to that effect it cannot be assumed that the first instalment was disconform to contract. Again, if the pursuers claimed that they were entitled to examine the eggs before paying the price in return for the documents, they ought to have obtained an award to that effect, and without such an award it cannot be assumed that they were right in their contention. Lastly, if the pursuers regarded the defenders' failure to tender a policy of insurance as material in the case of eggs which so far as appeared had arrived in safety and which were not alleged to have suffered from any maritime risk, they ought to have asked for the policy before imputing to the defenders an intention to repudiate the contract. This objection is obviously an afterthought.

For these reasons I think that the Lord Ordinary's interlocutor should be affirmed.

LORD CULLEN—In the position in which the first two delivery instalments stand as adverted to by your Lordships, it is I think clear that the questions which have arisen between the parties as to the due implement of the contract by the defenders *quoad* these instalments fall within the exclusive jurisdiction of the arbiter under the contract. That being so, it appears to me that the principle of the *Johannesburg* case 1909 S.C. (H.L.) 53, has no application.

The Court adhered.

Counsel for the Pursuers—Lord Advocate (Morison, K.C.)—D. P. Fleming. Agents—P. Morison & Son, W.S.

Counsel for the Defenders — Moncrieff, K.C. — Black. Agents — Webster, Will, & Company, W.S.

Wednesday, February 2.

FIRST DIVISION.

[Exchequer Cause.

ROSYTH BUILDING AND ESTATE COMPANY, LIMITED *v.* INLAND REVENUE.

Revenue—Income Tax—Relief—Investment Company — Expenses of Management — Income Consisting Principally of Rents of Property—Chargeability under Schedule D—Finance Act 1915 (5 *and* 6 *Geo. V, cap.* 62), *sec.* 14 (1) (*a*)—*Income Tax Act* 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule D, Case I.*

A company carrying on a business which consisted mainly in the making of investments, and deriving its income principally from rents of lands and houses, was charged for income tax on its whole income, except interests from bank deposits, under Schedule A. The company claimed relief under the Finance Act 1915, section 14 (1), in respect of sums disbursed by it as expenses of management. The relief claimed would have made the tax paid by the company less than the tax which it would have paid if it had been charged in accordance with the rules of the first case of Schedule D of the Income Tax Act 1842, sec. 100. *Held* that the company was alternatively chargeable for income tax on the profits of its business, including the rents, under Schedule D, and that the claim was excluded by proviso (*a*) of section 14 (1).

Revenue—Income Tax—Relief—Investment Company—Income Consisting of Rents of Property—Assessment under Schedule D —Deductions for Repairs — Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 35—*Finance Act* 1915 (5 *and* 6 *Geo. V, cap.* 62), *sec.* 14 (1) (*a*)—*Income Tax Act* (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Schedule D, Case I.*

Held that in assessing the profits of a company under Schedule D for the purpose of proviso (*a*) of section 14 (1) of the Finance Act 1915, the proper deduction from rents for repairs was the actual cost of repairs incurred, and not the one-sixth allowed under the Finance Act 1894, section 35.

The Finance Act 1915 (5 and 6 Geo. V, cap. 62), section 14, enacts—"(1) Where an assurance company carrying on life assurance business, or any company whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom, claims and proves to the satisfaction of the Special Commissioners that for any income tax year it has been charged to income tax by deduction or otherwise, and has not been so charged in respect of its profits in accordance with the rules under the first case in section one hundred of the Income Tax Act 1842, the company shall be entitled to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year, provided that—(*a*) Relief shall not be given under this section so as to make the income tax paid by the company less than the tax which would have been paid if the profits of the company had been charged in accordance with the said rules."

The Finance Act 1894 (57 and 58 Vict. cap. 30), section 35, enacts—"In respect of the income tax hereby imposed under Schedule A, where the tax is charged upon annual value estimated otherwise than by relation to profits, the following provisions shall have effect. . . . (*b*) In the case of an assessment upon any house or building (except a farmhouse or building included with lands in assessment) the amount of the assessment shall, for the purposes of collection, be reduced—(*i*) Where the owner is occupier or assessable as landlord, or where a tenant is occupier and the landlord undertook to bear the cost of repairs, by a sum equal to one-sixth part of that amount."

The Rosyth Building and Estates Company, Limited, *appellants*, being dissatisfied with a determination of the Commissioners for the Special Purposes of the Income Tax Act at a meeting held in Edinburgh on 6th February 1918, obtained a Case for appeal in which P. Rogers, Surveyor of Taxes, was *respondent.*

The appellants claimed repayment, under the provisions of section 14 of the Finance Act 1915, of so much of the income tax paid by it for the years ended 5th April 1916 and 5th April 1917 respectively as was equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for those years.

The Case stated—"1. The following *facts* were admitted or proved:—(1) The company was incorporated on 22nd May 1909 under the Companies (Consolidation) Act 1908 for the purpose, *inter alia*, of purchasing land and erecting property thereon. Copies of its memorandum and articles of association and of a prospectus dated 22nd April 1910, relating to the issue of the balance of the company's authorised share capital . . . form part of this case. The company has acquired by feu a piece of land in Inverkeithing and has erected dwelling-houses and shops thereon. Up to the present there have been no sales, and the operations of the company have been purely those of an investment company. The income of the company arises from—(*a*) Rents of property duly assessed to income tax, Schedule A. (*b*) Interest on loans—taxed prior to receipt. (*c*) Interest on bank deposit — received in full—duly assessed under Case 3, Schedule D. (2) The company has therefore been charged to income tax by deduction or otherwise, and has not been so charged in respect of its profits in accordance with the rules under the first case in section 100 of the Income Tax Act 1842. (3) The receipts of the company from untaxed sources for the years ended 30th September 1914 and 30th September 1915 respectively were as under—

	Year ended 30th Sept. 1914	Year ended 30th Sept. 1915
Interest on bank deposit receipts	£5 15 0	£6 16 10

Assessments to income tax, Schedule D, under the third case in section 100 of the Income Tax Act of 1842 were made on the company in respect of the above sources of income as under—

For the year ended 5th April 1916 . . . £6
For the year ended 5th April 1917 . . . £7
(Without any deduction for expenses)

(4) The rents received by the company from heritable properties after deduction of the owner's rates paid thereout, and the statutory allowance of one-sixth for repairs, were assessed to income tax, Schedule A, as under—

	Year ended 5th April 1916	Year ended 5th April 1917
Net Schedule A . .	£1108	£1099

The statutory one-sixth allowed for repairs in arriving at the above net Schedule A assessment was approximately £260 each year, whereas the actual expenditure of the company on repairs was only £54, 8s. 1d. and £92, 7s. 1d., for its years ended 30th September 1915 and 30th September 1916 respectively. (5) The tax which the company would have paid for the years ended 5th April 1916 and 5th April 1917 respectively, if all its profits, without regard to the schedules under which they are actually chargeable, had been charged in accordance with the rules under the first case, in section 100 of the Income Tax Act 1842, amounted to £181, 19s. and £294, 5s. respectively. But the tax which would have been borne by the company is equivalent to the difference between these amounts and the tax recoverable on payment of the feu-duties and interest, viz.:—

	1915-16.		1916-17.	
At 3s. in £ . . .		£181 19	at 5s.	£294 5
Less—Feu-duties . .	£57		£60	
Interest on bonds	466		435	
	£523	£181 19	£495	£294 5
£523 at 3s. .		78 9	£495 at 5s.	123 15
		£103 10		£170 10

(6) The total amount of income tax to which the company has been charged by deduction or otherwise, and which has ultimately been borne by it, for the income tax years ended 5th April 1916 and 5th April 1917 is as under:—

	1915-16		1916-17	
Net Schedule A		£1108		£1099
Interest taxed by deduction, say .		46		5
Interest assessment, Schedule D, Case 3		6		7
		£1160		£1111
Deduct—				
Paid less income tax—				
Feu-duties	£57		£60	
Interest on bonds, say .	466	523	435	495
		£637		£616
At 3s. in £ .		£95 11	At 5s. in £	£154

(7) The 'expenses of management' for the years ended 5th April 1916 and 5th April 1917 (as shown in the company's accounts for its years ended 30th September 1915 and 30th September 1916) in respect of which repayment is claimed are as under:—

	Year to 30th September 1915.	Year to 30th September 1916.
Secretary's salary and office expenses . . .	£110 0 0	£110 0 0
Law expenses . . .	2 3 9	33 2 0 (apportioned)
Printing, stationery, &c. .	11 16 4	12 2 3
Auditor's fees . . .	7 7 0	7 7 0
Directors' fees . . .	42 0 0	42 0 0
	£173 7 1	£204 11 3
At 3s.	£26 0 0	At 5s. £51 2 9

and it is agreed on both sides that if the company is entitled to the relief granted by section 14 of the Finance Act 1915 repayment of the above £26 and £51, 2s. 9d. will fall to be made. . . . The Special Commissioners having considered the facts and contentions submitted to them were of opinion that the objection of the Surveyor of Taxes to the company's claim was well founded, and they accordingly refused the application."

Argued for the appellants—The appellants had been charged for income tax in respect of the principal part of its income, including the rents from property, under Schedule A. As a company whose business consisted mainly of making investments they were entitled under section 14 of the Finance Act 1915 to the relief claimed. Proviso (*a*), section 14 (1), was not applicable. The income arose mainly from the rents of property. According to the scheme of the Income Tax Acts these could be charged only under Schedule A (Income Tax Act 1842 (5 and 6 Vict. cap. 35), sections 60, 63, and 64; Income Tax Act 1853 (16 and 17 Vict. cap. 34), section 2, and Schedule A, No. I, General Rule, No. IX and No. X, Schedule D, 1st Case, Rule 2, and 1st and 2nd Cases, Rule 2; Revenue Act 1866 (29 and 30 Vict. cap. 36), section 8; Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8), section 69), and could not be included as they had been in this case in a calculation of the tax which would have been paid

under Schedule D, Case I. In any event the rents could only be included under the deduction of one-sixth for repairs allowed by section 35 of the Finance Act 1894. In either case the allowance of the claim would not make the tax paid less than would have been paid if the profits had been charged under Schedule D, Case I.

Argued for the respondent—The appellants could have been assessed under Schedule A or Schedule D, in the option of the Crown, for the whole income from their business, including the rents from property—*Lord Advocate* v. *Edinburgh Life Assurance Company*, 1910 S.C. (H.L.) 13, 47 S.L.R. 94; *Revell* v. *Edinburgh Life Assurance Company*, 1906, 5 Tax Cases, 221; *Liverpool and London and Globe Insurance Company* v. *Bennett*, (1913) A.C. 610; *London County Council and Others* v. *Attorney-General*, (1901) A.C. 26. There was nothing in the Income Tax Acts to exclude the tax on the rents from being charged under Schedule D. Proviso (*a*) of section 14 (1) of the Finance Act 1915 was therefore applicable, and in the calculation of the amount of tax which would have been paid under Schedule D the rents were properly included. Even though tax was not exigible under Schedule D in respect of rents the proviso would apply. The proper deduction from rents in making the calculation was the cost of actual repairs and not the statutory one-sixth. It was admittedly a business that was being taxed. The result was that the relief claimed would make the amount of tax paid by the appellants less than what they would have paid if charged under Schedule D and was excluded by the proviso.

Lord President—This appeal relates to the income tax years ended on 5th April 1916 and 5th April 1917; it is accordingly necessary to refer to the Income Tax Acts as these stood prior to the commencement of the Income Tax Act 1918 (8 and 9 Geo. V, cap. 10).

A company carrying on business is usually charged to income tax on the profits of its business, as these are assessed in accordance with the rules of the first case of Schedule D of the Income Tax Act 1842, section 100. But some companies—life assurance companies, for example—own in connection with their business invested funds of large amount, the interest of which constitutes a large, it may be a preponderant, part of their income. Such companies occupy, with reference to their chargeability to income tax, what I may call a double position. On the one hand, as persons to whom there arise or accrue annual profits or gains from property in the United Kingdom or elsewhere—investments, for instance—they are chargeable (either by deduction or otherwise) on the interest received by them under the initial part of the first paragraph of Schedule D. On the other hand, as persons to whom there arise or accrue annual profits or gains from a business, they are alternatively chargeable under the immediately succeeding part of the same paragraph. It is settled that it is for the Crown to choose in which capacity the company shall be charged—as property or investment owner on the one hand, or as trader conducting a business on the other. Naturally the decision depends on whether the interests received are greater than the profits earned, or *vice versa*. If a company in this double position is made chargeable in its trading or business capacity, then the interests received (to which the deductions of tax made therefrom before receipt will be added) are treated as part of the company's receipts, and so enter into the assessment of its business profits. In that case the company escapes chargeability as a property or investment owner. Again, if the company is made chargeable in the capacity of property or investment owner, it discharges its liability by suffering deduction of tax from the interests it receives, or by direct assessment as the case may be, and in that case the company escapes chargeability as a trader carrying on business.

By section 14, sub-section 1, of the Finance Act of 1915 a company such as I have described, which has been charged to income tax as property or investment owner—and not as trader carrying on a business—is entitled to repayment of a sum equal to the amount of the tax on the expenses of managing its business incurred in the year in which it has been so charged. But this right is qualified by the condition that the effect of giving the relief shall not be to make the tax paid by the company less than the tax which would have been payable by it if it had been charged as a trader.

The companies to whom this relief applies are described (without being further defined) in the section as companies carrying on life assurance business, or companies whose business consists mainly in the making of investments, and the principal part of whose income is derived therefrom. It is common ground that the appellant company is an investment company answering to this description. The company's investments consist of land purchased by the company and of houses erected thereon by it, and the principal part of the company's income consists of the rents drawn by letting these houses to tenants. It has also made some small loans from which it receives interest, and it has some still smaller sums on bank deposit-receipt from which it also receives interest. Like other investment companies the appellant company holds what I have called a double position with reference to its chargeability to income tax. But in the case of this company the position is somewhat further complicated. Thus in the capacity of owner of house property and of funds laid out at interest, it is chargeable (*a*) in respect of its lands and heritages under Schedule A (subject to the allowance of one-sixth for repairs under section 35 of the Finance Act of 1894 (57 and 58 Vict. cap. 30)), and (*b*) in respect of the profits or interests arising from its loans and bank deposits under Schedule D. On the other hand, in the capacity of a trader carrying on investment business, it is alternatively chargeable on the annual profits or gains arising or accruing to it therefrom, under

the latter portion of the first paragraph of Schedule D. It has in point of fact been charged during the years under review in the former capacity, and not in the latter capacity.

The question in the case arises out of a claim by the company to relief under section 14 of the Finance Act 1915. In order to avoid the effect of the proviso already referred to, the company maintains that if it had been charged as a trader carrying on business no account could have been taken of the rents received from the letting of the houses. To this the Crown replies that—just as in the case of interests received from invested funds—these rents (to which would fall to be added the deductions of tax made therefrom before receipt by the company) must have been included in the company's general receipts, and thus made to enter into the assessment of the company's business profits. If the company is right the profits of the business earned by it as a trader, assessed in accordance with the rules under the first case of Schedule D, would be reduced to vanishing point, with the result that the granting of the relief would not make the tax actually paid by the company less than the tax so assessed. In this way the company seeks to justify its claim to relief.

The idea underlying the company's contention is that the rents of land or of house property are incapable in any circumstances of finding a place within any of the schedules except Schedule A. If the company's profits were assessed in accordance with the rules under the first case of Schedule D, then—according to the appellants' contention—all receipts in the shape of rents must be disregarded, because these being inseparably appropriated to Schedule A, cannot become constituents of profits under Schedule D. This idea, which has in all probability been suggested by the fact that the rents received by land and heritable investment companies are in practice assessed under Schedule A, appears to me fallacious. The alternatives open to the Crown in the case of an ordinary investment company are not limited to a choice amongst the several heads of chargeability of Schedule D only. It was not, for example, disputed that if Government annuities were among the investments held, the Crown could choose between an assessment on interests received, partly under Schedule C (as regards the annuities), and partly under the initial part of the first paragraph of Schedule D (as regards the interests on other securities), and an assessment on business profits under the second part of the first paragraph of Schedule D. Government annuities, in short, though belonging primarily to Schedule C, can become constituents of the profits of an investment company under Schedule D, and can alternatively be assessed accordingly. In like manner, while rents belong primarily to Schedule A, they may be regarded as proper constituents of the profits of an investment business such as that which the appellant company carries on, and can alternatively be assessed as such under Schedule D. It is true that for the purpose of assessment under Schedule A the rents accruing from the ownership of heritage are subject to a deduction of one-sixth for repairs, while the same rents regarded as profits of a business company, such as the appellant company, are only subject to deduction of the repairs actually incurred; but this difference only reflects the distinction between the incidents of mere landownership on the one hand, and those of commercial dealings in landed property on the other. It may sometimes be difficult to draw the line between landownership and commercial enterprise in land; but that is a question of fact of a kind which is not infrequently met with under the Income Tax Acts, and it is solved in the present case in favour of the Crown, because it is common ground that the appellant company is a land investment concern. I do not find anything in the Income Tax Acts which excludes—as an alternative competent to the Crown—the inclusion among the profits of a company carrying on the business of investment in land or house property, of the rents accruing from such land or property. There is certainly nothing of the kind in the rules under the first case of Schedule D. On the contrary, the second of those rules excludes only such adventures or concerns on or about lands, tenements, hereditaments, or heritages as are mentioned in Schedule A, namely, quarries, mines, and so on. The inference seems to be that other adventures or concerns on or about lands or heritages (such as the adventure or concern which constitutes the business of the appellant company) are not excluded. I assume, in accordance with the argument of the appellants, that the reference in section 14, sub-section (1), to the rules under Case 1 include the rules applying to both Case 1 and Case 2. The second of those rules excludes profits arising from lands and heritages occupied for the purposes of the trade or business, but none other. The house property in this case is not occupied for the purpose of the company's business; it is occupied by tenants to whom the company lets it. Accordingly I think the Crown is alternatively entitled to treat the rents either as chargeable in respect of the company's property under Schedule A, or as constituents of the profits arising or accruing to the company from its business chargeable under Schedule D. As that is the point on which the whole question in this appeal turns, I think the determination of the Commissioners must be sustained and the appeal refused.

LORD MACKENZIE—I agree with the opinion just delivered by your Lordship. The question that we have to consider in this case is whether the contention on behalf of the Crown is well founded or not. That contention is that in computing the profits of the company for the purpose of section 14 of the Finance Act 1915 the whole of the income from all sources must be included, and that the allowance of the claim for repayment of duty on its expenses of management would reduce the tax ulti-

mately borne by the company below the tax which would be borne were its whole profits charged in accordance with the rules of Schedule D, first case. Now the question is whether the Crown were entitled to charge the profits under Schedule D or not. That depends upon the true view of this company. If the Crown is entitled to treat the company as a trading concern whose income is derived from its business, then the first step is taken to establishing its right to tax under Schedule D. If, on the other hand, the true view is that the company is a concern whose profits and gains arise merely from the returns on the property of which they are the owners, then the Crown's contention fails. In my opinion as between these two views there can be no doubt. The memorandum of association and the business carried on by the company show that it was carrying on a business, and that the bulk of its income was derived from the business in the shape of rents. It therefore is a concern which makes a profit out of the business, and *prima facie* that is just the kind of undertaking to which Schedule D is appropriate. Why should the rents of heritage not be taken into account in estimating the profits of the trade? I could quite understand that if under Schedule A there was found a provision which covered this kind of undertaking, then it might be said that the Crown was limited to the provisions of Schedule A, and was not entitled to make an assessment under Schedule D, because by the second rule of the first case under Schedule D all such adventures or concerns on or about lands, tenements, hereditaments, or heritages as are mentioned in Schedule A are excepted from chargeability under Schedule D. But Schedule A contains no provision which would enable the profits from an adventure of this kind to be assessed. It is not covered by any of the enumerated classes of quarries and mines and so forth described in the rules contained in group No. 3 of the rules applicable to Schedule A, and it appears to me to be not to the point to refer to general rule No. 1 of Schedule A, because that does not apply to an adventure at all, but merely to the ownership of land. Accordingly I cannot understand why in dealing with this company the first entry to be made on the credit side of the profit and loss account is not the gross amount of the rents received, less the actual outgoings. It follows therefore that on the figures contained in the balance-sheet for the first year that is in dispute—and one year is just as good as another—that there must be deducted from the gross amount of the rents of the heritable properties an actual figure of £54, 8s. 1d. for repairs, not the statutory one-sixth, or £260, because I agree with the contention of the Crown that the statutory deduction of one-sixth is only legitimate in the case of an assessment under Schedule A, and has no application where a true profit and loss account falls to be made up for the purposes of Schedule D. Accordingly I think that on those very simple grounds we are entitled to hold that this is a trade relative to land not brought under the provisions of Schedule A, and that under the provisions of section 14 of the Act of 1915 the Crown is entitled to examine the figures and bring out the true profit and loss account when the company seeks to get a deduction of the expenses of management, which is the claim put forward in the present case.

LORD SKERRINGTON—The Inland Revenue do not seek to assess the appellant company according to the rules under the first case in Schedule D, but it is essential to their success in this litigation to demonstrate that they would have been entitled to make such an assessment if they had so wished. Unless that proposition is established, the Inland Revenue could not in my view obtain the benefit of proviso (*a*) of sub-section (1) of section 14 of the Finance Act 1915. I should have listened to the argument with more satisfaction if at the outset we had been informed that a company in the position of the appellant company had never, so far as known, been assessed according to the rules under the first case in Schedule D, and if we had been invited to attend to the provisions of the Income-Tax Acts for the purpose of considering whether there was any good reason why such an assessment should not now be imposed for the first time. However, I have come to think that the Inland Revenue have established their case. The burden of proof or argument lay upon them, but it has been satisfactorily discharged, for the reasons explained by your Lordships, which I need not here recapitulate. Accordingly I am of opinion that the appeal must be refused.

LORD CULLEN did not hear the case.

The Court refused the appeal.

Counsel for the Appellants—Christie, K.C. —Maitland. Agents—Mylne & Campbell, W.S.

Counsel for the Respondents—Leadbetter, K.C.—Henderson. Agent—Stair A. Gillon, Solicitor of Inland Revenue.

Tuesday, March 8.

FIRST DIVISION.

HOME'S TRUSTEES *v.* FERGUSSON'S EXECUTRIX.

Succession—Vesting—Acceleration—Trust—Direction to Accumulate Income of Lands and to Apply the Same in Payment of the Debts Secured thereon, and on Extinction of Debts to Convey to A and his Heirs—Offer to Pay off Debts in Return for a Conveyance to the then Prospective Heir.

A testator who died in 1881, after providing in his trust-disposition and settlement for his widow's liferent and for payment of certain legacies on the security of his lands, directed his trustees to accumulate and apply the