initiate by a remit new proceedings before the arbitrator in order to allow a party to the stated case to open up a new matter which the proceedings out of which the stated case arises did not embrace, and to which the stated case is quite properly not directed.

The appellant, however, founds on the case of *Mulligan* v. *Corporation of Glasgow*, 1917 S.C. 450, 54 S.L.R. 352, which followed the case of *Dempsey* v. *Caldwell & Company*, 1914 S.C. 28, 51 S.L.R. 16. I am unable to find any material distinction between the case of *Mulligan* and this one with reference to the present question. Accordingly, subject to the doubt which I have ventured to express, I recognise that the case of *Mulligan* forms a precedent for making the remit which your Lordships propose.

LORD SKERRINGTON was absent.

The Court pronounced this interlocutor—

"On consideration that the appellant intimates to the respondents within eight days that the whole expenses of the Stated Case on appeal will be paid by him, *hoc statu* recal the determination of the Sheriff-Substitute as arbitrator appealed against, and remit to him, in view of the finding that the claimant 'although he is not altogether blind in his left eye, still he falls to be regarded as a one-eyed miner, and as such fit for work below ground like any other one-eyed miner,' to consider and decide whether the ending of the payments should be permanent or temporary. . . ."

Counsel for the Appellant — Chisholm, K.C.—Gentles. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Respondents—Sandeman, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Thursday, May 30, 1918.

OUTER HOUSE.

[Lord Ordinary in Exchequer Causes.

COLQUHOUN'S TRUSTEES *v.* LORD ADVOCATE.

Revenue—Estate Duty—Settled Property—Aggregation—Power of Appointment—Finance Act 1900 (*63 and 64 Vict. cap. 7*), *sec.* 12 (2)—*Finance Act* 1907 (*7 Edw. VII, cap.* 13), *sec.* 16.

The Finance Act 1900 enacts—Section 12 (2)—"Where settled property passes, or is deemed to pass, on the death of a person dying after the passing of this Act, under a disposition made by a person dying before the commencement of part 1 of the Finance Act 1894, and such property would, if the disponer had died after the commencement of the said part, have been liable to estate duty upon his death, the aggregation of such property with other property passing upon the first-mentioned death shall not operate to enhance the rate of duty payable either upon the settled property or upon any other property so passing by more than one-half per cent. in excess of the rate at which duty would have been payable if such settled property had been treated as an estate by itself."

By a marriage contract entered into in 1837 a husband conferred on his wife a power of appointment over certain trust funds to be exercised in favour of the children of the marriage. The wife exercised the power by conferring, with the consent of a son of the marriage, a liferent of part of the fund on that son, and the fee on his children. The original donor of the power died prior to the commencement of part 1 of the Finance Act 1894, his wife in 1897, and the son in 1916. In a question with the Crown, *held* that as the appointment by the wife would have been invalid but for the son's consent, the son must be regarded as the settlor of the fund in question, and that the fund appointed must be aggregated with the rest of his estate for the purposes of estate duty.

The Finance Act 1900 (63 and 64 Vict. cap. 7), section 12 (2), is quoted *supra in rubric.*

The Finance Act 1907 (7 Edw. VII, cap. 13), section 16, enacts—"In the case of persons dying on or after the nineteenth day of April Nineteen hundred and seven, any settled property which would under subsection (2) of section twelve of the Finance Act 1900 be aggregated with other property so as to enhance the rate of duty to the limited extent provided in that section, shall, for the purposes of the principal Act, instead of being so aggregated, be treated as an estate by itself."

Major Kenneth Mackenzie Drummond and Lieutenant-Colonel Julian Campbell Colquhoun, D.S.O., trustees under the indenture or deed of marriage settlement of Mr and Mrs William Lawrence Colquhoun of Clathick, Perthshire, presented a petition to the Court for recal of certain assessments made in respect of estate duty on the estate of Captain William Campbell Colquhoun, a son of the marriage.

The petition stated, *inter alia*—"1. That by indenture or deed of marriage settlement in the English form dated 5th April 1837, entered into between William Lawrence Colquhoun of Clathick, in the county of Perth, and Lousia Locke of Rowdeford House, in the county of Wilts, the former transferred to the trustees therein mentioned £5625 stock of the Royal Bank of Scotland, and the latter transferred £7500 3 per cent consolidated bank annuities, and also assigned all acquirenda of which she might become possessed during the subsistence of the marriage above a certain value. 2. The trusts of the said settlement provided, *inter alia*, (1) that the said funds should be held by the trustees to pay thereout yearly a sum of £100 'to such person or persons, and for such intents or purposes, as the said Louisa Locke shall from time to

time, notwithstanding her coverture, by any writing direct or appoint,' and failing such direction and appointment, 'into her own hands for her sole and separate use and benefit by way of pin money, independently and exclusively of the said William Lawrence Colquhoun'; (2) that the remainder of the said income and dividends should be paid to the said William Lawrence Colquhoun during his life; and (3) that the whole income should be paid to the survivor of the spouses during his or her life. 3. It was further provided that after the death of the survivor of the spouses the trustees should hold the capital of the said trust estate 'in trust for all and every or such one or more exclusively of the others or other of the children and child of the said William Lawrence Colquhoun by the said Louisa Locke at such age, day, or time—or respective ages, days, or times if more than one—in such parts, shares, and proportions, and with such annual sums of money and limitations over for the benefit of the said children or some or one of them, and with such provisions for the maintenance and education or advancement or preferment in the world of any such children or child (either at the discretion of the said trustees or trustee for the time being, or of any other person or persons to be named or appointed in that behalf or otherwise), and upon such conditions, with such restrictions, and in such manner as the said William Lawrence Colquhoun and Louisa Locke, his intended wife, shall during their joint lives, by any deed or deeds, or instrument or instruments in writing, with or without power of revocation and new appointment, to be by them both sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, jointly direct or appoint; and in default of such joint direction or appointment, and so far as no such appointment shall extend, then as the survivor of them, the said William Lawrence Colquhoun and Louisa Locke, shall by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment to be by him or her sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his or her last will and testament in writing, or any codicil or codicils in writing to be by him or her signed and published in the presence of, and to be attested by, the like number of credible witnesses, from time to time direct or appoint; and in default of any such direction or appointment as aforesaid by the said William Lawrence Colquhoun and Louisa Locke, or the survivor of them, or so far as no such direction or appointment shall extend, in trust for all and every the children and child of the said William Lawrence Colquhoun by the said Louisa Locke, who being a son or sons shall attain the age of 21 years, or being a daughter or daughters shall attain that age or marry with the consent and approbation of the said John Campbell Colquhoun, John Archibald Campbell, Francis Alexander Sydenham Locke, and Alexander Pitts Elliot Powell (being the trustees of the settlement), or the survivors or survivor of them, his executors or administrators (such consent and approbation to be testified by some writing under their or his hands or hand), to be divided between or amongst such children, if more than one, in equal shares, and if there shall be but one such child the whole to be in trust for that one child. 4. The marriage was duly solemnised, and William Lawrence Colquhoun, who was domiciled in Scotland, resided at Clathick until his death on 16th January 1861. His widow continued to live in Scotland until her death in 1897. 5. Two children were born of the marriage, viz., Captain William Campbell Colquhoun of Clathick, who died on 11th September 1916, and Miss Louisa Selina Colquhoun, afterwards Mrs James Cleland Burns, who survived her father but predeceased her mother. . . . 7. On 22nd March 1884 Mr William Lawrence Colquhoun's widow—being then Mrs Dunlop, wife of James Dunlop of Tollcross, now deceased—executed a . . . deed of appointment by which she appointed a sum of £7000 out of the investments held by the trustees of the said indenture or deed of marriage settlement to be invested for behoof of her granddaughters, the children of the said Mrs Louisa Selina Burns—who was then dead; And she further provided that the trustees 'shall realise the whole balance of the trust funds of the trust created by the said indenture and shall invest the same . . . for William Campbell Colquhoun, the only son of the marriage between the said William Lawrence Colquhoun and me, in liferent, and for his children *natis et nascituris* equally, share and share alike, in fee—declaring that the shares of such children shall not vest in them till they attain 21 years of age or become married, whichever shall happen first.' . . .' 12. Captain William Campbell Colquhoun died as before mentioned on 11th September 1916, and certain questions have arisen with regard to the claims of the Commissioners of Inland Revenue for estate-duty upon his estate. In particular, the question has arisen as to whether the funds now representing the securities settled by his father William Lawrence Colquhoun under the indenture of 1837 fall to be aggregated with the rest of Captain Colquhoun's estate, or whether—in respect that his father died prior to the Finance Act of 1894—these funds fall to be treated as an 'estate by themselves' under the provisions of section 12 (2) of the Finance Act 1900, and section 16 of the Finance Act 1907. . . . 15. Captain William Campbell Colquhoun was the only person legally entitled to challenge the validity of the said deed of appointment of 22nd March 1884. He did not challenge its validity, but on the contrary accepted the liferent interest thereby conferred upon him as sufficient, and continued to do so throughout his life. 16. Upon the question which has arisen as mentioned in paragraph 12, the Inland Revenue authorities maintained that the deed of appointment executed by Mrs Dunlop in 1884 was *ultra vires* in so far as it purported to limit Captain William Camp-

bell Colquhoun's interest in the settled funds to a mere liferent, and that he was therefore entitled to receive an absolute conveyance of the fee. They accordingly claimed estate-duty on the basis that Captain Colquhoun was the settlor of the funds and that these fell to be aggregated with the rest of his estate for the purpose of estate-duty. The petitioners, on the other hand, maintained that Captain Colquhoun's father was the real settlor of the funds, that these did not fall to be aggregated with Captain Colquhoun's own estate, and that the latter's acceptance of the said deed of appointment of 22nd March 1884 had not the effect of making him the real settlor so as to entitle the Commissioners of Inland Revenue to claim aggregation, and further, that the said Commissioners were not *in titulo* to question the validity of the said deed. 17. In these circumstances the petitioners, after considerable correspondence with the Commissioners of Inland Revenue, at the request of the latter sent to them an estate-duty account for assessment, *inter alia*, of the funds which at the date of the said Captain William Campbell Colquhoun's death represented the estate settled by the said William Lawrence Colquhoun under the said deed of marriage settlement. 18. The Commissioners duly assessed the said account on the basis of the Commissioners' contention as above set forth, and on 4th January 1918 sent to the law agents of the petitioners the relative assessment notice. 19. On 9th January 1918 the said law agents, on behalf of the petitioners, intimated an appeal against the assessments, and sent to the said Commissioners a formal letter of appeal, dated said 9th January 1918, addressed to them. 20. It having been intimated to the petitioners that the Commissioners proposed to maintain the assessment, the petitioners thereafter paid the duty upon the accounts as assessed, the same being a condition-precedent to the right of appeal."

The petitioners craved the Court—"(1) To recal the assessment complained of; (2) to find that the deed of direction, appointment, and division by the said Mrs Louisa Locke or Colquhoun (afterwards Dunlop), dated 22nd March 1884, was in all respects a valid exercise of the power of appointment conferred upon her by the marriage contract of 5th April 1837 entered into on her marriage with the late William Lawrence Colquhoun; (3) that in any event the provisions of the said deed of direction, appointment, and division having been accepted by the deceased Captain William Campbell Colquhoun and the other beneficiaries thereunder, and thereafter acted upon, the Commissioners of Inland Revenue have no title to challenge the legal results following thereupon; (4) that the estate settled by the said William Lawrence Colquhoun in the said marriage settlement of 5th April 1837 and appointed by the said deed of direction, appointment, and division of 22nd March 1884, falls to be treated as an estate by itself under the provisions of section 12 (2) of the Finance Act 1900, as amended by section 16 of the Finance Act 1907; and (5) that the amount of the estate so settled being at the date of the death of the liferenter of said funds, the said Captain William Campbell Colquhoun, on 11th September 1916, of the value of £13,582, 17s. 2d., the rate of duty payable thereon should be five per centum, and that the duty upon the said funds comprised in the inventory of Captain William Campbell Colquhoun's estate and relative accounts (other than the said sum of £13,582, 17s. 2d.) amounting to £54,000 or thereby, should be assessed at the rate of seven per centum and no more."

Counsel for the petitioners cited the following authorities—*Crawcour* v. *Graham*, 1844, 6 D. 589; *Lennock's Trustees* v. *Lennock*, 1880, 8 R. 14, 18 S.L.R. 36; *Gillon's Trustees* v. *Gillon*, 27 S.L.R. 338; *Mackie* v. *Mackie's Trustees*, 1914 S.C. 10, 51 S.L.R. 345; *MacGillivray's Trustees* v. *Watson's Trustees*, 1911 S.C. 1103, 48 S.L.R. 887.

LORD CULLEN—I think I may dispose of this case now. In the first place, I am clearly of opinion, on a construction of the terms of the indenture of 1837, that the objects of the power of appointment which is in question in the case were only the children of the marriage between William Lawrence Colquhoun and Louisa Locke, and that remoter issue were not objects of the power. In the second place, I am of opinion on that footing that the deed of appointment of 1884 was not valid as an exercise of the widow's unaided faculty as the donee of the power in so far as it conferred on her son's issue the fee of the funds to be liferented by him. In the third place, I must hold, on the authority of the case of *Mackie*, 1885, 12 R. 1230, 22 S.L.R. 814, that the consent of William Campbell Colquhoun, the son, made the deed of 1844 effectual *quoad* the settlement of his fee on his issue; but the ratio of that case as I understand it is that the consent of the child in the position of William Campbell Colquhoun makes the transaction a composite one, and that one has to conceive of the fee of the fund being thereby appointed first to the child in question, and then of that child, of his own initiative, making a settlement of the fee on his own issue or on other strangers to the power. And applying the ratio as I have stated it to the circumstances of the present case, it appears to me to be clear that the settlor of the fund was William Campbell Colquhoun. On no view of the case which has been presented does it seem to me to be possible to carry the date of the settlement of the fee on William Campbell Colquhoun's issue back to the year 1837 and to regard the spouse who put the funds in settlement under the indenture of that year as the settlor of the fund in relation to the present question. Even if the view were taken—which I think unsound—that the deed of 1884, having received the adhesion of William Campbell Colquhoun, operated as a settlement on his issue, made not by him but by his mother, that view would not suit the petitioner's case because the mother did not die until after 1894. Accordingly I am of opinion that I should refuse the petition.

The Lord Ordinary refused the prayer of the petition.

Counsel for the Petitioners—Chree, K.C—C. H. Brown. Agents—Russell & Dunlop W.S.

Counsel for the Respondent—The Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Saturday, March 8.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

GREIG *v.* THE TRUSTEES OF THE WIDOWS' FUND OF THE COMPANY OF MERCHANTS OF THE CITY OF EDINBURGH.

Insurance—Presumption of Life at Common Law—Proof of Death.

The wife of an insured person who had not been heard of for eighteen years, and who would have been sixty-one years of age at the date of the action, brought an action against the trustees of a certain widows' fund for declarator that her husband must be held to have died at the date he was last heard of, and for payment of an annuity which was contingent on his death. *Held* (*rev.* judgment of Lord Blackburn, Ordinary) that the pursuer had made sufficient averments on record to warrant an inquiry into the facts, and proof before answer *allowed*.

Mrs Agnes Douglas or Greig, *pursuer*, brought an action against the trustees of the Widows' Fund of the Company of Merchants of the City of Edinburgh, *defenders*, (1) for declarator that her husband David Greig junior, a contributor to the defenders' Widows' Fund, "must be presumed to have died prior to 31st December 1900, that he must be held to have died on that date, and that the pursuer, his widow, is entitled to an annuity out of the said fund of £40 sterling;" and (2) for decree ordaining the defenders to make payment to the pursuer of the annuity of £40 as from Whitsunday 1901.

The pursuer averred, *inter alia*—"(Cond. 2) The pursuer's husband was the son of the late David Greig, builder, Edinburgh, and was born on 28th January 1857. . . . (Cond. 3) The pursuer was married to her husband upon 18th September 1879, but the marriage proved unhappy. (Cond. 4) In October 1896 the pursuer obtained decree of judicial separation from him with a decree for payment of aliment on account of his cruelty. They never lived together again. On two or three occasions after the decree he applied to her for money but she was unable to give him any. On these occasions he appeared to be very necessitous and to be living at no fixed abode. (Cond. 5) From 1890 onwards the pursuer's husband became of dissolute habits, and he neglected his business, with the result that he found himself in penury by 1896. He was never able to make any payment to the pursuer under the said decree either for aliment or for expenses. Shortly after decree was granted he left Edinburgh and lived a vagrant life. For some years prior to 1896 he had been drinking to excess, and for at least three years prior to the said decree he had shown signs of moral and physical deterioration. In 1896 he was convicted in the Edinburgh Police Court on charges of assault. On two occasions at least he suffered from *delirium tremens*, with one keeper on the first occasion and two keepers on the second occasion in attendance upon him. (Cond. 6) Since in or about the year 1900 the pursuer's husband has never been heard of. The pursuer believes and avers that he is dead, and that he has been probably buried about the year 1900 as a pauper without his identity having been made known or discovered. In the circumstances stated the death of the pursuer's husband must be presumed to have taken place prior to or at 31st December 1900. . . . (Cond. 8) The Register of Deaths in Scotland has been searched for the years from 1896 to 1914, and in England and Wales for the years from 1898 to 1917, but no entries have been found relating to the pursuer's husband. (Cond. 9) In these circumstances the pursuer has submitted to the defenders the statements of relatives and friends of her husband legally and reasonably sufficient to satisfy them of his death in or about 1900. . . ."

The pursuer *pleaded, inter alia*—"1. Upon the facts averred, the death of the pursuer's husband ought to be judicially presumed as having taken place in 1900, and the pursuer is accordingly entitled to decree of declarator as craved for under the first conclusion of the summons. 2. The pursuer, upon the death of her husband being so presumed, having right to the annuity as his widow, payable by the defenders from the Widows' Fund under their administration, is entitled to decree against the defenders for payment thereof as craved under the second conclusion of the summons."

The defenders pleaded, *inter alia*—"1. The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, which should be dismissed. 4. The defenders are entitled to be assoilzied in respect that (*a*) no sufficient evidence of death has been submitted to them; (*b*) the presumption of life at common law has not been displaced."

On 8th November 1918 the Lord Ordinary (BLACKBURN) sustained the first plea-in-law for the defenders and dismissed the action.

Opinion.—"The pursuer in this case seeks to have it declared that her husband died prior to 31st December 1900, and that he must be presumed to have died before that date. She accordingly claims that as his widow she is entitled to an annuity of £40 a year out of the funds administered by the defenders, and she further sues them for payment of the arrears of the annuity from Whitsunday 1901 with interest at 5 per cent. on each termly payment. The defenders admit that prior to the date in question the pursuer's husband had completed his contributions to the fund so as to entitle his widow to an annuity of £40 from the date of his death, but they deny that he is dead, and maintain that the pursuer has not