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

company *in gremio*, but merely referred to the said agreement and articles of constitution.

The Court, while pronouncing no order, expressed the opinion (1) that the petition was premature, and that the first step to be taken before proceeding with it was for the company to re-register as a limited company; (2) that the objects of the company should be set forth *in gremio* of the memorandum and not by reference; and (3) that in virtue of the definition of "the Court" in sections 285 and 135 of the Companies (Consolidation) Act 1908 the petition might proceed in vacation before the Lord Ordinary on the Bills.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69) enacts—Section 3—"In the case of a company limited by shares (1) the memorandum must state (i) the name of the company with 'limited' as the last word in its name; . . . (iii) the objects of the company."

Section 9—"(1) Subject to the provisions of this section a company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company so far as may be required to enable it 'to do certain things'; (2) the alteration shall not take effect until and except in so far as it is confirmed on petition by the Court; . . . (4) the Court may make an order confirming the alteration either wholly or in part, and on such terms and conditions as it thinks fit. . . ."

Section 57—"(1) Subject to the provisions of this section, any company registered as unlimited may register under this Act as limited, or any company already registered as a limited company may re-register under this Act, but the registration of an unlimited company as a limited company shall not affect any debts . . . incurred. (2) On registration in pursuance of this section the registrar shall close the former registration of the company, and may dispense with the delivery to him of copies of any documents with copies of which he was furnished on the occasion of the original registration of the company, but, save as aforesaid, the registration shall take place in the same manner and shall have effect as if it were the first registration of the company under this Act. . . ."

Section 135—"The Court having jurisdiction to wind up companies registered in Scotland shall be the Court of Session in either Division thereof, or, in the event of a remit to a permanent Lord Ordinary, that Lord Ordinary during session, and in time of vacation the Lord Ordinary on the Bills."

Section 285—"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them (that is to say) . . . 'The Court,' used in relation to a company, means the Court having jurisdiction to wind up the company. . . ."

The Society of Proprietors of the Royal Exchange Buildings, Glasgow, incorporated under the Companies Acts 1862-1867, presented a petition for approval of a memorandum of association set forth in special resolutions passed on 4th May 1911, and confirmed on 19th May 1911.

The petition set forth:—"1. The petitioners are proprietors of the Royal Exchange Buildings, Royal Exchange Square, Glasgow. They have a constitution which is contained in an agreement and articles of constitution, dated 13th and subsequent days of May 1836, certain days in June, in July, and December in the same year, and 1st and 21st both days of January 1840, a copy of which is herewith produced.

"2. The Society was incorporated under the Companies Acts 1862 to 1867 upon the 20th day of April 1869, by being registered as a company with unlimited liability. The capital of the Society is divided into 1177 equal shares of £50 each fully paid, making in all the sum of £58,850. That capital is represented by the Royal Exchange Buildings, with the furniture and appurtenances, which is the only property possessed by the Society.

"3. The main object for which the Society was formed was to acquire the Royal Exchange Buildings which were to be used only for an exchange, news room, sample room, counting-houses, and other public and mercantile purposes, of which however an exchange or news room should always form a particular part, all as set forth in the narrative contained in the said agreement and articles of constitution.

"4. The present Royal Exchange Buildings are no longer suitable for the uses and purposes for which they are intended. They are inadequate in size and require extensive additions and alterations to make them conform to modern requirements. These alterations, which have been resolved upon by the Society, will involve a considerable expenditure. Under the present constitution the powers of the Society to enter into the necessary contracts with builders and other tradesmen are doubtful, and in addition the Society has no power to raise any part of the money required by borrowing or otherwise if it should be deemed necessary or expedient to do so.

"5. The form of the Society's constitution under the said agreement and articles of constitution having therefore been found to be inconvenient, it has become desirable to alter the form of the present constitution, and accordingly a memorandum and articles of association were prepared under the direction of the directors of the Society, and were recommended by them for adoption, and with reference thereto the special resolutions hereinafter mentioned were passed unanimously on 4th May 1911 and confirmed on 19th May 1911.

"6. By the said special resolutions it was resolved as follows—'(*First*) That the Society of Proprietors of the Royal Exchange Buildings, Glasgow, now registered as an unlimited company, shall be incorporated under the Companies (Consolidation) Act 1908, as a company limited by shares. (*Second*) That the existing agreement and articles of association of the Society, dated the 13th and subsequent

days of May in the year 1836, certain days in June, in July, and December in the same year, and 1st and 21st, both days of January 1840, executed by the original subscribers of the scheme for establishing exchange buildings in Glasgow and others be cancelled and abrogated. (*Third*) That the memorandum of association, of which a copy is annexed hereto, be and the same is hereby approved and adopted as the memorandum of association of the Society. And (*Fourth*) That the regulations submitted to this meeting, and for the purpose of identification subscribed by the chairman thereof, be and the same are hereby approved and adopted as the regulations of the company.'

"7. The following is a copy of the said proposed memorandum of association—

"'*Companies* (*Consolidation*) *Act* 1908.

Company Limited by Shares.

MEMORANDUM OF ASSOCIATION
of the
SOCIETY OF PROPRIETORS OF THE ROYAL EXCHANGE BUILDINGS, GLASGOW, Limited.

"'(1) The name of the company is the "Society of Proprietors of the Royal Exchange Buildings, Glasgow, Limited." (2) The registered office of the company will be situate in Scotland. (3) The objects for which the company is established are—(*a*) Those set forth in the narrative or preliminary part of an agreement and articles of constitution, dated the 13th and certain subsequent days of May in the year 1836, certain days in June, in July, and December in the same year, and 1st and 21st, both days of January 1840, executed by the original subscribers of the scheme for establishing exchange buildings in Queen Street of Glasgow, or by persons deriving right from original subscribers, or by persons properly authorised by original subscribers, or those in their right, all as fully expressed in the subscription clause of said agreement, which agreement was filed with the Registrar of Joint Stock Companies in Scotland on the 20th day of April 1869. (*b*) To carry on and extend the present undertaking. (*c*) To add to and alter the Royal Exchange Buildings, situated in Queen Street and Royal Exchange Square, Glasgow. [*The memorandum specified certain other objects.*] (4) The liability of the shareholders is limited. (5) The share capital of the company is £58,850, divided into eleven hundred and seventy-seven shares of £50 each. The company has power from time to time to increase or reduce its capital, and to issue any shares in the original or increased capital with preferred, deferred, or other special rights, or such restrictions, whether in regard to dividend, voting, return of capital, or otherwise, as the company may from time to time by special resolution determine.'

"8. The said memorandum specifies the objects of the Society in detail, but not so as to alter or extend the leading and principal objects of the Society. The adoption, however, of the memorandum involves a limited extension of objects in order to invest the Society with ancillary powers, which it is desirable it should possess, and which are conveniently vested in other like companies.

"9. The alteration of the form of the Society's constitution, by substituting a memorandum and articles of association in place of the said agreement and articles of constitution is expedient for the following among other reasons—(*a*) Because the directors find very considerable inconvenience from the old articles of constitution, which are very antiquated and do not conform to the rules of the Registrar of Joint Stock Companies. Considerable difficulties on this account have already been experienced. (*b*) To enable the Society to cope with the prospective development of their property it is necessary that the directors should secure more extended powers. And (*c*) because a modern constitution is better understood in business circles, and facilitates business and does not create doubt as to the powers of the Society and of the directors.

"10. The financial position of the Society is sound—(1) The assets, which consist of the Royal Exchange Buildings, furnishings, cash in bank and in hand, and on loan to Glasgow Corporation, stand in the books as at 30th May 1911 at £61,146, 11s. 9d.; while (2) the outstanding debts and liabilities at the same date, apart from the share capital, which stands at £58,850, are small and do not exceed £300. These debts represent expenses in connection with the present scheme. The average net profits for the last three years have been £5829, 18s. 4d., out of which a dividend of £4, 10s. per £50 share for each of the three years has been declared and the balance carried forward.

"11. No one will be prejudiced by the proposed alteration of the Society's constitution, or by the extension of the powers thereby conferred upon the Society, and it is just and equitable that the proposed memorandum of association should be approved of. This petition is presented under sections 9 and 57 of the Companies (Consolidation) Act 1908."

On 12th July 1911 the Court remitted to David Johnston, Esq., W.S.

On 17th July 1911 the reporter made the following report—"This petition is presented by the Society of Proprietors of the Royal Exchange Buildings, Glasgow, who own certain property in Queen Street of Glasgow, which was acquired by disposition, dated 23rd November 1833, from the Royal Bank of Scotland, and the present Royal Exchange Buildings which have been erected thereon.

"The Society was formed in 1836 as an unregistered company on the terms and conditions set forth in an agreement and articles of constitution executed by the subscribers to a scheme for founding New Exchange Buildings in that city.

"The Society was in 1869 incorporated as an unlimited company under the Companies Acts 1862 to 1867.

"The reporter has inspected the files at the office of the Registrar of Joint Stock Companies and has found that the require-

ments of these Acts were then complied with.

"When the Society was thus registered the provisions of the original constituting deed were deemed, by virtue of section 196 of the Act of 1862, to be conditions and regulations of the Society, as if they had been contained in a registered memorandum and articles of association.

"The objects of the Society are, however, not definitely stated in that document, but are only to be inferred from a quotation, incorporated therein, from the title to its heritable property, whereby the property was declared to be disponed on this condition (among other express conditions and regulations) that 'the buildings then erected and the buildings to be erected thereupon should be used and occupied only for an exchange, news-rooms, sample-room, counting-house, and other public and mercantile purposes, of which however an exchange and news-room should always form a principal part, and that in the event of the said premises not being so used and occupied' the Society 'should be obliged to resell the whole of the said premises in one lot and to make the first offer thereof to the said Royal Bank . . . .'

"The petitioners state that their buildings are inadequate in size for modern requirements and are no longer suitable for the uses and purposes for which they were intended. They therefore contemplate making extensive additions and alterations.

"The directors are empowered by the articles of constitution to order repairs and improvements, but it is not clear that they can embark upon 'extensive additions and alterations,' and they have no power to borrow or otherwise raise the money which may be required for such purposes.

"For these and further adequate reasons stated in the petition the petitioners are desirous of obtaining a modern constitution with wider powers.

"Accordingly the directors caused to be prepared a memorandum and articles of association which they recommended for adoption by the Society, and with reference thereto the special resolutions set forth were duly passed and confirmed at meetings held on 4th and 19th May.

"By these resolutions it was determined, *inter alia*, (1) To incorporate the Society as a company limited by shares under the Companies (Consolidation) Act 1908. (2) To cancel and abrogate the existing constituting deed. (3) To approve and adopt the above memorandum as the memorandum of association of the Society. (3) (*a*) It is unnecessary to quote the deed of constitution at length having regard to the terms of sections 263 (1) and 246 of the Act of 1908.

"The memorandum which is set forth at length in the petition contains all the matter required by section 3 (1) of the Act.

"The reporter deems it right however to draw the attention of the Court to paragraph 3 of the memorandum, which, instead of stating expressly and *in gremio* the primary and original objects of the company, indicates them merely by reference to the agreement and articles of constitution, and that in an indefinite and uncertain manner, so that on referring to that document it does not readily or clearly appear what passage it is intended to incorporate.

"Section 3 (1) of the Act enacts that the memorandum must state the objects of the company, and as the reporter thinks that the intention is that this should be done expressly and not by reference, he thinks that this part of the memorandum should be particularly brought under your Lordships' notice.

"Further, what the Society craves your Lordships' approval of appears at first sight to be rather a substitution of an entirely new constitution than a mere alteration. But as already stated the provisions of the original constituting deed by virtue of section 196 of the Act of 1862 at present apply to the Society in the same manner as if they were contained in a registered memorandum, and the new memorandum is in substance only an alteration of the old deed, which is a cumbersome document quite out of keeping with the requirements of the Act. The memorandum, though in form entirely new, meets the sense and intention of the statute and contains nothing out of keeping therewith.

"Now the Society, having been registered under the Act of 1862, cannot take advantage of Part VII of the Act of 1908, being debarred therefrom by section 249 (4). On the other hand, having been registered but not formed under the Act of 1862, it does come within section 246 of the Act of 1908. The provisions of the latter Act therefore apply (with certain qualifications having no bearing on the present question) in all respects as if the Society had been formed under that Act. Accordingly the reporter is of opinion that the Society has proceeded correctly in bringing this petition under sections 9 and 57 of the Act.

"The reporter, however, desires to point out that the Society which is registered as an 'unlimited company' by this petition craves your Lordships to approve of its adoption of a new memorandum of association in which it is declared to be limited, before the necessary steps have been taken to have its liability limited. This appears to the reporter to be irregular and not in conformity with practice, so far as that can be said to exist in a special class of cases which rarely come before the Court.

"A case in point is that of *The London and Edinburgh Shipping Company*, which was founded in 1809 as an unregistered company, but was registered in 1864 as an unlimited company under the Act of 1862. Desiring to alter its constitution, it was first registered under the Companies Act 1862 on 7th July 1908, and then on September 24th of that year presented a petition to the Second Division for confirmation of the special resolution altering the form of its constitution.

"The reporter thinks that the petitioners should have followed the same course by first re-registering under section 57 of the Act of 1908 and then applying to your

Lordships for sanction to their alteration of the memorandum under section 9 of that Act. If your Lordships, however, are pleased to grant the prayer of this petition the objection may be obviated by registration before the petition is disposed of, or stating in your Lordships' interlocutor that your approval shall not have effect until the company has been registered as limited.

"The reporter is satisfied that the procedure followed by the Society in adopting the memorandum, and in course of this petition, has been regular and proper and in conformity with the statutes, except as above stated with regard to the question of re-registration. This is borne out by certificates which have been produced in process.

"It should, however, be pointed out that by article undecimo of the old articles of constitution three months' interval is required to elapse, in the event of a motion to alter the constitution, between the meetings which pass and confirm the necessary special resolutions. Section 69 of the 1908 Act is, however, quite definite in requiring not more than one month's interval to elapse, and as the Act makes no provision for any other condition which may be included in the company's regulations, article undecimo is presumably overridden.

"The reporter has made inquiry and has ascertained that the practice in the office of the Registrar of Joint Stock Companies is to insist on the terms of section 69 (2) (*b*) being strictly adhered to.

"The secretary has also furnished a certificate that there are no debentures and that the total indebtedness is as stated on page 6 of the petition. The petition has not been notified to the creditors, but they are few in number and the total debt is small, and relates, as alleged, only to the present schemes for altering the Society's constitution.

"In these circumstances your Lordships may see fit to dispense with notice to the creditors in virtue of the provision to that effect in section 9 of the Act of 1908.

"On your Lordships determining these points, and arriving at an opinion that the alteration of the memorandum in the form proposed by the Society is one which should receive the sanction of the Court, the reporter humbly submits that the prayer of the petition may be granted."

Counsel referred to sections 9, 57, 135, 246, and 263 (1) of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), and to *London and Edinburgh Shipping Company, Limited*, 1909 S.C. 1, 46 S.L.R. 85.

LORD PRESIDENT—This is a petition which is presented under section 9 of the Companies Act for the approval of an altered memorandum which this company has passed by special resolution. The company is in this position. It is a company which was formed in 1836 as an unregistered company, but which was registered under the Companies Acts 1862 to 1867. In the course of the discussion that matter having been brought out by the very clear report we have got from the reporter, it became evident that this alteration of the memorandum is a step in the proceeding of, *inter alia*, changing from an unlimited to a limited company. The memorandum proposed is headed "Company Limited by Shares." Now the way that a company changes from unlimited to limited is by re-registration under section 57, and at this present moment the company has not so re-registered. We are therefore of opinion that the company is really premature in this step at this moment. By that I do not mean that the petition should be turned out of Court, but that it is not time yet to authorise the change of the memorandum until the company, by registration as a company limited by shares, has put itself into a position to have a memorandum, of which the heading is "Company Limited by Shares." Accordingly I do not think we ought to pronounce any order upon the petition to-day, but I think that we should wait until the company has applied to the registrar under section 57 and obtained re-registration as a limited company. That having been done the petition will go on.

As, however, it is clear that the petition may go on in the vacation before the Lord Ordinary on the Bills—I arrive at that conclusion by reading "the Court" in section 9 in the light of the definition, sections 285 and 135—it is probably convenient that we should indicate to him that in our opinion he ought to insist upon the memorandum as tabled being so far altered in phraseology as to express *in gremio* the objects of the company instead of expressing them merely by reference to the original document which was lodged with the registrar in place of the memorandum. I think that is quite within the competency of the Court under sub-section 4 of section 9, and I think all the Lord Ordinary on the Bills in vacation will have to do will be to see that the petitioners do truly express *ad longum* the pith of what is contained in the somewhat voluminous document to which at present they have merely made reference.

LORD KINNEAR—I am of the same opinion.

LORD JOHNSTON—I concur.

LORD MACKENZIE—I also concur.

The Court pronounced this interlocutor—

"The Lords having considered the petition, together with the report by Mr Johnston, . . . and having heard counsel for the petitioners, remit of new to the reporter to proceed."

Counsel for the Petitioners—Black. Agents—Forrester & Davidson, W.S.