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

income of his said lands in payment of the debts secured upon them, and to convey the lands as soon as disencumbered to the eldest son of his brother J. F. and his heirs. In 1920 the husband of the person entitled to succeed to the lands, if the conveyance fell to be then executed, made an offer to the trustees to pay off the debts in return for a conveyance of the lands to his wife, whom failing to her heirs in heritage in their order. *Held* (1) that the trustees were not restricted to paying off the debts out of income alone; (2) that their duty was to avail themselves of the offer made for their payment; and (3) that they were bound to grant a conveyance of the lands thus disburdened to the person then entitled thereto under the destination.

Scarlett v. *Lord Abinger's Trustees*, 1907 S.C. 811, 44 S.L.R. 525, *distinguished.*

Major John Hutchison Fergusson Home of Bassendean, in the county of Berwick, died on 27th May 1881 leaving a trust-disposition and settlement dated 23rd June 1879, by which he conveyed his whole means and estate to trustees for the purposes therein set forth. By the fourth purpose he dealt with the estate of Bassendean and others. With regard to it he provided (*first*) that it should be held for the liferent use of his widow; (*second*) that on her death his trustees should pay certain legacies amounting to £1350, with power to them to borrow that sum on the security of Bassendean. The third and fourth sub-heads of the fourth purpose were as follows—"(*Third*) I direct my said trustees, after payment of certain legacies in manner before provided, to collect and accumulate the annual income, profits, and produce of my said lands and estate of Bassendean and others, and from time to time as they shall consider expedient to pay and apply the same in and towards payment *pro tanto* of the debts secured upon the said lands, including the sum or sums of money which may be borrowed as aforesaid on the security of the said lands and estate; and also in payment to each of my trustees, the said Evan Allan Hunter and Patrick Blair, of the sum of £500 sterling each, which legacies shall only be payable at the termination of this trust, but notwithstanding the date of payment thereof shall be held to vest at my own death; and (*Fourth*) as soon as the foresaid debts, including as aforesaid, and legacies shall have been fully satisfied, and my said lands and estate of Bassendean and others shall be entirely freed and disencumbered thereof, I direct and ordain my said trustees with all convenient speed to dispone, convey, and make over the said lands and estate of Bassendean and others to and in favour of the eldest son of my brother James Fergusson and his heirs, declaring that in the conveyance and deed of denuding to be executed by my said trustees they shall take the disponee and his heirs bound to use and bear the name and arms of Home of Bassendean, and also shall take him and his foresaids bound never to sell or dispose of the said lands and estate of Bassendean and others in all time thereafter." The testator declared that the purposes of the trust should take effect only in the event (which happened) of his dying without leaving heirs of his body. He conferred no power of sale on his trustees, but he conferred on them "generally all powers necessary for enabling them to carry this trust into full and satisfactory effect and execution."

Questions having arisen as to the construction and effect of the trust-disposition and settlement, a Special Case was presented for the opinion of the Court, to which Hew Francis Cadell and another, the trustees acting under the trust-disposition and settlement, were the *first parties.* The testator was survived by his widow and she enjoyed the liferent of the estate of Bassendean until her death on 28th May 1888. He was also survived by two children of his brother James Fergusson, viz., a son James Johnston Fergusson and a daughter Mary Fergusson or Home. The son James Johnston Fergusson died unmarried on 29th December 1903 leaving a last will and testament by which he assigned and disponed his whole estate, heritable and moveable, to his mother Mrs Clara Johnston or Fergusson and appointed her his executrix and universal legatee. Mrs Fergusson as such executrix and as an individual was the *second party* to this case. The daughter Mary Fergusson or Home, her husband, and her two children Captain Robert George Home and Clara Josephine Home (who were both of full age) were the *third parties* to the case. The *fourth party* was Major Home Johnston Fergusson, who was the only son of the late Major Home Mackay Fergusson, the next younger brother after the said James Fergusson of the testator. The fourth party would in the event of failure of the third parties and their issue be the heir-at-law of the said James Johnston Fergusson.

The Case stated, *inter alia*—"4. The first parties have duly implemented the first three purposes of the testator's trust-disposition and settlement. On the widow's death they borrowed the sum of £1350 on the security of the estate of Bassendean, and with the proceeds they duly paid the legacies provided for by the second sub-head of the fourth purpose of the said trust-disposition and settlement. At the testator's death, and also at his widow's death, the estate of Bassendean was burdened with heritable debt to the extent of £5920. The addition of the aforesaid sum of £1350 raised the amount of the heritable debt to £7270. When the legacies of £500 each to the two original trustees provided for in the third sub-head of the fourth purpose are added, the total amount to be paid off before the estate of Bassendean can be conveyed in terms of the trust-disposition and settlement is thus £8270. As directed by the said third sub-head, the first parties have since the widow's death accumulated the income arising from the estate of Bassendean, and therefrom have been enabled to

make the following payments towards reduction of the debt :—

At Whitsunday 1894	. .	£1350
At Martinmas 1899	. .	720
At 15th March 1902	. .	100
At Whitsunday 1902	. .	200
At Martinmas 1918	. .	300
		£2670

thus leaving £5600 still to be paid off before the conveyance of the estate can take place. 5. Owing to the increased burdens imposed on all landed estates in recent years there is at present no surplus revenue arising from the estate of Bassendean, and the first parties see little or no prospect of paying off or even of materially reducing the debt affecting the estate out of accumulations of income. . . 6. In these circumstances the first parties have been approached by Colonel Home, the husband of Mrs Mary Fergusson or Home, one of the third parties, and he has offered to pay off, or provide the first parties with money to pay off, all the debt still affecting the estate of Bassendean, and also the legacies to the trustees, in return for a conveyance of the estate thus disburdened. The second and third parties have all concurred in requesting the first parties to accept this offer, and after the said debt and legacies are paid off with the money provided by Colonel Home, to execute a conveyance of the estate in favour of the said Mrs Mary Fergusson or Home, whom failing the said Captain Robert George Home and the heirs of his body, whom failing the said Clara Josephine Home and her heirs, or in such other terms as may be agreed upon between the second and third parties. The second party has offered, and hereby offers, to execute a renunciation and discharge of any right or interest which she may have or may pretend to in the said estate, and to concur in any conveyance which may be executed by the first parties in the said terms or in such terms as may be agreed upon as aforesaid; and on the first parties executing such conveyance and accounting for their intromissions with the estate, the second and third parties are prepared to grant a discharge to the first parties as trustees foresaid. 7. The first parties, however, are doubtful whether it would be competent for them to accept this offer, and upon a consideration of the offer in the light of existing circumstances the questions after noted have arisen. . . . There is a further question whether the first parties are restricted to paying off the debt on the estate out of accumulations of income, or whether they are free to resort to other means of disburdening the estate. If the latter view be sound, the question arises whether it is competent for the first parties to accept the offer of Colonel Home, and with the consent of the second party to grant a conveyance of the estate in the terms requested by the second and third parties. . . ."

The only *questions of law* which the Court dealt with were—"3. Are the first parties in disburdening the estate of Bassendean of debt (*a*) restricted to doing so out of accumulations of income? or (*b*) are they bound to avail themselves of the offer mentioned in article 6 of this Case? 4. In the event of question 3 (*b*) being answered in the affirmative, are the first parties bound, after the said estate has been disburdened of debt with money provided in terms of the said offer, to grant a conveyance of the estate in the terms mentioned in the said article 6?"

The first parties offered no contention.

The fourth party maintained that the debts affecting the estate fell to be paid off out of accumulations of income only, and that it was not competent for the first parties to accept the offer for payment of these debts. The effect of such acceptance would be to accelerate the date of conveyance of the estate, with the result that the estate would or might fall to be conveyed to a person other than the person who would have taken had the debts been paid off out of accumulations of income. The following cases were cited—*Scarlett* v. *Lord Abinger's Trustees*, 1907 S.C. 811, 44 S.L.R. 525; *Muirhead* v. *Muirhead*, 1890, 17 R. (H.L.) 45, *per* Lord Watson at 48, and Lord Herschell at 52, 27 S.L.R. 917. The case of *Colquhoun* v. *Colquhoun's Trustees*, 1892, 19 R. 946, was distinguished, in respect that there the operation of the Thellusson Act had rendered further accumulation impossible; similarly in *Sinclair's Trustees* v. *Sinclair*, 1913 S.C. 178, 50 S.L.R. 296, it was fully recognised that there was no prospect of the debts being paid off out of income.

The second and third parties maintained, *inter alia*, that the first parties were not restricted to paying off the debts out of accumulations of income, but were bound to avail themselves of the said offer and thereafter to grant a conveyance of the estate thus disburdened. There was nothing in the will to suggest that the testator intended the debts to be paid exclusively from accumulations of income and from no other source. In this respect this case was clearly distinguished from that of *Scarlett*. Moreover, in view of the present condition of the revenues there was no hope of disburdening the estate from this source for an indefinite period of time. Counsel referred to the following cases—*Tewart* v. *Lawson*, 1874, L.R., 18 Eq. 490; *Norton* v. *Johnstone*, 1885, 30 Ch. D. 649; *In re Green*, 1858, 40 Ch. D. 610; *Colquhoun's Trustees* (*cit.*); *Sinclair's Trustees* (*cit.*); *Stainton* v. *Stainton's Trustees*, 12 D. 571, *per* Lord Moncreiff at 595.

At advising—

LORD PRESIDENT—In the course of the debate it clearly appeared that the whole controversy between the parties will be settled by our answers to questions 3 and 4. The late Major John Hutchison Fergusson Home of Bassendean in his will provided that as soon as certain debts and legacies should have been fully satisfied and his lands and estate of Bassendean freed and disencumbered thereof, his trustees should "with all convenient speed, dispone, convey, and make over the said lands and estate of Bassendean and others to and in favour of the eldest son of my brother James Fergusson and his heirs." That clause followed a direction to the effect

that the trustees, after payment of the legacies referred to, were "to collect and accumulate the annual income, profits, and produce of my said lands and estate of Bassendean and others, and from time to time, as they shall consider expedient, to pay and apply the same in and towards payment *pro tanto* of the debts secured upon the said lands." The heir-at-law of the eldest son of the testator's brother James Fergusson—as at the present date—is his daughter Mrs Mary Fergusson or Home.

What has happened is that from Colonel James Murray Home, husband of the said Mrs Mary Fergusson or Home, the trustees have received an offer which would enable them immediately to free and disencumber the lands and estate of Bassendean without continuing to hold the same and accumulate the revenue until the accumulations should enable them to pay the debts on the estate. It is a condition of this offer that the trustees should convey the estate to Mrs Mary Fergusson or Home as heir of the eldest son of the testator's brother James Fergusson. It clearly appears from the present condition of the revenues of the estate that, unless circumstances were greatly to alter, the period at which it could be hoped that the lands would be disencumbered by accumulating the estate revenues is far distant. But acceptance of the offer which is now before the trustees would (if such acceptance is consistent with and permitted by the will) result in bringing about the occasion on which the lands and estates themselves would fall to be made over, and in the ascertainment of Mrs Mary Fergusson or Home as the person favoured under the designation "of the eldest son of my brother James Fergusson and his heirs." There is no doubt that if the terms of a will like this are such as to show that the testator intended the selection of the favoured heir to be postponed until the time when by means of accumulation of revenue—and by that means alone—the debts are paid off, it would be wrong by acceptance of such an offer as has been made to interfere with the testamentary scheme, for the effect of such interference would be to put one person in the place of another as the heir favoured in the will. The case of *Scarlett* v. *Lord Abinger's Trustees* (1907 S.C. 811) was a case which presented that feature. The settlement made it clear that what the testator had in view was the payment of the debts by means of accumulation and disposal of the revenue and by no other means; that the trust administration was to continue until the purpose of disencumbering the estates was thus fulfilled, and that it was the person who bore the title as at the date when the trust administration so devised and continued came to an end who was to be the first heir of entail of the estates. But the features which led to that result in *Scarlett* are absent from the will in this case. There is, it is true, no indication that the testator foresaw precisely the position which the present offer creates. On the other hand there is nothing to indicate that he intended the disponee of the estates to be selected when the debts were paid off by accumulation of revenue only. The disencumberment of the estates was what was uppermost in his mind. I think there is no reason for following here the same line of reasoning as was adopted in *Scarlett*, and my opinion is that it is the duty of the trustees to accept the offer made to them so as to free and disencumber the estate, and (when that is done) to make over to Mrs Mary Fergusson or Home the estate of Bassendean. It is unnecessary to answer any of the questions with the exception of No. 3—the first branch of which I propose that we should answer in the negative and the second in the affirmative; and No. 4—whereof I propose that we should answer the first alternative branch in the affirmative.

LORD MACKENZIE—I am of the same opinion. We are invited to dispose of this Special Case upon a ground which really turns upon the construction of the fourth clause of the fourth purpose of the settlement read along with the direction in the third clause. The fourth clause provides for the conveyance being made at a postponed period, and coupled with that is what must now, in the existing state of the authorities, be taken as a conditional institution in favour of the heirs of the "eldest son of my brother James Fergusson." The only question to be decided is, therefore, what is the period at which the conveyance is to be made. Will the postponed period have arrived as soon as the debts affecting the estate of Bassendean have been paid off, or must the trust be kept up in order that those debts may be paid out of the funds indicated in the third purpose?

It is evident from the figures which have been given in the case that at the rate of progress made it will take hundreds of years before the debt can be paid off out of the sources indicated in the third clause of the fourth purpose of the settlement.

The case as it appears to me is a clear one. I do not think that the testator intended that the trust administration should continue in order that the debt might be paid off. I think that if the debt is paid off—and by that I mean that the existing encumbrances are discharged, not merely assigned to a new creditor—then I think that the period will have arrived contemplated by the testator for the execution of the conveyance.

I think that on a proper construction of the present settlement the case is in marked contrast to the case of *Scarlett* (1907 S.C. 811). The ground of judgment in that case appears quite clearly from the opinion of Lord M'Laren at the top of page 822 of the report. It was held that the payment of debt there referred to was payment under a course of administration which the testator had himself prescribed. There was also the additional element that there were other purposes which rendered it necessary for the trust-administration to be maintained. Here we have nothing of the kind. Accordingly I agree that the questions should be answered as your Lordship proposed.

LORD SKERRINGTON—It is, I think, clear that the scheme of administration which the testator had in mind was that his trustees should pay off the debts and legacies out of the accumulated rents of his heritable property. On the other hand, the will does not say in express language or by necessary implication that the debts and legacies shall be paid from no other source except the accumulated rents if any other source should become available. Such a source has now become available, and my opinion is that it is the duty of the trustees to take advantage of it. It follows that branch (*a*) of the third question ought to be answered in the negative and branch (*b*) in the affirmative.

LORD CULLEN did not hear the case.

The Court answered question 3 (*a*) in the negative, 3 (*b*) in the affirmative, and the first alternative of question 4 in the affirmative.

Counsel for First and Fourth Parties—Brown, K.C.—Leadbetter, K.C.—J. Stevenson. Agents—Blair & Cadell, W.S.

Counsel for Second and Third Parties—Macphail, K.C. — Henderson. Agents — Tods, Murray & Jamieson, W.S.

Friday, February 4.

FIRST DIVISION.

MITCHELL-GILL *v.* BUCHAN.

[Sheriff Court at Aberdeen.

Arbitration—Landlord and Tenant—Jurisdiction of Arbiter — Duty of Arbiter to Act in Accordance with Decision of the Court on Question of Law Obtained in Stated Case—Agricultural Holdings (Scotland) Act 1908 (*8 Edw. VII, cap.* 64), *sec.* 11 (3), *and Second Schedule, par.* 9.

In an arbitration under the Agricultural Holdings (Scotland) Act 1908 the landlord objected to the relevancy and competency of the outgoing tenant's claim for compensation. A joint minute of admissions having been lodged, and the arbiter having issued proposed findings repelling the landlord's objections, a case was stated for the opinion of the Sheriff in which the question of law was, "Whether on the facts admitted or proved it can be competently found that the landlord terminated the tenancy without good and sufficient cause and for reasons inconsistent with good estate management." The question having been answered in the negative by the First Division on appeal from the Sheriff-Substitute, and a remit made to the arbiter to proceed, the arbiter proposed to decide the question for himself in the affirmative. *Held* that the arbiter was bound to give effect to the decision of the Court by finding that the landlord did not terminate the tenancy without good and sufficient cause and for reasons inconsistent with good estate management, and to refuse the tenant's claim in so far as relating to compensation for unreasonable disturbance.

The Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64), enacts—Section 11 (3)—"If in any arbitration under this Act the arbiter states a case for the opinion of the sheriff on any question of law, the opinion of the sheriff on any question so stated shall be final unless within the time and in accordance with the conditions prescribed by Act of Sederunt either party appeals to either Division of the Court of Session, from whose decision no appeal shall lie. . . ."—Second Schedule, Rule 9—"The arbiter may at any stage of the proceedings, and shall, if so directed by the sheriff (which direction may be given on the application of either party), state in the form of a special case for the opinion of the sheriff any question of law arising in the course of the arbitration."

On 3rd May 1920 James Ebenezer Esslemont, the arbiter in a reference under the Agricultural Holdings (Scotland) Act 1908 (8 Edw. VII, cap. 64) between Andrew John Mitchell-Gill, the landlord of the holding of Savoch, Aberdeenshire, and William Alfred Buchan, the outgoing tenant, stated a Case for the opinion of the Sheriff at Aberdeen upon certain questions of law which had arisen in the course of the arbitration.

The Case stated—"Among the claims falling to be disposed of by the arbiter, who was appointed by the Board of Agriculture by minute dated 16th October 1917, is a claim by the tenant for £745 as compensation under section 10 of the Act for loss or expense alleged to have been incurred by him on his quitting the holding at Whitsunday 1917 in consequence of the landlord having without good and sufficient cause and for reasons inconsistent with good estate management terminated the tenancy by notice to quit. The landlord disputed the relevancy and competency of the said claim, and it having been agreed that findings on the relevancy and competency of the claim should be issued before dealing with it on its merits, the landlord lodged answers to the tenant's claim to which the tenant lodged replies and the landlord thereafter additional answers. On 12th March 1918 the arbiter after consideration of the statements contained in the said claim, answers, replies, and additional answers, and in a joint minute of admissions, lodged by parties with a view to obviating the leading of evidence, issued proposed findings, indicating his opinion that the landlord had terminated the tenancy without good and sufficient cause, and for reasons inconsistent with good estate management, and proposing to repel the landlord's objections to the relevancy and the competency of the claim. Against this proposed finding the landlord lodged representations in which, *inter alia*, he objected to the proposed findings in respect that 'there is no evidence upon which he (the arbiter) can competently find that the landlord terminated the tenancy without good and sufficient cause, and for reasons inconsistent