It only remains to consider what should be the form of the decree to be granted. The procedure here, which has been started in the form now imperative in the Sheriff Court by initial writ, is not so calculated as to suggest exact words as the conclusions of a declarator. I am of opinion that there should be declarator of the pursuer's right to pew No. 94 as his family pew, and a negation of any right on the part of the defenders to sittings therein. By a sitting is merely meant a right to go there and exclude others before service begins, and it does not touch the question of the rights of anyone to ask for a vacant seat in order to occupy it during worship; and in view of the attitude and actings of the defenders, I think there should be interdict against their putting furnishings or books into the pew or entering themselves therein at any time previous to the commencement of public worship. In view of the perfectly reasonable offer which was made by the pursuer before litigation in the letter of 2nd July 1909, and which the defenders refused, I think the litigation was necessary and justified, that the defenders have been wrong all through, and that consequently they must be held liable in expenses in all the Courts.

LORD MACKENZIE—I concur.

The LORD PRESIDENT intimated that LORD KINNEAR, who was present at the hearing but absent from the advising, also concurred.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

". . . Find and declare that the pursuer John Paterson has right to the pew No. 94 in the area of the Parish Church of Bothwell as his family pew, and that the defenders have no right to any sittings therein: Therefore interdict the defenders from putting furnishings or books into said pew, or entering thereinto at any time previous to the commencement of public worship. . . ."

Counsel for the Pursuer and Appellant—Blackburn, K.C.—J. R. Christie. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for the Defenders and Respondents—Dean of Faculty (Dickson, K.C.)—Macmillan, K.C.—J. Stevenson. Agents—Davidson & Syme, W.S.

Tuesday, December 10.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

HEGARTY & KELLY *v.* THE COSMOPOLITAN INSURANCE CORPORATION, LIMITED.

Contract — Arbitration — Termination — Clause Referring to Arbitration Disputes as to Construction of Contract—Repudiation by Party Founding on Clause—Bar.

A contract between an insurance corporation and a firm of live stock agents provided—Art. VI (*a*)—"The sellers shall warrant all fat cattle and pigs sold by them to pass the authorised meat inspectors subject to the conditions hereinafter stated"; and Art. VII—"Any dispute or difference between the insurers and the sellers as to the construction of this agreement, or any matter arising out of or in connection with the same, shall be referred to a single arbitrator, to be mutually chosen, or failing agreement to be appointed by the Court on the application of either party; and the award of such arbitrator shall be final, and no action shall be maintainable against the insurers except upon such award." Disputes having arisen as to the meaning of clause VI (*a*), the insurance company declined to transact further business until they had been determined by arbitration. The stock agents thereupon raised an action of damages, to which the company pleaded the arbitration clause. The stock agents then pleaded that as the company had repudiated the contract they were barred from pleading the arbitration clause.

Held (*rev.* judgment of Lord Skerrington, who had allowed a proof before answer) that as the contract had not been rescinded, and as the decision of the arbiter upon the construction of clause VI (*a*) was a condition-precedent of liability, the defenders were entitled to plead (as they had done) the arbitration clause, and action *sisted* to await the determination of the arbiter.

Municipal Council of Johannesburg v. *D. Stewart & Company (*1902*) Limited*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20, *distinguished.*

On 28th June 1910 Hegarty & Kelly, live stock agents, Glasgow, and the individual partners thereof, *pursuers*, brought an action against the Cosmopolitan Insurance Corporation, Limited, *defenders*, for £6000 (afterwards restricted to £4500) as damages for alleged breach of contract—the breach alleged being that they (the defenders) had since 9th October 1909 refused to insure any of the pursuers' live stock although bound to do so by the agreement, dated in March 1909, and to endure for three years from 1st March 1909, the material clauses of which are quoted *supra in rubric.*

The pursuers pleaded, *inter alia*—"(1) The defenders being in breach of their contract with pursuers as condescended on, are liable to the pursuers for the loss and damage thereby sustained and to be sustained by them. (3) The defenders having repudiated said contract of insurance, are barred from now founding upon its terms."

The defenders, *inter alia*, pleaded—"(1) The action is incompetent in respect it is not laid upon an award of an arbitrator finding that the position taken up by the defenders in their letter of 9th October 1909 was not justified by the facts. (2) The action is excluded by the arbitration clause in the contract founded on, and should accordingly be dismissed. (6) The pursuers being in breach of the contract founded on are barred from maintaining the present action."

The pursuers averred—"(Cond. 3) Certain disputes or differences having arisen between pursuers and defenders as to the construction of the said contract and parties' rights thereunder, the defenders on 9th October 1909 wrote to the pursuers as follows—'*Glasgow, 9th October* 1909. Dear Sirs,—We have your memo. of 8th inst., together with cheque value £153, 15s., but regret we must return the latter, and same is enclosed herewith. We are compelled to decline further business in view of your total disregard of our letters of 1st, 6th, 13th, and 23rd September last, all of which we confirm. — J. M. BUCHANAN, General Manager.' Thereafter the pursuers and the defenders, by minute of reference dated 10th and 16th November 1909, agreed to refer to Mr William Gillies, writer, Glasgow, as arbitrator mutually chosen, all the disputes or differences that had then arisen between them, and nominated and appointed him arbitrator accordingly. The defenders on said date refused, and since said date have continued to refuse, to implement said contract, and at said date they were in breach of contract in respect that they then refused to accept further premiums or to pay any losses arising out of said contract. Since said date, and until the raising of the present action, the defenders have never withdrawn from the position that they repudiated the contract, and that the same was at an end. . . . . (Ans. 3) . . . Admitted that the defenders have refused since 9th October 1909 to accept further premiums from the pursuers in terms of said agreement, or to pay any losses arising out of the said contract of insurance, and explained that the defenders were forced to take up this position in consequence of the breach of contract of the pursuers. Explained further that on 13th October 1909 the defenders, in terms of the contract, expressed their willingness to arbitrate upon the questions which had arisen, including the questions raised by the defenders' said letter of 9th October and the pursuers' reply dated 11th October 1909. . . . . (Cond. 4) A claim and answers were duly lodged in said process of arbitration, and after sundry procedure and after hearing a full proof and the arguments of parties, the said arbitrator on 26th April 1910 issued proposed findings, and on 9th June 1910 pronounced and issued his formal award by decree-arbitral of that date, whereby he found, *inter alia*, that the pursuers had not in any of the ways claimed by the defenders in their condescendence and claim in the reference committed a breach of the said agreement, and further that the defenders were not warranted in refusing to implement their part of the said agreement from and after 9th October 1909, and were therefore in breach of said agreement. . . . . (Ans. 4) . . . Explained that in the course of the said arbitration proceedings the defenders, who were anxious to have all disputes decided in terms of the contract, on 17th March 1910 tendered to the arbitrator a minute of amendment specifying certain facts involving breaches by the pursuers of the sixth article of said agreement, but the pursuers, although well aware that the questions raised must go to arbitration, objected to the said amendment being dealt with by Mr Gillies or the question raised therein being determined by him, and they succeeded in inducing the arbitrator to disallow the said amendment, to refuse to inquire into the facts therein set forth, and to decline to decide the question whether the defenders' letter of 9th October 1909 was justified by the facts. The said decree-arbitral does not deal with or decide the questions raised by the said amendment or any question as to breach of contract on the part of the defenders on or after 9th October 1909. The defenders were all along willing that the said disputes between them and the pursuers arising out of said contract should be decided by arbitration, but the pursuers declined to allow the arbitrator to consider the same. The said disputes are disputes which the pursuers are bound by the terms of the said contract to refer to arbitration, and to obtain the award of an arbitrator on, as a condition-precedent to maintaining an action of damages against the defenders for breach of the said contract. . . . (Cond. 5) . . . On 20th June 1910 the defenders raised an action for reduction of the said award. The Lord Ordinary, by interlocutor dated 30th November 1910, dismissed said action, and on 9th December 1911 their Lordships of the First Division refused the reclaiming note against the Lord Ordinary's judgment and adhered thereto. The defenders have finally repudiated said contract, and the present action of damages in respect of their breach has accordingly been rendered necessary. The defenders having repudiated said contract and refused to recognise in any way said arbiter's award, and having declined all further business with the pursuers the pursuers have been compelled to treat and have treated said contract as being now at an end, and have made other arrangements for protecting themselves against risks arising in connection with their sales of insured cattle. . . . (Ans. 5) . . . Explained that it was the duty of the

pursuers under the contract to proceed to arbitrate upon the questions raised by the defenders' said letter of 9th October 1909 and the questions raised under the said minute of agreement, but in further breach of their contract they declined to do so. . . ."

On 5th July 1912 the Lord Ordinary (SKERRINGTON) repelled the defenders' first plea-in-law and allowed a proof before answer.

Opinion.—"The pursuers are a firm of live-stock agents, and the defenders are an insurance company. On 2nd and 3rd March 1909 the parties entered into a somewhat obscure written agreement which was to remain in force for three years, and which was intended to indemnify the pursuers against loss arising from the live stock which they sold for killing purposes being condemned as unfit for human food. I do not need to explain how it came about that the pursuers as auctioneers were interested in the fate of the animals which they sold. . . .

"In the present action the pursuers claim £6000 (restricted to £4500) in name of damages through the defenders having since 9th October 1909 refused to do any business with the pursuers or to insure any of their live stock. The defence is primarily founded upon the 7th clause in the insurance agreement—'. . . [*quotes, v. sup. in rubric*] . . .' The defenders' first plea-in-law is—'The action is incompetent in respect it is not laid upon an award of an arbitrator finding that the position taken up by the defenders in their letter of 9th October 1909 was not justified by the facts.'

"The dispute, which in the defenders' view ought to be decided by arbitration, arises out of clause 6 (*a*) of the insurance agreement, which, as the defenders construe it, bound the pursuers to pay premiums upon all the live stock which they sold, and did not entitle them to insure the bad and doubtful animals, while refusing to pay premiums upon the good ones. The defenders' sixth plea-in-law is that 'the pursuers being in breach of the contract founded on are barred from maintaining the present action.' The defenders' advisers seem to have had so much confidence in their first plea that they did not think it necessary to make their averments in support of this sixth plea with proper specification or in such a form as to elicit a reply from the pursuers. Accordingly the defenders will require to amend their pleadings if, contrary to their contention, the present action is held to be competent.

"I am unable to hold that in the circumstances disclosed and admitted in the pleadings the present action is incompetent. However wide a construction one may put upon the arbitration clause, the fact remains that at the date when the present action was instituted (28th June 1910) the pursuers held (as they still hold) a decree-arbitral, dated 9th June 1910, by which the arbiter (Mr Gillies) found 'that the said Hegarty & Kelly did not in any of the ways claimed by the said the Cosmopolitan Insurance Corporation, Limited, in the said condescendence and claim commit a breach of the said agreement, but that the said agreement still subsists, and that the said the Cosmopolitan Insurance Corporation, Limited, and the said Hegarty & Kelly, are bound to perform their respective parts of the said agreement for its full course of three years from 1st March 1909 as therein provided; . . . and further, I find that the said Cosmopolitan Insurance Corporation, Limited, were not warranted in refusing to implement their part of the said agreement from and after 9th October 1909, and are therefore in breach of said agreement.' It is true that the arbiter did not adjudicate upon the particular dispute which I have already explained, because he considered (and as the Court afterwards decided) rightly considered that he had no jurisdiction to do so. The question whether the present pursuers had contravened article 6 (*a*) of the insurance agreement was raised by the present defenders for the first time on 16th March 1910, the day before the proof in the arbitration, whereas Mr Gillies (and subsequently the Court) held that by the terms of the minute of reference of 10th and 16th November 1909, his jurisdiction was limited to the decision of the disputes which were in existence at the last-mentioned date. The defenders protested against the arbiter's decision upon this point, and after the issue of his award they unsuccessfully attempted to reduce it upon the ground that he had refused to decide a question which was within the submission. The summons of reduction was signeted on 20th June 1910, and was finally dismissed by the Inner House on 9th December 1911. Pending this action the present action of damages was sisted but the sist was recalled on 15th December 1911. From the foregoing statement it is, I think, apparent that when the present action was instituted the defenders had never made any competent demand upon the pursuers to submit to arbitration the new dispute as to the pursuers' alleged violation of article 6 (*a*) of the insurance agreement. I do not require to consider how the rights of parties would have stood if, immediately on the issue of the decree-arbitral, the defenders had intimated that they acquiesced in it, and if they had then called upon the pursuers to join with them in a new reference to an arbiter. Instead of taking this course the defenders persisted in their erroneous contention that the new dispute had already been submitted to Mr Gillies. In these very special circumstances I am of opinion that the pursuers were entitled to sue upon the award in their favour and that they were entitled to treat the defenders as persons who refused to go to arbitration before a new arbiter.

"The defenders' second plea-in-law raises somewhat awkwardly the question whether, assuming the action to be competent, I ought not to sist process until the dispute as to the pursuers' alleged breach of contract has been decided by arbitration. The pursuers' counsel argued that although a question had arisen as to the construction of article 6 (*a*), that question did not

fall to be decided by arbitration, because admittedly the arbitration clause does not empower the arbiter to assess damages, and because the arbiter is entitled to construe the contract only so far as is necessary in order to explicate his own jurisdiction. The Court took this view in the case of *Mackay* v. *Leven Police Commissioners*, 20 R. 1093, but the arbitration clause there was not identical with that now under construction. He also argued that the clause was executorial only and could have no further effect seeing that the contract time expired on 1st March 1912. I am not prepared to sustain either of these contentions. If both parties had treated the contract as binding and subsisting for the whole period of three years, and if their only dispute had been whether the defenders were justified in having refused during these years to insure a particular kind of stock, *e.g.*, sheep, as not being 'live stock' within the meaning of the agreement, I should have thought that the question whether the defenders were liable in damages ought to be decided by arbitration in spite of the fact that the arbiter could not assess the damages, and in spite of the fact that the contract period had now expired. The peculiarity in the present case is that the defenders' position ever since October 1909 has been a complete refusal to insure any of the pursuers' live stock. That looks very like a repudiation of the contract on the part of the defenders, but I do not propose to pronounce any decision to that effect, because the position taken up by the pursuers and also the arbitration proceedings may have to be considered in their bearing on the question of repudiation. The safer course is to allow the pursuers a proof of their averments including those in support of their third plea-in-law — 'The defenders having repudiated said contract of insurance, are barred from now founding upon its terms.' That was the course adopted by the House of Lords in the case of *Johannesburg* v. *Stewart*, 1909 S.C. (H.L.) 53. If it be the fact that either justifiably or unjustifiably the defenders have refused to fulfil their part of the contract, *prima facie* I should think that they cannot demand specific performance of the arbitration clause. If they were right in the dispute and acted justifiably, then the defenders will be assoilzied in the present action of damages, and can in their turn sue the pursuers for damages. On the other hand, if the defenders were in the wrong in refusing performance, the damages due to the pursuers will be assessed in the present action.

"I repel the defenders' first plea-in-law, and I allow the record to be amended as proposed by the defenders in their minute and by the pursuers in their answers thereto. I close the record of new, and before answer I allow the parties a proof in common form. I do not repel the defenders' second plea-in-law as it is possible that the agreement for arbitration may still be held binding upon the parties, though not as a condition-precedent to the present action."

The defenders reclaimed, and argued—The determination of the arbiter was a condition-precedent of liability. The action should therefore be sisted to await his decision—*Caledonian Insurance Company* v. *Gilmour*, December 16, 1892, 20 R. (H.L.) 13, *per* Lord Watson at p. 18, foot, 30 S.L.R. 172; *Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642; *Anstruther* v. *Burns*, 1893, 1 S.L.T. 421; *Scott* v. *Avery*, 1855, 5 Clark's H.L. Cas. 811, *per* Cranworth, L.C., at p. 847-8. Where one party committed a material breach of a contract the other party could either rescind the contract or hold to it and claim damages irrespective of whether there was or was not an arbitration clause, though in the latter case the determination of the arbiter might, as here, be a condition-precedent of liability — Pollock on Contracts (8th ed.) 616, *et seq.*; *Turnbull* v. *M'Lean & Company*, March 5, 1874, 1 R. 730, at p. 738, 11 S.L.R. 319; *Mersey Steel and Iron Company* v. *Naylor, Benzon, & Company* (1884) L.R., 9 A.C. 434, *per* Selborne, L.C., at p. 439. The pursuers had clearly adopted the latter course. They were therefore barred from maintaining that the contract had been rescinded. A party to a contract could not by himself rescind it—*Johnstone* v. *Milling*, (1886) L.R., 16 Q.B.D. 460, *per* Lord Esher, M.R., at p. 467. The case of the *Municipal Council of Johannesburg* v. *D. Stewart & Company, Limited*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20, on which the pursuers relied, was distinguishable, for the circumstances there showed that both parties had treated the contract as totally rescinded. That was not so here, for neither party regarded the letter of 9th October as putting an end to the contract. The defenders were therefore clearly entitled to plead the arbitration clause.

Argued for respondents—Where, as here, the defenders had repudiated the contract, they could not appeal to the arbitration clause, for the contract with all its clauses was gone—*Municipal Council of Johannesburg* (*cit.*). That was especially so where, as here, the pursuers had acted in the belief, induced by the defenders, that the contract was at an end—Leake on Contracts (6th ed.) 639; *Shiells* v. *Scottish Assurance Corporation, Ltd.*, July 17, 1889, 16 R. 1014, 26 S.L.R. 702; *Ripley* v. *M'Clure* (1849), 4 W.,H., & G. 345 (18 L.J. Exch. 419). As to the mutual rights of parties to a contract of lease, reference was made to *Munro* v. *M'Geoghs*, November 15, 1888, 16 R. 93, 26 S.L.R. 60; and to *M'Donald* v. *Kyd*, June 14, 1901, 3 F. 923, 38 S.L.R. 697.

At advising—

LORD MACKENZIE—The only question argued on this reclaiming note was whether the question now in dispute between the parties should be settled by arbitration, or whether the pursuers are entitled to the proof which the Lord Ordinary has allowed. Now the nature of the present dispute turns upon the proper construction to be put upon VI (*a*) of the contract—"The sellers shall war-

rant all fat cattle and pigs sold by them to pass the authorised meat inspectors, subject to the conditions hereinafter stated." The arbitration clause is in these terms—"Any dispute or difference between the insurers and the sellers as to the construction of this agreement, or any matter arising out of or in connection with the same, shall be referred to a single arbitrator, to be mutually chosen, or failing agreement, to be appointed by the Court on the application of either party; and the award of such arbitrator shall be final, and no action shall be maintainable against the insurers except upon such award." In the previous arbitration between the parties, the Cosmopolitan Insurance Corporation, Ltd., the insurers, had proposed to raise the question on a construction of VI (*a*) whether Hegarty & Kelly were bound to pay premuims to them on all fat cattle and pigs sold by them, or whether they were entitled to sell certain of these without insurance. The position of Hegarty & Kelly upon Clause VI (*a*) was that it is permissive and not obligatory in its terms, and did not prohibit them from selling cattle uninsured. The arbiter refused to allow the amendment, and your Lordships have held, by interlocutor of 9th December 1911, that he was within his rights in taking this course. This question has therefore never been considered or determined, and the reference clause in the contract applies in terms to such a dispute as the present.

The difficulty which the pursuers seek to introduce into the case arises on their averment that the defenders repudiated, to use their phrase, the contract, and that they are entitled to a proof of this. Their argument upon this point was really solely founded upon the case of *The Municipal Council of Johannesburg* v. *D. Stewart & Co.* (1902) *Ltd.* (1909 S.C. (H.L.) 53). I think this argument proceeded on a misapprehension of the term repudiation. If one party to a contract is in breach of it as regards a stipulation which goes to the root of the contract, the other party has the option of rescinding the contract. If he does, then the contract with all its clauses goes, and amongst them the clause providing for a reference to arbiters. In the view taken in the House of Lords the facts averred in the *Johannesburg* case were of a character to bring that case within this category. In the present case it sufficiently appears, in my opinion, without any proof, that the parties never treated the contract as rescinded. The pursuers found upon the letter which the defenders wrote to them on 9th October 1909, stating that they were compelled to decline further business in view of the pursuers' total disregard of certain of their previous letters. These were the letters which raised the questions in dispute in the previous arbitration. The reply to this was dated 11th October, and contains this passage—"Meantime we shall continue to insure live stock on your account in terms of the contract." On 13th October the defenders wrote to the pursuers that they had nothing to add to their letter of the 9th inst., except to invite them to concur in nominating a suitable arbitrator, as provided by the agreement, to determine the questions which had arisen. These were the questions which were disposed of in the previous arbitration. Messrs Hegarty & Kelly were thus at this date treating the contract as a going contract. This is entirely in harmony with what they wrote on the 14th September 1909—"We have a good-going, plain-worded contract, which admits of only one interpretation, is valid for three years, and any breach of the whole or part of which will involve the committal of the whole matter into a court of law." The arbiter endorsed this view when he found by his decree-arbitral that the agreement still subsisted, and that both parties were bound to perform their respective parts of the agreement for its full course of three years from 1st March 1909.

On the 18th of April 1910 the defenders wrote to the pursuers that, in view of the fact which had recently come to their knowledge, and which was admitted in the proof in the arbitration, that they had not insured all the fat cattle, they intimated that they had broken the contract, and that on that, apart from other grounds maintained in the reference, the contract was at an end. Messrs Hegarty & Kelly did not assent to this view, and on 28th June 1910 raised the present action to recover damages for the difference between the rates at which they had been compelled to insure as compared with those agreed on with the defenders.

The action was sisted on the 18th of October 1910. After the decision in the action of reduction the sist was recalled. As I understood the argument put by pursuers' counsel, they founded, not on the letter of the 9th October 1909 alone, but on the fact that the defenders did not say that they were going to the arbiter to see if they were entitled to end the contract or not. The question, however, whether they were entitled to take up the position they did in their letter of 9th October 1909 is just the question of which party is right in the construction to be put upon Clause VI (*a*) of the contract.

In such circumstances as these the judgment in the case of *Johannesburg* does not help the pursuers, and the expressions of opinion in it do not apply to the facts of this case. The arbiter in this case has not power to award damages, but the question whether the defenders are liable in damages or not depends upon the view whether they are in breach of contract. In my opinion the interlocutor of the Lord Ordinary should be recalled, and the case sisted that parties may go to the arbiter and get him to decide the dispute between them as as to the proper construction to be put upon Clause VI (*a*).

LORD PRESIDENT—I am of the same opinion. Lord Watson in the House of Lords, in the case of *Hamlyn & Company* v. *Talisker Distillery* (21 R. (H.L.) 21), says

this—"The jurisdiction of the Court is not wholly ousted by such a contract," viz., the contract to submit the matter in dispute to arbitration. "It deprives the Court of jurisdiction to inquire into and decide the merits of the case, while 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 Weymss Bay Railway Company* (10 Macph. 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."

Now in the case of the *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* the extent of the arbitration clause was as follows:—"All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation. . . . ." I think that is about as near the clause in the present case as one could well wish, for the clause reads thus—"Any dispute or difference . . . as to the construction of this agreement, or any matter arising out of or in connection with the same, shall be referred to a single arbitrator."

I humbly think that that law, which is treated by Lord Watson as being the well-established law of Scotland, and of which a previous illustration may be found in Lord Rutherfurd Clark's opinion in the case of *Mackay* v. *The Parochial Board of Barry* (10 Macph. 1046), was not altered—as was pled to us—by the judgment of the House of Lords in the *Johannesburg* case (1909 S.C. (H.L.) 53). In the *Johannesburg* case it was held that the contract had been so thoroughly repudiated that it was gone altogether. But I concur with Lord Mackenzie in the distinction he has drawn between the *Johannesburg* case and this case. I would also beg leave to repeat what I said in the *North British Railway Company* v. *Newburgh and North Fife Railway Company* (1911 S.C. 710), to the effect that, although there are traces in the *Johannesburg* case of a doctrine which seems to be good law in England and which I assume was rightly applied in the *Johannesburg* case—a case in which the whole stipulations fell to be construed by English law—viz., the doctrine that the Court may apply the arbitration clause or not as it thinks right in the circumstances—such a doctrine is wholly alien to the law of Scotland. If there is a binding reference, then to the tribunal which the parties have thus chosen the parties must go, and the Court has no dispensing power.

LORD KINNEAR—I concur.

The LORD PRESIDENT stated that LORD JOHNSTON also concurred.

The Court pronounced this interlocutor—

"Recal said interlocutor in so far as it repels the first plea-in-law for the defenders and allows proof: *Quoad ultra* adhere to the said interlocutor: Sist the cause to allow the parties to determine by arbitration the true meaning of clause VI (*a*) of the contract between them: Find the reclaimers entitled to expenses since the date of said interlocutor, and remit," &c.

Counsel for Pursuers—Chree, K.C.—Paton. Agents—Maxwell, Gill, & Pringle, W.S.

Counsel for Defenders—Morison, K.C.—Wark. Agents—J. & J. Galletly, S.S.C.

Saturday, October 26.

EXTRA DIVISION.

[Lord Dewar, Ordinary.

MACINTYRE BROTHERS *v.* SMITH.

Arbitration—Reference—Expenses—Fee to Arbiter—Remuneration not Stipulated for.

One of the parties to an arbitration refused to pay his share of the arbiter's fee on the ground that as no remuneration had been stipulated for, the common law rule applied that the arbiter in such a case must be presumed to act without remuneration.

Held that that rule is not applicable to the modern conditions of business, and that a professional man can no longer be presumed to give professional services gratuitously.

On 24th June 1911 Messrs Macintyre Brothers, building contractors, Glasgow, *pursuers*, raised an action against Alexander Smith, Glengarnock, Ayrshire, *defender*, for, *inter alia*, the sum of £31, 10s., being one half of the sum of £63, the fee fixed by the Auditor of the Faculty of Procurators in Glasgow as suitable remuneration to the arbiter in an arbitration between the parties. The defender disputed liability on the ground that the arbiter was not entitled to any fee.

The following *narrative* of the *facts* is taken from the opinion of Lord Dewar—"In this action Macintyre Brothers, building contractors, Glasgow, sue Alexander Smith, Glengarnock, Ayrshire, for £268, 4s. 7d., being the amount of the expenses incurred by the pursuers in an arbitration between parties, and found due by decreet-arbitral—together with the expenses of the clerk to the reference and half the arbiter's fee. The defender disputes liability on the ground (1) that the decree-arbitral was *ultra fines compromissi* and *ultra vires* of the arbiter, and (2) that the arbiter is not, in any event, entitled to a