Friday, July 21.

FIRST DIVISION.

EMPIRE GUARANTEE AND INSURANCE CORPORATION, LIMITED, PETITIONERS.

Insurance—Life Assurance—Transfer of Business—Petition to Sanction Transfer—Competency—Assurance Companies Act 1909 (9 *Edw. VII, c.* 49), *sec.* 13.

The Assurance Companies Act 1909, sec. 13, enacts—"Where it is intended to amalgamate two or more assurance companies, or to transfer the assurance business of any class from one assurance company to another company, the directors of any one or more of such companies may apply to the Court by petition to sanction the proposed arrangement."

An insurance company which had power under its memorandum and articles of association to sell or dispose of its business or any part thereof in consideration of payment in cash or in shares or securities of any other company, or for such other consideration as the directors might deem proper, presented a petition for sanction of a proposal to transfer its life assurance business (which had not been a profitable one) to another company. Under the proposed arrangement the policies issued by the petitioners were to be cancelled, the policy holders receiving in lieu thereof policies of the same value in the new company. Though non-participating policies were to be issued for participating policies, the transaction was an advantageous one for the policy holders, who had a better chance of obtaining profits under the new policies than under the old, and who could, if they desired it, obtain participating policies in the new company on payment of a higher premium. All the policy holders were in favour of the proposed transfer.

Held (1) that the fact that the petition was presented by the company and not by the directors (as provided for in the Act) did not render the petition incompetent, and (2) (*diss.* Lord Johnston) that the Court had power under the Act to sanction the proposed arrangement, and application *granted.*

In re Sovereign Life Assurance Company, (1889) L.R., 42 Ch. Div. 540, *distinguished.*

The Assurance Companies Act 1909 (9 Edw. VII, c. 49), sec. 13, is quoted *supra* in rubric.

The articles of association of the Empire Guarantee and Insurance Corporation, Limited, provided, *inter alia*, as follows:—"*Powers and Duties of Directors*—109. The whole affairs and business of the company . . . shall be managed by the directors, who, in addition to the powers expressly conferred on them by these presents or otherwise, may exercise all such powers of the company as are not specially required to be exercised by the company in general meeting, subject, nevertheless, to such regulations as are herein contained, and as may be prescribed by the company in general meeting, and to the provisions of the statutes; . . . and the generality of the powers hereby conferred shall not be limited by any subsequent clause or proviso conferring any express power. . . . 111. The directors shall have power from time to time, as they think proper in the interests of the company, to sell any portion or the whole of the company's properties, and to accept payment therefor in shares, . . . or in debentures, or debenture stock or bonds of another company, or in cash, or partly in one and partly in another of these modes."

On January 28, 1911, the Empire Guarantee and Insurance Corporation, Limited, with the consent of the Royal Exchange Assurance Corporation, presented a petition under sections 13 and 29 of the Assurance Companies Act 1909 (9 Edw. VII, c. 49) for sanction of a proposed transfer of its life assurance business to the said corporation.

The *circumstances* in which the petition was presented and the *nature of the proposed arrangement* appear from the report by the Hon. J. M. Balfour, W.S., to whom on 24th February 1911 the Court remitted the application.

The reporter stated—"The Empire Corporation was registered on 31st December 1900 to carry on a life, fire, marine, accident, burglary, etc., insurance business. It had an authorised capital of £100,000 in shares of £5 each, thereafter increased to £500,000 in shares of £1 each, of which £200,000 has been subscribed, and £93,198 called up, 41,775 shares being fully paid and the remaining 158,225 shares having 6/6 per share called up. The amount standing at debit of profit and loss at the date of the last balance sheet (30th June 1910) is £77,766.

"The Empire Corporation having made the necessary deposit with the Accountant in Chancery effected a certain amount of life assurance business, including one annuity contract. This branch of the company's business never having attained such dimensions as to make it assuredly profitable, it appeared to the directors that it would be in the interest both of the shareholders and the life policy holders if it were transferred to another company. The directors on 14th October 1910 entered into an agreement with the Royal Exchange Assurance Corporation, which is here referred to *brevitatis causa* for its terms.

"The Royal Exchange Assurance Corporation was incorporated by royal charter in 1720. At 31st December 1909 its life assurance and annuity funds amounted to the sum of £3,849,293. For each of the eleven years to 1904 it paid a dividend of 14 per cent., and in that year the capital underwent some rearrangement, since when it has paid a dividend of 9 per cent. free of income tax.

"An independent actuarial report on the proposed transfer has been obtained from Mr R. Gordon Smith, F.I.A., F.A.A., 35 St

Vincent Place, Glasgow, who states in the conclusion of his report that in his opinion (1) the proposed money consideration of £5600 is reasonable and moderate, (2) that the security to be afforded by the Royal Exchange for the due fulfilment of the life assurance and annuity contracts of the corporation is undoubted, and (3) that the future bonus prospects of the participating policy holders of the corporation would be greatly improved by the proposed transfer of the policies to the Royal Exchange.

"The requirements of section 13 (3) of the Assurance Companies Act 1909 appear to have been complied with. Notice of the intention to make the application has been duly given in the London and Edinburgh Gazettes of 9th December 1910, and such notice appears to be in order, except that the company is therein stated to be 'incorporated under the Companies Acts 1862 to 1900,' whereas the company is incorporated under the Companies Acts 1862 to 1898. A similar error as your Lordships will observe occurs on the first page of the petition. A statement of the nature of the proposed transfer, together with an abstract containing the material facts embodied in the agreement, and a copy of a report by an independent actuary, have been transmitted to the life policy holders of the Empire Guarantee and Insurance Corporation, Limited, as evidenced by certificate by J. H. Martindale. Such abstract of the agreement appears to give a fair statement of what is proposed, except that the statement in such abstract 'by clause 8 it is provided that a commission of £200 shall be paid by the Exchange Company for the introduction of the business' might be susceptible of the interpretation that such payment was to be made to the Empire Company, whereas the payment is to be made to Mr David Alexander St Clair Swanson. Your Lordships by your interlocutor of 31st January 1911 have dispensed with the necessity of transmitting such documents to the policy holders of the Royal Exchange Assurance Corporation. The petition has been duly intimated on the walls and in the minute book in common form and advertised as required by your Lordships' said interlocutor of 31st January 1911. The induciæ have expired and no answers have been lodged. Certificates have been produced to the reporter showing that the agreement of 14th October 1910 was open for the inspection of the policy holders and shareholders at the offices of both companies for a period of fifteen days after publication of the notice in the Gazettes.

"Your reporter, however, has grave doubts as to (1) whether the transaction set forth in the agreement is a transfer of the nature which falls to be submitted to the Court for its sanction, in terms of section 13 of the Assurance Companies Act 1909, and (2) if it is, whether the procedure adopted to carry out the transaction has been regular.

"Section 13 (1) of the Assurance Companies Act 1909 is as follows—'. . . [*Quoted supra in rubric.*] . . .'

"In the present case the existing policies are not being assumed or guaranteed by the Royal Exchange Assurance Corporation, but fresh contracts are to be entered into with the policy holders. It is proposed to cancel all the presently existing policies of the Empire Corporation and issue in lieu thereof non-profit policies of the Royal Exchange Corporation at the same premiums as are presently paid upon profit-participating policies of the Empire Corporation, the policy holders to have the option of obtaining profit-sharing policies in the Royal Exchange Assurance Corporation upon paying the rates usual in that company for such policies. Accordingly it is assumed that it will only be possible for the policy holders to obtain a profit-sharing policy upon paying an additional premium.

"Clause 2 of the agreement which deals with this is in the following terms:—'In consideration of such payment (*a*) All life assurance policies or contracts of the Empire Company current on the date of these presents (a list whereof is contained in Schedule A hereto) shall be cancelled and in lieu thereof the Exchange Company shall issue to each of the several policy holders a new non-profit policy or contract for a sum equal to the amount originally assured plus all bonuses (if any) declared prior to the date of these presents, subject to the payment of the like premiums and generally on the like terms as are reserved and contained in the cancelled policy. (*b*) The Exchange Company shall issue to each of the several holders of profit-participating policies of the Empire Company who may desire to take the same, and in substitution for the non-profit policy issuable under the preceding sub-section a new profit-participating policy or contract for a sum equal to the amount originally assured plus all bonuses (if any) declared prior to the date of these presents, and generally on the like terms as are contained in the cancelled policy, except that the policy holder shall as from the date of issue of the new policy, in lieu of the premiums reserved by the cancelled policy, pay to the Exchange Company premiums at the profit rate fixed by the Exchange Company's tables for the original age at which the life was insured by the Empire Company, and so that in consideration of the payment of such last-mentioned premiums the policy holder shall be entitled as from the date of issue of the new policy to share in the profits of the Exchange Company on the same terms and conditions as are contained in the current profit-participating policies of the Exchange Company. (*c*) A life annuity contract for One hundred and fifty-two pounds, five shillings, issued by the Empire Company, numbered , shall be cancelled, and in lieu thereof the Exchange shall issue and pay a life annuity contract for the like amount and on the like terms as are contained in the cancelled contract.'

"Your Lordships will observe that while the new policies are to be issued generally on the like terms contained in the cancelled policy, it is not stated whether the new

policies are to be dated back to the respective dates of the cancelled policies so as to give the holders the surrender values which would naturally attach to policies of some years' standing, and it appears to your reporter that this point is one of such importance that it should have been specially provided for in the agreement, or that the facts as to the surrender rights under the new policies should have been clearly communicated to the policy holders. [At the hearing counsel for the petitioners stated that the surrender value would be calculated from the date of the original policies.]

"It appears to your reporter that the arrangement embodied in the agreement cannot be considered as a transfer of the assurance business of a class from one company to the other company, and that there is nothing in the section of the Act above quoted which would compel a policy holder to release his policy and accept that of another company. It may be that such an arrangement as is set forth in the agreement might be competent under the 120th section of the Companies (Consolidation) Act 1908, but it does not appear to your reporter as authorised by the Assurance Companies Act 1909, under which this petition is presented. Your reporter cannot find any reported case in the Scottish Courts, but would respectfully refer your Lordships to the case of the Sovereign Life Assurance Company, 42 C.D. 540, which was a case under the almost similar section of the Life Assurance Companies Act 1870, and where Mr Justice Chitty in delivering his judgment said—'There are other objections which it is not necessary for me to enter into fully here, but they are objections which are of a serious character, namely, to the nature of the proposed transfer, that it will not be a transfer of the existing business—that is, of the existing policies to the Sun Office, so that the Sun Office will be answerable for the amounts purported to be secured by the policies to the policy holders, but the Sun Office will only become answerable for a reduced amount, the premiums of the policy holders being still continued at the original rates. The Sun Office is making what appears to be a bargain with the policy holders, which under the circumstances will no doubt be advantageous. I am not questioning that, and my judgment proceeds upon the footing and upon the assumption that what is proposed to be done would be beneficial. I am only considering whether the Act of Parliament would allow it, and now I find that the policy holders would not find under this scheme, if it were eventually sanctioned, that their policies were going to be continued on foot as existing policies, but they would find that their policies were reduced in amount.'

"Reference is also respectfully made to Palmer's Company Precedents, 10th edition, part I, pages 1224 and 1225, and the case of the *Emperor Life Assurance Society* there referred to; also Lindley on Companies, 6th ed., vol. 2, page 1210.

"Should your Lordships be of opinion that the arrangement proposed can be sanctioned under the Assurance Companies Act your reporter begs to draw your attention to the following points:—

"It would appear from the Sovereign Life Assurance Company case before referred to that section 13 of the Assurance Companies Act 1909 has not the effect of conferring upon all insurance companies a power to amalgamate, but that the Act is restrictive and not enabling, and that unless the constitution of the company authorises the amalgamation or transfer the sanction of the Court cannot be obtained.

"The memorandum of association of the petitioning company provides as follows:—'To sell or dispose of the business and property of the company or any part thereof, in consideration of payments in cash or in shares, stock debentures or securities of any other company, or partly in any of such modes of payment or for such other consideration as the directors may deem proper.' And section 153 of the articles of association of the company is in the following terms:—'The directors may at any time amalgamate with any other company doing a like business upon such terms as may be approved of by an extraordinary resolution of the company, or the directors may acquire the business of, or an interest in, other companies or copartnerships doing a like business in this country or elsewhere as they may think proper, but that only without the sanction of a general meeting to the extent in any one case not exceeding one-fourth of the issued capital of the company. The directors may further with the approval of an extraordinary resolution of the shareholders sell the whole business and assets of the company, taking in payment therefor either cash or shares or debentures or debenture stock, or bonds of another company, or partly cash and partly shares and debentures or debenture stock or bonds, or they may in their own discretion sell any property held by the company, taking payment therefor in any of the ways hereinbefore stated.'

"The effect of these provisions is in the opinion of your reporter sufficient to authorise the directors to sell the whole business and assets with the consent of an extraordinary resolution of the company, or to sell any property held by the company without such consent. It appears to your reporter, however, doubtful whether the transaction embodied in the agreement could be held to be a sale of 'any property held by the company,' and he respectfully suggests that the proposed arrangement is really one which should only have been entered into after receiving the approval of an extraordinary resolution of the shareholders.

"Your reporter has examined the minute book of the petitioning company. The resolutions referring to the transaction set forth in the minute book are somewhat meagre, and although the draft agreement was approved no resolution was minuted

to the effect that it should be entered into and executed. On the 21st October 1910, however, the signing and sealing was confirmed, and your reporter respectfully suggests that this is probably sufficient.

"The terms of section 13 of the Assurance Companies Act 1909 before quoted appear to your reporter to require that the petition should be presented by the directors. Although there have been a considerable number of cases under the Act, only a few have been reported, but apparently in the following cases the petition was made by the directors:—*Argus Life Assurance Company*, 39 C.D., p. 571; *London and Southwark Insurance Company*, 42 L.T. 247. On the other hand should your Lordships be of opinion that the petition has been properly presented in name of the company, your reporter would respectfully submit that a meeting of the company should have been held to authorise the presentation of the petition in name of the company, following your Lordships' judgment in the case of the *Dailuaine-Talisker Distilleries, Limited* v. *Mackenzie and Others*, 1910 Session Cases, 913."

Argued for petitioners—The doubts entertained by the reporter as to whether (1) the Court could sanction the proposed transfer, and (2) the proper procedure had been followed, were not well founded. (1) The company had very wide powers under their memorandum, including, *inter alia*, power to sell, and that included power to transfer. *Esto* that no money would pass, the company got "other considerations" in the form of (*a*) relief from existing obligations, and (*b*) the setting free of their statutory life assurance reserve fund. Two conditions only required to be satisfied, viz., those prescribed by secs. 13 and 30 (*d*) of the Insurance Companies Act 1909 (9 Edw. VII, c. 49), and these had been complied with. The case of the *Sovereign Life Assurance Company* (1889), L.R., 42 Ch. D. 540, cited by the reporter, was distinguishable, for there the policy holders objected to the proposed transfer, whereas here both the policy holders and the shareholders were willing to accept the new policies, the surrender value of which would, of course, be calculated as from the date of the original policies. (2) The fact that the petition was presented by the company and not by the directors was not a valid objection, for section 13 of the Act of 1909 (*cit. sup.*) plainly meant that the petition was to be presented with the directors' authority and not necessarily by the directors themselves. Nor was it a valid objection that no meeting of the company to authorise the presentation of the petition had been called, for the directors had power under the articles of association (*vide* article 109) to enter into the transaction. Further, article 111 conferred power on the directors, should they think fit, to sell any portion or the whole of the company's properties. Article 153, quoted by the reporter, was inapplicable, for it referred to an amalgamation and not to a transfer.

At advising—

LORD MACKENZIE—This is a petition presented by the Empire Guarantee and Insurance Corporation (Limited) for the sanction of the proposed transfer of their life business. The petition sets out that the corporation was formed for conducting insurance business in practically all its branches. It appears that there is only one annuity contract which has been entered into, but there are 184 life policies, and the sums assured come to over £41,000.

It sufficiently appears from the proceedings that that life assurance business has not been a profitable one. The Empire Guarantee and Insurance Corporation, through its directors, have entered into an agreement with the Royal Exchange Assurance for the transfer of their life policies and the life annuity contract, subject to the sanction of the Court being obtained. This petition is presented in order to obtain the sanction of the Court to the agreement.

The petition is presented under section 13 of the Assurance Companies Act of 1909, which provides that where it is intended to amalgamate or transfer the assurance business of any class from one insurance company to another company, the directors may apply to the Court by petition; and then the Court, after hearing the directors and other persons who may be considered to be entitled to be heard, may sanction the arrangement if it is satisfied that no sufficient objection to the arrangement has been established.

The only other section that I need refer to is section 30 (*d*), which gives the life policy holders a right to object to what is proposed to be done. That section enacts that in any case if it appears to the Court that the life policy holders, representing one-tenth or more of the total amount assured in the company, dissent from the proposed amalgamation or transfer, then the Court shall not sanction the proposed amalgamation or transfer. That section reverts to the policy of the Insurance Companies Act of 1870. There was an alteration in that policy in the Act of 1872, which provides by section 7 that where there is to be such a transfer then no policy holder is to be held to have abandoned his claim against the company with whom he made the contract, unless such abandonment and acceptance has been signified by some writing signed by the policy holder or his agent. What is termed by the Act novation I should have called delegation, as it is the substitution of another debtor. That section, however, has been repealed, and instead of that safeguard of the policy holder, we have the safeguard provided by section 30 of the Act of 1909.

The full report which we have from Mr J. M. Balfour in this case makes it quite clear that there had been loss on the workings of this corporation during the ten years of its existence. The amount of debit at profit and loss as at the date of the last balance at 30th June 1910 is £77,766. I mention that because I apprehend that

what has to be safeguarded is really the position of the policy holders. That is the position of the corporation with which their contracts at present are made.

On the other hand, the position of the Royal Exchange Assurance, as set out in the report, seems to be one of great strength. I do not need to go into the figures, but they show that a dividend of 14 per cent. has been paid for each of the eleven years prior to 1904, and that since then, under a re-arrangement which was made in that year, 9 per cent. has been paid. The proposal is that the contracts for the future should be, not with the Empire Guarantee Corporation, but with the Royal Exchange Assurance.

The report sets out that all the formalities required by the Act have been complied with, and a report has been obtained from an actuary in regard to the proposed transfer. One term of the agreement is that the petitioners are to pay the Royal Exchange Assurance a sum of £5600. This sum the actuary considers reasonable and moderate. The actuary's report sets out that the security to be afforded by the Royal Exchange Assurance for the due fulfilment of the life assurance and annuity contracts is undoubted, and that the future bonus prospects of the participating policy holders of the corporation will be greatly improved by the proposed transfer.

The reporter has, however, quite properly drawn your Lordships' attention to certain matters which it is necessary to advert to. The first of these is that the petition is presented in name of the corporation, whereas section 13 of the Act of 1909 says that it is to be presented by the directors. I think that it would be taking too strict a view to refuse to entertain the petition upon that ground.

In the next place, the reporter suggests for consideration whether this is not one of the proceedings in which a meeting of the corporation should have been held, as provided by section 120 of the Companies Consolidation Act 1908. It does not appear to me that that section is appropriate to the matter in hand here. It deals with a compromise or arrangement between a company and its creditors or a company and its members, such as your Lordships had to consider the other day in the case of the *Shandon Hydropathic Company*. If three-fourths of those present at a meeting of the company vote in favour of the proposal, then the Court may sanction it. Under the Act we are dealing with here, if one-tenth of the policy holders dissent, then the Court shall not sanction it.

The next point is that article 153 of the articles of association of the petitioning company seems to contemplate the calling of a meeting of the corporation. The petitioners' counsel, however, founded on article 109. That and article 111 seem to me sufficient ground for holding that the directors have power to sell.

That, I think, disposes of another difficulty which the reporter suggests. It is raised by the observation of Chitty (J.) in the case of the *Sovereign Life Assurance Company*, 42 C.D. 540. What Chitty (J.) said in that case was that section 14 of the Act of 1870 conferred no power on an assurance company to transfer its business to another company, and that the power had to be sought elsewhere. It was then held that the company in question had no such power. In the next place, the view taken in that case was that more than one-tenth of the policyholders did dissent. There was, further, a proposal that the policies were to be limited in amount, and a serious question was raised as to whether the liability of the shareholders was limited or not. That case was quite different from the present.

The reporter points out that policy holders who have profit-sharing policies under the Empire Guarantee Corporation are to have non-profit-sharing policies in the Royal Exchange. From the financial position of the Empire Guarantee Corporation there seems little prospect of the policy holders getting any profits from that corporation, and therefore little prospect of suffering actual loss from the transfer. True, they will get a non-profit-sharing policy instead of a profit-sharing policy, but by the transfer they do not have their prospects of receiving profits reduced. They are really not asked to give up anything substantial. If they desire it and pay the premium to the Royal Exchange Assurance chargeable upon profit-sharing policies, they will get a profit-sharing instead of a non-profit-sharing policy.

The last point is in regard to the surrender value. I think that branch (*a*) of clause 2 of the agreement deals with that sufficiently clearly, because it provides that the contracts with the Royal Exchange are to be "subject to the payment of the like premium and generally on the like terms as are reserved and contained in the cancelled policy."

Upon the whole matter I think that it is clear that in the language of section 13 no sufficient objection to the arrangement has been established. No one of the policy holders dissents or objects, and the difficulties are raised on the report. It is quite proper that these points should have been brought before the Court, but, for the reasons I have explained, I think that the prayer of the petition should be granted.

LORD JOHNSTON—In this application by the Empire Guarantee and Insurance Corporation, Limited, for sanction of a proposed transfer of its life business to the Royal Exchange Assurance Corporation we have had the advantage of a very careful and able report from Mr J. M. Balfour, W.S., who has pointed out several serious and some, as I think, fatal objections to the Court granting the sanction craved. I shall deal with these *seriatim*.

The application is made under the Assurance Companies Act 1909, section 13, and the first objection is the technical one that the application proceeds in name of the company, and not, as the section provides, in name of the directors. I have difficulty in giving a reason for the statute, section

13 (1) and (2), saying, as did its predecessor, the Act of 1870, so expressly, that when such transfer is intended, "the directors of any one or more of such companies may apply to the Court for sanction;" and again, "The Court, after hearing the directors and other persons whom it considers entitled to be heard upon the petition," &c. But I cannot think that the statute intends any real discrimination between the company and its directors. What a company does, not *inter se* but in relation to the outside business world, it does through its directors as representing it, even when their authority is derived, not from their ordinary powers under the company's constitution or articles, but from resolutions of the company. I think, therefore, that when the directors apply for sanction in name of the company, the application is in reality theirs in the sense of the statute. But it would, I think, be proper, looking to the very precise terms of the Act, *pro forma* to make such applications run in name of the directors for the time being, or of the company and the directors, and I think that with leave of the Court the instance here should be altered accordingly. But I would not hold the objection such as to justify throwing out the petition.

There is, however, a much more serious objection in Mr Balfour's suggestion that the transfer proposed is not such as the Act contemplates. The statute, section 13, is not empowering, it assumes the power and imposes certain conditions, or rather certain protective formalities upon its exercise. The objection with which I am dealing wears two aspects. Logically the first point for consideration is the question of power. Though Mr Balfour has touched on this point, he has not indicated quite such a distinct opinion on it as on the second point, which I shall afterwards deal with.

But referring to the question of power to transfer its life assurance business, how does the Empire Corporation stand? By its memorandum of association the company may sell or dispose of its business or any part thereof in consideration of payment in cash or in securities, "or for such other consideration as the directors may deem proper." The transfer proposed is certainly intended as a transfer of the company's life assurance business, and it will be recollected that the Act, section 3, makes provision for separation of assurance business into classes and for segregation of funds. But the consideration for the proposed transfer is not the receipt of anything, either cash or securities. The consideration is really the relief of obligations, and for that consideration not only the business is to be transferred but a substantial payment in cash made. Still I think that the relief of obligations is a consideration in the sense of the article of memorandum to which I have referred, and I should not sustain objection to the transfer on that ground alone. But when I come to consider the articles of the company I think that the objection takes a more serious shape. It is by the current articles that the powers of the directors are conferred and limited. It is true by article 109 they may exercise "all such powers of the company as are not specially required to be exercised by the company in general meeting." But then this is subject "to such regulations as are herein contained and as may be prescribed by the company in general meeting, and to the provisions of the statutes." The only subsequent articles bearing on the directors' powers are 111 and 153. Section 111 confers on the directors power "to sell any portion or the whole of the company's properties," and to accept payment therefor in shares or debentures of another company or in cash. But neither do I think that the company's life assurance business is property, nor the proposed transference a sale for consideration in the sense of this article. Section 153, on the other hand, authorises the directors to amalgamate the company with another doing life business, but only with the approval of an extraordinary resolution of the company. They may also acquire the business of or an interest in another company, but, except to a limited extent, only with the sanction of a general meeting. Again, they may sell the whole business and assets, but only with the sanction of an extraordinary resolution. And lastly, they may in their own discretion sell any of the property of the company. Not one of these powers covers the transaction proposed. And that which comes nearest requires the sanction of an extraordinary resolution of the company. I come therefore to the conclusion that the directors have no power under the articles to complete this transaction at their own hand, and I do not find that they have received from the company any express or special authority, or that the company has itself acted in the matter, for I do not accept Mr Balfour's suggestion that there is a sufficient equivalent. The company, if they are to enter into such a transaction as this, must either alter its articles of association as was done *in re Argus Life Assurance Company* (L.R., 39 Ch. Div. 571), or it must itself do in general meeting what its memorandum contemplates as competent to it. The objection in this aspect of it is therefore, in my opinion, fatal to the present application.

But in its other aspect, that is, when regarded with reference to the Act, the objection is, I think, equally fatal. I regret that it should be so, because the transaction proposed is, I am persuaded, eminently advantageous to all concerned, and especially to the policy holders. I feel that we are *in pari casu* with Chitty, J., in the *Sovereign Life Assurance Company* case (L.R., 42 Ch. Div. 540), who, if he could have ignored statute and contract, would, I have no doubt, have sanctioned the proposal brought before him as a business proposition eminently advantageous to the parties concerned. But that learned Judge gave to statute and contract their natural, though possibly in the circum-

stances, but in the circumstances only, unfortunate effect.

The question is, Is the proposal a transfer of the life assurance business of the company to another company in the sense of the Act? I think that the question must be answered in the negative. Shortly, what is proposed is this. The policies of the Empire Corporation shall be cancelled. New policies of the Royal shall be issued in lieu of them. That in itself is not, I think, a transfer of insurance business in the sense of the Act. In speaking of a transfer of business I think that the statute contemplates delegation, not novation, of the contract of insurance that the new company should take the place of the old one in the existing contract. But it is said that the cancellation of the one policy and the issue of another is really the same thing as the statute contemplates. Possibly this might be so in fact though not in law, if the provision be yet made, as pointed out by Mr Balfour, which is necessary for antedating the new policies, to give the holders the benefit of the age of their old policies in the matter of surrender, and I should also add, if the policies involved were all non-participating policies. But the objection goes deeper. Policies are of two kinds, non-participating and participating. It is true there were no profits of the Empire Corporation in which to participate, and therefore no bonus declared. But there was the real distinction between the two classes of policy, viz., that the holders of the one class paid a higher scale of premium, and were legally entitled to participate in any profits there might be. Now the further conditions of transfer were that the policy holders of the Empire Corporation, whether non-participating or participating, should accept the same class of policy from the Royal, and that non-participating, for the sums insured to them by the Empire, plus all bonuses (if any) declared, while continuing to pay their old rates of premium. This means that on substituted policies with equal advantages the two classes of holders would pay different rates of premium—for the distinction ostensibly introduced by the words "plus all bonuses (if any) declared prior to the date of these presents" are on paper merely, and, in the circumstances of there having been no profits made, elusory. So then the participating policy holder is to have no prospect of sharing in profit, but he is to continue to pay his higher rate of premium. If he wants to participate in the profits of the company to whom his obligation is to be transferred, he must, by a further provision, pay an enhanced premium beyond what he is by his contract paying. That is not, in my opinion, a transfer of business in the sense of the statute. I believe that the transaction proposed would be advantageous to all the policy holders. But the Court has no business to judge of what would be advantageous merely to them in the circumstances. What we have to consider is whether the transaction proposed is a transfer in the sense of the statute, which by virtue of our statutory sanction can be imposed on the policy holders. In regarding that question I cannot throw out of view the fact that section 7 of the Life Assurance Companies Act 1872 finds no place in the codification of 1901, and that its provision is therefore abrogated. These considerations to which I have adverted lead, I regret to say, unmistakably to the conclusion arrived at by the learned reporter. And I think therefore that we are constrained to take the same course as Chitty, J., in the *Sovereign Life* case *supra*, and to refuse the prayer of the petition.

LORD PRESIDENT — I agree with the opinion delivered by my brother Lord Mackenzie. Really there are two classes of objections here. There is, first, the question of whether this arrangement is within the powers of the corporation itself. Now when one speaks of "within the powers of the corporation itself," one necessarily means such powers as in a question between the members of the company, because it is quite obvious that they could have no relation to the creditors of the company. No power or want of power will affect them. They stand upon their bargain whatever the powers of the company were as between themselves. If there is no embodiment in the bargain with the creditors of a power to change the obligation, the obligation will always remain as it is.

I agree with the opinion both my brethren expressed—and which was first expressed also by Mr Justice Chitty in the case of the *Sovereign Life Assurance Company*—that you do not get the power of a company out of the Act. The Act only deals with companies which have a power in their own constitution. I do not think it necessary to go through the matter of the articles of association, because I am quite content with what Lord Mackenzie has said—and I adopt the same reasoning—when he says that in the documents constituting the corporation the power is to be found.

Then if that is so, we come to the other class of objection as to whether this class of transfer is such that, within the purview of the statute, it can be sanctioned. When I come to section 13 of the statute I find there that "when it is intended to amalgamate"—we are not dealing with that here—"or to transfer the assurance business of any class from one assurance company to another . . .," I ask myself what kind of transfer can that mean? It obviously points to what is sought to be done here, namely, to give up a certain branch of insurance—be it accident, be it life, be it whatever it is—the giving up of one branch and getting another company to go on with the existing contracts.

Now if that is so, I do not think that there can possibly be any point in the mere form which the transaction takes as in a question with the policy holders—I mean the difference in form which might be expressed perhaps by the words "delegation" and "novation." Of course delegation and novation are not exactly the same,

but they often run very nearly into each other. Take the case of an ordinary lease for a term of years. According to the law of Scotland, there is delegation implied in that lease if the original landlord dies and his heirs succeed. But would it make any difference if as a matter of fact the original lease were cancelled on the death of the original landlord and a new lease were granted? No more would it, I think, make any difference here if the original policy was not cancelled but some sort of *notandum* was put upon the back of it by which it was said that the original contract was now delegated to a new insurance company. Consequently I think upon the mere question of form in the cancellation of one contract and the substitution of another there cannot be any point.

Next it seems to me that really the whole statute would be quite futile if it was not impliedly meant that when the transactions are within the power of the company and are sanctioned by the Court the old company should be free. If it were otherwise, what would be the use of the Court sanction? Debtors in bargains cannot get free of their contracts by any power inherent in themselves. The only meaning of calling in the Court is that the one contract should be gone and that the other should be enforced. What is here called "the cancellation of the old contract" is no more than carrying out the intention of the original contract, only with the substitution of a new company as debtor in the obligation.

If that is so, that leaves only the objection of my learned brother beside me relating to the question of the sharing of profits. Of course, if under the name of transference of the business it were proposed to substitute a perfectly different kind of contract from the old, certainly the policy holder might object. I cannot help thinking that in such a case the Court would refuse its sanction, but still, I agree, it would not be within the purview of the statute. But what about the matter of profits? It seems to me that if you take the matter with absolutely rigid strictness you never could transfer a profit-sharing policy from one company to another, because the profits of A company can never be the same thing as the profits of B company. It is in a different position from the promise to pay a certain capital sum of money. £100 sterling is precisely the same thing whether it is paid by A or by B. You may have a better chance of getting it from B than from A, but the thing is precisely the same. But the profits of A never can be the profits of B, and therefore it seems to me that if the thing is looked at with rigid strictness there never can be an absolute transfer of a profit-sharing policy, and that would be absurd.

That being so, and if it is looked at in a practical business and common-sense way, it is simply this—What is the true interest of the policy holder to be secured here? In the first place, he is likely to be a good judge of his own interest, and no policy holder has come to make the slightest objection. But even if they had objected, it would be for the Court in the same way to look at the question with a business eye. Doing so, I find that really in this particular company the chances of sharing in the profits of the business were *nil*, and that consequently the policy holders are really losing nothing in this matter. By the transfer they are getting a very much better security for the capital sum under their policy, and losing their sort of visionary prospect of profits which never have existed and never seem to have any chance of existing in the future.

Accordingly in that way the difficulty that presses upon my learned brother does not press upon me, and I therefore come to the same conclusion as Lord Mackenzie.

LORD KINNEAR—I agree with the Lord President and Lord Mackenzie.

The Court pronounced this interlocutor—

"Find that the requirements of section 13 of the Assurance Companies Act 1909 have been duly complied with, and that it is within the power of the directors of the Empire Guarantee and Insurance Corporation, Limited, to carry out the proposed transfer: Sanction said transfer of the life assurance business of the said Empire Guarantee and Insurance Corporation, Limited, to the Royal Exchange Assurance Corporation in terms of the agreement mentioned in the petition, and decern."

Counsel for Petitioners—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Saturday, July 22.

FIRST DIVISION.

SOCIETY OF PROPRIETORS OF THE ROYAL EXCHANGE BUILDINGS, GLASGOW, PETITIONERS.

Company — Process — Registered but Unlimited Company—Petition for Approval of Memorandum brought before Re-registration as Limited Company—"The Court" in Vacation—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *secs.* 3 (1) (*iii*), 9, 57, 135, *and* 285.

A company formed in 1836 as an unregistered company, on certain terms and conditions set forth in an agreement and articles of constitution, became incorporated in 1869 as an unlimited company under the Companies Acts 1862 to 1867. In 1911 the company before becoming re-registered under the Companies (Consolidation) Act 1908, sec. 57, as a limited company, presented a petition for approval of a proposed memorandum of association which had been agreed to by special resolutions. The memorandum was headed "Company Limited by Shares." It did not set forth the objects of the