On the topic characterised by Mr Clyde as "piquant," although not so interesting as that with which I have just dealt, to which the first question relates, all I need say is this, that whatever view may be entertained of the course which the learned Sheriff thought proper to pursue, I am very clearly of opinion that it did not in any way prejudice the appellants in their defence on the merits within the meaning of the 75th section of the Summary Procedure Act.

Holding these views I propose that we should answer all the questions put to us in the negative.

LORD DEWAR—I concur.

LORD HUNTER—In this case the appellants, who are printers and publishers in Dundee, were charged with and convicted of keeping open or using their offices for the receipt of money by them as the consideration for an undertaking to pay money thereafter on events or contingencies relating to games of football contrary to section 1 of the Betting Act 1853.

It appears that the appellants are proprietors of a newspaper called the *People's Journal*, and that in certain issues of that paper they inserted a notice offering a prize to the person who on a coupon attached to the paper would give a correct forecast of a certain number of football matches. In the event of no correct forecast being given, a prize of smaller amount was to be given to the competitor whose forecast showed the greatest number of correct results.

According to the findings of fact of the Sheriff, the appellants sold copies of their newspapers with the above notice and appropriate coupons to newsagents at the price of 9d. per dozen. The newsagents in turn sold the papers to the public at the price of 1d. per copy. Certain members of the public appear to have bought several copies of the newspaper for the purpose merely of extracting the coupon and taking part in the competition, and to have been successful in receiving prizes from the appellants. It is not found by the Sheriff that the sales by the appellants were other than *bona fide* sales of copies of their newspapers; that they sold or received money for coupons independent of copies of the newspapers; or that the newsagents in selling to the public and receiving the price of the newspapers were acting as agents for the appellants.

It has been held both in England and Scotland that publishers of newspapers by selling and receiving at their offices money for coupons in connection with coupon competitions relating to racing or games commit an offence against the Act. Further, it has been decided that in order to constitute the offence it is not necessary that the money should be received at the publisher's office, if that office is used for the purpose of money being received as the consideration for an undertaking to pay money thereafter on a contingency connected with racing or games. No case, however, was cited to us of the conviction of the publisher of a newspaper for the *bona fide* sale by him of newspapers to the public with competition coupons attached. I do not consider it necessary in this case to consider whether in such circumstances an offence would or might be committed. It appears to me sufficient for the decision in this case that upon the findings of fact of the Sheriff it would be an undue straining of the language of section 1 of the Betting Act of 1853 to hold that in any reasonable sense the appellants used their premises for the receipt of money as the consideration for an undertaking to pay money thereafter on events or contingencies relating to games of football. I accordingly agree that the questions in the case should be answered in the way which your Lordship proposes.

The Court answered the questions in the case in the negative and sustained the appeal.

Counsel for the Appellants—Clyde, K.C. —Sandeman, K.C.—Boase. Agents—Alex. Morison & Co., W.S.

Counsel for the Respondent—Solicitor-General (Morison, K.C.)—Wark. Agent—Sir W. S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Friday, February 6.

SECOND DIVISION.

[Lord Cullen, Ordinary.

LIQUIDATORS OF GLASGOW ASSURANCE CORPORATION, LIMITED *v.* WELSH INSURANCE CORPORATION, LIMITED.

Company—Insurance—Liquidation—Ranking—Employers' Liability Insurance—Assurance Companies Act 1909 (9 *Edw. VII, cap.* 49), *secs.* 1, 2, 3—*Re-insurance.*

An insurance company entered into a treaty with another insurance company under which the first company agreed to re-insure certain risks arising out of employers' liability insurance business carried on, *inter alia*, by the second company, in consideration of payment by the second company of a proportion of policy-holders' premium received by it. The first company having gone into liquidation, it was *held* that the re-insurance of the second company was part of the employers' liability business of the first company, and that the second company was entitled to a ranking on the employers' liability insurance fund (including therein the statutory deposit) of the first company.

Insurance—Re-insurance—Contract—Liability for Policy-Holders' Medical and Legal Expenses—Construction.

Held, upon the construction of a contract of re-insurance, that a re-insured

company's liability to policy-holders for medical and legal expenses incurred by them was included in the re-insuring company's liability.

The Assurance Companies Act 1909 (9 Edw. VII, cap. 49) enacts:—Section 1—"This Act shall apply to all persons or bodies of persons . . . who carry on within the United Kingdom assurance business of all or any of the following classes:—. . . (*d*) Employers' liability insurance business—that is to say, the issue of, or the undertaking of liability under, policies insuring employers against liability to pay compensation or damages to workmen in their employment. . . ." Section 2 (1)—"Every assurance company shall deposit and keep deposited with the Paymaster-General for and on behalf of the Supreme Court the sum of twenty thousand pounds. . . . (4) Where a company carries on or intends to carry on assurance business of more than one class, a separate sum of twenty thousand pounds shall be deposited and kept deposited. . . . as respects each class of business, and the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund. . . ." Section 3 (1)—"In the case of an assurance company transacting other business besides that of assurance, or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to form a separate assurance fund with an appropriate name: Provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund. (2) A fund of any particular class shall be as absolutely the security of the policy-holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

The Liquidators of the Glasgow Assurance Corporation, Limited, presented a note "for authority to intimate deliverances on claims in respect of the company's employers' liability business, and the value of the company's liability to persons appearing to be interested in the policies granted in connection therewith." Answers were lodged by the Welsh Insurance Company, Limited.

The following *narrative of facts* is taken from the opinion of the Lord Ordinary (CULLEN)—"The Glasgow Assurance Corporation, Limited, now in liquidation, carried on various kinds of insurance business, and, *inter alia*, that of employers' liability insurance. The respondent company, the Welsh Insurance Corporation, Limited, carries on, *inter alia*, an employers' liability insurance business. The two companies entered into a re-insurance treaty, dated 30th November 1909, whereby the Welsh company agreed to pay to the Glasgow company 21½ per cent. of its workmen's compensation premiums, and the Glasgow company in consideration thereof agreed to indemnify the Welsh company under its policies in respect of fatal accidents (with certain exceptions), and also to a certain extent against claims in respect of disablement. The re-insurance treaty was terminated on or about 31st August 1911, subject to the risks still current for which the Glasgow company had previously become liable under its provisions. During the period while the treaty was in full force the Welsh company paid over the stipulated proportion of its premiums. The Glasgow company carried the amounts so received by it into the account of its 'separate assurance fund,' applicable to employers' liability insurance business, kept in pursuance of the Assurance Companies Act 1909, and similarly entered on the other side of that account the payments of claims made under the treaty. It thus treated the re-insurance transaction as part of its employers' liability insurance business under the Act. The Welsh company has, admittedly, a claim in the liquidation for sums due to it under the treaty, and the main question now raised is as to the mode of ranking the due amount of this claim. A subsidiary question is raised as to the validity of part of the claim."

The *re-insurance treaty* between the Welsh Insurance Corporation, Limited, and the Glasgow Corporation, Limited, contains, *inter alia*, the following provisions:—"Whereas the Welsh Insurance Corporation, Limited, of Cardiff (hereinafter called the re-insured) undertakes the business of insuring employers against liability for injuries to their workmen, and is desirous of being relieved of the whole of such liability in respect of fatal accidents as hereinafter provided, and their liability in excess of fifty pounds (£50) for each permanent disablement case of accident as hereinafter provided, the Glasgow Assurance Corporation, Limited, of Glasgow (hereinafter called the Corporation) has agreed to indemnify the re-insured against such liability in accordance with the terms and conditions of this treaty. . . . *Article* 1—The corporation hereby undertakes to relieve the re-insured of and indemnify the re-insured against all liability under the Workmen's Compensation Act 1906, Employers' Liability Act 1880, Lord Campbell's Act, and at common law, for fatal accidents and accidents causing disablement occurring to the employees of employers insured against such liability by the re-insured. . . . It is also agreed that in the case of accidents causing disablement the re-insured shall bear the first fifty pounds of compensation payable to each claimant, the liability of the corporation being for all sums payable to each such

claimant in excess of fifty pounds. *Article* 2—The re-insured agrees to forward to the corporation at the end of each week a statement on Bordereau Forms of all Workmen's Compensation risks accepted by them excepting mining risks as hereinbefore mentioned. *Article* 4—On the happening of a fatal accident for which the corporation will be liable, the re-insured undertakes to advise the corporation with full particulars as soon as possible and will use every effort to obtain a favourable settlement, and the corporation undertakes immediately on production of a claim receipt to refund the re-insured the amount paid by them, and permanent cases shall in like manner be dealt with, the re-insured advising the corporation when compensation has been paid to any injured party for a period of six months, but should an accident seem to be of a permanent nature the re-insured will advise the corporation as soon as they conveniently can and settlement shall be effected as herein provided in respect of fatal accidents. *Article* 5—It is agreed that the corporation will take over and settle within three months after the re-insured shall have paid a total sum of fifty pounds (£50) in weekly compensation all claims in respect of accidents causing disablement. . . . *Article* 7—Notwithstanding anything contained in article 6 the corporation agrees that it will submit to the re-insured its revenue account for its Workmen's Compensation Department as lodged with the Board of Trade, and within seven days after it shall have been so lodged and the corporation further agrees that if its ratio of claims to premium income in the said Workmen's Compensation accounts shall in any financial year have exceeded 60 per cent. the re-insured shall have power to cancel this treaty by giving one calendar month's notice of their intention to do so."

On 18th December 1913 the Lord Ordinary (CULLEN) pronounced this interlocutor:—"... Finds (1) that the respondents are not entitled to any ranking in respect of the costs—legal, medical, and other expenses—incurred in connection with the determination or settlement of claims made under the policies issued by the respondents: And (2) that the respondents are entitled to a ranking on the employers' liability fund of the company (including therein the statutory deposit) in respect of their claim, in so far as the same arises out of claims paid under policies issued by the respondents of which the company was under obligation to relieve the respondents in respect of the agreement or treaty. . . ."

Opinion.—[*After the foregoing narrative of facts*]—"The argument on the first of these questions related to certain provisions in the Act of 1909.

"By section 1 the Act is made applicable generally to persons or bodies of persons (therein referred to as 'assurance companies') which carry on within the United Kingdom all or any of five specified classes of insurance business. One of these classes (section 1 (*d*)) is—'Employers' liability insurance business, that is to say, the issue of or the undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment.' The provisions of the Act in question do not apply to assurance companies in so far as they carry on assurance business of kinds not falling within any of the five specified classes.

"Section 2 obliges an assurance company within the scope of the Act to make a deposit with the Paymaster-General for or on behalf of the Supreme Court of the sum of £20,000 in respect of each or any of the five specified classes of insurance business which it carries on, and provides that 'the deposit made in respect of any class of business in respect of which a separate assurance fund is required to be kept shall be deemed to form part of that fund.'

"The matter of the 'separate assurance fund' is dealt with in section 3, which is in the following terms:—'. . . [*quotes, v. sup.*] . . .'

"This section is, in terms, applicable to such companies as either (1) carry on other business than that of insurance, or (2) carry on more than one class of insurance business. The receipts and payments in respect of any of the five specified classes of insurance business which such a company carries on are to be carried to and form a separate assurance fund with the appropriate name; and under section 2 (4) where more than one specified class of business is carried on, each of the required deposits is to form part of the separate assurance fund applicable to the particular class of business in respect of which the deposit has been made.

"Section 3 does not legislate for the case of a company whose sole business consists in carrying on one of the five specified classes of assurance business, and which has therefore no need to make a separation of its funds.

"Sub-section (2) of section 3, in harmony with sub-section (1), is directed to cases where the company is doing more than carrying on one of the five specified classes of assurance business, and its object is to declare that a separate assurance fund required and kept under sub-section (1) shall be a security for the policy-holders of the particular class, 'as absolutely . . . as though it belonged to a company carrying on no other business than assurance business of that class,' and that it 'shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied directly or indirectly for any purposes other than those of the class of business to which the fund is applicable.'

"In such a case the policy-holders of any particular class thus have the same claim on a separate assurance fund applicable to that class as they would have had on the unseparated funds of the company if the company had carried on only business of that class. They may therefore come into competition with other lawful creditors of the company whose claims arise out of the same class of the company's business. Section 3 (2) does not secure them against such competition, but only against competition

with creditors under contracts incident to other classes of business.

"Assuming that the Glasgow company had carried on only a business of employers' liability insurance, using that description in a general sense, and had in the course of its business undertaken re-insurances of another company's risks, as they did by the treaty now in question, it could not have been said that it was going beyond the ordinary scope of such a business. Re-insurance for the spreading of risks is an ordinary feature of the various kinds of insurance business both in this country and elsewhere. But while this may be so, the liquidators of the Glasgow company maintain that the undertaking of re-insurance of another company's risks is no part of an employers' liability insurance business as such a business is defined in section 1 of the 1909 Act for the purposes of that Act, and, in particular, for the purpose of the provisions as to keeping separate assurance funds. If this contention be sound, then where an employers' liability insurance company engages, lawfully under its constitution, in transactions for re-insuring other companies' risks, these transactions fall to be regarded as being, from the point of view of the statute, a separate species of insurance business (to which the Act does not apply), and it is necessary that the company, in order to a due observance of the statute, should keep a 'separate assurance fund' for its business so far as consisting of the direct insurance of employers under its policies, from the accounts of which fund its receipts and payments in respect of such re-insurances fall to be excluded.

"The definition in section 1 runs:—'Employers' liability insurance business, that is to say, the issue of, or the undertaking of liability under, policies insuring employers, &c.' Re-insuring other companies is not the issuing of such policies. And equally, say the liquidators, it is not 'the undertaking of liability under' them. In one sense it is not. The re-insuring company does not become the debtor of the employers holding the policies which are the subject of the re-insurance. There is no privity of contract. But in another sense the re-insuring company does undertake the liabilities under such policies, for it undertakes to bear and discharge these liabilities, its creditor being the company re-insured. The former construction of the statutory words is the more literally exact. But it may be that the wider construction is the preferable one.

"Here I may recall the fact that the Glasgow company in keeping their accounts acted on the wider view. In the accounts of their separate assurance fund applicable to their employers' liability insurance business (lodged with the Board of Trade in pursuance of the Act) they regularly entered on the one side the premiums received from the Welsh company, and on the other the payment of claims made by them in pursuance of the treaty. This is said to be the ordinary practice in such cases. I do not know as to that. The statute falls to be construed on its terms. The liquidators say that the Glasgow company was wrong in entering the said receipts and payments as they did. It may be that it was; and the question at issue must be considered irrespective of the method in which the said accounts were *de facto* kept.

"Now re-insurance is an almost universal feature in the conduct of insurance business in its various branches both in this country and in others. This is so well known that it is, I think, justifiable to keep the fact in view in considering the intendment of the Act of 1909; and it seems unlikely that the Legislature should have intended that where a company carries on an employers' liability insurance business, or any other of the five specified classes of insurance business to which it relates, the undertaking of re-insurance should fall to be treated as a thing apart and as a separate species of business. The re-insurance amounts to a spreading of risks among insurance companies, and it cannot well be said in its nature to militate against the interests of policy-holders.

"The insurance statutes show that the practice of effecting re-insurances was within the contemplation of the Legislature as a feature of insurance business. The prototype Act of 1870, in its schedule form for the separate assurance fund account of a life assurance company doing other business, has a note appended to it in these terms—'Items in this . . . account should be the net amounts after deducting the amounts paid and received in respect of re-assurances.' The schedule forms in the Act of 1909 have this note—'Items in this account to be the net amounts after deduction of the amounts paid and received in respect of re-insurances of the company's risks.' It is thus clear that the Legislature had expressly in view the practice of re-insurance as an ordinary feature of an insurance company's business, and in particular (under the Act of 1909) as an ordinary feature of an employers' liability insurance business. The liquidators, however, appeal to the terms of the 1909 note and say that while it recognises re-insurance as a feature in the business of the re-insured company, it does not recognise re-insurance as a feature in the business of the re-insuring company. It is true that the note is only directed to the mode of stating the accounts of a re-insured company. But I confess I find it difficult to believe that the Legislature intended this one-sided recognition of re-insurance—that is to say, that it should be treated in the case of a re-insured company as an ordinary element in its business, but that in the case of a re-insuring company it should be treated as a separate line of business. No reason for such a distinction was advanced in the argument.

"The premiums received by an insurance company form, while it is a going concern, the fund from which realised risks are satisfied. Under some policies claims arise and have to be satisfied. Under others no claims arise; and the success of the company's business depends on its premium income being in excess of the claims emerging under its policies. Now while this is so, the liquida-

tors' argument concedes that a company doing employers' liability insurance business is entitled, under the statute, to hand over to another company, under a re-insurance agreement, any given part of its received premiums going to make up the natural fund for satisfaction of claims by its policy-holders, and thus to deplete that fund. This, taken by itself, is to the prejudice of the re-insured company's policy-holders who look to that fund. Surely it must be intended by way of equivalent that the proportion of the premiums paid by these policy-holders which is transferred to the re-insuring company shall go into the employers' liability insurance fund of that company, and that the re-insured company for behoof of its policy-holders is to have recourse against that fund. In that way the policy-holders of the re-insured company are put in much the same position as if they had insured partly in the one company and partly in the other. The splitting up of the risk is done, not directly by them, but by the company whose policies they have taken; and it is common ground that that company may, in a question with its policy-holders, lawfully take such course under the statute.

"I was not favoured with any argument for the liquidators directed to showing on principle why the Legislature should have intended to make the one-sided recognition of re-insurance business which they maintain. The argument consisted in tabling the definition in section 1 of the Act, and also the note to the schedule form dealing, as that note does, only with the mode of giving effect in a re-insured company's accounts to re-insurance of its own risks, and in pointing out that there is no corresponding note saying that a re-insuring company should include in its accounts the premiums received and payments made by it under re-insurance transactions. But I do not find it very difficult to conclude that it was taken for granted that such receipts and payments would enter the accounts of a re-insuring company. All the note deals with is 'net amounts.' The re-insured company is thereby directed not to enter separately (1) the gross amounts of its received premiums and payments made therefrom, and (2) the proportion of its received premiums paid over for re-insurance and the amounts received by it by way of indemnity under re-insurances, but to deduct the latter from the former in order to state net sums. This is only a direction as to a particular mode of stating a re-insured company's account. It remains, I think, that re-insurance was contemplated by the Legislature as an ordinary feature in the conduct of an employers' liability insurance business.

"The liquidators of the Glasgow company have rejected the claim of the Welsh company for ranking on the 'separate assurance fund' of the former company. Following the views which I have expressed, I am of opinion that the deliverance of the liquidators is wrong, and that the Welsh company is entitled to have its claim ranked on that fund.

"The second question raised is a subsidiary one, and relates to a part of the claim of the Welsh company which the liquidators say is not a valid matter of claim under the terms of the treaty. It is composed of legal and medical expenses to which the Welsh company were put in connection with claims under their policies falling within the indemnity undertaken by the Glasgow company in the treaty of re-insurance. The question turns on the terms of the treaty.

"A general indemnity by way of re-insurance may very well devolve such incidental expenses on the re-insuring company. But a particular and partial indemnity may or may not do so according to the terms in which the bargain is conceived. In the present case the Welsh company, having issued policies and being in receipt of the whole premiums payable under such policies, agreed to pay over a certain proportion of such premiums to the Glasgow company, and the Glasgow company in consideration thereof undertook to indemnify the Welsh company against a certain part of the policy risks. It was a matter of bargain as to what should be included in the Glasgow company's undertaking. If they were to pay such legal and medical expenses as are here in question the consideration to be paid to them would naturally be greater than if they were not to do so. One is relegated to the actual terms of the re-insurance treaty. Article 1 thereof is in general terms. Articles 4 and 5 go on to formulate specifically the obligations of indemnity undertaken by the Glasgow company relating respectively to (1) cases of fatal accidents to workmen, and (2) cases of disablement. Article 4 binds the Glasgow company 'on production of a claim receipt to refund to the re-insured the amount paid by them,' and goes on to say that 'permanent cases shall in like manner be dealt with.' This seems to me to confine the obligation of indemnity to what the Welsh company might have to pay to the insured. Article 5 deals with cases of disablement generally. The Welsh company is to pay the first £50 of compensation due in such cases, and the Glasgow company is to 'take over and settle within three months after the re-insured shall have paid a total sum of £50 in weekly compensation all claims in respect of accidents causing disablement.' This article also seems to me to limit the obligation of the Glasgow company to money payable to the insured. I am therefore of opinion that the liquidators are right in their contention that there falls to be excluded from the claim of the Welsh company for ranking so much thereof as is composed of the said legal and medical expenses incurred by the Welsh company."

The liquidators of the Glasgow Assurance Corporation, Limited, reclaimed, and argued —Section 3 of the Assurance Companies Act 1909 (9 Edw. VII, cap. 49) gave the policy-holders in any one of the particular classes of insurance business dealt with in the Act a security over the whole funds applicable to the particular class of business, and conferred on such policy-holders a preference over ordinary creditors of the company in that particular class of business. The respondents were not policy-holders; nor were

they creditors, by virtue of the contract of re-insurance, of the Glasgow company so far as its employers' liability business was concerned. Re-insurance differed from direct insurance in respect (1) that the risks covered were different—*Nelson* v. *Empress Assurance Corporation, Limited*, [1905] 2 K.B. 281, *per* Matthew, L.J., at p. 285; *Lancashire Insurance Company* v. *Inland Revenue*, [1899] 1 Q.B. 353; (2) that re-insurance depended not upon the risks of the original policies but upon the careful management of the re-insured company. The legislation contained in the Assurance Act was directed to the security of policy-holders and did not apply to re-insurance—*In re Popular Life Assurance Company, Limited*, [1909] 1 Ch. 80; *In re Life and Health Assurance Association, Limited*, [1910] 1 Ch. 458. As regards the claim for medical and legal expenses, all that was re-insured under the agreement was the amount paid to the policy-holder as shown by his claim receipt.

Argued for the respondents—The respondents were entitled to rank on the Glasgow company's employers' liability fund. A policy was a contract of indemnity against a defined risk for a valuable consideration, and according to this definition the respondents were policy-holders. The respondents were policy-holders in the particular class of employers' liability business, the risks covered by the re-insurance being risks of claims by workmen against their employers. The only class of insurance which the words of section 1 (*d*) of the 1909 Act, "undertaking of liability under policies," covered was re-insurance. Even if the respondents were not policy-holders, they were certainly creditors and entitled to a ranking as much as the stationer who supplied goods for the reclaimers' office. As regards the claim for medical and legal expenses, the re-insurance being essentially a contract for indemnity, such expenses should be included in the indemnity, and as a matter of insurance practice such expenses were always allowed.

At advising—

Lord Hunter—The principal question raised under this reclaiming note is whether the respondents, who are an insurance company carrying on business in Wales, are entitled to rank in the liquidation of a Scots insurance company upon the employers' liability fund of that company in respect of admitted indebtedness by the Scots company to the Welsh company.

Both the companies, prior to the liquidation of the Scots company, carried on different classes of insurance business, *inter alia*, that of employers' liability insurance. By what is described as a re-insurance treaty between the two companies, dated 30th November 1909, the Glasgow company, in consideration of the payment of a premium by the Welsh company, undertook to relieve the latter of and indemnify them against all liability under the Workmen's Compensation Act 1909, Employers' Liability Act 1880, Lord Campbell's Act, and at common law, for fatal accidents and accidents causing disablement occurring to the employees of employers insured against such liability by the Welsh company. There were certain exceptions to the general obligation of re-insurance undertaken by the Scots company, but these need not be noted, as they do not affect the present question. The premium payable by the Welsh company was a proportion of the gross premium received in respect of the risks undertaken by them. The treaty of re-insurance was to remain in force until 30th September 1914, but provision was made under article 7 empowering the Welsh company in a certain event to cancel the treaty on giving one month's notice of their intention to do so. The agreement was in conformity to notice sent by the respondents and accepted by the Scots company, terminated on 31st August 1911, but certain of the risks did not run off until after that date.

The Scots company went into liquidation on 27th February 1912, and at that date they were indebted in a considerable sum to the Welsh company in respect of claims upon risks current at the date of the termination of the treaty. The liquidators of the Scots company rejected the claim of the Welsh company to rank upon the employers' liability fund of the company in liquidation, but allowed them a ranking upon the general assets of the company. I understand that the latter ranking is of no value, as the company had at the date of liquidation practically no general assets. On the other hand, the employers' liability fund is of considerable amount, consisting largely of a statutory deposit.

By the Assurance Act 1909 (9 Edw. VII, cap. 49) certain provisions that had previously been made applicable to companies carrying on the business of life assurance were extended to other companies carrying on other classes of assurance business. By the first section of the Act the companies to which the Act applies are companies carrying on all or any of five specified classes of insurance business, one of these classes being employers' liability insurance business. By section 2 an assurance company within the scope of the Act must deposit and keep deposited with the Paymaster-General for or on behalf of the Supreme Court a sum of £20,000 in respect of each class of the five specified classes of business—the deposit made in respect of any class of business to form part of the separate assurance fund required to be kept for such business. As an insurance company may carry on several classes of insurance business or other business than that of assurance, provision is made in such a case for separating the funds connected with the different businesses. Section 3 of the Act is in the following terms:—". . . [*quotes, v. sup.*] . . ."

The solution of the present question depends on the proper interpretation of this section. The liquidators maintain that the section gives the policy-holders in any class of insurance business to which the Act applies a security over the whole insurance fund applicable to that class of business, so as not only entirely to exclude the holders of policies and creditors referable to the other classes of the company's

business, but to give the policy-holders a preference over the ordinary creditors of the company in that particular class of business. Their contentions as against the Welsh company are that that company are not policy-holders of the Scots company, and, in any event, are neither policy-holders nor creditors of that company so far as its employers' liability business is concerned. The Lord Ordinary has reversed the deliverance of the liquidators on the ground that the position taken up by them is unsound. I agree with him in the result which he has reached and in the reasoning by which he has reached that result.

It has to be kept in view that the insurance fund applicable to any of the classes of business enumerated by the statute of 1909 consists not only of the statutory deposit, but of all receipts of the company in respect of that particular class of business. I think it would require very clear language to show that the Legislature intended to give the policy-holders an absolute security over such a fund so as to leave all other creditors dealing with the company in that line of its business nothing but a claim to the surplus remaining over after full satisfaction of the claims of the policy-holders. The language used does not appear to me to have brought about such a result. Even as regards the statutory deposit, I do not find any indication of intention to confer upon the policy-holders such a preference as is claimed. In the argument presented to us it was admitted that a provision as to deposit is first found in the Life Assurance Act of 1870. That Act provided in section 3 that every life assurance office established, or to be established should deposit £20,000 with the Accountant-General of the Court of Chancery to be invested in certain securities selected by the company who were to receive the income therefrom. There is nothing however in the provision to suggest that in the case of liquidation the policy-holders are to have a preference on this fund over the other creditors, and the deposit is to be returned to the company when the life assurance fund accumulated out of the premiums amounts to £40,000. The 4th section of that Act provides that a company carrying on life assurance business and any other business shall keep the funds of its life business separate from its other funds, and it is enacted that the life assurance fund "shall be as absolutely the security of the life policy and annuity holders as though it belonged to a company carrying on no other business than that of life assurance, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of life assurance." These are practically the same words as are afterwards found in (2) of section 3 of the 1909 Act. The effect of the two clauses in the Act of 1870 is to make deposit of the statutory amount a condition of carrying on the business of life insurance, and to provide for complete separation of life insurance funds from other funds where a life assurance company does other business. The protection given to the life policy-holders of the company is against creditors whose claims do not arise in connection with the life assurance business of the company, but not against creditors upon the life assurance business proper. The statutory deposit was not under this Act part of the assurance fund of the company. By the Life Assurance Companies Act 1872 (35 and 36 Vict. cap. 39), sec. 1, the deposit made by a life company is deemed to have been made by and to be part of the assets of the company. It is also deemed to form part of the life assurance fund, and to be subject to the provisions of section 4 of the Act of 1870. As the deposit is made part of the assets of the company, I do not see anything in this statute to support the contention of the liquidators that policy-holders have a preference over the ordinary creditors. In the year 1907, by the Act 7 Edw. VII, cap. 46, the provisions of the Life Assurance Companies Acts 1870 to 1872 were made applicable to companies carrying on the business of insuring employers against liability to pay compensation or damages to workmen in their employment.

The Act of 1909 was passed to consolidate the provisions of the Life Assurance Acts and to extend them to certain other classes of insurance. As in the preceding Acts, so in that Act there is nothing to indicate that the policy-holders in the case of a company carrying on only one class of insurance business should be preferred on the assurance fund to other creditors of the company. In the case of a company carrying on several businesses the policy-holders in one class of business were to be put in the same position as regards the insurance fund applicable to that business as if the company carried on no other business. The object and effect of section 3 is in my opinion, as I have indicated with reference to section 4 of the Act of 1870, to effect separation of the funds of different businesses carried on by the same company, but not to grant preferences over the separated funds to some as contrasted with other creditors having claims in connection with the same class of business.

If the view which I have just expressed be sound, the respondents are entitled to rank on the fund, provided that they are creditors of the Scots company with reference to their employers' liability business. The Act of 1909 defines that business as "the issue of or the undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment." The contention of the liquidators is that the issuing of direct policies to employers is in its nature distinct from re-insuring risks undertaken by other companies. This may be true. At the same time, as the Lord Ordinary points out, re-insurance for the spreading of risks is an ordinary feature of various kinds of insurance business both in this country and elsewhere. In the case of a company carrying on only one of the enumerated classes of insurance businesses, say employers' liability assurance, and therefore having only one insurance fund, and in the course of its business re-insuring other companies in connection with employers' liability risks

undertaken by the latter, either in virtue of power to do so in their memorandum or as an incident of their business, I think that it would be only natural to treat the premiums received from re-insurance as receipts from their employers' liability business and the re-insured companies as creditors upon the assurance fund. Direct insurance and re-insurance appear to be two methods of carrying on the same class of insurance business rather than two separate classes of such business. I think the issue of policies apt to cover cases of direct insurance, and the words "undertaking of liability under policies" apt to cover cases of indirect insurance. It is significant that in the definition of the five different classes of insurance business affected by the provisions of the Act of 1909 the undertaking of liability under policies is referred to in the cases of life, fire, accident, and employers' liability where re-insurance is common, and is not referred to in the case of bond investment business where, as I understand, re-insurance is practically unknown. The only explanation suggested by the liquidators as to the meaning of "undertaking liability under policies" was that it refers to the case of two companies amalgamating. That appears to me to be a much less natural meaning to attach to the words than that contended for by the respondents. In re-insurance the insurance company no doubt take into consideration, not so much the character of the risk itself as the skill and prudence of the re-insured company, and they have no contract with the policy-holders of the re-insured company. Their liability, however, arises on the occurrence of the same event—death of a policy-holder in the case of life assurance, and injury or death of a workman in the case of employer liability assurance. They have undertaken the liability of another, but that was a liability under a policy of assurance upon human life, or of assurance of employers against liability to pay compensation or damages to workmen.

The schedule forms attached to the Act of 1909 prescribe the form of the accounts and balance-sheets that have to be kept by assurance companies, and which require to be deposited at the Board of Trade within six months after the close of the period to which they relate. To the form of revenue account there is a note appended—"Items in this account to be the net amounts after deduction of the amounts paid and received in respect of re-insurance of the company's risks." The liquidators argue that this note assists their case, as it recognises the company's right to re-insure its own risks, but makes no mention of their undertaking the re-insurance of the risks of others. I agree with the Lord Ordinary that it is improbable that the Legislature intended this one-sided recognition of re-insurance, and that it would or might lead to hardship or anomaly as pointed out by him. In the revenue account under the head of premiums the amount received for re-insurance, just as the amount received for direct insurance, will be properly entered.

From the respondents' side of the Bar we were informed that insurance companies doing re-insurance business enter the premiums as effeiring to the life assurance or employers' liability assurance fund, according to the character of the risk re-insured. That was not admitted by the liquidators, and therefore cannot be taken as a fact. It is, however, admitted in the present case that the Scots company, in making up their revenue account applicable to employers' liability insurance business, always entered on the receipt side the premiums paid by the Welsh company. These premiums have therefore gone, at all events in part, to satisfy claims of holders of employers' liability policies of the Scots company. The treaty of insurance shows, I think, that both parties contemplated that this would be done, and that the employers' liability assurance fund of the Scots company would be available to meet the claims of the Welsh company. On no other footing can I interpret article 7 of that document, which provides that the Scots company would submit to the Welsh company its revenue account for its workmen's compensation department as lodged with the Board of Trade within seven days after its being lodged, and that if the ratio of claims to premium income in this revenue account in any financial year should have exceeded 60 per cent. the Welsh company should have power to cancel the treaty.

It is not necessary, in the view which I take of the rights of creditors of the company, to decide whether or not the respondents are policy-holders of the company. In applying the provisions of the Act of 1909 to employers' liability insurance companies, section 33 (*g*) provides—"The expression 'policy' includes any policy under which there is for the time being an existing liability already accrued, or under which any liability may accrue." That does not, however, assist one in ascertaining whether or not a document is a policy. The form of document to which the term policy is ordinarily applied is certainly different from that of the treaty of assurance between the two companies. At the same time I think the word policy may be held, and is properly held, to cover any document evidencing a contract of insurance within the scope of the company's employers' liability assurance. I should therefore be prepared to hold that the respondents are policy-holders of the Scots company in liquidation.

A subsidiary point was raised by the respondents as to the first finding of the Lord Ordinary excluding them from "any ranking in respect of the costs—legal, medical, and other expenses—incurred in connection with the determination or settlement of claims made under the policies issued by the respondents." This matter is dealt with by the Lord Ordinary in the latter part of the note attached to his interlocutor. The question depends on the construction of the treaty of re-assurance. The primary obligation undertaken by the Scots company is to relieve the Welsh company of "all liability under the Workmen's Compensation Act 1906, Employers' Liability Act 1880, Lord Campbell's Act, and at

common law, for fatal accidents and accidents causing disablement occurring to the employees of employers insured against such liability by the re-insured." Article 4 provides for the Scots company refunding, in the case of death or permanent disablement, the amount paid by the assured. If that amount includes legal or medical outlays for which the assured employers were liable under the Acts above mentioned or at common law, I think that the re-assured have clearly a claim to recover the same from the Scots company, and to this extent I do not agree with the Lord Ordinary's finding. Article 5 has a similar provision in cases of disablement—the Welsh company paying the first £50 of compensation, and the Scots company taking over and settling "within three months after the re-insured shall have paid a total sum of £50 in weekly compensation all claims in respect of accidents causing disablement."

I am inclined to agree with the Lord Ordinary's interpretation of the treaty in so far as he excludes expenses incurred by the re-assured themselves. In the course of the debate, however, counsel for the Welsh company made statements as to the actings of parties under the agreement which were not admitted by the liquidators. I am not prepared to say that evidence as to the way in which parties themselves interpreted the treaty of re-assurance is or may not be a material element to be taken into consideration by the Court in dealing with this question. I think that parties ought to be agreed upon a statement as to what has occurred or expressly renounce probation. It is also unsatisfactory that no information was given to us as to what is included under expenses for which a claim is made by the Welsh company, or by whom the expenses were incurred. Until some such statement is made, I do not think that this question ought to be finally disposed of.

I think that we ought to recal the first finding of the Lord Ordinary, affirm the second finding, and *quoad ultra* remit to the Lord Ordinary.

LORD SALVESEN—The leading question in this case depends on a construction of section 3 (2) of the Assurance Companies Act 1909. In construing this section I have had more difficulty than your Lordships, and I confess that for some time the inclination of my mind was in the opposite direction. In the first place I am unable to hold with the Lord Ordinary or with Lord Hunter that the Welsh company were policy-holders within the meaning of that section. The word "policy-holder" has a popular and well understood meaning, and does not include a party to a re-insurance treaty such as that on which the Welsh company base their claim. This re-insurance treaty gives no direct action at the instance of the parties insured against the re-insurers. It is a mere contract of indemnity as between the original insurer and the Glasgow company, the liability under which falls to be measured in each case by the conditions of the policies issued to the insured taken in conjunction with the terms of the treaty itself.

There is more to be said for the view that such a treaty of re-insurance constitutes an "undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment," to use the words of section 1 (*d*) of the 1909 Act. I find it, however, unnecessary to express an opinion on this point, as it is at all events plain that the Welsh company were creditors of the Glasgow company at the date of its liquidation. If the Glasgow company had done no other business than this particular class of insurance I cannot find any warrant for the view that all its creditors would not be entitled to rank on the whole funds which it possessed, nor for differentiating in this matter between the deposit fund and the other assets of the company. The difficulty is that in section 3 (2) language is used which at first sight suggests that policy-holders are to have a security for their claims which by implication is to be denied to creditors who are not policy-holders. The clause to which I refer is in these terms—"Shall be as absolutely the security of the policy-holders of that class as though it belonged to a company carrying on no other business than assurance business of that class." On further consideration, however, I think this clause is a mere superfluity, and means precisely what is more accurately expressed in the succeeding clause, "shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class," &c. One is unwilling to assume that the Legislature used two separate and apparently cumulative clauses to express exactly the same thing, but perhaps it was assumed that in the liquidation of an assurance company which carried on only one form of assurance business the policy-holders, strictly so called, would be the chief creditors, and that other claims might be treated as negligible—as for the most part indeed they would be where the only business carried on had been direct business with insured parties whether or not the claims of policy-holders were re-insured by the company who undertook the risk. In this view the only material point is whether the Welsh company are creditors of the Glasgow company. If so they will rank upon the whole funds in the same way as a stationer who supplied the forms of policies used in the employers' liability assurance or any agents who had unsatisfied claims of commission for obtaining such business.

It was argued, however, on behalf of the Glasgow company that the business which was done under the treaty of re-insurance was not of the nature of employers' liability insurance business, but was to be treated as a separate business to which the provisions of section 1 of the Act do not apply, as for instance marine insurance. If it were so, no doubt the policy-holders or other creditors in connection with that separate business would not be entitled to rank upon the special deposit of £20,000, but be relegated to any general assets representing the capital

originally taken up in the company. It is certainly remarkable that the Act of 1909 contains no direct reference to re-insurance of the kind embodied in the treaty in question. On the other hand, in the schedule appended to the Act re-insurance of the company's own risks is recognised. The premiums paid in respect of such re-insurance are to be deducted in stating the premium income, and I presume that payments made under policies also fall to be entered under deduction of the amounts recoverable from a re-insuring company. I think it may fairly be implied from the mention of re-insurance that mutual re-insurance was to be treated on the same lines. It is here, however, that my main difficulty lies, because it is at least conceivable that Parliament meant to treat insurance business of this class as being distinct from proper insurance risks undertaken to the policy-holders direct, just as undoubtedly marine insurance business would be so treated.

On the second question, which relates to the construction of the re-insurance treaty, I agree with Lord Hunter in holding that the respondents are entitled to a ranking in respect of the legal and medical expenses which they have had to pay to the holders under policies issued by them. As regards the further question, whether the legal and medical expenses which the Welsh company properly incurred in connection with claims made upon them under such policies do not also form a good item of charge, I am far from clear. The treaty of re-insurance does not expressly exclude such a claim, and if it be the fact that the parties to the treaty dealt with each other from the first on the footing that such claims were included—as we were told at the Bar—I think this contemporaneous exposition of what the parties meant by the contract would have been of value in construing it. I doubt whether the liquidators would be entitled on the mere language of the contract to maintain a view of its meaning which was contrary to that upon which the parties to it had consistently acted for several years, if that be the fact. On this matter therefore I should prefer to have some inquiry, or admissions by the parties, before deciding that the Welsh company had no claim in respect of the legal and medical expenses which they incurred as matter of ordinary business in settling the claims made by their policy-holders, and I understand that this matter will not be foreclosed by the interlocutor now to be pronounced.

LORD GUTHRIE—I agree. On the main question in the case, namely, the right of the Welsh Insurance Corporation, Limited, to a ranking secured on the employers' liability company fund of the Glasgow Assurance Corporation, Limited, I think the Lord Ordinary has come to a sound conclusion, and I take the case as he has done apart from any alleged practice of bookkeeping on the part of the Glasgow Corporation.

The Welsh Corporation admits that if their claim is sound, the re-insurances effected by them with the Glasgow Corporation must have formed an integral part of the employers' liability business carried on by the latter. If it did not, then the Welsh Corporation would only be entitled to the ordinary ranking conceded to them by the liquidators, because by section 3 (2) of the Insurance Companies Act of 1909 the employers' liability fund "shall not be applied directly or indirectly for any purpose other than those of the class of business to which the fund is applicable." The Welsh Corporation bases its claim on two grounds. First, it says that the re-insurances which it effected with the Glasgow Corporation fell under the definition of employers' liability insurance business contained in section 1 of the Act of 1909—that is to say, the issue of or the undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment." They say that these contracts of re-insurance were either policies issued by the Glasgow Corporation, or at all events that under these contracts there was by the Glasgow Corporation "the undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment." I read the statute as making a clear distinction in section 1 between two classes of documents—a distinction which excludes these re-insurance contracts from the category of policies "insuring employers against liability to pay compensation or damages to workmen in their employment," and includes them within the category of documents involving "the undertaking of liability under policies insuring employers against liability to pay compensation or damages to workmen in their employment." The contracts of re-insurance are not called policies either in the Glasgow Corporation's memorandum, which expressly authorises them, nor in the re-insurance treaty of 30th November 1909, entered into between the Welsh Corporation and the Glasgow Corporation, although no doubt in the latter the payments made by the Welsh Corporation to the Glasgow Corporation are called premiums. Confining attention to the definition in the Act it seems to me an unnecessarily strained construction to bring contracts of re-insurance between one insurance company and another under the category of "policies insuring employers." I think that phrase refers to policies between insurance companies and employers, insuring employers directly, and not to contracts to which employers are no parties, and of whose existence they may be unaware. But however this may be, it seems to me clear that contracts of re-insurance cannot be reasonably excluded from the scope of the alternative in section 1 of the Act. Cases of amalgamation of companies may be provided for under this alternative, but I read it as primarily applicable to contracts of re-insurance, which have been familiar features of insurance business in Great Britain, at all events since 1880, and the existence of which was recognised both in

the Act of 1870 and in the Act of 1909, the former referring to re-insurances of both kinds, and the latter to re-insurances of company's risks. This view is not noticed by the liquidator in the note appended to his adjudication.

Second, the Welsh Corporation says that as creditors their claim is good because it does not involve in the words of the section 3 (2) already quoted any application of the employers' liability fund "directly or indirectly for any purpose other than those of the class of business to which the fund is applicable." A tradesmen who supplied furnishings or other articles for premises used in whole or in part for the employers' liability business would be entitled to rank on the fund created for and in connection with that business, and would not be bound to submit to a general ranking. If so I do not see any distinction for the present purpose between such a claim and the claim of the Welsh Corporation, who, whether the Glasgow Corporation did or did not issue a policy to them, were certainly parties with the Welsh Corporation to a contract of insurance, which was an ordinary incident of the Glasgow Corporation employers' liability business.

As to the Welsh Corporation's claim for medical and legal expenses, I agree with your Lordships in the views expressed and the course proposed.

The Court recalled the first finding of the Lord Ordinary, affirmed the second finding, and *quoad ultra* remitted the cause to the Lord Ordinary.

Counsel for Reclaimers—Macmillan, K.C. —Black. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondents—Clyde, K.C.—C. H. Brown. Agents—Alexander Morison & Company, W.S.

Saturday, February 7.

SECOND DIVISION.

[Lord Johnston, for Lord Cullen, Ordinary.

BOYD & FORREST *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

(Reported *ante* November 10, 1910, 48 S.L.R. 157, and 1911 S.C. 33; May 16, 1912, 49 S.L.R. 735, and 1912 S.C. (H.L.) 93.)

Contract—Error—Misrepresentation—Restitutio in integrum — Railway Constructed by Contractors under Contract Induced by Innocent Misrepresentation and by Non-disclosure of Information by Railway Engineer—Quantum meruit.

A railway company after inviting tenders entered into a written contract with a firm of contractors for the construction of a railway for a lump sum. The specification attached to the contract and forming its basis stated that bores had been put down at various parts of the line, and that a copy of the journal of these bores might be seen at the engineer's office. It contained clauses against errors and omissions. In the course of the work the contractors found that to a considerable extent the strata consisted of rock or hard material where the journal of bores represented it to be soft. Some of the bores, it turned out, had not been made by professional borers but by servants of the company, and the journal of bores had been prepared by the company's engineer from notes supplied by the borers, omitted bores, and in several instances described the strata as soft where the borers had described it as hard or rock. The contractors found further that the proposed route was traversed by a water-pipe laid under statutory authority, the existence of which was known to the railway company but had not been disclosed.

In an action brought by the contractors against the railway company after the completion of the work to recover the extra expense to which they had been put in carrying it out, *held* (1) (*diss.* Lord Guthrie) that the pursuers had entered into the contract under essential error, induced by the innocent misrepresentations of the defenders, that they were therefore entitled to have the contract rescinded and to a *quantum meruit* for the work done, and that it was no bar to rescission that the contract had been completed and that literal *restitutio in integrum* could not be made, equitable restitution by repayment of the sum received being sufficient; (2) (*diss.* Lord Guthrie) that the defenders (*a*) had been in breach of an essential condition of the contract in failing to give the pursuers material information in their possession relative to the bores, and were therefore barred from founding on the contract as the basis of charge, and (*b*) in respect of their non-disclosure of the water-pipe had been in breach of a condition of the contract, not, however, going to the root of it, but entitling the pursuers to damages, and not merely to payment as for an extra under the contract; but (3) that the work done was not so entirely different in character from the work undertaken in the contract as to make the latter inapplicable as a basis of charge.

On the 15th November 1907 Messrs Boyd & Forrest, contractors, Kilmarnock, who had completed the formation of the Dalry and North Johnstone Railway for the Glasgow and South-Western Railway Company, *pursuers*, brought an action against the Railway Company, *defenders*, with a simple petitory conclusion for payment of £106,688, 13s. 11d., conform to a detailed account lodged by the pursuers. In September 1900 a formal contract had been entered into between the parties, whereby the pursuers undertook to construct the railway for the lump sum of £243,090 within thirty months from 12th April 1900. Extra work not embraced in