each other, just as it had altered the position of the company's creditors towards the shareholders. This alteration is effected by the 38th section of the statute, which imposes new liabilities upon the members of the company, both towards the creditors and towards one another, and the learned Judge points out, that the other shareholders were therefore to be considered as innocent parties who had acquired rights under the 38th section, which would be taken away from them if the applicant were allowed to withdraw. They were exactly in the same position, in so far as regards the claim of one of their fellow-shareholders to withdraw from the company after liquidation, as the company's creditors were in the case of *Oakes* v. *Turquand*. Now, if that be the ground of judgment in the case of *Burgess*, it appears to me very clear that it has no application to the present case, because what was decided there was that a shareholder who had been induced to take shares by fraud, but who had retained his shares until innocent third parties had acquired rights against him in his character of shareholder, was not thereafter entitled to rescind his contract, and relieve himself of his shares, to the prejudice of such innocent parties. He might have had a good claim against the company while it existed, but he had no claim against the contributories after the company had ceased to exist. But the defender is not seeking to rescind the contract to take shares. He has no need to do so. It has been determined by the valid act of the directors. He has been relieved of his shares, and is converted, as the Sheriff-Substitute I think rightly says, into a mere debtor of the company; and his liability, if it exists, is still a liability to the company and to no one else. The liquidation makes no such change in the position of the company towards its debtors as to give to individual shareholders any personal demand against such debtors, or any new right in the debts due to the company which they did not possess before. They cannot therefore be represented as innocent third parties, who have acquired a right, by virtue of winding-up, to enforce a claim against the defender, which could not be enforced against him by the company itself. It is still the company which is the creditor, if the claim be a good one; and it appears to me to follow that a defence, which would have been good against an action by the directors on behalf of the company, must be equally valid against an action by the liquidators, who have come into their place as the company's agents. The rights of the company against its debtors must be the same whether it is going on or whether it is winding up.

If the action is maintained on the ground that the other shareholders have an interest in enforcing the obligation of the defender, that is not putting those other shareholders in the position of third parties who ought not on account of the fraud of the company to be deprived of a right which they have innocently acquired, but of persons who are seeking to procure a gain in knowledge of the fraud.

I am therefore of opinion that the Lord Ordinary's judgment should be recalled and the defender assoilzied.

LORD M'LAREN—I concur.

LORD ADAM—I also concur, and I am authorised by the Lord President to say that his Lordship is of the same opinion.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender from the conclusions of the libel.

Counsel for the Pursuers — Lorimer — Guthrie. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defender — Jameson — Dundas. Agents—Henry & Scott, W.S.

Friday, January 30.

FIRST DIVISION.

[Lord Trayner, Ordinary.

SHEDLOCK AND HUDSON *v.* HANNAY.

Contract—Foreign—Locus Contractus.

By agreement executed at New York, Duncan, on behalf of Hannay of Glasgow, an inventor, agreed with Shedlock and Hudson of New York, "for sale of said inventions for the two Americas, and to designate to them power to handle said . . . process" upon specified terms. Subject to certain conditions Hannay confirmed this agreement by writing appended thereto at Glasgow, and the modifications so introduced were accepted by Shedlock and Hudson by note appended at New York. Hannay subsequently sold all his rights in connection with the invention to a company, and to an action by Shedlock and Hudson for this breach of contract answered that the validity of the agreement fell to be determined by the law of New York, and that it was by that law invalid, as no consideration was expressed and it was not under seal.

The Court *held* (*aff.* Lord Trayner) that the validity and meaning of the agreement must be determined by the law of New York, as the place where the contract was executed.

Opinion by the Lord President, that if the agreement, which was a bilateral contract, were not enforceable at the instance of Hannay in America, it could not be enforced against him in this country.

On 16th November 1888 the following agreement was executed at New York by J. Thomson Duncan, as agent for J. B. Hannay of Glasgow, the inventor of a new process of producing white lead, and Alfred Shedlock and James Hudson of New York:—"It is understood that J. Thomson Duncan has an understanding with J. B.

Hannay, F.R.S.E., of Glasgow, the inventor of the apparatus and new method or process of producing white lead, whereby he is empowered to enter into arrangements, which he hereby does, with Alfred Shedlock and James A. Hudson, of New York, for sale of said inventions for the two Americas, and to designate to them power to handle said apparatus, method, or process in such manner as shall seem to them best, and that upon terms as already fixed by correspondence between the said Shedlock and Duncan, and approved of by the said Hannay, viz., That all necessary expenses shall be first deducted from any income that may be derived from sale or use of the patents, and the one-half of the remainder is to go to the said Hannay and the other half to be retained by the said Shedlock and Hudson; it being understood that the said Hannay is to be kept free of all responsibility as to outlays which may be made by the said Shedlock and Hudson, in the event of failure to carry through the business to a successful issue.—Dated New York, November 16th, 1888.—J. THOMSON DUNCAN; ALFRED SHEDLOCK; JAMES A. HUDSON. Attest—J. S. Michael, Notary Public, New York County."

On 1st December Mr Hannay confirmed the agreement with certain modifications by the following writing appended to the agreement at Glasgow:—"The above agreement is hereby confirmed by me, subject to the following conditions: That in the event of other patents being taken up in America, all improvements made by any one connected with the undertaking shall be added for the general good of the process, free, except for any expenses incurred. Employees to be engaged under contracts specifying this." The modifications so introduced into the agreement were accepted by Mr Shedlock and Mr Hudson by the following note appended to the agreement at New York:—"We hereby accept the foregoing modifications made by Mr J. B. Hannay, under date December 1st 1888, and accept the conditions thereby imposed, and so re-execute that agreement as so modified."

The present action was raised in July 1890 by Shedlock and Hudson against Hannay for payment of £30,000 as damages for alleged breach of contract.

The pursuers founded on the agreement above set forth, and, *inter alia*, averred—"(Cond. 2) That the defender had thereby agreed with the pursuers for the sale of said inventions for the two Americas, and gave to them power to deal with said apparatus, method or process, as they thought proper, upon the terms, *inter alia*, that after deducting all necessary expenses from the income to be derived from the sale or use of the patents one-half of the remainder should be retained by the pursuers, the other half being received by the defender. . . . By the said agreement the pursuers acquired the sole right to use the said inventions in, *inter alia*, the United States of America, and to dispose of said right in said United States as they pleased. The statements in answer are denied, subject to the admission that the pursuers registered the agreement in the United States patent office, and under reference to the proceedings there." (Cond. 3) That the defender had, in violation of his agreement with the pursuers, in April 1889, sold to the White Lead Company, Limited, the whole patents and inventions belonging to him—or which he was entitled to acquire—for the said improved method of manufacturing white lead, which he had applied for in the United States of America and other countries, and all future improvements thereon, including the rights previously sold to the pursuers, and had refused to carry out his agreement with them; and (Cond. 4) That they had in consequence of the defender's breach of contract incurred a loss of £30,000.

The defender in answer averred, *inter alia*—"The alleged agreement is referred to. *Quoad ultra* denied. The said deed was framed and executed in New York, and the contract therein expressed was to be performed in New York. Explained that the validity and interpretation of the agreement therefore fall to be determined according to the law of the State of New York. No consideration is therein expressed; and by the law of the State of New York a consideration is necessary for the validity of an agreement not under seal; the said agreement is not under seal, and is therefore invalid. . . . The pursuers afterwards registered the document above mentioned in the American Patent Office, New York, and endeavoured to get the patents issued to them, on the plea that the said document conferred on them the ownership of the said patents, but they were entirely unsuccessful. According to American law the said document is inept to convey any right of ownership in the said patents or to entitle them to have letters-patent issued to them." The defender further denied that he had committed a breach of his agreement, but admitted that he had sold all his patent rights relative to white lead manufacture to the White Lead Company.

The defender pleaded, *inter alia*—"(2) The validity and meaning of said alleged agreement fall to be determined and interpreted according to the law of New York, by which, 1st, it is invalid and inoperative; and 2nd, it is and has been determined by decree to be unavailing to confer any rights on the pursuers."

On 7th November 1890 the Lord Ordinary (TRAYNER) pronounced the following interlocutor:—"Finds (1) that the agreement founded on was made and executed in New York; and (2) that the validity and meaning of said agreement fall to be determined by the law of New York: Therefore to this extent and effect sustains the second plea-in-law for the defender, and *quoad ultra* continues the cause: Grants leave to reclaim.

"*Opinion.* — The only question with which I have at present to deal is that raised by the first part of the defender's second plea-in-law.

"The agreement in question, which has

reference to the obtaining and use of a certain patent in America, was executed in New York on 16th November 1888 by the pursuers and a Mr J. Thomson Duncan, the latter being represented *in gremio* of the deed as a person empowered by the defender to enter into the arrangements there expressed. The agreement so executed is 'confirmed' by the defender, subject to certain conditions in a writing dated 'Glasgow, 1st December 1888,' appended to the agreement, and these conditions the pursuers agreed to and accepted by a note, also appended to the agreement executed by them in New York. In this state of the facts I am of opinion that the agreement or contract in question was made and executed in New York, and that any question regarding its validity as a contract, its construction, or the extent and character of the rights and obligations arising therefrom, falls to be determined by the law of New York — *Peninsular and Oriental Steam Navigation Company* v. *Shand*, 3 Moore's P.C. (N.S.) 272; *Jacobs*, L.R., 12 Q.B.D. 589.

"The difficulty which has sometimes arisen in the determination of questions similar to that with which I am now dealing, from the fact that the place of making the contract was different from the place where it was to be performed, does not seem to arise here. In the present case the *locus solutionis* is, to some extent at least, the same as the *locus contractus;* and I think the whole circumstances, viz., the character of the contract, its subject-matter, its execution in New York, and its anticipated fulfilment there and elsewhere in America, lead to the inference that the parties intended the law of New York to be that according to which the contract should be interpreted, and if necessary, enforced. There is certainly nothing to indicate that the parties had in view the law of Scotland as the law which was to determine their rights or liabilities."

The pursuers reclaimed, and argued—Unless there were some special reason to the contrary, a court would construe an agreement according to its own law—the *lex fori* would govern. In the present case there were several reasons, in addition to this general rule, why the validity of the contract in question should be determined by the law of Scotland. New York was not the *locus contractus* so much as Scotland, for till the confirmation of the contract by the defender at Glasgow it had no binding effect upon him. Further, the agreement was for the sale and transference by the defender of his invention, and the *locus solutionis* — the place where the transfer was to be carried out — would naturally be Scotland, which was the defender's domicile. The test of where a person was bound to perform an obligation was to ask, where, in the event of his refusal, would an action be raised to compel him? Scotland was the only *forum* where the present action could have been raised, and the *onus* lay on the defender to show that the question between the parties should not be determined by Scotch law. Assuming the contract to have been executed in New York, there was nothing technical in its language to lead the Court to seek the aid of foreign law in order to interpret it. According to Scotch law there was consideration, and the contract was good, and the position taken up by the defender was adopted with the object of nullifying the contract, contrary to the usual maxim that a contract was to be interpreted *ut valeat majis quam pereat.* In the view that the contract was to receive effect all over the two Americas, there were then a number of *loci solutionis*, and no special law could be said to be in the contemplation of parties. In that view the contract might be looked upon as a cosmopolitan contract, which was to be interpreted according to the law obtaining at the place where the action was brought —*Owners of the "Emmanuel"* v. *Denholm & Company*, December 7, 1887, 15 R. 152; *Valery* v. *Scott*, July 4, 1876, 3 R. 965 (*per* Lord President, 966); *Ainslie, &c.* v. *Murray*, March 17, 1881, 8 R. 636; *Don* v. *Lippmann*, May 26, 1837 (H. of L.), 2 Sh. & M'L. 682; *Stewart* v. *Gelot*, July 19, 1871, 9 Macph. 1057; *in re Missouri Steamship Company*, 1888, L.R., 42 Ch. Div. 321; Storey's Conflict of Laws, sec. 280; Bell's Law Dict., *voce* "Law" (Law Merchant); *Clements* v. *Macaulay*, March 16, 1866, 4 Macph. 583.

Argued for the defender—The decision of the Lord Ordinary was right, and the agreement must be construed according to the law of New York. New York was clearly the *locus contractus*, for the real agreement was contracted there. The defender might have confirmed the act of his agent by letter to New York, and his confirmation was not required to make the agreement good, but it prevented him saying that he had not authorised Duncan to act for him. The general rule was that the *lex loci contractus* applied unless a different intention was to be gathered from the nature of the contract, *e.g.*, if it were to be entirely carried out elsewhere, as in the *Missouri* case, *supra*, or where its subject-matter was heritable estate in a foreign country, or where the *lex loci contractus* was the revenue law of a foreign state, as in *Stewart* v. *Gelot*, *supra*; *Dale* v. *Dumbarton Glasswork Company*, February 5, 1829, 7 Sh. 369; Wharton, sec. 401; *Peninsular and Oriental Steam Navigation Company* v. *Shand*, 1865, 3 Moore's P.C. (N.S.) 272; *Jacobs*, L.R. 1884, 12 Q.B.D. 589; *Lloyd* v. *Guibert*, 1865, L.R., 1 Q.B. 115. The maxim "*Actor sequitur forum rei*" was applicable to a question of jurisdiction, and not to such a question as was now before the Court. Nor was the rule that a deed was to be construed *ut res valeat majis quam pereat* more applicable. Suppose the case were reversed, and the defender were suing the pursuers in New York, if the defender's averment was true, he would by the *lex fori* be unable to enforce the contract. To apply the *lex fori* as a general rule would mean that the construction of the contract would in many cases vary according as a party was pursuer or defender. The Court could not look at the contract to see whether

there was consideration in the technical sense referred to by the defender, for consideration according to the law of New York might signify something quite different from consideration in Scottish law. That question must be determined by the law of New York. The contract was to be carried into effect all over the Americas. Nothing remained to be done in Scotland. There were therefore many *loci solutionis*, and the *lex loci solutionis* could not be looked to in construing the contract.

At advising—

LORD PRESIDENT—This is an action at the instance of two persons who are citizens of New York, and it is founded upon an agreement the terms of which are before us, and which bears to be dated in New York on 16th November 1888. A supplementary writing was added to the agreement on 1st December in this country in which the defender assented, subject to certain modifications to the agreement made in New York on his behalf, and this supplementary writing was again met by an acceptance by the modifications so introduced. This agreement appears to me undoubtedly to have been executed in New York, and it is only necessary to look at it further to see what is its nature before disposing of the question raised.

If the agreement is binding according to its terms, there is no doubt that there has been a grave breach by the defender of the obligation undertaken by him, because the agreement was entered into for the purpose of constituting a sort of joint-adventure for carrying on a trade in a patent invention in the two Americas by the pursuers and the defender, and the defender, after laying himself under this obligation, in breach of that agreement sold the invention in the month of April 1889 to the White Lead Company. One has, therefore, very little sympathy with the defender so far as concerns the honour of the transaction, but the question before us is entirely one of law—whether the agreement is enforceable according to its terms?

There are many curious speculations among writers on international law as to how far the place of making a contract affects its construction and validity, but one consideration presses itself very strongly upon my mind, which is this:—It is alleged by the defender that the agreement is invalid according to the law of the State of New York, because it is not under seal, and therefore not enforceable by that law. When we look at the agreement we see that, whatever other characteristic it may have, it is an agreement for a joint-adventure, and at all events is a bilateral contract, and such a contract must be binding on both parties or neither. Now, suppose the case were reversed, and the defender were seeking to enforce the agreement in the New York Courts, if he could not enforce it there it seems to me to follow that the agreement cannot be enforced here either, because that would be to make one party liable and the other not—a result which the law will not countenance, because a bilateral contract is binding on both parties or neither. This view confirms very much an impression I entertained otherwise, that in a case like the present the *lex loci contractus* must necessarily govern, because there is no other law which can be applied to regulate the validity and construction of the agreement. We cannot here apply the *lex loci solutionis*, because the agreement is to be carried into effect in different places all over the Americas, and accordingly its validity would in that view have to be determined according to the law of a great many States in North and South America, and the law of these States on questions of this kind may be essentially different. I am therefore driven to think that the *lex loci solutionis* cannot regulate the validity or construction of this agreement.

Is there then any choice between the law of the place of execution and any other law? I think necessarily there is not, but that we are shut up to the *lex loci contractus* as the law which must regulate the construction and validity of this agreement.

I am therefore of opinion with the Lord Ordinary that this agreement having been made in New York, its validity and meaning are to be determined by the law of that State.

The Lord Ordinary has in his interlocutor sustained the 2nd plea-in-law for the defenders, but only to the extent and effect that the validity and meaning of the agreement fall to be determined by the law of New York. With that limitation I think the sustaining of the plea is quite consistent with our judgment.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion. I think that the case is freed from many of the difficulties which sometimes attend cases of contracts executed in one country with a view to being performed in another. There are two material points to be kept in view—First, that the contract was executed in New York, and, in the second place, that the right which is the subject-matter of the contract was to be exercised in that State. Now the pursuers' averment is, that the agreement entered into was an agreement by which "the defender agreed with the pursuers for the sale of said inventions for the two Americas." They then go on to make an averment which as a matter of pleading was out of place if they intended to invoke the law of Scotland, but was quite relevant and proper if they were dealing with foreign law which is matter of fact. They say—"By the said agreement the pursuers acquired the sole right to use the said inventions in, *inter alia*, the United States of America, and to dispose of said right in said United States as they pleased," and then they go on further to say, that they "registered the agreement in the United States Patent Office." Now, that is an averment that, as a matter of fact, the pursuers acquired the sole right to use

the invention in the United States of America. The right so acquired must of course depend on the law of the United States, because it is not a right which could be conferred by any other law.

The Court adhered.

Counsel for the Pursuers—D.-F. Balfour, Q.C.—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defender—Graham Murray—Guthrie. Agents—Reid & Guild, W.S.

Friday, March 20.

FIRST DIVISION.

[Sheriff of the Lothians and Peebles.

MID AND EAST CALDER GAS LIGHT COMPANY *v.* OAKBANK OIL COMPANY, LIMITED.

Mines and Minerals—Right to Support of Party not Owner of Surface—Gas Company.

A gas company agreed with a proprietor to supply gas to his mansion-house, and for that purpose laid a branch line of pipes through his lands, it being part of the agreement that the pipes should belong to the company. The proprietor subsequently leased the minerals under his lands, and his tenants, while constructing a railway in connection with their works, without asking leave, uplifted part of the branch line of gas-pipes and relaid them in a defective manner. The mineral workings also occasioned a subsidence of the ground in certain places, with the effect of causing further injury to the gas-pipes.

In an action by the gas company, with consent of the proprietor, *held* (1) that the mineral tenants were liable in the expense of repairing and relaying the portion of the pipes which they had uplifted and relaid defectively; but (2) that they were not liable to repair the damage done to the pipes by subsidence of the ground, as they were bound by no contract to give support to the pursuers' pipes, and it was not suggested that they had worked the minerals negligently.

In 1845 the Mid and East Calder Gas Light Company, which was a proprietary company formed by voluntary contract, agreed with Mr Hare, the proprietor of Calderhall, to supply gas to the mansion-house, and for that purpose laid down a branch line of gas-pipes, which ran from the mansion-house for 200 or 300 yards through the policy of Calderhall, and was joined to the company's main pipe outside the policy grounds. It was part of the agreement between Mr Hare and the Gas Company that each should defray one-half of the expense of laying down the branch line of pipes, and that these pipes should belong to the company.

About 1870 Mr Hare leased the shale under his lands to the Oakbank Oil Company, who bound themselves in their lease "to pay for all ground that may be used, occupied, or taken by them, and all surface or other damages, whether already done or hereafter occasioned during the currency of this tack, . . . and all other damages done by them of whatever nature, whether to land, houses, trees, growing crops, roads, fences, wells, water and watercourses, drains, or others." . . . This company worked the shale till 1886, when it went into voluntary liquidation with a view to reconstruction, and the whole undertaking was transferred to a new company, also called the Oakbank Oil Company, who, with the assets, took over all the debts, liabilities, and obligations of the old company.

The present action was raised in 1889 in the Sheriff Court at Edinburgh by the Mid and East Calder Gas Light Company, with consent of Lieutenant-Colonel Hare of Calderhall, for his interest, against the Oakbank Oil Company. The pursuers prayed the Court to ordain the defenders to lift the whole of the branch line of gas-pipes from the main pipe to Calderhall House, or so much thereof as might be found necessary, and to renew and repair and relay the same to the satisfaction of a party named by the Court; and failing the defenders doing so, to authorise the principal pursuers to carry out the work at the defenders' expense.

The pursuers averred that their pipes had been broken and damaged, and considerable leakage of gas caused in two ways—(1) by subsidence of the land caused by workings of the defenders; and (2) by the defenders failing to relay in a satisfactory manner a part of the pipes which, at their own hand and without leave, they had lifted and removed.

These averments were denied by the defenders.

The pursuers pleaded, *inter alia*—"(1) The gas-pipes mentioned having been, through the mining operations of the defenders or their predecessors, for whose acts they are responsible, injured or destroyed, the pursuers are entitled to the warrants craved. (2) The defenders having unwarrantably and illegally lifted and destroyed or injured the gas-pipes belonging to the pursuers, in the manner condescended on, the pursuers are entitled to the warrants craved."

The defenders pleaded, *inter alia*—"(1) The action is irrelevant."

A proof was allowed, the result of which sufficiently appears from the interlocutor of the Sheriff-Substitute.

On 20th January the Sheriff-Substitute (RUTHERFURD) pronounced the following interlocutor:—"Finds as matter of fact, (1) that in the year 1845 the pursuers the Mid and East Calder Gas Light Company agreed with Mr Steuart B. Hare, then proprietor of Calderhall, to supply gas to his