No. 351.—In the High Court of Justice (King's Bench Division).—28th, 29th and 30th March, 1911.

Court of Appeal.—29th and 30th January, and 27th February, 1912.

House of Lords.—7th, 9th and 31st July, 1913.

The Liverpool and London and Globe Insurance Company *v.* Bennett (Surveyor of Taxes).[1]

Brice (Surveyor of Taxes) *v.* The Ocean Accident and Guarantee Corporation, Limited.

Brice (Surveyor of Taxes) *v.* The Northern Assurance Company.

An English Company, carrying on insurance business in this country and abroad, invests sums of money abroad, the interest on which is not remitted to this country.

Held, *that such interest forms part of the profits or gains of the Company assessable under Case* 1 *of Schedule D, Section* 100, *of the Income Tax Act*, 1842.

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[1] Reported K.B.D. [1911] 2 K.B. 577; C.A. [1912] 2 K.B. 41; and H.L. in [1913] A.C. 610.

CASE stated by the Commissioners for Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice pursuant to the provisions of the Taxes Management Act, 1880, Section 59.

1. At a meeting of the Commissioners for Special Purposes of the Income Tax Acts held at 49 Wellington Street in the city of Westminster on the 4th April, 1908, and again by adjournment on the 26th May, 1909, the Liverpool and London and Globe Insurance Company appealed against the undermentioned Assessments made upon them by the additional Commissioners of Income Tax for the Division of Liverpool in the County Palatine of Lancaster, under Schedule D of the Acts 5 and 6 Vic. cap. 35 and 16 & 17 Vic. cap. 34 in respect of the profits of the Insurance (Fire and Life) and Annuity business carried on by them viz.:—

For the year	1903	ended 5 April,	1904	in the sum of	£104,119
,,	1904	,,	1905	,,	£200,000
,,	1905	,,	1906	,,	£250,000
,,	1906	,,	1907	,,	£250,000

2. The following facts were proved at the hearing of the appeal:—

(*a*) By a Deed of Settlement dated the 21st May, 1836, several persons at Liverpool entered into an unincorporated partnership as the "Liverpool Fire and Life Insurance Company" with a view to carrying on business as insurers against fire and accidents; as grantors of life policies and annuities; and as dealers in reversions and contingent interests, and generally to carry on the business usually called or known as fire insurance and life insurance and all matters connected therewith and allowed by law or under the rules therein declared.

An Act of Parliament, 6 & 7 William IV. cap. cxix., was passed in the same year enabling the newly formed company to sue and be sued in the name of its chairman, deputy chairman, or any one of its directors and for other purposes.

(*b*) In 1847 an Act of Parliament 10 & 11 Vic. cap. cclxviii. was passed changing the name of the Company to the Liverpool and London Fire and Life Insurance Company.

(*c*) A supplemental Deed of Settlement was executed on 28th February, 1851, and a further supplemental Deed of Settlement on the 7th January, 1863.

(*d*) In 1864 an Act of Parliament 27 & 28 Vic. cap. cxvi. was passed confirming an agreement for the amalgamation of the Globe Insurance Company with the Liverpool and London Fire and Life Insurance Company; the company thus created being named the Liverpool & London & Globe Insurance Company hereinafter called "the Company."

(*e*) In 1889 an Act of Parliament 52 & 53 Vic. cap. cl. was passed extending and amending the Acts relating to the Company and for other purposes.

(*f*). In 1898 an Act of Parliament 61 and 62 Vic. cap. lxviii. was passed extending and defining the objects of the Company and for other purposes.

(*g*) Until the 25th July, 1904, the business of the Company was conducted under and governed by the aforesaid Deeds of Settlement and Acts of Parliament and by Laws and Regulations made under the said Deeds and Acts.

(*h*) In 1904 an Act of Parliament, 4 Edward VII. cap. xxxiv., was passed providing for the registration of the Company under the Companies Acts 1862 to 1900 and for the substitution of a Memorandum and Articles of Association for its existing constitution and regulations, and for the repeal of certain Acts relating to the Company and for other purposes and on the 25th July, 1904, the Company was registered and incorporated as an "unlimited company" under the Companies Acts 1862 to 1900. This Act of 1904 repealed all the above-mentioned Acts of Parliament and deeds excepting the said Act of 1864 and the agreement thereby confirmed.

From the 25th July, 1904, the business of the Company has been conducted under and governed by the said Acts of 1864, 1904 and the Public General Companies and Life Assurance Acts.

Copies of all the said several Deeds of Settlement, Acts of Parliament (other than the Public General Acts), Laws and Regulations, Memorandum of Association and Articles of Association referred to above, are attached hereto and form a part of this Case.(1)

(*i*) The head office of the Appellants is at Liverpool but they carry on business through agencies and branches not only in the United Kingdom but in the colonies and abroad but they do not carry on all the three kinds of business (fire, life and annuity) mentioned in paragraph 1 hereof in places other than the United Kingdom. Thus in the United States of America, Canada, Australia, New Zealand, the continent of Europe, India and Japan, they confine themselves almost entirely to fire insurance business.

(*j*) The Company has large sums of money invested in various securities, possessions and properties; some in the United Kingdom, some in other parts of the world. The question raised by this appeal arises only with respect to the investments in the United States of America, in Canada, and in Australia, hereinafter mentioned. In the United States of America the only business transacted by the Company is that of fire insurance, the laws of the States prohibiting the carrying on of any other: in Canada and Australia it transacts only fire insurance business. The Company did at one time transact some life business in the last two countries and there are still some risks running which have survived from that time but the amount of these is quite negligible. In the United States of America, Canada and Australia, it is the exception

(1) Omitted from the present print.

to insure against fire for one year; the business in those countries is carried on by insuring against fire for a period of years the predominating period being five, six or seven years, a reduction in the amount paid being given as the payment for the whole period is made at the beginning when the contract is entered into.

(*k*) The investments in the United States of America, Canada and Australia, may be divided into three classes designated for the purposes of this case as classes A, B and C. The question at issue on this Appeal arises in regard to the said three classes of investments.

(*l*) Class A of the said investments have been made by the company in the United States of America and in Canada, under the following circumstances. In six of the States of the United States of America where the Company do business (namely the States of New York, Ohio, Oregon, Virginia, Georgia and New Mexico) and in Canada, it is required, as a condition of a foreign insurance company doing fire insurance business in the said State or in the Dominion (as the case may be), that the said company should deposit certain minimum amounts with a representative of the Government or trustees who pledge themselves to the Government not to part with the said deposits. The sums so deposited must be invested in accordance with the local laws of the said States and Dominion extracts from which are annexed hereto and form part of this Case. The Company has accordingly been required to make and has made in the said States and in the said Dominion the various deposits required by law as a condition of carrying on business as aforesaid and so long as it carries on business therein or any liability remains in respect of any risk in the said States or Dominion (as the case may be) they are by law unable to recover possession of any part of the sums so deposited but the same are held as a fund out of which in case of non-payment of claims by the Company the policy holders of the Company in the said States and Dominion can be paid. Extracts from the relevant laws of the said six States of the United States of America and of the Dominion of Canada are annexed to and form part of this Case.

(*m*) Class B of the said investments have been made by the Company in the State of New York and in Canada under the following circumstances. In addition to the obligation imposed by law upon the Company to make the fixed deposit mentioned in the preceding paragraph hereof it is also required by law—

> (*a*) In New York that an insurance company doing fire insurance business in the said States may not undertake and keep by way of insurance on any one risk an amount exceeding one-tenth of what is termed in this Case "the surplus" of such Company. The term "surplus" means the amount which is arrived at by deducting all the liabilities of the Company in

the whole of the United States of America from such of the assets of the Company in the whole of the United States of America as are either (1) deposited on fixed deposit in any State of the United States of America in accordance with the requirements of the law of such State as mentioned in paragraph (*l*) hereof or (2) are invested in any form of investment in the United States of America permitted by the insurance laws of the State of New York, if and so long as such investments are invested and held in the United States of America by trustees who are American citizens and are approved by the Superintendent of Assurance of the State of New York. In order to undertake and keep such an amount on any one risk as the Company may desire the Company has been compelled under the provisions of the law above referred to, to make considerable deposits with trustees in the United States of America beyond the fixed deposits described in paragraph (*l*) hereof. The limitation imposed extends only to the total amount undertaken on any one risk and does not restrict the number of different risks that may be undertaken.

(*b*) In Canada that an insurance company doing fire business in Canada but incorporated elsewhere than in Canada and authorised by its charter to also carry on life and other branches of insurance shall keep and maintain assets in Canada in excess of its liabilities to policy holders in Canada at such an amount as the Treasury Board shall determine. For this purpose the assets of the Company in Canada are deemed to consist of the deposit mentioned in the paragraph (1) hereof and of such assets as have been vested in trust for the Company in two or more persons resident in Canada and approved by the Minister of Finance, and are of a character approved by the Treasury Board. The Company has accordingly been required to make considerable deposits with trustees in Canada beyond the fixed deposits mentioned in paragraph (1) hereof.

(*n*) The funds representing the further moneys necessarily deposited in the United States of America and Canada in order to comply with the aforesaid laws of the State of New York and the Dominion of Canada although they cannot in the ordinary course of business be used by the Company for the purpose of meeting current losses or defraying current expenses are intended to constitute a trust fund for the protection of the Company's policy-holders in the said States and Dominion. As regards the said classes A and B the laws of the United States of America and Canada do not prevent the Company changing or varying the deposited investments if they so desire provided the substituted investments comply with the statutory requirements.

(*o*) Class C of the said investments have not been made by the Company under or by reason of any legal obligation whatever and are investments made in the United States, Canada and Australia for the purpose of deriving income or profit from moneys of the company. These sums consist of accumulated profits made in past years, but not distributed among the shareholders, which the directors have invested in high-class securities in order to have a fund easily realisable if required.

Generally it has not hitherto been necessary for the Company to realise or expend any part of these moneys for the immediate purpose of carrying on their business as insurers, but they are available like any other property owned by the Company for such purpose or any other purpose of the Company whenever the Company may think fit or necessary.

(*p*) The investments referred to in all the aforesaid three classes produce annually or from time to time interest and dividends which interest and dividends have been paid to and received by the agency or branch of the Company in the State, Dominion or Country where the money, from which such interest or dividends arose, is invested or deposited.

(*q*) None of the sums so as aforesaid received by the Company or its agents or branches by way of interest or dividends arising from the deposits or investments aforesaid are in fact remitted in forma specifica to the United Kingdom. The actual amounts so retained abroad and not remitted home in the years 1900, 1901, 1902, 1903, 1904, 1905 and 1906 were not ascertained by us, it being arranged between the parties that these amounts could be ascertained and agreed on at a later date if necessary.

(*r*) Although no part of the said interest and dividends arising from the Company's said deposits and investments abroad has been in fact remitted in forma specifica to the United Kingdom the whole amount is duly credited in the United Kingdom in the Company's books and brought into all its accounts, where appropriate, including its profit and loss accounts.

(*s*) As a general rule the liabilities of the Company accruing in the United States of America and the Dominion of Canada can be met out of the profits the Company has there, that is to say, the dividends or interest received from the moneys invested as hereinbefore set out in classes A, B and C and the premiums which are paid to it. But should extraordinary circumstances arise the Company could and would meet the claims made upon it by drawing upon its investments.

Copies of the printed audited accounts (including the balance sheets) and the reports of the directors as published by the Company for the years 1900, 1901, 1902, 1903, 1904, 1905 and 1906, are hereunto attached and form part of this Case.

3. It was contended on behalf of the Company:—

(*a*) That the dividends or interest arising from the said three classes A, B and C of deposits and investments were none of them assessable to the Income Tax under the Income Tax Acts.

(*b*) That the said three classes of deposits and investments were standing aside from and outside of the carrying on of the business and employment therein and that the motive why that was so was immaterial and hence the profits therefrom form no part of the profits of the business within Case 1 of Schedule D or otherwise.

(*c*) That as the interest and dividends arising from the said three classes of deposits and investments had been retained and re-invested abroad neither the interest nor the dividends were liable to income tax.

(*d*) That the case of the *Gresham Life Assurance Society* v. *Bishop* [1902] A. C. 287, 83 L. T. 654, 4 T. C. 464 applied.

(*e*) That as the said interest and dividends from the said three classes of deposits and investments were not remitted to or received in the United Kingdom, they are not liable to assessment to income tax, whether under Case IV. or Case V. of Schedule D or otherwise.

(*f*) That they are not taxable under Case I. of Schedule D of the Income Tax Act, 1842, as profits or as part of the profits of the business mentioned in paragraph 1 hereof as being carried on by the Company.

4. It was contended inter alia on behalf of the Crown—

(*a*) That the investment of the Company's moneys as specified in Classes A, B and C is an essential part of its business without which it could not undertake or carry on the business of insurers.

(*b*) That the interest and dividends arising from investments necessarily made for the purpose of a business form part of the profits and gains of that business.

(*c*) That the whole of the profits and gains of the Company including all such interest and dividends has been properly assessed in one sum under Case I. of Schedule D of the Income Tax Act, 1842.

(*d*) That as the assessments are under Case I. it is immaterial whether the interest and dividends were remitted to or received in the United Kingdom or not.

(*e*) That the case of the *Gresham Life Assurance Society* v. *Bishop* does not apply inasmuch as in that case the assessment was not under Case I. in respect of profits but under Case IV. in respect of securities out of the United Kingdom, the interest on which was not remitted to this country.

5. In the course of argument the following cases were referred to and duly considered by us—

Gresham Life Assurance Society v. *Bishop* (1902) 4 Tax Cases, 464.

San Paulo (Brazilian) Railway Co. v. *Carter* (1896) 3 Tax Cases, 407.

Scottish Mortgage Co. of New Mexico v. *McKelvie* (1896) 2 Tax Cases, 165.

Scottish Union and National Insurance Co. v. *Smiles* (1889) 2 Tax Cases, 551.

Northern Assurance Company v. *Russell* (1889) 2 Tax Cases, 571.

Norwich Union Fire Insurance Company v. *Magee* (1896) 3 Tax Cases, 457.

Clerical, Medical and General Life Assurance Society v. *Carter* (1889) 2 Tax Cases, 437.

Last v. *London Assurance Corporation* (1885) 2 Tax Cases, 122.

6. Having regard to the manner in which the "liabilities" and "assets" are set out in the Company's balance sheets, and to the fact that insurers, in considering what would be the nature and extent of their security, would have regard to the total amount of the assets of the Company and having considered the facts of the case as hereinbefore stated and the provisions of the Income Tax law relating thereto we gave judgment as follows:—

We are of opinion that the contention of the Crown is correct. We find that the investments in question made by the Appellant Company in the foreign countries named were made in the carrying on of and were part of its business transactions, and we hold that the interest on such investments should be included as receipts of the Company in arriving at its liability under Case I, Schedule D.

We adjourned the case for the parties to discuss figures and to submit to us the sums at which under such judgment on the foregoing point of law, the several assessments for the years in question should be respectively fixed.

7. At the adjourned meeting held on the 26th day of May, 1909, we reduced the assessments to the following sums:—

For the year	1903	ending	5th	April,	1904	to £103,359.
,,	1904	,,	,,		1905	,, £187,789.
,,	1905	,,	,,		1906	,, £208,423.
,,	1906	,,	,,		1907	,, £243,588.

8. The Company immediately after the determination of the said Appeal expressed their dissatisfaction with the same as being erroneous in point of law, and duly required us to state and sign a Case for the opinion of the High Court of Justice, under the Statute 43 and 44 Vic. c. 19 which we have stated and do sign accordingly.

9. The question of law for the opinion of the Court is whether we are right in concluding from the facts set out herein that the whole of the interest and dividends arising from the several investments under Class A, Class B and Class C (whether actually remitted to the United Kingdom or not) form part of the profits of the Company assessable under Case I of Schedule D of the Income Tax Act, 1842. If the Court decides in favour of the Appellants the Case is to be remitted to us to adjust the assessments accordingly.

Dated this 22nd day of February, 1910.

WALTER GYLES,
H. W. PAGE-PHILLIPS,
G. J. HOWE,
} Commissioners for the Special Purposes of the Income Tax Acts.

49, Wellington Street, W.C.

EXTRACTS from the relevant Laws of the six States of the United States of America and of the Dominion of Canada referred to in paragraph 2 (*l*) of Case Stated.

Funds and Capital of Insurance Corporations Incorporated outside of the United States.

State of New York, Chap. 690. Chap. 38 of the General Laws, Section 27.

A foreign insurance corporation incorporated by or existing under the government or laws of any country outside of the United States, and admitted to do business in this State after May 27, 1880, shall not transact any business of insurance in this State unless it shall have within the United States deposited with Insurance Departments or held in trust as hereinafter provided not less than five hundred thousand dollars, if a fire insurance corporation, and not less than two hundred thousand dollars if a life or casualty insurance corporation, invested in like manner as the capital of a similar domestic insurance corporation is required to be invested.

The capital of such foreign fire insurance corporation doing fire insurance business in this State, or of any such company hereafter admitted to such business in this State, shall, for the purposes of this chapter, be the aggregate value of such sums or securities as such corporation shall have on deposit in the insurance department of this State and of the other States of the United States for the benefit of policy holders in any of such States or in the United States and of all bonds and mortgages for money loaned on real estate in this State or in any State of the United States, if such loans shall be made in conformity with the laws of such State providing for the incorporation of insurance companies therein, and the investment of their capital, and of all other assets and property in the United States in which fire insurance companies organised under the laws of this State, may, by the laws thereof invest if such bonds and mortgages, assets and property shall be invested in and held in the United States by trustees, approved by the superintendent of insurance and citizens of the United States, or deposited with a trust company to be approved by him for the general benefit and security of all its policy holders in the United States, after taking from such aggregate value the same deductions for losses, debts and liabilities in this and the other States of the United States, and for premiums upon risks therein, not yet expired, as is authorised or required by the laws of this State, or the regulation of its insurance department with respect to fire insurance companies organised under the laws of this State.

In addition to the reports required by law of any such foreign fire insurance corporation, it shall annually, in the month of January, render to the superintendent a detailed statement of the items making up such capital, and the deductions to be made therefrom, signed and verified by the manager and a majority of the trustees (or if a trust company by the proper officers thereof) of the corporation residing in the United States, and the superintendent shall thereupon, and from such examinations as he may make of the affairs of the corporation, determine the

amount of such capital as of the first day of January, and issue to such corporation his certificate of the amount of its capital so determined, and if it shall at any time appear that the net capital for which the last certificate shall be outstanding has been materially reduced, the superintendent may call in such certificate and issue another, corresponding to such reduced capital, providing the capital is not reduced below the sum of two hundred thousand dollars.

The capital of any such foreign fire insurance company so determined and certified, shall be subject to taxation as provided for in section thirty-four of this chapter.

State of Ohio.

Preliminary Documents.—Company must file with the superintendent certified copy of its charter and bye-laws and a verified statement showing its financial condition.

N.B.—By a subsequent Act this deposit is now made to exist for the benefit of policy holders in the U.S.A. generally, not merely in the State of Ohio.

Funds.—Company must have a fully paid up capital of not less than $100,000, a mutual company must have assets equal to $100,000.

Companies of other Countries.—Foreign companies must deposit with the superintendent $100,000 in the stocks of the State of Ohio, United States bonds or bonds of any city or county in Ohio, for the benefit of policy holders of the company residing in Ohio.

State of Oregon.

Preliminary Documents.—Company must file with the Insurance Commissioner a certificate of the proper Insurance Officer of some State having an Insurance Department certifying that it possesses paid up unimpaired cash capital of at least $200,000 and is duly organised to do an insurance business, also file copy of charter or articles of incorporation. Register title under which it proposes to write fire insurance.

Funds.—Each company must have a paid up capital of not less than $200,000.

Deposits.—Company must deposit with the State Treasurer $50,000 in securities of the United States or State of Oregon.

Companies of other Countries.—Foreign Countries must have at least $200,000 deposited with the proper officer of some State for the protection of policy holders in the United States, and also make a special deposit of $50,000 with the State Treasurer.

State of Virginia.

Preliminary Documents.—Company must deposit with the Treasurer of the State bonds of the State of Virginia, or of the United States, or of the Cities of Richmond, Petersburg, Lynchburg, Norfolk, Alexandria, Danville, Winchester, or Staunton, to an amount equal in cash value to five per cent. of its capital stock but not less than $10,000 nor more than $50,000. Company through its Agent in Virginia, must give bond with two or more sureties, or a guaranty company authorised to do business in Virginia of not less than $1,000 nor more than $5,000 conditioned to make returns and pay taxes as required by law, said bond to be approved by Auditor of Public Accounts.

State of Georgia.

Preliminary Documents.—Company must file with the Insurance Commissioner a certified copy of its charter and a verified statement showing its financial condition on December 31 preceding.

Funds.—Company must possess at least $100,000 invested in bonds and stocks estimated at their market value or in mortgages of real estate worth double the amount for which mortgage is given.

Deposit.—Company must deposit with the Treasurer $10,000 in United States or State Bonds before receiving license to do business.

State of New Mexico

Preliminary Documents.—Company must file satisfactory evidence that it has a paid-up capital of $300,000.

Funds.—Company must have a paid-up capital of $300,000.

Deposit.—Foreign companies must have on deposit in some State or Territory at least $200,000 for the benefit of all the policy holders in this country, and a special deposit of $10,000 with the Territorial Treasurer.

Companies of other Countries.—Such companies must have at least $100,000 on deposit in some one of the States or Territories for the benefit of all policy-holders in this country.

The Insurance Act, Chap. 124. *Revised Statutes of Canada* (1886) *as Amended by* 51 *Vic. Chap.* 28 (1888), 57 *Vic. Chap.* 20 (1894), 58 *&* 59 *Vic. Chap.* 20 (1895) *and* 62 *&* 63 *Vic. Chap.* 13 (1899).

Licenses.

Canada.

4. No company or person except as hereinafter provided shall accept any risk or issue any policy of fire or inland marine insurance or policy of life insurance or grant any annuity on a life or lives or receive any premium, or carry on any business of life or fire or inland marine insurance in Canada, or prosecute or maintain any suit action or proceedings either at law or in equity or file any claim in insolvency relating to such business without first obtaining a license from the Minister to carry on such business in Canada.

2. Before issuing a license to a company legally formed elsewhere than in Canada, the Minister must be satisfied that the corporate name of the Company is not that of any other known company incorporated or unincorporated, or any name liable to be confounded therewith or otherwise on public grounds objectionable.

5. The license shall be in such form as is from time to time determined by the Minister and shall specify the business to be carried on by the company, and it shall expire on the thirty-first of March in each year, but shall be renewable from year to year.

6. The Minister as soon as the company applying for the same has deposited in his hands the securities hereinafter mentioned and has otherwise conformed to the requirements of this Act, shall issue such license as aforesaid.

6B. A license shall not be granted to a company which is by its charter authorised or empowered to carry on classes or branches of insurance greater in number or variety than those for which a license could be granted under the provisions of the next preceding section. Provided however that any company incorporated elsewhere than in Canada regardless of its charter powers which has a paid-up capital in the case of a company authorised to transact among other classes of business the business of fire insurance of at least 300,000 dollars and in the case of any other company of at least 100,000 dollars wholly unimpaired and in addition to such paid-up capital holds over and above all liabilities estimated according to the existing Dominion Government standard, a rest or surplus fund equal to at least 20 per cent. of such paid-up capital and the market value of whose stock is at a premium of at least 20 per cent. and which has carried on successfully for a period of at least 5 years the business for which a license is sought, being only one class of insurance or if more than one then such classes as may be combined under the provisions of the next preceding section shall be deemed eligible for and entitled to such license upon depositing keeping and maintaining assets in Canada as defined by sub-sections 2 and 3 of Section 10 of this Act over and above and in excess of the amount which would be required if such company's charter powers were limited to the purposes for which such license is asked to such an amount as the Treasury Board on the report of the Superintendent fix or determine such excess not being in any case more than 200,000 dollars and not being less in the case of a company applying for a license to transact fire insurance or life insurance than 50,000 dollars and in the case of any other company 10,000 dollars. Provided further that a license may upon the terms and conditions and subject to the limitations with regard to the depositing and maintaining of excess assets in the preceding proviso contained be granted to a company which while not in all respects complying with the requirements of the said proviso does not materially fall short thereof in any essential particular.

Deposits to be made before the issue of License.

7. Every company carrying on the business of life insurance and every Canadian Company carrying on the business of fire or of inland marine insurance or of both combined shall before the issue of such license deposit with the Minister in such securities as are hereinafter mentioned the sum of 50,000 dollars and every company incorporated or legally formed out of Canada carrying on the business of fire or of inland marine insurance or of both combined shall before the issue of such license deposit with the Minister in such securities as are hereinafter mentioned the sum of 100,000 dollars.

8. All such deposits may be made by any company in securities of the Dominion of Canada or in securities issued by any of the Provinces of Canada and by any company incorporated in the

United Kingdom in securities of the United Kingdom and by any company incorporated in the United States in securities of the United States and the value of such securities shall be estimated at their market value not exceeding par at the time when they are so deposited.

(2) If any securities other than those above mentioned are offered as a deposit they may be accepted at such valuation and on such conditions as the Treasury Board direct.

(3) If the market value of any of the securities which have been deposited by any company declines below that at which they were deposited the Minister may notify the company to make a further deposit so that the market value of all the securities deposited by the company shall be equal to the amount which it is required by this Act to deposit and on failure by the company to make such further deposit within 60 days after being called upon to do so the Minister may withdraw its license.

(4) Any company licensed under this Act may at any time deposit in the hands of the Minister any further sums of money or securities beyond the sum herein required to be deposited and any such further sums of money or securities therefor so deposited in the hands of any Minister shall be held by him and be dealt with according to the provisions of this Act in respect to the sum required to be deposited by such company and as if the same had been part of the sum so required to be deposited.

(5) If at any time it appears that a company has on deposit with the Minister a sum in excess of the amount required under the provisions of this Act the Treasury Board may upon being satisfied that the interest of the company's Canadian policyholders will not be prejudiced thereby and upon the giving of such notice and the exercise of such other precautions as may seem expedient authorise the withdrawal of the amount of such excess or such portion thereof as may be deemed advisable provided that such withdrawal may be authorised without the giving of any notice.

10.—(2) If any such company as is mentioned in this and the next preceding section is incorporated or legally formed elsewhere than within Canada the assets in Canada as aforesaid shall be taken to consist of all deposits which the company has made with the Minister under the foregoing provisions of this Act and of such assets as have been vested in trust for the company for the purposes of this Act in two or more persons resident in Canada appointed by the company and approved by the Minister.

(3) The trust deed shall first be approved of by the Minister and the Trustees may deal with such assets in any manner provided by the Deed of Trust appointing them but so that the value of the assets held by them shall not fall below the value required by this section.

CASE stated under the Statute 43 & 44 Vict. Chapter 19 Section 59 by the Commissioners for the General Purposes of the Income Tax Acts for the City of London for the opinion of the King's Bench Division of the High Court of Justice.

1. At meetings of the said Commissioners the last of which was held at the Guildhall Buildings in the said City of London on the 15th day of February 1906 the Ocean Accident and Guarantee Corporation Limited (for brevity hereinafter termed "the Corporation") appealed against the several assessments under Schedule D of the Income Tax Acts made upon the Corporation for the undermentioned years

Year ending 5th	April	1899	in the	sum	of	£44,937
,,	,,	1900	,,	,,		15,626
,,	,,	1901	,,	,,		15,937
,,	,,	1902	,,	,,		7,322
,,	,,	1903	,,	,,		9,230
,,	,,	1905	,,	,,		4,544

and also against an assessment under Schedule D computed according to the rules of Case IV. of that Schedule for the

Year ending 5th April 1904 in the sum of £12,230.

The ground of the appeal in respect of all the years was that there was included in the profits forming the basis of such assessments certain sums of untaxed interest received abroad and which the Corporation claimed should be included only to the extent of the amount actually received in the United Kingdom and that interest should have been dealt with according to the rules of Case 4 and that only such of the interest received abroad as had been actually received in this country during the respective years should be subject to tax.

2. The Corporation are an English Company incorporated in the year 1871 with the objects of granting either by themselves or through the agency or medium of any Company or person in the United Kingdom or abroad assurances (other than life assurances) and doing all such things as are or may be incidental or conducive to the attainment of such objects. The said objects were subsequently extended so as to include, among others, the object of making any deposits, and giving any securities required by any law in force in the United States of America, or in any other country, Colony, or Settlement to enable the Corporation to carry on business there. Copies of their Memorandum and Articles of Association are annexed to and form part of this Case.(1)

3. The registered and head office of the Corporation is situate in the City of London.

4. The Corporation has branch offices in several Colonies and Foreign States.

5. In the year 1895 the Corporation established a branch office in the United States (which is hereinafter referred to as the United States Branch).

(1) Omitted from the present print.

6. In order that the Corporation may be permitted to carry on business in the various states of the United States of America, they are compelled by the laws of the various states to make and maintain a deposit of securities of a certain value with the Government Insurance Department and also a further deposit of securities in the hands of Trustees, which further deposit varies in value according to the amounts of the liabilities of the Corporation in the United States for the time being. In all the years in question on the appeal the Corporation had further voluntarily placed and retained other securities in the hands of trustees in the United States. In order to enable the United States Branch to make such deposits and to place such securities as aforesaid and to supply it with working capital the Corporation from time to time between the years 1895 and 1899 sent to the United States Branch cash and securities together of the value of £172,895. Down to the end of the year 1904 they had received back from the said Branch in cash the amount of £66,900 leaving a balance of £105,995 owing to the Corporation in respect of the capital advances referred to. The capital aforesaid is invested in securities in the United States which are deposited with the said Department or with the said Trustees and Bankers for the Corporation and the interest upon such securities is collected in each year for the Corporation and is the interest hereinafter referred to.

7. The following table in respect of the years referred to shows in column 1 the total amount of interest collected for the Corporation in the United States from the said investments; in column 2 the total amount of such interest which was remitted to or received by them in the United Kingdom; in column 3 the total amount of other remittances to the Corporation from the said branch and in column 4 the profit earned or losses incurred by the said branch:—

Year.	1. Interest collected.	2. Interest remitted to the United Kingdom.	3. Other remittances.	4. Profit or loss of the United States Branch.
	£	£	£	£
1898	2,986	None	None	
1899	3,283	None	4,000	
1900	8,067	None	None	
1901	9,942	5,350	None	
1902	12,173	5,505	20,000	
1903	13,137	None	40,000	47,245 proft.
1904	14,095	None	None	13,837 loss.

8. The said sums of £5,350 and £5,505 appearing in column 2 were remitted from time to time by the bankers of the Corporation in New York as the interest represented by the coupons making up the said sums respectively was received by such bankers.

9. All of the sums set forth in the said column 3 were alleged by the Corporation and were found by the Commissioners to be repayments of capital and to have been applied by the Corporation for capital purposes in the United Kingdom.

10. The Corporation alleged that no part of the sums respectively set forth in the said column 1 was received in the United Kingdom save and except the several sums set forth in the said column 2 and the Commissioners so found.

11. The business of the Corporation on the average of three years ending on the 31st of December 1902 if all Foreign interest which was not remitted to the United Kingdom be excluded from account resulted in a loss of £6,087 and if all such interest be included in account in a profit of £3,240.

12. The assessments appealed against by the Corporation for each of the years ending respectively on the 5th April 1899, 1900, 1901, 1902, 1903 and 1905 had been arrived at by the Surveyor on the following basis:—The figures were in each case based, subject to certain adjustments not material to the present question, on the profit shown in the Corporation's profit and loss accounts on the average of the three years to the 31st December preceding the year of assessment, the accounts of the Corporation being made up to the 31st December in each year. Into the Corporation's profit and loss account there were carried in each year all the Corporation's receipts including both premiums and income from investments whether taxed or not, and such receipts include all the interest collected abroad. The amount of the profit for income tax purposes having thus been found, assessments were raised to the extent to which the profits ascertained on the above basis were in excess of the income from investments already taxed included in the profit and loss accounts, but the assessment appealed against for the year ending on the 5th April 1904 was made under Schedule D in the sum of £12,230 upon the assumption that the sum of £11,123 part the said sum of £13,137 collected as interest in the United States of America was received by the Corporation in the United Kingdom in the said year 1903. The Commissioners found that no part of the said sum of £13,137 was received by the Corporation in the United Kingdom.

13. For each year the accounts of the Corporation are made up to the 31st December and such accounts have been taken as the basis of the several assessments.

14. The assessment however in respect of the year ending on the 5th April 1904 was made according to the rules under Case IV instead of Case I because upon the three years average applicable for the said year the trading operations of the Corporation resulted when computed according to the Crown's method in a smaller profit than the amount of the interest from foreign investments received in the United Kingdom and when computed according to the Corporation's method in a loss as appears by paragraph 11 hereof and as hereinafter appears the Revenue

Authorities claimed the right to assess the Corporation in respect of the interest now in question under Case I or under Case IV as they thought fit.

15. The said sum of £11,123 was taken by the Crown Surveyor in the assessment for the said year ending on the 5th April 1904 as an amount of interest which ought to be taken as received in the United Kingdom because the said sum bears the same ratio to the said sum of £13,137 as the said sum of £40,000 (being the amount remitted in the year 1903 by the said Branch to the Corporation) bears to the said sum of £47,245 (being the total amount of profits and interest earned and collected by the said Branch in the said year).

16. The Corporation contended that only such parts of the said sums of interest collected as aforesaid as were received in the United Kingdom (being such as are set forth in the said column 2) ought to have been comprised in the assessments upon them in respect of the six years first referred to in paragraph 12 hereof, and they further contended that they ought not to have been assessed for the said year ending on the 5th April 1904 in respect of the said sum of £11,123 or any part thereof inasmuch as such sum was a purely fictitious sum and so far as it had any reality was part of the larger sum of £40,000 which was a transference of capital. In support of their contentions they referred to the *Gresham Life Assurance Co. Limited* v. *Bishop*, 1902, *A.C.* 287.(1)

17. The following table in respect of each of the years in question on the said appeal shows in column 1 the amounts of the several assessments on the Corporation with the corresponding tax; in column 2 the amounts of the assessments as claimed to be corrected according to the contentions of the Corporation with the corresponding tax and the findings of the Commissioners; in column 3 the difference of the amounts of the tax under columns 1 and 2 respectively:—

Year ending on 5th April.	1.		2.		3.
	Assessment.	Tax.	Assessment as claimed to be corrected.	Tax.	Difference of Tax.
	£	£ s. d.	£	£ s. d.	£ s. d.
1899 ...	44,937	1,497 18 0	44,892	1,496 8 0	1 10 0
1900 ...	15,626	520 17 4	14,527	484 4 8	36 12 8
1901 ...	15,937	796 17 0	13,619	680 19 0	115 18 0
1902 ...	7,322	427 2 4	2,156	125 15 4	301 7 0
1903 ...	9,230	576 17 6	3,278	204 17 6	372 0 0
1904 ...	12,230	560 10 10	1,595	73 2 1	487 8 9
1905 ...	4,544	227 4 0	2,489	124 9 0	102 15 0

18. It was contended by the Surveyor of Taxes that all of the said respective sums set forth in column 1 of the said table in

(1) 4 T.C. 464.

paragraph 7 hereof were properly taken into account and assessed as profits according to the rules of Case I and not as interest according to the rules of Case IV but that the Revenue Authorities might lawfully assess according to the rules of Case IV so much of the said sum of £13,137 collected in the year 1903 as foreign interest inasmuch as the amounts of the assessment for such year under Case I would show a loss and no profit and might assess the Corporation in respect of so much of the same as was received in the United Kingdom, and further that the said sum of £11,123 was a fair and proper estimate of the proportion of the said sum of £13,137, which ought to be taken as having been received in the United Kingdom during the year 1903.

19. Mr. Dewhirst the chief accountant of the Corporation was called as a witness. He deposed to the matters set forth in paragraphs 2, 3, 4, 5, 6, 7, 8 the last sentence of paragraphs 9, 10, 11, 12, 13, 14, 15 and 17 of this Case; that the said sums of £4,000 remitted in 1899, of £20,000 remitted in the year 1902 and of £40,000 remitted in the year 1903 were respectively remittances of capital and not any part of the interest collected by the United States Branch; that the ability of the said Branch to make remittances and the necessity for making them did not depend on the profits made or interest received by it in any particular year; and that it sometimes had funds available for remittance to the Corporation in the years when it made a loss, and that such was the case and the said remittance of £20,000 was actually made in January 1905 in respect of the year 1904 when there was a loss of £13,827 5*s*. 9*d*. The correspondence and also a statement prepared by Mr. Dewhirst and marked "A" true copies whereof are annexed to this Case(1) were produced to the Commissioners.

20. The Commissioners found as facts:—

(1) That the said respective sums set forth in column 1 of the table in paragraph 7 hereof were interest on investments abroad and that except as appears by column 2 of the said table no part of the same was received in the United Kingdom.

(2) That the said sums of £20,000 and £40,000 were returns of capital.

The Commissioners decided that in ascertaining the amount of the assessment for the seven years in question, the liability should be computed on the amount of the business profits for each year estimated according to the rules of Case I but that the whole of the interest in question for each year should be computed according to the rules of Case IV.

They therefore allowed the appeals and reduced the assessments accordingly.

It is agreed that the amount of the liability of the Corporation is to be adjusted in accordance with the final decision of the Court.

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(1) Omitted from the present print.

The Surveyor of Taxes thereupon expressed his dissatisfaction with the determination as being erroneous in point of law and duly required us to state and sign a Case for the opinion of the High Court of Justice, which we have stated and do sign accordingly.

H. COSMO BONSOR,
HOWARD MORLEY,
W. D. POWLES,
} Commissioners of Taxes for the City of London.

17th November, 1910.

CASE stated under the Statute 43 and 44 Vic. cap. 19 Sect. 59 by the Commissioners for the General Purposes of the Income Tax Acts for the City of London for the opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the said Commissioners held at the Guildhall Buildings in the said City on the 30th November 1905 the Northern Assurance Company (for brevity hereinafter termed "the Company") appealed against an Additional Assessment dated the 26th May 1905 of £37,639 for the year ending the 5th April 1905 made upon them under the following circumstances:—

2. The said Company made a Return dated 2nd November 1904 under Schedule "D" of the Act 16 and 17 Vic. cap. 34 for the sum of £97,788 6*s*. as the profit made by the Company for the year ending the 5th April 1905, and an assessment dated the 22nd December 1904 was made at £100,000.

A copy of this original Assessment of £100,000 is hereto annexed marked "A."(1)

A Second and Additional Assessment for the same year and dated the 26th day of May 1905 was subsequently raised at the instance of the Surveyor of Taxes for the sum of £37,639 including therein two several sums of £31,096 and £6,690.

A copy of the Additional Assessment made as aforesaid of £37,639 is hereto annexed marked "B."(1)

Notice of Appeal of the Northern Assurance Company against the Additional Assessment of the 26th May 1905 was thereupon given by the said Company. A copy of the said Notice dated the 25th April 1905 is hereto annexed marked "C."(1)

3. The Company was originally incorporated by Act of Parliament in 1848 for the purpose of carrying on the business of fire and life assurance and of selling or granting annuities. These powers were from time to time extended by other Acts of Parliament down to the Northern Assurance Company's Act of 1899 under which last-mentioned Act the Company was authorised to transact generally all kinds of insurance business and under the

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(1) Omitted from the present print.

powers so conferred insurance against accident and risks, liabilities and contingencies of all descriptions are now undertaken by the Company, in addition to fire and life assurance and the selling or granting of Annuities.

4. The Act of 1848 was repealed by the Northern Assurance Act 1865 and during the year of assessment in question the Company was conducted under the said Act of 1865, the Northern Assurance Act 1874, the Northern Assurance Act 1889, and the Northern Assurance Act 1899.

The Northern Assurance Act 1865 section 10 provides as follows: —

"The business of the Company shall be the granting of Assurances of all descriptions of property against loss or damage by fire, Assurances of single lives, joint lives and survivorships . . . . the making advances on the security of policies and on the security of lands or any other description of property, or on personal security; the purchase and sale of reversions, reversionary interests and immediate or deferred annuities and all contingent and other interests in lands or other property; the grant of endowments for children and others or of immediate or deferred annuities, and any future or contingent interests, and the repurchase and redemption thereof; the receiving monies for investment and accumulation; the employment and investment of such monies and other the funds and property of the Company in accordance with the Act; and in general the carrying on of the business of a fire and life assurance Company in all its branches . . . ."

The Northern Assurance Act 1889 in sections 4 and 5 gives power to the Boards of Directors of the Company to vary and transpose the investments of the Company.

The Northern Assurance Act 1899 by section 6 empowered the said Boards ". . . . at pleasure to alter change sell or dispose of any existing loans investments or securities or any loans investments or securities which may hereafter be made acquired or taken by or for behoof of the Company either in virtue of the power conferred by this section or otherwise and again to lend lay out or invest the proceeds thereof from time to time in any obligations investments or securities which the Companies are authorised to hold. . . ."

The whole of the said Acts may be referred to as part of this case.

5. The Company has a subscribed capital of £3,000,000 (of which £300,000 is paid up) divided into 30,000 shares of £100 each and dividends are annually paid to the shareholders on the amounts paid up thereon.

6. The Head Offices of the Company (during the year of assessment) were in Aberdeen and London. The business of the Company is managed by a Board of Directors in Scotland and by a Board of Directors in London the latter Board having the control and regulation of the Company's business in all parts of the world other than in Scotland.

7. There are certain foreign countries in which the Company carries on the business of Fire and Life Insurance by means of local agents or managers. The Company has funds invested in various securities in those countries. By the laws of some of those countries the Company is obliged to keep invested in securities within those countries respectively a sum to answer liabilities on its policies and other engagements in those countries respectively. No part of the money so compulsorily invested can be removed until the liability in respect of the said policies or engagements has run off. The interest on the investments whether compulsory or not is either (*a*) reinvested in those foreign countries upon securities there (*b*) applied in establishment and other expenses in the foreign countries where the interest is earned or (*c*) remitted to Great Britain.

8. It is essential for the purposes of the Appellants as an Insurance Company, that the greater portion of the premiums received by them should be invested in interest-bearing securities and that from time to time the interest accruing thereon should also be invested and the investments mentioned in paragraph 7 are accordingly made for that purpose. The said investments are made in the course of and for the purposes of the business of the Company as an Insurance Company and the total amount of the interest received on such investments is taken into account in arriving at the profits of the Company.

9. All interest capitalised abroad by reinvestment in the event of the winding up of the Company or the discontinuance of the Company's operations in any particular country forms part of the assets of the Company available for the fulfilment of the Company's obligations.

10. The sole and complete management and control of all the affairs operations and business of the Company in foreign Countries subject to the laws of the various Countries in which it carries on its business were and are subject to the control of General Meetings of the Shareholders vested in and exercised by the Board of Directors at the Head Office in London.

11. The Agents or Managers of the Agencies and Branches in the Countries out of the United Kingdom in which the Company carries on the business of Fire and Life Insurance and of selling or granting Annuities from time to time include in the accounts which they render to the Head Office in London all moneys received and paid there by or on behalf of the Company such accounts setting forth all transactions at the Agencies and Branches.

12. The receipts at the Agencies and Branches abroad include (*inter alia*) premiums received from policy holders, payments for the purchase of annuities and interest or dividends arising from foreign securities or investments. Payments at these Agencies and Branches include (*inter alia*) payments under policies on account of claims, payments on account of annuities, policy surrender values, bonuses, commissions, management and office expenses. All receipts payments and balances in hand at these

Agencies and Branches are dealt with from time to time in the manner directed by means of special or general instructions by the Board of Directors from the Head Office in London and are controlled by such Directors by means of such instructions and are either invested abroad applied towards payments abroad or are otherwise dealt with or expended as may be required or directed by the Board of Directors in London.

The said first Assessment amounting to £100,000 is based upon the average profits of the Company from their business as a Fire and Life Insurance Company.

The said additional Assessment of £37,639 is composed of the interest amounting to the sum of £31,096 hereinbefore mentioned received abroad and not remitted to the United Kingdom accruing to the Company on paid-up capital and funds accumulated from time to time and set aside as reserves and invested as part of the paid-up capital of the Company.

Also a sum of £6,690 before mentioned the profits on the three years' average arising from the sales of investments as hereinafter stated. In arriving at the amount of the assessment allowance has been made in respect of interest, dividends, &c., on which Income Tax has already been paid by deduction and in respect of the Company's expenses in their business as a Fire and Life Insurance Company.

13. All interest and dividends including those the subject of the appeal are included as money received by the Company in the Profit and Loss Accounts Revenue Accounts and consolidated Revenue Accounts of the Company under the head of Interest. The accounts are made out in the United Kingdom and are accounts made out by the Head Office of the Company in the United Kingdom and are by that Head Office rendered to the shareholders as accounts of all the Company's transactions and affairs which are all directed and controlled as before stated by the Directors from the Head Office in the United Kingdom.

14. The accounts of the Company are made out in the forms prescribed by the Life Assurance Companies Act 1870 and no distinction is made in the accounts of the Company with regard to receipts or expenditure whether arising or made in the United Kingdom or abroad but the whole receipts and expenditure at home and abroad are included together in one entire account in the revenue and other accounts and valuations of the Company.

15. If the interest and dividends in question in this appeal and the premiums received abroad had not been retained abroad the Company would have been obliged to send out from the United Kingdom to their foreign Agencies and branches for the payment of claims and annuities or discharge of other obligations or for the payment of expenses purposes of compulsory investment or otherwise an amount sufficient for such purposes. By not remitting the interest, dividends and premiums in forma specifica to the United Kingdom the Company saves the cost of the exchange expense and inconvenience which such remittance would involve.

16. In paragraph 7 of this Case the establishment and other expenses described under (*b*) include payment of claims under policies and annuities.

17. The printed accounts (Revenue Accounts and Balance Sheets &c.) are made up annually and show the nature and extent of the entire business and financial operations carried on by the Company both in the United Kingdom and abroad as one entire and indivisible business. The profits of the Life and Annuity Branches are ascertained by actuarial valuation once in five years.

18. The Company claimed to be assessed in respect of interest arising from its foreign securities under Case IV of the Act 5 and 6 Vic. cap. 35 Sect. 100 and contended before the Commissioners that under the fourth Case Sect. 100 of 5 and 6 Vic. cap. 35 only such part of the said interest as was actually received in Great Britain during the year of account was assessable to tax and that the interest applied as in (*a*) and (*b*) clause 7 hereof was exempt from tax and that the assessment under Appeal ought to be reduced by the said sum of £31,096 being the amount included in the assessment in respect of interest arising from the Company's Foreign securities and applied as stated in (*a*) and (*b*) clause 7 hereof and they cited and relied upon the Case of *Gresham Life Assurance Society* v. *Bishop* 4 Tax Cases p. 464 and [1902] A.C. p. 287, and other cases.

19. As a second point the Company also claimed that they were not liable to be assessed in respect of a sum of £6,690 profit on sale of Investments made on an average of three years as claimed by the Surveyor and included in the said assessment.

20. It was proved to the satisfaction of the Commissioners that it was not part of the business or trade of the Company to deal in investments or to vary its investments or to make profits by so doing; that investments were not made or sold with the intention of earning profits and were rarely realised and then only for special reasons and that any sums realised in excess of the cost of such investments were treated as and were capital and carried to Capital Investment Reserve Fund or used in writing off depreciation on other securities and were not in any way used or dealt with as profits or gains or taken into account for dividend purposes.

21. It was contended on behalf of the Crown that there should be no reduction of the assessment and that there was a constructive remittance of the interest and they quoted the cases of *Scottish Mortgage Company of New Mexico* and *McKelvie*[1] and *Norwich Union Fire Insurance Company* v. *Magee.*[2]

The Surveyor of Taxes also contended that he had the right of fixing the case under which the assessment should be made whether under Case I. or Case IV. Also that on the sale of the Investments the Appellants were liable to be assessed on the said sum of £6,690 profit made thereon.

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(1) 2 T.C. 165. (2) 3 T.C. 457.

22. The Commissioners having heard the evidence of the General Manager of the Company and other persons found as a fact:—

1. That the Appellants received abroad the sum of—

£32,694 in the year 1901
£29,659 ditto 1902
£30,937 ditto 1903

from Interest on Foreign Investments and that no portion of these sums had been remitted to or received by the Company in the United Kingdom.

The Commissioners decided that in respect of these sums the assessment should be under Case IV. of the above-mentioned Act.

2. That as to the net proceeds of sale of Investments the same were not profits or gains derived or arising from the Company's trade or business, and were Capital and were not subject to be assessed to income tax.

They thereupon reduced the assessment accordingly by both the said amounts.

23. The Surveyor of Taxes thereupon expressed his dissatisfaction with the determination of the Commissioners as being erroneous in point of law and duly required them to state and sign a case for the opinion of the King's Bench Division of the High Court of Justice which we have stated and do sign accordingly.

HOWARD MORLEY,
HENRY D. LE MARCHANT,
L. SEYMOUR GRENFELL,
} Commissioners of Taxes for the City of London.

THOMAS HEWITT,
Counsel and Clerk to the Commissioners,
1st December, 1910.

The Cases were argued on the 28th and 29th March, 1911, before Mr. Justice Hamilton. Mr. Danckwerts, K.C. and Mr. Latter appeared as Counsel for the Appellants, and the Solicitor General (Sir J. A. Simon, K.C., M.P.) and Mr. W. Finlay as Counsel for the Respondent. Judgment was given on the 30th March, 1911, in favour of the Crown.

Danckwerts, K.C., for the Appellants.—The distinction between the operations which produce the profits and what may be called preliminary operations, which are intended to be undertaken preliminary to earning a profit, and are no part of the business, is a well known one for Income Tax purposes. Take, for example, the Case of *Sulley* v. *The Attorney General*.(1)

[*Hamilton, J.*—Can you divorce the deposit from the carrying on of the business? It seems to me there is a formidable difficulty

(1) 2 T.C. 149.

in your way, that if they cannot carry on this business without making the deposit then the whole business includes two parts: one, the making and the maintenance of the deposit, and the other the taking advantage of it by trading.]

My answer to that is twofold. First, I submit the two things are distinct. The keeping of a sum of money invested by way of security is not employing that sum in a trade; it is employing it outside the trade and preliminary to the trade. Second, to make an investment and to keep an investment, which is the essence of this transaction, is simply in the position of a compulsory investment of money, not to be engaged in the trade. The difference between money produced by an investment and money produced by carrying on a trade is kept up throughout the Income Tax Acts.

The question always is: what is the business that is being taxed? Now the business which is being taxed here is the insurance business. The Company subsists, and side by side does another thing altogether. It has got funds which, as Lord Shand says, (*Smiles* v. *Australasian Mortgage and Agency Company*) (1) are at rest for the time being, and these funds are invested. Some the Company invests voluntarily in order that its funds may not be idle. That is Class C. The others are Classes A and B which are investments made by the Company for a double motive: (1) to draw income from the investments: (2) to put themselves in a position to do something else, but the two things are in different compartments, if I may use the expression.

The Company, in fact, is in possession of funds which it cannot afford to let be idle. It does not require them in the current transactions of its business. It therefore does what a private person would do; it invests them in permanent investments, and as owner of the investments gets dividends. All it has to do is to sit still and draw its moneys. no operation of trade is necessary. An individual invests as the owner of money which he is not going to expend in carrying on a trade, which he is not going to leave lying idle, and which therefore he has to invest in some way; but, as Lord Shand says, by making an investment you are not carrying on a trade; it is not expenditure for the purpose of a trade, or income derived in connection with a trade.

I submit here the question, is this a business being carried on by the Company, is a question of law, and that the only business carried on by the Company is that of granting policies of insurance, and the investments made in America and the other countries are investments made of money which is unemployed in the business, in accordance with the expression in the Memorandum and Articles of Association: "To invest the moneys of the Company not immediately required in such manner as may from time to time be determined."

(1) 2 T.C. 367.

The Solicitor General, for the Respondent.—It really is a false analogy to compare the position of a private individual, a man who is engaged in a profession and who is investing his savings, with a Company, because you have to have regard to the fact that your entity here is not an individual entity with unlimited rights to do what it pleases. It is a body which has got an existence only for certain definite purposes, and it is not to be presumed, and it is not suggested, that in what it is doing here it is going outside that which is its statutory power. It is not one of those Companies formed otherwise than for the purposes of gain. The actual object of the Company, and of every Company, necessarily must be to make profit, and it would be only in very exceptional cases that the proceeds of investments lawfully made by the Company ought not to be so regarded. A commercial company is an entity only for the purpose of carrying on the trade which it is formed to carry on. Unless your Company is a company which is expressly authorised to do a thing side by side with the carrying on of its business, as in the Hudson Bay case, I should submit that if a company which is called into existence for the purpose of carrying on a particular business or trade makes investments, the interest on those investments is necesarily treated as part of the profits of that company. The investment of funds is a necessary and inevitable part of the business of an insurance company. If the investments produce interest, that is part of the profits of the concern, and it is no less part of the profits of the concern because the investment is not only within the Company's powers, not only a class of operation which it must perform somewhere, but it is an operation which for other reasons must be performed owing to foreign law in a particular place. I submit, in short, that there is no distinction between the classes of investments designated A, B and C, and that the interest is assessable as profits or gains.

JUDGMENT.

Mr. Justice Hamilton.—These three cases raise substantially one and the same point, namely, whether, when a limited liability company carrying on the business of fire insurance both in this country and abroad in British colonies or foreign states but having the principal direction of its business in the United Kingdom, invests sums of money which it does not require for the current discharge of its liabilities upon securities abroad, and receives in respect of those securities dividends or interest abroad, which it does not cause to be remitted to this country or which it does not receive here, the Company can be compelled, when it is assessed to income tax under Schedule D, Part 1, to bring in such dividends and interest as receipts upon its credit side for the purpose of assessing the profits or gains which arise or accrue to it from the trade or employment of insurance in question.

There are one or two points in respect of which the two later cases differ from the first, but it has not been contended before me that the point for decision is different in either of the last two cases from the point on the first, and although there are some circumstances of fact which differ, I do not think that they materially affect the question. In the last two cases the Solicitor-General on behalf of the Surveyor of Taxes, the Appellant, abandoned formally any argument upon subsidiary points that were raised in those cases—in the Ocean Accident and Guarantee Corporation case a contention that there had been a receipt of interest in this country constructively, and in the Northern Assurance Company's case a contention that certain sums received upon the sale of investments abroad were profits or gains accruing. The former point was admitted to be unarguable in the face of the decision in the Gresham Life case; the second was abandoned in the face of the finding of fact by the Commissioners that the nett proceeds of such sale were not profits or gains.

The common features of fact are these. The Insurance Company, directed and controlled by its Board and Officers in England, possesses branches abroad, which in the case of the Liverpool and London and Globe Insurance Company are branches in the United States of America, in Canada and in Australia; and it appears that they make investments of three classes in securities or upon possessions which are out of the United Kingdom in connection with those branches. Class A, which is a class referring to six of the States of the United States of America and to the Dominion of Canada, consists of investments which are made for the purpose of complying with the laws set out in the case, which require that the Company as a condition of its doing fire insurance business in the State or in the Dominion in question shall deposit certain minimum amounts with the representative of the Government or trustees, who pledge themselves to the Government not to part with the deposits, the deposits to be invested in accordance with the local laws of the said States and Dominion, the deposits to remain as long as business is carried on and liability is outstanding in respect of any risk in the said States or Dominion, and so long as that state of things continues the law prevents the Insurance Company from recovering possession of any part of the sums so deposited and the same are held as a fund out of which in case of non-payment of claims by the Company the policy-holders of the Company in the said States and Dominion can be paid. The second class, Class B, applies to the State of New York and to the Dominion of Canada, the laws there requiring that there shall be a certain statutory relation between the extent of what is called amongst underwriters the Company's retained line, that is to say, the business by way of insurance on any one risk which the Company may undertake and keep, and the amount of what is called a surplus of assets available for meeting those liabilities, and if the Company desires in the State of New York to increase the amount of its retained line, it has also to increase the amount of certain investments and funds deposited with trustees beyond

the fixed deposits that I have already referred to. In Canada this takes a slightly different form, but the point is the same, and the fact is to require the Company to make considerable deposits with trustees in Canada beyond the fixed deposits already mentioned. In these cases both Classes A and B, the laws of the Governments in question do not prevent the Company from changing or varying the deposited investments, and, of course, do not prevent the Company from receiving the growing produce, be it dividend or be it interest, of those investments. The third class of investments is made by the Company abroad purely voluntarily, not under or by reason of any legal obligation, but solely for the purpose of deriving income or profit from moneys of the Company. These sums consist of accumulated profits made in past years, but not distributed among the shareholders, which the directors have invested in high-class securities in order to have a fund easily realisable if required. Generally it has not hitherto been necessary for the Company, that is the Liverpool and London and Globe, to realise or expend any part of these moneys for the immediate purpose of carrying on their business as insurers, but they are available like any other property owned by the Company for such purpose or any other purpose of the Company whenever the Company may think fit or necessary.

In the case of the Ocean Company, these facts which I have stated in the case of the Liverpool and London and Globe Company are substantially the same, but are stated at less length in paragraph 6 of the Case.

In the case of the Northern Assurance Company, paragraph 7 of the Case states in general terms that in certain foreign countries in which the Company carries on the business of fire and life insurance by means of local agents or managers, the Company has funds invested in various securities in those countries. By the laws of some of those countries the Company is obliged to keep invested in securities within those countries respectively a sum to answer liabilities on its policies and other engagements in those countries respectively. No part of the money so compulsorily invested can be removed until the liability in respect of the said policies or engagements has run off. The interest on the investments, whether compulsory or not, is either re-invested in those foreign countries upon securities there applied in establishment and other expenses in the foreign countries where the interest is earned, or remitted to Great Britain. The question in dispute here relates to those sums which are not remitted to Great Britain. Now, in the same case, the Northern Assurance Company's Case, it is further found that it was proved to the satisfaction of the Commissioners that it was not part of the business or trade of the Company to deal in investments, or to vary its investments, or to make profits by so doing; that investments were not made or sold with the intention of earning profits and were rarely realised, and then only for special reasons, and that any sums realised in excess of the cost of such investments were treated as and were capital and carried to Capital

Investment Reserve Fund or used in writing off depreciation on other securities, and were not in any way used or dealt with as profits or gains, or taken into account for dividend purposes. As regards the finding of fact, I do not regard it as qualifying in any way the finding of fact in paragraph 8 of the Northern Assurance Company's Case. I do not regard the statement at the end of it that the sums realised in excess of the cost of such investments are not in any way used or dealt with as profits or gains as in any way affecting or modifying the state of the facts with regard to dealing with the interest and dividends periodically received as profits or gains, and I should draw the inference in the other two cases from the facts set out that in their cases also it was not part of the business or trade of the Company to deal in any investments or to vary its investments or to make profits by so doing, whether it is within the actual scope of the Memorandum of Association in either case or not; it is not a matter that has arisen before me, but I take it that throughout the object of these investments is not to do what I venture to call a stock-jobbing business, it is not to invest money with the object of getting in and getting out of rapidly moving investments, but is, as is stated expressly in the Liverpool and London and Globe Case, in order to have a fund created out of accumulated profits in past years and not distributed, and which may be easily realisable if required.

The contention on the part of the Crown is that they are entitled to assess, and the Surveyor purports to assess these Companies under Case I. of Schedule D upon profits or gains arising or accruing to them from their trade or employment, and that for that purpose they are entitled to have brought into the account the amount of the dividends and interest upon these various classes of foreign investments. The contention on behalf of the Companies is that either Case I. does not apply at all, or that if Case I. does apply, then the nature of the facts and the nature or purposes of the investments are such that the receipts by way of interest or dividend from these investments cannot be deemed to be profits or gains arising from the trade of insurance which they carry on. It is obvious at once that inasmuch as these annual sums do not fall within Cases IV. or V. operatively, because they are not received in the United Kingdom, the effect of the contention for the Insurance Company will be that, although they do as a matter of fact direct the whole of their business from the United Kingdom, and carry on a business which is world-wide, and has its brain and head in England, they are not to pay income tax upon the whole of the advantages accruing to them in that business annually by reason of the circumstance that they choose to carry on part of their business abroad, and also choose not to remit part of the sums that they receive from foreign parts to this country. That may be the effect of the Act, but I have no reason to think that it is the effect of the Act of set purpose, or that the legislature deliberately intended to discriminate between traders who direct their business from this country, and receive profits in this country, and traders

who carry on their business and receive profits in the course of the same business, but partly abroad and partly in the United Kingdom. I think, also, it may be observed that if the question had arisen as to whether the Insurance Company should be assessable in this respect, either under Cases IV. or V., or under Case I., if the facts have made them assessable under both classes, and if the Insurance Company was entitled to any say in the matter they would forcibly and vigorously contend that they ought to be assessed under Case I. for the express purpose of enabling them to bring in these very investments with the chance of reducing the amount of them by losses and expenses incurred in the business. Neither of those considerations can, of course, carry the matter any further, provided the Act is plain.

Before passing from the facts of the case, I must deal with the contention which was raised, that the facts relating to these investments constitute them something apart from the profits or gains of the business; that the investment is not a part of the business of the insurance, and that the receipts from the investments are not part of the profits or gains accruing from the trade. The analogy taken is that of a private individual of whom it is said that he may carry on a trade, and he may be a person of great possessions independently of his trade; he may trade at little or no profit, and yet be in receipt of a large annual income from investments, and then it is said as such an individual as that has two separate departments of his affairs, the trade in which he may or may not make a profit, and the investments upon which he certainly receives a large and secure annual income, so with these Insurance Companies, they ought to be regarded as possessed of a large fortune accumulated by the usual process of thrift and good husbandry, the investments in which that fortune is placed are a separate matter, the income derived from it may be taxable under Cases IV. and V., but is not capable of being described as profits or gains, because it does not accrue from any trade, and it is said that is none the less so, although it may be part of the grounds for the trader's credit in his trade standing high that he is known to be, outside his trade, a man of wealth. Similarly, it may be part of the grounds for bringing insurance risks to the Liverpool and London and Globe that it is known to be possessed of princely funds outside its business, which, of course, it would apply if it were necessary to the liquidation of its trading obligations. It appears to me that upon a consideration of what this business is that analogy fails altogether. To my mind the business of the Insurance Companies in these cases, at any rate, cannot be divided up in this way. I am told, and experience would lead me to credit it, that for practical purposes there is a very distinct and a very permanent division made between the English and the foreign branches of such a business. It may very well be that the staff who manage the one department interchanges rarely with the staff in the other department. It may be that the policy pursued on the other side of the Atlantic differs from the policy pursued here; it may be that as far as possible the

assets and the liabilities on the other side of the Atlantic are kept together without being, as matters of account, intermingled with the same here, but at the same time the whole business is one business, and it has not been contended before me, nor is there any finding of fact in the case to the contrary, that the whole business is not subject to the control of the English officers, the English Board, and ultimately the shareholders in general meeting assembled. That seems to me to be quite different from the case of a private individual. The private individual may have property entirely independent of his trade, although part of his assets, no doubt, in case of his insolvency, and it is intelligible to say that his trade does not extend to or touch his private property. I do not think that that is true of the Insurance Companies. The private individual may save to provide for his old age or for his family, he has leisure to enjoy, he has ambitions to gratify, and his existence, in fact, can be separated into his trading and his private life. Nothing of the kind can be done with an Insurance Company. Subject to the scope of the Memorandum and Articles, which in this case is, of course, very wide, and in terms includes the power to make these investments, but still always subject to the scope of the Memorandum and Articles, they are a trading company and a trading company only. In its trade it lives and moves and has its being, and it appears to me that it has no interests and no field of operations outside its business, and consequently I derive no assistance from the analogy of a private trader, or from decisions to the effect that the purchase of goods in one country to sell in a trade carried on in another does not constitute a trading in both countries—which is Sully's case—and I am compelled to discuss this Case entirely upon the basis of the facts found with regard to this Case.

There is another point with regard to the Insurance Company. It embarks its funds in its business simply by having money ready to pay its debts with. We are not here concerned with manufactories or the maintenance of a stock which is to be sold. The business of insurance consists in making promises to pay, by way of indemnity, *in futuro* and contingent sums in consideration of present payments of money, and the whole business therefore, apart from the wisdom and prudence with which it is conducted, consists in being ready to meet the liabilities if they accrue, and to the extent to which they accrue, out of one class of funds or another. Consequently the money is embarked in the business as soon as it is money which belongs to and is available to the Insurance Company. If they have paid it away in the shape of dividends, it is no longer available, but all their assets substantially are only possessed for the purpose of meeting the contingencies of losses on the policies if they should fall in. I am speaking of fire insurance only as an illustration, but I do not think that either indemnity business or, for this purpose, life business differs, although of course the calculation of risks and the mode of carrying out the transaction are enormously different.

Now, the practice of English Insurance Companies, which is found to be the practice of the companies in question here, has, as far as I know, always been to start from the very first accumulating large accessible funds for the purpose of meeting losses. The advantages are numerous. It renders the calling up of unpaid capital an extremely improbable event; it presents to the insuring world an enormous reserve of security; it assures within the company a uniform dividend and a uniform state of solvency apart from the changes and chances of a business which is essentially a business of hazards, and consequently it is the very pivot of the conduct of a fire insurance business to build up with prudence, by not distributing surpluses of premiums as and when they are received, large reserve funds and to invest them, of course, so that they may not be fruitless while they are held in hand. That is the policy that is pursued here under Class C, and thanks to it and thanks to the usual policy of not putting all the eggs in one basket, either with regard to the risks or the investments, the companies have under all imaginable contingencies large available funds in different parts of the world readily realisable in case of need. As it appears from the case of the Liverpool and London and Globe that emergency practically does not arise. But the funds received from the investments are just as much part of the receipts of the business, and the making of the investments is just as much part of the mode of conducting the business, as the taking of the risks, and except to the extent to which the current account at the bank, fed by premiums on the one side and depleted by losses paid on the other, is sufficient to carry on the business, all these funds in their several degrees may have to be called upon at some time or in some way or other.

The matter is made no more favourable for the Insurance Companies here in regard to Classes A and B. A is a class of deposit which has to be made and maintained as the condition of entering into a closed field. The policy of the States which impose these laws is not material, although it is easily understood, but in order that the Insurance Company may trade in an area which it thinks it advantageous to trade in, it must comply with the laws and make the deposit. It is not therefore the case, which was put in argument, of *Styles* v. *The City of London Corporation* where a distinction was to be drawn between the money being used to acquire a concern and the money being used to carry on the concern; it is not a case dealing with the expenses of carrying on the business, it is a case in which as a condition of doing the business at all and as long as the business is not wound up, sums have to be maintained as deposits permanently in the United States or in Canada as the case may be. If a figure of speech is of any assistance, it is a key which unlocks the gate into a closed place of trade. That appears to me to be essentially a disposition of the money in the way of and as part of the actual trading itself. The circumstance that the money can be invested in gilt-edged securities and yield a good deal to the Insurance Companies is no doubt beneficial to them, but it only obscures the facts to dwell upon that side of it. It

would equally be a security if they obtained the guarantees of bankers or bondsmen by paying them commissions, and no one could doubt in that case that the money spent annually in continuing those guarantees would be money spent in carrying on the business, in the business, and for the business.

The same considerations apply to Class B. When it is worth while to increase the lines which the Company takes and retains it is worth while to increase the amount of the investments locally made. They have to balance the advantages of doing more business against the disadvantages of investing money in that particular place and way, but the object of doing it is to extend the business: it is done as part of doing the business, and the advantages of the business include on the one side the receipts from the local investments, and on the other hand, it may have to make some deduction for the fact that better use might be made of the same sum of money if it were invested elsewhere. To my mind, therefore, all the employment of these funds is essentially in and part of the business. The way in which the receipts are dealt with has the same effect. The balance sheets, of course, do not serve to alter the liabilities of the taxpayers; they are not used for the purpose of constituting some admission of liability or something which would estop them from having the Act properly administered, but they are of some use as showing what as a matter of fact is the true and proper way of dealing with these receipts. It is convenient, perhaps, in connection with the Act of 1853, perhaps also for other reasons, not to remit these sums of money to the United Kingdom as long as they can be applied in discharging liabilities out of the United Kingdom, but at the same time before the true position of the Company can be ascertained, before the directors can be properly seized of its financial position for the purpose of declaring the dividend, all these receipts must be taken into account and are taken into account in order to see what is the success with which from period to period the whole of the operations are carried on. I am, therefore, unable as a matter of fact to see how these Companies can be said not to derive the receipts in question from the trade which they carry on, and it appears to me that the receipts in question form part of the gains which arise or accrue to them from the business of fire insurance which they are incorporated to carry on.

Now to apply the law to this. I think the first thing to be done is to ask, within which case does the surveyor claim to assess the subject? Because if he claims to assess the subject under the wrong case, the subject is entitled to the decision in his favour, and the surveyor must begin again. He does, in fact, claim to assess the Company under Case I. The next thing is to enquire whether the words of charge are wide enough to cover the facts of the case, and, as I have said, I think that the words of charge in Schedule D of Section 2 of the Act of 1853 are wide enough to cover these sums and that they do fall precisely within it. Although in general the scheme of the Act may be, as far as conveniently may be done, to make each case exclusive to each

of the other cases, not only is there no provision in the Act that there shall be no overlap, but it has been recognised repeatedly that the facts of a given case may cause it to be assessable under more than one of the cases in the old Act of 1842. That is in terms recognised in the case of *Colquhoun* v. *Brooks*, and I may refer to expressions in the judgment of Lord Fitzgerald which speaks of the universal language of the 2nd section of the Act of 1853 and Schedule D of that Act, to the judgment of Lord Herschell who in that case said that the words of the Statute *prima facie* supported the contention that the profits in question accrued to the subject from a business carried on elsewhere than in the United Kingdom, and to the language of Lord Macnaghten who says in terms that the profits or gains in the Respondent's Melbourne business might be held to fall either under the first case or under the fifth case, if one looked at nothing more than the language of those two cases. I do not find, with regard to the present case, anything, either in the machinery of Section 5 of the Act of 1853 or the cases in the Act of 1842, which would have the effect that the same provision had in *Colquhoun* v. *Brooks*, that is to say, restraining the operation of the tax to Cases IV. or V. by reason of there being no machinery which would enable the Case I. to be applied to those facts, and it has been repeatedly recognised in Scotch cases, which I shall have to refer to later, the New Mexican case and the Australasian Mortgage Company's case and the Edinburgh Life Assurance Company's case, that the same facts may fall within two or more of the cases under Schedule D, and in that connection it has been said that the Crown has in such cases the option to tax under one case or the other. I understand that expression, which is no doubt convenient if not very accurate, to mean this: if the words of the Act plainly make the subject taxable under either of two cases and he is assessed under one case, it is no defence to him to say that he is also assessable under the other, and unless the words of the Act are not plain, and to my mind in connection with this Case they are quite plain, the subject cannot pray in aid the interpretation of the Act in favour of the subject so as to require that he should be taxed under the case which is least burdensome to himself. As soon as the words clearly cover his case it appears to me that it is no answer to him to say that it is hard on him not to be taxed under the other and lighter case. What the duty of the revenue officers may be with regard to selecting the one case or the other for their assessments is a matter I have nothing to do with, but it appears to me that as soon as the charging words are shown to cover the case, then one must find some other answer on behalf of the subject than to point out that he might have been brought under another and less burdensome case. I do not, accordingly, think it is a point upon which the decision here can turn to say that if the money had been remitted to this country, it is quite plain that these cases would have fallen within Case IV. or Case V. of Schedule D, as the case may be. The question is whether it falls within Case I.

A considerable number of cases have been cited without its appearing very clear that any one of them conclusively contains authority upon this point. Reliance is placed on behalf of the Crown upon paragraph 2 of a series of propositions which are contained in the Judgment of the Court in the *Northern Assurance Company* v. *Russell* and also the *Scottish Union & National Insurance Company* v. *Smiles'* case which is reported in the 2nd Tax Cases and also in the 16th Rettie. The Court, delivering a considered Judgment, thought fit to express the reasons for its decision in the following instructions to the Commisioners to whom they remitted the Case. The material one is number II. They are speaking of a fire and life insurance company: "That "the interest of investments which has not suffered deduction "of Income Tax at its source must be taken into account in "ascertaining the assessable amount of profits and gains of the "Company." I do not think the criticism is correct that this proposition assumes that the Case is one in which the interest could suffer deduction at its source and can, therefore, have no application to a case where the interest could not suffer such deduction. I think having regard to the facts with which the Court is dealing it was treating this as applicable to a case where the investments had not suffered deduction of income tax either because they could not, because it had been suffered, or because it had been overlooked or for any other reason, but I do not think that that is a universal proposition which I can treat as a binding part of the Judgment which requires me to say that apart from the facts of the particular case every fire insurance company must take into account in ascertaining the assessable amount of profits and gains of the Company the interest on the investments. I think that as a matter of business that always has to be done, but it does not appear to me that that is a proposition which solves the legal question whether this interest is necessarily part of the profits or gains accruing so as to bring the facts of the case within Case I. of Schedule D. On the other hand, a previous case, the *Australasian Mortgage Company's* case, which was before the Court in the Northern Assurance case, is relied on on the other side by the Counsel for the Insurance Companies, and it is said to be a binding decision in favour of the proposition that if an Insurance Company makes investments of realised funds in stocks in the colonies which pay them interest periodically, the investment and the interest of them would not fall within Case I., but would fall within Case IV., and for the further proposition that because they would fall within Case IV. they cannot fall within Case I. I think it is clear that as the members of the Court were, to a large extent, the same, and as the interval between the two cases is not great, and the Australasian Mortgage case was cited to the Court in the Scottish Union and Northern Assurance case—I think it is clear that the Court did not so understand their own decision in the Australasian Mortgage case. I think next the question before the Court was whether the facts of that particular trade—it was

a wool broker's trade—brought the case within the first Case of Schedule D, or within the fourth Case of Schedule D. Now, upon the facts the Court came to the conclusion that the sums of interest which were received were not, as they describe it, interest on investments, but, as perhaps it would be more in accordance with the language of the case to say, were not interest arising upon securities or chargeable in respect of possessions abroad, and they came to the conclusion, in the words of the Lord President, that this is proper trading and nothing else, and not investment of money upon securities. That therefore enabled them to answer the question that the charge was not under Case IV. The same decision of fact enabled them to say that the case did fall within Case I., because it was, in the words of Lord Shand, a making of profits by the use of its capital in mercantile transactions. There are passages which appear to show that the Court thought that if it fell within the one class it could not fall within the other. Doubtless that is so often the case that it may be a very convenient mode of approaching the question. I do not think the Court purports to say that if it fell within Case I. it cannot fall within Case IV., or *vice versa*. If it does purport to say that, I do not think that that is part of its decision, and it is not a view which I find myself able to take. Lord Shand, to whose opinion of course I should pay the greatest regard, evidently thought that in the case of an Insurance Company making investments of its realised funds in stocks in the Colonies which were paying them interest periodically that would, so far as those investments were concerned, be a very different matter, and I understand by that that he thought it would be a matter not falling within Case I. Be that so. I had, however, cited to me on behalf of the Crown a case in the Divisional Court of the Queen's Bench Division which shows the contrary opinion. This is the *Norwich Union Fire Insurance Company* v. *Magee* (*Surveyor of Taxes*). It is reported copiously. It is reported in the 44 Weekly Reporter, it is reported also in the 73 Law Times, and it is reported furthermore in the 3rd Tax Cases, at page 457, and if it is reported elsewhere I have not been made aware of it. Some contention has arisen as to the accuracy of the reports. The report in the Tax Cases and in the Law Times is textually the same with regard to the passage that appears to be material for the present purpose. The report in the Weekly Reporter, which is shorter, differs in its language, and for the present purpose differs in its effect from the language in the other two reports. I have no materials before me to tell how or when these different reports were prepared, except that I think it is quite clear that the coincidence of the language in the report in the Tax Cases and the report in the Law Times shews that the very language taken down from Mr. Justice Wright, who gave the judgment of the Court, is there set out. He says in that case: "The real point in this case may be put in one "sentence. If there is a trade which cannot be carried on "without making investments abroad, the interest arising on

"the investments necessarily made for the purposes of the trade "is, as it seems to me, part of the gains of that trade. Con- "stantly it occurs that Companies carrying on operations abroad "have balances which they leave at interest on foreign securities "for a time, or they even provide a reserve fund in foreign "securities. In practice the interest on securities of either kind "is always brought into account as part of the profits and gains "of the business. In the present case, I think it clearly appears "that the Company could not carry on, or could not so profit- "ably carry on, its business in America unless, as the business "increased, they provided continually augmenting reserves in "these American securities. They do not invest in those "securities for the sake of investment or for the sake of making "profit by those investments, but for the sake of having a "fund invested in America to answer the requirements of the "American law."

Now in that judgment Mr. Justice Kennedy then and there agreed. It appears to me to be quite clear that the judgment of Mr. Justice Wright precisely covered Cases A and B of these investments. Some doubt may be raised as to whether he intended to draw a distinction between Cases A and B and Case C, the voluntary investments, because he points out that they did not make these investments for the sake of investments or for the sake of making a profit by these investments, but for the sake of having funds invested in America to answer the requirements of the American law. It was suggested that this may not have been the very language used by the learned judge. It appears to me that additional internal evidence is to be found that this is a shorthand note of what he said from the fact that five times in one sentence he uses the word "invest" or "investment," a thing I think that could not have escaped the correcting pen.

Now, if that is a decision, that binds me. If it is an opinion it is one which I should regard with very great respect, and I think ought to follow in preference to the opinion cited from the judgment of Lord Shand; furthermore, it expresses the conclusion I have arrived at from the facts and the Act, and I think that while it is perfectly clear, in the words of the learned judge, that as regards Classes A and B this trade which the Company desire to carry on in the United States and in Canada cannot be carried on without making investments abroad, and therefore the interest arising on the investments neces- sarily made for the purposes of the trade is part of the gains of that trade, I think, also, it is quite clear, when one considers what the facts found in this case are with regard to these fire insurance companies, that the investments which they voluntarily make abroad are still made not merely for investment sake, not for the purpose of making a profit on investing as a business, but for the sake of having a fund invested over a sufficiently wide area sufficiently readily realisable to meet the requirements of their business and their liabilities in their business if need should be. The question whether this was

obiter dicta of both Judges of the Divisional Court—because whatever Mr. Justice Wright said Mr. Justice Kennedy agreed in—or whether it was a decision of the Divisional Court was debated at some length, and I have had the advantage of hearing Mr. Danckwerts upon the point, who was Counsel in the case, and furthermore remembered what happened. He suggested that there was no point before the Court with regard to the necessity for making these investments, and that consequently there was no point which the Court could decide in connection with that, and he pointed out that as far as these three reports go the materials upon which the objects of the investments in the United States were concerned consisted solely of a letter from the Chief Accountant of the Company, which Counsel for the Company alludes to in his argument. It appears to me quite immaterial whether the letter stated the facts rightly or not. The question is, whether the Court was given to understand that those were the facts, and I have come to the conclusion that Counsel for the Appellant having stated that that was the object of these investments, and there being no trace of Counsel for the Respondents disputing that, the Court was led by the parties to understand that that was to be treated as one of the facts in the case. I do not think it would have escaped either the vigilance or the interposition of one or other of the Counsel for the Respondents if it had been really desired to challenge that fact. Consequently, I think it was before the Court to say as a matter of decision whether the point in the case, which was one with regard to the investments necessarily made for the purposes of trade abroad in order to comply with the American laws as to an insurance reserve—it was a matter for decision by the Court whether they did or did not validly bring the case in hand within Case I. of the Act of 1842. There was a point raised also as to Case IV., but the Court was deciding in this part of the judgment, as it seems to me, a similar point to the one which is raised before me.

I think, therefore, the decision in the Norwich Union case is one which binds me, and, as I have said, I have arrived independently at the same conclusion.

Then, that being so, the only other case I think that I need allude to is the New Mexican case, the *Scottish Mortgage Company of New Mexico* v. *McKelvie*, in the second Tax Cases at page 165. That case, first of all, recognises that duty may be chargeable either under one case or under another. In that particular case, the question was whether it could come under Case IV. The decision was, that it could come under Case IV. It was a case of a company which borrowed money in the United Kingdom on debentures in order to invest that money at a high rate of interest sufficient to cover management and profit as well in securities abroad, I suppose in New Mexico. It, therefore, is not a case which, in regard to the point arising for decision, touched the present one. It may be or it may not be, it is not material to enquire whether the case came within Case IV. The Court recognised that it might come within Case I., and their

decision upon this particular point does not appear to me to affect the present case.

I have come to the conclusion, therefore, that in regard to the Liverpool and London and Globe Company's case the appeal fails. I ought to say, in order to put it on record, a word as to the findings of the Commissioners in that case. Paragraph 6 contains this passage: "Having regard to the manner in which "the 'liabilities' and 'assets' are set out in the Company's "balance sheets, and to the fact that insurers, in considering "what would be the nature and extent of their security, would "have regard to the total amount of the assets of the Company, "and having considered the facts of the case as hereinbefore "stated and the provisions of the Income Tax law relating "thereto, we gave judgment as follows:—We are of opinion "that the contention of the Crown is correct. We find that the "investments in question made by the Appellant Company in "the foreign countries named were made in the carrying on of "and were part of its business transactions, and we hold that "the interest on such investments should be included as receipts "of the Company in arriving at its liability under Case 1, "Schedule D." It was at one time suggested that that constituted a finding of fact by the Commissioners which was only submitted for review for the purpose of asking, as a matter of law, whether, upon the facts set out previously in the case, they could or could not reasonably find the fact as they did. So that if it was held that there was material on which they reasonably could so conclude, that conclusion would be binding. Whether the matter was one of law as was suggested on the authority of the Hudson's Bay case, or of fact, it has now become unnecessary to decide, because the Solicitor-General, as all parties desire a decision in this matter, consented to treat the words beginning "We find" as only the statement of opinion upon a matter of fact of the three Commissioners who signed the case, and only, therefore, as being in *pari materia* with all the other facts in the case for the purpose of enabling the Court to come to a conclusion both of fact and law upon the whole of the materials. It is right to put that on record. I have given to that finding such importance as it appears to me attaches to the opinion of Commissioners for the special purpose of the Income Tax Acts as such, and have endeavoured to apply myself to the facts which they set out in the previous paragraphs.

The answer to the question of law propounded in paragraph 9 of the Liverpool and London and Globe Insurance Company's case is that the whole of the interest and dividends arising from the several investments under Class A, Class B and Class C (whether actually remitted to the United Kingdom or not) form part of the profits of the Company assessable under Case I. of Schedule D of the Income Tax Act, 1842.

In the Ocean Accident and Guarantee Corporation's case, the decision is that the liability should be computed on the amount of the business profits for each year estimated according to the rules of Case I.

In the Northern Assurance Company's case, the decision is that the Surveyor of Taxes had the right to assess the Company under Case I.

If in any of these cases it is necessary that further adjustments of figures should take place, the cases will be remitted for that purpose.

The Solicitor-General.—Then in the first case, the main case, the Liverpool and London and Globe case, the appeal will be dismissed with costs?

Hamilton, J.—Yes.

The Solicitor-General.—In the other cases, I submit that your Lordship's order amounts to the allowing of the appeal with costs, and I ask for costs.

Mr. Bremner.—On behalf of the Northern Assurance Company, I want to say a word as to the question of costs. Your Lordship has pointed out in your judgment, the Crown appealed here with regard to two wholly distinct matters. There was a sum of about £7,000, the profits realised by the sale of investments, and the Crown contended before the Commissioners, and they contended again before your Lordship, although not for very long, that they were entitled to income tax upon that amount. That part of the appeal has failed, and it certainly has put my clients to additional costs, and therefore I submit in that case there should be no costs. Certainly, I submit that it would be quite contrary to the practice of the Courts to order my clients to pay costs in respect to a matter in which they have been completely successful. We have vindicated our position with regard to this sum of £7,000.

Hamilton, J.—I am with you there.

The Solicitor-General.—May I say this much about it, if your Lordship would allow me? You will remember that there were the two points involved in the one case, there was £31,000 which, as the City Commissioners' decision went, we were not able to assess, and also a sum of £7,000 which I gave up. The result of your Lordship's decision is that I get an assessment on £30,000, which I otherwise should not have got. The reason why these cases were put in the list together, and the reason why your Lordship held over a Judgment till all three had been disposed of, was precisely because the big point in all three cases was the same, and that big point in each of the three cases I have succeeded on.

Hamilton, J.—If it had not been for the substantial point in each of the other two cases, it would not have been necessary to set down those appeals, would it? They could have awaited the decision in the London and Liverpool and Globe case.

The Solicitor-General.—Your Lordship will decide whatever you think fair about it, and I do not want to keep up an argument, but I did want to point out the reason why they are treated together, coming as they do from different tribunals, and the decisions being conflicting with one another. The question was whether the City Commissioners were right in saying that I was wrong, or whether the Special Commissioners were wrong

in saying that I was right. That was the issue, and that is why the three are brought on together. My learned friend Mr. Danckwerts, so far from involving his client in additional expense so far as arguments go, said that his arguments were the same as before.

Hamilton, J.—I think in the second and third cases there should be no costs on either side.

Mr. Latter.—In the London and Liverpool and Globe case the matter is very important, and if after consideration my clients desire to appeal, I do not know whether the Solicitor-General would consent that the expense of taxation should be avoided.

Hamilton, J.—I should think that could be arranged.

The Solicitor-General.—That seems reasonable enough. I imagine we should have recourse, if need be, to the funds invested in America.

Mr. Latter.—Your Lordship will grant a stay accordingly.

Hamilton, J.—Do you need a formal stay?

The Solicitor-General.—Assuming you proceed with reasonable expedition, we should do nothing in the way of taxation. I do not think it is necessary for an Order to be made. My friend has to appeal, I think, within a fortnight?

Mr. Latter.—Yes.

Hamilton, J.—No formal Order need be made, you have agreed that taxation will not proceed if the appeal is proceeded with at once?

The Solicitor-General.—Yes, my Lord.

Mr. Danckwerts.—My clients wish me to point out to your Lordship that there were differences in the three cases of fact.

Hamilton, J.—Yes, I pointed that out about three-quarters of an hour ago, that there were differences of fact.

Mr. Danckwerts.—I understood that my client understood your Lordship to say there was no difference of fact.

Hamilton, J.—I am afraid either I was not speaking distinctly or he was not listening. There are some differences of fact which I do not think affect the result.

Mr. Danckwerts.—And differences in the findings.

Hamilton, J.—A shorthand note, I daresay, has been taken, but I hope there will not be more than one report of my decision.

Notice of Appeal having been given, the case came before the Court of Appeal on the 29th and 30th January, 1912, when Mr. Danckwerts, K.C., and Mr. Latter appeared as Counsel for the Appellants, the Solicitor-General (Sir J. A. Simon, K.C., M.P.) and Mr. W. Finlay as Counsel for the Respondent. Judgment was given on the 27th February, 1912, in favour of the Crown affirming the judgment of the Court below.

JUDGMENT.

The Master of the Rolls.—These three Appeals all raise the same point, and I shall, therefore, only refer to the first, namely,

the Liverpool, London and Globe Insurance Company *v.* Bennett. It is true that there are some slight distinctions, but they are of no real importance.

The question is whether the Appellant Company can be charged under Case I., in Schedule D, in respect of the income of certain American and Canadian investments, or whether they can only be charged under Case IV., in respect of such moneys as are actually received in Great Britain. The general principle has been laid down in the Court of Session by Lord Dunedin, in *Revell* v. *The Edinburgh Life Insurance Company*, 5 Tax Cases, page 226. The Lord President says: "The Income Tax Acts "are complicated enough, but I thought it had been settled "beyond all possibility of doubt that inasmuch as the Income "Tax Acts do not only deal with profit in the true sense of the "term as a commercial profit, but also deal with and impose "taxes upon the interest of investments, the Crown has always "been allowed, when investments are held by a trading company, "if it suits them, to say: 'We will charge you a tax upon "'the produce of your investments, and we won't charge the tax "'upon your profits.' The Crown cannot charge the tax on "both—that is to say, it cannot take a trading account which "has money, its assets and investments, and first of all charge "Income Tax upon the produce of investments, and then over "and above charge upon the profits. It must elect between the "two. The reason is very obvious; because, if the Crown were "not allowed to do that, the Crown would lose the produce of "an investment according to the extent whether that investment "was held by a private individual or by a trading company. "That being so, when you come to deal with a business like an "insurance company, especially a Life Insurance Company, "which has to hold very large investments, it nearly always, "in fact, in the case of an insurance company which has not a "fire business, pays the Crown better to take the interest on the "investments, and not to trouble with the profits." I feel no doubt that the Crown has an option to tax under Case I., or under Case IV., in any state of circumstances falling within that case.

The Plaintiff Company is an English Company; and its whole business is controlled by its board in England, although it possesses branches abroad. The business of the Company extends to life and fire insurance. For the purpose of this appeal it is only necessary to consider fire insurance. A large business in fire insurance is transacted in the United States and Canada. By the law of both those countries, no business in fire insurance can be carried on by a foreign insurance company unless the Company deposits certain sums, to be invested in certain securities. Large investments have been made by the Appellant Company in pursuance of this requirement; and the case finds that these are held as a fund out of which, in case of non-payment of claims by the Company, the policy holders of the Company in the United States and Dominion can be paid. Meanwhile, the interest or income on the investments is paid to and received by the Com-

pany. These investments are called Class "A." Class "B" investments stand very much in the same position. They are required as a further security in the event of the Company desiring to undertake and retain fire insurance risks beyond a certain amount. These further investments are found by the Case to be intended to constitute a trust fund for the protection of the moneys of the policy holders in the States and Dominion. Class "C" are investments which have not been made by reason of any legal obligation, but are investments made for the purpose of deriving income or profit from moneys of the Company and in order to have a fund easily realizable if required. The interest and dividends of the investments in Classes "A," "B," and "C" have been retained by the Company in the United States and Dominion, and no part has been actually received in this country. They have not been taxed at the source. In these circumstances, it is contended by the Crown, and has been decided by Mr. Justice Hamilton, that the interest or dividends form part of the amount of the balance of the profits or gains of the trade adventure or concern of the Company within Case I. In my opinion, this decision was perfectly right. It seems to me that with respect to "A" and "B," those investments are required for the purposes of the business of the Company, and that the income thereof must be brought into the profit and loss account. The business could not be conducted at all without such investments being made. With respect to Class "C," the case is scarcely less strong. The investments are made in order to secure the credit of the Company, and to enable it to discharge its obligations in the United States and the Dominion.

I have thus far treated the case apart from authority. So far as I am aware, there is no authority against this view; and there are several authorities in favour of it. The Gresham Society case, in the House of Lords, has no real bearing. It only decided that the Crown, in a case like this, could not charge under Case IV. on the footing that the dividends had been constructively received in England by reason of having been brought into the published profit and loss accounts. The doctrine of constructive receipt was negatived, but there was not a word to suggest that the Crown might not have claimed under Case I. In *The Scottish Mortgage Company of New Mexico* v. *McKelvie*, 2 Tax Cases, page 165, the Lord President expresses the clear opinion, in a case similar in many respects to this, where it was claimed under Case IV. that he had no doubt that the duty might have been charged under the First Case in Schedule D, see page 172; and in the case of *The Northern Assurance Company* v. *Russell*, 2 Tax Cases, page 577, dealing with the case of an insurance company, the Lord President laid down "that the "interest of investments which has not suffered deduction of "income tax at its source must be taken into account in ascer- "taining the assessable amount of profits and gains of the com- "pany." In *The Norwich Union Fire Insurance Company* v. *Magee*, 3 Tax Cases, page 457, it was held by Mr. Justice Wright, that "If there is a trade which cannot be carried on

"without making investments abroad, the interest arising on "the investments necessarily made for the purpose of the trade "is, as it seems to me, part of the gains of that trade." In my opinion, the decisions to which I have referred correctly state the law.

It was argued that by Clause 18 of the Memorandum of Association of the Company one of its objects is to invest the moneys not immediately required in such manner as may from time to time be determined; and that this was an object quite distinct from carrying on any trade or business. In my opinion, that was not proper subject matter for insertion in the Memorandum. It would have been implied, if not expressly mentioned. It is not really a distinct object. The business of the Company in all its branches is, in truth, one. In this respect, a limited company in no way resembles a private individual, who may have, in addition to his business and the capital employed therein, a private fortune, which he may spend or invest in any way he thinks fit.

The result is that, in my opinion, these appeals fail, and must be dismissed with costs.

Fletcher Moulton, L.J.—It is admitted by all parties that these cases must follow the decision in *The Liverpool London and Globe Insurance Company* v. *Bennett*, and I shall therefore in my judgment deal only with that case. It is in this case unnecessary for me to recapitulate the facts. They are clearly set out in the Special Case and in the judgment of the Master of the Rolls, and I shall at once proceed to deal with the legal contentions raised on behalf of the Appellants.

In the first place it is contended that the dividends or interest arising from the classes of deposits and investments known as A, B and C, ought not to be taken into consideration in ascertaining the balance of the profits or gains of the Appellant Company. In support of this contention numerous points were raised, such as that the Company held these deposits, or investments, in some other capacity than as a trading Company, and that they were, therefore, to be treated in a like manner as private investments belonging to a person engaged in some trade wholly unconnected therewith, the interest or dividends on which would form part of his total income, but not of the profits of his trade. Indeed, it was at one time suggested that the Company, by virtue of the ample powers given by its Memorandum of Association, could not only carry on more than one business, but that it could in exercise of special powers so given to it, purchase and hold investments, and that, in respect of the holding of such investments, the Company was not carrying on any concern in the nature of trade, and was therefore outside the First Case of Rule 1 of Schedule D. I cannot agree with these contentions. Without deciding that a company cannot in any case carry on more than one business (or in other words that the totality of the business operations which it carries on must in all cases be considered as the one business of the company), I am of opinion that the facts of the present case give no support whatever to the contention.

The Company, no doubt, carries on an insurance business of a very wide and comprehensive character, but it does nothing more. The formation of reserve funds out of the accumulations of premiums or otherwise so as to meet the demands made upon it under its policies is an essential part of the business of such a company, and the dividends and interest from such investments form an integral part of its business receipts. For this reason I decline to treat separately the three classes A, B and C, into which these deposits and investments are divided in the Case. They appear to me to be all equally investments made for the purposes of the business, and in the ordinary course of carrying it on and the returns therefrom must equally be brought into account. And inasmuch as the point was raised in argument and should not be left undecided, I hold that as a matter of interpretation the words "in the nature of trade" only qualify the word "concern" that immediately precedes them. They cannot be taken to qualify all the preceding words, inasmuch as it would be absurd to speak of a "trade in the nature of trade," and, therefore, they can only be construed as qualifying the last of these words. The word "adventure" therefore stands unqualified, and I hold that the whole business of this Company comes rightly within it and that the interests and dividends from these deposits and investments must be brought into account in ascertaining the balance of its gains and profits.

It follows from the above that the Company is liable to be assessed in the manner appealed against unless there is something in the remainder of the Act which limits the application of Case I, Schedule D. This the Appellants claim to find in Case IV. of Schedule D. They say that these deposits and investments come within the term "foreign securities" which is there to be found, and that therefore they are liable only to the duties therein prescribed, that is to say, that duty is to be paid only upon such part of the dividends and interest as is brought over to this country.

It may well be that these deposits and investments come within the category of securities to be found described in Case IV. and that the Crown could claim the duties thereby imposed in respect thereof. But this will not suffice to support the contention of the Appellants. They must show that the Crown is compelled to charge them under Case IV. and not otherwise. If they could do so it would establish their case because these receipts, having been taxed under Case IV., could not be brought into account in calculating the profits to be taxed under Case I. as that would be to tax them twice over. It is here that the contention of the Appellants breaks down. In my opinion the Crown is not compellable to take this course. It may tax the whole gains and profits under Case I. if it pleases so to do, but in that case it cannot charge the dividends and interest which furnish a component part of these profits under the specific provisions of Case IV.

In my opinion the true position of the five Cases under Schedule D is as follows: They impose separate and independent

liabilities to pay income tax and so far as the circumstances of any individual bring him within the ambit of any one of them he is liable to pay the income tax imposed thereby. But they are not cumulative. This has been held by every court and is evident from the nature and structure of the Act itself. The Crown may therefore enforce any one or more of these liabilities but if it enforces more than one it must do so only to such an extent that there is no double charging in respect of any item of income or receipt. In the present case the Crown purposes to enforce the liability under which the Company lies by reason of the taxation imposed by Rule 1. In calculating the balance of gains and profits on which the charge is to be made the Crown must take into account the whole of these dividends and interest, and having done so and levied the tax on the balance so obtained, it is precluded from charging such dividends or interest or any part thereof under Case IV. This it does not seek to do.

That the liabilities under the five Cases of Schedule D are independent appears to me to flow directly from the language of the Act. None of the Cases are limited by words which refer to the ambit of any of the other Cases, and though it is clear that certain of them apply only to cases which cannot come within the ambit of certain others, there is no general provision against the Cases overlapping and undoubtedly they must do so. This being so, it is clear that whenever there is such an overlap, it must be open to the Crown to choose under which Case it will assess the tax. The only restriction that can bind its hand, is that it must not proceed under more than one in such a way as to make the liability cumulative. This amounts to saying that where a receipt comes under more than one Case, the Crown has the option under which Case it will assess the tax, subject to the restriction that it must not tax it twice over.

Upon this short ground, therefore, I am of opinion that the fact that the Crown might have assessed the tax on these dividends and interest under Case IV. does not in any way prevent its assessing the Company on the whole of its gains and profits under Case I. In doing so the whole of these dividends and interest must be brought into account, and this will prevent any assessment of the Company in respect of them under Case IV. It follows, therefore, that this appeal must be dismissed with costs.

Buckley, L.J.—The business of the Liverpool and London and Globe Insurance Company includes fire, life and annuity business, but in the United States of America, and in Canada, they confine themselves almost entirely to fire insurance business. Their fire insurance business is carried on also in this country. That class of business, therefore, is carried on not wholly without the United Kingdom, but partly within, and partly without it. The head office of the Company is at Liverpool. The case is, therefore, one in which, according to the decisions in *Colquhoun* v. *Brooks*, 14 Appeal Cases, page 493, and *San Paulo Company* v. *Carter*, 1896, Appeal Cases, page 31,

the Corporation, if assessed under the First Case of Schedule D, is assessable upon the full amount of the balance of the profits of the trade and not only upon the actual sums received in the United Kingdom. Further, so far as that is material, the business of the Company in respect of fire insurance is not to be segregated from that in respect of life and annuity business. For the purposes of income tax the three businesses are one business, and the profits of that business are to be taken as a whole. *Last* v. *London Assurance Company*, 12 Queen's Bench Division, page 389 (which upon this point was not disturbed on appeal), 14 Queen's Bench Division, page 239, 10 Appeal Cases, page 438, *Smiles* v. *Australasian Mortgage Company*, 2 Tax Cases, page 367, and *Northern Assurance Company* v. *Russell*, 2 Tax Cases, pages 551, 577.

The question upon this appeal is whether the interest and dividends arising from investments under Classes A, B and C presently stated, although not actually remitted to the United Kingdom, form part of the profits of the Company assessable under the First Case of Schedule D. The three classes are as follows—Class A are investments made in the United States of America and Canada as deposits required by law as a condition of carrying on business there. So long as the Company there carries on business they are by law unable to recover possession of the deposits, but the sums are held as a fund out of which in case of non-payment of claims by the Company the policy holders there can be paid (Case, paragraph *l*). Class B are similar deposits not required as a condition of carrying on business, but required as a condition if the Company carries on business by accepting risks beyond a certain limit. Class B cannot in the ordinary course of business be used by the Company for the purpose of meeting current losses or defraying current expenses, but constitute a trust fund for the protection of the policy holders there (Case, paragraph *n*). Class C are investments voluntarily made in the United States, Canada and Australia. They consist of accumulated profits not distributed which the Directors have invested in order to have a fund easily realisable if required. They are available like any other property owned by the Company for the purpose of carrying on the business, or any other purpose, of the Company whenever the Company think fit or necessary (Case, paragraph *o*). None of these sums received by way of interest or dividend on any of these three classes are in fact remitted to the United Kingdom (Case, paragraph *q*), but paragraph *s* of the Case states as regards all the three classes of investments as follows: "(*s*) As a general "rule the liabilities of the Company accruing in the United "States of America and the Dominion of Canada can be met "out of the profits the Company has there, that is to say, the "dividends or interest received from the moneys invested as "hereinbefore set out in Classes A, B and C and the premiums "which are paid to it. But should extraordinary circumstances "arise the Company could and would meet the claims made "upon it by drawing upon its investments." The dividends,

therefore, are presently available—and the *corpus* is available if circumstances so require—to meet the Company's liabilities.

Under Schedule D the Corporation may be assessed either under Case I. upon its profits, or under Cases IV. and V., or one of them, upon the sums arising from its investments so far as they have been received in Great Britain. It is for the Crown to say under which Case it seeks to assess the Corporation. *Scottish Mortgage Company of New Mexico* v. *McKelvie*, 2 Tax Cases, pages 165, 176, *Revell* v. *Edinburgh Life Assurance Company*, 5 Tax Cases, pages 221, 226. The subject is liable both under the one and under the other, but so, of course, as that the duty is not paid twice over. See also the first sentence of Lord Halsbury in *The Gresham Life Society* v. *Bishop*, 1902, Appeal Cases, page 291. In most cases the Crown not seeking to involve itself in an inquiry as to the balance of profits and losses of the business has proceeded under the Fourth Case to assess upon the interest and dividends received in this country. For in respect of these the duty is payable whether the business has been carried on at a loss or not. But where the Crown proceeds under the First Case it is immaterial whether the interest or dividends have been received here or not. The only question is whether they are profits on the business. Even where the Crown proceeds under the First Case it is not all fruit produced by property of the Company which is profits for this purpose. In the *Kodak Company* v. *Clark*, 1903, 1 King's Bench, page 505, and in the *Gramophone Company* v. *Stanley*, 1906, 2 King's Bench, page 856, and 1908, 2 King's Bench, page 89, the profits in question were fruit of property of the Company, but were not assessable under the First Case because the claim was made not upon the balance of profits and losses, but for these profits as being profits earned by the English Corporation which it was held they were not. They were profits assessable under the Fourth or Fifth Case, but only if received in this country. On the other hand, where the assessment is under Case I. for a balance of profits and losses, interest upon advances made in the trade is chargeable under the First Case. *Smiles* v. *Australasian Mortgage Company*, 2 Tax Cases, page 367.

The question here, in my opinion, is not whether these dividends have been brought into account in the balance sheet, for that is not equivalent to a receipt in the United Kingdom if the Crown is proceeding under the Fourth Case, *Gresham Life Society* v. *Bishop*, 1902, Appeal Cases, page 287, but whether the interest and dividends are profits of the business as fruit derived from a fund employed and risked in the business. The decision in the *Gresham Life Society* v. *Bishop* does not govern this case for the simple reason that the Crown there was proceeding under the Fourth Case, and not under the First Case. This case is similar not to the *Gresham Life Society* v. *Bishop*, but to the *Norwich Union Company* v. *Magee*, 3 Tax Cases, page 457, 73 Law Times, page 733, a decision which I think was right. The same proposition as in the last mentioned case is to be found in

the *Northern Assurance Company* v. *Russell*, 2 Tax Cases, pages 551, 577. I arrive at the conclusion that this appeal fails upon the strength of the statements in the case which I cited at length at the commencement of this Judgment. From these I learn what these funds are as regards their origin, what are the circumstances under which the investments are made, and what are the purposes to which the income presently, and the *corpus* under circumstances, are applicable. As regards Classes A and B the investments were made for the purposes of the trade, and as a condition precedent to doing business at all, or doing business beyond a certain limit. As regards C, they were made voluntarily. But one and all of them are as regards both principal and income available either generally or under circumstances to meet the liabilities of the trading Company in the course of its business. Under these circumstances their income is, I think, a sum which whether remitted to this country or not is, upon a statement of profits and losses in order to arrive at an assessable balance of profit, a sum to be taken into account. For these reasons I think that this appeal fails, and should be dismissed with costs.

The other two cases follow the decision in this case.

Mr. Finlay.—The appeal is dismissed with costs?

The Master of the Rolls.—Yes.

Mr. *Latter.*—For the purpose of avoiding a double taxation, I do not know whether the Crown would agree not to tax if we give notice of appeal within a reasonable time?

Mr. Finlay.—Certainly, we quite agree to that, my Lord.

The case was taken by the Liverpool and London and Globe Insurance Company, on appeal, to the House of Lords, and was argued on the 7th and 9th July, 1913. Mr. Danckwerts, K.C., and Mr. Latter appeared as Counsel for the Appellants, the Attorney-General (Sir Rufus Isaacs, K.C., M.P.), the Solicitor-General (Sir J. A. Simon, K.C., M.P.), and Mr. W. Finlay as Counsel for the Respondent. Judgment was given on the 31st July, 1913, in favour of the Crown, affirming the judgments of the Courts below.

JUDGMENT.

Lord Shaw of Dunfermline.—My Lords, the Appellants are an Insurance Company. An elaborate analysis was made before your Lordships of its Memorandum and Articles of Association. But substantially the only relevant matters to be extracted from these documents are that the Company does (1) fire business, and (2) life business, and (3) it invests its moneys "not immediately required."

All these things are done for the benefit of one body of shareholders. The transactions with regard to them enter the Company's accounts, and the profits arising from fire and life business,

and the interest arising from investments, all go into these accounts and are computed as making up the balance of the profits or gains of the Company's trade.

The facts thus appear to answer, in terms, Case 1 of Schedule D of the Income Tax Act. The duties under that Schedule are "to be charged in respect of any trade manufacture and adven-"ture or concern in the nature of trade not contained in any "other schedule of the Act." No other Schedule is put forward by the Surveyor. And "the duty to be charged in respect "thereof shall be computed on a sum not less than the full "amount of the balance of the profits or gains." *Prima facie*, it is difficult to figure a case so plainly covered by a Statute.

But it was argued that the investment of funds abroad placed this Company in the position of being only liable to be taxed under the Fourth Case of Schedule D, which covers "the duty "to be charged in respect of interest arising from securities" abroad, and that the duty was restricted accordingly to duty upon the amount of interest "received in Great Britain in the "current year." My lords, it is not necessary to decide whether that case applies or not. The assessment has been laid on, not in respect of it, but has been laid on in respect of the First Case in Schedule D, which is applicable to the balance of profit of trade. The argument as to the Fourth Case, therefore, drops out, because it is well settled that if a sufficient warrant be found in the Statute for taxation under alternative heads the alternative lies with the taxing authority. They have selected Case 1. It appears to me that this selection is not only justified in law, but is founded upon the soundest and most elementary principles of business.

It was argued, or it appeared to be argued, that this Company carried on separate businesses, and that the matter of investments of the Company's funds was separate from its business of fire and life insurance. My Lords, such companies in the transactions for the year may make little profit, and sometimes considerable loss, on one or other of their fire or life departments; but, nevertheless, their stability may be maintained, and often the regularity of their profit as a whole is continued by the fact that in the general balance of profits and gains there falls on general accounting principles to be paid in as an item of credit to revenue the interest upon invested funds. The same kind of book-keeping occurs, and properly occurs, whether these funds are invested at home or abroad. Neither in the one case nor in the other are the funds kept, nor can they be kept on sound book-keeping out of the sum total of the profits or gains of the concern. My Lords, many cases have been referred to in the Courts below, and were referred to in the argument of the Appellants. No case contravenes this plain and ordinary principle of accounting. The series of propositions in "The Northern "Assurance Company" and "The Scottish Union and National "Company," which were formulated as instructions to the Commissioners, cover the present case, and have never been judicially controverted as a convenient guide.

Further, my Lords, not only was the entire business one business, but in the present instance it was so in a very special sense. Of these investments abroad there were three classes. "A" was the class where the investments were actually required as a condition of the Company carrying on insurance business in the United States. This was also the case with Class "B" which applied to Canada. With regard to Class "C" that consisted of sums which the Company in its own interest, and not by reason of any legal obligation, invested in the United States, Canada and Australia. The Commissioners state, and the fact must be so accepted, that these sums "are available, like any other property owned by the Company, for any other purpose of the Company whenever the Company may think fit or necessary." There can be no doubt whatsoever that these sums, one and all, whether invested in colonies or countries abroad by reason of an obligation to comply with local laws, or as a matter of business to add to the stability of the Company, its profit-earning, or its attractiveness to foreign and colonial insurers, were in every sense of the term a business investment, that is to say, an investment in the course of business and for the purpose of business. No accountant, auditor, or actuary could exclude the interest arising from such investments from the category of the earnings and profits of the Company. If the Company itself attempted to do so, it would *quoad hoc* sterilise that portion of the account, compelling the interests from investments not only to be piled up as part of accumulations of capital, but not to be accounted as profits of the business. It would be ceasing to conduct correct accounting, and by the device of treating the interest as no part of the profits of the year, it would be, so to speak, treating itself as out of business *quoad* these investments, and as treating the interest upon them as not arising from its own trade. The whole of this argument is a mass of confusion because it is founded upon unreality, the simple fact being that these interests are part of the profits of the Company. They are treated as such quite properly in its accounts, and they are divisible as such among its shareholders.

I think the case of *Last* applies; but, as already remarked, in this particular instance the most elementary considerations go to show the unity of the concern and the combination of interest with the other elements of profit or loss in making up the sum of the year's gains. It may not be conclusive that the Company's books, kept upon these sound principles, show that the interest was so treated, namely as part of the annual profits, but, as Mr. Justice Hamilton remarks, the balance sheets are at least "of some use as showing what, as a matter of fact, is the true and proper way of dealing with these receipts."

I am of opinion that the lengthy argument presented for the Appellants is without any foundation in fact or in law, and that the Appeal should be dismissed with costs.

Earl Loreburn (*Read by Lord Parker*).—My Lords, the facts of this case have been found by the proper authority, and are not in dispute. The Globe Insurance Company have their head

office in England and do fire insurance business, which alone is here material, in the United States, Canada, and Australia. In those countries the Company have made investments which are of three classes. Class A consists of investments necessarily made to comply with the law of the country, which requires certain sums to be deposited as a condition of doing fire insurance business there. Class B is in the same position, except that these investments must be made as the condition of effecting insurances of a certain amount. Class C consists of investments made voluntarily in each country in order to put the moneys of the Company to a profitable use. These sums consist of accumulated profits made in past years, which the directors have invested in high class securities in order to have a fund easily realisable if required. In all the classes the Company receives the dividends upon the sums so invested, but in no case are they specifically remitted to England. They are received abroad by the branch or agency of the Company.

As a general rule, the liabilities of the Company accruing within the United States and Canada can be met out of the profits the Company has there, that is to say, the dividends or interest received from the investments in Classes A, B and C, and the premiums earned there; but should extraordinary circumstances arise the Company could and would meet the claims upon it by drawing upon its investments. Evidently the same thing applies in Australia, as the moneys were invested there in order to have a fund easily realisable if required.

In these circumstances the Commissioners determined that the investments in question were made in the carrying on of, and were part of the Company's business transactions, and that the interest on such investments should be included as receipts of the Company in arriving at its liability under Case 1, Schedule D.

I agree with Mr. Justice Hamilton, and with the Court of Appeal in holding that the Commissioners were right. We are not dealing with the 4th Case or the 5th Case. We are not concerned with the question whether or not the interest or dividends were received in this country, and I say nothing about decisions upon that subject, simply because I do not wish to be diverted from the matter in hand. The only question here is whether the interest and dividends before us are profits or gains of this Company's trade, manufacture, adventure, or concern in the nature of trade, within the meaning of the 1st Case. I think they are, upon the facts found by the Commissioners—whatever may have been the source from which the invested moneys were originally derived, and whether the investments were compulsory or not. They are, to use Lord Justice Buckley's apt expression, the "fruit derived from a "fund employed and risked" in a business coming within the statutory description. And the Crown cannot be compelled to proceed under Case 4 or 5 if it prefers to proceed under Case 1.

An argument was urged upon us on behalf of the Company that it should be treated in the same way as an individual, for

example, a banker, whose private fortune would be available to pay his banking debts in the last resort, though the annual income from it would not be profits of his banking adventure. An infinite number of ilustrations might be given of instances in which part of a trader's income is or is not profit of his trade, and it will be time enough to decide each case when it actually arises. I know of no formula which can discriminate in all circumstances what are and what are not profits of a trade. Probably that is the reason why the Statute does not contain a closer definition.

In my opinion this Appeal must be dismissed with costs, and I so move your Lordships.

Lord Mersey.—My Lords, the Appellant Company has its head office in England, but it carries on part of its fire insurance business in Canada and in the United States of America. In the course of carrying on this part of its business it has invested money in securities in those countries in the circumstances and for the purposes mentioned in the case stated by the Commissioners for Income Tax. The dividends from these securities have been received in Canada and in the United States respectively, and have not been remitted to this country. The question is, whether these dividends are to be taken into account when estimating the balance of profits for the purpose of an assessment to Income Tax under the First Case of Schedule D of the Act of 1842. The First Case deals with "duties to be charged in "respect of any trade, manufacture, adventure, or concern in "the nature of trade," and it provides that "the duty to be "charged in respect thereof shall be computed on a sum not "less than the full amount of the balance of the profits or "gains of such trade, manufacture, adventure or concern." It is not disputed that the Respondents do carry on a trade within the meaning of the First Case, nor is it disputed that the profits earned from the fire insurance business in Canada and the United States are to be taken into account when estimating the balance of profits for Income Tax purposes. But it is said that the dividends from the securities in question are not part of the profits earned in carrying on the business of fire insurance at all, that they are the fruits of money set apart and kept apart from the business, and neither invested nor used in the business. In support of this contention the Memorandum of Association, which defines the objects for which the Company is established, was relied on. These objects are stated to be to carry on the business of fire insurance, of life insurance, of accident insurance, of marine insurance, and other similar businesses, and (Clause 18) "to invest the moneys of the Company "not immediately required in such manner as may from time to "time be determined."

It is said that the dividends in question are derived from investments made under this Clause (18), and that such investments form no part of the "business" of the Company. In my opinion there is no foundation either in fact or in law for this contention. It is well known that in the course of carrying on

an insurance business large sums of money derived from premiums collected and from other sources accumulate in the hands of the insurers, and that one of the most important parts of the profits of the business is derived from the temporary investment of these moneys. These temporary investments are also required for the formation of the reserve fund, a fund created to attract customers and to serve as a standby in the event of sudden claims being made upon the insurers in respect of losses. It is, according to my view, impossible to say that such investments do not form part of this Company's insurance business, or that the returns flowing from them do not form part of its profits. In a commercial sense the directors of the Company owe a duty to their shareholders and to their customers to make such investments, and to receive and distribute in the ordinary course of business, whether in the form of dividends, or in payment of losses, or in the formation of reserves, the moneys collected from them. I make no distinction between the three classes of investments (A, B, and C).

I agree with the judgments in the Courts below, and I think this Appeal should be dismissed.

Lord Parker of Waddington: My Lords, the Appellant Company, whose head office is at Liverpool, carries on the business of fire and life assurance and also the business of granting annuities. Its operations are not confined to the United Kingdom, though in the United States, Canada, and Australia it transacts fire insurance business only. It is admitted, and indeed could hardly be disputed, that all these businesses are trades, or concerns in the nature of trade, within the meaning of Case I. of Schedule D of the Income Tax Act, 1842, and that the Crown is entitled to income tax on the annual profits and gains arising therefrom, whether such profits and gains are made within the United Kingdom or abroad. The only question arising on this Appeal is whether, for the purpose of computing such profits and gains, the interest and dividends on certain investments of the Appellant Company in the United States, Canada, and Australia ought to be taken into account. This question ought, in my opinion, to be determined on ordinary business principles, having regard to the circumstances under which, and the purposes for which, the investments were made and are held by the Appellant Company.

The case stated by the Special Commissioners for the opinion of the Court divides these investments into three classes. Those contained in Class A are investments in the United States and Canada of moneys required by law to be deposited as a condition precedent to carrying on in those countries the business of fire insurance. They, in fact, constitute a security to the policy holders in case the Appellant Company fail to satisfy their claims. The investments contained in Class B are investments in the United States and Canada of moneys required by law to be deposited as a condition precedent to undertaking in those countries fire risks beyond a certain limit. They also constitute a security to the policy holders. The investments contained in Class C are

investments voluntarily made by the Appellant Company in the United States, Canada, and Australia, out of accumulated profits in order to have a fund easily realisable if required. The interest and dividends on the investments comprised in all three classes, though received by the Appellant Company, are not actually transmitted to this country so as to be taxable under Case IV. of Schedule D. If they fall to be taxed at all it can only be under Case I., by being brought into account in annexing or computing the profits or gains to be taxed under that Case.

With regard to the investments contained in Classes A and B, it is, I think, beyond controversy that they were made for the purpose of, and are at risk in the Company's fire assurance business, and it appears to me quite clear that under these circumstances the interest and dividends arising therefrom ought, on ordinary business principles, to be brought into account in computing the profits and gains of such business.

With regard to the investments contained in Class C, they have been made in order to have a fund easily realisable if required, that is (as I read it) if required for the purposes of the businesses of the Appellant Company. The income and dividends of these investments are, in fact, treated as receipts on account of these businesses, and dealt with accordingly, and the capital thereof is, and is intended to be, at any time available for the purposes of these businesses. The investments, in fact, constitute a reserve fund, and it is, I think, essential in all such businesses as those carried on by the Appellant Company that similar reserve funds of this nature should be accumulated. In my opinion it is impossible to say that such reserve funds are not assets employed in the business for the purposes of which they have been accumulated. I understood the Appellant Company's Counsel to rely on Clause 3 (18) of the Memorandum of Association of the Appellant Company. In my opinion this clause is not in favour of, but against, the Appellant Company's contention. It provides that moneys of the Company "not immediately required" may be invested in such manner as might from time to time be determined. Obviously moneys invested under this clause are not withdrawn from the businesses of the Company, but are retained for the purposes of such businesses, though temporarily invested, so as not to lie idle. I conclude that in the case of the investments comprised in Class C, as well as those comprised in Classes A and B, the interest and dividends therefore ought, according to ordinary business principles, to be brought into account for the purposes of ascertaining the profits and gains of the Appellant Company under Case 1.

On these grounds I think that the Appeal fails and should be dismissed with costs.

Questions put.

That the Order appealed from be reversed

The not contents have it.

That this Appeal be dismissed with costs.

The contents have it.