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

defenders that the pursuer should be ordained to consign said sum.

B, the concurring pursuer, having failed to pay the said sum, the Lord Ordinary on 8th March 1894 pronounced an interlocutor, wherein, in respect of the failure of the concurring pursuer to pay the said sum, he assoilzied the defenders from the conclusions of the summons, finding no expenses due to or by either party.

The concurring pursuer reclaimed against this interlocutor, and argued—He had a good title to reclaim, for his was the real interest in the case though it was formally brought up by the judicial factor. The Court of Session Act of 1868 contemplated the possibility of others than the pursuer or defender in an action presenting a reclaiming-note. Section 52 provided that "Every reclaiming-note . . . shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause." He had been allowed to appear without any objection, and was therefore entitled to be heard. He would of course be liable to any expenses incurred after the date of the reclaiming-note — *Morrison* v. *Gowans*, November 1, 1873, 1 R. 116. This was analogous to the case of a pupil bringing an action with consent where the consenter might be found liable in expenses, and had the right to reclaim.

Argued for the respondents—The concurring pursuer was not really a party to the action, though he called himself so. He had refused to obey an order of the Court, as not being a party to the action. He had no right to come forward now and reclaim as if he were a party to it. This was not a case where a title defective in itself could be remedied by the concurrence of someone else. The reclaimer should have sisted himself as a party to the action before judgment was given in the Outer House if he wished to reclaim.

At advising—

LORD PRESIDENT—When the reclaimer gave his consent and concurrence to this action being brought, he entered into an agreement with the parties, under which it was intended that, so far as he was concerned, his interests in the action should be contested by the judicial factor. If that view of the agreement be correct, it is hostile to the notion that a person who has agreed that someone else should be the *dominus litis*, should be enabled to shake himself free from this agreement, and himself present a reclaiming-note against an interlocutor in the case. There is nothing here to alter the reclaimer's primary position, and accordingly he cannot now be heard.

LORD ADAM—It is quite clear that the reclaimer here was not *ex facie* a party to the action. There might be cases in which something had passed which would change the position of a concurring pursuer and make him a party to the action, but in the present case what has passed leads to the opposite conclusion. For the reclaimer appeared at a stage in the Outer House and pleaded that it was incompetent for the Lord Ordinary to pronounce a certain interlocutor against him, on the ground that he was not a party to the action. I do not think that he can now be heard when trying to take up an opposite position.

LORD M'LAREN—I agree that the position of a concurring pursuer is that he enters into a contract that the question should be settled between the principal pursuer and the defender, and that he should be bound by the decision. It is enough here to say that a person who merely grants his consent and concurrence has no title to reclaim against an interlocutor assoilzieing the defender. Such a step can only be taken by the principal pursuer.

LORD KINNEAR concurred.

The Court refused the reclaiming-note.

Counsel for the Concurring Pursuer—Salvesen. Agent—Party.

Counsel for the Defenders — Dundas. Agent—Thomas White, S.S.C.

Wednesday, May 16.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

DUNCAN *v.* BROOKS.

Lease—Right to Take Peats Imported into Lease—Tenant Deprived of Right to Take Peats under Lease — Abatement — Retention of Rent.

A tenant took a lease of the farm of Newton "all as possessed by him." The tenant and two of his progenitors who had been tenants before him, had been in possession of a peat lair known as the Newton lair, in the moss of Tillychip on their landlord's estate, and from this lair they dug the fuel required for their use. Certain estate regulations were incorporated in the lease, by which the landlord reserved to himself the mosses on his estate, with power to regulate and divide them as circumstances rendered necessary, it being further provided that the tenants should be bound to cast their peats and fuel on the allotments set apart for them.

The proprietor having sold a portion of his estate, including the farm of Newton, to one person, and another portion of his estate, including the moss of Tillychip, to another person, and the latter having intimated to the tenant of Newton that he must take no more peats from the moss — *held* that the right to take peats from the Newton lair in the moss of Tillychip was part