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.

For a number of years prior to 3rd October 1892 Owen Milne was superintendent of the Bute Certified Industrial School, Rothesay. On that date he was dismissed from his post by a majority of the directors in consequence of certain charges which had been made against him. A report of the directors' meeting was published in the local papers.

On 7th December a letter from Milne was published in the *Rothesay Express*, in which he denied the truth of the charges, and complained that he had been given no opportunity to rebut them. The letter contained the following passage about Bailie Walker, one of the directors—"I notice from the newspapers that Bailie Walker was profuse in his attacks upon me. He admitted that his relations towards me were strained, because, as he alleges, of some old complaint which he made against me, which turned out to be groundless. I doubt not his attitude towards me was strained, or rather hostile, but it was for a very different reason. Although a director, he has been a contractor for the supply of groceries to the school. At the commencement of his present contract I detected that he was trying to send a different brand of coffee from what was contracted for, and I believe a cheaper brand, and I had to call upon him to take it back and insist that he adhere to his contract. He did so with a bad grace, and probably this accounts for the animus which he now displays towards me." The letter also contained attacks on other residents in Rothesay.

On 10th December a letter from Bailie Walker containing the following passage was published in *The Buteman and Advertiser for the Western Isles*, of which paper William Archibald Wilson was the publisher—"When Mr Milne rushed into print a few weeks since with statements which on the very face of them bore the impress of apparent untruths, many in the community thought that he would have been advised in his own interest to write no more in the same vicious strain of vituperation, but if he did get such advice he has not benefited by it, as again your midweekly contemporary contains two columns of the most extraordinary composition which perhaps has ever appeared in any newspaper. Every sentence of this contribution mirrors with startling significance the man 'Milne.' Meant to be an exposure of a number of Rothesay gentlemen, every line exposes the true nature of the man who wrote it. Perhaps none will feel the sting of the letter 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. Perhaps the best way to deal with a person guilty of writing such letters would be to treat him with silent contempt, more especially as there is not an individual named by him, whether directors of the school or shopkeepers who had occasion to expose his methods, who cannot well afford to adopt this course. But silence is sometimes misinterpreted, and if I am able to show that the statement made as regards myself is a consummate lie, the other statements in 'Milne's' letters 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. He says that at the commencement of the contract he detected me in supplying a cheaper brand of coffee. This is a deliberate lie. Immediately on getting the contract I ordered into stock the brand of coffee which was in the schedule. I have the invoice before me which from its date proves this. Several months after I got the contract another order came down for one dozen bottles of coffee. In my absence my shopman executed the order, and in doing so found he was short of the brand by either two or three bottles. He made up the dozen with another brand, which, instead of being cheaper, actually cost more than the scheduled brand, and if any of 'Milne's friends' call upon me I will show them convincing proof of this. Mr Milne says he called upon me to take back the coffee and adhere to my contract. This is another deliberate falsehood. When my shopman told me what he had done, I said he should have sent the nine or ten bottles until we got more into stock, which I got the following day, when I sent up the odd bottles and got the others back. What a flimsy story to construct such a superstructure of untruths on! I think I have been sufficiently specific in my reply, and if Mr Milne considers it strong enough to enable him to bring me before that tribunal which he threatened to all and sundry, but which no one fears more than he, I will be delighted, as it will give me an opportunity of proving not only what I have said, but much more that will not be comfortable for him."

On account of the statements made in this letter Milne raised an action of damages for slander against Walker and Wilson.

The defenders admitted the writing and publishing.

They pleaded, *inter alia*—"(1) The statements of the pursuer are irrelevant. (2) Privilege. (3) *Veritas.* (4) The said letter being a fair reply to the attacks made by the pursuer in the public prints upon the writer thereof, the pursuer is barred from claiming damages in respect thereof."

On 18th July the Lord Ordinary (KINCAIRNEY) approved of issue for the trial of the cause against both defenders, in these terms—(1) Against Walker—"Whether the said statement is in whole or in part of and concerning the pursuer, and falsely and calumniously represents that the pursuer has no regard for truth and is a liar, or makes similar false and calumnious representations of and concerning the pursuer, to the loss, injury, and damage of the pursuer?"

The following counter-issue for the defender was disallowed—"Whether pursuer's statement in his letter published in the *Rothesay Express* newspaper of 7th December 1892, that he had detected the

defender Walker at the commencement of his contract for the supply of groceries to the Bute Certified Industrial School at Rothesay, trying to send a different and cheaper brand of coffee than what he had contracted to supply, was a lie?"

"*Opinion.*—The pursuer Milne was governor of the Bute Certified Industrial School at Rothesay, and the defender Walker, a grocer in Rothesay, was a director of that school.

"On 2nd December 1892 Milne published in the local newspaper a charge against Walker, which may bear the meaning that Walker had dishonestly attempted to palm off on the school cheaper goods than those he had contracted to furnish.

"On 10th December Walker published a letter in which he, *inter alia*, asserted that that statement was a deliberate lie, and made other statements which the pursuer Milne innuendoes as meaning that he, Milne, was a person who had no regard for truth, and a liar.

"On 7th February Milne raised this action of damages against Walker and against Wilson, the publisher.

"On 9th March Walker replied by an action of damages founded on Milne's letter of 2nd December.

"The record was closed in both actions on 16th May, but in consequence of amendments having been made on the record in this action, Walker's action has got the start of it, and an issue has been adjusted in it putting the question whether Milne had falsely and calumniously averred that Walker had dishonestly attempted to supply the school with the inferior goods averred, and a counter-issue of *veritas* putting the question whether Walker had in fact acted in the dishonest manner asserted.

"The first question arising in the present case is, whether the pursuer is entitled to innuendo the portion of Walker's letter of 10th December, quoted in the first schedule, as representing that the pursuer Milne is a person who has no regard for truth and is a liar. I am of opinion that the innuendo is legitimate.

"The letter as I read it asserts that Milne's statements about Walker were consummate and deliberate lies. If that had been all which the letter said, it would not, in my opinion, have warranted the innuendo. But then the letter further says that Milne had made 'vile statements' against many prominent townsmen. What these vile statements were I do not know, and then he says that if the statement about himself were shown to be a lie, the other statements might be put down in the same category. That apparently means that these vile statements were deliberate lies. Further, he says that every sentence of Milne's letter 'mirrors with startling significance the man Milne.' This language is figurative, but it is not extravagant to represent it as meaning that these vile statements which were consummate and deliberate lies were characteristic of Milne, and what is that but asserting that Milne had no regard for truth and was a liar? I therefore consider the innuendo admissible.

"To publish of a man in the newspapers that he has no regard for truth and is a liar is certainly *prima facie* actionable.

"But it is said that this part of the letter complained of is a fair reply to Milne's letter charging Walker with dishonestly furnishing inferior goods, and that therefore on the authority of *Gray* v. *The Society for the Prevention of Cruelty to Animals*, July 18, 1890, 17 R. 1185, it would not warrant any action. I understand the law on that subject to be that publications in answer to a public attack, meeting that attack and vindicating the character of the person attacked, are not actionable, but I also understand that this privilege does not extend to charges unconnected with that reply or vindication. If, for example, A should charge B with theft, a denial by B of the charge would not warrant an action of damages by A, however vigorous or gross the language might be in which B's denial was couched. But if B should go on to charge A with theft, that would be actionable, and would not be protected or privileged to any extent on account of A's previous attack.

"In this case Walker was entitled to deny Milne's charge, and to do so in whatever language he might think most becoming. But when he went on to charge Milne with having told other lies, it appears to me that he went beyond the bounds of fair reply and retort, and therefore out of the bounds of privilege. My opinion therefore is that the case of *Gray* does not apply, and that the pursuer is entitled to make the present demand.

"And because I think that Walker's charge goes beyond the bounds of fair retort and of privilege, I think that the pursuer is not bound to put malice in his issue. But I do not express any opinion on the question whether ultimately he may be held bound to prove malice.

"I think that the defenders' first counter-issue must be disallowed as not coming up to the pursuer's issue. I do not affirm that an issue of *veritas* must in all cases echo the innuendo or come up exactly to the pursuer's issue. But it must, I think, assert the truth of that part of the accusation complained of which is slanderous and actionable—*Bertram* v. *Pace*, March 7, 1885, 12 R. 798. . . .

"No separate argument was submitted for the defender Wilson, the publisher, and I understood it to be conceded that the second issue must be substantially the same as the first."

The defenders reclaimed, and argued—With reference to the 1st and 2nd issues, the letter complained of would not bear the innuendo sought to be put upon it. The pursuer's character was not assailed. While his statements were called lies, he was not called a liar. To reply to a slanderous attack by calling your calumniator a liar had been held not actionable—*Watson* v. *Duncan*, February 4, 1890, 17 R. 404. There was nothing in the letter amounting to the assertion that the pur-

suer was a habitual liar. It was only a somewhat vehement denial of the libellous statement which the pursuer had sent to the papers about the defender Walker, and was a fair retort to the pursuer's attack. It was therefore not actionable—*Gray* v. *Society for the Prevention of Cruelty to Animals*, July 18, 1890, 17 R. 1185. The counter-issue should have been allowed. The defenders were willing to insert "deliberate" in their counter-issue, but they were not ready, nor could they fairly be asked, to take upon themselves the burden of proving that the statements which the pursuer had made in his letter about other people were lies, or that the pursuer was an habitual liar. All that could be required was that the counter-issue should fairly meet the substance of the pursuer's charge, and the proposed counter-issue satisfied this condition—*Carmichael* v. *Cowan*, December 19, 1862, 1 Macph. 204; *Torrance* v. *Weddell*, December 12, 1868, 7 Macph. 243; *M'Iver* v. *M'Neill*, June 28, 1873, 11 Macph. 777; *M'Kellar* v. *Duke of Sutherland*, January 14, 1859, 21 D. 222; *Hamilton* v. *Hope*, 1826, 4 Mor. 222.

Argued for the pursuer—The letter would bear the innuendo put upon it. It went beyond the limits of a fair reply to the pursuer's letter. If a reply was turned into a weapon of attack it might be made the basis of an action of slander—Odgers, p. 232; *Gray's* case, *per* Lord Shand, 17 R. 1198. The counter-issue must meet the pursuer's innuendo. The counter-issue disallowed did not, and had been rightly refused.

At advising—

LORD PRESIDENT—If it had been clear that the passage in the first schedule could not be read as meaning more than an emphatic and indignant denial of the charge brought against the defender in the matter of the coffee, no issue could have been allowed. But the pursuer says that the passage does mean more; that not content with repelling the accusation against himself, the defender goes out of his way to accuse the pursuer of general mendacity. At this stage we have not to determine which of those two readings is the true one; that will be for the jury to say, and it is quite an open question. But it being an open question—the language admitting of either construction according to the surrounding facts—I do not think that we can refuse to let the pursuer go to trial. I think that the first and second issues may be approved as they stand.

In this view it is plain that the counter-issue will not do. It ignores the whole sting of the pursuer's issues. If the pursuer complained merely that his accusation of the defenders had been called a lie, this counter-issue would have been very appropriate; but then in that case we should not have given the pursuer an issue at all.

I understood the defenders' counsel to state that they were not prepared to propose a counter-issue undertaking to prove specifically the untruth of statements of the pursuer relating to others than the defenders.

As regards the pursuer's 3rd and 4th issues as adjusted by the Lord Ordinary, I think they may be allowed with this alteration, that in place of the words "cruel and inhuman conduct," I would insert the word "cruelty." It is our duty to make the issue express, as directly and concisely as may be, the substance of the pursuer's case, and his case is one of neglect and cruelty. The adoption of the more rhetorical language preferred by the pursuer would, I think, be less correct practice; and as we could only impose on the defender the burden of establishing what we think the substance of the charge, the difference in the phraseology of the issues and counter-issues would merely confuse the jury.

I would give the defender the first and second counter-issues adjusted by the Lord Ordinary with the same variance of expression in the last part as I have suggested in the issues, viz., substituting the word "cruelty" for "cruel and inhuman conduct." The third counter-issue is manifestly inadmissible; it is not a counter-issue at all. What now stands as the fourth counter-issue seems admissible. As each of these counter-issues relates to a separable part of the second schedule, it will be of course for the Judge at the trial to point out the relation each separately or all taken together bear to the 3rd and 4th issues of the pursuer.

LORD ADAM concurred.

LORD M'LAREN—The only question of principle in this case is that of the relation of the counter-issue to the issue proposed by the pursuer. It has been sometimes said to entail hardship on the part of a defender in an action of damages for slander that when the pursuer puts an extravagant meaning on the defender's words the latter is under the necessity of justifying the alleged libel in the sense which the pursuer has put upon it, instead of in the sense which the defender says the words complained of were used. This difficulty has been sometimes met by giving the defender a counter-issue negativing the substance of the innuendo suggested by the pursuer without negativing all the expressions which the pursuer has chosen to put into it. I agree with your Lordship that the better course is to make the principal and counter-issue meet wherever that can be done, and I think it generally can be done by such a modification of the innuendo in the principal issue as will fairly raise the defender's case, and not put upon him a burden which he should not be called upon to bear. I feel greatly the force of your Lordship's observation that the jury might have difficulty in shaping their verdict if the issues of the parties were so framed that neither completely contained the averments of the other.

LORD KINNEAR was absent.

The Court approved of the issues and disallowed the counter-issue.

Counsel for the Pursuer—Comrie Thomson—MacWatt. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—Jameson—A. S. D. Thomson. Agent—F. J. Martin, W.S.

Tuesday, November 28.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

OGSTON *v.* STEWART.

Salmon Fishings—Fishings not ex adverso of Lands—Title to Sue—Prescription.

The lands belonging to A and B, bounded on the north by the Dee, marched inland, but at the river bank were separated by a glebe. It was quite uncertain out of what lands the glebe had originally been designated, but it was admitted that the salmon fishings *ex adverso* did not belong to it. Those *ex adverso* of the eastern part belonged to B. A, who held his lands, "together with the salmon fishings in the water of Dee belonging to the said lands," raised an action against B claiming exclusive right to those *ex adverso* of the western part, and adduced a large amount of evidence supporting his contention as to the boundary, but failed to prove exclusive possession for the prescriptive period.

Held that he had no title to sue, and that the fishings in question did not necessarily belong to either A or B, but might belong to the Crown.

Opinion expressed that salmon fishings were an estate in land in the sense of the 34th section of the Conveyancing Act of 1874, and that accordingly proof of possession for twenty years would have been sufficient; also that possession by rod alone would have sufficed, as net and coble could not be used in the water in question.

In September 1892 Alexander Milne Ogston, Esquire of Ardoe, brought an action against David Stewart, Esquire of Banchory, and another, as trustees of the late John Stewart, and against the said David Stewart as an individual, to have it found and declared "that the pursuer has the sole exclusive right to the salmon fishings in the river Dee *ex adverso* of the lands of Ardoe, in the parish of Banchory-Devenick and county of Kincardine, and also *ex adverso* of that portion of the glebe lands of the said parish of Banchory-Devenick extending eastwards from the point where the said glebe lands meet the lands of Ardoe on the river bank to a point *ex adverso* of the office houses of the manse of Banchory-Devenick, or the drain proceeding from the said office houses to the river, which drain forms the eastmost boundary of the said fishings, and that the pursuer is entitled to fish for salmon and other fish of the salmon kind in the said river *ex adverso* of the said lands of Ardoe and of the said glebe lands of Banchory-Devenick for the distance claimed, and that by net and coble, rod and line, and every other lawful mode, and it ought and should be found and declared, by decree of our said Lords, that the defenders have no right of salmon fishing in the said river Dee *ex adverso* of the said lands of Ardoe, and of the said glebe lands for the distance claimed by the pursuer, and that they are not entitled to fish for salmon or fish of the salmon kind in any part of the said river *ex adverso* as aforesaid, and the defenders ought and should be interdicted, prohibited, and discharged by decree foresaid from fishing for salmon or fish of the salmon kind in any manner of way, and also from molesting or interfering with the pursuer, and those deriving right from him in the peaceable possession and enjoyment of their right of fishing for salmon and fish of the salmon kind in the river Dee *ex adverso* of the said lands of Ardoe, and the said glebe lands for the distance claimed by the pursuer in all time coming."

The lands of Ardoe marched inland with those of Banchory, but along the (south) bank of the Dee the glebe of Banchory-Devenick lay between them. The earliest title of Ardoe produced was of date 1594, but the pursuer founded on an instrument of sasine in favour of Alexander Ogston, his father, recorded 29th June 1840, and a charter of confirmation from the Crown also in his father's favour, of date 30th March 1853. In these writs the land and estate were described as "all and whole the town and lands of Ardoe or Ardoch, both sunny and shadowy halves thereof, with the mill of Ardoe or Ardoch, mill lands, astricted multures, sucken, sequels, and knaveships of the same, together with the salmon fishings on the water of Dee belonging to the said lands," &c.

In 1853 the late Alexander Ogston, who died in 1869, sold a portion of the lands of Ardoe nearest to the glebe, and called Cotbank, "with the salmon fishings in the Dee, so far as comprehended within the boundary of the said lands," to the Rev. Dr Gillan, but his son, the present pursuer, made up a title to the remaining lands of Ardoe in 1870, bought back Cotbank in 1873, and in 1874 consolidated the lands of Ardoe and Cotbank.

The glebe was designed about or before 1602, but out of what lands was uncertain. The pursuer averred—"It would appear as if the said glebe lands had originally been taken partly from the lands of Ardoe and partly from those of Banchory." In 1797 the west boundary of the glebe was straightened by taking part of the lands of Ardoe and adding them to the glebe, while part of the glebe was added to the lands of Ardoe in exchange therefor.

The lands of Banchory or Banchory-Devenick were formed into a barony at an early period. In 1618 the proprietor of these lands purchased Kirkton of Banchory, which until then had remained a separate subject, and the titles of which contained no reference to salmon fishings. Since 1618 these two subjects have be-