nection, far less a necessary connection, as Lord Hunter seems to indicate. I think it is not too much to insist that an assessor who wishes to upset a pre-existing valuation should offer some evidence of the reasons upon which he desires to make that alteration so that the persons concerned may have an opportunity of challenging his reasons. But to say that the onus of proof is upon the person who maintains the *status quo* is entirely contrary to the practice of this Court and to the law as we have hitherto understood it. Accordingly I entirely agree with Lord Cullen in the result at which he has arrived, and in the reasons which he has adduced for sustaining the appeal both in the Galashiels case and also in the case from Jedburgh, which presents no points of difference.

The Court were of opinion that the determination of the Magistrates was wrong, and that the valuations should be reduced to the figures at which they had previously stood.

Counsel for the Appellants John Maxwell and Others—Brown, K.C.—Keith. Agent—James Purves, S.S.C.

Counsel for the Appellants J. W. Scott and Others — Christie. Agents — Murray Lawson & Macdonald, W.S.

Counsel for the Assessors for Galashiels and Jedburgh—Wark, K.C.—Gibb. Agents —Winchester & Nicolson, W.S.

COURT OF SESSION.

Saturday, October 30, 1920.

FIRST DIVISION.

[Lord Hunter, Ordinary.

A. SANDERSON & SON *v.* ARMOUR & COMPANY, LIMITED.

Contract—Sale by Instalments—Breach—Repudiation—Arbitration Clause—Right of Party Alleged to have Repudiated the Contract to Appeal to Arbitration Clause.

Six hundred cases of American storage eggs, Armour's brand, were bought c.i.f. to Glasgow and/or Liverpool, to be delivered in three equal instalments, payment to be cash against documents on arrival of the goods. The buyers took up the documents tendered and paid cash for the first instalment on its arrival. On the arrival of the second instalment they refused to take up the documents and pay the price until they had had an opportunity of examining the eggs. They thereafter brought an action of damages for breach of contract against the sellers and averred that the eggs of the first instalment were not of the brand specified and were largely unmerchantable when shipped, that the sellers had refused to allow them to inspect the second instalment before accepting the documents and paying the price, and that that instalment was also unmerchantable. No objection was taken at that time to the documents, but it was averred in the action that no proper policy of insurance had been tendered. *Held* that these averments were insufficient to instruct that the sellers had evinced an intention not to be bound by the contract and had repudiated it to the effect that the whole contract, including the arbitration clause, was at an end, and action *sisted* that the damages due, if any, might be ascertained by arbitration in terms of the contract.

The Municipal Council of Johannesburg v. *D. Stewart & Company (1902), Limited*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20, *distinguished* and *commented on.*

A. Sanderson & Son, egg merchants, Leith, *pursuers*, brought an action against Armour & Company, Limited, meat importors, Glasgow and London, *defenders*, concluding for £1566, 15s. 9d. damages for breach of contract.

The *contract note* between the parties was—

"34 Great Clyde Street,
Glasgow, 14th May 1919.

"To Messrs A. Sanderson & Sons,
Kirkgate, Leith.

"We have this day sold you the following goods c.i.f. to Glasgow and/or Liverpool. Subject to the rules and regulations of the Scottish Provision Trade Association, so far as they are not varied by or inconsistent with the conditions mentioned below :—

"Form No. 305 c.i.f.

No. of Packages.	Description.	Brand.	Average lbs. about	Price per cwt. Shippers' Weights.	Shipment (Route at Seller's option) in one or more Parcels from the Packing-House.
600 (six hundred)	American storage eggs	Armours.	3' hd.	p. hdd. 28/6	About equal quantities September/October/November, in ordinary space, subject to space being available.
	Exchange in freight buyer's ac	below $4 above $1. count.	58 and a 60 per	ny excess case to	
		Steamer	*lost. Sa*	*le void.*	

"*Terms of Payment.*—Cash against documents on arrival of goods. The sellers shall not be responsible for delays, damage, or loss arising from strikes, lock-outs, fires wherever occurring, or any cause *beyond their own control*, and if from such strikes, lock-outs, fires, or any cause *beyond their own control*, the sellers shall be unable to ship and/or deliver all or any portion of the goods within the time stipulated by this contract, they shall be at liberty to ship and/or deliver, and the buyer agrees to accept in place of such unshipped and/or undelivered goods those of any other good

brand to be selected by the sellers, and a reasonable extension of time shall be allowed the sellers for shipping and/or delivering such substituted goods, and any difference in value on the day of delivery of the substituted goods between their value and the value of the goods as mentioned in the contract shall be paid to the sellers or allowed by them to the buyer. In case the sellers make default in shipping and/or delivering any goods upon this contract, they shall pay the buyer the difference (if any) on the day of default between the contract price of such goods and the market price of the same or similar goods to those sold by this contract, but they shall not be liable for any penalty or other payment. Any dispute on this contract to be settled by arbitration in the usual way. *For* ARMOUR & COMPANY, LTD.,
W. B. SHEARER."

The pursuers *averred*—"(Cond. 3) On or about 14th May 1919 the pursuers purchased from the defenders in Glasgow 600 cases of eggs, 'Armour's brand,' at the price of 28s. 6d. per 100 eggs, with certain additions as specified in said contract herewith produced. The eggs were to be delivered in about equal quantities in September, October, and November. (Cond. 4) The place of delivery to the pursuers was Glasgow, and prior to delivery the pursuers had no concern with the eggs. On or about 21st October 1919 the first instalment of 200 cases, each containing 300 eggs of 120 eggs per 100, was sent to the pursuers at Leith. (Cond. 5) The documents of title to said first instalment of eggs were accordingly tendered to the pursuers at Leith, being the place of payment, on 10th October 1919. At the time the pursuers believed that said documents were in order, and that the goods tendered on delivery at Glasgow were in conformity with the contract and would be duly forwarded to the pursuers at Leith in fulfilment of defenders' obligation, and on that footing they paid the price, being £955, 15s. 8d., and received the bill of lading endorsed, and got the 200 cases delivered to them at Glasgow. . . . (Cond. 6) The eggs did not arrive at Leith until the 22nd October 1919, and immediately on arrival the pursuers proceeded to open the cases and turn over the eggs and examine each egg by 'candling,' and they found, and it is the fact, that in the lot of 200 cases there were 95 cases of eggs wholly bad and totally in an unmerchantable condition which had to be destroyed. The remainder of the eggs were of a very inferior quality and the pursuers had to sell them at a reduced rate. Further, the said eggs were not only not 'Armour's brand,' but they were of the description known in the trade as 'unbranded eggs,' which are altogether an inferior class of eggs, nor was any insurance effected nor any policy of insurance tendered by the defenders to the pursuers. The condition of the eggs was such that it was not possible for them to be, and the fact is they were not of fair merchantable quality when tendered to the pursuers at Glasgow. In point of fact a large portion of these eggs were rotten and unmerchantable before they left America. Altogether the pursuers lost in respect of this consignment (including the 95 cases wholly bad and the inferior quality of the remainder) £566, 15s. 9d., which the pursuers claim from the defenders as loss and damage for breach of contract. . . . (Cond. 7) On the 23rd November 1919 the s.s. 'Crown of Navarre' arrived at Glasgow. It contained a large quantity of eggs which belonged to the defenders, and the bill of lading was in their name. They appropriated 200 cases of these eggs to the pursuers' said contract, and intimated this allocation in a letter of 24th November. The pursuers had reason to suspect that said eggs were also to a large extent unmerchantable, and they were not 'Armour's brand,' but were 'unbranded eggs.' They also were aware that no insurance had been effected and no policy of insurance accompanied the documents of title. (Cond. 8) On the 25th November the pursuers made arrangements to accept delivery of the said eggs at Glasgow on being satisfied that they were of merchantable quality. They directed Messrs Noble & Son of Paisley to examine the goods on that date and ascertain their condition before the defenders' documents of title arrive. The defenders unwarrantably refused to permit Messrs Noble to make said examination although the goods destined to the pursuers were allocated and marked '(G) 314.' The defenders were well aware that a large proportion of said eggs were unmerchantable. (Cond. 9) On 27th November the pursuers pressed their request to examine the goods at the place of delivery and offered to consign the price. These proposals were unwarrantably rejected by the defenders. They presented documents of title to the pursuers on or about 26th November without a policy of insurance, and in point of fact no insurance had then been effected. The pursuers declined to take up said documents. (Cond. 10) The delivery of unmerchantable and 'unbranded eggs' at Glasgow by the defenders to the pursuers under the first instalment of the contract, their refusal to permit examination of the second instalment, the tender of unmerchantable and unbranded eggs in implement thereof, the failure to tender policies of insurance therefor, and their insistence that payment should be made on their allocation of a certain number of boxes, the contents of which were unknown and concealed from pursuers at Glasgow, amounted to a repudiation of the said contract by the defenders. On 29th November the pursuers rescinded the said contract, and intimated this to the defenders and that they held them liable in damages. (Cond. 11) Notwithstanding the rescission of the said contract the defenders on 9th December, contrary to the stipulations of the contract, tendered to the pursuers for the first time what purported to be a certificate from Lloyds setting forth that an insurance had just been effected, and on 17th December they tendered 200 cases of unmerchantable eggs allocated by them from their eggs on the s.s. 'Wyncote.' These tenders were

rejected as the contract had been previously breached by the defenders and ended on 29th November. (Cond. 12) By the delivery of unmerchantable eggs under the first instalment the pursuers have incurred a loss of £566, 15s. 9d. Arising from the rescission of the contract in consequence of the defenders' repudiation of it the pursuers have suffered loss of profit. The egg market was rising during the period of the contract and the pursuer's loss in consequence is not less than a further sum of £1000. The pursuers have frequently called upon the defenders to make payment of the said sums, but they refuse or at least delay to do so, and this action has thus been rendered necessary. . . ."

The pursuers *pleaded, inter alia*—"3. The defenders having repudiated their material obligations under the contract, and the same having been validly rescinded, the pursuers are entitled to recover the amount of the damages due to them in a court of law. 4. The defenders are barred from pleading the arbitration clause in the contract, and in any event said clause does not apply to the present dispute."

The defenders *pleaded, inter alia*—"1. The action should be dismissed in respect that in terms of the contract any disputes arising thereunder fall to be referred to arbitration."

On 4th June 1920 the Lord Ordinary (HUNTER) pronounced an interlocutor sisting procedure pending the decision of the matters at issue between the parties by arbitration.

Opinion.—"The pursuers are egg merchants carrying on business in Leith. The defenders are produce merchants and egg merchants carrying on business in Glasgow.

"On 14th May 1919 the pursuers purchased from the defenders in Glasgow 600 cases of eggs. In terms of the contract, as evidenced by the pursuers' bought note, the eggs were described as American storage eggs, Armour's brand, and the price was to be 28s. 6d. per 100. They were to be delivered in about equal quantities in September, October, and November. The goods were c.i.f. to Glasgow and/or Liverpool. According to the pursuers' averments the defenders purchase eggs in large quantities from Messrs Armour of Chicago, and ship them from America to one or other of the above ports.

"Under the bought note the goods were purchased subject to the rules and regulations of the Scottish Provision Trade Association, so far as they are not varied by or inconsistent with the conditions mentioned in the note. The last paragraph in the note is in the following terms:—'Any dispute on this contract to be settled by arbitration in the usual way.' According to the constitution and rules of the Scottish Provision Trade Association, special rules are laid down for the determination of disputes by arbitration. Such disputes are referred to the Arbitration Committee of the Association.

"On 10th October 1919 the pursuers received the documents of title referable to the first instalment of 200 cases which were sent to them at Leith on 21st October 1919. The pursuers say that immediately on arrival of the cases at Leith they proceeded to open them and turn over the cases and examine each egg by 'candling.' As a result of this examination they allege that they found, and it is the fact, that in the lot of 200 cases there were 95 cases of eggs wholly bad and totally in an unmerchantable condition, which had to be destroyed. They also allege that the remainder of the eggs were of a very inferior quality, and had to be sold at a reduced rate. They are said not only not to have been 'Armour's brand,' but of a description known in the trade as 'unbranded eggs,' *i.e.*, altogether an inferior class of egg. No policy of insurance was tendered by the defenders to the pursuers. It is averred that a large portion of the eggs were rotten and unmerchantable before they left America. The pursuers say that they lost in respect of this consignment (including the 95 cases wholly bad, and the inferior quality of the remainder) £566, 15s. 9d., which they claim to recover from the defenders in the present action as loss and damage for breach of contract.

"In the 7th article of their condescendence the pursuers aver that the s.s. 'Crown of Navarre' arrived at Glasgow with a large quantity of eggs for the defenders, in whose name the bill of lading was. Of these eggs the defenders are said to have appropriated 200 cases to the pursuers' contract, and to have intimated this fact to the pursuers by letter dated 24th November. The pursuers allege that they made arrangements to accept delivery of the eggs at Glasgow on being satisfied that they were of merchantable quality. They directed Messrs Noble & Son of Paisley to examine the goods on that date and ascertain their condition before the defenders' documents of title arrived. The defenders unwarrantably refused to permit Messrs Noble to make said examination, although the goods destined to the pursuers were allocated and marked '(G) 314.' In reply to this averment the defenders maintain that the pursuers had no right under the contract to examine the eggs until they had paid for and received the documents of title. As the pursuers were not afforded the opportunity of examining the eggs, which they claimed, they refused to pay for the eggs on presentation of the documents of title.

"The 10th article of the condescendence is in the following terms—[*His Lordship quoted the article*].

"The pursuers claim that the contract was brought to an end on 29th November. They say that notwithstanding this rescission the defenders tendered to them for the first time on 9th December what purported to be a certificate from Lloyds setting forth that an insurance had just been effected, and on 17th December tendered 200 cases of unmerchantable eggs allocated to them from their eggs on the s.s. 'Wyncote.' These tenders they rejected.

"In the present action the pursuers claim, in addition to the sum of £566, 15s. 9d.

to which I have referred, a further sum of £1000 as loss of profit arising from the rescission of the contract owing to the defenders' alleged repudiation of it. The defenders deny that they have repudiated the contract, and maintain that they are not in breach of any condition imposed upon them. The defenders have put forward several pleas under the arbitration clause, and it is with these alone that I am at present concerned. The real question is whether or not I ought to sist proceedings until the questions in dispute between the parties have been determined by arbitration.

"The pursuers maintain that as they have averred that the defenders repudiated the contract by their conduct and actings they are entitled to a proof of these averments, because if they establish them the defenders will not be entitled to found upon the arbitration clause. They maintain that the decision of the House of Lords in *The Municipal Council of Johannesburg* v. *D. Stewart & Company* (1902), *Limited*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20, supports their contention. If this view be sound it would appear that in every case where in a contract all questions are referred to arbitration one party could always get an inquiry in Court by averring that the other party had committed a breach or breaches of the contract that amounted to repudiation. The effect of this would in many cases be to defeat the clause of arbitration. Questions whether there have been breaches of contract by one of the parties are essentially questions under the contract which the parties have agreed should be determined by arbitration instead of being made the subject of action in a court of law. I do not think the *Johannesburg* case affords any warrant for the pursuer's contention. In that case the Municipal Council brought an action of damages against contractors who had contracted to supply them with engineering plant. They maintained that the whole contract had been repudiated by the defenders, and that they were therefore entitled to repayment of certain sums paid by them and to damages. The defenders maintained, *inter alia*, that the matter in dispute fell to be disposed of by arbitration in England. The House of Lords remitted the case to the Court of Session to allow a proof, holding (1) that as there was an averment that the whole contract had been repudiated by the defenders it was for the Court of Session to say whether that was so, and whether therefore the arbitration clause could still be appealed to by them; and (2) that in any event as English law would not compel an English Court to refer the matters under certain clauses of the contract to arbitration, the Court of Session was not bound to refer such matters to arbitration but had jurisdiction to entertain the whole case.

"In giving judgment Lord Shaw said—'In this case there are two averments, the breadth of which has been too much left out of view in the arguments submitted to us. These averments occur in condescendence 21 and condescendence 23. In the former article it is stated that in breach of the contracts which are set out the one party closed the work and ceased their endeavours to carry out their contract and implement the obligations binding upon them thereunder. So far as that point is concerned that is a perfectly specific, relevant, and comprehensive averment. It is followed by the statement in condescendence 23 that, following upon the closing and stoppage of the work, the plant was rejected, intimation of the rejection was given, and a demand for a refund of the payments was accordingly made.

"'Standing those averments the natural course of the case in Scotland would have been to remit them to probation.' His Lordship then proceeded to deal with the plea that the action was barred by the arbitration clause and said — 'As these averments stand this contract was wholly repudiated. It does not appear to me to be sound law to permit a person to repudiate a contract and thereupon specifically to found upon a term in that contract which he had thus repudiated.'

"In the present case I think that the pursuers have endeavoured in their averments to make a similar case of repudiation of the contract to what was alleged in the *Johannesburg* case, but have failed to do so. On their own showing they refused to take either the second or third instalment of the eggs which were tendered to them by the defenders, who maintain they have committed no breach of the contract. Whether they have done so in one or more respects is a question under the contract on which, in view of the reference clause, I do not think that I should be justified in expressing any opinion. From what was said in argument before me I rather gather that one of the most important points raised in the case may be as to whether the risk of deterioration of the goods during transit was with the buyer or the seller. It may also be natural that the pursuers should desire to have such a question determined by a court of law, but that is no ground for sustaining my jurisdiction if the parties have agreed by contract to abide the decision of a different tribunal.

"The judgment of the House of Lords in the *Johannesburg* case was specially considered by the judges of the First Division of the Court of Session in *Hegarty & Kelly* v. *Cosmopolitan Insurance Corporation, Limited*, 1913 S.C. 377, 50 S.L.R. 256. In that case Lord President Dunedin, after quoting Lord Watson's statement in *Hamlyn & Company* v. *Talisker Distillery*, 21 R. (H.L.) 21, 31 S.L.R. 642, said—'I humbly think that that law, which is treated by Lord Watson as being the well-established law of Scotland, and of which a previous illustration may be found in Lord Rutherfurd Clark's opinion in the case of *Mackay* v. *The Parochial Board of Barry*, 1883, 10 R. 1046, 20 S.L.R. 697, was not altered—as was pled to us—by the judgment of the House of Lords in the *Johannesburg* case. In the *Johannesburg* case it was held that the contract had been so thoroughly repudiated that it was gone altogether. But I concur with Lord Mackenzie in the distinc-

tion he has drawn between the *Johannesburg* case and this case. I would also beg leave to repeat what I said in the *North British Railway Company* v. *Newburgh and North Fife Railway Company* to the effect that, although there are traces in the *Johannesburg* case of a doctrine which seems to be good law in England, and which I assume was rightly applied in the *Johannesburg* case—a case in which the whole stipulations fell to be construed by English law, viz., the doctrine that the Court may apply the arbitration clause or not as it thinks right in the circumstances, such a doctrine is wholly alien to to the law of Scotland. If there is a binding reference, then to the tribunal which the parties have thus chosen the parties must go, and the Court has no dispensing power.'

"The pursuer also founded on the decision in the case of *Jureidini* v. *National British and Irish Millers Insurance Company, Limited*, [1915] A.C. 499. In that case a claim was made for loss of goods by fire under a policy which provided—(1) that all benefit under the policy was to be forfeited if the claim was fraudulent or the loss had been occasioned by the wilful act of the assured, and (2) that in the event of difference as to the amount of loss this question was to be referred to arbitration and the decision of the arbiter on the amount of the loss, if disputed, was to be a condition-precedent to any right of action on the policy. The insurance company repudiated the claim *in toto* on the ground of fraud and arson. It was held that as the company repudiated all liability on a ground going to the root of the contract they were precluded from pleading the arbitration clause as a bar to an action to enforce the claim. Lord Atkinson said that he thought the arbitration clause referred to 'existing disputes and differences about the amount of loss sustained, and in a contract such as this I do not think that article has any application whatever when the persons to indemnify say "You yourself brought about the destruction of the goods which were insured for the loss of which you claim to be indemnified, and we rely upon an article which provides that in that state of circumstances all benefit under policy is forfeited."' Lord Dunedin indicated that he desired to reserve his opinion as to what would have been the effect if the company had pled in this way—'We will allow this question to be disposed of at law by a jury as to whether there was a fraud and arson or not,' and had gone on to say 'but in the event of that being negatived we wish this ascertainment of actual damage to be ascertained by arbitration.'

The pursuers' case as stated does not appear to me to raise any true case of bar to the defenders founding upon the arbitration clause. I shall therefore sist procedure to enable parties to get the questions in dispute between them determined by arbitration."

The pursuers reclaimed, and argued—The contract between the parties involved the following obligations — (1) the defenders were bound to ship eggs merchantable on delivery at Glasgow or at least at the port of shipment; (2) to tender documents of title including a proper policy of insurance along with delivery; and (3) to give the pursuers an opportunity to inspect the eggs at least before tender of the documents—section 34 of the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71). The pursuers averred that the defenders had failed to fulfil all those obligations. These were all material breaches going to the root of the matter, and they amounted to renunciation or repudiation of the contract by the defenders which gave the pursuers an option either to rescind the contract *in toto* or to hold the defenders to it. The pursuers averred that they had exercised their option by rescinding. If so, the contract was entirely wiped out, and as part of it the arbitration clause was also wiped out, and the pursuers were entitled to have the questions raised dealt with by a court of law. *The Municipal Council of Johannesburg* v. *D. Stewart & Company (1902) Limited*, 1909 S.C. 880, *per* Lord President Dunedin at p. 877, 46 S.L.R. 657, 1909 S.C. (H.L.) 53 *per* Lord Loreburn, L.C., at p. 54 and Lord Shaw at p. 55, 47 S.L.R. 20; *Wade* v. *Walden*, 1909 S.C. 571, 46 S.L.R. 359; *Hegarty & Kelly* v. *Cosmopolitan Insurance Corporation, Limited*, 1913 S.C. 377, 50 S.L.R. 256; *Jureidini* v. *National British and Irish Millers Insurance Company, Limited*, [1915] A.C. 499; *General Billposting Company* v. *Atkinson*, [1909] A.C. 118; *Turnbull* v. *M'Lean & Company*, 1874, 1 R. 730, *per* Lord Justice-Clerk Moncreiff at p. 738, 11 S.L.R. 319; *Muldoon* v. *Pringle*, 1882, 9 R. 915, 19 S.L.R. 668. Leake on Contracts, p. 639, Hudson on Building Contracts, vol. i, p. 751, referring to *Kennedy Limited* v. *Barrow-in-Furness (Mayor of)*, reported in vol. i, p. 411, *per* Fletcher Moulton, L.J., at p. 415, and (vol. ii, p. 122) referring to *Bush* v. *Whitehaven Trustees*, and section 11 (2) of the Act of 1893, were referred to. [Lord Mackenzie referred to *Davie* v. *Stark*, 1876, 3 R. 1114, *per* Lord Justice-Clerk Moncreiff at p. 1119, 13 S.L.R. 666.] The law as therein stated had been altered by the Sale of Goods Act 1893, section 31 (2). The defenders' tender of the floating policy of insurance was not a proper tender of documents under a c.i.f. contract—*Manbre Saccharine Company* v. *Corn Products Company*, [1919], 1 K.B. 189.

Argued for the defenders—The only question in the present case was—the necessity of inquiry being admitted—what form was the inquiry to take, arbitration or ordinary action? The reference clause in the present case was perfectly general and was not of the class of clause which applied only during the course of the work, for such limited clauses always contained some indication that their operation was to be limited. There was no such indication here. An arbitration clause was in a special position. One who was in material breach of a contract could not found on the contract, but if a clause of reference was expressly framed to meet those circumstances it would be binding in spite of material breach. But all arbitration clauses necessarily assumed circumstances in which one party was alleg-

ing a breach of contract while the other was denying it, and there was nothing in the clause to limit its application to a minor breach. Hence by necessary implication an arbitration clause must be held to apply even though one of the parties should aver a material breach. The *Johannesburg* case was the only apparent authority to the effect that if one party averred a material breach by the other, that, as it must be taken *pro veritate*, excluded the application of the contract including therein the arbitration clause. That case turned on the law of England, which differed from Scots law—the English courts never regarded themselves as bound by the arbitration clause of the contract, and ignoring that clause they did what they considered expedient. Further, in that case repudiation of the contract was admitted. In *Hegarty's* case Lord Skerrington accepted the *Johannesburg* case as being a good decision in Scots law, but that ground of judgment was not accepted on appeal. *Jureidini's* case did not touch the present point. But even accepting the pursuers' reading of the *Johannesburg* case the pursuers had failed to aver such a breach as would justify rescission. There was nothing to show an intention not to go on with the contract, for the defenders had tendered deliveries after the pursuers had attempted to rescind the contract. The quality of the eggs was clearly a question within the contract. The failure to tender an insurance policy was irrelevant, for the pursuers had accepted the documents tendered and had therefore waived any right to object to the tender. In any event that was not a material breach. The pursuers had no right to refuse to take delivery without an opportunity of inspection. In such a contract as the present the property passed on delivery of the documents, and on that being done the sellers had done everything that could be demanded of them—*Delaurier* v. *Wyllie*, 1889, 17 R. 167, *per* Lord Kyllachy at p. 191, 27 S.L.R. 148; *Manbre Saccharine Company, Limited* (*cit.*). The buyers had a right to reject the goods thereafter upon inspection. The fact that the pursuers suspected that the defenders would not fulfil their bargain merely because they refused to give such an opportunity of inspection as the pursuers demanded but were not entitled to was not relevant to instruct a material breach. *M'Connell & Reid* v. *Smith*, 1911 S.C. 635, 48 S.L.R. 564, was referred to.

At advising—

LORD PRESIDENT—The question is whether the pursuers' third plea-in-law should be sustained to the effect of sending this case to proof instead of sisting it to await the result of arbitration in terms of the contract.

The pursuers contend that they have averred a case amounting to a repudiation of the whole contract by the defenders, similar to that averred by the pursuer in the case of the *Municipal Council of Johannesburg* v. *D. Stewart & Company* (1909 S.C. (H.L.) 53, 47 S.L.R. 20), and that in accordance with the decision in that case it is for the Court to determine whether or no the defenders have repudiated the whole contract, and whether therefore the arbitration clause can still be appealed to by the defenders.

The case averred by the Municipal Council of Johannesburg was not founded merely on the inefficiency of the plant supplied, nor even on the contractor's admission of its inefficiency, but on averments which were held to amount to an express announcement by the contractors that they threw up and renounced the whole of the three contracts which they had unsuccessfully endeavoured to perform. Total rejection of the plant and intimation of rescission of the whole contract by the Municipal Council followed on this announcement. A wholesale repudiation of this kind is similar in its effects to that which is involved in an act of one of the contracting parties by which the contract is rendered wholly impossible of performance. It does not raise any disputable question as to the materiality of a particular shortcoming or shortcomings in performance. On the contrary, it is effectual to give the other party an immediate right of wholesale rescission whatever the nature of those shortcomings, and even though the time of performance has not arrived at all. The expression "anticipatory breach" has been used to describe this last case. Parties to an executory contract have a right to more than performance at the due time. They have a right to have the contractual relation maintained from the date when the contract is made right on until it is discharged by performance. It was with regard to averments of an express repudiation of the whole of the three contracts, made during performance, that it was said in the House of Lords not to be "sound law to permit a person to repudiate a contract, and thereupon specifically to found upon a term in that contract" (viz., the arbitration clause) "which he has thus repudiated."

The case which the pursuers aver is not the same as this. But they contend that the decision in the *Johannesburg* case is wide enough to apply to it. The case they aver is one of ordinary breach of contract in the course of performance, and the repudiation on which they found is one which, rightly or wrongly, they claim to be entitled to impute to the defenders by way of inference from the defenders' alleged breach of the first two instalments of the contract. The validity of the pursuers' rescission depends, not on any throwing up of the whole contract formally intimated to them by the defenders, but on the ascertainment of (1) whether the defenders' breach was of a material part of the contract, and (2)—the contract being an instalment one—whether the circumstances warrant the imputation to the defenders of an intention to repudiate the whole contract, or whether the case must be treated as one of compensation as for a severable breach or severable breaches of contract.

I am not as at present advised satisfied that the application of the *Johannesburg* decision extends beyond cases of complete

repudiation, arising not by way of mere inference from insufficient performance, but from an express renunciation of the whole contract, or it may be from an act which renders the contract wholly impossible of performance. But it is neither necessary nor appropriate to decide this question unless the pursuers' averments which are submitted for our scrutiny are relevant at least to establish circumstances in which they were entitled to impute repudiation of the whole contract to the defenders. For if the pursuers' averments are not so relevant, the question of the applicability of the *Johannesburg* decision does not arise.

The eggs were bought c.i.f. to Glasgow, and were to be delivered in three instalments. Payment was to be by cash against documents on arrival. On the arrival in this country of the first instalment, the pursuers took up the documents and paid the price. They say they found the goods not to be of the brand specified, and to be to the extent of about one-half unmerchantable. They allege that the goods were unmerchantable when shipped. They did not, however, reject the eggs, but sold those of them that could be sold. They also say that the documents they took up did not include a proper insurance policy, but they paid for them in that knowledge. So far as this instalment is concerned, the case sets forth nothing but a ground for compensation under section 11 (2) of the Sale of Goods Act. The pursuers, however, seek to use the defenders' alleged breaches of contract in connection with this instalment to buttress their general case.

When the second instalment arrived the pursuers, suspicious that it might prove no better than the first, refused to take up the documents and pay the price until they had first satisfied themselves by inspection that the second instalment was of the contract description and quality. They had no right under the contract to adopt this attitude. The pursuers do not allege that these eggs were unmerchantable when shipped, and they do not aver that they made any rejection of them other than may be implied in their refusal to pay for them or—so far as appears—to handle them. They also say that they knew that the documents presented for this instalment were defective in the same particular as those which they had taken up for the first instalment. But they do not aver that they tabled this objection as a ground of refusal to pay the price, and it appears from the correspondence printed in the pursuers' appendix and incorporated in their condescendence that they never tabled this objection until after intimation of rescission, when it was too late for the defenders to obviate it, if that was possible. They founded their rescission on the defenders' refusal to tender the eggs forming the second instalment for inspection before payment against the documents tendered. This ground was bad in law. It is in these circumstances in vain for the pursuers to attribute repudiation to the defenders on the ground that the documents tendered were defective in a particular (the absence of a policy of insurance) of which they were themselves fully aware but which they ignored in their communications with the defenders. We are entitled to take note of the terms of the letter by the pursuers agents to the defenders' agents, of date 29th November 1919.

I do not doubt that in an instalment contract if performance of one or more instalments is materially defective, the buyer may, notwithstanding that he has not rejected the goods delivered in implement of them, be entitled to refuse to accept further instalments and to refuse to implement (or to accept implement of) the contract so far as such future instalments are concerned. The term "rescission" may be used, and has been used, as describing such a refusal, but it is certainly not a rescission of the whole contract. The dictum of Lord M'Laren in *Govan Rope Company* v. *Weir* (1897, 24 R. 368, at p. 374, 34 S.L.R. 310), pronounced in reference to a continuing contract for supply of rope to the buyer's requirements during a specified period, applies equally to the case of an instalment contract—"If a seller systematically sends goods which are not conformable to contract, and the contract is for successive deliveries, I do not doubt that where such conduct is persisted in so as to make it evident that the seller does not intend to fulfil his contract, the purchaser may rescind the contract and refuse to take further deliveries." But as I have pointed out, a rescission in these circumstances is not and cannot be a rescission of the contract as a whole. So far as the purchaser has allowed it to be performed (however defectively) without rejecting the goods delivered to him, he has disentitled himself from treating the seller as repudiating the whole of the contract, and has lost his right to rescind it as a whole. It is in this view immaterial whether the pursuer did or did not reject the eggs comprised in the second instalment, since it is clear that he did not reject those comprised in the first. Unless the contract is effectively rescinded as a whole, the *Johannesburg* decision has no application.

Further, it is clear that the pursuers' claim of damages, so far as arising out of defective delivery of the first instalment, must fall under the arbitration clause, for in view of the absence of rejection such defective delivery cannot be regarded otherwise than as a separable breach—whatever cumulative effect such breach, or a series of such breaches, might have with regard to the buyer's right to draw the line and refuse to accept further deliveries. I did not understand it to be contended that the arbitration clause, if enforceable as regards part of the contract, could be treated as unenforceable with regard to another part. In any case I do not see how such a contention could be successfully maintained, either on general grounds or under the principle of the *Johannesburg* decision.

In my opinion therefore the validity of the pursuers' claims for damages under the second and the third instalments must go to arbitration in the same way as their claims under the first. They must all be

treated as separable breaches of parts of the whole contract, inasmuch as the circumstances disclosed in averment are not such as if proved could have entitled the pursuers to impute to the defenders a repudiation of the contract as a whole.

LORD MACKENZIE—This is an action of damages for breach of contract. The contract contains this clause—"Any dispute on this contract to be settled by arbitration in the usual way." The defenders found on this clause, and the Lord Ordinary has given effect to their contention. The pursuers' position is embodied in their third plea-in-law — "The defenders having repudiated their material obligations under the contract, and the same having been validly rescinded, the pursuers are entitled to recover the amount of the damages due to them in a court of law." It is necessary to examine the pursuers' averments in order to see whether they have relevantly set out a case of repudiation. I assent to the view that if there has been entire repudiation of the contract on the part of the defenders, then the pursuers were entitled to rescind the contract. The authorities which support this view are the cases of *The Municipal Council of Johannesburg* v. *D. Stewart & Company* (1902), *Limited* (1909 S.C. (H.L.) 53, 47 S.L.R 359); *Hegarty & Kelly* v. *Cosmopolitan Insurance Corporation* (1913 S.C. 377, 50 S.L.R. 256); *Mersey Steel and Iron Company* v. *Naylor, Benzon, & Company* (1884, 9 App. Cas. 434); and *Llanelly Railway and Dock Company* v. *London and North-Western Railway* (1873, L.R., 8 Ch. App. 942). If they validly rescinded the contract, then they determined the clause of arbitration as much as any other part of the contract. In my opinion there was no repudiation by the defenders which justified the pursuers in rescinding the contract. The case the pursuers make in condescendence 10 is one which relates to disputes on the contract. They say that the eggs in the first instalment were unmerchantable; that they were refused permission to examine the eggs in the second instalment, which they aver were also unmerchantable; that there was a failure on the part of the defenders to tender policies of insurance; and that the defenders insisted that payment should be made on their allocation of a certain number of boxes. The position as regards the first instalment is that there was complete implement subject to an investigation into the quality of the eggs. If this was decided against the sellers, the buyers would be entitled to a rebate. As regards the second and third instalments it is to be noted that this was a c.i.f. contract, the incidents of which are explained in the case of *Delaurier* v. *Wyllie* (1889, 17 R. 167, 27 S.L.R. 148). The question whether the risk of deterioration in quality during the transit from New York to Glasgow was with the buyers or with the sellers is a question on the contract. The sellers say the quality is to be judged of at New York; the buyers say the quality is to be judged of at Glasgow. In the case of the second instalment this was not rejected, but the buyers refused to pay cash against the documents. They maintained that they were entitled to examine the goods on arrival. The sellers maintain that in so doing the buyers were not complying with the terms of the contract. The dispute as to insurance turns upon whether tender of a certificate was equivalent to tender of a policy. In the case of the second instalment the documents tendered were the same as those which had been accepted in the case of the first instalment. The question as to the rights of the buyers as to insurance, in the case of goods which duly arrived at Glasgow, is plainly one which arises on the contract. The third instalment was rejected when tendered. There is nothing which comes up to a case of the defenders having evinced their intention to be no longer bound by the contract. Unless the case amounts to this, then nothing that was said in the *Johannesburg* case entitles the pursuers to rescind.

I am for adhering to the interlocutor of the Lord Ordinary.

LORD SKERRINGTON — The averments made by the pursuers Messrs Sanderson & Son do not seem to me to raise any of the difficult questions which are discussed by the Lord Ordinary in his opinion and which were debated before us. The pursuers having paid the price for the first instalment of eggs and taken delivery thereof, and having retained and not rejected this instalment, they must in my opinion abide by the terms of their agreement with the defenders and must allow the question whether these eggs were disconform to contract to be settled by arbitration. The pursuers cannot both retain the eggs comprising the first instalment and at the same time rescind the contract by which they acquired them. Accordingly the pursuers' claim for damages for loss in consequence of the alleged unmerchantable quality of the first instalment must, if it is to be of any avail to them, be established by arbitration. As regards the second and third instalments the pursuers' claim is of a different character. It is for loss of profit incurred in consequence of the pursuers having rescinded the contract. By their letter of 29th November 1919 they claimed right to rescind the contract, *firstly*, because of the alleged unmerchantable character of the first instalment, and *secondly*, because of the defenders' refusal to allow the pursuers to examine the second instalment before paying the price. Their counsel stated a third reason in the course of his speech, viz., the defenders' failure to tender with the documents of title a policy of insurance covering the second instalment of eggs. I do not think that these reasons either separately or together entitled the pursuers to treat the defenders as having repudiated the contract, and to rescind it as regards the second and third instalments. As has been already stated, it was for the arbiter and not for the Court to decide whether the first instalment was unmerchantable, and the pursuers failed to take the proper steps in order to obtain a decision in their favour. In the absence of an award

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.*