Saturday, January 13.

FIRST DIVISION.

[Lord Pearson, Ordinary.

MILLER & SON *v.* OLIVER & BOYD.

(See *ante* November 10, 1903, 41 S.L.R. 26, and 6 F. 77.)

Arbitration—Scope of Reference—Extension by Pleadings—Bar.

In an arbitration under a reference clause referring any question as to the true intent and meaning of a minute of agreement, parties lodged claims which extended beyond the limits of the clause of reference. The arbiter closed the record and proposed to allow a general proof in order to determine whether the claims fell within the reference. One of the parties protested that he should not be compelled to lead proof save to expiscate facts showing the true intent and meaning of the agreement.

Held that the scope of the reference had not been enlarged by the proceedings of parties—*per* Lord President on the ground that the agreement of parties was the basis of a reference, and there was no such agreement here to an extended reference; *per* Lord M'Laren on the ground that no arbitration can be enlarged without the consent of the arbiter as well as that of the parties, and that had not been given here before one of the parties had resiled; *per* Lord Pearson on the ground that in the special circumstances there was still time for the parties to withdraw from an extended reference.

Opinions (*per* Lord President and Lord M'Laren) that it is commonly on the ground of bar that a party to a reference is not allowed to challenge an award which, while within the pleadings in the reference, is outwith the scope of the reference clause.

Arbitration — Scope of Reference — True Intent and Meaning of Agreement — Averment that Words in Agreement have not Ordinary but Special Meaning —Averment that Condition of Agreement though Apparently not Really Fulfilled —Alleged Fraudulent Conduct of Party so as to Fulfil Condition — "Business Turnover."

A minute of agreement which referred to an arbiter any questions as to its true intent and meaning, provided that the purchaser of a business should pay a certain sum for the goodwill on the basis that the seller should introduce to him not less than a certain sum of "business turnover." The purchaser refused to pay the price on the ground that the condition had not been fulfilled, and maintained (1) that "business turnover" meant a turnover of business on which there was the usual business profit, and (2) that the seller, who under the agreement was thereafter employed as a manager, had accepted business below current rates and bound to result in a loss, in order to swell and bring up to the required figure the turnover. He pleaded in defence to an action that the question fell within the reference clause.

Held that the reference clause was not applicable because (1) the words "business turnover" must be taken in their ordinary meaning and left nothing to the arbiter to decide, and (2) the averment of the fraudulent conduct of the seller when acting as manager did not raise a question of "the true intent and meaning" of the agreement.

Arbitration — Arbiter — Disqualification — Arbiter Functus Officio—Previous Final Award by Arbiter Reduced but not on Ground of his Misconduct.

Opinion per Lord Pearson (Ordinary) that an arbiter who had acted as arbiter under a clause of reference in an agreement and had issued his final award, which, together with all proceedings since the closing of the record, had been reduced, but not on the ground of his misconduct, was not *functus officio* and disqualified from acting further.

By minute of agreement dated 15th and 20th April 1897 Messrs Oliver & Boyd, publishers, Edinburgh (of the first part) agreed to purchase the printer's business of Messrs J. Miller & Son, Rose Street North Lane, Edinburgh (of the second part). The minute, which stipulated that Andrew Carruthers Miller, the sole partner of J. Miller & Son, should be employed on certain terms by the first parties, *inter alia* contained the following clauses:—"*Second*, the price of the goodwill of the said business of J. Miller & Son has been mutually arranged between the parties to be £800 sterling, on the basis that the said second parties shall introduce not less than £1600 sterling per annum of business turnover to the first parties prior to 30th June 1898, and in the event of their failing to introduce business turnover to the amount of £1600 sterling, the parties agree that the price of the goodwill for which the second parties shall be credited in the books of the first parties shall be proportionately less: And the first parties bind themselves to pay to the second parties, as at 15th May 1897, said sum of £800 sterling, or such lesser sum as may be ascertained as aforesaid; but declaring that in no event shall payment of the said sum of £800 sterling in name of goodwill be demandable by the second parties, or their heirs or representatives, from the first parties until 15th May 1902, unless this agreement shall be terminated previous to that date by the first parties: And further declaring that at 15th May 1902 it shall be in the option of the second parties to demand payment of one half only of the sum to be ascertained in name of goodwill, the remaining one half of goodwill to remain in said business, and to be paid at 15th May 1907, and said first parties to pay interest on said remaining half of goodwill at five per centum from 15th May 1902 until

15th May 1907. . . . *Third*, . . . [this clause contained the terms of employment of Andrew Carruthers Miller]. . . . *Fourth*, The price to be paid by the first parties to the second parties for the stock, plant, and machinery and fittings at present belonging to and used by the second parties in the conduct of their business as printers in Rose Street North Lane, Edinburgh, and to be taken over by the parties of the first part, shall be fixed by mutual valuation; and said stock, plant, machinery, and fittings shall be property of the first parties from and after the 15th day of May 1897. *Fifth*, Meantime it is agreed that the first parties shall pay to the second parties the said price of their stocks, plant, machinery, and fittings as follows, *videlicet* — (1) the sum of £500 sterling at 15th May 1897, and (2) a farther sum of £500 sterling at 30th June 1898, said sums to bear interest at the rate of five per centum from 15th May 1897 till paid; and (3) the balance of any price exceeding £1000 sterling shall be paid at 15th May 1899, said balance to bear interest at five per centum from 15th May 1897 till paid. *Sixth*, Should any question arise between the parties regarding the true intent and meaning of these presents, the same is hereby referred to Charles Ritchie, Esq., S.S.C., whom failing, to James Morton, Esq., Secretary, Union Bank of Scotland, Limited, Edinburgh, whose decision, whether *interim* or final, shall be binding upon both parties."

In accordance with clause fourth a valuation of the stock, plant, &c., was obtained bringing out the value at £1340, 9s. 3d., and this valuation was signed as accepted on 22nd July 1897 by J. Miller & Son. Acceptance by letter of the same date was also given by Oliver & Boyd.

On 10th August 1904 Miller & Son raised an action against Oliver & Boyd, in which they sought to recover, *inter alia*, £400, being the first instalment of the price of the goodwill, and £390, 9s. 3d., being the balance of the price, as brought out by the valuation, of the stock and plant.

In a statement of facts the defenders made the following averment—"(Stat. 9) After the agreement between the pursuers and defenders was entered into, the pursuer Andrew Carruthers Miller accepted work at prices greatly below the current rate, and which he knew or ought to have known must result in a considerable loss. [He did so in order to procure an apparent turnover of £1600, and so enable him to claim £800 for goodwill. In point of fact, however, the said turnover was not a business turnover in the sense of the contract, it being an implied condition of the pursuers being entitled to a payment as for goodwill that the business which he introduced was capable of yielding a profit at the ordinary trade rate.] *He did so in order to attempt to procure an apparent turnover of £1600, and so enable him to claim £800 for goodwill. The said pretended turnover which, as appearing from the pursuer's statements thereof, amounts to the sum of £1470, consists only of a business turnover in the sense of the said agreement to the extent of £627. The balance thereof 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 at least £710 was so introduced in order to create a fictitious appearance of turnover introduced by him. The said turnover was not a business turnover in the sense of the minute of agreement. On a sound construction of articles 2 and 3 of the said minute of agreement the defenders contend that the business turnover referred to meant either a turnover capable of yielding a profit at the ordinary trade rate to the defenders, or at all events such a turnover as a prudent manager of the defenders with a practical knowledge of the trade would introduce into their business.* The defenders suffered damage through the failure of the pursuers to implement their part of the agreement, amounting to at least £1000. This sum the defenders are entitled to set against any sum to which the pursuers may be found entitled . . ." (The portion in brackets was deleted and the portion in italics added by amendment in the Inner House.)

There had already been arbitration proceedings before the arbiter Ritchie, and the arbiter's final award and the proceedings after the 30th October 1899, *i.e.*, practically everything from the making up of the record in the reference, had been reduced partly on the ground that it did not appear that he had exhausted the questions, and partly on the ground that the award was in part *ultra vires*. The claims in the reference went beyond the clause of reference, but on the arbiter allowing a general proof in order to determine whether the claims fell within the reference, the pursuer had protested against evidence being led save to expiscate facts to prove the true intent and meaning of the agreement (41 S.L.R. 26, and 6 F. 77).

The defenders now, *inter alia*, pleaded—"(2) The action ought to be dismissed in respect that the questions raised fall to be determined by Mr Ritchie acting as arbiter in terms of the agreement. (3) At all events the action ought to be sisted until the questions submitted by the parties to arbitration have been determined by Mr Ritchie as arbiter."

The pursuers, *inter alia*, pleaded—"7. The present action is not excluded by the clause of reference in the minute of agreement or by the former arbitration proceedings in respect that—(1) No question regarding the true intent and meaning of the agreement is now raised. (2) Any consent to submit questions not strictly falling within the clause of reference was limited to the arbitration before Mr Ritchie, *et separatim*, was limited to the last date to which Mr Ritchie's jurisdiction was prorogated by consent of parties, namely, 4th July 1900. (3) The said arbitration before Mr Ritchie lapsed on 4th July 1900. (4) *Separatim*, it lapsed by the issue of his final decree-arbitral, on which event he became *functus officio*. (5) The whole arbitration proceedings have been reduced and set aside by the decree of reduction referred

to. (6) Mr Ritchie has become disqualified from acting as arbiter under said minute of agreement. (7) *Esto* that the reference to Mr Ritchie is left untouched as regards the proceedings prior to 30th October 1899, the pursuers had not at that date agreed to extend the scope of the reference."

On 8th August 1905 the Lord Ordinary (PEARSON) pronounced an interlocutor sisting process that the parties might proceed with the reference to Ritchie the arbiter.

Opinion.—[*After narrating the origin of the action and the provisions of the said clauses of the minute of agreement, supra*] — . . . "The present action relates (1) to the payment to the pursuer of the price of the goodwill, with interest; (2) to a small sum of £4, 18s. 8d. of salary due to the pursuer down to 12th December 1898, on which date he was dismissed by the defenders; and (3) to a sum of £340, 9s. 3d., being the balance of the price of the plant and machinery said to have been due and unpaid to the pursuer at the date of his dismissal.

"The defence mainly relied on is, that the action is excluded by a subsisting reference to Mr Charles Ritchie, S.S.C., as arbiter, and that in any view the action should be sisted until the questions have been determined in that reference.

"It is the case that questions having arisen between the parties, they requested Mr Ritchie to act as arbiter under the agreement, and after an ineffectual attempt to adjust a separate minute of reference embracing all the points in dispute, the parties proceeded with the reference under a simple acceptance by Mr Ritchie as 'arbiter nominated in the submission contained in the within-written minute of agreement.' The arbiter's acceptance is dated 5th April 1899, and on the same date he appointed parties to lodge claims within fourteen days, and answers in eight days thereafter. The adjustment of the record on the claims and answers was continued from time to time, and on 29th May 1899 the record was closed. Shortly afterwards certain amendments by the defenders were allowed to be added, with answers for the pursuer, and the record was of new closed on 22nd June 1899.

"Although the scope of the reference clause as set forth in the agreement was limited to questions 'regarding the true intent and meaning of these presents,' the record made up before the arbiter and closed by him on 22nd June 1899 went considerably beyond the scope of the reference clause. The parties were thus committed, so far as regards the proceedings before Mr Ritchie, to a considerably wider reference than the clause itself would have covered, although as soon as a proof was allowed (which was not until six months later) the pursuer lodged a minute of protest against any evidence being given to establish facts other than those bearing on the true intent and meaning of the agreement, and reserved his objections against the competency of the arbiter adjudicating on any other matters.

"In the result, after a proof which lasted for several days, Mr Ritchie on 1st June 1900, pronounced a 'decree-arbitral,' in which he found the present defenders liable to the pursuer in a lump sum of £618, 7s. 11d., and decerned and ordained the defenders to make payment thereof to the pursuer, with interest at five per cent. from the date of the decree. He further found the pursuer liable to the defenders in two-thirds of their expenses, and on the parties implementing the decree-arbitral he declared them respectively freed and discharged of all claims *hinc inde* in consequence of the minute of agreement or of the claims lodged in the submission, and ordained them each to execute and deliver a valid discharge accordingly.

"The present pursuer being dissatisfied with this award challenged it in an action of reduction, in which he obtained decree of reduction on 10th November 1903. He maintains that the way is thus clear for the present action upon the agreement. The defenders, on the other hand, maintain that the matters in dispute in the present action were within the scope of the reference to Mr Ritchie, that the reduction had not the effect attributed to it by the pursuer, and that there is nothing in the legal position of the parties to prevent the arbiter from proceeding with the reference by taking it up at the point from which the reduction is operative, but prior to which it has no operation.

"Now, the documents reduced and set aside by the decree of reduction, which was in terms of the conclusions of the summons, were the orders of the arbiter from 24th November 1899 to 26th January 1900 both inclusive, and also (1) the proposed findings issued on 24th March 1900; (2) the proposed decree-arbitral issued on 4th May 1900; and (3) the decree-arbitral dated 1st June 1900. The first order reduced (24th November 1899) allowed to both parties a proof of certain specified averments and to each a conjunct probation, and the remaining orders were consequential upon that, in the way of recovery of documents and the like. All this leaves untouched the reference itself, and the procedure therein down to and inclusive of the closed record, which contains the claims now made in this action so far as these are in dispute. I note in passing (as bearing upon an argument which I shall have to deal with presently) that on 4th April 1900 the arbiter, 'of consent and by request of the parties,' prorogated the submission to the 4th day of July 1900.

"The grounds of reduction are set forth, I think quite accurately, in the rubric of the case as reported (*Miller & Son*, 1903, 6 F. 78). They were (1) that the pursuer's claims were not *ejusdem generis*, and it was impossible to discover *ex facie* of the decree how far the arbiter had considered all of them; (2) that the decree-arbitral did not show how the arbiter had dealt with the defenders' counter-claim; and (3) that the order for mutual discharges, which was admittedly *ultra vires*, was not separable from the rest of the decree. In other words, it was not clear that the arbiter had exhausted the reference, while in another direction he had gone *ultra fines*. I should

add that there was no allegation of misconduct on the part of the arbiter, except that it was alleged he had received and considered statements bearing on the submission which were made to him by the defenders outwith the knowledge of the pursuer. But these averments were not proved, and did not enter into the grounds on which decree of reduction was pronounced.

"In these circumstances the pursuer, in replying to the defenders' appeal to the reference as still subsisting, maintains in his seventh plea-in-law that it is at an end and cannot now be invoked for the decision of the questions raised in this action; and this on several grounds.

"In the first place, it is said there was a time limit which has long since expired. This does not refer to the expiry of year and day before the final award; for though this was alluded to in argument it was not pressed. It could not apply so far as the reference depended on the clause in the agreement; and even beyond this, the authorities are to the effect that the proper case for the application of the rule as to year and day is where the usual blank is left in the clause as to prorogation. The time limit here is said to have been fixed by the arbiter's order of 4th April 1900, already mentioned, by which he 'of consent and by request of parties' prorogated the submission to 4th July 1900. I cannot attribute such an effect to this order. It seems to have been pronounced *ob majorem cautelam* and in consequence of some one having raised a doubt on the point. But it proceeded on the erroneous assumption that the reference would fall unless prorogated; and I am unable to hold this as imposing a term upon its duration to which it would not otherwise have been subject.

"Then it is said that the arbiter, by reason of having issued his award as and for a final award, was *functus officio*, and that this ended the matter so far as he is concerned. This is undoubtedly the case while the award stands, as is illustrated by many decisions. But where the award has been reduced *in toto* together with the documents immediately leading up to it, namely, the proposed findings and the proposed award, that rule can have no application. The rule excludes all dealing on the part of the arbiter with a final award once issued. But whatever other objections may be urged here, that particular rule cannot apply, for it is not the arbiter but the Court which has dealt with the award by setting it aside as if it had never been.

"Further, it is urged that the arbiter himself is disqualified by what has happened from again taking up the reference. As I have already said, nothing of the nature of misconduct can be imputed to him. But the disqualification is said to attach—first, by reason of the issuing of the final award, which shows that his mind is already made up on the disputed points; and secondly, by his having given evidence in the reduction on the defenders' citation and as their witness. As to the first point, I think it is necessary to distinguish, and in particular to have regard to the precise grounds of reduction. Misconduct on the part of the arbiter would of course preclude his dealing with the matter again, on general grounds. He then becomes absolutely disqualified from judging in that dispute. But here the grounds of reduction were that in certain matters he had gone beyond his powers, and that in certain other respects he had not exhausted the reference or might not have exhausted it. I know of no authority for holding that in such circumstances an arbiter is disqualified from again taking up and adjudging on the reference; nor am I aware of any rule or principle of law which should compel such a decision. But it is said that the arbiter having been cited and examined as a witness for the defenders in the reduction must be held as disqualified from judging fairly between the parties. That would no doubt have been so if he had been examined on the merits of the dispute, as in the case of *Dickson* v. *Grant*, 1870, 8 Macph. 566. But his evidence was confined within the usual and well-known limits imposed in a case where the arbiter is examined; and this seems to me to distinguish this case also from that of *Reid* v. *Walker* (1826, 5 S. 130), where the arbiter, having issued his award, had given a quite erroneous explanation of the meaning of it to one of the parties privately, and the Court declined in the circumstances to send the case back to the same arbiter.

"On the whole matter, taking the facts as they stand, I do not find any sufficient cause for withdrawing the case from the cognizance of the tribunal selected by the parties. It was strenuously urged for the pursuer that there is no question now raised which falls even within the scope of the reference clause of the agreement, inasmuch as there can be no doubt or question as to the intent and meaning of the agreement as regards the expression 'business turnover.' To me it appears that there is a *bona fide* difference between the parties as to the meaning of that expression in this agreement, however easy it may be of solution; and I regard that as clearly a matter for the arbiter to decide, along with such other questions in dispute as may have been put in issue by the parties in the closed record which was made up in the reference. But since the arbiter has no power to pronounce a decree for payment, I think the proper course is to sist this action."

The pursuers reclaimed and argued—They were not bound to submit the questions in dispute to arbitration. There was no question on the true intent and meaning of the agreement. As to the £340, 9s. 3d., that was a liquid debt about which there could be no dispute. There was the valuation accepted by the parties which fixed the sum of £1340, 9s. 3d. as the price of the plant, &c., and of this £1000 had been paid. As to the claim for £800, the only question could be whether the conditions under which it was payable were fulfilled. The

defenders said that raised a question about the meaning of the words "business turnover," but no construction was required for these words, and the nature of the turnover was a question of fact. There must be a real question of construction if the arbitration clause was to be brought into force—*Mackay & Son* v. *Leven Police Commissioners*, July 20, 1893, 20 R. 1093, 30 S.L.R. 919. The defenders' contention that the turnover was a fraudulent one raised a question of fact, not of construction. Further, the arbitration could not be taken up at the point it had reached prior to the proceedings which had been reduced. On the pronouncing of a decree-arbitral the arbiter was *functus officio*, and on reduction of the decree his jurisdiction could not be revived—Bell on Arbitration, 295, s. 584; Russell on Arbitration, 8th edition, 100; *Bannatyne* v. *Gibson & Clark*, December 2, 1862, 1 Macph. 90; *North British Railway Co.* v. *Barr*, November 27, 1855, 18 D. 102; *Wilson* v. *Porter*, June 19, 1880, 17 S.L.R. 675; *in re arbitration Stringer & Riley Brothers*, [1901] 1 K.B. 105. The contract was to take an award from the arbiter once for all. If he failed to issue a valid decree he could no longer look on the case with an unbiassed mind. The slightest bias was enough to disqualify a person from acting as arbiter unless the parties went into the arbitration with the facts which caused the bias full in view—*Peckholtz & Co.* v. *Russell and Others* (O.H.), July 13, 1899, 7 S.L.T. 135; *M'Lauchlan* v. *Brown & Morrison* (O.H.), December 1, 1900, 8 S.L.T. 279; *Dickson* v. *Grant and Others*, February 17, 1870, 8 Macph. 566, 7 S.L.R. 317; *M'Dougall* v. *Laird & Sons*, November 16, 1894, 22 R. 71, 32 S.L.R. 52; *Buchan* v. *Melville*, February 28, 1902, 4 F. 620, 39 S.L.R. 398. In one case it was considered but not decided whether a dispute in which arbitration proceedings had been set aside should be sent back to the same arbiter—*Reid* v. *Walker*, December 15, 1826, 5 S. 140, n.e. 130. The reasons for sisting a case that a reference might be proceeded with were stated in Lord Watson's opinion in *Hamlyn & Co.* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642, but were not applicable here where there should be no reference. The proceedings in the arbitration did not extend the scope of the reference, and besides, any proceedings which could have this effect had been swept away by the decree of reduction.

The defenders argued—The scope of the reference had been widened by the claims made by the pursuers in the arbitration. The presentation of a claim going beyond the scope of the reference involved a new agreement to refer. No objection being taken and the record closed (not as a technical act but as a formal adjustment of the pleadings) the agreement was complete. The arbiter was not *functus officio* —Bell on Arbitration, 297. There were no averments tending to show that the arbiter was disqualified through bias as in the cases cited. There was something to refer under the reference clause in the agreement. The words "business turnover" meant turnover capable of yielding a profit —*Mordue* v. *Palmer*, 1870, L.R. 6 Ch. 22; *in re Stringer* and *Bannatyne* v. *Gibson & Clark*, *cit. sup.* The turnover introduced by the pursuer was a fictitious turnover fraudulently introduced.

After argument had been partially heard the Court pointed out that the defenders' averments did not sufficiently specify and distinguish their two replies to the claim for £800, viz. (a) that the pursuer took advantage of his position as manager to create a fraudulent turnover; and (b) that "business turnover" meant a turnover which was capable of producing an ordinary business profit, and that this was a question of construction with which the arbiter ought to deal. The defenders therefore by permission of the Court amended their averments in this respect (*v. sup.*).

At advising—

LORD PRESIDENT—This is an action at the instance of Miller & Son against Messrs Oliver & Boyd. I do not think it necessary to preface my observations with a full statement of the facts, because not only are they given in the note of the Lord Ordinary to the interlocutor under review, but they are also fully detailed in a former case between the same parties, reported in 6 Fraser, of which case this is a sequel. That action reduced an award which had been made by Mr Ritchie between these two parties. The documents under reduction which were called for in the conclusions of that action were all the proceedings in an arbitration which had taken place before Mr Ritchie subsequent to an interlocutor of the arbiter of 30th October 1899, but the prior steps of procedure in the arbitration, which consisted of the preliminary stages, equivalent to what is known in Court of Session practice as making up the record, were left unreduced. The present action is raised upon obligations which arise out of a contract between the parties, the contract being in connection with the transference of a printing business of the present pursuers to the defenders. The first question in the case has reference to a sum of £800, which is part of the price conditioned under the contract for the goodwill of the business which was so transferred; and the second to a sum of £340 odds, which is the balance unpaid of stock-in-trade and fittings which were handed over, the price of the stock-in-trade and fittings being fixed by a valuation, to which is appended a document containing an acceptance by both sides concerned of the figures contained in that valuation. The contract of sale out of which all these matters arose contained an arbitration clause referring to Mr Ritchie all matters relating to the true intent and meaning of the contract, and that clause accounts for the fact that the parties betook themselves to Mr Ritchie for arbitration purposes.

Now, the first answer that is made by the defender to the demand for these two sums which I have mentioned is that the action is barred by the right of the defender

to have these questions determined by arbitration and not by the Court, and that was the view that was taken by the Lord Ordinary in the interlocutor under review. The pursuer states several contentions in reply to this. He says, first of all, that the matters in dispute are not in any proper sense of the word questions relating to the true intent and meaning of the contract. To that the defender replies, that even if the questions do not fall under the original contract of submission as contained in the arbitration clause of the contract of sale, still the parties have enlarged the scope of the reference by their proceedings before Mr Ritchie. The pursuer replies to that again, that the proceedings before Mr Ritchie have no such effect. The pursuer, secondly, contends that he cannot go to Mr Ritchie now, because Mr Ritchie having taken up these matters in an arbitration subsequently reduced is no longer in that condition of absolute open-mindedness in which every arbitrator must be. Of course he does not impute in the slightest degree any prejudice of any sort to Mr Ritchie, who is above any such suspicion, but he simply says it is an implied condition of every arbitration submission that parties should get an arbitrator who has had nothing to do with the matter before, and that in every case where the arbitrator has had something to do with the matter before his jurisdiction may be declined unless it can be shown that the parties at the time of submission knew that and took him with their eyes open.

Now, if the parties are under the original contract of submission, the criterion is whether these questions which are now in dispute are questions having to do with the true intent and meaning of the contract. Taking first, the claim for the sum of £340 odds, the pursuer in evidence of his claim produces a document—I would not exactly say that it is a liquid document—which settles the matter if nothing more can be said, because it is a valuation of the machinery in question with attested acceptance of the figures in that valuation by both parties, bringing out a total sum of £1340, 9s. 3d. Admittedly there has been a payment to account of £1000, and accordingly of course the balance *prima facie* remains due, and therefore it would seem to me to be impossible to say that there is any question which could be submitted to an arbitrator under the true intent and meaning of the purposes of the contract.

To the claim for the £800 the defence that is made upon the merits is this—There was a clause in the contract which made the payment of the £800 conditional upon there being a turnover of £1600 in the business transferred, and the defenders say that that turnover was never attained. When the case was first heard before your Lordships—and of course when it was first heard before your Lordships it was in the condition in which it was when the Lord Ordinary pronounced his judgment—your Lordships came to be of opinion that the defender had not been sufficiently precise in his statements about this question of the turnover, in respect that he really attempted in one statement to make two allegations, which when analysed are really two very different allegations—the one being in one sense what might be called a point of law, and the other being rather different. Accordingly, your Lordships invited the defender if he wished these points to be raised, to amend his record, and that has now been done. That amendment, I think, has brought out perfectly clearly and satisfactorily the two different points which are sought to be raised. The one is that turnover means turnover capable of yielding a profit. That does not seem to me to be a question at all. I do not think it is possible for a person to take any phrase in a contract which is conceived in ordinary English, and then by attaching quite a fantastic meaning to the English to say that he has thereby raised a question of law. Turnover means turnover, and the result of that turnover may be a profit to the business or not, and, accordingly, I am of opinion that there is no question in that point of the defence that could go to the arbiter, for there is nothing for him to determine.

The other question is different. It is set forth that the pursuer, as manager of the business after it was transferred, had the right of taking in contracts for work which bound the firm, and that he took in work not on ordinary tradesmanlike terms, but simply with the view of fictitiously increasing the turnover. I think it is perfectly clear that while that is a perfectly relevant defence, it is a defence which has nothing to do with the true intent and meaning of the contract. It is a defence, on the facts, that what is called turnover is not really turnover at all, but is part of a scheme not far short, I think, of a fraudulent scheme. Accordingly, here again I do not think that there is anything to send to an arbiter. Now, that disposes of the matter, provided we are under the arbitration clause as constituted by the clause in the original contract.

How now shall the matter stand when we come to the question of whether the submission has been enlarged by the conduct of parties? I do not hesitate to say that I have had, not difficulty in this part of the case, but rather doubt if I am right, because, although it is not in any sense *res judicata*, it is quite obvious that the learned Judges of the other Division took the view that it had been so enlarged in the case that I have quoted, and the same view seems to have been taken by Lord Kyllachy in another Outer House case, the details of which I need not go into; but at the same time I am not certain that the matter was really argued with the same precision before the other Division as it has been now, and for this very good reason that after all it did not very much matter there.

Now, the only foundation of submission must always be the consent of the parties, the submitters. That consent is appropriately shown by a formally tested contract of submission, or, as here, by a

clause of submission contained in a contract relating to other things, and it may be shown in other ways, for wherever you have got something that will really show a consent between the two parties to a submission, that is enough. There is no technical rule of law which says that it must be done with any certain formality, but none the less you must show consent of the parties. Now, when parties, having entered into a contract of submission, which is, so to speak, limited in its scope, proceed to an arbitration under that contract of submission, I think I am at least right in saying this, that *primâ facie* you certainly expect the pleadings in that arbitration to have the function of carrying out the contract of submission upon which they are indubitably based, and not of forming a new contract of submission. These pleadings are not as a rule written by the party himself, but are written by his legal adviser, and it would be a very startling proposition to suppose that by the mere act of his legal adviser, whose mandate is to carry out the original proceedings and not to institute new ones, the party could be bound to submit questions far beyond the scope of the submission to which he had already put his hand. I do not mean that in the course of pleadings that might not be done. I think you might bind the client from the whole scope of the circumstances. I am far, therefore, from giving countenance to this, that if parties choose to put in claims and go on after their submission with an arbitration which is somewhat wider than the strict terms of the original contract of submission, and then find the award little to their taste, that they might be entitled to turn round and then take the matter critically upon the contract of submission. But the doctrine which would prevent them would be, I think, not so much the doctrine that you had proved against them a new contract in the earlier period of the pleadings, but the doctrine of bar, which has, I think, been probably more fully developed in the sister country under the name of estoppel. But here, owing to the question of reduction, we are not in that condition. We have to judge of this point as if this matter had arisen at the time of the interlocutor of 30th October 1899. Now, what did these parties do in this arbitration? No doubt they put in claims which, being framed as merely for pecuniary sums, covered these sums about which there is at present the dispute. But they do no more than that, and the arbiter seems *in initio* to have taken a perfectly proper view of the subject, because he said he proposed to allow a proof as to the determination of the agreement, and as to the turnover of the printing business, its extent and nature, in order that he might determine whether the claims made in respect thereof fell within the true intent and meaning of the agreement. Upon that the present defenders in the case asked for a hearing, and they then started the point that the reference had been enlarged, and there for the moment they were successful before the arbiter, but the other parties at once protested that they ought not to be made to lead proof upon any subjects which did not go to an expiscation of what was the true intent and meaning of the agreement. In the face of that protest, taken at once when the matter came to a head, it seems to me almost impossible to contend that you have here such a consent of the parties as to make what is a new contract of submission; and therefore I come to the conclusion that this submission has not been enlarged. I think it is better for the law that it should be thus, because I do consider it a most dangerous doctrine that when parties enter into a submission, the terms of which they carefully consider and then sign, you may suddenly find that at any moment of the pleadings something quite outside these terms is imported into the reference, and I think abuse can be checked perfectly satisfactorily by applying the doctrine of bar or estoppel. The pursuer argued that, even assuming that the submission had been enlarged, the present pursuer could not be called upon to go before Mr Ritchie again. That is a point which at first I confess I did not think was strong, but I wish to say most emphatically that the learned Dean of Faculty's argument convinced me that the point was one of extreme difficulty. In the view that I have taken of the case it is immaterial to decide that. I only wish to say, therefore, that I entirely reserve my opinion upon the point, and although the Lord Ordinary has decided it, I am not to be held as concurring with him in that matter.

LORD M'LAREN—The substantial question which we have to consider is whether the present action is excluded by an agreement to refer to arbitration the questions raised on this record. The case is peculiar in this respect, that the parties have already gone to arbitration upon questions arising in the execution of the contract in question, *i.e.*, the contract for the purchase of the printing business. In consequence of the arbitrator having gone beyond the scope of the reference on material points, his award has been set aside by a decree of the other Division of the Court, but in such terms as to leave the pleadings and certain interlocutory orders of the arbitrator apparently unaffected by the decree of reduction. Accordingly the defenders say that there is still a pending submission—which is undoubtedly true in a sense—and that nothing which has been done in regard to either the hearing of the case or the decision of the arbiter precludes them from setting up the reference again, and thereby excluding the action.

I hold, in common with your Lordship in the chair, that the question whether the arbiter is *functus officio* is a very delicate and important question, because it is a question that must occasionally arise in other cases of much greater importance, and as I concur in the judgment proposed upon the other grounds, I should desire to reserve my opinion upon this question. I am especially desirous of doing so, because

in a standard work on the law and practice of arbitration in England—Russell on Arbitration—it is laid down as a perfectly accepted and undoubted proposition that when the award of an arbitrator is set aside his functions are at an end and the arbitration cannot be set up. I should be unwilling, unless compelled by principle or authority, to establish a different rule in Scotland from what has been established and found to work conveniently in the sister country, but it may be that the principles of our law might in a case raising the question lead to a conflict of practice, and I do not desire to give any definite opinion upon it.

The question whether the parties have agreed to enlarge the scope of the reference arises in this way. There are two claims made in this action. One of these is for a balance due on the price of machinery, and it raises no difficulty, for there is really no question as to the price of the machinery.

The other claim arises upon the terms of the contract of sale, and relates to a sum which was to be paid for the goodwill of the business based on the turnover. Now, I agree with your Lordship that when a case is before the Court, and the question arises whether it should be sent to an arbitrator to determine the true meaning of the contract, we must be satisfied that there is a question upon the meaning of the contract which would justify the case being turned out of Court. It may be that if parties had voluntarily gone before the arbitrator and one of them had said, "A turnover means a turnover that has resulted in a profit at the end of the year," the arbitrator might well have found that the most convenient way of disposing of the defence was simply to repel it as manifestly unsound, but it does not follow that we are to send the case to an arbitrator that he should go through what may be an empty form. But then it is also said that the manager for his own purposes had made sales, or made contracts for printing, below trade prices, with the dishonest purpose of swelling the turnover, and thereby getting in the shape of goodwill a larger sum than he stood to lose upon the sales. That may be a relevant objection to the claim, but it has nothing to do with the meaning and effect of the contract of sale, and therefore, unless the reference has been enlarged, obviously that is not a question for the arbitrator at all. Now, I am perfectly satisfied that the scope of the reference may be enlarged by the action of the parties when they come before the arbitrator. Whether particular acts have that effect or not is always a circumstantial question which depends on the facts of the case. There are some cases where the statements in the pleadings before the arbiter may be so clear and unequivocal that they put it beyond question that the arbitration must be enlarged. There are others where we may not be able to see evidence of an original intention to enlarge, and yet where, if the arbiter goes on to decide questions outside the scope of the reference, it may be held that the defending party is stopped or barred from saying that he has not enlarged it, because his actions have been inconsistent with such an attitude. But the present case does not seem to me to fall within either of these categories.

I think that the solution of this case lies in this proposition, that no arbitration can be enlarged without the consent of the arbitrator as well as the parties to the reference. No arbitrator by accepting a reference undertakes to do anything more than to decide the questions which are submitted to him in the written contract of reference. Of course, if the arbitrator makes no objection, and goes on to consider other questions, he would be held to have given his consent, but until the merits of the case are approached by the arbitrator, either by the leading of evidence or by agreements between the parties, I cannot hold that there is a final agreement to enlarge.

Now, how stand the facts in this case? It is no doubt true that—intentionally or *per incuriam*—these questions were included in the claims originally submitted to Mr Ritchie, but before proof was taken the pursuer entered a protest against the arbitrator proceeding to deal with this question. Well, I think his protest was in time, because it was taken before the parties had been heard in the enlarged reference, and it is consonant with general contractual principles that until a contract is assented to by all the parties anyone may withdraw. I think there is no question in this case that there was *locus pœnitentiæ* at the time when the protest was made, and therefore that there never was on the part of the pursuers a final and binding agreement to enlarge the reference. It follows, then, that as the questions raised in this action are not questions upon the true effect and meaning of the contract, the action is not excluded, and proof ought to be allowed.

LORD KINNEAR—I agree entirely with all that has been said by your Lordship in the chair and do not think it necessary to repeat any part of what has been said. I only desire to add, what I think is quite in accordance with the views stated by your Lordship, that while it may be perfectly possible to enlarge the scope of a reference by lodging competing claims before an arbiter and inviting his award upon these claims, that necessarily amounts to a new contract of arbitration between the parties. Therefore if it is maintained that the contract of submission to be inferred from these claims excludes an action, we must be satisfied that the question raised in the action is exactly the same as the question raised in those claims. The hypothesis is that it is the new claims that constitute or at all events express the contract, and therefore when we are to exclude an action at law it can only be upon the ground that the question included in that action is already to be found stated in the claims. Now, the most material averment upon the record now before us with reference to one

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