ladder to be used notwithstanding, he committed a fault, but the question is, whether the owners are liable for his fault?

In the Irish decision quoted to us by Mr M'Kechnie it was held that in such a case the owners would be liable, but in the English case in which that decision is considered, such a reading of the law of master and servant is altogether rejected, and in this Court there is no doubt that under the decision quoted by the defenders a captain is held to be a fellow-servant of the seamen under him; therefore the owners would not be liable for an accident caused by the captain's fault.

The case of *Gordon* v. *Pyper*, I think, is quite decisive of this question. In that case a traveller-rope had been supplied to a trawler. It was in good condition when supplied, but during its service it had got frayed and weakened, and was unfit to bear a strain put upon it, so that it broke and injured a seaman. It was the duty of the captain to see that the rope was kept in proper condition, and the owners were held by a unanimous judgment of this Court not to be liable. I think the rope and the ladder are in the same category, and therefore I think the rule must be made absolute for a new trial.

LORD YOUNG—I am of the same opinion. It is not alleged that the appointment of the ship was defective. There were two iron ladders fixed to the side, and leading down into the hold, and these were sufficient for the purposes of the ship, but there was some special work going on, and this wooden ladder was placed where it was for the use of the workmen, but it is plain from the proof that the sailors used this wooden ladder as well as the iron ladders. This ladder was not part of the ordinary appointment of the ship—it lay on board, and was carried about from place to place, but it was not part of the appointment, and that is why I said the pursuer did not complain of defective appointment.

It is plain that the ladder was in a defective condition, because it broke down, but whether the defect was patent or not is a matter of controversy.

Suppose that the defect was patent, who was to blame for allowing the ladder to remain on board in such a condition that when it was used it broke down? As a matter of common sense I should think it was the duty of some one of the crew to see that the ladder was kept in proper repair, and not of the owners of the vessel. Whose duty among the crew, then, was it to see that this was done? That raises the question, if an accident occurs to one of the crew from the fault of another of the crew, who is responsible? That, again, raises the general question, what is the law of contract applicable to the circumstances? Does a sailor, when he ships on board a vessel, take upon himself the risks of accident occurring through the fault of one of the crew who was his fellow-servant, or does he not? It must be by implication of course, because there is nothing of that kind stated in the contract of service.

I have no hesitation in saying that according to our law any sailor engaging to go on board a vessel takes upon himself the risk of error or fault upon the part of any other member of the crew, and I think it is according to the decisions that he takes upon himself the risk of any error or fault upon the part of his captain. The captain and crew are really the contracting parties. It is usually the case, and it was the case here, that the master of the ship engages his own crew. The crew select what captain they will serve under, and the captain engages what crew will suit him, and therefore it is the strongest case possible for implication in the contract that a sailor engaging under any captain takes the risk of any danger which may arise from the error or neglect of that captain. Therefore if there is any fault from the error or neglect of the captain the owners are not liable, because under the common law the captain is a fellow-servant of the seaman.

The same reasoning would apply if the defect was latent—*prima facie* in that case there would be no fault—but if there was fault, then the fault would be that of one of the crew and a fellow-servant.

I think that the evidence has not proved any wrongdoing on the part of the owners of the vessel.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

The Court set aside the verdict and granted a new trial.

Counsel for Pursuer— M'Kechnie—Mackintosh. Agents—Snody & Asher, S.S.C.

Counsel for Defenders — Jameson — W. J. Mackenzie. Agents — Mill, Bonar, & Hunter, W.S.

Thursday, November 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

TALISKER DISTILLERY *v.* HAMLYN & COMPANY.

Contract — Conflict of Laws — Clause of Reference—Arbiters Unnamed—Lex loci solutionis.

A contract executed in London between Scottish distillers and English merchants for the sale of grains to be made and delivered in Scotland contained a clause providing that should any dispute arise out of the contract, it was to be settled by arbitration by members of the London Corn Exchange or their umpire in the usual way.

Held (*aff.* Lord Kyllachy—Lord President *abs.*, and Lord Kinnear *diss.*) that action on the contract was not excluded by this clause of reference to arbiters unnamed, the contract being a single

indivisible Scottish contract to which Scots law alone was to be applied.

By memorandum of agreement executed in London on 27th January 1892 Roderick Kemp & Company, of Talisker Distillery, Carbost, Skye, agreed to sell, and Hamlyn & Company, merchants, 153 Cheapside, London, agreed to purchase, all grains made by the said Roderick Kemp & Company, at a fixed price, such grains to be delivered f.o.b., Carbost, to Hamlyn & Company's order, or otherwise as required. Hamlyn & Company agreed to erect at the distillery a drying machine for drying the grains, which was to be worked and kept in repair by the Talisker Distillery. The contract was to remain in force for ten years from the erection of the machine.

The memorandum contained this clause—"Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way."

The drying machine was erected, but according to the Talisker Distillery was inefficient for the work required, and in March 1893 the Talisker Distillery, having founded jurisdiction by arrestment, brought an action against Hamlyn & Company to have it declared that they were bound to purchase all grains made by the pursuers, and for £3000 as damages for breach of contract.

The defenders, *inter alia*, answered—"The said memorandum of agreement was drawn and executed by the parties thereto in England, and falls to be construed and governed by the law of England. Further, it was drawn and executed in contemplation of the English law, and the parties thereto intended that it should be construed and enforced according to the law of England, and that that law alone should govern its construction and effect. It is the law of England, and in particular it is prescribed by the Arbitration Act 1889, that a clause of reference expressed in the terms of the clause above quoted, is irrevocable and valid and binding upon the parties, and must be given effect to by the courts of law, and bars either party from raising, or at least insisting, in an action at law. The present action, and all others arising out of the said memorandum of agreement, are, and by the parties thereto were, intended to be excluded by the said clause of reference. By letter dated 21st December 1892 the defenders called upon the pursuer Mr Allan to appoint an arbitrator within seven days from that date, offering at the same time to nominate a second one, as provided by the said memorandum of agreement, for the settlement of the dispute which had arisen and is the cause of the present action. The pursuers refused to do so, but the defenders have always been and still remain ready and willing to have the dispute settled by arbitration, and to do all things necessary to the proper conduct of the arbitration."

The defenders pleaded—"(2) The action is excluded by the clause of reference in the said memorandum of agreement."

The pursuers "admitted that they refused to appoint an arbiter, explained that the present dispute does not arise out of the contract, but is inherent in the contract itself, and that the agreement falls to be construed according to the law of Scotland."

On 6th July 1893 the Lord Ordinary (KYLLACHY) repelled the second plea-in-law for the defenders, and before answer allowed a proof.

"*Opinion.*— . . . The defenders plead that the action is excluded by the clause of reference contained in the memorandum of agreement on which the action is laid, and it is undoubtedly provided by that agreement that 'should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way.' The defenders admit that this stipulation is inoperative by the law of Scotland, inasmuch as the arbiters are not named, but they aver that it is good and effectual by the law of England, and they contend that the contract is an English contract, and falls to be interpreted and receive effect according to English law.

"I am not prepared to adopt this view. The contract was no doubt executed in England, but it was an agreement to which one of the parties was a Scotch firm, and it had reference to the treatment and disposal of the 'grains' produced at the distillery of the Scotch firm in the Isle of Skye. It was therefore an agreement of which Scotland was the place of performance, and that being so, the validity and effect of its stipulations must, in my opinion, be determined by the law of Scotland. Such is—I think it is now fixed—the general rule; and there seems nothing in the nature or terms of the agreement to displace that rule. It is true that if the *lex loci actus* were here applied, one of the clauses of the ageeement, viz., the particular clause in question, would be operative, whereas according to the *lex loci solutionis*, it is inoperative; but it is not, so far as I know, a proposition which can be supported that the law to be invoked for ascertaining the rights of parties under a contract is necessarily or even generally the law which least interferes with the operativeness of its various stipulations.

"In this view it is not necessary to decide whether the law of Scotland is not here applicable on another ground, viz., that it is the *lex fori*. But it is at least a very arguable proposition that this clause of reference relates to a matter of procedure, and so belongs to the department of remedy. In that case it would appear to follow that the *lex fori* applied on the principle of the case of *Don* v. *Lippman*. It is not, however, as I have said, necessary to consider that question at present. In any view, the law of Scotland is the law applicable, and according to that law the clause of reference is inoperative."

The defenders reclaimed, and argued—It was not clear that Scotland was the *locus solutionis;* there was to be payment of money by a London firm of merchants,

But even if Scotland was the *locus solutionis*, that did not necessarily make Scots law the law of the contract. That was not the general rule to be presumed unless an exception was proved. It was always a question of intention, and weight was to be given to the place where the contract was entered into—*in re Missouri Steamship Company*, 1888, L.R., 42 Ch. Div. 321 (Chitty, J.); *Jacobs* v. *Crédit Lyonnais*, 1884, L.R., 12 Q.B.D. 589 (Lord Bowen). Here both these considerations were in their favour. To refuse to give effect to their plea was to make a stipulation deliberately inserted in the agreement of no effect. It was not necessary that there should be only one place of performance, or only one law affecting the contract. The contract might be ruled partially by English law and partially by Scots—Nelson's Private International Law, p. 275; *Duncan* v. *Campbell*, 1842, 12 Simons, 616; *Cohen* v. *South-Eastern Railway Company*, 1877, L.R., 2 Exch. Div. 253; *Chamberlain* v. *Napier*, 1880, L.R., 15 Ch. Div. 614. The clause of arbitration might be regarded as a separate contract to which English law applied. The *lex fori* did not govern the contract; that was to beg the question the Court had to decide—Bar's Private International Law (Gillespie's 2nd ed., 1892), p. 561; *Alexander* v. *Badenach*, December 23, 1843, 6 D. 322 (and a rule of the Scots common law could not be stiffer than an Act of Parliament); *Chartered Mercantile Bank of India* v. *Netherlands India Steamship Navigation Company*, 1883, L.R., 10 Q.B.D. 521; *Corbet* v. *Waddell*, November 13, 1879, 7 R. 200; *Scottish Provident Institution* v. *Cohen & Company*, November 20, 1888, 16 R. 112; *Shedlock* v. *Hannay*, March 11, 1891, 18 R. 663.

The respondents argued—There was no case of two systems of law being applied to the same contract. The case in Simons did not support that view. This was a single contract, to be regulated either by Scots or English law. The real question was, where was the seat of the contract? Undoubtedly in Scotland, where it was to be carried out, and to which money due under it would have to be sent. It was a mere accident that it had been entered into in London. The defenders' agent might have been in Scotland instead of the pursuers' agent having been in London—*Clements* v. *Macaulay*, March 16, 1866, 4 Macph. 583; *Valery* v. *Scott*, July 4, 1876, 3 R. 965; *Ainslie* v. *Murrays*, March 17, 1881, 8 R. 637; *Don* v. *Lippman*, 1837, 2 S. & M'L. 682.

At advising—

LORD ADAM—This is an action of damages brought at the instance of the Talisker Distillery Company, as in right of the extinct firm of R. Kemp & Company, against Messrs Hamlyn & Company, in respect of an alleged breach of agreement entered into between Kemp & Company and Hamlyn & Company.

By this agreement Hamlyn & Company agreed to purchase from Kemp & Company, at a fixed price, all grains made by them at their distillery. Hamlyn & Company, on the other hand, agreed to furnish a certain drying machine for the manufacture of the grains, which Kemp & Company agreed to work and keep in repair.

The alleged breach of agreement consists in this, that Hamlyn & Company failed to supply an efficient machine, so that the pursuers were unable to produce grains for sale and suffered loss in consequence. The defence is that Hamlyn & Company duly supplied a proper drying machine in terms of the contract, but that Kemp & Company or the pursuers failed to work it properly or keep it in repair, and that the deficiency, if any, in the production of grains has arisen from the pursuers' own fault.

The defenders plead, *inter alia*, that the action is excluded by a clause of reference in the agreement.

The clause of reference is in these terms—"Should any dispute arise out of the contract, the same to be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way."

The Lord Ordinary has repelled this plea, and the only question argued to us was, whether his Lordship was right in so doing.

From what I have stated as to the nature of the dispute between the parties, it is clear that it falls within the terms of the clause of reference, and that indeed was not controverted, and the question therefore at issue between the parties is, whether or not that clause is an operative clause.

If the law of Scotland is to rule the matter, it is admitted that the clause would be inoperative, in respect that it is a reference to persons as arbiters who are unnamed. It is averred by the defenders, and not disputed by the pursuers, that by the law of England the clause would be operative and would exclude the present action.

The contract is between an English and a Scotch firm, and was executed in England. The fact that it was executed in England does not appear to me to be material in this question. It was probably a matter very much of convenience or of accident whether it was signed in England or in Scotland, or partly in both countries.

On the other hand, it is to be observed that the place of performance was in Scotland. The grains were to be made at the pursuers' distillery at Carbost in Scotland, and were to be delivered to the defenders there, and the machine for producing the grains was to be erected and worked there. The agreement is silent as to the mode of payment, but in the absence of stipulation I should say that the pursuers were entitled to demand payment on and at the place of delivery, so that the place of payment was there also. So far as I see, nothing required to be done in England in implement of the contract.

That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the *lex loci solutionis*—that is, by the law of Scotland. It was, however, maintained to us that if it appeared to be the intention of the parties that the contract should be ruled by the law of England, it was the

duty of the Court to give effect to that intention; that it must be presumed that the parties intended that all the stipulations of the contract should receive effect; that this would be so if the contract were ruled by the law of England, but would not be so if it were ruled by the law of Scotland, and therefore it was said that the parties must have intended that the contract should be treated as an English contract. But if, as I think, the law of the *locus solutionis* is the law which is applicable to and which regulates the rights of parties under the contract, then I think with the Lord Ordinary that it is no reason for not applying that law that the result may be that a particular stipulation in the contract may not receive effect.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN—This is an action instituted in the Court of Session to compel performance of a contract entered into between a company of distillers in Scotland, pursuers and Hamlyn & Company, merchants, London, defenders, whereby the pursuers agreed to sell and the defenders to purchase all "grains" made by the pursuers in their distillery at a specified price per quarter. The defenders also agreed to supply and erect at the pursuers' distillery a certain drying machine, and the pursuers undertook to work and keep in repair this machine, and to pack and deliver the "grains" to Hamlyn & Company's order, the contract to be in force for ten years.

The contract contains a clause referring disputes which might arise out of the contract to two members of the London Corn Exchange or their umpire. This clause is inoperative by the law of Scotland, because the arbiters are not named, and the parties are at issue on the question whether this rule of the law of Scotland takes effect upon the contract, in which case the action would be sent to trial in the exercise of the ordinary jurisdiction of the Court; or whether the parties are to be held to have contracted with reference to the law of England, which recognises agreements to refer disputes to the arbitration of persons unnamed, in which case the action would either be dismissed or the proceedings stayed in order that a decree might eventually be pronounced giving effect to the decision of the arbiters.

According to the terms of the contract Scotland must be taken to be the *locus solutionis*. The contract does not prescribe any particular mode of payment of the price of the grains which are to be supplied during its continuance, and I am not sure that the obligation of payment of the price has reference to any definite locality or system of local law. The price has to be remitted from England to Scotland, but by arrangement the price might be paid into a London bank, or settled in such way as the parties might find to be convenient. But certainly all the other stipulations of the contract of sale are to be performed in Scotland, including the manufacture of the grains, their shipment to any part of the world on the order of Hamlyn & Company, the erection of the drying machine, and the operation of drying preparatory to shipment. It does not appear to me that in the question of the locality of the contract any conclusive inferences can be drawn from the domicile of the parties. The sellers have a Scottish domicile and the purchasers have an English domicile, and the circumstance that this mercantile contract was signed in London is probably the least important of the elements which enter into the determination of the question of the *locus* of the contract.

As regards the arbitration clause, I think that in a fair construction the place of performance may be held to be in London, because the reference is to members of the London Corn Exchange.

The question, what system of law governs the construction and validity of the contract, was argued as a question of private international law, and we are referred to the opinions of Story and Bar, and to decisions of the English and Scottish Courts. In considering such questions it may be kept in view, as was very forcibly stated by Lord Selborne in the great jurisdiction case of *Orr Ewing's Trustees*, July 24, 1885, 1 R. (H.L.) 1, that writers on international law have no legislative authority to impose their opinions on the courts of any independent state, and that their *dicta* are only obligatory on courts of justice in so far as they have been received into the system of jurisprudence which is administered by the court where jurisdiction is invoked. Now, in this case Scotland is at once the *forum* and the *locus solutionis*, and the question we have to consider is, whether there is any principle of private international right, as understood and administered in Scotland, which displaces the ordinary rule, according to which a contract expressed in ordinary language will be interpreted and applied by a court of law according to its own conception of the terms of the contract, and with reference to any rules of law which it administers.

In the present case, at least for the purposes of the present dispute, no question of construction of the contract is raised. If there were such a question we should not, so far as I can see, find it necessary to resort to the law of England for assistance, because the contract is expressed in ordinary language, and it is the settled practice of the Scottish courts, and I apprehend also of the English courts, to construe ordinary mercantile contracts according to their own understanding of their meaning, and of course consistently with the decisions of the courts of the United Kingdom.

But in this case the meaning of the clause of arbitration is perfectly clear; the question is as to the obligatory character of an agreement to refer disputes to two members of the London Corn Exchange or their umpire. If the position of the parties had been reversed; if this had been a contract between an English company and a

mercantile firm in Scotland, to be executed in England, I should have held without hesitation that the obligation to refer disputes to arbiters unnamed was a valid obligation, because whatever differences of opinion may exist among jurists, this Court has always acted on the principle that the *lex loci solutionis* is the governing law in the construction of contracts; the law which determines the validity of their stipulations, and which in certain cases attributes to particular stipulations a special meaning depending on local custom or rules of construction pertaining to that system of law. On this point I refer to the opinion of the late Lord President in *Valery* v. *Scott*, 13 R. 965.

As in the present case Scotland is the *locus solutionis*, we have no occasion to consider any system of law other than our own so far as the contract of sale is concerned.

But it was maintained by the defenders, first, that the clause of arbitration ought to be treated as an independent contract to be performed in England, and secondly, reference was made to the opinion of Lord Justice Bowen in the case of *Jacobs* v. *Crédit Lyonnais*, 12 Q.B. Div., to the effect that it is open to the parties to a contract to make any such agreement as they please as to incorporating the provisions of a foreign system of law in the obligatory writing. I should distrust any opinion I might provisionally form on a question of this nature if I found it to be in conflict with that of Lord Bowen, but in this case the real question is as to the application of the principle, and it is to be observed that Lord Bowen, while stating the principle as a necessary step in the argument, declined to apply it to the case before him. Because in considering the question whether the parties should be held to have contracted with reference to the law of France, he points out that while the parties may be assumed to have incorporated with their contract so much of the law of the foreign country as was inseparable from the performance of the contract in Algeria, it would not follow that they had contracted with reference to a provision of the law of France which released the parties from their obligations on the ground of the impossibility of performance in a certain state of facts.

Now, taking the defenders' arguments as I have stated them, my opinion on the first point is that the agreement to refer disputes to members of the London Corn Exchange, is not an independent contract to be performed in England and therefore to be governed by the law of England. I think it is a stipulation ancillary to the contract of sale. One test of independence is, whether the provision is capable of standing alone, or whether any effect could be attributed to it if the contract of sale to which it is annexed were displaced. But it is plain that the clause of arbitration would have no meaning if it were detached from the contract of sale, because it is a clause of reference of disputes arising out of that contract.

Thus, I come to the conclusion that the clause of reference is merely an incident in a contract of sale, the validity and interpretation of which as a whole is regulated by the law of Scotland.

On the second point, my opinion is also adverse to the argument of the defenders. I do not doubt that the parties to a contract may incorporate expressly or by implication such provisions of a foreign system of law as they might put into their contract by writing them out at length. But it does not follow that the parties to a contract can by agreement dispense with a rule of law which affects the validity of the stipulation. Supposing that the two parties to this agreement had been domiciled in Scotland, and that they had written down, "Notwithstanding the rule of our law which disallows references to arbiters unnamed, we agree to refer our disputes to two members of the Exchange to be mutually chosen, and elect to have our contract judged by the law of England," everyone would admit that such an agreement would not enable the courts of Scotland to assist the party who might be desirous of enforcing the agreement. Now, in my view the circumstance that one of the parties is domiciled in England, and that the arbitration is to be carried out in England, does not put the defender in any better position than he would occupy in the case supposed unless I could regard the arbitration clause as an independent stipulation, which, for the reasons stated, is a view I am unable to accept. It follows, in my opinion, that the interlocutor of the Lord Ordinary is well founded, and that the reclaiming-note ought to be refused.

LORD KINNEAR—I need hardly say that I have found this to be a question of difficulty, since I have the misfortune to differ from your Lordships and the Lord Ordinary. I do not think, however, that there is any material difference of opinion as to the principles by which the question must be determined.

There is no absolute rule of the law of Scotland that a contract made in one country, to be performed in another, must be governed either by the law of the place of execution or by the law of the place of performance. The Lord President observes in *Valery* v. *Scott*, "that these are both circumstances to be taken into consideration as regards the nationality of a contract." But whether the greater weight is to be given to the one consideration or the other must depend in each case upon the construction of the contract itself, because the validity of either consideration depends upon the presumed or expressed intention of the parties to contract with reference to the law of a particular place. I agree that the place of performance has been considered in this Court to be of more importance than the place of contracting, and for reasons that are especially cogent when one of the parties to the contract is domiciled in England and the other in Scotland. If such a contract is to be performed entirely in one part of the United

Kingdom, it may in general be of very little consequence that it has been made in the other. The place of contracting may depend on the merest accident; and it seems to me that the occasional presence of a Scottish manufacturer in London, or of an English merchant in Scotland, affords very little ground indeed for the inference that either intends to subject himself to any other law but that of the country where he lives. And therefore, were it not for the arbitration clause, I should agree with the Lord Ordinary and with your Lordships that the contract in question is to be wholly performed in Scotland, and that its validity and effect must be determined by the law of Scotland But it is not suggested that there is any difference between the law of England and the law of Scotland with reference to the construction or legal effect of the main provisions of the contract, or with reference to anything else than the clause by which disputes are referred to arbitration. The only question we have to consider therefore is, whether the agreement to submit to arbitration is to be governed by the law of Scotland or of England? That appears to me to be a question of contract, and I think the rule for deciding it is that stated by Lord-Justice Bowen in *Jacobs* v. *The Crédit Lyonnais*—"The only certain guide is to be found in applying sound ideas of business, convenience and sense to the language of the contract itself with a view to discovering from it the true intention of parties."

Is it, then, the intention of the contract to incorporate the English law regulating arbitrations?

Now, this contract was made in London between merchants carrying on business in the city of London and distillers in Skye. The parties therefore are subject to different jurisdictions, and it is reasonable to presume that the possible consequences of this difference were in their view when they made their agreement as to the tribunal by which disputes, if they arose, were to be settled. The contract which they made in these circumstances is that disputes should "be settled by arbitration by two members of the London Corn Exchange or their umpire in the usual way." Now, when a London merchant stipulates that disputes under his contract are to be referred to members of such a body as the London Corn Exchange—that is, to merchants or brokers carrying on business in the city of London—I think that means that the tribunal is to be constituted and the arbitration conducted in London; and when it is further stipulated that the arbitration is to be by two members of the Corn Exchange "or their umpire in the usual way," I think that imports a reference to a known law and practice regulating the constitution and conduct of such arbitrations, and that can only be the law and practice of England. If that be so, London is the place of performance as well as the place of making the contract. No doubt the arbitrators might come to Scotland if they thought it necessary or expedient to make inquiries in Skye. But it would be a question for their judgment whether it was expedient to do so or not, and whatever course they might think fit to take for the purpose of informing their mind, the main seat of the arbitration must still be in England. The material considerations are that the tribunal must be constituted in London, and the powers of the arbitrators and their umpire must be determined and their proceedings must be regulated by the law under which they are living. We have constant experience of questions on which parties to an arbitration find it necessary to appeal to the Court, and I see no room for doubt that if both parties had been willing to carry out their agreement to submit, and questions of that kind had arisen, they must necessarily have been brought before the English Courts, and determined according to the law of England. We have no jurisdiction over the arbitrators, and we are not acquainted with the law and practice to which the contract refers by the use of the words "in the usual way." We do not know how the tribunal is constituted, whether the arbitrators appoint their umpire, or whether the umpire is named by the parties; on what conditions the functions of the arbitrators may be devolved upon the umpire; what are the specific powers of either in working out the arbitration; or what remedy the parties would have in case of misconduct. These would have been questions for the English Courts. I cannot conceive that the arbitrators themselves should have regard to any law but their own in the conduct of their own proceedings, even if it be assumed that they might be called upon to give effect to some foreign law on adjudicating between the parties. And if the constitution and procedure of the tribunal is to be regulated by the law of England, I think the intrinsic validity of the contract of submission must be determined by the law of England also.

It is not immaterial to observe that our jurisdiction over the defenders depends on the mere accident that somebody in Scotland is in possession of certain sacks belonging to them, which are said to be of the value of £3, 6s. 8d., and which the pursuers have arrested. I do not suggest that the law we are to administer is dependent on the manner in which jurisdiction is founded. But it is a consideration that ought not to be overlooked in construing the contract, that but for the accident of the defenders possessing moveables of very trifling value which have been arrested in Scotland the pursuer must have gone to England to sue upon the contract. Can we hold that if he had appealed to the Court in England to enforce the contract of submission by the appointment of arbitrators or otherwise, the English judges must have declined to adjudicate upon that question according to their own law, and have come to this Court for instruction as to the meaning or legal effect of the contract to submit? I cannot but think that they would have determined the validity of the

contract, just as they would determine any question that might arise during the working out of the arbitration according to the law which they themselves administer as the law of the place where the contract was made, and where also it is to be performed.

It is said that we must assume that an English Court would give effect to the law of Scotland, because this is to all intents and purposes a Scottish contract. But that is the question to be determined. The argument is that all the substantive obligations of the contract for the purchase, treatment, and delivery of the grains in question are to be performed in Scotland, and must be governed by the law of Scotland, and therefore that the ancillary obligation to refer disputes to arbitration must be governed by the same law, because two different systems of law cannot be applied to the same contract. That does not appear to me to be a very weighty consideration in the present case, because, as I have said, it is not alleged that there is any difference between the laws of England and Scotland in so far as regards the main provisions of the contract. But if the obligations of a contract are separable, and one is to be performed in England and another in Scotland, I see no ground in principle for holding that the law of each country may not be incorporated in the contract for its own special purpose, and no further. The more correct view seems to me to be that the agreement for arbitration is a distinct collateral agreement, and that the question we are to determine is, whether it was the instruction of the parties that that agreement should be carried into effect by an English or a Scotch arbitration. But if the contract is one and indivisible, I think it false reasoning to argue from the other stipulations taken separately, and apart from the arbitration clause, that the contract is entirely Scottish, and therefore conclude that the arbitration clause must be governed by the law of Scotland. The arbitration clause may be of the greatest possible significance in determining the law with reference to which the parties intended to contract. If the contract were to be construed differently, according as it is held to be English or Scottish, then I think the stipulation for an English arbitration would be an argument—I do not say a conclusive argument—for preferring the English construction. For the ground on which so much importance has been attached to the place of performance appears to be that it is there that the parties must have anticipated that their mutual obligations would be discussed and enforced. But that ground is displaced if they have stipulated that their rights shall be determined by a tribunal of their own selection elsewhere than at the place of performance.

In the present case, however, we are not embarrassed by any conflict of laws except with reference to the constitution of the tribunal to which the parties have agreed to refer their differences. If their agreement to that effect is to be governed by the law of Scotland, it is ineffectual. I admit, that they cannot alter the law by their agreement. But I think it was open to them to contract, first, that they should not have recourse to the ordinary courts of either England or Scotland, but to a tribunal of their selection; and secondly, that this private *forum* should be constituted and carry out its proceedings either in England or Scotland as they thought fit. They have, in my opinion, agreed that it shall be constituted in England, and I think it is for the law of England to determine whether that agreement can be carried into effect.

The LORD PRESIDENT not having heard the whole argument gave no opinion.

The Court adhered.

Counsel for the Pursuers and Respondents — Ure — M'Lennan. Agent — Alex. Mustard, S.S.C.

Counsel for the Defenders and Reclaimers —Dickson—A. S. D. Thomson. Agents— Finlay & Wilson, S.S.C.

Friday, November 24.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MILNE *v.* WALKER AND WILSON.

Reparation — Slander — Statements in Answer to Attack — Issue — Innuendo— Counter-Issue.

A wrote to a newspaper attacking various persons, and, *inter alia*, stating that he had detected B, who had been the contractor for the supply of groceries to a certain school, sending a different and, he believed, a cheaper brand of of coffee than that contracted for. B replied by a letter to the newspapers, in which he made the following remarks on A's letter—"Every line exposes the true nature of the man who wrote it. Perhaps none will feel it so much as those whom he so gushingly thanks in the same breath as he levels his vile statements against so many of our prominent townsmen. . . . If I am able to show that the statement made as regards myself is a consummate lie, the other statements may be put down in the same category. I hereby charge this man with a deliberate and wilful untruth, contained in what he says with reference to my supplying the school with goods."

In an action of damages for slander by A, the Court *held* that he was entitled to the issue whether B's letter represented that he had no regard for truth and was a liar, and *disallowed* the counter-issue proposed by B, whether the accusation made against him by A was a lie, as not meeting the pursuer's issue.