Presented in her name and by her agent in the matter, and constituting the essential preliminary to her action, they must stand as her acts, and the representations made therein must be taken as true until at least some mistake is shown to have occurred in them. As already said, no suggestion is made that these proofs do not truly state the manner of the death of the insured. It is sought, however, to avoid their effect in favor of the company by taking a part of the statement of its officers as to what the proofs showed, and rejecting the residue, and then excluding the proofs themselves. This position cannot be sustained without manifest injustice to the company.

The judgment must, therefore, be

REVERSED, AND A NEW TRIAL ORDERED.

CARY, COLLECTOR, *v.* THE SAVINGS UNION.

Where depositors in a savings bank do not receive a fixed rate of interest independently of what the bank itself may make or lose in lending their money, but receive a share of such profits as the bank, by lending their money, may, after deducting expenses, &c., find that it has made, such share of profits is a "dividend" within the meaning of the Internal Revenue Act of 1864, as amended by the act of 1866, and not "interest."

ERROR to the Circuit Court for the District of California; the case being thus:

An act of Congress passed in 1864, as amended in 1866,* enacted that there should be levied and collected a tax of five per centum on all dividends thereafter declared due, wherever and whenever the same should be payable to depositors as part of the earnings, income, or gains of any savings institution:

"*Provided*, That the annual or semi-annual *interest* allowed or

* 13 Stat. at Large, 283; 14 Id. 138.

paid to the depositors in savings banks or savings institutions shall not be considered *as dividends.*"

This statute being in force, Cary, collector of internal revenue at San Francisco, demanded of the Savings Union, one of the savings banks of that city, a certain sum of money which had been assessed against the company as a tax for *dividends* paid by it to its depositors. The company refused to pay, alleging that they had paid no "dividends" to their depositors, and had only paid to them semi-annual *interest* on their deposits. The collector, however, being about to distrain for the amount, the company paid it under protest, and now brought suit as for money thus paid under duress.

The Savings Union was this sort of institution:

It had a capital stock. Its business was to receive deposits, and in the contract under which they were received, provision was made for the accumulation of a reserve fund out of the profits earned, which was to be the property of the company. The capital stock, reserve fund, and deposits were also made, by the same contract, a common fund to be lent out by the company as opportunity offered. The stock and the reserve fund formed a guarantee capital for the security of the return of the deposits to the depositors.

At the expiration of every six months the directors were required to ascertain the amount of the profits of the business, and after deducting certain salaries and expenses, and setting apart a certain proportion, not exceeding one-tenth, to the stockholders as a compensation for furnishing the capital, apportion the remainder for a dividend upon the capital stock, reserve fund, and deposits, at such monthly or yearly rates as the total amount of net profits would permit. The dividend apportioned to each account was to be in proportion to the time the several amounts represented in the account formed part of the funds of the corporation, and the rate of dividends or ordinary deposits was to be increased by twenty per cent. to form the rate upon funds remaining permanently in the hands of the corporation, including what were denominated "term deposits." The

directors were also required to determine and make known from time to time a rate of interest to be paid to depositors who might wish to take such rate in lieu of dividends, on drawing out the balance of their accounts between one dividend day and another.

Each depositor at the time of opening his account, signed a contract printed on the first three leaves of the little pass-book, which he then received. The contract was headed,

"*Conditions of agreement on which deposits may be made with, and will be repaid by the San Francisco Savings Union.*"

And it contained a large number of provisions in regard to the returns which the depositor expected to get for his deposit. In these "conditions" these returns were always styled "dividends," as *ex. gr.*, in the following, which was one of the conditions:

"*Dividends* will be payable during the six months following the half year for which they may have been declared, in preference to deposits; . . . and all *dividends*, not drawn within the first thirty days, will share in the next *dividend*."

The question was whether the payments made to depositors, upon which the taxes now sought to be recovered, were assessed and collected, were made as interest or as dividends of profits. The court below held them to be dividends, but held also that under an act of Congress, to which it referred, and passed since the two acts above quoted, the dividends were not taxable. It accordingly gave judgment for the company, and the collector brought the case here.

The ruling of the court below as to the validity of the tax had, lately, and *since the judgment*, been declared by this court a wrong one; and the law declared to be that dividends were then still taxable. So that the only question now was whether the tax was laid on dividends or on interest. If on the former, the judgment was, of course, to be reversed, and a judgment entered below for the collector.

Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error, distinguished the case of such a savings bank as this

one was, from that of savings banks—such as he said there are many of—which simply take money from depositors, agreeing to pay to them a fixed rate of interest per annum; a rate for which the corporation is bound, no matter how little gain it may itself make; and for no more than which it is bound, however great its own gains may be; any surplus above the interest agreed to be paid to depositor, not belonging to him but to the corporation.

Mr. H. J. Tilden, *contra*, argued that what the depositor got here was really the interest which was paid by borrowers on money put by him into the bank, and that *calling* that interest a "dividend" did not less make it "interest."

The CHIEF JUSTICE delivered the opinion of the court.

A distinction is expressly recognized in the act of Congress between interest and dividends, and the Circuit Court decided that the payments to the depositors were for dividends. The question is whether this decision was correct.

We think it was. The depositors contracted not for a rate of interest to be paid upon their deposits, but for a share of the profits of the business in which their money was, by agreement, to be employed. It is true that the profits of the company were principally to be derived from interest upon loans made, but they were none the less on that account profits. The interest received for the loan of each deposit was not kept by itself, and paid to the depositors after deducting a charge to cover expenses, but all was placed in a common fund, and when the net result of the business was ascertained, that was divided among the several contributors according to the value of their contributions. Such a division clearly produces a dividend according to the common understanding of that term. The parties themselves so understood it, for they gave it that name in the contracts, executed when the depositors made their deposits. They stipulated for the payment of dividends and not interest.

JUDGMENT ACCORDINGLY.