

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

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

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

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

LORD PEARSON—I also agree.

The Court pronounced this interlocutor—

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

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

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

Thursday, March 11.

## SECOND DIVISION.

(SINGLE BILLS.)

### DINGWALL v. FISHER.

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

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

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

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

of an issue. On Monday, 8th March, the defender lodged a notice of motion to vary the issue. The case appeared in the Single Bills on Wednesday, 10th March, but was continued till Thursday, 11th March, when the pursuer objected to the competency of the motion to vary the issue.

Argued for the pursuer—The motion to vary the issue was incompetent. The Court must be moved to vary the issue within six days of the interlocutor approving thereof. It was not enough that the notice of the motion had been lodged within the six days—*Craig v. Jex-Blake*, March 16, 1871, 9 Macph. 715, 8 S.L.R. 428. Though the interlocutor in this case was pronounced on 2nd March, the case did not appear in the Single Bills until the 10th March, and the motion was therefore too late.

Argued for the defender—*Esto* that the six days expired on Sunday, 7th March, the notice of motion which was lodged on Monday, 8th March, was lodged in time. It was immaterial that the Court had not been moved until after the expiration of the six days.

LORD JUSTICE-CLERK—This objection must be repelled. The last day on which notice of the motion to vary the issue could be given was Monday the 8th. The notice was lodged in process on Monday, and that, I think, is sufficient. When it is lodged, the putting of it out in Single Bills is a matter of procedure which is attended to by the Court, and, according to the usual practice a notice which is lodged on Monday does not come out in Single Bills till Wednesday.

LORD LOW and LORD ARDWALL concurred.

LORD DUNDAS was absent.

The Court repelled the objection.

Counsel for the Pursuer—A. J. P. Menzies.  
Agent—James Wilkie, S.S.C.

Counsel for the Defender—Jameson.  
Agent—William C. Morris, Solicitor.

Thursday March 11.

## SECOND DIVISION.

[Sheriff Court at Aberdeen.]

### CRAIG v. ABERDEEN HARBOUR COMMISSIONERS AND OTHERS.

*Harbour—Ship—Accident—Responsibility of Harbour Authority—Berthing and Unberthing Vessels—Reparation—Culpa.*

While a steam trawler the "Nettle" was being hauled out from its berth at the quay under the directions of the harbour-master by means of a wire rope attached to its stem from the winch of another vessel, the "Edinburgh," so as simultaneously to pull the former out and the latter into her place, A, who was working on board

the "Nettle," was caught by the rope and thrown into the water.

In an action by A against the Harbour Commissioners, and the owners of the "Edinburgh," held that the Harbour Commissioners were alone to blame for the accident, in respect (1) that it was due to the fault of the harbour-master in giving a wrong order, and (2) that no fault on the part of those in charge of the "Edinburgh" had been established.

#### *Expenses—Successful and Unsuccessful Defenders—Liability inter se.*

In an action of damages for personal injury brought against two defenders, each maintained that the injury was due to the fault of the other.

Held that the unsuccessful defender was liable in expenses to the successful defender as well as to the pursuer.

Alexander Craig, fish porter, Aberdeen, brought an action against (1) the Aberdeen Harbour Commissioners, and (2) the Caledonian Steam Trawling Company, Limited, Aberdeen, registered owners of the steam trawler "Edinburgh," in which he craved the Court to ordain the defenders jointly and severally, or severally, to pay him the sum of £200 damages for personal injury.

The pursuer averred—"(Cond. 4) On the morning of 3rd January 1908 the pursuer was engaged by the mate or other officer of the steam trawler 'Nettle' to assist in discharging the catch of the 'Nettle,' and afterwards to assist in cleaning up and preparing the 'Nettle' for sea. . . . In doing so it was necessary for him to draw water from the harbour by means of a bucket attached to a rope. The stem of the 'Nettle' was then close up against the Fish Market Wharf. The vessel was lying at an angle to the wharf with another trawl boat on each side of it, too near to permit of another trawl boat to lie between the 'Nettle' and the boat on either side. (Cond. 5) . . . The harbour-master (Captain James Crombie) was unable to give the steam trawler 'Edinburgh,' belonging to the defenders the Caledonian Steam Trawling Company, Limited, a berth on its arrival in the harbour on the afternoon of 2nd January. The 'Edinburgh' accordingly lay off the wharf until the morning of 3rd January until about 10 o'clock, when the harbour-master or his assistant (Mr Wyness), both of whom were then on the wharf close to the 'Nettle,' and in full view of all that was taking place on the deck of the 'Nettle,' directed the officer in charge of the 'Edinburgh' to approach the wharf. After the 'Edinburgh' had approached so far towards the wharf as to be alongside of the 'Nettle's' stern the harbour-master or his assistant directed one of the crew on board the 'Edinburgh' to attach the wire rope from the 'Edinburgh's' winch to the stem of the 'Nettle,' his purpose apparently being by applying steam to the 'Edinburgh's' winch to pull the 'Nettle' out from the wharf and pull the 'Edinburgh' into its place, and so provide the 'Edinburgh' with the berth occupied by the