of the leading questions between the parties is the averment contained in the amendment added by the defenders, to the effect that the pursuer put before them a statement of a turnover amounting to £1470, which in great part did not consist of legitimate business but was introduced by the pursuer without the knowledge or consent of the defenders, and to the extent of £710 was so introduced in order to create a fictitious appearance of turnover, and that the said turnover was not a business turnover at all. Now, I agree that that is equivalent to a fraudulent statement by the pursuer of a fictitious turnover. I do not find that averment in the pleadings before the arbiter at all. I think it is a new question, and I cannot infer from anything that took place before the arbiter that the parties have agreed to be bound by his judgment upon the question of the honesty or fictitious character of the balances put before the defenders by the pursuer Mr Miller. On that ground alone I should hold that the question now before your Lordships is not embraced in any contract of submission which has been brought before us. But while I so hold I desire to say—as indeed I have already said—that I entirely assent to the reasons which have been given by your Lordship in the chair and by Lord M'Laren, and that I also agree in reserving my opinion upon the point which your Lordship has not thought it desirable to decide in this case.

Lord Pearson—In sisting this action as Lord Ordinary, in order that the parties might proceed in the reference to Mr Ritchie, I acted upon two assumptions.

The first was that the question in dispute as to the business turnover might be regarded as a question as to the intent and meaning of the agreement; that to that extent it fell within the scope of the original reference clause, and that there was a real dispute between the parties on that head, however easy it might be of solution. The defenders have since been allowed to amend their record so as to bring out more clearly the question actually in dispute, and it now appears clearly that the parties are really at one as to the meaning of the expression "business turnover," and that the variance is upon the facts as to the character of the business introduced by Mr Miller. That being so, it is no longer a question to be tried in the original reference, but in an extension of that reference, if it has been extended, or in this action, if it has not. Now, the second assumption on which I proceeded was, that the reference had been extended by the parties so as to include all the claims appearing in the record as closed by the arbiter, and these certainly included the two pecuniary claims made in this action. Now I think it would be impossible to lay down any general rule as to what circumstances will be sufficient to import a concluded agreement to refer, or at what stage of the arbitration proceedings an agreement is to be inferred from the pleadings. I should be unwilling to hold that it was in every case open to either party to resile unless and until the award was issued. Further, I should think that the joining issue on a closed record was a circumstance of some importance on that question, though perhaps not absolutely conclusive. But the present case is peculiar in this respect, that the arbiter had no sooner closed the record for the second time than he threw the whole thing loose by proposing to limit the proof in such a way as to restrict it to matters falling within the original reference clause; and he appointed parties to be heard on that proposal, an order which was immediately followed by a strong protest from the present pursuer. It was precisely at that stage that the decree of reduction subsequently pronounced took effect. All the procedure that followed was cleared away by that decree, and while I think the point is one of some difficulty, I am prepared to hold that it would not have been too late at that stage, and consequently is not too late now, for the pursuers to withdraw from the position they had previously taken up, and to decline to have the reference enlarged.

The Court recalled the interlocutor reclaimed against and remitted to the Lord Ordinary to allow a proof.

Counsel for Pursuers and Reclaimers—The Dean of Faculty (Campbell, K.C).—M'Lennan, K.C.—Lippe. Agents—Dalgleish & Dobbie, W.S.

Counsel for Defenders and Respondents—Johnston, K.C.—Hunter, K.C.—Morison. Agents—Somerville & Watson, S.S.C.

Tuesday, January 9.

FIRST DIVISION.

[Lord Pearson, Ordinary.

H. M. ADVOCATE *v.* WARRENDER'S TRUSTEES.

Revenue—Estate-Duty—Property Passing on Death—Deductions Allowable as Debts—Debts Incurred for "Full Consideration in Money or Money's Worth wholly for the Deceased's own Use and Benefit"—Marriage-Contract Provision—Provision by Father in Son's Marriage Contract—Discharge of Possible Claim for Legitim—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 7.

A father in his son's marriage contract bound himself, in contemplation of the son's marriage and in consideration of a conveyance by the son's intended spouse in an indenture or marriage settlement executed by her, to grant a bond over his estate in security of an obligation undertaken by him in the said contract to settle a sum of £30,000 in trust for behoof of the son, and on his (the son's) death for behoof of his widow in liferent and their issue in fee. In the marriage

contract the son discharged any claim of legitim that he might have against his father's estate.

Held that the bond being granted in consideration of, not only the discharge of legitim, but also the marriage, was not a debt incurred "for full consideration in money or money's worth wholly for the deceased's own use and benefit," within the meaning of sec. 7 (1) of the Finance Act 1894, and therefore that it did not fall to be deducted in ascertaining the value of his estate for the purpose of estate duty.

The Finance Act 1894 (57 and 58 Vict. cap. 30), sec. 7, enacts—"Value of Property.—(1) In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and encumbrances, but an allowance shall not be made (*a*) for debts incurred by the deceased or encumbrances created by a disposition made by the deceased, unless such debts or encumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest . . . and any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto."

Sir George Warrender, Bart., of Lochend, died on 13th June 1901 leaving a trust-disposition and settlement dated 24th January 1899, and, with relative codicils, recorded 26th June 1901, whereby he conveyed to certain trustees for the purposes therein stated his whole estate heritable and moveable. For the purpose of adjusting the estate duties leviable in respect of the heritable property which passed or was deemed to pass on the testator's death, the trustees lodged accounts from which it appeared that such estate amounted to £319,008, 2s. 7d., but they claimed to make therefrom a deduction for bonds amounting to £92,500, including therein a bond for £30,000 which had been granted by the testator over his estate of Bruntsfield in favour of his son's marriage contract trustees. The inclusion of this bond for £30,000 was objected to.

In these circumstances the Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, raised an action on 1st March 1905 against William Hugh Murray, W.S., Edinburgh, and others, the trustees acting under the trust-disposition and settlement, in which he sought to have them ordained to deliver a corrective account and to pay the sum of £2200 as the amount of estate duty on such heritable estate still due and resting-owing.

He pleaded—"On a sound construction of the Finance Act 1894, and in particular of section 7, the value of the testator's heritable estate passing on his death is not subject to any deduction in respect of the bond and disposition in security for £30,000 granted under his son's marriage-contract."

The facts connected with the bond for £30,000 are given in the opinion (*infra*) of the Lord Ordinary (PEARSON), who on 5th December 1905 pronounced this interlocutor—"Appoints the defenders to deliver to the pursuer the corrective account called for in the summons: Finds that in said corrective account deduction for the sum of £30,000 contained in the bond and disposition in security mentioned in the record is not permissible: Finds the pursuer entitled to expenses."

Opinion. — . . . . [*After narrating the nature of the action, supra*] — . . . . "The Inland Revenue Commissioners object to the proposed deduction of this sum of £30,000. They have ascertained the principal value of the property in terms of section 7, subsection 5 of the Finance Act, by estimating the price which, in their opinion, the property would have fetched if sold in the open market at the time of the death, on the footing of the property being unencumbered. Then, in terms of section 7, subsection 1, they are called on to make allowance for debts and encumbrances, subject to this direction that 'an allowance shall not be made for debts incurred by the deceased, or encumbrances created by a disposition made by the deceased, unless such debts or encumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit.' Allowance has been made in respect of all the encumbrances except the bond for £30,000. As to that encumbrance it is maintained that the defenders have failed to show that it was created 'for full consideration in money or money's worth wholly for the deceased's own use and benefit.'

"The bond bears to be granted in implement of an obligation contained in the antenuptial contract of marriage (dated February 1894) between George Warrender (Sir George's second son) and Lady Ethel Maud Ashley; and it is in favour of the trustees of that contract. Sir George Warrender thereby binds himself, and his heirs, executors, and representatives, to pay to the trustees the sum of £30,000 at Martinmas 1894, with interest and penalty, and conveys the Lands of Bruntsfield in security in common form. Accordingly, the question must be decided in view of the marriage contract provisions and the circumstances of the parties to that contract.

"The parties (as the contract bears) were George Warrender, with the special advice and consent of Sir George Warrender his father, and Sir George Warrender for himself, on the one part; and Lady Ethel Maud Ashley, with the special advice and consent of her mother Lady Shaftesbury, on the other part. Sir George bound himself to grant the bond now in question; and it was further stipulated that if the trustees should call upon him to pay up the amount in the bond, or in the event of his doing so, he should be bound to provide other security which, with the £30,000, should be sufficient to yield a minimum annual income of £1200. The trust fund was to be held for payment of the income to the husband during his life. On his death the trustees were to set aside £20,000, and pay the income of it to Lady Ethel if she survived

him, restrictable on her re-marriage. The fee was to be divided among the children or their issue up to certain specified amounts, subject to a power of appointment vested in the husband, and subject also to the exclusion of any child succeeding to the entailed estate of Lochend at the period of division. Any surplus of the trust-fund was to be made over to the person who should have succeeded to the baronetcy when the funds became available. Power was conferred on the husband, in the event of his marrying again, to make certain provisions for the wife and children of the second marriage.

"These provisions in favour of the wife and children were declared to be in full satisfaction of all legal rights arising to them through the decease of the husband.

"Further, the husband accepted of the obligations thereby contracted by his father Sir George Warrender as in full satisfaction of all legal claims for legitim or otherwise that he might have against Sir George's estate, other than his rights under his father's marriage settlement. And he also bound himself, if he should become heir-apparent to the entailed estate of Lochend during his father's lifetime, to enter into a re-entail of that estate in certain terms should his father request him to do so. The effect of these clauses, as shewing onerous consideration between Sir George and his son, is said to be enhanced by the circumstances set forth by the defenders in answer 9. It appears that under Sir George's own marriage settlement there was already an exclusion of the rights to legitim of all his children other than the child who should succeed to the entailed estate of Lochend. The heir-apparent to Lochend was his eldest son John Warrender; and in 1892 Sir George, being anxious to have a perfectly free hand in the disposition of his moveable estate, had obtained from his son John, for valuable consideration, a discharge of his right to legitim. In 1894 John Warrender's state of health was such as to make it not improbable that George would succeed his father as heir of entail in Lochend, in which case he would be entitled to legitim. Hence the desire of Sir George Warrender to obtain from his son George a discharge of his legitim in any event. The defenders do not say what the amount of Sir George's free moveable estate was at the date of the marriage contract in 1894, but they aver that George's share of legitim at his father's death would have amounted to over £250,000.

"I hold that the defenders fail to bring the case under either of the requirements of section 7, subsection 1. In the first place, I cannot affirm the proposition that the encumbrance was created wholly for the deceased's own use and benefit. The renunciation of legitim, which is said to have been the consideration for it, did not operate for Sir George's use and benefit in any real sense. It did not enlarge his estate nor his own powers over it *inter vivos*. It only enlarged his testamentary power over so much of the estate as he chose not to spend. It is true that, if the trustees had called on him to pay up the money (as they were entitled to do), he might possibly have arranged to obtain the money from a third party on the security of the estate; and it may be that such an encumbrance might have been represented as being for his own use and benefit, seeing that it was to raise money to pay a debt. But the original incurring of the debt, the original creation of this encumbrance, can hardly be so represented, apart from the question whether Sir George created the encumbrance for full consideration in money or money's worth. As I am prepared to answer this question in the negative it is needless to pursue the discussion of the other question further.

"I note, to begin with, that Sir George Warrender's obligation to grant the £30,000 bond, as undertaken in his son's marriage contract, bears to proceed (1) in contemplation of the marriage, and (2) in consideration of the conveyance and obligation by Lady Ethel Ashley in a marriage settlement in English form which she executed of even date with the Scotch contract. In view of this clause so expressed it is impossible to say to what extent the alliance of his son with Lady Ethel Ashley may not have entered into his mind, and even into his calculations, in resolving to grant a bond for the amount he did. It is well settled that the consideration of marriage is not money's worth within the meaning of such a statutory enactment; and therefore it is impossible to find out how much of the obligation in the bond is to be held as induced by a consideration in money's worth, if any such existed.

"The defenders suggest that such full consideration for the bond is to be found in the stipulations of the contract as between the husband and his father. They concede that the consideration of marriage cannot be represented as money or money's worth. But they say that the contract, apart from the rights and stipulations of the spouses *inter se*, contains also a series of stipulations as between Sir George Warrender and his son which furnished Sir George with full and ample consideration in money or money's worth for his granting the bond for £30,000. They found, in particular, on the clause whereby the son discharged his right to legitim in the circumstances I have briefly described. Even so, it appears to me impossible to affirm that this can be taken as fulfilling the requirements of the statute. The value of the share of legitim as at the date of the marriage contract is not stated, but assuming that as at that date the share would have been well over £30,000, the contingencies which stood between George Warrender and the enjoyment of it were such as to render all calculation of its value futile. It depended not only on his surviving both his father and his elder brother, but also on his father's not spending his fortune in his lifetime, and not investing it in heritable property. On these grounds I am of opinion that the defenders fail to bring the case within the requirements of section 7, subsection 1, so as to entitle them to the

deduction which they claim.

"I have thought it right to consider the particular arguments urged in this case; but I must add that I think in principle it is ruled by the case of *Alexander's Trustees*, 1905, 7 F. 367.

"The defenders maintained that in any view partial deduction of the debt should be allowed, even if it could not be wholly deducted as having been created for full consideration. I confess I am not satisfied that the statute allows any such partial deduction, and there are no materials in the defenders' pleadings for the ascertainment of it, even if it were allowable."

The defenders reclaimed and argued—The sum in the bond fell to be deducted in respect that it was granted for full consideration in money's worth and for the granter's use and benefit. The claim of legitim which was discharged in the marriage-contract was a valuable right, and the discharge operated to the father's benefit—*Fisher* v. *Dixon*, June 16, 1840, 2 D. 1121; Lord Fullerton at pp. 1139-40. In *Lord Advocate* v. *Sidgwick*, June 6, 1877, 4 R. 815, 14 S.L.R. 522, it was recognised that the discharge of legal rights might in some cases amount to a "consideration in money or money's worth." The case of the *Inland Revenue* v. *Alexander's Trustees*, January 10, 1905, 7 F. 367, 42 S.L.R. 307, on which the Lord Ordinary founded, was distinguishable in that there the son did not discharge his legal rights.

Counsel for the respondent were not called on.

LORD PRESIDENT—In this case I am satisfied that the Lord Ordinary has come to the right conclusion. The whole point turns upon the meaning of sub-section (1) of the 7th section of the Finance Act, which provides that "allowance shall not be made (*a*) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest." Now, the sum which is here sought to be deducted is a sum of £30,000, for which Sir George had granted a bond and disposition in security. This bond was granted in implement of an obligation undertaken by Sir George in his second son's marriage contract as a provision for that son, the sum being settled under the marriage contract in consideration of the marriage which he was about to make with his proposed spouse Lady Maud Ashley. It is quite true that as one of the incidents of the marriage contract there is also a discharge by the said son of any claim for legitim which he might have. His claim for legitim was in a peculiar position, because in Sir George's own marriage contract all rights in respect of children's legitim had been discharged with the exception of such child as should succeed to the family estates. At the time of the marriage contract with the younger George, the eldest son, the heir-apparent to the family estates, was a certain John, and it was possible that if John should die Sir George would require, if he wished his estate to avoid the payment of legitim, to take a discharge from the younger George. But all that seems to me to come in quite incidentally. It is perfectly impossible to say that the £30,000 was a consideration wholly for Sir George's own use and benefit. Whether the language "own use and benefit" applies to a discharge of a possible claim of one of the children for legitim is doubtful, but without deciding that, it is enough to say that the £30,000 was not wholly given for the discharge of legitim, and the further consideration of the marriage is obviously not a consideration in money's worth for Sir George's own use and benefit.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court adhered.

Counsel for the Pursuer and Respondent — Solicitor-General (Ure, K.C.) — A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for Defenders and Reclaimers—Macfarlane, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, January 16.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

MASSIE *v.* THE CALEDONIAN RAILWAY COMPANY.

Process — Jury Trial — Appeal for Jury Trial—Remit to Outer House—Motion for Trial—Trial not Necessarily within Three Weeks of Party's Motion — Court of Session Act (13 and 14 Vict. c. 36), sec. 40 —Notice for Sittings.

Observed, per Lord President, that the provision of section 40 of the Court of Session Act 1850 that "where an issue or issues is or are approved . . . it shall be competent to the Lord Ordinary in the cause, on the motion of either of the parties, to appoint a time and place for the trial of such issue or issues, such time being . . . except upon special cause shown, not later than three weeks from the date of such motion," does not apply to cases appealed from the Sheriff Court for jury trial; and where such a case has been remitted to the Outer House the judge to whom the case is remitted may try it at any time before the next sittings, but if he is unable to do so notice may be given for such sittings.

This was an action in the Sheriff Court of Lanarkshire at Glasgow at the instance of Mrs Margaret Slessor or Massie against the Caledonian Railway Company for damages for the death of her son due to the alleged fault of the defenders. The pursuer ap-