them, and all or any other kinds of insurances of the like or a similar nature . . . , excepting life insurance.' . . . 4. The company makes up its accounts to the 31st December in each year. For each of the years ending 31st December 1902, 31st December 1903, and 31st December 1904, the company paid the dividends shown in its reports and accounts. . . . 5. The business carried on by the company up to 31st December 1904 consisted of fire, sickness, accident, and guarantee insurances. The net premium income for the year 1902 was £231,354, 14s. 10d.; for the year 1903 £262,479, 8s. 3d.; and for the year 1904 (exclusive of £52,940 for monthly payments) £306,258, 2s. 6d. 6. Insurances are effected with the company at all periods of the year. All its fire policies, and much the larger portion of all its other policies, are granted for one year. Some of the policies endure for one month only. 7. It is the practice of insurance companies to estimate the unexpired risk at any given date on yearly policies of insurance, whether against fire, sickness, or accident, at 33⅓ per cent. of the total premium income of the year. In the case of policies granted by

this company for one month, it estimates the unexpired risk at any given date at 50 per cent. of one month's premium income. 8. The annual accounts made up by the company in terms of the Companies Acts show the results of the company's business in all its branches in one revenue account. Each year's revenue account credits premiums, interest, and other income received, and debits losses, expenses of management, and other disbursements made during the year, and brings out a balance which, for each of the years 1902, 1903, and 1904, was a credit balance or surplus. 9. This surplus is described in the reports by the directors of the company as 'the balance at credit of revenue account after providing for estimated claims' (*i.e.*, claims made but not settled) 'and outstanding accounts.' In their reports the directors recommend that a certain proportion of this surplus shall be appropriated to the payment of dividend, interim (previously declared) and final; that a certain proportion shall be placed to reserve; and that the balance shall be carried forward to next year's account; and these recommendations are considered at the annual meetings of the company held in March or April each year and adopted, a fixed amount of the balance of the revenue account being thus appropriated to interim dividend, final dividend, and reserve. 10. The amount paid in dividends for each of the years 1902, 1903, and 1904 was £9999. The amount placed to reserve for the year 1902 was £14,000, and for each of the years 1903 and 1904 £20,000. 11. The amount of the reserve as at 31st December 1904 was £150,000, made up of £85,500 set aside from revenue account and of £64,500 derived from premiums on the issue, during the period from the year 1896 to the year 1902, of new shares in the company, which latter sum was carried direct to reserve and was not credited in the revenue accounts, and on which no income-tax has been paid. The amount of the deduction claimed by the company for unexpired risks at 31st December 1904 is £104,291, 18s. The reserve is described in the annual balance sheets as 'reserve fund, including reserve for unexpired risks.' In the opinion of the Commissioners no part of the company's revenue is specifically appropriated to a reserve for unexpired risks, and no losses arising during the period of unexpired risks are charged to reserve fund. The income of each year has hitherto been sufficient to meet the losses on the unexpired risks of the previous year as well as its own losses, and to allow of an addition being made to the reserve. The losses on the unexpired risks of any year are paid out of the income of the following year, and in arriving at the amount of the profits for such following year for the purposes of the Income Tax Acts, a deduction is allowed in respect of such payments. 12. In arriving at the assessable profits of the company for the purposes of the Income Tax Acts in any year a deduction for the unexpired risks of that year has never been allowed.

"The company *contended* that, before arriving at the profits for the year for income-tax purposes, the deductions for unexpired risks made in the foregoing particulars of income should be allowed; that in the case of any insurance company with yearly policies, and in particular in the case of a company whose premium income was rapidly increasing, it was clearly necessary to provide for unexpired risks before the true profit could be ascertained; and that, if this were so, the appellants were entitled to the deductions claimed, whether they had made provision for unexpired risks in their annual accounts or not. It was further contended that, in point of fact, such provision had been made in the annual accounts because the balance sheet contained an account entered as 'Reserve Fund, including amount reserved for unexpired risks,' and to that account the company had each year carried a large proportion of the balance of revenue. It was further contended that the case differed entirely from that of the *Scottish Union and National Insurance Company* v. *Inland Revenue*, 1889, 16 R., pp. 461 and 474, 26 S.L.R. 330, relied on by the Surveyor of Taxes in respect (1) that in that case the premium income was practically stationary, and (2) that no provision whatever had been made in the accounts for unexpired risk."

"The Surveyor of Taxes *maintained* (1) that in arriving at the amount of the assessable profits of the company the whole of the premiums received by the company in any year ought to be taken into account as profits of that year, notwithstanding that the risks covered by a portion of such premiums may extend into the subsequent year (*Imperial Fire Insurance Company* v. *Wilson*, 1876, 35 L.T.R. 271, 1 Tax Cases 71); (2) that the company is not entitled to make yearly the deduction claimed for unexpired risks in respect that the deduction is not one of the expressly enumerated deductions authorised by the provisions of the Income Tax Act to be made in estimating its annual profits (5 and 6 Vict. c. 35, secs. 100 and 159); (3) that the unexpired risks ought not to be taken into account in ascertaining the amount of income tax payable by the company, in respect that the accounts of the company, on which the assessment made is based, show that such risks are not taken into account for the purpose of ascertaining the amount of profits divisible among the shareholders of the company, and that it is only after declaring the dividend out of the profits that any sum is placed to general reserve; and (4) that the present case is governed by the opinion of the Court in the cases of the *Scottish Union and National Insurance Company* and the *North British and Mercantile Insurance Company* v. *Inland Revenue*, 1889, 16 R. 461 and 474. In the latter case it was stated that 'in the fire department of the business it has for many years been the custom of the company, on 31st December, when the books are closed for the year, to set aside one-third of the net premiums received during the past year to provide for liabilities on current policies.'"

Argued for the appellant—The distinction drawn in the books between life and fire insurance was unsound. In the case of the *Scottish Union and National Insurance Company* (*cit. supra*) the point now raised as to deducting unexpired risks did not seem to have been fully argued, and accordingly the rule there laid down ought to be reconsidered, especially as it operated substantial and cumulative injustice in the case of companies like the present with an increasing business. Moreover, the rule in question was really one of convenience and not one of principle, and ought not therefore to be regarded as sacred. To take into account merely the actual receipts and the actual outlays without allowing for unexpired risks was unfair. The view that failure to deduct unexpired risks in any one year was made up by their being allowed for in the subsequent year was unsound, for its effect was to tax the appellants on profit which was never earned—*in re County Marine Insurance Company* (*Rance's* case) (1870), L.R. 6 Ch. App. 104, per James, L.J. In the case of the *Imperial Fire Insurance Company* (*cit. supra*) there was no specific statement as to the element of unexpired risk. The manner in which the company's accounts were stated might render the general rule stated by Kelly, C.B., in that case inapplicable; *per* Amphlett, B., and Huddleston, B.

Counsel for the respondent were not called on.

LORD M'LAREN—There is no doubt that the question which has been argued before us is a question of great importance to insurance companies, whose business in the aggregate is very large, and if it had come up for the first time we should have desired to hear a full argument upon it. But the point is not new, because it was first considered nearly thirty years ago by the Court of Exchequer in England in *The Imperial Fire Insurance Company* v. *Wilson*, and eighteen years ago it was considered by this Division of the Court in the case of *The Scottish Union and National Insurance Company*. In the collective opinion of the Court, which was delivered by Lord President Inglis, the distinction (which had long before been recognised) is clearly drawn between the character of the business done by fire insurance offices and the character of the business done by life insurance offices, the one being an annual contract of indemnity, and the other being a prospective contract which may endure for the whole course of the life of the person making the contract, provided he continues to pay his premiums. Obviously these two classes of insurance business have to be treated on different principles. Now, with regard to fire insurance, their Lordships, who had the English case before them, were satisfied with the rules there laid down, and they were content in a single sentence to express the ratio of that judgment—that the contract was an annual contract, and that while a complete deduction could not be made in the year in which the premiums were paid, yet what was not made in that year was allowed in the following year, and thus approximate justice was done between the Crown and the subject. That, according to the opinion of the Court of Exchequer in England and the Court of Exchequer in Scotland, is the best approximation we can make to profits under the somewhat stringent conditions of the Income Tax Acts. Now we are asked to reconsider the question. I do not think that any of your Lordships would hold that this Division of the Court would take it upon itself to consider the question as if it had not been already decided by our own Division, and I do not see anything in the circumstances of the case which ought to lead us to refer it to a larger Court. I think, on the contrary, the acquiescence for eighteen years in the principle of that decision shows that the insurance companies have not felt aggrieved by the rule there laid down. But, sitting as one Division of the Court, I think it is enough to say that we confirm the decision of the Commissioners.

LORD KINNEAR—Mr Constable conceded that he could not prevail in this case unless we are to overrule the judgment in the case of *The Scottish Union and National Insurance Company*, and the other case which was considered at the same time. I cannot doubt that that decision is binding upon this Court, and I think we are not entitled to disregard it. If it is to be challenged, it must be challenged elsewhere. So far as we are concerned, we are bound to follow it.

LORD PEARSON—I take the same view.

The LORD PRESIDENT was absent.

The Court affirmed the determination of the Commissioners, sustained the assessment, and decerned.

Counsel for Appellant—Dean of Faculty (Campbell, K.C.)—Constable. Agents—Bonar, Hunter, & Johnstone, W.S.

Counsel for Respondent—Cullen, K.C.—A. J. Young. Agent—Solicitor of Inland Revenue (Philip J. Hamilton Grierson).

Wednesday, June 12.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.
[Lord Mackenzie, Ordinary.

BROWN'S TRUSTEES *v.* HORNE.

Right in Security—Heritable Security—Trust—Heritable Creditor in Possession—Expenses of Management—Power to Employ and Pay Co-Trustee as Law Agent.

A truster by his trust-disposition and settlement provided—"And to enable my trustees to carry out the purposes of this settlement, and of any codicils