they had been original regulations, but it does not provide that an altered regulation shall be held to have come into force as at the date when the company was formed. The alteration comes into force at its own date, and if so, section 50 is no authority for Mr Sandeman's proposition. There is also this further element that the alteration was made, not so much because the directors deemed it to be an alteration required in the general interests of the company, as simply in order to meet the particular case of the petitioner's transfer. I am therefore clearly of opinion with your Lordship that the position taken up by the respondents is untenable.

LORD ARDWALL—The petitioner is the liquidator of a company called W. & A. M'Arthur, Limited, London, and it appears that there was an allied company of W. & A. M'Arthur (South Africa) Limited. These two companies were connected to a certain extent, but at the time when this transfer was presented the former company had gone into liquidation. What happened was that the South African Company, being holders of a number of shares of this Gulf Line Company, which they had mortgaged to the bank of Australasia, approached the liquidator of the London company, and asked him to relieve them of the debt to the bank and to take over the shares which had been mortgaged, which he did. That was a perfectly fair and open transaction without any collusion, and it was carried out with the sanction of the High Court of Justice in England. If there had been any collusion, that would, of course, have altered the complexion of the case. The petitioner accordingly got a transfer from the South African Company of 10,023 fully-paid shares in the Gulf Line Company. There were other shares held by the South African Company in the respondents' company which were not fully paid, but with these we have nothing to do at present as nothing is asked with regard to them. It is perfectly clear under the articles of association that the registration of transfers of the unpaid shares might have been objected to until the amount due in respect of them was paid up, but with regard to these 10,023 shares there is equally no doubt that when the transfer was presented to the respondents on 3rd June 1908 for registration, it was the absolute right of the petitioner to have the transfer registered, and I think it would be grossly inequitable if that right were held to be defeated by any resolution subsequently passed. The petitioner purchased the shares on the footing that they were free of liability, and it is out of the question that the respondents' company should be entitled to put burdens upon them by resolutions passed after the date of purchase. The petitioner, in my opinion, is in the same position in which he was on 3rd June 1908, when he presented the transfer for registration, and I think that we should now order the register to be rectified so as to give effect to the transaction.

LORD DUNDAS concurred.

The Court granted the prayer of the petition.

Counsel for the Petitioner — Constable, K.C. — Ingram. Agents — Langlands & Mackay, W.S.

Counsel for the Respondents—Sandeman. Agent—F. J. Martin, W.S.

Tuesday, March 9.

FIRST DIVISION.

[Lord Johnston, Ordinary in Exchequer Causes.

INLAND REVENUE *v.* EDINBURGH LIFE ASSURANCE COMPANY.

Revenue—Income Tax—Life Assurance—Annuities, Sale of—Deduction of Income Tax from Annuities—Company Assessed on Revenue from Invested Funds—Annuities Charged on Whole Funds—Income Tax Act 1842 (5 *and* 6 *Vict. c.* 35), *sec.* 100, *Sched. D, and sec.* 102 — *Income Tax Act* 1853 (16 *and* 17 *Vict. c.* 34), *sec.* 40—*Customs and Inland Revenue Act* 1888 (51 *and* 52 *Vict. c.* 8), *sec.* 24 (3).

A life insurance company paid income tax on their invested funds, on which the interest had been uplifted by them in the United Kingdom, the amount so paid being greater than if they had been assessed upon their nett profit as a commercial concern. Their business included, *inter alia*, the selling of annuities in return for the payment of lump sums. In paying the annuities which were charged on their whole funds the company deducted therefrom income tax.

Held that the company were bound to debit the annuities against their revenue in proportion as that revenue had (as in the case of income from investments), or had not (as in the case of revenue from the sale of annuities), already paid income tax, and to account to the Crown for the income tax deducted from the annuities thus paid out of revenue which had not already paid income tax.

The Customs and Inland Revenue Act 1888 enacts—section 24 (3)—"Upon payment of any interest of money or annuities charged with income tax under Schedule D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge as the case

may be, and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly. . . ."

The Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, raised an action against the Edinburgh Life Assurance Company, incorporated by Act of Parliament, in which he sought to have the defenders decerned and ordained "to render to the Commissioners of Inland Revenue a full account of the sums deducted by the defenders in respect of income tax during the period from 5th April 1905 to 30th November 1907, upon their making payment of annuities charged with income tax under Schedule D; and whether such account be rendered or not," to have them decerned and ordained "to pay to the pursuer the sum of £5809, 3s. 7d sterling, or such other sum, more or less, as may be found to be due and payable by the defenders in respect of income tax deducted by them as aforesaid. . . ."

The defenders pleaded, *inter alia*—"The defenders are entitled to absolvitor in respect that said annuities have in fact been paid out of profits and gains already brought into charge."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), and are summarised in the opinion of the Lord President.

On 30th July 1908 the Lord Ordinary, after a proof, assoilzied the defenders from the conclusions of the summons, and decerned.

Opinion.—"The purpose of this action is to test the question whether life insurance companies which deal in annuities, and which, in the exercise of an option competent to the Inland Revenue, are assessed to income tax, not on their profits, but on their income from investments, are accountable to the Inland Revenue for income tax deducted from annuities paid to their annuitants, and if so, to what extent and effect?

"The Edinburgh Life Assurance Company have been selected by the Inland Revenue as defenders with whom to test this question. It is said that during the period from 5th April 1905 to 30th November 1907, or a little more than two and a-half years, the company have paid in annuities chargeable with income tax under Schedule D, a sum of £116,259, 13s., and have in so paying deducted the sum of £5809, 3s. 7d. as income tax payable to the Crown thereon, but that they have not accounted for or paid to the Crown the sum so deducted. There is no dispute about this fact or about the figures. The Crown, founding upon the Customs and Inland Revenue Act 1888, section 24 (3) maintain that, having deducted the income tax in question, as they were bound to do, the company must account to the Commissioners of Inland Revenue for the same. The company maintain that the Crown's demand is an attempt to compel them to pay the same income tax twice over, and that the annuities in question having in fact been paid out of profits and gains already brought into charge, they are entitled to be assoilzied.

"On the main contention I think that the defenders are right, though whether their argument is a complete defence to the Crown's claim remains for consideration. My short ground of judgment is that the Crown's claim is only made possible by their reversing their election to treat the defenders as assessable, not on profits, but on their income from invested funds. If they find the latter course more profitable, they are entitled to take it. But if they do, they must deal with the defenders consistently on that footing, and cannot be allowed to try and make the best of both worlds by assessing the defenders on one basis and calling on them to account for this particular item on another.

"But as the case is avowedly a test case and of importance to the Revenue, and to most, if not all, life insurance companies, it is right that I explain the grounds which have brought me to this conclusion.

"The Edinburgh Life Assurance Company was founded in 1823 under a contract of copartnery, which has since been but slightly altered by statute. One of its purposes was the granting and purchasing annuities, either for 'lives or otherwise, and on survivorships.'

"By head 28 the liability of the partners in the company, it having been founded without a charter, and before the Companies Act of 1862, was limited by this device. It was declared 'that nothing herein contained shall extend, or be construed to extend, the liability of each proprietor beyond the amount of the share or shares which they respectively hold in the company, and that in every policy of insurance or other obligation entered into by the court of directors for behoof of the company, there shall be a special clause inserted declaring *that the capital stock and funds of the company for the time being shall be the only fund answerable* for any demand under such policy of insurance or other obligation; and that in no respect shall any member of the company be subject or liable for more than the amount of his or her share or shares of the capital stock thereof.'

"In strict accordance with this provision, the form of bond of annuity adopted by the company, and still, I understand, in use, bears—'Provided likewise that the funds of the company and the capital stock so far as not paid up at the time shall alone be answerable for any claim or demand under or by virtue of this bond; and that the partners of the company for the time being shall be subject and liable to such demand or claim, each to the amount then unpaid of his or her share of the said capital stock, but not to any further or greater extent, and that no other person or funds shall under any circumstances be liable or subject to any claim or demand under this bond.'

"The only other points which call for note in the company's constitution are that articles 31 and 32 provide for a separation,

which is still maintained, and is an essential of the contracts between the company and its insured, between the capital, 'the Proprietors' Fund,' and 'the Assurance and Annuity Fund.'

"The paid-up capital is, I understand, now £20 per £100 share on 5000 shares.

"The Proprietors' Fund consists of 'all other sums appropriated or to be appropriated to the proprietors by way of profit, and the interest, dividends, and accumulations of the same and of the paid-up capital'; and of these sums a separate account is to be kept, 'apart from the other funds of the company, and which shall be called "The Proprietors' Fund."'

"On the other hand, 'the amount of all premiums and other sums to be received for assurances, endowments, annuities, and other obligations undertaken by the company, and the interest, dividends, and accumulations thereof respectively,' are to form 'a separate fund, to be called "The Assurance and Annuity Fund,"' and this fund is, in the first instance, to be 'the fund for answering all claims and demands on the company in respect of its assurances or otherwise, and for defraying the expense of carrying on the business of the company.'

Article 34 provides for a quinquennial investigation and the ascertainment of the profit of the quinquennium by valuing the current obligations of the company and 'deducting the net value of the liabilities from the assurance and annuity fund, and bringing into account any sums already paid out of current profits in respect of intermediate bonus,' and the balance of profit so ascertained is to be divided in the following proportions, viz., one-tenth part thereof shall be added to the Proprietors' Fund, and nine-tenths parts thereof shall—after deducting the sums paid for intermediate bonuses as aforesaid—go to provide bonus additions to the sums in the policies then current.'

"By article 38 the directors have power to lay out and invest 'the funds of the company' in any description of securities authorised or approved by the proprietors.

"A proof was led, for the satisfaction of the Inland Revenue authorities, regarding the company's mode of dealing with their funds and keeping their accounts. But I do not think that anything was elicited which is not disclosed in the published revenue accounts and balance-sheets of the company, made up in the form prescribed by the Life Assurance Companies Act 1870.

"The facts essential to the disposal of the present question are these, and they are very simple. The company does nothing but a life business. Annuities, as well as assurances on lives, are charged indiscriminately upon the whole funds of the company. No particular funds are set aside or investments ear-marked and charged with the annuity obligations of the company. Certain accounts kept in the books of the company prior to 1906, tending to show the contrary, may be disregarded. They were book-keeping entries having no real meaning, and have rightly been discontinued. The statutory annual accounts published by the company for the years 1905-6-7, which embrace the period in question, are Nos. 28, 29, and 30 of process, the last of them showing the result of a quinquennial investigation as at 31st December 1907. The states Nos. 37 and 38 of process show the result of that investigation from two points of view. No. 37 of process shows that in the five years under review the interest and other income of the company from invested funds was £804,731. If the company's profits were struck after taking into account this item of income, the result of the five years' working of the company as a trading concern would show a net surplus of profit of £334,450. If, then, the company were to have been assessed on the profits of their business, they would in the course of five years have paid income tax upon the sum of £334,450 plus the amount of income tax actually deducted from their investment income, which would have been their net profits or gains for the year, instead of upon the sum of £804,731 plus the tax so deducted, on which they were actually assessed. No. 38 of process, again, shows that if the income from investments is excluded from the trading account, the result of the company's trading would be a substantial deficit on the five years of £195,681, if annuities paid, &c., are omitted from the account, or of £470,281, if, as I think, for proper comparison, they must be, those items are taken into account. It is clear, therefore, that but for the amount of income from funds set aside on actuarial calculations, and accumulated and invested to secure the company's obligations to its policy-holders and annuitants, and which income is already taxed as income from investments, the company would have no profits or gains to return for assessment. What is true over the quinquennium is true for any particular year, there being, of course, slight fluctuations in the respective figures of the different items from year to year. The income from investments is mostly taxed at the source. A comparatively small and fluctuating amount is assessed direct, and another similar amount escapes taxation by accruing abroad, and being left there for investment instead of being brought home. The amount of the annuities paid during the quinquennium was £218,463, or an average of about £45,000 per annum.

"These are, I think, all the important facts which the accounts disclose, and the essential ones are that the company's annuities are charged indiscriminately with its other obligations on its whole funds; that but for the income from investment of accumulated funds, as a trading concern the company would not show any profit or gain; and that as its income from investments is already taxed as such income, it cannot again be taxed as profits or gains without double taxation of the same income resulting.

"The determination of the question raised in this case depends on the interpretation and application of the enactment contained in the Customs and Inland

Revenue Act 1888, sec. 24 (3). But it was pointed out by all the Lords who pronounced reasoned judgments in the case of *London County Council* v. *Attorney-General*, L.R. (1901) A.C. 26, that this section was not a charging section but an amending section, and could not be interpreted without considering how matters stood under prior legislation.

"In 1803 the principle, which has been followed and extended in application ever since, of taxing income at the source where possible, was first adopted. The right of making deductions from gross income was abolished. Gross income was thereafter assessed, leaving to the person assessed to deduct and retain from the recipient of any payment charged on that gross income the tax corresponding to such payment.

"When the schedules included in the Income Tax Act 1842 were adjusted, for some reason annuities and annual interest on money were not included in any of the schedules, but were made the subject of a special charging section, viz., section 102 of Act, although the charge was to be 'according to and under and subject to the provisions by which the duty in the third case of Schedule (D) may be charged.' The section is a long one, and without further quoting it I think its provisions as affecting the present question may be summarised thus:—Where an annuity was payable out of profits or gains brought into charge by virtue of the Act of 1842 no direct assessment was to be made on the annuitant, but such profits or gains were to be assessed in full, with right to the person assessed to deduct and retain the portion of the income tax paid by him corresponding to the annuity. But where an annuity was not paid out of such profits or gains, the annuitant was to be assessed direct. Section 104 contained a somewhat cumbrous arrangement for providing the person paying the tax with a certificate entitling him to deduct and retain.

"When the Income Tax Act 1853 was passed, it was seen to be convenient to include interest of money, annuities, &c., in the altered Schedule (D) contained in that Act, section 2. And section 40 provided for dispensing with the certificate required by the Act of 1842, section 104, and enacted that every person liable to the payment of any annuity, either as a charge on any property or as a personal debt, 'shall be entitled and is hereby authorised on making such payment to deduct and retain,' &c. This enactment was so far a complement of section 102 of the Act of 1842. Income tax on annuities payable out of profits and gains chargeable was already provided for. As regards such, all that section 40 did was to dispense with the certificate. But it gave the person liable in payment of an annuity not so payable the option to deduct and retain. It did not, however, make this course compulsory, and, apparently by an omission, it did not impose any obligation on the person paying the annuity and deducting the tax to account to the Crown for the tax so deducted.

"In relation to the law as it stood after the passing of the Act of 1853, an important decision in the House of Lords—*The Gresham Life Assurance Society* v. *Styles*, L.R., (1892) A.C. 309—was quoted. In the case of this society the assessment was then made on profits and gains in the trading sense, not on the income from its invested accumulated funds. It, like other insurance companies and societies, dealt in annuities, and the question was whether, in ascertaining its annual profits and gains, it was entitled to deduct the amount of the annuities which it paid away. It was held that the society was a commercial concern, and could not strike its profits without allowing for the cost of the article supplied, and as part of its adventure consisted in selling annuities, what it paid as annuities was in its case the cost of the article supplied. Though decided after the passing of the Act of 1888, the question had arisen at an earlier date.

"That Act, as was pointed out in the *London County Council* case, *supra*, was passed to stop the gap left by the Act of 1853. The tax on annuities payable out of profits and gains was already fully provided for. Henceforth the tax on all annuities not so payable was to be deducted and retained, not optionally but compulsorily, by the person liable in payment of the annuity, but with an obligation to account to the Revenue for the tax so deducted.

"The precise terms of section 24 (3) of the Act of 1888 are—'. . . [*His Lordship read the terms of the section, quoted supra*].

"It has been decided (*London County Council, supra*) that 'charged with income tax under Schedule D' means simply charged under Schedule D with income tax, there being no difference occasioned by the schedule in the tax imposed but only in the method of imposition, and hence that the expression 'payable out of profits or gains brought into charge to such tax,' and again, 'paid out of profits or gains brought into charge,' means brought into charge to income tax generally and not in any way limited to the cases provided for by Schedule D. Now, as Lord Macnaghten pointed out, 'it is to be observed that the expression "profits or gains," which occurs so often in the Income Tax Acts, is constantly applied without distinction to the subject of charge under all the schedules.' Accordingly it was held that as the London County Council paid the interest on their consolidated stock to the extent of £100,000 out of the income from lands, assessed to income tax under Schedule A, to the extent of £500,000 out of the interest of the council's loans to minor local authorities, already taxed at the source, and only to the extent of £500,000 from rates, that while it was entitled and bound to deduct income tax from all interest payable by it, it was entitled to retain that portion which corresponded to the proportion paid out of its

income from land and from interest receivable, and was only bound to account to the Revenue for that portion which corresponded to the proportion paid out of rates. To construe the enactment otherwise was recognised to result in taxation of the same income twice over, which was contrary to the principle uniformly adopted in the Income Tax Acts from the first imposition of the tax, which an amending and not a charging provision could not be intended to affect.

"It appears to me that this judgment affords an authority for the disposal of the case before me. It is true that the circumstances differ in detail, but not as affecting principle. It has been held by a series of decisions—*Scottish Mortgage and Investment Company of New Mexico*, 14 R. 98; *Northern Investment Company of New Zealand*, 14 R. 734; *Clerical, Medical, and General Life Assurance Society*, L.R., 22 Q.B.D. 444 (450); *Edinburgh Life Assurance Company*, (1906) 5 Tax Cases 221—that it is in the option of the Inland Revenue to assess the income tax in any manner that the schedules, cases, and rules of the Income Tax Acts allow, and to ignore profits and gains in the popular or trading sense so as to produce the largest return to the Revenue. But it seems to me that having exercised their option, the Inland Revenue authorities must stand by their election.

"Had the Inland Revenue elected to assess the Edinburgh Life Assurance Company, as in 1883-85 they assessed the Gresham Assurance Society upon its profits, and gains in the trading sense, it would, in the quinquennium to which I have referred, have received tax upon £334,450 of net profits, together with the tax upon £218,463 of annuities paid away, or upon £552,913 in all, and the company's income from their invested accumulated funds, or £804,731 plus the amount of tax actually deducted from that income, would have formed an item in arriving at the net amount of profits. As it is, the Revenue, discarding trade profits, have recovered the tax on the company's income from invested accumulated funds, or on the gross income of which £804,731 is the net after deducting income tax. The Revenue have thus taken that mode which produced by far the larger return to the Crown (an assessment on trading profit plus an assessment on annuities paid would have given only five-eighths of what was actually received), and to allow the Revenue to recover the tax effeiring to the annuities, in addition to that received on invested income, would be to sanction the taxing over again in part at least of the same income, just as much as the course proposed to be taken in the *London County Council* case would have done. And this, it has been held, was neither the intention nor the effect of the Act of 1888.

"Looked at from another point of view, it was recognised in the *London County Council* case, *supra*, that it was the duty of the managers of every commercial concern to follow the business-like course of keeping down current obligations out of current income. The Edinburgh Life Assurance Company were therefore entitled, and naturally as a business concern bound, to keep down their current obligations for annuities by paying them out of current income from invested funds. That income was profit and gain in the wider sense of the 24th section of the 1888 Act, and having paid the tax, the company were entitled to treat their current annuities as paid out of their own current interests and dividends from invested funds, and to deduct and retain in a question both with the annuitants and the Revenue. If this result altered what the Commissioners conceived it profitable for the Crown to do, it was open to them to exercise their option so as to meet the emergency, but not so as to tax the same income twice.

"In some circumstances it is possible that a similar distribution of the tax deducted from annuities might have to be made, as was done in the *London County Council* case, *supra*. But the figures in the present case to which I have referred make it unnecessary to go into that point. I do not therefore require to consider the matter adverted to at the outset, and reserved.

"The defenders will therefore fall to be entirely assoilzied, with expenses."

The pursuer reclaimed, and argued—The annuities were not paid out of profits or gains brought into charge by virtue of the Income Tax Acts. They were not a part of the company's profits, but were disbursements which the company had to make before it earned its income or made its profit—*Gresham Life Assurance Company* v. *Styles*, [1892] A.C. 309, 62 L.J., Q.B. 41. The fact that the assessment was there made, not as here upon income from investments but upon trading profit, made no difference. The Crown had the right to select as a basis on which the duty was to be charged either commercial profits or interest from investments, each being "profits or gains" within the sense of the Acts—*Revell (Surveyor of Taxes)* v. *The Edinburgh Life Assurance Company*, June 28, 1906, 5 Tax Cases 221; *Scottish Mortgage and Investment Company of New Mexico* v. *Inland Revenue*, November 19, 1886, 14 R. 98, 24 S.L.R. 87; *Surveyor of Taxes* v. *Northern Investment Company of New Zealand*, May 31, 1887, 14 R. 734, 24 S.L.R. 530. The annuities, accordingly, not having been paid out of profits, the company were bound under the Act of 1888, section 24 (3), to deduct income tax therefrom and to render an account thereof to the Commissioners—*The Attorney-General* v. *The London County Council*, [1907] A.C. 131; *Lord Advocate* v. *Corporation of Edinburgh*, October 15, 1903, 6 F. 1, 41 S.L.R. 1, and July 6, 1905, 7 F. 972, 42 S.L.R. 691; *Commissioners of Supply for Aberdeenshire* v. *Russell*, June 14, 1890, 17 R. 942, 27 S.L.R. 759. The distinction between the present case and *The London County Council* v. *The Attorney-General*, [1901] A.C. 26, 4 Tax Cases 265, was that the London County Council was not a company trading in annuities; the interest was not an outgoing

or expense necessary to earn a profit, but the County Council acted merely as a conduit pipe for the interest or dividends.

Argued for the defenders and respondents —The case depended upon the construction of section 24 (3) of the 1888 Act, and the construction of that section could not turn upon the decision in the *Gresham* case (*cit. sup.*), which depended on the law prior to that Act, the assessment there in question being for the year 1885-1886. The annuities were there held not to be paid out of "such profits or gains" (1842 Act, section 100, Schedule D, 1st case, rule 4), *i.e.*, not to be paid out of the balance of profits and gains, or the commercial profit. Such a construction of profits or gains as used in the 1888 Act, section 24 (3), would be inconsistent with *The London County Council* cases (*cit. sup.*) The present case fell under the principle of the first London County Council case, and the company were bound to account to the Crown for the tax deducted. The contrary result would involve double payment of the income tax deducted. The only cases in Scotland in which *The London County Council* v. *The Attorney-General*, [1901] A.C. 26, appeared to have been cited were *The Lord Advocate* v. *Corporation of Edinburgh* (*cit. sup.*), and *Dalrymple* v. *Dalrymple*, February 4, 1902, 4 F. 545, 39 S.L.R. 348.

At advising—

LORD PRESIDENT—The facts as regards the respondents' company are set out with great minuteness by the Lord Ordinary, and I do not need to repeat what he has said. Nor indeed is there any dispute as to them. I think, therefore, it is sufficient that I should state in a summarised form the propositions of fact which are relevant to the question in dispute.

The company carries on all usual branches of business of a life insurance company, including, *inter alia*, the selling of annuities either immediate or deferred in return for the immediate payment of a slump sum.

In paying the annuities to the annuitants it deducts income tax on the sum so paid, and the *cumulo* deductions on this head for the last five years amount to £5809, 3s. 7d., for which sum the Crown now sues them.

The company have paid income tax on their invested funds, the interest on which has been uplifted by them within the United Kingdom. The amount thus paid in income tax has been greater than if the Crown had preferred to charge them upon their net profit as a commercial concern.

The demand is made in respect of section 24 (3) of the Customs Act of 1888. But that Act, as was decided by the House of Lords in the London County Council case, only altered the machinery and did not alter the law itself. The expression, therefore, "As much as is not paid out of profits or gains brought into charge" in that section must be understood in the same sense as the original expression in section 102 of the Act of 1842—"profits or gains brought into charge by virtue of this Act." In other words, the sole question is, are these annuities paid out of profits or gains brought into charge by virtue of these (*i.e.*, the Income Tax) Acts.

The Solicitor-General—now the Lord Advocate—argued very strenuously that they were not, because of the decision in the *Gresham* case. In the *Gresham* case the Crown elected to charge upon the commercial profit, not upon the produce of investments. When I say elected to charge, I use the expression rather for clearness and convenience than with absolute accuracy. For really it is not a case of election, but rather that the Crown charges according to one or other of the several methods of charging allowed under the Acts. The Crown can take the method that suits it best; but it cannot take more than one at the same time. This I imagine to be absolutely settled both by authority and practice. The authorities are cited by the Lord Ordinary, and I never heard it contended that the Crown could first charge income tax on interest from investments, and then over and above and without deduction charge upon the profits of the commercial concern, part of whose revenue consisted of these investments.

The Crown, therefore, having elected in the *Gresham* case to charge upon the commercial profit, the point decided was that the Gresham Company, in striking the commercial profit, were entitled to treat the sum payable by them in annuities as a necessary outgoing before arriving at the net figure of profit. Therefore, says the Solicitor-General—now Lord Advocate—the annuities are not paid out of profits—*quod erat demonstrandum*.

I think this argument is fallacious, because it ignores the two different senses of the word "profits," and from a premise in which the word is used in one sense draws a conclusion in which it is used in the other. That the word "profits" is used in two senses can be easily shown, although it is true that in either sense it is profits in the sense of the Income Tax Acts. For example, suppose an insurance company had a very bad year's trading; suppose a life company had most of their business in Messina; for this year they might have made no profit, but rather incurred a great loss as a trading concern. In other words, their position actuarially calculated at the end of the year might be worse than it was at the beginning. Thus in the commercial sense they would have made no profits. Yet none the less the income on their investments would be profits in the sense of the Income Tax Acts, and chargeable as such.

Now the question decided in the *Gresham* case had to do with profits in the commercial sense, and those alone; and it would be straining the judgment, in my opinion, to apply it any further. In other words, I think the House of Lords in the *Gresham* case decided that the annuities were payable as an expense, and not out of commercial profits; but they did not decide, because the question was not and could not be raised, that the annuities were not paid out of "profits or gains brought into charge under this Act."

The latter question was, however, I think,

directly handled by the House of Lords in the *London County Council* case, although the point actually decided was somewhat different, and I ask your Lordships' attention to the facts of that case. The facts and the import of that case are, if I may be allowed to say so, extremely clearly summarised by the Lord Chancellor in the second *London County Council* case, and I therefore take them from his opinion. There he says—"The annual income of the London County Council liable to income tax is £956,000 a-year. I take rough figures throughout. Part of it—viz., £838,000 a-year—consists of rents or other sums which the Council receives. The remainder—viz., £118,000—consists of landed property which the County Council occupies. It does not let this latter property, but uses it, and thereby saves the rent it would have to pay if instead of occupying its own property it hired other property for the purpose. Upon this £956,000 a-year the County Council has paid income tax.

"Upon the other hand, the County Council is obliged to pay £1,371,000 annually as interest upon borrowed money due to the holders of Consolidated Stock, and all the property on which the County Council pays income tax is included in the security held by the owners of the stock. Thus the annual value of all the property owned by the London County Council is less by £415,000 than the interest it has to pay upon its debt. And the annual receipts by the County Council from that property show a still greater deficiency, for the County Council receives nothing in cash for that part of its property which it occupies.

"Pursuant to the scheme of the Income Tax Acts, which require the tax where possible to be collected at its source, the County Council, when it pays £1,371,000 interest to the owners of the Consolidated Stock, is bound to deduct from the whole of it the amount of income tax due upon it. They have done so, and the question in this case is, how much of the income tax so collected by the County Council must be handed over to the Crown, and how much it may retain for itself?

"It is quite clear, and is not disputed, that in respect of the income tax deducted from the £1,371,000 the County Council must account to the Crown for the tax they have collected on £415,000—the difference between £1,371,000 and £956,000—because they have received it purely as tax-collectors for the Crown, and cannot pretend that it represents any moneys which have already paid income tax. Again, as to the remaining £956,000, the decision of this House in *London County Council* v. *Attorney-General*, [1901] A.C., admittedly applies, and the County Council may retain for itself the tax that it has collected upon £838,000 parcel thereof."

The last sentence concludes, I think, the whole matter. It is worth noting that you will find, by referring to the report of the first case at p. 27, that originally in their information the Crown contended that the London County Council was bound to pay the tax retained on the whole £1,371,000. This contention, however, they abandoned before the Divisional Court, and no more was subsequently heard of it.

Now this being so, what distinction can be drawn between the money which the London County Council were bound to pay in name of interest and the sum which the company here are bound to pay by way of annuity? I confess I cannot see any. In each case the sum is an annual payment, and is income from the point of view of the ultimate recipient. In neither case is the payment income from the point of view of the party paying, but nevertheless that party is entitled to retain the income tax deducted by him if in point of fact the payment is made out of profits and gains brought into charge under the Income Tax Act.

But while I think the *London County Council* case conclusively settles the principle on which this case falls to be determined, I am not able to agree with the result at which the Lord Ordinary has arrived, because I think he has omitted to notice a material difference in the facts of the *London County Council* case and the present. In that case the sum paid was the interest due by the London County Council on their consolidated stock, amounting to £1,371,000. Their sources of income for payment thereof were, so far as £838,000 was concerned, rents, &c., upon which they had paid income tax at the source, but *quoad ultra* the rates, on which they had paid no income tax. And therefore, as the case sets forth, "so far as the dividends and interest were paid out of moneys raised by rates the Council accounted for income tax to the Commissioners." Accordingly the Lord Chancellor made the observations in the last paragraph which I have already quoted from his opinion.

Now in the present case the sum paid out is the annuities, amounting during the period in question to £116,259, 13s., and the sums to meet that are not only the sums from investments brought into charge, but also the premium income on which obviously no income tax has been paid. I use the term premium income as including all payments on which no income tax has been paid. I cannot state the precise figure here because it is not brought out.

It seems to me clear that the company have no right to say, "We pay the annuities out of the proceeds of funds on which we have paid income tax; we pay our other debts out of funds which have paid none." In the *London County Council* case there was no need for an apportionment, or rather the apportionment worked itself out. And I only say by way of caution what is probably unnecessary, that though an apportionment was there asked by the Crown, that was an apportionment between income and capital of a most fantastic sort which met with scant, but yet no less than it deserved, courtesy from the noble and learned Lords. But here the matter does not work itself out, and in my view the Lord Ordinary, though right in the general view he takes of the cases, is wrong in thinking that the result is absolvitor. I

think there must be a remit in order to fix what proportion for the period in question the premium income of the company bore to what I may call the investment income of the company, and that according to that proportion the income tax retained from the annuitants must be accounted for to the Crown.

LORD M'LAREN—I concur in the judgment, and after hearing your Lordship's opinion I have very little to add. I think in this, as in many practical questions, one gets the clearest idea of the question and its solution by first considering what is the normal case for the application of the rule of assessment. It seems to me that, giving effect to the settled policy of the Income Tax Acts that the assessable income is to be taxed at the source, the normal case is that the person assessed to income tax has an income-yielding property, and that property is subject to some security or charge, and therefore the income which he draws from his property does not represent simply what is beneficial to himself, but represents his personal benefit plus the share of the income which he has to pay to the person holding the charge. In that normal case the rules of the Income Tax Acts require that the owner of the property should pay the tax upon his gross income, and then he is allowed to recoup himself by deducting the proper proportion of income tax from his secured creditor or other person holding the charge on the estate, whatever it may be. In such a case of course there is no accounting to the Crown. An accounting would only show that the owner of the property is entitled to retain the tax which he has deducted, because he has already accounted to the Crown in anticipation when he paid duty upon his gross return from the property. Under the earlier Income Tax Acts it was only in this normal case that deduction was made at all, because if a party had to pay an annuity or interest to some one which was not charged on property, it was not part of a larger sum on which duty had been paid. He did not deduct the income tax at all, leaving it to the Revenue authorities to find out his creditor and to assess him. But by an extension of the principle of charging the tax at its source, it is now matter of obligation that every person who has any interest or annuity to pay shall act as collector for the Inland Revenue and deduct the tax subject to the obligation to account to the Crown. Now, if he cannot show that he has already paid the income tax by payment upon a gross amount, then he must account in a very practical sense by paying over the money which he has deducted as collector for the Crown.

But I think these cases are exceptional. One exception is the case, illustrated by the *London County Council* decision, where as regards the sum raised by taxation for making up the balance of the interest due upon their consolidated stock, the County Council had to account to the Crown because they had not already paid income tax upon so much of their income. That was because it was income raised by taxation, and was not directly assessable. But I will put another case—the case where a commercial firm has come under an obligation to pay an annuity to a retired partner. Now, if the company has been making profit, and if it is assessed on its profits, it is not allowed to deduct this annuity in striking profits, but they pay upon the gross profit, and then when they come to pay the annuity they are allowed to retain what they have collected to reimburse them for money already paid.

But it might happen in some particular year, or it might even be on the average of three successive years, that no profit could be shown, and therefore there is no assessment under Schedule D. But as the company has come under an obligation to pay the annuity to the retired partner they must either pay him out of capital or borrow money to pay him; and when they deduct his income tax they have to account for it to the Crown because they have not already paid it under their assessment, the hypothesis being that there is no assessment upon the company when no profit has been made. That is a case which I daresay sometimes happens; and then there is this case of an insurance company. It seems to me that the principle which is to be extracted from the *London County Council* case is this, that in order to justify the subject who is taxed in retaining the income tax that he has deducted from money payable to his creditors—in order to justify him in retaining this money for his own benefit—it is not necessary to show that the charge upon which he has paid his interest or annuity is by specific deed made a burden upon some source of income, because if that had been the rule the decision would have been the other way. But it suffices to entitle him to retain the benefit of the deduction if he can show that upon sound administration and a sound system of keeping accounts this fund upon which he has paid income tax is truly appropriated to the discharge of his obligation as a debtor to other people.

Now in the *London County Council* case it is not said that the holders of the consolidated stock had any mortgage over the County Council's land, still less over the debts which were due to the London County Council from other corporations to whom they had lent money. But although they had no mortgage this money was appropriated by the necessities of the situation to payment of interest, and the County Council had no other source from which interest could be paid on their consolidated stock. I think that the holders of the stock had some general right under their statute to a charge on the whole property. But these specific lands were not in the position of land which was covered by a bond and disposition in security. I think that principle is broad enough to cover the present case. It certainly is sound finance and sound administration on the part of an insurance company that its income from investments should be applied in paying

annuities which it has come under obligation to pay, because that practice satisfies the rule that annual charges are always to be paid out of income if the income is sufficient to meet them. If it is insufficient, of course you must have resort to capital.

Supposing that any insurance company were to do such an absurd thing as to propose to divide their income from investments amongst their shareholders leaving their annuities either unprovided for or to be provided for out of capital, I do not doubt that upon a proper application to a court of law such maladministration would be corrected and the mode actually adopted would be held to be the sound and true method of the administration of the finances of an insurance company. If that is so, they are, I think, substantially in the same position as the London County Council, because as a matter of duty their income from investments is appropriated in the first instance to the discharge of their annual obligations, that is, to the payment of annual sums to their creditors. But then, as was pointed out by your Lordship, there is this difference between the two cases, that in the present case the income from investments is not the only income of the Edinburgh Life Assurance Company, because it has also a large income from premiums coming in year by year. There is no true analogy in this respect between the two cases, because I take it that when the London County Council made up their annual budget, providing for all expenses of administration and works and interest on debt, there was a deficit which they had to raise by taxation, and of course they would take care, approximately at least, not to raise more money by taxation than was necessary to meet their obligations; and therefore the several funds appropriated to payment of dividends on stock were already fixed by their method of administration and no apportionment of the nature of calculation was necessary. But in the present case the amount of income from premiums does not necessarily bear any specific relation to the amount of money derived from investments, but you have the two sums the proportions of which will vary from year to year.

We have then to consider how far the income from investments is applicable to the discharge of the annuities, and it has to be borne in mind that there is another fund also applicable to the same purpose but which would be altogether insufficient if it were taken alone. Then when you have two funds which are practically charged with the payment of these annuities, I think the rule of law is that you must apportion the liability rateably between them. Therefore I agree with your Lordship's proposal that we should make a remit to ascertain the exact amount of the premiums of the company for the year, and to have the liability for payment of the annuities properly apportioned. When that is done we shall then be in a position to give an effective decree.

LORD KINNEAR—I concur with your Lordships and have nothing to add.

LORD PEARSON—I also agree.

The Court pronounced this interlocutor—

"Recal the Lord Ordinary's interlocutor of 30th July 1908: Find that the annuities paid by the defenders in any year fall to be debited proportionally against their revenue on which income tax has been paid and their revenue on which income tax has not been paid, in each year: Find further that the defenders are bound to account to the pursuer for income tax on the portion of the annuities thus paid out of revenue which has not paid income tax: Remit to the Lord Ordinary to fix the amount of income tax due in terms of these findings and to proceed as accords: Find no expenses due to or by either party in respect of the reclaiming note; and decern."

Counsel for Pursuer (Reclaimer) — Lord Advocate (Ure, K.C.) — Munro — Umpherston. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for Defenders (Respondents) — The Dean of Faculty (Dickson, K.C.) — Macphail. Agents—Mackenzie & Kermack, W.S.

Thursday, March 11.

SECOND DIVISION.

(SINGLE BILLS.)

DINGWALL *v.* FISHER.

Process—Issue—Motion to Vary—Whether Timeously Made — Motion Lodged but not Moved within Six Days of Approval of Issue—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 28.

Held that a motion to vary an issue which was lodged within six days from the date of the Lord Ordinary's interlocutor approving it as the issue for the trial of the cause, but not moved till after the expiry thereof, was timeously made.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 28, enacts—"Any interlocutor" [*relating to the allowance of proof*] "pronounced by the Lord Ordinary . . . . shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming note against it to one of the Divisions of the Court . . . .: Provided always that it shall be lawful to either party within the said period, without presenting a reclaiming note, to move the said Division to vary the terms of any issue that may have been approved of by an interlocutor of the Lord Ordinary, specifying in the notice of motion the variation that is desired. . . ."

Christina Dingwall, 1 Cochran Terrace, Edinburgh, brought an action of damages for slander against John Fisher, Royal Hotel, Dunkeld. On Tuesday, 2nd March 1909, the Lord Ordinary (GUTHRIE) approved