No. 114.—In the House of Lords. 26th and 28th March and 1st July 1889.

Styles v. New York Life Insurance Co.

Styles (Surveyor of Taxes) v. New York Life Insurance Company. (b)

Income Tax.—Profits.—Mutual Life Insurance.—A mutual life insurance company has no members other than the holders of participating policies, to whom all the assets of the Company belong. At the close of each year an actuarial valuation is made, and if the aggregate receipts of the Company have been more than sufficient to cover the expenses and estimated liabilities, the surplus is divided between the participating policy-holders, who receive their dividends in the shape either of a cash reduction from future premiums, or of a reversionary addition to the amount of their policies.

The surplus divided consists partly of the excess of the premiums paid by the participating policy-holders, over and above the cost of their insurances, and partly of profits arising from non-participating policies, the sale of life annuities, and other business conducted by the Society with non-members.

Held, *by Lords Watson, Bramwell, Herschell, and Macnaghten* (*Lord Halsbury, L.C., and Lord Fitzgerald* dissenting), *that so much of the surplus as arises from the excess contributions of the participating policy-holders is not profit assessable to the Income Tax.*

Last v. *London Assurance Corporation* (c.) distinguished.

1. At meetings of the Commissioners for the general purposes of the Income Tax Acts for the City of London, held at the Guildhall Buildings in the said city on the 10th June, 1st July, and 22nd July, 1886, the New York Life Insurance Company appealed against two respective assessments of 50,000*l.* and 50,000*l.* under Schedule D. to the Act 16 & 17 Vict. c. 34 for the years ending 5th April 1885 and 5th April 1886 respectively made upon them under the following circumstances :—

2. The New York Life Insurance Company, herein-after, for brevity, termed the " Company," was incorporated by special Act of the Legislature of New York dated the 18th April 1843.

(b) Reported L. R. 14 App. Cases 381. (c) 2 T.C. 100.

3. The central office is in New York, and the Company there carries on the business of insurance on lives and all and every insurance appertaining to life.

4. All the corporate powers of the said Company are exercised by a board of Trustees, and such officers and agents as they may appoint.

5. A branch or department for the said Company for Great Britain and Ireland, under the management of a general manager appointed by the trustees and responsible to them, has been established and carries on business at Nos. 76 and 77, Cheapside, in the city of London.

6. The Company has no shareholders and there are no shares. The Company is organised for and, *except as herein-after stated*, does business solely under the plan of mutual insurance. Each policy-holder is a member of the Company, and is entitled to a share of the assets of the Company and liable to all losses and expenses incurred by the Company, as provided by the 11th clause of the Company's charter herein-after set forth.

7. A calculation is made by the Company of the probable death-rate among the members of the Company and of the probable expenses and other liabilities of the Company, and the amount claimed for premiums from the policy-holders is commensurate therewith.

8. The following clauses of the Company's charter regulate the relations of the Company with its members :—

6. " Every person having taken a policy during the preceding year directly in his own name or in the name of his firm, and every person holding in his own name or in the name of his firm a certificate or certificates of the Company (not discharged by payment of losses) for a proportionate share of the premiums earned as herein-after provided for to the amount of one hundred dollars, shall be deemed a member of the said Company and entitled to vote in person or by proxy at all elections, and every person holding such certificate or certificates in his own name or in the name of his firm shall be entitled to an additional vote for every sum of one hundred dollars over the first one hundred dollars included in the same, provided, however, that in no case shall any such person have a right to give more than one hundred votes.

7. " Every person who shall become a member of this Corporation by effecting an insurance therein shall the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees, and no premiums so paid shall be withdrawn from said Company during its continuance, but shall be liable to all the losses and expenses incurred by the Company during the continuance of its charter. Nothing,

however, in this section contained shall prevent the said Company from receiving notes for premiums on marine insurances effected by the said Company.

11. "The officers of the Company at the expiration of one year from the time that the first policy shall have been issued and bears date, and within one month thereafter and during the first month after the expiration of every subsequent year, shall cause an estimate to be made of the profits and true state of the affairs of the said Company, as near as may be, for the preceding year and so on for each successive year, which estimate shall be conclusive upon all persons entitled to receive certificates as herein-after provided for, and shall thereupon cause a balance to be struck of the affairs of the Company in which they shall charge each member with a proportionate share of the losses of the Company according to the original amount of premium paid by him, but in no case shall such share exceed the amount of such premium. Such member shall be credited with his proportionate share of the amount of premiums earned after deducting losses and expenses and of the profits of the Company derived from investments, which share of profits derived from investments shall be paid to such members, and for his proportionate share of the premiums earned he shall be entitled to a certificate on the books of the Company of the amount remaining to his credit in the said Company, such certificate to contain a proviso that the amount therein is liable for any future loss by said Company. No certificates, however, shall be issued for any sum less than ten dollars nor for the fractional parts of sums between even tens of dollars, but all such fractional parts of sums and sums less than ten dollars shall be placed to the contingent account of the Company and applied to the expenses and other charges of the years to which they appertain."

A correct printed copy of the charters by and under which the Company is established and carries on business is hereto annexed marked A, and forms part of this case.

9. The certificates above mentioned are not issued by the Company, and are not held by any members of the Company or other persons in the United Kingdom or elsewhere.

10. An account is compiled every year of the income of the Company arising—

1. From premiums and annuities.
2. From interest received and accrued, including premiums on gold, rents, &c.

A corresponding account is also taken every year of the expenditure of the Company arising—

1. From claims by death.

2. From matured endowments, that is to say, payment of the money assured to be paid on the arrival of a fixed period.

3. From annuities payable.

4. From payments for surrendered policies.

5. From commission, medical fees, taxes, and expenses.

6. From contingent fund or sum set aside to answer any estimated depreciation in the value of securities.

11. The chief part of the surplus, as shown by the said accounts, is paid, or as the Company alleges, is returned to the Policy-holders as bonuses in addition to the sums insured or in reduction of the premiums required from them. The remainder of the said surplus is carried forward as funds in hand to the credit of the general body of the members of the Company.

12. The income of the Company is solely derived from premiums paid by members of the Company or by holders of non-participating policies from the purchase moneys paid for annuities granted by the Company, and from the interest, dividends, or annual income arising from the investment of the Company's assets.

13. A correct triennial statement of accounts deposited by the Company with the Board of Trade and a form of the ordinary life assurance policy of the Company are hereto annexed, marked B and C, and form part of this case. Prints of the prospectuses and annual accounts of the said Company for the years 1882, 1883, 1884, and 1885 are hereto annexed, marked D, E, F, and G, and form part of this case.

14. The Company in consideration of single payments grant annuities on lives. Neither the payment of the said consideration or the receipt of the said annuities constitutes a membership of the Company.

15. The Company in consideration of fixed premiums grant policies of assurance of a fixed sum of money payable on death or at a fixed period. The holders of such non-participating policies have no interest in the assets of the Company nor are they subject to any losses or liabilities of the Company. The non-participating policy-holders are not members of the Company.

16. Out of the premium income received by the Company in the United Kingdom claims under policies payable in the United Kingdom and the expenses of the Company incurred in the United Kingdom are first paid and satisfied, and the balance is invariably remitted to the head office at New York, in which state the same is invested according to the terms of the Company's charter in like manner as other income of the Company.

17. The Company does not pay the bonuses in cash, but the amount of the same is deducted from the next premium due or is added to the policy.

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18. It was contended by the Surveyor of Taxes on the above facts that the surplus, so far as the same is derived from premiums received in the United Kingdom, is a profit or gain of the Company liable to be assessed to Income Tax under Schedule D. to the Act 16 & 17 Vict. c. 34, and he cited the case of *Last* v. *The London Assurance Corporation* in support of his contention (*d*).

19. The Company, however, contended that a distinction existed between the said case and that of the present appeal inasmuch as the London Assurance Corporation received premiums in pursuance of and derived profits from contracts between that Corporation and their policy-holders who were not members of that Corporation, whilst the premiums paid to the New York Life Insurance Company are contributed by members of the Company as an estimated amount required to cover the risks for the year and the necessary expenses, and that any surplus or balance remaining over and above the sum that may actually be required for such purposes is not profit or gain liable to assessment, but it is in fact an excess of contribution over expenditure.

20. The Commissioners of Taxes were of opinion—

1st. That no part of the premium income of the Company received under participating policies is liable to be assessed to Income Tax as profits or gains chargeable under Schedule D. to the Act 16 & 17 Vict. c. 34.

2nd. That the Company was, however, liable to be assessed in respect of profits made on annuities granted.

3rd. That the Company was also liable to be assessed on profits made from premiums paid under non-participating policies.

4th. That the Company was liable to be assessed on all income derived by or from investment of all premiums or other money paid to them in the United Kingdom and invested in the United Kingdom or abroad, and as to the latter when such income is received in the United Kingdom.

5th. That the Company was liable to be assessed on all profits (if any) derived in any mode other than by the annual premium contributions of the participating policy-holders.

21. The Surveyor of Taxes immediately after the determination of the said appeal expressed his dissatisfaction with the same as being erroneous in point of law, and duly required the Commissioners to state and sign a case for the opinion of the High Court of Justice under the statute 43 & 44 Vict. c. 19, which we have stated and do sign accordingly.

22. The question for the opinion of the Court is whether on the above facts the finding of the Commissioners is or is not correct in the first of the above five cases. If the Court is of

(*d*) 2 T.C. 100.

opinion that the finding of the Commissioners is wrong on the first of the above questions, the case is to be remitted to them for their further decision as to the amount of the assessment.

SYDNEY H. WATERLOW, Chairman,
GEO. H. CHAMBERS,
J. G. HUBBARD,
WM. CAVE FOWLER,
H. COSMO BONSOR,
JAMES SPICER,
D. P. SPELLAR,
F. WYATT TRUSCOTT,
J. STEWART HODGSON.
} Commissioners of Taxes for the City of London.

The Guildhall Buildings,
17th March 1887.

In the Queen's Bench Division *Stephens* and *Wills*, *J.J.*, held that this case was not distinguishable from that of *Last* v. *London Assurance Corporation*, and that the surplus resulting from the premiums received from the participating policy-holders was therefore assessable to income tax. This decision was upheld by the Court of Appeal (*Lord Esher*, *M.R.*, *Fry* and *Lopes*, *L.J.J.*). The Company appealed.

Finlay, *Q.C.*, for the Insurance Company.:—In Last's case the Company was not a mutual insurance company, and therefore, the decision does not cover the present case.

There is a broad distinction between contributions from the members of a mutual association for the purpose of insuring one another, and sums received from outsiders. In order to be profits for Income Tax purposes the surplus must be the result of what has been received from outsiders; so long as it is the mere case of contribution there is nothing liable to Income Tax assessment. When the members contribute year by year so much according to the calculation made of the insurance requirements, and there remains at the end of the year a surplus because they allowed a margin and collected more than has really been wanted, that surplus of contribution over actual expenditure is not in any sense of the term income for the purposes of the Income Tax Acts.

In the Courts below the Judges seem to have attached importance to the fact that the Society was incorporated, and was an entity distinct from the members composing it. But where it is a mutual society of which the members are liable to contribute to make up deficiencies, and entitled to share any surplus that may remain after the expenses are paid, sums which do not come from any external source, but are mere contributions from persons within the Society, are not profits within the meaning of Last's case.

The members are not liable to Income Tax in respect of any surplus of their contributions over the actual expenditure in the year. They have provided the money. The money is really in the hands of each member.

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Bremner for the Company:—The surplus is neither profit nor gain. If you dissociate the surplus as to which this question arises from the rest of the business of the Company, you have left a mutual life insurance company. The object of the members is to insure each other's lives, and to provide a fund out of which the representatives of any member who may die may receive a certain sum. There are certain expenses—wages, salaries, and establishment charges, and of course there are claims which come in from time to time. To meet these a fund in hand is necessary; it would not be convenient or practicable to send a collector round to each member whenever a claim came in. Therefore, the arrangement made is that each member shall at the beginning of the year pay a sum which is known by experience to be more than sufficient. At the end of the year there is a surplus which may be added to the amount of the policy or carried forward and deducted from the next premium. But this surplus cannot be said to be profit.

Last's case differs from this. In Last's case there was a company carrying on business composed of shareholders who desired to make a profit out of the business. Of the sum said to be liable to taxation one-third belonged to the Company, the other two-thirds belonged to the participating policy-holders, and it was held that before this two-thirds got back to the policy-holders it was stamped with the character of profit.

Sir R. Webster, A.-G., for the Surveyor:—In this case people in America have formed themselves into a company. They come over here and by their trustees appoint a general manager, and through that manager they carry on a business or trade, viz., the trade of insuring one another's lives. They carry on other business besides; they issue non-participating policies and grant annuites. They admit their liability in respect of profits made in the latter branches of their business, but they contend that they are not to be considered as earning profits and gains in connexion with that part of their income which is derived from premiums on mutual policies.

With respect to the mutual policy-holder it is suggested that he goes into the Society upon the terms that his premiums are to be received, and that so much thereof as is not necessary to pay the amount required is to be returned to him because it is the excess paid by him beyond the amount necessary to insure his life. That statement in no way represents the bargain made. One goes in and becomes a mutual policy-holder upon terms which are the ordinary terms of life insurance; that the premiums shall be paid, shall be used by the manager of the Company, shall be invested, lent, or used in any other way in which money can be earned.

It is not the case that what is repaid to any one of these associated persons merely represents an excess beyond what is needed to keep him and his other friends safe; it is more or less according to the result of the transactions; it is more or less

according to whether or not the manager has made successful investments.

It is not because there is going to be a return of money to the persons who contribute it that it is not a business or trade. You have to see what they are engaged in, and here they are engaged in the receipt from one another of moneys which are to be employed by themselves or their appointed manager under such circumstances as are intended to produce profits and gains to the associated body.

Suppose 100 persons are already members of a mutual insurance company. Number 101 comes to the office in England and desires to become a member. I submit he comes on a contract with the 100 other members that his premium shall be used in the same way as their past and future premiums; that the money shall go to get what can be earned by proper investment of those premiums, that when he dies his representatives shall get the sum assured plus any share of profits previously declared. Such profits being the result of the investments and the tradings of the combined persons who previously paid their premiums. It is not simply that, because he has paid a premium he is entitled to receive a certain sum of money back. The Company do not even purport to divide or give back what is represented by the man's payment. Under the terms of the policies if one of the mutual policy-holders does not continue to pay his premiums a certain money benefit accrues to the general body of policy-holders.

[*Bramwell, L.J.*, but as every man is liable to forfeiture on non-payment it is only an equivalent.]

If the result of dealing with non-participating premiums ought to be regarded as profits, the result of dealing with the participating premium produces a fund of the same character and kind.

Dicey for the Surveyor:—This is a foreign Company, and on the facts stated in the case it is clear that they make a gain on a trade carried on in the United Kingdom. They describe themselves as carrying on a business and as dividing profits. The premiums received here after payment of expenses are transmitted to New York and dealt with as part of the income of the Company. The Company looked at as a foreigner carrying on business in England does gain to the extent of the surplus remitted to America. The Company is so much the richer for the English surplus whether it goes to meet a loss incurred in America or to add to their gains there.

In computing the taxable result of a trade carried on in England, they are not allowed to set against it losses which they incur abroad.

In taxing the gains made in England by a company or private person resident abroad, there is no account taken of whether upon the foreign business there is a profit or a loss.

Halsbury, L.C.—My Lords, I think in this case the judgment should be affirmed.

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I think the Appellants do carry on a concern (I speak, of course, of that part of the concern which is under debate) which brings in profit. I am content myself with the test applied by the Earl of Selborne in the *Mersey Docks* v. *Lucas* (*e*), where it was said that the profits or gains of a concern mean, for the purpose of Income Tax, the earnings of the concern, after deducting the expenses of earning and obtaining, before you come to the application of them even to the payment of creditors of the concern.

My Lords, it is extremely difficult to test the question whether the moneys divisible at the end of the year are profits or not by analogous cases, since it is almost impossible to avoid introducing some phrase or adding some term which impliedly begs the question in debate. I am, therefore, a little jealous of saying that this thing is like some other thing, and then showing that that other thing is not within the proposition necessary to support this judgment. If it were true that each individual of this concern did only subscribe what was supposed to be necessary to accomplish the desired object, and that either miscalculation or something else at the time of the original subscription made that subscription excessive, and that subsequent examination of the facts existing at the time of the original subscription showed that subscription to be excessive, and that the individual subscriber got back his original subscription and no more, or only such a sum as would make up the difference between his actual and, what I will call this, his proper subscription, I could follow the argument. But I do not so understand the facts. The associated adventurers get their original subscriptions and something more; they get, even if they get no more, the enhanced value of their policy; and even if they got back only their own original premiums they would have got something in the nature of a more valuable contract than when they entered into it originally. But in truth they do get more; they get their proportionate share of the good trading or fortunate adventure which has taken place during the year which consists in making contracts for the payment of large sums in the year which they have not been called upon to pay, and they have realised as profit something over and above what they have individually subscribed.

My Lords, I confess I am quite unable to distinguish this from Last's case. The distinction of fact simply consists in this—that people in the case before your Lordships entered into the transaction only with each other, a limited class, and not with what has been described as the outside public. I cannot see the difference.

Mr. Justice Stephen, I think, quite accurately described this transaction as in the nature of a bet on the duration of life, and I think both decision and legislation justify the introduction of such a phrase into the argument; and if this be the real nature of the transaction, it certainly seems to me to make no difference

(*e*) 2 T. C. 28.

whether the members of the association made bets upon each other's lives or on the lives of people outside their own circle. An ordinary betting man's gains would be assessable, and they would not be the less so if his bets were confined to his own club or to an association whose rules excluded any bet except with a member of their own body.

My Lords, I further think the case is concluded by authority; I am unable to distinguish it from Last's case.

Under the circumstances, I am of opinion that the judgment ought to be affirmed.

Lord Watson.—My Lords, I am of opinion that the Order appealed from ought to be reversed. It has been held by both Courts below that the present case comes within the principle of *Last* v. *London Assurance Corporation*, which is an authority binding not only upon them, but upon this House. I venture to think that the learned Judges have either misapprehended the scope of the decision in Last's case or have failed to give due weight to the differences which exist between the circumstances of that case, and the facts which we have to consider in this Appeal.

The London Assurance Corporation was a proprietary office, or, in other words, the Corporation and its shareholders formed a body quite distinct in personality and in interest from the insured. A member of the Corporation might effect an insurance with it, but that circumstance could neither enlarge or diminish his rights as a partner. The Corporation, as a branch of its business, dealt in what are termed "participating" policies, which it issued to all persons, whether members or not, who had insurable lives, and were willing to pay premiums on a higher scale than those charged for ordinary or non-participating policies. In consideration of these increased payments the Corporation undertook to return to the holders of participating policies by way of bonus or abatement of premiums, two-thirds of any surplus funds applicable to such policies, which were to be ascertained and allotted every five years. The one-third retained by the Corporation admittedly represented business profits; and it was not matter of dispute that the remaining two-thirds would also have been profits of the Corporation except for its agreement to return that amount to the insured. The only point decided by the House was this, that the two-thirds of surplus payable to the insured did not constitute a proper debt of the Corporation, falling to be deducted from receipts in ascertaining its trading profits, but was in reality a share of profits.

The Appellant Company, so far as regards its membership, is constituted upon the principles of mutual assurance. The Company issues life policies of two kinds, participating and non-participating; but the relations existing between the Corporation and the two classes of insured differ materially. There are no shares and no shareholders in the ordinary sense of the term; but each and every holder of a participating policy becomes,

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ipso facto, a partner of the Company with a voice in its administration, entitled to a share of its assets and liable for all losses and expenses incurred by it. On the other hand, the holder of a non-participating policy is not a partner of the Company; he is a creditor merely without any interest in its assets and without any liability for its debts. The rate of premiums paid for participating is different from that which applies to non-participating policies, and is, moreover, not fixed but fluctuating. A calculation is made of the probable disbursements of the Company on account of expenses and other liabilities; and the amount claimed as premiums from policy-holders, who are members, is adjusted in conformity with that estimate. Then an account is annually taken of the transactions of the Company, and the excess, if any, of premiums received from these members over expenditure for which they are responsible is, after carrying part to a reserved fund, returned or repaid to them, either in the shape of bonus additions to their insurances, or by a deduction of the future premiums required from them.

Besides issuing life policies, the Appellant Company insures, without participation, sums payable at fixed future periods, sells annuities, and has funds invested which bear annual interest. It is not disputed that, in so far as its transactions relate to non-participating policies, whether for life or for periods certain, and to annuities, the Company carries on a trade in the same sense as any proprietary office does; or that surplus moneys arising upon these transactions are business profits, and as such are liable to Income Tax. With these profits and with the income derived by the Company from its investments we have no concern. This appeal is limited to the surplus arising upon its English transactions in participating or members' policies; and the question which we have to decide is whether that surplus represents "annual gains or profits" arising or accruing from a "trade carried on" by the Appellant Company, within the meaning of Schedule D. in the Income Tax Act of 1853.

The main and, to my mind, essential difference between Last's case and the present consists in the fact that, in this case, the policy-holders are not outsiders because they, and they alone, are members of the Company. In Last's case the insured and the Corporation stood to each other in no other relation than that of creditor and debtor; they were in all respects separate and independent bodies without community of rights and interests, their sole connexion being a right on the one part to pay premiums, with a counter obligation, when these have been duly settled, to pay the sum insured. A member had in that capacity no claim under his policy, and a policy-holder had, as such, no share in the receipts and assets of the Corporation. But according to the constitution of the Appellant Company, insurance by means of a participating policy is the only possible qualification for membership; and, as soon as it is effected, the insured is invested with all the rights, and becomes subject to all the liabilities of a partner. The individuals insured and those

associated for the purpose of receiving their dividends, and meeting policies when they fall in, are identical, and I do not think that their complete identity can be destroyed or even impaired by their incorporation. The Corporation is merely a legal entity which represents the aggregate of its members; and the members of the Appellant Company are its participating policy-holders.

When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits. That consideration appears to me to dispose of the present case. In my opinion, a member of the Appellant Company when he pays a premium makes a rateable contribution to a common fund, in which he and his co-partners are jointly interested, and which is divisible among them at the times and under the conditions specified in their policies. He pays according to an estimate of the amount which will be required for the common benefit; if his contribution proves to be insufficient he must make good the deficiency; if it exceeds what is ultimately found to be requisite, the excess is returned to him. For these reasons I have come to the conclusion that the transactions of the Appellant Company in so far as these relate to the participating policies, do not constitute the carrying on of a trade within the meaning of the Income Tax Acts, and that the surplus funds returned or credited to its members are not profits.

I move that the judgment appealed from be reversed with costs.

Lord Bramwell.—My Lords, I am of opinion that this judgment should be reversed. The Appellants do not carry on a profession, trade, employment, or vocation from which profits or gains arise or accrue within the meaning of the Income Tax Act. It is for the Respondents to make out what they do. I think it can be shown negatively that they do not. I speak, of course, of the mutual insurance business. They are a corporation, but the case may be, as is admitted, dealt with as though they were an unincorporated association of individuals. Take it that they were; take it that half-a-dozen persons so associated themselves at the beginning of the year; they each put into a common purse 10*l.* to be given to the executors of any one who dies, or divided, if more than one dies, among the executors of those having died. In fact, no one dies, and the money is returned, or carried on for the next year. Is it possible to say that this is an association for the purpose of profit or that it has made any profit? But that, with less complexity, is the present case. Instead of six, there are many hundreds, perhaps thousands, associated; instead of the arrangement being for one year, it is for the respective lives of the associated; instead of all the subscriptions being given

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to the executors of one or more deceased, there is an agreed sum given to them, the rest being carried on to meet the case of future deaths of which there will be a proportionate increase as the associates grow older. Instead of the money subscribed being returned, it is applied to the reduction of future payments by the associates, or to the increase of the sum they will be entitled to. It cannot be a profit if added to the sum insured, unless it would be if returned.

This was the way the case was put by my noble and learned friend Lord Herschell. The same proposition is in truth in the argument of the Appellants' counsel. That argument was, that there are no persons outside the associated members from whom an income is derived; that, therefore, there can be no profit except interest on investments, for which the Appellants are liable to a tax, and which is not in question here; that of course, if they thought fit to employ their surplus in trade, they would be liable to Income Tax on any profits they made, but as traders, not as an insurance association. Try the case as before. At the beginning of the year a man put by 20*l.* He is alive at the end of it; has he made a profit of 20*l.*? Suppose he has associated himself with others and only 10*l.* of his 20*l.* have been wanted. Has he made a profit of 10*l.*? Who has made the profit if one has been made? Is it those who survive? Certainly not, because in insuring lives, the longer an insured person lives the less is the profit of the transaction to the insurers. Or is it the executors and administrators of those who have died who make the profits? But then they are not assessed. Take the case I put of the book-club; is the money not wanted a profit?

I am of opinion, then, that as a matter of reasoning, the judgment is wrong. But it is said that we are bound by the authority of *Last* v. *The London Assurance Corporation* to hold otherwise. If I thought that that case decided otherwise, I would abide by it; it would be my duty to do so, and, I may say, my inclination, for it is much better that a wrong decision should be set right by legislation than that idle distinctions should be made between it and other cases, and the law thrown into confusion. But I think that this case is not governed by that. I understand the principle of that decision to be, that there was a company making profits, meaning to make profits, not from its own members, but from those it dealt with; that although they returned two-thirds of those profits to those they dealt with, they were not the less profits, and that, therefore, Income Tax was payable upon them. I thought, and still think, that wrong. I thought that the profits were only what remained after the return they had agreed to make on what was divisible among the shareholders. But, whichever opinion is right, and it must be taken that the opinion of the majority was, it seems clear that it does not govern this case. There were in that case two bodies, the shareholders and the assured. The object of the former was to make profits in dealing with the latter, and as much profit as they could, giving them no

better terms than were necessary to attract business. Here there is one body only, the assured, who are not dealing with another body, and are not to make profits, but to insure themselves and each other on terms as low as can be consistent with safety and solvency. In that case it was the insurers who were taxed; in this it is the assured. I think the cases wholly different.

Lord Fitzgerald.—My Lords, it is essential to the decision of this Appeal to unravel the tangle in which the constitution of the Appellant Corporation and their relation to their policy-holders seems to be involved. The foundation is the statute charter of the Nautilus Insurance Company, passed the 21st May 1841, by which the stockholders of this Company were incorporated for marine and fire risks. I have not discovered in that charter, or in the charter of the Hamilton Marine Insurance Company, which is to a large extent incorporated with the Nautilus Charter, any provision materially affecting the question before your Lordships.

The Nautilus was an ordinary marine insurance Corporation, and so continued to 18th April, 1848, when its charter was enlarged by giving it, "in addition to its existing charter rights, "the privilege of organising and doing business under the plan "of mutual insurance, and for that purpose the Corporation is "authorised to have and enjoy a charter similar in every re-"spect to that of the New York Mutual Insurance Company, "passed the 12th of April 1842." The latter Company was distinct from the Appellant Corporation, and does not appear to have been in any way connected with it.

We are thus thrown back on the charter of the New York Mutual Insurance Company, passed the 12th April 1842, and I assume, for the purposes of this Appeal, that the charter of the Nautilus Company is to read as if the charter of the New York Mutual Insurance Company was incorporated in it in terms, save the parts specially excepted. The Nautilus Corporation would thus, under its charter whilst retaining its prior powers as a marine and fire company, obtain an extended authority "to make insurances on lives, and to make all and every "insurance appertaining to life."

By section 6 of the New York Mutual Company, which is incorporated in the Nautilus Charter, "every person having "taken a policy during the preceding year directly in his own "name or in the name of his firm, and every person holding in "his own name or in the name of his firm a certificate or cer-"tificates of the Company (not discharged by payment of losses) "for a proportionate share of the premium earned as herein-"after provided for, to the amount of one hundred dollars, shall "be deemed a member of the said Company." It will be observed that this section does not appear to be expressly confined to participating policies.

By section 7 every person who shall become a member of this Corporation by effecting insurance therein shall the first time he effects insurance, and before he receives his policy, pay the rates

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that shall be fixed upon and determined by the trustees, and no premium so paid shall be withdrawn from said Company during its continuance, but shall be liable to all the losses and expenses incurred by the Company during its charter.

By section 11 the officers of the Company at the expiration of every year " shall cause an estimate to be made of the profits and " true state of the affairs of the said Company as near as may be " for the preceding year, and shall thereupon cause a balance to " be struck of the affairs of the Company in which they shall " charge each member with a proportional share of the losses of " the Company according to the original amount of premiums paid " by him, but in no case shall such share exceed the amount of " such premium. Such member shall be credited with his pro- " portionate share of the amount of premiums earned after " deducting losses and expenses, and of the profits of the Com- " pany derived from investments, which share of profits derived " from investment shall be paid to such member, and for his " proportionate share of the premium earned he shall be entitled " to a certificate on the books of the Company of the amount re- " maining to his credit in the said Company, such certificate " to contain a proviso that the amount named therein is liable " for any future loss by said Company."

Next and last comes the Nautilus Insurance Amending Act of 1849, by which " that Company is to be known thereafter as the " New York Life Insurance Company."

By section 2 the business of the said Company shall be confined to insurance on lives, and it may make all and every insurance appertaining to life, and receive and execute trusts, make endowments, and grants and purchase annuities.

By section 5 the officers of this Company within one month subsequent to the 1st day of January in each year, shall cause an estimate to be made of the profits, and true state of the affairs of the said Company as near as may be for the preceding year, and all such dividends as may be declared by the trustees shall be placed to the credit of the persons entitled thereto on the books of the Company, and each person so entitled may receive a certificate therefor. Such dividend certificates to contain a proviso that the amount named therein is liable for any loss by said Company. The trustees may at their discretion declare or pay interest on such certificates at a rate not exceeding 6 per cent. per annum, but no dividend shall ever be declared and payable impairing the capital or accumulation of the said Company. I assume it is on the provisions of clause 5 that the annual estimate and division of profits is now made by the Corporation.

Your Lordships have therefore to deal with a foreign Corporation with its main business in New York, but having a place of business in London, and carrying on a portion of its business there. The business of that Corporation is now confined to insurance business appertaining to life, and including life annuities, and tontines or other endowments depending on life, or on some event appertaining to life. The life insurance business is

again divisible into ordinary policies and participating policies, the holders of the latter becoming members of the Corporation.

The Corporation does by far the greater portion of its life insurance business under the plan of mutual insurance. I have not any information before me as to what the plan of mutual insurance may be, save as it is to be collected from the constitution and accounts of the Corporation.

There are many insurance concerns in this country having the character, and some the appellation, of mutual. Probably the society that existed in Serjeants' Inn so far back as 1706 was the oldest; the Equitable is certainly one, and the annual return to the Board of Trade published by authority of Parliament will disclose a great number of others, some of which are not only mutual but have long practised the plan of co-opting as members of the Company those to whom they issue policies.

I conjecture the term "mutual" is applicable to cases where the members form a correlative or reciprocal relation to each other to become their own insurers without the aid of capital, or stock, or shares. That common ground is reached in the present instance. The procedure is simple enough, though apparently complicated. It may be put thus:—A., desiring to effect an insurance on his own life, applies for a participating policy, and if, on the inquiry, his life appears eligible, and he pays the premium fixed by the rules of the Corporation, and receives a policy, he thereupon fills a double capacity. First, he is an individual insured by the Corporation; and, secondly, in respect to his policy, a member of the Corporation with the privilege of voting. He continues so as long as he pays the annual premium, and does not forfeit his policy. The premiums he has so paid never come back to him wholly or in part, but must remain liable to all the losses and expenses incurred by the Company during its charter.

The policy-holder gets in another shape what may be a profitable equivalent. At the end of each year the annual estimate is to be made of the profits and true state of the affairs of the Company for the preceding year. In making this estimate, each member is to be credited, first, with his proportionate share of the premiums earned, after deducting losses and expenses, and secondly, his proportionate share of the profits derived from investments; the latter is to be paid in cash. For his proportionate share of the premium earned he is to be entitled to a certificate on the books of the Company of the amount remaining to his credit in the said Company, such certificate to contain a proviso that the amount therein is liable for any future loss by the Company. The amount so certified is not paid to the policy-holder, and may never be.

The case stated finds that the Company does not pay the bonuses in cash, but the amount of the same is deducted from the next premium due or is added to the policy. But at page 84. Fifth Schedule, it is stated more fully and more accurately:—"The dividends of the Company are declared in the form of

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"reversionary additions to the policies. The amount of profits "so appropriated among the policy-holders after the valuation "of 31st December 1883 was 589,184*l.* (cash value of same "327,325*l.*), distributed among 64,037 policy-holders, insuring "40,847,209*l.*"

There is some little obscurity as to the meaning of "the dividends of the Company" in the passage last quoted, but probably it refers to each policy-holder's share of the premiums earned in the preceding year, and to be certified to his credit in the books of the Company.

The form of the policy is annexed to the case stated, and seems to be an ordinary form. There is no contract expressed in it as to membership, or as to any share of profits. It contains the ordinary contract on the part of the Corporation to pay the sum insured in the event of the death of the assured, and special provisions as to forfeiture in case of misrepresentation and as to lapse in the event of non-payment of the annual premium.

It is to be observed that the payment of the premium annually is a payment made on foot of the contract of insurance; that is its true foundation. If, for example, the insured being assessed for Income Tax, claims under the 54th section of the Act of 1853, or the amending Acts, as one who had made insurance on his life to deduct the annual premium for such insurance from the amount for which he may be assessed, he would be entitled to such relief.

We have only to deal with the premium income of the Company received in the United Kingdom, which according to the case stated is thus disposed of:—"Out of the premium income "received by the Company in the United Kingdom claims under "policies payable in the United Kingdom, and the expenses of "the Company incurred in the United Kingdom are first paid "and satisfied, and the balance is invariably remitted to the "head office at New York in which State the same is invested "according to the terms of the Company's charter in like manner "as other income of the Company."

It was urged before your Lordships that the balance of premiums received in the United Kingdom, and so remitted to New York, was eventually returned to the policy-holders in the United Kingdom, and ought not, therefore, to be considered as profits or gains of the Corporation. My lords, I can find nothing in the case to support the statement, and it seems to be contrary to the inferences to be properly deduced from the documents and accounts referred to in the case stated. The policy-holder does not appear at any time to get back or to receive, nor does he retain any right to any proportion of the premium he has paid. He is to be credited each year with a proportionate part of the net premiums gained in the preceding year ascertained by a very complex and difficult calculation, but he does not receive that sum and may never receive it. The practice seems to be to add to bonus to the policy, but subject to the liabilities of the Corporation. It would be payable only on the

dropping of the life. The right such as it is may be lost wholly or in part by failure to pay the annual premiums or to keep the policy in force, and if the policy-holder seeks to apply the bonus in part payment of premiums to become due, he can do so only by sacrificing about one-third of his bonus. Thus it, appears from the tables annexed to the case that if the reversionary bonus addition is 1*l.* 1*s.* 11*d.* its cash value if applied to the reduction of future premiums is 7*s.* 4*d.*

Thus far, my Lords, my effort has been to ascertain, if practicable, the true position of the participating policy-holder in relation to the Corporation. I have already pointed out that he fills two distinct capacities: 1, as an individual assured by the Corporation; 2, as a member of the Corporation by which he is assured.

What I have hitherto expressed, if it is of any importance, leads up only to the real question in the case, which is of importance, not by reason of the amount at issue, but of the very widespread result of a decision in one direction.

The Commissioners of Taxes were of opinion:—"1st. That no "part of the premium income of the Company received under "participating policies is liable to be assessed to Income Tax "as profits or gains chargeable under Schedule D. to the Act "16 & 17 Vict. c. 84."

Is that opinion correct in law on the finding in the special case? Was the nett balance of such premium income, after deducting all costs and expenses, and so remitted to the head office in New York to be there invested, a part of the annual profits or gains of the Corporation in respect of their trade or employment of an insurance company in the United Kingdom?

This question arises between the Crown and the Corporation, and not between the Crown and the individual policy-holders, though it will no doubt affect their ultimate interests.

The language of Schedule D. of the Act of 1853, "Annual "profits or gains arising to any person whatever from any pro- "fession, trade, or vocation exercised in the United Kingdom," must be read in connexion with the 1st Rule of Schedule D. in the Act of 1842, "that the duty shall be computed on a sum "not less than the full amount of the balance of the profits or "gains of such trade, adventure, or concern, on a fair and just "average of three years without other deduction than is there- "after allowed." . . . "And shall extend to every person, "body politic or corporate, fraternity, fellowship, company, or "society, and to every art, mystery, adventure, or concern car- "ried on in the United Kingdom."

Now, what are "profits and gains" of the concern? For an interpretation of these words we usually refer to *The Mersey Docks* v. *Lucas* (8 Ap. Ca. 891). The circumstances of that case are inapplicable, but the exposition of these words is conclusive. At page 903 Lord Selborne, in delivering the judgment of this House, says: "That proves distinctly that the "word 'profits,' as here used, does mean the incomings of the

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"concern after deducting the expenses of earning and obtaining "them."(*f*.)

And again, at page 905, on the word "gains," he says: "What "are the gains of a trade? To my mind it is reasonably plain "that the gains of a trade are that which is gained by the "trading for whatever purpose it is used, whether it is used for "the benefit of a community or for the benefit of individuals."(*g*.)

And another of their Lordships is represented to have said: "The Income Tax Act does not speak of 'profit' received by "any particular person or body for their own benefit, or that of "any other person or body, or of its purpose or object or applica- "tion, but simply of 'profits received therefrom,' and seems to "use 'profit' in the sense of income acquired from the estate, of "whatever character it may be, over and above the costs and "expenses of collection and receipt."(*h*.)

It is not questioned that if the participating policy-holders in the case before us had not become members of the Corporation, the balance of premiums would form part of the annual profits of the Corporation, and as such be liable to be assessed to Income Tax. It is urged, however, that the fact that each participating policy-holder is to be deemed a member of the Corporation makes the whole difference contended for. This is one of the inducements to outsiders to come in, as it is held out as a benefit that all the Corporation may earn is to be mutually divided; but it is not to be forgotten that the payment, when made to the representatives of policy-holders, is not to be made out of the premiums paid in by such policy-holders, but of the aggregate of the funds of the Corporation derivable from all sources as may appear by the last annual estimate. The annual surplus, as well as the final aggregate of the funds of the Corporation, must depend on the efficiency of working the Corporation, the amount of business brought in, and the manner of doing it.

My Lords, we are now dealing with this case not as between the Corporation and the individual policy-holders who may happen to be members in respect of their policies, but as between the Crown in respect of a public general tax and the Corporation as a trading concern, which it is indubitably. Is there, then, for the purposes of this appeal, any real difference between, 1st, the participating policy-holder in any other Company, such as the London Assurance Company, and, 2nd, the holder of a like policy of the New York Company?

In the first the policy-holder stipulates that a specified portion of the nett gains and profits shall be retained and added by way of bonus to the sum assured. In substance he may be regarded, to the extent of his interest, as a partner in the trading. The Company is chargeable with Income Tax and the sum allotted as bonus. Why? Because it represents a part of the gains and profits of the Company. In No. 2 the participating policy-holder, who is "to be deemed a member of the Corporation" on paying the annual premium and keeping his policy

(*f*) 2 T. C. 28. (*g*) 2 T. C. 29. (*h*) *Per Lord Fitzgerald*, 2 T. C. 35.

unforfeited and alive, is to be entitled to an addition to the sum assured by way of reversionary bonus, ascertained and payable in the manner described. It seems to me that whatever the difference, if any, may be, it is not favourable to the Appellants.

As to this question, having given the fullest consideration to the arguments at the bar, and to the considered reasons of the noble and learned Lords who have preceded me, I am unable to see how in this particular case the fact of membership of the policy-holders can lessen the liability of the Corporation to Income Tax on income earned in this country.

When I am unable to follow the clear and logical reasons of my noble and learned friend near me (Lord Bramwell), not the less weighty because of their conciseness, I am satisfied that it must arise from my own deficiency in reasoning power.

Then if this nett balance of premiums is income of the Corporation, the Queen's taxes on it cannot be effected by its future application. On this head Lord Selborne, at page 907 of the case last quoted, says :—" The mode of the application makes no " difference whatever to the question of what is profit and what is " gain."(*i.*) And Lord Blackburn, at page 910, puts it thus : " There is nothing in the nature of things, there is nothing in the " words of the Act, to say that when an income has been actually " earned, when an actual profit on which the tax is put has been " earned and received by any person or corporation, Her " Majesty's right to be paid the tax out of it in the least degree " depends on what they do with it afterwards."(*k.*)

Upon the whole I am of opinion that the balance of what I may for shortness call the English premiums so transferred to New York for the purpose of investment there by the Corporation formed part of the profit of the concern and became liable here to Income Tax.

I have, my Lords, thought it convenient to consider this Appeal irrespective of Last's case, and as if that case had not been decided. There is a distinction in fact between the two cases. In this case the policy-holders on accepting their policies and paying the stipulated premium become members of the Corporation. In Last's case it was not so; there the participating policy-holder was an outsider. In my opinion that distinction creates no real difference. Last's case was in my judgment well decided, and in principle governs the case now before your Lordships.

I may observe, in conclusion, that a decision in the opposite direction places in the hands even of existing insurance companies the power by a stroke of the pen of exempting their future premium income from taxation. My noble and learned friend Lord Bramwell points out in Last's case that such would probably be the result, for he says, " So far as insurance com- " panies are concerned all they will have to do will be to alter " their language."

(*i*) 2 T. C. 31. (*k*) 2 T. C. 33.

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Lord Herschell.—My Lords, in this case both the Courts below have given judgment for the Crown, on the ground that the question at issue was concluded by the judgment of this House in the case of *Last* v. *The London Assurance Corporation*. By that decision your Lordships also are bound. It will be convenient, therefore, in the first place to ascertain precisely what was there decided, and upon what grounds the judgment proceeded, before calling attention to the facts of the present case. The London Assurance Corporation carried on the business of life insurance, receiving premiums, and in consideration of them undertaking to make payments at the death of the persons effecting policies with them. And its object was so to conduct that business as to earn profits for its members. But for the arrangement to which I will advert in a moment, the whole of the excess in any year of the receipts of the Corporation beyond its expenses and the sum necessary to be added to its assets, in order that it might be in a position to meet the demands upon it, would have gone to the members of the Corporation as the profits of the business carried on, and would have been, beyond question, properly so described and taxed. With a view, however, of attracting business, the Corporation undertook that there should be distributed to persons insuring with them two thirds of the profits made, or that an equivalent addition should be made to the sum assured by their several policies. The question which fell to be determined was whether Income Tax was payable on so much of the "profits" as went to the policy-holders. It was contended that it was not, because the share of the "profits" which the policy-holders received was, in fact, a payment made in respect of a liability incurred for the purpose of inducing business, and was, therefore, to be regarded not as profits accruing to the Corporation from the business carried on by them, but as an expenditure necessary for earning profit. The majority of your Lordships rejected this contention, holding that the entire surplus acquired by the Corporation during the year constituted profits earned by it, and that the true view was that it had agreed to permit policy-holders to participate in and to take a share of these profits.

I turn now to the facts with which your Lordships have to deal. It appears from the case stated by the Income Tax Commissioners that the Appellant Company "has no shareholders, "and that there are no shares. Each policy-holder is a member "of the Company, and is entitled to the assets of the Company, "and liable to all losses and expenses incurred by the Company. "A calculation is made by the Company of the probable death-"rate among the members of the Company and of the probable "expenses and other liabilities of the Company, and the amount "claimed for premiums from the policy-holders is commensurate "therewith." Every year the officers of the Company compile an account of the income of the Company arising from premiums and annuities as well as from interest received and accrued. A corresponding account is taken every year of the expenses of the Company arising from—(1) claims by death;

(2) payments of moneys assured to be paid on the arrival of a fixed period; (3) annuities payable; (4) payments for surrendered policies; (5) commission, medical fees, taxes, and expenses; (6) contingent sum set aside to answer any estimated depreciation in the valuation of securities. In explanation of the second and third items of this account it must be stated that the Company, in consideration of single payments, grant annuities on lives, but neither the payment of these considerations nor the receipt of these annuities constitute a membership of the Company. The Company also, in consideration of fixed premiums, grant policies of assurance of a fixed sum on death, or at a fixed period. The holders of such non-participating policies have no interest in the assets of the Company, nor are the non-participating policy-holders members of the Company.

It is not disputed that in so far as the Company thus deal with those outside its own body it does carry on the business of insurance, and in respect of the profits made in this business is liable to Income Tax. But it was conceded by the Attorney-General, on behalf the Crown, that for present purposes the Company may be treated as if its operations were confined to the system of mutual insurance, which constitutes the bulk of its transactions. H further conceded that the fact that the persons thus associating themselves together for the purpose of mutual assurance had been incorporated was immaterial, and that the case might be treated as though it were an association of individuals unincorporated.

I think the Attorney-General was correct in thinking it immaterial that the persons thus associated had been incorporated, and that a legal entity had been created distinct from the members of which it was composed. This being so I shall, for the sake of simplicity, consider the questions that arise as though the association were unincorporated.

Before doing so, however, I must complete the statement of the facts. The chief part of the surplus shown by the accounts to which I have referred, is paid, or, as the Company alleges, is returned to the policy-holders (that is, to members of the Company) as bonuses. The remainder of the surplus is carried forward as funds in hand to the credit of the general body of the members of the Company. These bonuses are not paid in cash, but the amount of the same is deducted from the next premium due or is added to the policy. The only question raised by the case is whether the surplus, so far as the same is derived from the premium income received from members of the Company in respect of their policies, is a profit or gain of the Company liable to be assessed to Income Tax under Schedule D. of the 16 & 17 Vict. c. 84.

Let me now briefly summarise the facts in Last's case and those with which we have to deal. In the former, a Company formed for the purpose of earning profit transacted its business by entering into contracts of assurance with persons entirely outside the Company. In the assets of the Company these policy-holders

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had no property, and they had no right to any share in its management. There existed in that case, beyond doubt, a Corporation carrying on a trade from which profits or gains arose or accrued to it, the only controversy being whether, inasmuch as the Corporation had agreed to permit those with whom it dealt to take a share of the profits, that part of the surplus income which was thus applied was to be regarded as expenditure for the purpose of enabling the Corporation to earn profits, or as profits arising or accruing to it.

In the case before us certain persons have associated themselves together for the purpose of mutual assurance; that is to say, they contribute annually to a common fund, out of which payments are to be made in the event of death to the representatives of the persons thus associated together. These persons are alone the owners of the common fund, and they, and they alone, are entitled to the management of it. It is only in respect of his membership that any person is entitled to be assured a payment upon death.

I find myself unable to adopt the conclusion arrived at by the learned judges in the Court below, that these two cases are, so far as regards the question of liability to Income Tax, substantially the same. It appears to me that the distinction between them is substantial and important. Can it be said that the persons who are thus associated together for the purpose of mutual insurance carry on a trade or vocation from which profits or gains accrue to them? I cannot think so. I am aware that the surplus income with which we are concerned is called "profits" in the documents of the Appellants. But both the learned Lords who formed the majority in Last's case repudiated the idea that because moneys, which were not in fact profits, are erroneously so called, this would make them "profits" within the meaning of the Income Tax Acts. I entirely concur. We must look to see whether they are really so or not. Persons who agree to contribute to a common fund for mutual insurance certainly would not, in ordinary parlance, be regarded as carrying on a trade or vocation for the purpose of earning profit. Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith. This may result either from the contributions having, owing to an erroneous estimate or over-caution, been originally fixed at a higher rate than was necessary, or from the death-rate being lower than was anticipated. Can it be properly said that, under these circumstances, the association of mutual insurers has earned a profit? The members contribute for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore more than ought to have been contributed by them, for this object, and accordingly their next contribution is reduced by an amount equal to their proportion of this excess. I am at a loss to see how this can be considered as a "profit" arising or

accruing to them from a trade or vocation which they carry on. It is true the alternative is allowed them of leaving the excess in the common fund, and so increasing their representative's claim upon it in case of death, but I cannot think that this makes any difference.

Mr. Finlay truly pointed out that if these so-called bonuses were to be regarded as representing profits, it followed that if the premiums were trebled the profits would be increased in proportion. I will put it in another way. The grosser the miscalculation of what contributions were necessary to carry out the object of the association, and the higher the premiums which the members were accordingly called upon to pay, the greater would be the profits which they earned. Some fallacy must surely lurk in an argument which would lead to such a conclusion. I am, of course, limiting my observations to an association the funds of which are derived from and belong to the members alone.

My noble and learned friend Lord Fitzgerald said in Last's case, quoting the language of one of your Lordships in *The Mersey Docks* v. *Lucas*, that "the gains of a trade are what is "gained by the trading, for whatever purpose it is used." I entirely agree. Once show that profits are made by trading and they are taxable, whatever the purpose to which they may be applied. But in the present case I cannot see that the income sought to be taxed is profit arising from trading. Lord Fitzgerald further said, in Last's case, that we are bound to adopt the interpretation put upon "profits" in the Mersey Docks case as meaning "the incomings of the concern after deducting the "expenses of earning them," or "income, of whatever character "it may be, over and above the costs and expenses of receipt "and collection." These definitions were, I doubt not, correct in relation to the facts of the Mersey Docks case, and must be accepted for the purposes of any other case of a similar character. But I do not think they are applicable when dealing with a life insurance concern. It is of the very essence of such an enterprise that a portion of the income should from time to time be invested in order to create and maintain a fund capable of meeting the liabilities that have been and are being created. To treat and distribute as profits all the income in excess of the costs and expenses of receipt and collection would soon land such an undertaking in hopeless insolvency.

For the reasons I have given I think the judgment appealed from should be reversed.

Lord Macnaghten.—My Lords, in the argument on behalf of the Respondent no stress was laid on the circumstance that the question which calls for decision has arisen between the Crown and an incorporated Company. It happens here that the persons who combined to obtain the benefit of mutual insurance became, by the very act of insuring their lives, members of an incorporated Company. But the Company (so far as regards the participating policy-holders) was not formed for the purpose of

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carrying on a business having for its object the acquisition of gain—at least by the Company itself. It has no shareholders. For itself it makes no profits. The fact, therefore, that the insured, who are also the insurers, carry on their business through the medium of a company was properly treated as immaterial. And yet I cannot help thinking that the difficulty in the case, such as it is, has been caused by the existence of the Company. Put the Company out of sight altogether, and what remains? Certain persons agree to insure their lives among themselves on the principle of mutual insurance. They take care to admit none but healthy lives. They contribute according to rates fixed by approved tables, and they invite other persons to come in and join them by insuring their lives on similar terms. The rates fixed by the tables are taken as being sufficient to provide for expenses to meet liabilities and to leave a margin for contingencies. What is to become of the surplus if everything goes right? The practice is to take an account every year of assets and liabilities, and to give the insured the benefit of the surpluses, either by way of reduction of premium or by way of addition to the sum insured. It can make no difference in principle whether the surplus is so applied, or paid back in hard cash. In either case it is nothing but the return of so much of the amount contributed as may be in excess of the amount really required. I do not understand how this excess can be regarded from any point of view or for any purpose as gain or profit earned by the contributors. I do not understand how persons contributing to a common fund in pursuance of a scheme for their mutual benefit, having no dealings or relations with any outside body, can be said to have made a profit when they find that they have overcharged themselves, and that some portion of their contributions may be safely refunded. If profit can be made in that way, there is a field for profitable enterprise, capable, I suppose, of indefinite expansion.

It was argued, however, that this case is governed by *Last* v. *London Assurance Corporation*, 10 Appeal Cases, 488. That, of course is a binding authority. I quite agree that this House is bound not only by the case itself, but by the principles necessary to its determination. But it seems to me that there is a very great difference between Last's case and the present. There the insured were not members of the Corporation. There the Corporation was formed to carry on a business that had for its object the acquisition of gain by the Corporation itself, as well as by the individual members. It was a trading concern. It made profits, and it divided profits among its shareholders, though a large portion of the profits earned on participating policies were returned to the policy-holders. The promise of such a return was the attraction to a particular class of customers, who brought profitable business to the concern. But it was held that the amount so returned could not be treated as an expenditure for the purposes of earning profits, and that Income Tax must be paid on all the profits earned by the Corporation, however they

might be dealt with afterwards. I do not think that that decision compels your Lordships to hold in a case like the present, where the business is a mutual undertaking pure and simple, that persons who contribute in the first instance more than is wanted, and then get back the difference, are earning gains or profits, and so liable to Income Tax.

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Order of the Court of Appeal of the 14th March 1888, and Order of the Queen's Bench Division of the 14th July 1887, thereby confirmed, reversed. Respondent to pay to Appellants their costs below and in this House.