scribed by Schedule D of the said Act, so far a such rules are consistent with the said No. III.: Provided that the annual value or profits and gains arising from any railway shall be charged and assessed by the Commissioners for special purposes."

In *Knowles* v. *Macadam* Kelly, C.B., says—"It is quite clear that section 8 of 29 Vict. cap. 36, transfers the present case" (that of a coal mine) "from Schedule A to Schedule D," and the judgments of the Barons in that case seem to me to depend a good deal on this, as it seems to me an erroneous assumption. I think that the duties are to be assessed according to the rules in Schedule D, and consequently all the anxiously devised provisions for keeping the returns under Schedule D secret and confidential—to be found from section 100 to section 131—are made in future to apply to returns for the concerns described in No. III of Schedule A, and any rule expressed as to the mode of computing the balance of the profits and gains during the period of three years given in Schedule D, which is not inconsistent with No. III., may perhaps be made in future to apply to the mode of computing the annual profits of properties chargeable under No. III.; and I see that in *Addie* v. *Solicitor of Inland Revenue* (2 R. 431) reliance is placed on the judgment of the Lord President on the third rule as to concerns under the first case of Schedule D, that no deduction is to be made "for any sum employed or intended to be employed as capital." But I do not think reliance can be placed on this. If from the nature of the concerns in No. III. an allowance ought to be made for capital, then this rule should be rejected as inconsistent with No. III. If no such allowance should be made, the rule is not required.

In *Forder* v. *Handyside* (L.R. 1 Ex. Div. 233) the Exchequer Division came to a decision as to repairs estimated but not actually incurred, which, whether it was right or wrong, is no longer, since the 41 Vict. cap. 15, sec. 12, to apply, and as there is no question in the case at the bar as to repairs, it is unnecessary to inquire whether it was right or wrong.

If the effect of section 8 of 29 Vict. was to transfer cases in Schedule A No. III. to Schedule D, it would change the respective times on an average for which the profits were to be assessed. Mines would be reduced from a five year period to a three-year period; quarries and things of that sort would be raised from a single year to three. I cannot think this was either intended or expressed. But on the assumption that it had this effect, the Exchequer Division came in *Knowles* v. *Macadam* to a very startling decision. In that case a company had bought for a very large sum the minerals in beneficial leaseholds of coal mines having an average of thirty-two years to run, and in freeholds. The decision of the Exchequer Division was that the effect of transferring the mines as they thought from Schedule A to Schedule D was to cause the company to be assessed as persons carrying on the trade of vendors of coal who had bought wholesale a large quantity of coal, not stored in warehouses but in the earth, and which they were going to sell in the course of their trade, and that they ought to assessed on the principle of valuing the stock-in-trade—that is, the coals thus stored in the earth at the beginning of the three years, and again valuing the stock at the end of the three years, and taking the difference between them as being to be added to or deducted from the net receipts during that period in estimating the profits for the three years. The effect of this would be that though the mines were worked so as to produce a large profit above the working expenses, yet if they were worked by a purchaser who had over estimated the value of the minerals, and paid such a price for them that he was a loser, no income-tax was to be paid in respect of those mines. That is a result which could never have been intended by the Legislature, and if it follows by legitimate reasoning from the interpretation put upon the 29 Vict. cap. 36, sec. 8, it seems to me a *reductio ad absurdum* showing that the interpretation was wrong.

I therefore advise your Lordships to hold that the decision in *Knowles* v. *Macadam* was erroneous. I do not wish to lay down any general proposition either that money expended in sinking pits can never be in the nature of expenses incurred within the five years in working the coal so as to be properly taken into account in estimating the profits made in that period, or to say what, if any, the circumstances are under which it may be done. That I think had better be left to be determined when the case arises. I think it enough to say that this sum of £9027 described in the case is not such as ought to be deducted.

The result is that in my opinion the interlocutor below should be affirmed and the appeal dismissed with costs, with the modification proposed by the noble and learned Earl.

Interlocutor affirmed and appeal dismissed with costs, except the costs incurred by reason of the remit.

Counsel for Appellants — Solicitor-General (Herschell)—Asher. Agents—W. A. Loch, and Murray, Beith, & Murray, W.S.

Counsel for Respondents—H. M. Advocate (M'Laren)—Solicitor-General (Balfour)—Crawford. Agent—The Solicitor for Inland Revenue.

COURT OF SESSION.

Friday, March 11.

OUTER HOUSE.

[Lord Rutherfurd-Clark. Ordinary.

SANDILANDS *v.* JOHNSON'S TRUSTEES.

Obligation—Provision by Father for his Daughter in her Marriage-Contract, to which he was a Party, how far Affected by Provision in his Subsequent Testamentary Settlement—Conditional Obligation or Gift.

A father, who was a party to his daughter's marriage-contract, bound and obliged himself thereby to pay the marriage-contract trustees £5000 to be held by them for his said daughter in liferent, and after her decease for

her husband in liferent, and on the death of the survivor for the child or children of the marriage in fee. He further engaged, and bound and obliged himself, "that in case he shall, whether by gift in his lifetime or by will or testamentary deed at his death, make any further provision for his said daughter or her issue, the same shall be settled upon similar trusts to these above expressed with reference to the said sum of £5000." He died leaving a trust settlement, by which he left certain equalising legacies and shares of residue to his children, and provided that the amount falling to his said daughter and her sister respectively should be held in trust for their respective behoof in liferent, and for their lawful issue, under certain conditions, in fee. The husband raised an action against the trustees under this trust-deed to have it declared that the testator having by his trust-deed made a further provision for his said daughter and her issue, he was bound to settle it in terms of the trusts before specified, and that the defenders, as his trustees, were bound to hold the said money upon the said trusts. The Lord Ordinary (Lord Rutherfurd-Clark) found and declared accordingly, and his judgment was acquiesced in by the parties.

Mr Alfred Sandilands was married in 1868 to his wife Mrs Annie Matilda Johnson or Sandilands. By their antenuptial marriage-contract he bound and obliged himself, and his heirs, executors, and successors, to make payment to the trustees under it, within six months after his decease or bankruptcy (if he should become bankrupt) of the sum of £5000 sterling, the free annual produce of which they were directed to pay to Mrs Sandilands during all the days of her life as an alimentary provision to her, so as to be for her sole and separate use, and after her death they were to hold and apply it in trust for the child or children of the then intended marriage. He further renounced his *jus mariti* and right of administration in regard to the whole estate and effects then belonging or which should afterwards belong to his wife, which were to remain separate estate in her person, or in the persons of trustees for her, to hold the same, if not exceeding at any time £500, for her sole and separate use, and if exceeding that amount, for the ends, uses, and purposes declared in the contract with reference to the sum of £5000 to be immediately referred to.

Mr Johnson, Mrs Sandiland's father, was a party to this contract, and he was taken bound as follows:—"For which causes, and on the other part, and as a further provision for the said intended spouses and the children of said marriage, the said Edward Johnson binds and obliges himself, his heirs, executors, and successors, at or immediately after the solemnisation of the said marriage, to pay to the said trustees the sum of £5000 sterling, with interest thereof at the rate of £5 per centum per annum from the time the same becomes due till paid; declaring that the said trustees and their foresaids shall hold and apply the said sum of £5000 for the ends, uses, and purposes following, *videlicet*—In the first place, the said trustees shall pay the annual interest and produce of the said sum to the said Annie Matilda Johnson during all the days of her life on her own receipt alone, and for her sole and separate use, in manner hereinbefore declared concerning the first mentioned sum of £5000, and after her decease, to the said Alfred Sandilands during all the days of his life: In the second place, the said trustees shall pay the said principal sum, after the decease of the longest liver of the said intended spouses, to the children of said marriage, and to the lawful issue of such of them as may decease leaving such issue, and born within such period as aforesaid" (that is, during the lifetime of the spouses, or the survivor of them, or within twenty-one years from the death of such survivor), "in such proportions, with such restrictions, on such terms, and payable at such periods as the said spouses jointly, or the survivor of them, may appoint by any writing under the hand of them, or of such survivor; and failing such appointment, and so far as no such appointment shall extend, to and among all such of the said children, or such one child, as being sons or a son shall attain the age of 21 years, or being daughters or a daughter shall attain that age or marry, and if more than one, in equal shares, and with power to the said Annie Matilda Johnson, failing a child or children of said marriage, and their issue as aforesaid, to destinate and dispose of the fee of the said principal sum of £5000 after her decease in such manner as she may, and whether covert or sole, think proper."

Mr Johnson further undertook as follows:—(Cond. 5) "And the said Edward Johnson further engages and binds and obliges himself that in case he shall, whether by gift in his lifetime, or by will or testamentary deed at his death, make any further provision for his said daughter or her issue, the same shall be settled upon similar trusts to those above expressed with reference to the said sum of £5000 to be settled by him as aforesaid, with the exception that such further provision for her children and their issue may be extended to the issue of his said daughter by any future marriage (but so, nevertheless, that the portion to be appropriated to the issue of the present marriage shall not be less in proportion to the number of children of each marriage than the share appropriated to the issue of any future marriage), and that the distribution thereof among the issue of his said daughter by the present marriage (in default of, and subject to any appointment by, the said spouses, or the survivor of them, of the share which shall be appropriated to the issue of the present marriage), and her issue by any future marriage, shall be such as he may direct and appoint; and also with the exception that failing children of the said intended marriage and their issue, before attaining a vested interest in the sum of £5000 before provided, that then and in that case the principal sum constituting such further provision as above mentioned shall revert to and form part of the residuary estate of the said Edward Johnson, or shall be otherwise disposed of as he may direct or appoint."

Mr Johnson died in 1879, leaving a trust-disposition and settlement dated in 1871, and codicils thereto dated respectively in 1876 and 1878, whereby he left his whole heritable and moveable estate to trustees for the purposes therein mentioned. By this disposition—after narrating that he had already made and might increase

certain advances by way of absolute gift to one or more of his sons for the purpose of establishing them in life, and that it was his wish to effect an equal distribution of his means and estate among all his children,—Mr Johnson bequeathed to each of his sons and daughters who might survive him such a sum of money, free of legacy duty, as with the advances previously made to them respectively, and computing provisions of £5000 which he made for each of his daughters in their marriage-contracts as of the nature of advances, should equalise them all. The residue of the estate was to be held by the trustees till the youngest of the testator's children should attain the age of 21, and then to be divided among them equally. Mr Johnson was survived by four children, viz., two sons, Mrs Sandilands, and another daughter, all of whom at the date of this action had reached the age of 21.

The disposition further provided—"Providing and declaring, as it is hereby provided and declared, that the equalising legacies and shares of residue which, in terms of the provisions before written, shall devolve upon my said daughters Annie Matilda Johnson or Sandilands and Emily Harriet Johnson (afterwards Mrs Ross), shall be held in trust by my said trustees for behoof of my said daughters respectively in liferent during all the days of her life, for her liferent use allenarly, and for her lawful children who shall attain the age of 21 years, in such shares and proportions and under such conditions as she and her husband jointly, or the survivor of them solely, may direct and appoint by any writing under their, her, or his hand, to take effect after her death; and failing thereof, equally among them, whom failing, for heirs and assigns whomsoever in fee."

Mr Sandilands raised a declarator against Mr Johnson's testamentary trustees, to have it declared that "the said deceased Edward Johnson having by his trust-disposition and deed of settlement, dated 7th June 1871, made a further provision for his said daughter, the pursuer's wife and her issue, whereby he bequeathed to her an equalising legacy along with her sister and the defenders her two brothers of so much money as would, with the advances previously made to them respectively, equalise them all, and also a fourth part of the residue of his whole estate, he was bound, in virtue of the obligation undertaken by him in the foresaid contract of marriage, to settle the said provision, upon the trusts before specified, in favour of the pursuer and his wife and the children of the said Annie Matilda Johnson or Sandilands and their issue as aforesaid, and that the defenders, as his trustees, are bound, notwithstanding the terms of the said trust-disposition and settlement, to hold the foresaid equalising legacy and share of residue upon the said trusts, and to conform themselves thereto in administering the estate under their charge: Or otherwise, the said equalising legacy and fourth part of residue ought and should be settled, at the sight of our said Lords, upon the several trusts expressed in the said antenuptial contract of marriage."

The pursuer averred—"The provision or declaration last above quoted has the effect of settling the equalising bequest to the pursuer's wife and her share of residue upon trusts different from those expressed in the foresaid antenuptial contract of marriage with reference to the sum of £5000 therein settled by the late Mr Johnson, and is therefore a violation of one of the obligations undertaken by Mr Johnson in the said contract, on the faith of which the pursuer became a party to it. In particular, it does not provide for the pursuer enjoying, in the event of his surviving his wife, a liferent of the income arising from the said equalising bequest and share of residue, as was done in regard to the said sum of £5000, which income amounts annually to £1600 or thereabouts, and it limits the fee to the children of Mrs Sandilands who shall attain the age of twenty-one, and their issue, so excluding children who may die before attaining that age, and their issue, if any."

He pleaded—"(1) The obligations undertaken by the deceased Edward Johnson in the antenuptial contract of marriage libelled on having been binding upon him, and he having died without implementing the same, they are binding upon the defenders as his trustees. (2) The said Edward Johnson having, by his trust-disposition and settlement libelled on, made an additional provision for his daughter and the children of her marriage, the pursuer is entitled to decree of declarator as concluded for, or to have the said provision settled upon the trustees under the marriage-contract, and upon the several trusts therein expressed."

The defenders pleaded—"(4) The late Mr Johnson having had full power, notwithstanding the terms of the said marriage-contract, to make such further provision for his said daughter and her issue, and in such terms as he might think fit, the defenders are entitled to absolvitor. (5) The late Mr Johnson not having been bound by the terms of the said marriage-contract to settle any future provisions he might make in favour of Mrs Sandilands and her issue in the special manner therein expressed, *et separatim* the present defenders having come under no such obligation, they are entitled to absolvitor."

A *tutor ad litem* was subsequently appointed to Mr and Mrs Sandiland's children, and sisted as a party to the action.

The pursuer argued—Mr Johnson having made a further provision by his will for Mrs Sandilands, was bound to make it in the particular manner specified, and his trustees were now bound to give effect to that obligation.

Authorities—*Thurburn's Trustees* v. *Maclaine and Others*, Nov. 30, 1864, 3 Macph. 134; *Douglas' Trustees* v. *Kay's Trustees and Others*, Dec. 2, 1879, 7 R. 295; *Maude, &c.* v. *Wright's Trustees*, Jan. 23, 1878, 5 R. 570.

The defenders argued—Mr Johnson was admittedly not bound to make any further provision for his daughter at all. This put him at once in the position of a donor, and he was thus free to make his gift in any form he liked. This distinguished the present from previous cases. The undertaking in the marriage-contract was not one enforceable at law, and was therefore no obligation at all. On the wording of the clause itself, the "similar trusts" might be fairly read as trusts "for his said daughter or her issue," excluding pursuer. The testator's intention in his will was perfectly clear, and should be given effect to.

The Lord Ordinary (RUTHERFURD CLARK) found and declared in terms of the declaratory conclusions of the summons.

He added this note—"The first question is, whether the clause of the contract of marriage quoted in the fifth condescendence imposed any obligation on the truster, Mr Johnson. It was urged, that as he was not bound to make any further provision for his daughter, he might settle as he chose the condition of his own gift, or, in other words, that he could not put himself under any obligation with respect to the execution of a voluntary act. But in the opinion of the Lord Ordinary this view is not well founded. The truster was not bound to make any further provision on his daughter; but if he chose to do so he had very expressly bound himself to settle it in a particular way. There is nothing, it is thought, to prevent such an obligation from having legal force.

"The pursuer's interest in suing this action is to secure the life interest of the additional provisions which were settled by the truster on his daughter and her issue. It was maintained that the clause in question was to be construed as in favour of the daughter and her issue only, and that the pursuer could claim no benefit by it. The Lord Ordinary cannot accede to this view. He thinks that it must be held that the pursuer was stipulating for his own benefit as well as for that of his wife and children, and that inasmuch as he has a liferent interest in the provision settled by the marriage-contract he is entitled in like manner to a liferent interest in the additional provision contained in the trust-deed."

This judgment was acquiesced in by the parties.

Counsel for Pursuer—D.F. Kinnear, Q.C.—Burnet. Agents—Adam & Sang, W.S.

Counsel for Trustees—Asher—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Tutor *ad litem*—Wallace. Agent—A. Forrester, W.S.

Friday, March 18.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

PATERSON *v.* M'EWAN AND OTHERS.

(Before Seven Judges.)

Feu-Contract—Implied Obligation—Right-of-Way—Conditional Obligation.

A feuar became bound under his feu-contract to make and maintain the continuation of a proposed road, so far as fronting his feu, as soon as a road should be opened up through an adjoining estate in connection with the proposed road. The feuar subsequently acquired by purchase a narrow strip on the adjoining estate, which crossed the line of the proposed road and ultimately came to be the only barrier in way of completing it. *Held* that his contract with the superior did not imply any obligation to give a passage through the strip for the purpose of forming the proposed road, even although the strip was acquired in the knowledge that it might sometime come to block the proposed road, and was of no value to the feuar except for that purpose.

In November 1863 the pursuer, who was then sole proprietor of the lands of Dowanhill, feued to the defender M'Ewan a plot of ground, part of said lands, described in the feu-contract as situated on the south side of an intended continuation of Victoria Circus Road, to measure 40 feet in breadth, and bounded on the north by the central line of the intended continuation of Victoria Circus Road, and on the east by the lands of Kelvinside. At the date when the feu-contract was entered into, the pursuer was not proprietor of any part of the lands of Kelvinside, but he had for some time been in communication with the proprietors of Kelvinside—Messrs Montgomery and Fleming—with a view to arranging for the continuation of Victoria Circus Road through Kelvinside and on to the Great Western Road. The proprietors of Kelvinside were, however, unwilling to accede to the pursuer's desire for a junction of the systems of roads upon the two estates, and the defender was accordingly authorised by the feu-contract to include within his pleasure grounds the half of the 40 feet of the breadth of the intended road until the ground so included was required for the formation and continuation of the road. But the deed provided "that the said James M'Ewan and his foresaids shall be bound and obliged, if required by the said first party, so soon as a road shall be opened up and completed through the lands of Kelvinside to the Great Western Road in connection with the said road or street called Victoria Circus Road, to open up, make, and continue one-half of Victoria Circus Road so far as the said road bounds the said plot or area of ground above disponed on the north, and to maintain the same in good order in all time thereafter for mutual communication between the lands of Kelvinside and the first party's lands of Dowanhill."

In September 1864 the defender purchased from Montgomery & Fleming, at the price of £142, a strip of ground about 4½ feet wide, part of the lands of Kelvinside, running along the boundary of the estate of Dowanhill, and across the intended continuation of the Victoria Circus Road to the Great Western Road. This strip was about 590 feet in length, and was conveyed to the defender by Montgomery & Fleming free from obligations of any kind relative to the formation of roads. In 1873 the pursuer acquired a considerable portion of the estate of Kelvinside, and at the same time came under obligation to the proprietors of an adjoining portion of Kelvinside to open up and form a continuation of a road then projected across the lands of Kelvinside through the strip of land in question belonging to James M'Ewan to join Victoria Circus Road. Shortly afterwards the projected road was formed up to the defender's strip, and the pursuer then called upon the defender to form the continuation of Victoria Circus Road through his (the defender's) land, in terms of the feu-contract, and to allow the road to be formed across the strip of ground, upon payment of compensation for the right of passage. This the defender refused to do, and so matters remained till 31st December 1879, when the trustees of the