As to the buildings erected, they are admittedly of a class inferior to those in the neighbourhood. Certain communications are alleged to have passed between the pursuer and M'Rae, but even if M'Rae proved all that he alleges, it would not in my mind amount to a relevant case of acquiescence.

Lord Deas was absent.

The Court pronounced the following interlocutor:—

"The Lords having considered the cause and heard counsel for the parties on the reclaiming-note for Peter Simpson against the interlocutor of Lord M'Laren of 30th November last, Recal the said interlocutor: Find, declare, and decern in terms of the first two declaratory conclusions against the defender Mason: Decern against the defender M'Rae in terms of the conclusions for removal as restricted per minute No. 49 of process; and as regards the alternative conclusions of declarator and removal, dismiss the action and decern," &c.

Counsel for Pursuer—Scott—Thorburn. Agent—Party.

Counsel for Defender Mason—Low. Agents—Romanes & Simson, S.S.C.

Counsel for Defender M'Rae—Strachan. Agents—Duncan, Smith, & Maclaren, S.S.C.

Thursday, February 28.

FIRST DIVISION.

[Sheriff of Forfarshire.

PHILLIPS AND ANOTHER *v.* NICOLL AND ANOTHER.

Reparation—Domestic Animal—Owner's Liability to take Proper Precaution for Safety of Public.

Where the owner of a cow which was being taken through the public streets in circumstances under which it might have been expected to become excited and furious, had not taken special precautions for the safety of the passers-by—*held* that he was liable in damages to a person who had been injured by the cow.

This was an action of damages for personal injuries at the instance of Mrs Phillips, wife of James Phillips, insurance superintendent, Dundee, with consent of her husband, against James Nicoll, Millgate, Arbroath, and David Harris, butcher, there.

The facts of the case were stated by the Sheriff-Substitute (Robertson) in his interlocutor as follows:—"Finds in fact that on the 9th August 1882 the female pursuer while walking in Hill Street, Arbroath, was injured by a cow belonging to the defender Nicoll: Finds that Nicoll's servant had charge of this animal, and was taking it through the streets of Arbroath from the slaughter-house to a byre belonging to the defender Harris: Finds that the cow was in an excited and dangerous state, and required to be conveyed through the public streets with more than ordinary care: Finds that the animal was secured by a rope and halter, but that this mode of securing it was not sufficiently effective, in consequence of which it broke away from the defender's servant and ran at a furious pace upon the pavement of Hill Street: Finds that the female pursuer was either knocked down or was trampled upon by it, and sustained severe contusions on the side and leg, and that she was confined to bed for a fortnight, during which time she suffered severe pain: Finds in law that a master is liable for any carelessness of his servant in conveying an animal through the public streets, as also for the sufficiency of the tether and mode of securing the animal: Finds in fact and law that the precautions taken for the safe transit of the cow in question were not sufficient to relieve the defender Nicoll of all responsibility: Finds, therefore, that damages are due to the pursuers; assesses these at £25." He assoilzied the defender Harris.

On appeal the Sheriff (Trayner) recalled this interlocutor and assoilzied the defenders.

"*Note.*— . . . In a case like the present it is necessary for the pursuer to establish that the injury complained of arose out of some fault or negligence on the part of the defender. Such fault or negligence I cannot find established. The case presented by the pursuer is that the cow in question had become excited or infuriated in the shambles or byre adjoining the shambles, where it had been kept the night before the accident, and that being infuriated or excited when it left the shambles on the 9th of August, it was driven along the public street without sufficient precaution having been taken to prevent it injuring the passers-by. There are then two questions to consider, (1) Was the cow excited or infuriated when it left the shambles? and (2) if so, Was it sufficiently secured to make it safe to lead such a cow through the public streets? The evidence chiefly relied upon by the pursuer is that of the inspector of markets and slaughter-houses in Dundee [David Knight], who says (1) that cows brought to the shambles 'are apt to get excited after smelling the blood and offal in the slaughter-house, and I have often seen them infuriated;' and (2) that he 'would not consider an animal taken from the slaughter-house to be secured with merely a halter and a rope. I should recommend it to be tied at the head and feet.' This evidence (although proceeding from a witness of great experience in the matter to which he is speaking, and perfectly reliable) stands alone and without corroboration. But giving it the same effect as if spoken to by half-a-dozen witnesses, it amounts to this (on the first question), that animals are 'apt' in the circumstances described to become infuriated, and often do so. Plainly the effect spoken to is not invariable although frequent. Now, turning to the rest of the evidence, I find no proof whatever that the night's lodging in the byre adjoining the shambles had this effect upon the cow in question. The pursuers do not attempt to prove that when the cow left the shambles or byre on the morning of the 9th August it was excited or infuriated, or indeed was in any state which would suggest to the person having charge of it that it required any unusual care to be taken in order to prevent it doing injury to others. It is proved (1) that the cow was quiet before it went to the shambles, (2) that it was quiet immediately after

it had had the run in the course of which it knocked down the pursuer, and (3) was quiet when taken back to the shambles a few days afterwards. I take it therefore that the cow was quiet when it left the byre or shambles on 9th August. On the second question, I remark that if the cow was quiet when it left the shambles, and showed no signs of being excited or infuriated, then there was no need for extraordinary precautions. The ordinary mode of securing a cow passing through the streets is proved to be by means of a rope and halter, and that was the course adopted here. The defender, so far as I can see, was not guilty of fault or negligence in any way. Various causes are suggested to account for the cow running away. It appears to me that (whatever was the immediate cause of it) the fact is, the cow was frightened by something or somebody after it left the shambles, and that this fright made it run off. But such a contingency could not be foreseen, and therefore was not a contingency which the defenders were bound to provide against. Cows and horses will run off at times without blame or fault being attributable to anyone, and if under such circumstances injury is done, it is a misfortune which must just be borne by the person who has suffered. 'For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid'—*per* Bramwell, B., in *Holmes* v. *Mather*, L.R., 10 Exch. 267.". . .

The pursuer appealed to the Court of Session, and argued—There was a special duty on the defender to take more than ordinary precautions against trivial occurrences, in respect of the excitable state of the animal—*Clark* v. *Armstrong*, July 11, 1862, 24 D. 1315; *Burton* v. *Moorhead*, July 1, 1881, 8 R. 892; *Hennigan* v. *M'Vey*, Jan. 12, 1882, 9 R. 411; *Fletcher* v. *Rylands*, L.R., 3 H. of L. 330.

At advising—

Lord President—It is quite conceded in this case that Mrs Phillips was knocked down and injured by this cow, and that the amount of damages awarded by the Sheriff-Substitute is not in the circumstances excessive, but the question is whether fault is brought home to the defender Nicoll.

The allegation of the pursuers is that the defender "permitted the cow, while in an infuriated or improper condition, to be in or to be driven along or in the street;" that is the averment in the first article of the condescendence, and then in the third article there is this addition, "while without proper or sufficient means for controlling and directing the said cow." Now, I do not think that signifies that the means were insufficient if the cow was not in an infuriated condition, for if she was in her normal condition, then the ordinary way was to lead her by means of a halter and rope. But if she was infuriated, and this was known to the defender or his servant, then I should be disposed to agree with the Sheriff-Substitute that the precautions were not sufficient, and that there should have been additional means of controlling her movements as suggested in Knight's evidence.

The whole question therefore turns upon whether the person in charge of the cow was bound to know that its condition was such, not necessarily that it was furious from having been in the shambles, but that it was so much excited from having passed the night there that it was likely to become excited on the slightest cause.

On that question I am disposed to agree with the Sheriff-Substitute. I think that the evidence of Knight is extremely important, to the effect that animals after being in the slaughter-house are apt to get excited, and that he has seen them become infuriated. Therefore he says that when they are removed, after having been there some time, great caution is necessary not to take them through the streets without additional means of controlling their movements. Now, I do not find anything against that evidence, and it certainly commends itself to my mind. It is matter of ordinary observation that cows and cattle in such circumstances are generally in an excited state, and apt to get into a furious condition on provocation which at other times would not disturb them.

That being so, we have to consider whether it was proper in these circumstances, looking to where the animal had been for the previous night, to take her through streets fastened merely with a halter. On the whole matter I have come to the conclusion that that was not a proper mode of leading her, and that there should have been some additional mode of control, and that the absence of this led to the injury.

I am therefore for reverting to the judgment of the Sheriff-Substitute.

Lord Mure—This is a case attended with some nicety. The defender has not proved in his evidence the condition of the animal at the time when she emerged from the byre, or the distance the slaughter-house was from the place where Mrs Phillips was knocked down. The cow had spent the night in a byre adjoining the slaughter-house at the Seagate, near the shore, and having regard to the fact, which is proved by the inspector from Dundee, that animals in such circumstances are apt to get excited, I think a strong presumption is raised that she was in an excitable condition caused by the smell of blood. If it had been proved that she went quietly from the shambles, I think that would have been a strong argument against the pursuer succeeding, but the witness Hutton, who was leading the cow, says that it was something on the shore that frightened her, and that raises a presumption that it was shortly after she came out of the shambles that she became unmanageable.

I lean to the conclusion of the Sheriff-Substitute, that there should have been distinct precautions taken, either by having two men to look after the animal, or by fastening her legs together, as suggested by Knight in his evidence.

Lord Shand—This is undoubtedly a narrow case, but I am of opinion that the interlocutor of the Sheriff-Substitute should be reverted to. In so doing I am disposed to take the case on the facts as stated by the Sheriff on his view of the evidence, and in particular on the fact that it has not been proved that the cow was in an excited state when she left the byre, which is the circumstance that raises the difficulty.

It has been proved that the cow spent the night under the smell of butchered animals, for the byre was open to the shambles, and there were holes in the wall. Now, it is notorious that the

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