yet been done, and it forms no part of the existing knowledge available to railway companies. At present it is, to say the least, a moot point whether the thing is practicable. Because the defenders have not demonstrated it to be impracticable, the Lord Ordinary has found them liable.

I deem this quite inconsistent with the series of decisions, of which *The King* v. *Pease* and *Vaughan* v. *The Taff Vale Railway Company* are leading instances, approved by the House of Lords in *Hammersmith* v. *Brand*. The consequences of these decisions are no doubt serious and striking, but the rule fixed by them is that if locomotives set fire to property, the railway company are not liable unless they are proved to have been negligent. It is true that such negligence may be in the construction or the furniture or the conduct of the engine—*Freemantle* v. *London and North-Western Railway Company*, 31 L.J. C.P. 12—and this opens responsibilities which would not be discharged by a facile acceptance of any engine proposed by advisers who necessarily are not stimulated by any independent regard to the safety of the property of third parties. Still, negligence there must be, in a fair sense of the term. The facts of this case seem to me to disclose none.

I have only to add that I understand we all agree with the Lord Ordinary in rejecting the arguments founded on account of contributory negligence and on the insurance of the premises which were destroyed. The latter contention is not formulated in a plea.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuers—Ure—Salvesen. Agent—W. B. Rainnie, S.S.C.

Counsel for the Defenders—D.-F. Balfour, Q.C.—Guthrie. Agents—Hope, Mann, & Kirk, W.S.

Thursday, March 17.

FIRST DIVISION.

[Lord Low, Ordinary.

SIM *v.* ROBINOW.

Jurisdiction—Forum non conveniens.

S. and R. being both in business in Cape Colony entered into a joint speculation in the shares of a South African Mining Company. Some years afterwards, S., being then resident in England, raised an action of count, reckoning, and payment against R. in the Court of Session, averring that he had realised the shares and failed to account for the proceeds. At the date of service the defender had been resident in Scotland for more than 40 days. He stated that in the absence of his books and papers he could not give the details of the transaction referred to by the pursuer, but that the whole accounts connected therewith had long ago been settled, that his visit to Scotland was merely temporary, and that he was about to return to his business in South Africa. He pleaded *forum non conveniens*. The Court *repelled* the plea.

Patrick Sim, residing at 4 Hanover Street, Hanover Square, London, brought two actions against Henry Robinow, presently residing at Braemar. Both actions related to certain joint speculations in mining and other shares entered into by the parties in South Africa. At the date of service the defender had been resident for more than 40 days in Braemar.

In the first action the pursuer sought to have the defender ordained to count and reckon with him in regard to the proceeds of certain shares in the Kimberley Central Diamond Mining Company.

The pursuer averred that he and the defender, until recently, had both done business in South Africa; that while there they had become interested, as joint adventurers, in a number of investments, including the shares mentioned in the summons; that the share certificates and other documents had been entrusted to the defender, who had full power to dispose of them; that except as regarded the shares specified in the summons the parties had adjusted their accounts in 1887; that the said shares had been realised in 1888, and the defender had failed to account for the proceeds. The pursuer produced a copy of an account dated in 1887, to which was appended a docquet signed by the defender, bearing that these shares were not included in the adjusted account.

On the merits the defender answered that after such a lapse of time, and in the absence of all his books, papers, &c., he was "not in a position to state accurately the details of the transaction set forth in the condescendence. The whole accounts in connection therewith were long ago squared up, paid, and settled by the parties, and there is no sum due by the defender to the pursuer in connection therewith."

In the second action the pursuer sued the defender for payment of £710, 18s. 5d. and interest, alleging that the defender had been indebted to him in that sum on 13th April 1889, "conform to statement of accounts extracted from the defenders' books, and signed by his clerk, Mr A. Rodger."

On the merits the defender answered that it was impossible for him "to check or verify the 'statement of account' produced by the pursuer. The books and papers, as well as the witnesses necessary for doing so, are all in South Africa." He further averred that any sum due by him to the pursuer was more than counterbalanced by a claim which he had against the pursuer for a number of cases of dynamite, for which pursuer had failed to account while managing on behalf of the defender a magazine for storing dynamite in South Africa.

The defender also in both actions made

the following statements:—"(Stat. 1) The defender was born in Scotland, but he left that country in 1869, and has since resided abroad, principally in South Africa, where he has for ten years past carried on business as a merchant and commission agent at Kimberley. Since 1869 he has only twice been in Scotland on short visits, once in 1888-89, and again on 29th July 1891, when he arrived in Scotland for a short visit, on account of his health, and stayed for some time with his mother at Braemar, where she was a summer visitor. He has now left Scotland, and is about to return to Kimberley to conduct his business there, which during his absence is being conducted by his fully authorised attorney, Mr Louis Breitmayer, Beits Buildings, Church Street, Kimberley, who has power to accept service of any summons raised against the defender in the Courts of Cape Colony. The defender has no property or effects of any description in Scotland. He is not a domiciled Scotsman, nor subject to the jurisdiction of the Scottish Courts. (Stat. 2) The pursuer was also for many years in South Africa. He returned to this country about two years ago, but, as the defender believes and avers, is about to go back shortly to South Africa, where he has property. (Stat. 4) In the circumstances above narrated, any proceedings which the pursuer desires to raise against the defender ought to be taken before the Courts in Cape Colony, South Africa, and not in the Court of Session."

The pursuer in answer to statement 2 admitted that he held shares in mining and other companies in South Africa, but averred that he had no intention of returning there.

The defender pleaded in both actions—(1) No jurisdiction. (2) *Forum non conveniens.*

On 16th February 1892 the Lord Ordinary (Low) in both actions repelled the first and second pleas-in-law for the defender, and allowed the parties a proof of their respective averments.

"*Opinion.*—. . . . In these circumstances, while the jurisdiction of this Court is not disputed, the plea of *forum non conveniens* is urged. The defender maintains that the proper *forum* for trying the questions which are raised is in South Africa, because the joint adventures which are the subject-matter of the action were carried on there, and the books and the witnesses necessary to the determination of the matter in dispute are also there.

"In my opinion the considerations of convenience in this case are not sufficiently strong to justify me in sustaining the plea. Where there is jurisdiction the Court cannot, I apprehend, refuse to entertain an action, unless the circumstances make it plain that there is another tribunal to which not only the convenience of all the parties but the justice of the case point as the proper *forum.* Actions of accounting against a foreign executry or a foreign partnership are properly brought in the courts of the domicile of the executry or the partnership, and these form the most familiar examples of the kind of case in which the plea of *forum non conveniens* has been sustained—*Clements* v. *Macaulay,* 4 Macph. 583, Lord Justice-Clerk (Inglis), p. 592. The plea, however, is not confined to that class of cases, but applies wherever it can be shewn that the case cannot consistently with fairness and justice be tried in this country. Thus, where a gentleman in Scotland brought an action of damages against the manager of his estates in Jamaica for alleged mismanagement and neglect of duty, it was held that the Courts of Jamaica, where the estate, the books and documents, and the witnesses were, was the proper *forum—Tulloch* v. *Williams,* 8 D. pp. 6 and 7. Again, in *Williamson* v. *North-Eastern Railway Company,* 11 R. 596, it was held that an action of damages against an English Railway Company for an accident occurring in England, and in circumstances which raised a question of an English right-of-way, could not be maintained in the Scottish Courts. The question, therefore, is one for the discretion of the Court in view of the circumstances disclosed—the general rule, however, being, as I have already said, that the Court must exercise its jurisdiction unless there are very clear and weighty grounds for refusing to do so.

"In the present case I am of opinion that such grounds are not present. The action is not one of general accounting in regard to a former partnership or business. The one action is for an accounting for the price realised by the sale of specific shares, and the other is for an alleged ascertained balance upon a particular account between the pursuer and the defender. I therefore do not see that there will be any necessity for a general investigation into the business books of the defender. At the most, excerpts from the books of the entries relating to the joint speculations is all that can be required. Then the fact that some witnesses may require to be examined upon commission in South Africa does not appear to me to create a difficulty, especially as the questions at issue must turn rather on the state of the accounts in regard to certain specific transactions than upon matters of fact to be established by parole evidence. Further, I do not think that any specific question of South African law is raised.

"In regard to the counter-claim of the defender, I do not think that it can be properly pleaded in defence to an action for an ascertained balance, and if the defender seeks to constitute that claim in a specific action he can institute proceedings either here or in the Courts of South Africa.

"I shall therefore repel the plea of *forum non conveniens.*"

The defender reclaimed, and argued—The question raised by the plea of *forum non conveniens* was one for the discretion of the Court, and the plea should be sustained in any case where the result would be to further the ends of justice. It was not necessary to the validity of the plea that there should be a depending process in

another country. The question was simply which of the two Courts having jurisdiction was the most convenient *forum* for trial of the cause—*Williamson* v. *North-Eastern Railway Company*, February 28, 1884, 11 R. 596, *per* Lord Justice-Clerk, 598; *Longworth* v. *Cook and Others*, July 1, 1865, 3 Macph. 1049, *per* Lord President, 1053; *Martin* v. *Stopford Blair's Executors*, December 4, 1879, 7 R. 329, *per* Lord President, 331; *Tulloch* v. *Williams*, March 6, 1846, 8 D. 657. In the first instance the *onus* lay on the defender to show why the plea should be sustained, but the circumstances of the case had shifted the *onus*. (1) The jurisdiction was snatched when the defender was on a visit to Scotland for the benefit of his health, and the case was thus *a fortiori* of cases in which jurisdiction had been founded by arrestment — *Clements* v. *Macaulay*, March 16, 1866, 4 Macph. 583, *per* Lord Barcaple, 589; *Tulloch* v. *Williams*, *supra*. (2) The pursuer might, if he had wished to do so, have raised his actions in Africa, when both parties were there. (3) Everything in the case was African, and not Scotch. The claims arose out of transactions entered into in South Africa, and the books and witnesses which were the means of proof were to be found there. The defender was now in the Riviera, and was soon to return to South Africa, and in these circumstances it would be a great hardship to him if he were to be subjected to the jurisdiction of the Scottish Courts. A branch of the Supreme Court of the Colony sat at Kimberley, and that was the most appropriate, and would be the least expensive *forum* for trial of the cause.

Argued for the pursuer—The present did not fall within the class of cases to which the plea of *forum non conveniens* applied. There might be some little inconvenience to the defender in being called on to answer in the Courts of this country, but that was not a sufficient reason to justify the Court in refusing to exercise its jurisdiction. The defender must show that he would be put to an unfair disadvantage if the cases were tried in Scotland, and that he had failed to do. On the contrary, as pointed out by the Lord Ordinary, there was no special difficulty in settling all the questions between the parties in this Court. Further, the letters produced showed that the pursuer's claims had been intimated to the defender about two years before the actions were raised, and he had thus had plenty of time to clear up the points at issue while he was still in South Africa had he desired to do so. The plea of *forum non conveniens* should therefore be repelled. The defender's counter-claim in the petitory action was irrelevant.

At advising—

LORD KINNEAR—There are here two actions between the same parties. The first is an action of count, reckoning, and payment, and the second is a simple petitory action for payment of two specified sums of money. In defence to each of these actions the defenders have stated two preliminary pleas—(1) No jurisdiction; (2) *Forum non conveniens;* and in each action the Lord Ordinary has repelled both these pleas.

There can be no doubt that the plea of no jurisdiction has been rightly repelled; that the Court has jurisdiction is beyond all question. But it is said that this jurisdiction ought not to be exercised, because this is not a competent or convenient *forum* for determining the questions at issue between the parties, and that the only proper *forum* is in the Cape Colony in South Africa.

I think it will be convenient to consider this plea in the first place with reference to the action of count, reckoning, and payment.

The summons in that case is based upon a perfectly relevant averment, that while the pursuer and defender were resident in South Africa they became interested in a joint adventure in the shares of a limited company, that the share certificates and other documents were entrusted to the defender, who had power to dispose of them, that the shares were realised early in 1888, and that the defender has failed to account for his intromissions. The defence on the merits is that the whole accounts "were long ago squared-up, paid, and settled by the parties."

The only averments on which the plea of *forum non conveniens* is rested appears to be that the transactions were carried through in South Africa, that the defender's books and documents are in South Africa, and that the defender himself is about to return there. The defender further states that the pursuer also is about to return to South Africa, but this averment he denies, and it is one into which we cannot inquire. We must deal with the case on the same footing as any other action brought in this Court by a resident Englishman. In regard to the remaining averments in support of the plea of *forum non conveniens*, I agree with the Lord Ordinary that they are not sufficient to justify the Court in dismissing the action.

These averments certainly suggest that the matters in dispute between the parties might be speedily and conveniently tried in South Africa if both of them had been resident in that country, and it is very probable that an inquiry in this country cannot be carried through without considerable expense, as some of the witnesses and the books and documents which must be examined are now in South Africa. But then the parties who will probably be the principal witnesses are not now in South Africa, and even if we were entitled to assume, what I think we can hardly take to be certain, that the defender will have returned to South Africa by the time the inquiry comes to be made, the result simply comes to be a question of the balance of convenience and inconvenience between an inquiry in this country and inquiry in South Africa, and we are asked to decide that question in favour of South Africa. Now, I am not aware that the

Court has ever refused to exercise its jurisdiction upon the ground of a mere balance of convenience and inconvenience, and the reason is that such a ground of judgment would make it necessary for the Court to proceed upon facts and circumstances the full force of which it cannot appreciate without an inquiry into the whole merits of the case. But, further, in the present case the alleged inconveniences are such as necessarily arise in the daily business of a Court which is called on to adjudicate upon mercantile transactions carried through in all parts of the world. The Court recognises that it may be called upon to enforce contracts wherever they are made, and between whatever parties, provided it has jurisdiction to entertain the action, and therefore in such a case something more is required than mere practical inconvenience in order to sustain the plea of *forum non conveniens*. The general rule was stated by the late Lord President in *Clements* v. *Macaulay*, 4 Macph. 593, in the following terms—"In cases in which jurisdiction is competently founded, a Court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. *Judex tenetur impertiri judicium suum;* and the plea under consideration must not be stretched so as to interfere with this general principle of jurisprudence." And therefore the plea can never be sustained unless the Court is satisfied that there is some other tribunal having competent jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.

I do not think that any of the cases cited to us in which the plea of *forum non conveniens* was sustained are applicable to the present case. The cases of *Brown* v. *Palmer*, 9 S. 224, and *Macmaster* v. *Macmaster* 11 S. 685, were cases of executry administration, in which foreign executors were called to account in this country for the executry estate situated abroad, and the ground upon which the Court in these cases went in sustaining the plea of *forum non conveniens* is very clearly explained by the Lord President in *Clements* v. *Macaulay* when he says—"In these cases the question always was whether it was more for the true and legitimate interest of the executry estate and all the claimants that the distribution should take place where the executors have had administration. There is, of course, in most cases a strong presumption in favour of that consideration, and accordingly the plea is generally sustained in such cases." The same principle regulates actions relating to partnerships, in which there is a manifest expediency that questions relating to the partnership estate should be tried before the tribunal which has jurisdiction over the partnership as a whole. The case of *Williamson* v. *North-Eastern Railway Company*, 11 R. 596, was of a different character, but the grounds on which the Court there held that they ought not to exercise their jurisdiction were very strong. It was an action against an English railway company on account of a fault committed in England, and it involved questions of English law, besides which there could of course be no question as to the competency and ready accessibility of the Courts in England for the trial of the case. In deciding the case the Judges laid stress on the peculiar method by which the jurisdiction of the Court had there been founded, but apart from that specialty the judgment of the Court proceeded on the ground that it was more convenient in the interests of both the parties and for the ends of justice that the trial should take place in England instead of before this Court. The case of *Tulloch* v. *Williams*, 8 D. 657, was very exceptional, and I do not think it affords a precedent which we ought to follow. The Judges went mainly on the ground that the pursuer had no interest to prefer this Court to the Court of Tasmania but the action was not dismissed but was merely sisted in respect of the special circumstances of the case, and in respect that the defender had declared his readiness to answer in the Court of Tasmania and offered bond to that effect. The defender here makes no such proposal, but if he had I should not have been of opinion that to sist process was an expedient course to follow, for if this Court is not a convenient *forum* for the trial of the cause, then the action ought to be dismissed, but if this Court is a convenient *forum*, then I can see no reason why the action should not go on in the ordinary way.

In all these cases there was one indispensable element present when the Court gave effect to the plea of *forum non conveniens*, namely, that the Court was satisfied that there was another Court in which the action ought to be tried as being more convenient for all parties and more suitable for the ends of justice. But I cannot say that I am able to discover this element in the present case at all; it might have been if the defender had gone abroad and had now returned to South Africa, but all that he says is that he intends to go there. I do not think that the pursuer can be asked to wait till the defender carries out this intention, or that he ought to be sent to a court which may be unable to exercise any jurisdiction over the defender in consequence of his continued absence from South Africa. It seems to me, therefore, that it is neither expedient for both the parties, nor proper in the interests of justice, that the action should be dismissed. I am therefore of opinion that we should adhere to the Lord Ordinary's judgment.

In regard to the second action, I have great doubt whether we can in the meantime do more than repel the plea of no jurisdiction, because I think that the pursuer has stated no relevant ground of action, or rather no ground of action at all. All he says is—"The defender was, as at 13th April 1889, indebted to the pursuer in the sum of £710, 18s. 5d., conform to statement of accounts extracted from the defender's books, and signed by his clerk Mr A. Rodger, a copy of which is herewith

produced." Now, because the books of one party show a balance to the credit of another party, that is not of itself a ground of action at the instance of that other party against the first. He must aver some contract or circumstances out of which an obligation to pay the sum at his credit arises, and I cannot discover from the averments here what the nature of the action is. I think there must be some more specific averment of the contract in respect of which the balance in the pursuer's favour is said to arise. At present, therefore, I am not prepared in the present action to do more than to repel the first plea-in-law for the defender.

LORD ADAM concurred.

LORD M'LAREN—I also concur. I think it results from an examination of the authorities that in all or almost all the cases where the plea of *forum non conveniens* has been sustained, there has been another Court in another country which had jurisdiction over the parties interested and the whole subjects of the action, while in this Court the parties were either not subject to the jurisdiction, or a question of foreign law came to be involved, or there was some difficulty which prevented this Court from giving final judgment without the aid of the Court of another country. Such certainly was the nature of the ground of decision in the executry and partnership cases cited to us, and it is very difficult to see how any case could arise in which we would sustain the plea where the action is a simple personal claim for payment of a sum of money. No doubt the question raised by this plea always arises in cases where it is said that great inconvenience will be caused to the defender by subjecting him to the courts of his temporary domicile, but inconvenience does not appear to be an appropriate ground for rejecting the jurisdiction of a Court.

The LORD PRESIDENT concurred.

In the action of count, reckoning, and payment the Court adhered.

In the second action the Court adhered to the interlocutor of the Lord Ordinary in so far as it repelled the first and second pleas-in-law for the defender and remitted to the Lord Ordinary to proceed.

Counsel for the Pursuer—C. S. Dickson—M'Lennan. Agent—John Cameron, S.S.C.

Counsel for the Defender—Dundas—W. Thomson. Agents—Reid & Guild, W.S.

Friday, March 18.

FIRST DIVISION.

[Lord Low, Ordinary.

GRAY *v.* SMART AND M'DONALD.

Reparation—Wrongous Legal Proceedings—Want of Citation and Notice—Small Debt Decree—Proceedings before Decree—Diligence following Decree — Review — Small Debt Act 1837 (1 *Vict. c.* 41), *secs.* 30, 31—*Citation Amendment* (*Scotland*) *Act* 1871, *sec.* 3—*Citation Amendment* (*Scotland*) *Act* 1882, *sec.* 3—*Relevancy.*

A summons of sequestration for rent was taken out against a tenant in the Small Debt Court, upon which an appraisement of his effects was made, and thereafter decree was pronounced with warrant of sale under which his effects were sold. He brought an action of damages for wrongous legal proceedings against his landlord and against the sheriff-officer, in which he averred that he had received no citation under the summons, no notice of the appraisement, and no notice of the sale. He admitted that he had recently changed his address, leaving his furniture behind him, but averred that that change was well known to the defenders. The defenders explained that the summons, with a copy of the appraisement and the decree with warrant of sale, had both been duly served upon the pursuer at his last known place of residence.

Held (1) (*aff.* Lord Low, and following the case of *Crombie* v. *M'Ewan*, January 17, 1861, 23 D. 333) that any irregularities in the proceedings prior to the decree were protected by the decree, which was not open to review by the Court of Session, but (2) (*rev.* Lord Low) that the pursuer's averment of no notice of the diligence following upon the decree was relevant and entitled him to an issue, any explanations by the defenders falling to be dealt with at the trial.

Robert Gray, journeyman baker, Cockenzie, in the county of Haddington, brought an action of damages, concluding for £100, against Miss Ellen Smart, Mount View Road, Churchhill, London, proprietrix of certain heritable property in Musselburgh, and Alexander M'Donald, sheriff-officer, 5 Hill Square, Edinburgh, for wrongous legal proceedings. There was also a conclusion for the reduction of an inventory and appraisement as being inept. The pursuer averred that he was tenant for the year Whitsunday 1890 to Whitsunday 1891 of a house in Musselburgh belonging to Miss Smart, but that having got work at Cockenzie and secured a house there, he was proceeding to remove his furniture from the Musselburgh house early on the morning of 6th January 1891 when he was prevented doing so by Miss Smart's factor, by whom he was forced to replace the furniture in the house, although he was allowed to lock the door and retain posses-