smell of slaughtered animals excites other animals, and it is matter of common observation that there is immense difficulty in getting oxen or cattle into a slaughter-house. Knight's evidence, which is very strong, is that animals are excited by being placed in the shambles, and that there is a rule in Dundee that no animal may be removed from the shambles alive without permission, and then only if extra precautions are taken.

I cannot say that extra precautions were taken here, and although the cow was not infuriated at the moment it was taken from the slaughter-house, yet it was very liable to become excited from the position in which it had been placed all night, and therefore some such restraint as is suggested by Knight would have been proper. Therefore I think there was fault on the part of the owner taking her straight through the street from the shambles in the manner he did, and though the case is a narrow one I agree with your Lordships.

Lord Deas was absent.

The Court pronounced this interlocutor—

"Find of new in terms of the findings in fact contained in the interlocutor of the Sheriff-Substitute of 14th October 1883; and decern of new against the defender Nicoll, for payment to the pursuers of the sum of £25: Find the pursuers entitled to expenses," &c.

Counsel for Pursuer (Appellant)—Mackintosh—Pearson. Agent—J. Smith Clark, S.S.C.

Counsel for Defender (Respondent) — Sol.-Gen. Asher, Q.C. — Jameson. Agent — T. F. Weir, S.S.C.

Thursday, February 28.

SECOND DIVISION.

[Lord Lee, Ordinary.

WILLIAMSON *v.* THE NORTH-EASTERN RAILWAY COMPANY.

Jurisdiction—Process—Forum non Conveniens.

The widow, residing in Scotland, of a man domiciled in Scotland at his death, raised an action in the Court of Session against an English railway company for compensation for her husband's death, which was caused by one of the company's trains at a level-crossing on one of their lines in England. The company possessed heritable property in Scotland, and the pursuer had used arrestments to found jurisdiction. It was stated in defence that there was no public right-of-way at the crossing in question, and that at the time of the accident the deceased was a trespasser. *Held* that though the Court had jurisdiction to try the case, yet regard being had to all the circumstances, the *forum conveniens* was in England, and the action *dismissed.*

Mrs Williamson, residing in Leith, raised this action in the Court of Session, as widow of Archibald Williamson, against the North-Eastern Railway Company, whose principal office was at York, for compensation for the death of her husband, a sailor, who was killed by a passing train at a level-crossing on one of the company's lines at Middlesborough, in Yorkshire. At the time of his death her husband was a sailor on board the "Valund" of Grangemouth, which was then lying at Middlesborough.

The pursuer had used arrestments against the defenders *ad fundandam jurisdictionem*, and they were possessed of heritable property in Scotland—one of their lines running from Carham by Sprouston to Kelso.

The pursuer averred that her husband's death was caused by the fault and negligence of the defenders or of those for whom they were responsible.

The defenders denied that the death of pursuer's husband was due to fault on their part. They averred that the level-crossing where he was killed was not a level-crossing in the ordinary sense of the term, but a private crossing, over which there was no public right-of-way; and therefore that the deceased was a trespasser when seeking to cross the line at that point. They also stated—"The defenders are an English company carrying on business in England, and the place where the accident occurred is in the North Riding of the county of York. By the law of England, the title to sue in respect of the death of any person occasioned through the fault of any other person is vested for the first six months after the death in the executor of the person deceased. The sum awarded in any such action is divisible among the wife (or husband), parent or parents, and child or children of the person deceased, in such shares as the jury awarding damages may direct. Further, no damages are recoverable in name of *solatium.*

They pleaded, *inter alia*—"(2) *Forum non conveniens.* (3) The grounds of the present action having arisen entirely in England, the rights and liabilities of parties must be regulated by the law of England." They also pleaded that by the law of England the pursuer had no title to sue.

The Lord Ordinary pronounced this interlocutor:— . . . "Sustains the third plea for the defenders: Finds that the pursuer has not set forth any sufficient title according to the law of England to sue the present action: Therefore dismisses the action, and decerns, &c.

"*Note.*—It was scarcely disputed by the pursuer's counsel that she requires to found upon the law of England in order to maintain her action. But no allegation as to the law of England is made by her; and the defenders' allegations being only denied 'in so far as inconsistent herewith,' are not denied to any extent. In this state of matters, as there was no motion for leave to amend, I think that the pursuer has failed to set forth a sufficient title.

"If I were competent to decide upon the effect of the Act 9 and 10 Vict. c. 93, as amended by 27 and 28 Vict. c. 95, in their application to the present claim, I should have great difficulty in holding that an action sued by the widow, apparently for her own behoof alone, within six months of the death of the person killed, can be sustained. The provision of Lord Campbell's Act, which excludes more than one action, is not repealed; and the enactment that all such actions must be by and in name of the executor is only

modified to the limited extent provided by section 1 of the Act 27 and 28 Vict. c. 95, which does not expressly take away the exclusive right of the executor (if there be one), excepting after the lapse of six months. But this is just one of the questions of English law as to which the pursuer makes no allegation. The difference between this case and the case of *Goodman* v. *The London and North-Western Railway*, 14 Scot. Law Rep. 449, seems to be, that in that case the action, according to Lord Shand's judgment, was too late; and in the present case the action seems to have been raised too soon. I prefer, however, to give no opinion upon the question of English law, and to place my judgment upon the pursuer's failure to bring herself by relevant allegations within the scope of the statutes above mentioned."

The pursuer reclaimed, and argued—The pursuer being a domiciled Scotswoman, bringing her action in a Scottish Court, was entitled to have it tried according to the law of Scotland. The defenders' objection that pursuer had not set forth the law of England on record was immaterial—*Callendar* v. *Milligan*, June 20, 1849, 11 D. 1174; but by the law of England the pursuer had a good title to sue as administratrix for her children (9 and 10 Vict. c. 93; 27 and 28 Vict. c. 95). The circumstances of the case met the condition that the *lex loci delicti* and the *lex fori* should concur in the remedy—*M'Larty* v. *Steele*, January 22, 1881, 8 R. 435. The defenders' plea of *forum non conveniens* had been repelled in cases which were stronger than the present one—*Longworth* v. *Hope*, July 1, 1865, 3 Macph. 1049; *Clements* v. *Macaulay*, March 16, 1866, 4 Macph. 583. In both of these cases both parties were foreigners, the jurisdiction being unquestionable, and the remedy equally applicable. Here the action was competent in either country. The defenders then must show that England was the more convenient *forum* for both parties. If compelled to resort to England, the pursuer would be, from her circumstances, practically deprived of any remedy at all, while it would be equally convenient for the defenders to have the case tried here as in London on appeal. The objection that the case involved a question of English right-of-way was also immaterial, for statute provided for ascertaining the law of England in such circumstances. The Court had, then, no discretion, but was bound to exercise its jurisdiction; it was not entitled to make the pursuer's case harder for her by sending her to England when they could give her a remedy here—*Clements*, *supra*, *per* Lord Justice-Clerk, pp. 292-3.

The defenders replied—The question, wherever tried, must be tried by the law of England; but the pursuer could not now be heard on the law of England, because when she found it stated in defence as against her she declined to state or plead that it was in her favour. When the cause of action depended not on contract but on delict, its decision depended on the law of the place where the wrong was committed—*Goodman* v. *London and North-Western Railway Company*, *ante*, vol. xiv., p. 449. But by whatever law it was tried, the question should not be tried here, for it did not meet the condition of international law that the *lex loci delicti* and the *lex fori* should concur in all respects in regard to the remedy—Wharton's Conflict of Laws, secs. 478-9; Westlake's International Law, secs. 186-7; *Philips* v. *Eyre*, L.R., 4 Q.B. 225, 6 Q.B. 1; *The "M. Maxain,"* L.R., 1 Prob. Div. 107; *Mostyn* v. *Fabrigas*, 1 Smith's L.C. 625. By the law of England the present was not, as in Scotland, a good ground of action; the right of action belonged only to the executor. In considering the *dicta* in Clements' case (*sup. cit.*), it should be kept in view that it was a case of contract, good by the law of the place of contract. *Forum conveniens* meant convenient for both parties. This was not a convenient *forum* for the defenders. The Court was not at liberty to look at the pecuniary circumstances of the pursuer, but merely at the legal aspect of the question of *forum*. The question of the deceased's right to be where he was could be more conveniently tried there.

At advising—

Lord Justice-Clerk—This is a case of some interest. The pursuer is a widow residing in Scotland, and she claims compensation for the death of her husband, who was killed on an English line of railway near Middlesborough, in Yorkshire, by a train belonging to the defenders the North-Eastern Railway Company. Now, the company against whom the action is brought is unquestionably an English company, but the pursuer has arrested certain moveable property belonging to the company in Scotland, and it appears that the defenders' company is also possessed of a small amount of heritable property in this country. Theoretically, therefore, the jurisdiction of this Court is undeniable. Apart, however, from the question of jurisdiction, we are always entitled to consider the question of *forum conveniens*, which includes, where jurisdiction exists in more than one country, whether this is the most convenient *forum* for trying the case. Whether jurisdiction in any case exists, *ratione contractus*, *ratione rei sitæ*, in virtue of arrestment, or otherwise, is one question; whether, in the circumstances, this is the best and most suitable *forum* for trying the case is another and a different question.

The Court has in several cases refused to compel defenders resident abroad to answer in this Court where from the nature of the question to be tried it is more consonant to the ends of justice that it should be tried in another *forum* equally competent. The well-known cases of *Palmer*, 9 S. 224, and of *Macmaster*, 11 S. 685, are examples of the exercise of this power. These were cases of executry falling to be administered abroad, but the principle is applicable to all cases of double jurisdiction in which the ends of justice seem to require its exercise. This is a strong case for the application of it. The event occurred in England; the witnesses to prove it are in England; the law which apparently rules it is English; and there is said to be involved in it a question of right-of-way which English law must decide. It is true that the pursuer is in Scotland, but the general rule is *actor sequitur forum rei*, and the appropriate and suitable *forum* in this case seems to me to be English, not necessarily because it is the *forum delicti*, but because it is also the most convenient for the trial of this case.

Lord Young—I am of the same opinion, and substantially on the same grounds. I sympathise

with the hardship to the pursuer if it be the case that she is able to maintain, with the help of her friends, an action here which she is practically unable to maintain in England. But that is a consideration which we are not at liberty to give effect to. The action is founded on something done by an English railway company in England. I do not think it matters that the company are owners of some heritable property in Scotland. The action is against an English company, and the ground of it is something done by them. There is no doubt we have jurisdiction against the defenders in respect of the arrestment of their funds in Scotland by the pursuer, in virtue of the peculiar doctrine of our law that the moveable property of a person not otherwise subject to the jurisdiction of the Court may be attached to the effect of founding it, and it is unquestioned that we have jurisdiction to entertain an action founded on such grounds. My own opinion has ever been that this was, generally speaking, an inconvenient sort of jurisdiction, and I have been surprised at the readiness with which the Court has entertained actions by domiciled citizens against foreigners, or foreigners against foreigners, founded on arrestments of small sums of money or articles of small value. We had lately an instance, where a ship had suffered an injury somewhere off the north of England—about Shields, I think,—of an action brought, not in Germany, where the owners were domiciled, but in Scotland, which they had nothing to do with. Jurisdiction was sustained pending some abortive proceedings in the Courts in Germany, and on the failure of these the Court here pronounced judgment. The case against the *Saturday Review* (*Longworth* v. *Hope*) is another strong case of the Court entertaining an action between two parties not connected with Scotland. But so enamoured do Scots lawyers seem to be of so bringing actions between foreigners into the Courts here that the practice was extended to the Sheriff Courts by a clause in the Sheriff Court Act of 1877, which says that an action which would have been competent against a Scotsman subject to the Sheriff's jurisdiction, shall be maintainable against a foreigner there, provided that a ship which belongs to him, or of which he is part owner or master, shall have been arrested within the sheriffdom, the effect being that if a share of a ship be arrested in Glasgow, or say in Orkney, belonging to a merchant resident in London, any action on any ground may be brought against him in the Sheriff Court there.

I am myself very favourable to the Court taking a large and liberal view of such questions as we have here—that is to say, where, although jurisdiction does exist, it appears that it is not convenient nor fitting for the interests of the parties to entertain any individual case, then I think the Court should not listen to any such appeal as the pursuer makes here. The Court, indeed, has been slow to entertain this view hitherto, except in the case of foreign executors. Nevertheless, it is a sound principle that the Court may decline to exercise its jurisdiction on the ground that it is not convenient for both parties that it should be so, and I agree with your Lordship that that ground—that it is not convenient—exists in this particular case, which is, as I said, against a foreign company carrying on business in England for something done by them there. I think we are not entitled to listen to that appeal to our feelings which has been made by the pursuer, which nevertheless does touch us somewhat, since in consequence of our decision a poor widow, living in Leith, whose husband has been killed in England, may be practically deprived of any remedy at all. But, that consideration apart, I have really no difficulty in agreeing with the conclusion at which your Lordship has arrived, that it is not convenient that we should exercise our jurisdiction in this case.

Lord Rutherfurd Clark—I am of the same opinion. It is conceded that the remedy sought by the pursuer is as applicable to her case in England as in Scotland, so the only question is, whether she is to be forced to go there instead of coming here. It is stated that the case requires the decision of an English question of right-of-way. I think nothing could be more inconvenient than to try this case—involving the decision of such a question—in Scotland, and therefore I think this is not a convenient *forum*.

Lord Craighill was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the second plea-in-law for the defenders, and dismissed the action.

Counsel for Pursuer (Reclaimer)—Watt. Agent—Alexander Clark, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh — Graham Murray. Agents — Cowan & Dalmahoy, W.S.

Friday, February 29.

FIRST DIVISION

[Lord Fraser, Ordinary.

ORR EWING AND OTHERS *v.* ORR EWING'S TRUSTEES.

Jurisdiction—Foreign—Trust—Executor—Confirmation and Probate Act (21 *and* 22 *Vict. c.* 56), *secs.* 9 *and* 12—*Treaty of Union, Art. XIX.*—Forum Conveniens.

A domiciled Scotsman died leaving a trust-disposition and settlement executed in the Scottish form, by which he conveyed his estate to six trustees, all Scotsmen, of whom two were resident in England and the others in Scotland. The estate consisted chiefly of personal property, whereof £435,314 was situated in Scotland, and £25,235 in England. The testator had no English creditors, and none of the purposes of the trust required to be performed elsewhere than in Scotland.

The trustees gave up an inventory in Scotland, including the English as well as the Scottish estate, and were confirmed as executors by the commissary of the county in which the deceased died domiciled, in terms of section 9 of the Confirmation and Probate Act 1858. They then had the confirmation stamped with the seal of the Probate Court in England under section 12 of the same Act.

The trustees had realised and transmitted