SUMMER SESSION, 1894.

HOUSE OF LORDS.

Thursday, May 10.

Before the Lord Chancellor (Lord Herschell) and Lords Watson, Ashbourne, Macnaghten, Morris, and Shand.)

HAMLYN & COMPANY *v.* TALISKER DISTILLERY AND OTHERS.

(*Ante*, Nov. 30, 1893, p. 143, 21 R. 204.)

Contract — Locus Solutionis — Conflict of Laws—Reference to Arbiters Unnamed.

When two parties, living under different systems of law, enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either expressed or implied.

By contract executed in London, an English firm agreed to buy from distillers in Skye all grains made by them at a specified price, and to erect a grain-drying machine at the distillery. The distillers agreed to maintain the machine and to bag up their grains in the sacks of the English firm, and deliver them free at a port in Skye. The contract further provided—"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."

Held (*rev.* the decision of the First Division) that the language of the reference clause indicated that the parties intended it to be interpreted and governed by English law, and being valid by that law the Scottish Court must give effect to it.

This case is reported *ante*, p. 143, and 21 R. 204.

Hamlyn and Company appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, on the 27th January 1892 an agreement was entered into between Roderick Kemp & Company, of the Talisker Distillery, Carbost, Isle of Skye, and Hamlyn & Company, of London, under which Hamlyn & Company were to supply to the distillery a patent drying machine, which was to be worked by the Distillery Company, who were to bag up and deliver to Hamlyn & Company dried grain free on board at Carbost to their order, or otherwise as required. The agreement concluded with a clause in the following terms—"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." This agreement was made between the parties in England.

Shortly after the contract was entered into, Alexander Grigor Allan became the sole partner in the firm of Roderick Kemp & Company, and the present action was instituted by him in Scotland in respect of an alleged breach of the contract. The defenders pleaded that the Court of Session had "no jurisdiction," and that "the action is excluded by the clause of reference in the memorandum of agreement." These pleas were repelled by the Lord Ordinary, and his judgment was affirmed by Lord Adam and Lord M'Laren in the Inner House, Lord Kinnear dissenting. During the course of the litigation the pursuer died, and is now represented by the respondents.

It is not in controversy that the arbitration clause is according to the law of England a valid and binding contract between the parties, nor that according to the law of Scotland it is wholly invalid inasmuch as the arbiters are not named. The view taken by the majority of the Court below is thus expressed by Lord Adam—"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 is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the *lex loci solutionis*. My Lords, I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland.

My Lords, the learned Judges in the Court below treat the *lex loci solutionis* of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places, and where different systems of law prevail, it is a question, as it appears to me, in each case with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is of itself conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. My Lords, in this, case, as in all such cases, the whole of the contract must be looked at, and the contract must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ which system of law they intend to be applied to the construction of the contract, and to the determination of the rights arising out of the contract.

Now, in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of contract between them, shall be interpreted according to and governed by the law not of Scotland but of England, and I am aware of nothing which stands in the way of the intention of the parties thus indicated by the contract they entered into, being carried into effect. As I have already pointed out, the contract with reference to the arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and for the reasons which I have given, I see no difficulty whatever in construing the contract between the parties as an indication that the contract, or that term of it, was to be governed and regulated by the law of England.

But then it is said that the Scotch Court is asked to enforce a law which is against the public policy of the law of Scotland, and that although the parties may have so contracted, the Courts in Scotland cannot be bound to enforce the contract which is against the policy of their law. My Lords, I should be prepared to admit that an agreement which was against a fundamental principle of the law of Scotland, founded on consideration of public policy, could not be relied upon and insisted upon in the Courts of Scotland; and if according to the law of Scotland the Courts never allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which is insisted upon by the respondents. But that is not the case. The Courts in Scotland recognise the rights of the parties to a contract to determine that any disputes under it shall be settled, not in the ordinary course of litigation, but by an arbitration tribunal selected by the parties. If in the present case the arbitrators had been named, the Courts in Scotland would have recognised, and given effect to, and enforced the arbitration clause, and would by reason of it have declined to enter upon a trial of the merits of the case. That being so, I have been unable to understand upon what fundamental principle of public policy it can be said to rest as a foundation that where an arbitrator is not named an agreement between the parties to refer a matter to arbitration ought not to be enforced.

It is not necessary to inquire into the history of the distinction which has arisen in the Courts of Scotland between arbitration clauses where arbiters are named and clauses with an unnamed arbiter. It is

sufficient to say that when once it is admitted, as it must be, that the Courts of Scotland do enforce and give effect to an arbitration clause and hold their hands from the determination of the merits by reason of the parties having agreed upon it, it seems to me to follow that if this arbitration clause is to be interpreted according to the law of England, and is therefore a valid arbitration clause, there is no reason why the Courts of Scotland should not give effect to it just as much as if it were a valid arbitration clause according to the law of Scotland.

But then it is argued that an agreement to refer disputes to arbitration, deals with the remedy, and not with the rights of the parties, and that consequently the *forum* being Scotch, the parties cannot by reason of the agreement into which they have entered, interfere with the ordinary course of proceedings in the Courts of Scotland. My Lords, stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where merits fall to be determined in the Scotch Courts, insist by virtue of an agreement, that those Courts shall depart from their ordinary course of procedure. But, my Lords, that is not really the question which has to be determined in the present case. The question which has to be determined is, whether it is a case in which the Courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scotch Courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the Courts in Scotland not to adjudicate upon the merits of the case but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. My Lords, viewed in that light, I can see no difficulty, but the argument that to give effect to this arbitration clause would interfere with the course of procedure in the *forum* in which the action is pending seems to me entirely to fail.

For these reasons I move your Lordships that the judgment appealed from be reversed.

The question then arises, what course should be taken in the present case—whether the action should be stayed until the arbitration is completed, or whether the House should make an order remitting the cause to be determined pursuant to the arbitration clause. My Lords, I am quite satisfied, upon that part of the case, with the suggestion which will be made by my noble and learned friend who will follow me (Lord Watson), and I think that there is really no difficulty in the manner in which he proposes to give effect to the contract between the parties.

LORD WATSON—My Lords, this action was brought in the Court of Session by a Scotch distiller who died during its dependance, and is now represented by the respondents, against the appellant firm, who are merchants in London, concluding for damages in respect of their breach of a mercantile contract. For the purposes of this appeal it is sufficient to say that the contract, which was made in England, but fell to be mutually performed in Scotland, contains this provision, "Should any dispute arise out of this contract, the same to be settled by two members of the London Corn Exchange or their umpire in the usual way."

In defence, the appellants pleaded—"(1) No jurisdiction; (2) the action is excluded by the clause of reference." Both pleas were exclusively founded upon the agreement to refer. They were repelled by the Lord Ordinary (Kyllachy), and in the First Division by Lords Adam and M'Laren, Lord Kinnear dissenting. The learned Judges of the majority were of opinion with the Lord Ordinary, that inasmuch as Scotland was admittedly the *locus solutionis*, the whole stipulations of the contract, including the clause of reference, must be governed by Scotch law. In that view, the agreement to refer being to arbiters unnamed, was plainly invalid, and their Lordships accordingly sent the case to proof before the Lord Ordinary.

With reference to the two pleas which have been repelled, I wish to observe that although they seem to have become stereotyped in cases like the present, they do not correctly represent the rights of a defender who relies upon a valid contract to submit the matter in dispute to arbitration. The jurisdiction of the Court is not wholly ousted by such a contract. It deprives the Court of jurisdiction to inquire into and decide the merits of the case, whilst it leaves the Court free to entertain the suit and to pronounce a decree in conformity with the award of the arbiter. Should the arbitration from any cause prove abortive, the full jurisdiction of the Court will revive to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine*, the proper course to take is either to refer the question in dispute to the arbiter named, or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company*, 10 Sess. Cas. (3rd. series) 892, where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case not as establishing but as illustrating the rule of procedure, which was in force long before its date.

The first question in this appeal is whether the law of England or the law of Scotland applies to the interpretation of the clause of reference. If the law of Scotland must prevail, the judgments appealed from are unimpeachable. If, on the other hand, the contract must be governed by English law, the clause of reference is obligatory according to that law, and in that event the further question arises whether the Courts of Scotland ought to give the same effect to it as if it had been a binding Scotch covenant.

Upon the first of these questions I have

been unable to arrive at the same conclusion with the Courts below. When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract, and the course of performing its stipulations contemplated by the parties, and amongst these considerations the *locus contractus* and *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one *forum* and the place of performance in another. In the present case it does not appear to be necessary to discuss the relative value of these considerations, because in my opinion the clause of reference is expressed in terms which clearly indicate that the parties had in contemplation and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles, and, to my mind, their selection from the membership of a commercial body in London of a conventional tribunal which is to act "in the usual way," or, in other words, the manner which is customary in London, indicates not less conclusively that in agreeing to such an arbitration they were contracting with reference to the law of England.

Upon the assumption that the contract must be read in the light of English law, the respondents maintained, that in so far as concerns the agreement to refer, that law is inadmissible. They argued that the agreement relates not to the substance of the contract, but to the remedy which the parties were to pursue, and that according to a well-known principle of law, all questions touching the remedy must be decided according to the rules of the *forum* in which the remedy is sought. They also contended that the Court of Session were not bound to recognise any reference to unnamed arbiters, whatever be its validity elsewhere, to the effect of excluding their own jurisdiction, because its recognition would be contrary to the policy of Scotch law. Neither of these contentions are, in my opinion, well founded.

It has never, so far as I am aware, been seriously disputed that, whatever may be the domicile of a contract, any Court which has jurisdiction to entertain an action upon it must in the exercise of that jurisdiction be guided by what are termed the curial rules of the *lex fori*, such as those which relate to procedure or to proof. *Don* v. *Lippmann*, 2 Sh. & M'L. 682, which is the leading Scotch authority upon the point, has settled that these rules include local laws relating to prescription or limitation, but all the rules noticed by Lord Brougham in his elaborate judgment as belonging to that class, refer to the action of the Court in investigating the merits of a suit in which the jurisdiction has been already established. I can find no authority—and none was cited to us—to the effect that in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the Court ought to disregard an agreement to refer which is *pars contractus* and binding according to the law of the contract, because it would not be valid if tested by the *lex fori*. Without clear authority I am not prepared to affirm a rule which does not appear to me to be recommended by any considerations of principle or expediency. One result of its adoption would be that if two persons domiciled in England made a contract there, containing the same clause of reference which occurs in this case, either of them could avoid the reference by bringing an action before a Scotch Court if the other happened to be temporarily resident to Scotland, or to have personal estate in that country capable of being arrested.

The second reason advanced by the respondents for denying effect to the reference, would have been more plausible if it had been the law of Scotland that no private agreement could exclude to any extent the jurisdiction of the ordinary tribunals. I am not disposed to hold that Scotch Courts are bound to give effect to every stipulation in a foreign contract, unless it is shown to be *contra bonos mores* in the sense of the law which they administer. There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply rooted and important considerations of local policy, that her Courts would be justified in declining to recognise them. But the law of Scotland has from the earliest times permitted private parties to exclude the merits of any dispute between them from the consideration of the Court by simply naming the arbiter. The rule that a reference to arbiters not named cannot be enforced, does not appear to me to rest upon any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, the rule has been so largely trenched upon by the legislation of the last fifty years, both in general and in local and personal Acts, that I should hesitate to affirm that the policy upon which it was originally based could now be regarded as of cardinal importance.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and the cause remitted, with directions to sist procedure in *hoc statu* in order that the matters in dispute may be settled by arbitration in terms of the contract. Such an order will leave the parties at liberty, in the course of the reference, to

avail themselves of the provisions of the Arbitration Act 1889, and will enable the Court of Session in the event of any lapse of the reference to dispose of the merits of the case.

LORD ASHBOURNE—My Lords, I concur. The substantial question to be determined is whether the law of Scotland or the law of England is to be applied to the interpretation of the arbitration clause in question. One of the parties was a Scotch distiller, and the parties on the other side were merchants in London. The contract was made in England and was (apart from the arbitration clause) to be performed in Scotland. That clause, set out in the case, is of the highest importance. There is no absolute rule of law as to the way in which the intention of the parties to a contract with reference to the law of a particular place is to be ascertained. Were it not for the arbitration clause I should assent to the conclusion that the parties contracted solely with a view to the application of the law of Scotland. Having regard however to the terms of that clause, I am led to the conclusion that the parties intended that it should be interpreted by the rules of the law of England alone. A contract which provided that disputes should be settled by arbitration by two members of the London Corn Exchange or their umpire "in the usual way" distinctly introduces a reference to the well-known laws regulating such arbitrations, and these must be the laws of England. This interpretation gives due and full effect to every petition of the contract, whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the laws of Scotland which would at once refuse to acknowledge the full efficacy of a clause so framed. It is more reasonable to hold that the parties contracted with the common intention of giving entire effect to every clause, rather than of mutilating or destroying one of the most important provisions.

LORD MACNAGHTEN—My Lords, I concur.

LORD MORRIS—My Lords, I also concur.

LORD SHAND—My Lords, I also am of opinion that the appeal in this case should be sustained, and the judgment complained of reversed for the reasons which have already been so fully stated, and which it would serve no good purpose to repeat. From the terms in which the clause of reference is expressed, in a contract to which, it must be observed, a firm of merchants in London and carrying on business there, is one of the parties, I think it is to be inferred to be *pars contractus* that the agreement which it contained for the settlement of disputes which might arise out of the contract, was to be interpreted and governed by the law of England; and I am further of opinion that there are no such considerations of public policy at the basis of the rules of Scottish law in reference to the necessity of arbiters being named in order to create a binding obligation to refer, as can warrant the Courts in Scotland, in an action brought there, in refusing to give effect to the law and practice as to arbitrations in England. In accordance with the ordinary practice in Scotland, I think that procedure in the present action should be stayed, to allow the arbitration to be proceeded with in England as provided by the contract.

Their Lordships reversed the interlocutors appealed from, and remitted the cause with directions to sist procedure in *hoc statu* in order that the matters in dispute may be settled by arbitration in terms of the contract, the respondents paying the costs of this appeal and the costs in the Court below from the date of the interlocutor of the Lord Ordinary.

Counsel for the Appellant—Sir Henry James, Q.C. — A. Graham Murray, Q.C. — A. H. Ruegg. Agents—Ranger, Burton & Frost, for Finlay & Wilson, S.S.C.

Counsel for the Respondents—The Lord Advocate (J. B. Balfour, Q.C.)—Danckwerts. Agents—R. S. Taylor, Son, & Humbert, for Alexander Mustard, S.S.C.

COURT OF SESSION.

Wednesday, May 16.

FIRST DIVISION.

[Lord Low, Ordinary.

A *v.* C & D.

Process — Concurring Pursuer — Title to Reclaim.

Held that a party with whose consent and concurrence an action was brought had no title to reclaim against an interlocutor of the Lord Ordinary assoilzieing the defenders.

An action was raised by A, judicial factor on the estates of the dissolved firm of B, C, & D, with consent and concurrence of B, against C & D, calling upon them to implement a certain agreement which had been made on 1st June 1892 with regard to the dissolution of the firm. In the course of the action, B, the concurring pursuer, was represented by separate counsel, and intervened at various stages. He objected to any order being pronounced against him, on the ground that he was not a party to the case.

On 19th December 1893 the Lord Ordinary (Low) pronounced an interlocutor, in which, *inter alia*, he found that by the agreement above referred to the defenders had agreed, upon payment of £500 by the concurring pursuer to the pursuer, to discharge the concurring pursuer of all claims they or the dissolved firm might have against him, and that the said sum fell to be paid by the concurring pursuer to the pursuer, but refused as incompetent a motion by the