action at all, because, as Lord Kinnear has stated, it is an action to have her compelled to perform a personal obligation which is alleged to be incumbent upon herself, and for damages for failure to fulfil that personal obligation of hers. Now, that is just where I think the Lord Ordinary has gone wrong in this case. He "finds that the said personal obligation is now binding on the defender as his general representative." I do not think that it falls upon the defender as personal representative of the late Kenneth Mackenzie. I think that the obligation is transmissible and enforceable against nobody but the vassal himself. I agree with Lord Kinnear that the questions which arose in the cases of *Russell* v. *Aiton*, and the *Magistrates of Dundee* v. *Stratton*, are not in this case, because from the very nature of the case it can only arise where a person becomes vassal in the feu, because these conditions are not imposed as separate obligations; they are only imposed as conditions of the acceptance and holding of the feu. Now, if that be so—if a person never takes possession and never accepts the feu, as the defender has not—there is no condition which can raise an obligation against her. It is only in respect of the acceptance of the feu that the obligation arises. If the feu is never accepted, the obligation can never arise. In my view that is enough for the disposal of this action, because, as Lord Kinnear has pointed out, this action is founded upon a certain obligation the fulfilment of which is personal to the defender. If she is under no obligation to fulfil any stipulation, it is clear that she can be under no liability in damages for not fulfilling a condition which is not binding upon her at all; that is the state of this process.

Upon these grounds I entirely concur in all that Lord Kinnear has said.

LORD M'LAREN—I concur in Lord Kinnear's opinion, and I only wish to express one qualification which I think is implied in the opinions which have been given—I mean, when we say that an obligation of this kind if unfulfilled by the immediate grantee transmits against the heir in heritage, it is understood that we are speaking of an obligation which has some natural relation to the lands or the subjects of disposition. This is the character of the obligation in the present case. It is an obligation to put buildings on the lands. We know that there are decisions of this Court, and also of the House of Lords, where the subject has received very great consideration, to the effect that a continuing obligation having relation to lands, such as an obligation to relieve the other party of the payment of tithes or public burdens, will transmit against the heir in heritage, assuming that the relation of superior and feuar existed between the original contracting parties. But it is conceivable that obligations unconnected with the land or subject of conveyance may be undertaken in a feu-contract, and such obligations would not in general affect the heir in heritage. There of course are some obligations which would not be binding on anyone—I mean such as are annulled by the operation of the statute law. Of this nature are obligations to render personal services to the superior, and obligations restraining alienation without the consent of the superior, both of which are prohibited as to all future grants by the Act abolishing Ward Holdings, 20 Geo. II. c. 20. Another instance is the condition that deeds of transmission of the feu are to be prepared by the superior's agent—a condition which is made illegal by one of the sections of the Conveyancing Act. But setting aside these cases, it is evident that these are conditions which may be binding as matter of contract between the parties to the original feu-contract or charter although not relating to the subject-matter of the charter, and as to these the question might arise, whether the obligation, after the death of the original obligant, is to be performed by his heir or by his executors. Such cases of course are not very likely to arise, and I only wish to say that our decision in this case would not necessarily govern the case of the effect to be given in a question with the grantee's heirs to an obligation which is outside the proper scope of the feudal contract.

LORD PRESIDENT—I agree in holding that the defender, who is not the vassal, is not bound to erect houses in terms of the clause in this feu-contract, and by consequence that she is not bound to pay damages if she does not do so. The conclusion of this action being solely to compel her to do one or other of these things, I think she is entitled to absolvitor.

We recal the interlocutor and assoilzie the defender.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for the Pursuer—Jameson—N. J. Kennedy. Agents—R. D. C. Marshall, W.S.

Counsel for the Defender—C. S. Dickson—Wilson. Agents—Gray & Handyside, S.S.C.

Friday, November 20.

FIRST DIVISION.

[Court of Exchequer.

ARIZONA COPPER COMPANY *v.* SMILES (SURVEYOR OF TAXES).

Revenue—Income-Tax—Act 5 *and* 6 *Vict. c.* 35, *Sched. D, First Case, Rule* 4, *sec.* 159—*Profits—Deduction.*

A limited company borrowed a large sum of money, and undertook, along with repayment of the capital sum borrowed, to pay the lenders a bonus of 10 per cent. thereon. *Held* that in "intimating the balance of profits and gains chargeable under Schedule D," the company were not entitled to deduct the amount of the bonus from

the profits of the year in which it was paid.

The Arizona Copper Company, Limited, was formed and registered on 11th August 1882, and was re-constructed in 1884. On 4th December 1883 a company called the Arizona Trust and Mortgage Company, Limited, was formed and registered, as the prospectus bore, "primarily for the purpose of acquiring and holding the obligations of the Arizona Copper Company, Limited, and to provide the funds necessary to complete its works."

By agreement between the Copper Company and the Mortgage Company, dated 8th and 11th December 1883, it was provided, *inter alia*, (1) that the Mortgage Company should lend to the Copper Company the whole sums required for these purposes, not exceeding in all the sum of £360,000; (2) that the Copper Company should repay all such sums as were lent, on 15th May 1894, with an option to the Copper Company, upon giving six months' notice to the Mortgage Company, to pay a part or the whole of the advances made to them at 15th May 1889, and that on repayment of any capital sum the Copper Company should also pay to the Mortgage Company along therewith a bonus of 10 per cent. on the amount unpaid; and (3) that the Copper Company should pay interest at the rate of 10 per cent. on the amount of the advances due by them.

Following upon this agreement the Mortgage Company lent the Copper Company sums amounting to £337,414, and the Copper Company repaid these sums under an agreement dated 2nd and 4th June 1888, and along with repayment of the capital sum borrowed they paid the Mortgage Company the stipulated bonus of 10 per cent., which, less 7 per cent. discount, amounted to £31,379, 11s. 9d.

In making their return for assessment to income-tax for the year 1889-90, based on the profits of the three preceding years 1886-88, the Copper Company stated a sum of £27,462, 8s. 7d. as the amount of their profits for the purpose of assessment, and on that sum they were assessed and paid income-tax. In making that return the Copper Company had deducted from the profits of the year ending September 30th 1888, *inter alia*, the amount of the bonus of £31,379, 11s. 9d., but this and certain other deductions were disallowed by the Income-Tax Commissioners, and an additional assessment of £14,527, or one-third of the disallowed deductions, was subsequently intimated to the company.

The Copper Company then appealed to the General Commissioners of Income-Tax. In support of their appeal they stated—"The above sum of £31,379, 11s. 9d. was duly debited to profit and loss as a charge on the business of the company, and it remained at the debit of that account until, in order to identify the larger sums so dealt with, and if deemed expedient spread them over longer than one year, the said suspense capital account was opened. The amount debited to that account was in due course charged against and paid out of the profits of the company." The Commissioners refused to allow the deduction claimed for the amount of the bonus. At the request of the agent for the Copper Company, a case, from which the above narrative has been taken, was stated for the opinion of the Court of Exchequer.

The First Case of Schedule D, sec. 100, of the Income-Tax Act 1842 deals with "duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act."

Rule 3rd of the First Case provides, *inter alia*, that "in estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, . . . for any sum employed or intended to be employed as capital in such manufacture, adventure, or concern." . . .

Rule 4 provides—"In estimating the amount of the profits and gains arising as aforesaid no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains."

Section 159 provides—"And be it enacted that in the computation of the duty to be made under this Act in any of the cases before mentioned, either by the party making or delivering any list or statement required as aforesaid, or by the respective assessors or commissioners, it shall not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity, or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments." . . .

Argued for the Arizona Copper Company—The deduction of a bonus paid on borrowed money was not one of those specially allowed by the Income-Tax Acts, but the company's right to deduct was not rested upon that ground. The deductions allowed were payments "out of profits," while the payment in question was not made in that sense "out of profits" at all. It was part of the expense of carrying on the business of the company, without which no profit could be earned, and was to be deducted before the profits could be ascertained. Rule 4 of the First Case of sec. 100 had therefore no application at all. Whether the bonus was to be looked on as additional interest payable in the year immediately preceding repayment of the loan, or as a commission to a financial agent for getting the loan, it was in either case a payment quite distinct in character from the interest paid to the debenture-holders of a company, which was the matter under consideration in the case of the *Alexandria Water Company* v. *Musgrave*, *infra*. The scheme of the statute was to set forth all the deductions which were to be allowed, and as this deduction was not one of those prohibited, the inference was that it was an allowable deduction. There were a number of cases, of which the following were instances, in

which claims for deduction had been considered, but none of them bore directly on the present question—*Addie* v. *Solicitor of Inland Revenue*, February 16, 1875, 2 R. 431; *The Coltness Iron Company* v. *Black*, April 7, 1881, 8 R. (H. of L.) 67; *Forder* v. *Handyside*, 1876, L.R., 1 Exch. Div. 233; *Watney & Company* v. *Musgrave*, 1880, L.R., 5 Exch. Div. 241. In *Addie* v. *The Coltness Iron Company* it had been held that coalowners were not entitled to deduct the expense of sinking new pits, and in *Forder* that an ironfounder was not entitled to deduct a sum set aside for depreciation of plant. The ground of judgment in these cases was that the payments in question were really to account of capital, but that was not the nature of the payments in this case. In *Watney & Company* no deduction was allowed for premiums paid by a brewer on the purchase of the leases of public-houses in respect that these were payments made outside his business with a view to increase his custom. The payment here was made in order to carry on the business. There was one decision as to the quality of a bonus, but the nature of the bonus there was entirely different from the one in question in this case—*Irving* v. *Houston*, 1803, 4 Pat. App. 521.

Argued for the Surveyor of Taxes—The sections of the Income-Tax Act dealing with deductions made no reference to gross or nett profits, but required a trader to put on one side everything in the nature of profits, making only such deductions as the statute allowed—section 159. The only allowable deductions from a trader's receipts before assessment, other than those expressly authorised by the statute, were legitimate working expenses, which had to be deducted before profit could be ascertained. The sum for which deduction was claimed here fell under neither category. In any view that might be taken of it, it was a payment bearing express relation to capital made out of profits, and any deduction for such a payment was expressly disallowed by the Act — section 100, First Case, rule 3; *Edinburgh Southern Cemetery Company* v. *Surveyor of Taxes*, November 29, 1889, 17 R. 154; *Mersey Docks and Harbour Board* v. *Lucas*, 1883, L.R., 8 App. Cas. 891; *Paddington Burial Board* v. *Commissioners of Inland Revenue*, 1884, L.R., 13 Q.B.D. 9. It was not a commission, for a commission implies an intermediary, and here there was none. Even if looked upon as a commission, it would not be an allowable deduction—*City of London Contract Corporation, Limited* v. *Styles*, 1887, Tax Cases, ii. 239. The idea that the claim of the Crown could be resisted on the ground that this bonus was a payment of a debt was excluded by the decision in the *Mersey Docks* case. It was an "annual payment," for which no deduction was to be allowed—Schedule D, First Case, rule 4, section 159; *Last* v. *London Assurance Corporation, Limited*, 1885, L.R., 10 App. Cas. 438; *Gresham Life Assurance Society* v. *Styles*, 1890, L.R., 24 Q.B.D. 500. In its nature it very much resembled the premiums, deduction of which was disallowed in *Watney & Company's* case. It was really a payment of additional interest on borrowed capital, but no deduction could be allowed on that ground—Schedule D, rule 4, section 159; *Alexandria Water Company* v. *Musgrave*, 1883, L.R., 11 Q.B.D. 174. So far as the Crown was concerned, it was a question, *inter alios*, whether the Crown had a right to deduct the tax before paying the borrower.

At advising—

LORD PRESIDENT—The Arizona Copper Company, Limited, borrowed from the Arizona Trust and Mortgage Company, Limited, moneys amounting to £337,414 for the purpose of completing their works. By the agreement between the two companies under which these loans were given, they were to be repaid on 15th May 1894, but the borrowers were entitled upon giving six months' notice to pay off the whole, or such portion as they thought fit, at 15th May 1889. On the repayment of any capital sum the borrowers undertook to pay to the lenders along therewith a bonus of 10 per cent. upon the amount of the repayment.

The option thus given was exercised, and the whole loan has been repaid before the stipulated term, along with £31,379, 11s. 9d. as the covenanted bonus. This sum, according to statement of the appellant (the borrowing company), was in their books debited to profit and loss as a charge on the business of the company; it remained at the debit of that account until in order to identify the larger sums so dealt with, and if deemed expedient spread them over longer than one year, it was put to a suspense capital account, but the amount was in due course charged against and paid out of the profits of the company.

The question before the Court is, whether the Arizona Copper Company, the borrowers, are entitled to deduct this bonus in returning their profits under the Income-Tax Acts?

There cannot be said to be any complexity or ambiguity in the application of the money or in the source from which it was paid. It was paid in a lump payment as one of the considerations stipulated for a loan of capital employed in the adventure—to wit, the completion of the works—the other consideration being interest at 10 per cent. per annum, and it is in terms admitted in the case to have been paid out of the profits of the company.

Now, at this stage of the development of the law of the income-tax, it is not to the purpose to consider whether such a payment is a proper deduction from the point of view of a business concern, making up its own balance-sheets for its own purposes. The question is, whether such a payment out of profits is an authorised deduction in estimating the balance chargeable under Schedule D. It appears to me, as a sum paid in return for a loan of capital, to be entirely heterogeneous to those outlays, the deduction of which is permitted as being necessarily incidental to the earning

of profit, and I think to deduct it would be contrary to the prohibitions laid down in Schedule D and in the 159th section of the same Act.

LORD ADAM—I confess I cannot see upon this case, and I do not think the case tells us, when the various sums of capital were repaid by the Copper Company to the Mortgage Company, and when the 10 per cent. bonus accresced and became due. I rather gather that the matter is one of adjustment in the Copper Company's books. But however that may be, I think the most favourable way to take the question for the Copper Company is to assume, as was assumed in the discussion, that this whole sum of £31,379, 11s. 9d. was paid within the year in which it is proposed to be assessed, although, I confess, I do not see that that appears upon the face of the case.

Now if that be so, my opinion is with your Lordship, that this sum of £31,379, 11s. 9d. is simply a debt due by the Copper Company to the Mortgage Company. So far as I can see, it is not a loss incurred in carrying on the business of the Copper Company in any way. If it were, it might or it might not be a proper sum to deduct before striking the balance of profit and gains even in a question with the Crown. But it is not a loss; it is merely a debt incurred in carrying on the business of the company. I do not see, if we were to allow a deduction of this debt on the ground that it was paid out of profits, where we should be able to stop. I find no authority in any of the Taxing Statutes for allowing such a deduction.

Now, if the amount of this bonus be not—as I think it very clearly is not—a sum which ought to be deducted before striking the balance of profits and gains on which this company falls to be assessed, I think there is no question in this case, because if it is not to be deducted in order to ascertain the balance of profits and gains, then to be deducted it must fall under some of the clauses of the statute which allow deductions to be made. But there is no clause allowing such a deduction as this. Therefore I agree with your Lordship.

LORD M'LAREN—I agree with your Lordship in the chair, and the only remark I would make is, that if this is not profit, then the amount of profit earned in a particular year must depend on the resolution of the company to pay off debt or not to pay off debt. Now, that seems to me to reduce the case contended against the Crown to the absurd proposition that the company should be entitled to fix what they consider profit, and be assessed upon that sum.

LORD KINNEAR concurred.

The Court affirmed the determination of the Commissioners.

Counsel for the Copper Company—Asher, Q.C.—Ure. Agents—Davidson & Syme, W.S.

Counsel for the Surveyor of Taxes—Lord Adv. Pearson—A. J. Young. Agent—David Crole, Solicitor of Inland Revenue.

Tuesday, November 17.

FIRST DIVISION.

SMITH & TURNBULL (LIQUIDATORS OF THE BENHAR COAL COMPANY, LIMITED).

Process—Authority to Correct Error in Note and Extract Decree.

The liquidators of the Benhar Coal Company presented a note to the Court setting forth that they had in 1882 sold the superiority of certain ground feued by the company to a Mr Renton under the authority of the Court; that after the sale was completed, it had been discovered by the purchaser's agents that in the note craving authority to sell, and in the extract-decree thereafter obtained, the date of the feu-contract, under which the ground was held by Mr Renton, had been wrongly stated as 24th and 29th September 1878 instead of 24th and 27th September 1878. The liquidators therefore prayed the Lord President "to move the Court to authorise the correction of the foresaid error in said note, and also to grant warrant to the Principal Extractor of Court to make the corresponding alteration on the extract of the decree thereafter pronounced, and to the Deputy Keeper of the Records to make the corresponding alteration in the record copy of the said decree, by substituting the date 24th and 27th September as the proper date of said feu-contract in place of 24th and 29th September. Reference was made to the following authorities:—*Hope* v. *Hamilton*, July 1, 1851, 13 D. 1268; *Small's Trustees*, July 5, 1856, 18 D. 1210. The Court *granted* the prayer of the note.

Counsel for the Liquidators — Pitman. Agents—J. & F. Anderson, W.S.

Saturday, November 21.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

WEIR *v.* THE INVERNESS COUNTY COUNCIL.

Process—Reparation—Damages—Proof or Jury Trial.

While a heap of stones on the side of a road were being broken for road-metal, a splinter of stone struck and injured a passer-by. He sued the road contractor for damages, and averred that the site of the heap was ill-chosen, that there was special danger from the kind of stone used, and from the proximity of a wall, which affected the flight of the splinters.

The Lord Ordinary having appointed