Tuesday, March 6.

OUTER HOUSE.

GOODMAN *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Reparation—Railway—Foreign—Act 8 *and* 9 *Vict. cap.* 93, § 3.

A domiciled Scotchman was killed by an accident on the line of a English railway company. The line was entirely in England, but the company had a place of business in Scotland. Three years after the accident the widow of the deceased used arrestments to found jurisdiction in Scotland, and brought an action of damages in the Court of Session. *Held* (*per* Lord Shand) that the grounds of action having arisen entirely in England, the rights and liabilities of parties must be regulated by the law of England, and that as by that law the action was not maintainable it must be dismissed.

This was an action for damages and *solatium* brought by Mrs Goodman, residing at Helensburgh, Dumbarton, widow of the deceased Robert Goodman, lately commercial traveller in the employment of Walter Macfarlane & Company, Saracen Foundry, Glasgow, against the London and North-Western Railway Company, incorporated by Act of Parliament, designated as carrying on business in Glasgow and elsewhere in Scotland and elsewhere in England. The pursuer's husband had died on 19th August 1873 in consequence of injuries received by him at the accident at Wigan on the defenders' line, which occurred on 2d August 1873. At that time he was engaged in his business, and travelling on the defenders' line, having booked through from Swansea to Glasgow. The other material facts appear sufficiently from the Lord Ordinary's note.

The defenders pleaded—"(1) 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. (2) The action is not maintainable according to the law of England, and ought to be dismissed."

The Lord Ordinary (SHAND) pronounced the following judgment:—

"*Edinburgh*, 30*th November* 1876.—Having considered the cause, sustains the defenders' first and second pleas in law, and assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses; allows an account thereof to be given in; and remits the same when lodged to the Auditor for taxation, and to report.

"*Note.*—This action has been instituted in this Court in peculiar circumstances, and obviously for a very special reason. The pursuer is the widow of the late Robert Goodman, commercial traveller in the employment of Walter Macfarlane & Co., iron-founders, Saracen Foundry, Glasgow, who died in consequence of injuries sustained in the Wigan railway accident, which occurred on the line of the defenders, the London and North-Western Railway Company, on the 2d of August 1873. The pursuer avers that the accident took place through the fault of the defenders' servants, and claims damages in respect of the death of her husband. The defenders plead in defence that the pursuer's claim must be decided according to the law of England, where the accident took place, and that according to that law the pursuer has no claim. The defence is rested on the English common law and the Statute 9 and 10 Victoria, chapter 93, which for the first time in England gave a right of compensation to the wife, husband, parent, and child, of any person whose death had been caused by the wrongful act, neglect, or default of another. That statute provides that no more than one action shall be competent in respect of the same subject-matter of complaint—that the action shall be brought by the executor or administrator of the deceased, and shall be commenced within twelve calendar months after the death.

"The death of the pursuer's husband took place on 19th August 1873, and the present action was not raised until nearly three years afterwards. The defenders aver that the pursuer has no right of action in England, where the injury occurred, and they maintain that in these circumstances the present action cannot be sustained here.

"The pursuer explains, as accounting for her delay in adopting legal proceedings, that an action was brought against the defenders by the representatives of Sir John Anson, who was killed in the same accident, and that this case was decided in the Court of Queen's Bench on 21st June 1875, when a verdict was given against the defenders. It is alleged on record that 'it was understood or agreed between the defenders and the parties injured by the said accident that one case of damages for injury suffered therein should be proceeded with by way of testing the question of the defenders' responsibility;' but on its being put to the pursuer's counsel whether the pursuer could undertake to prove a case of agreement between her and defenders, either that a trial case should be decisive of her claim, or that the defenders should waive all objection on the ground of delay on her part in raising the action, her counsel stated that she could not undertake a proof of either alternative.

"It is not maintained by the pursuer that action at her instance could be sustained in England, but she pleads that nevertheless her claim is valid, and must receive effect in this country.

"The defenders are an English company, and their line of railway is situated entirely in England. The pursuer alleges that this Court has jurisdiction over them, however, in respect they have a place of business in Glasgow, and separately in respect of arrestments used to found jurisdiction. The defenders' office in Glasgow, it is understood, is occupied by a servant who canvasses for Scotch traffic for their line in England, and the argument has been taken on the footing that by having a place of business in this country they are liable to the jurisdiction of this Court.

"There appears to be no difficulty as to the law of England. It is clear the pursuer has no right of action there. It was not until 1846 that the law of England gave any right of action to the widow or children of a person deceased against a third party who had by his fault caused the death of the husband or parent. At common law in England, 'as to suits of every class, it is gene-

rally true that the right of action is not assignable so as to enable an assignee to sue in his own name' (Stephen's Commentaries founded on Blackstone, 5th edition, vol. iii., p. 483), and this rule has been relaxed from time to time by statutes which gave to executors and representatives rights of action, both with reference to real and personal estate, which they had not at common law, and making them liable to actions to which they would not have been subject if statutes to that effect had not been passed (Stephen's Commentaries, *ut supra*, 7th edition, vol. iii., pp. 369–70). Prior to 1846, while a person who sustained a personal injury through the fault of another had a claim of damages, yet, if the death of the injured party resulted, there was no claim against the wrongdoer by his representatives, although there might be liability for a deodand or 'forfeiture of the personal chattel which was the immediate and accidental occasion of the death of any reasonable creature,' and which fell to the Crown or the Crown's donatory (Stephen's Commentaries, 7th edition, vol. ii., p. 551). In 1846, however, the Legislature was induced to adopt the principle, which had long received effect in Scotland, of recognising a right of compensation, not to the executors of a person deceased, whose death had been caused by the fault of another, so as to add to the executry estate, but to the wife, husband, parent, and child of such person. The statute was introduced by Lord Campbell, and was passed at the same time as the Act, also introduced by him, to abolish deodands (9 and 10 Victoria, chapter 61 and chapter 93).

"But although the general right to compensation was recognised, it was introduced under important limitations, for it was provided (section 3) that only one action should be competent in respect of the matter of complaint, and that this action should be commenced within twelve calendar months 'after the death of such deceased person;' and by section 2 it was provided that the action should be brought by and in the name of the executor or administrator of the person deceased, 'that the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action should be brought,' and that the amount recovered should be divided in shares as the jury should find and direct. By a later statute, not noticed on record, 27 and 28 Victoria, chapter 95, provision is made (section 1) for the case in which either there should be no executor of the party deceased, or the executor had not brought the requisite action within six months, in either of which cases it is provided 'such action may be brought by and in the name or names of all or any persons, if more than one, for whose benefit such action would have been if it had been brought by or in the name of such executor or administrator,' and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure as nearly as might be as if it were brought by and in the name of such executor or administrator.

"As the result of the provisions of these statutes, it is clear there are important differences between the law of England and the law of this country in reference to claims of damages arising out of the death of a person caused by the fault of another. In England the jury 'may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought.' It has been decided that this statute does not include any claim of *solatium* such as the law of Scotland recognises; Addison on Torts, 409; *Pim* v. *Great Northern Railway Co.*, 31 L.J., Q.B. 249, and 32 *ib.* 377, and authorities there cited. Again, in Scotland each person within the requisite degree of relationship has a separate right of action, while in England the right of action is in the executor alone, and failing an action at his instance within six calendar months, yet one action only is competent for behoof of the persons to whom the statute gives a claim; and (3) while in Scotland the action may be brought within any time which the Court may deem reasonable under forty years, in England the right of action subsists for twelve months only after the decease of the party whose death gives rise to the claim.

"Conceding that under the common law of England there is no right of action, and that under the statutes any right of action which the pursuer had expired on 19th August 1874, the pursuer notwithstanding maintains that her action is good in this country (1) on the ground that the English statute gave her a right of action immediately on the occurrence of the death of her husband, and that this right subsists in this country although it has lapsed in England, because the *lex fori* applies in regard to the matter of remedy, and according to the law of Scotland there is no absolute limitation in time of the remedy by action which is now sought. (2) But it is further maintained that even if the statute had never been passed, and the law of England recognised no ground of action, the law of Scotland which gives such an action must be applied to the case.

"The pursuer's argument, if sound, would produce the remarkable and startling result that, because the defenders, by carrying on business to a very limited extent in this country, happen to be subject to the jurisdiction of the Courts in Scotland, all persons who have not availed themselves of the right of action arising out of the accident in question, competent within twelve months, might yet bring actions and recover damages in this country. I am, however, of opinion that the defenders are right in the contentions embodied in their first two pleas, viz.:—That the rights and liabilities of the parties must be regulated by the law of England; and that, as the present claim is not maintainable in England, this action must be dismissed.

"It is, I think, a mistake to regard the limitations as to time and as to the nature of the action competent in England, as relating merely to the matter of remedy, and therefore to be disregarded in this country, where the remedy is sought, in the same way as a foreign law of prescription or the like would be disregarded. The case is not one of a statute introducing a limitation or prescription on a previously existing common law right. The statute for the first time gave the right. It gave a limited right only, viz., a right for twelve months and a right of special action which must be pursued for behoof of all persons having a claim. It is understood the pursuer's husband left a family; and assuming that the law of Eng-

land is to be applied to the case, then under the statute each child acquired the right to compensation. One action only was competent, however, for behoof of the pursuer and her children, and that right only subsisted for twelve months. If the right given under these limitations was not made available, then the law of England gave no other. The defenders were liable by the statute to a claim only for a limited period and in a particular form, and the claim not having been made either within the time or in the form authorised, lapsed as if it had never existed, and so no longer subsists, but became extinguished.

"But it is said that even assuming that according to the law of England no right of action subsists, and assuming that the statute had never been passed, yet the pursuer is entitled to damages for the injury sustained, because the law of Scotland gives such a claim. I cannot give effect to the argument of the pursuer in support of this view. The defenders being subject to the jurisdiction of the Court, are no doubt liable to legal proceedings for the enforcement of any claims arising either out of a contract entered into in another country, or out of any acts committed by them in a foreign country, which gave them a right of action there. But just as the *lex loci contractus* must be applied in reference to the terms and effect of the contract for the purpose of ascertaining whether liability exists, so I think the *lex loci* must be applied with reference to the acts committed, in order to ascertain whether there be liability. It may be that it will not be enough that the pursuer shall be able to shew that the act committed in a foreign country gives a right of action there, and that the Courts of this country will not sustain an action founded on a foreign municipal law unless the claim is also consistent with the law of this country also. The case of the '*Halley*,' L. R., 2 P. C. Ap., p. 193, cited by the pursuer, in which the decision of Sir Robert Phillimore was reversed, is an authority to that effect. But where the act is lawful according to the law of the country in which it is done, or where the act gives no cause or right of action there, I am of opinion that it cannot be treated as unlawful or as giving rise to a claim of damages in this country, should it happen that the person complained of either is or afterwards becomes subject to the jurisdiction of the Courts here. The present branch of the argument (which is taken on the footing that the pursuer cannot take any benefit by the English statute) involves the proposition, which appears to me to be extravagant, that an accident caused by the fault of the servants of an English railway company, which would in England give no right to compensation to the relatives of persons killed, would, notwithstanding, subject the company to claims of damages in the Courts of this country, provided the company happened to be from any cause liable to the jurisdiction of these Courts; in other words, an act inferring no legal liability in the country where it occurred might be made the ground of liability in this country, because of the accidental circumstance of the defenders being or becoming liable to the jurisdiction of the Courts here.

"The pursuer in support of her argument referred to the dictum of Justice Wightman in the case of *Scott* v. *Seymour*, and *Hurlston* v. *Coltman*, (Exchequer Reports, p. 219). In that case damages were claimed by one British subject from another for an assault and false imprisonment in Naples. The question arose whether the defender's plea could be held as amounting to an averment that by the law of Naples no right of action had accrued or existed, but the Court were of opinion that the plea could not be so construed, and that its effect related to procedure simply, and not to the right of action. The dicta of the Judges on the question—whether, assuming the plea had stated that no right of action existed in the country where the acts complained of took place, the action could be sustained—were merely *obiter*. Justice Wightman thus expressed himself:—'I am not aware of any rule of law which would disable a British subject from maintaining an action in this country for damages against another British subject for an assault and battery committed by him in a foreign country, merely because no damages for such trespass were recoverable by the law of the foreign country, and without any allegation that such trespasses were lawful or justifiable.' Justice Williams, with reference to this part of Justice Wightman's opinion, stated—'I am desirous of saying that, as at present advised, I am not prepared to assent to it;' and the other Judges carefully reserved their opinions, Justice Blackburn stating—'As at present advised, I think that when two British subjects go into a foreign country they owe legal allegiance to the law of that country, and are as much governed by that law as foreigners.' The dicta of the Judges as a whole do not support the pursuer's contention. The observation of Justice Wightman is mentioned by Justice Story ('Conflict of Laws,' section 307, d.), where a general principle is thus stated to an opposite effect:—'In general, where actions *ex delicto* are held transitory, and suits allowed to be maintained in a foreign country, the right of action and the nature and extent of damages must be estimated according to the laws of the place where the wrong is committed.' It may be that where the act complained of amounts to what is in this country a crime at common law, the general principle thus stated may suffer relaxation. That question, however, does not arise here. But in cases of damages for injury to property or the person, where the remedy consists in an action before the Civil Courts, it appears to be that the liability for damages, or, in other words, the right of action, ought on sound principle to be determined according to the law of the country where the wrong was committed.

"In the case of *Callender* v. *Milligan*, 11 D, p. 1174, the observations of Lord Jeffrey and Lord Mackenzie, who differed in their views, were *obiter* merely. It humbly appears to me that the view expressed by the latter is in accordance with sound principle. The passage in 'Kames' Equity,' p. 236-27, referred to by the pursuer, does not touch the question in dispute, for the learned author merely asserts the jurisdiction to entertain civil actions founded on delinquency committed abroad, and the jurisdiction to this effect is not here disputed.

"The authorities in the law of England, consisting mainly of cases of damages for alleged wrongs committed in foreign countries, appear to me to bear out the view to which I have given effect. It is repeatedly assumed and stated to be the law that an act which is not unlawful, or which can be justified in the country in which it was com-

mitted, cannot be the ground of an action in England — *Mostyn* v. *Fabrigas*, 1 Smith's Leading Cases, p. 658. The learned commentator states his view, deduced from the authorities reviewed, that to sustain an action the pursuer must shew that he has a right of action both according to the law of the country in which the act was done, and the law of England where the remedy is asked; and Addison (on Torts, p. 30) expresses a similar opinion. The judgment of the Court of Queen's Bench in the case of *Phillips* v. *Eyre* (4 E.R., Q.B., p. 1), is substantially to the same effect, and the judgment of the learned judges, delivered by Chief-Justice Cockburn, and particularly that part of it on p. 239 of the report, expresses the views which in my opinion govern the present case. In the following passage (p. 240) it is true the case of *Scott* and *Seymour* is referred to as presenting a question which may possibly be regarded as still open; but the whole reasoning on which the judgment rests, as well as the authority of Justice Story, are against the opinion which Justice Wightman expressed in that case, and support the view which I have adopted in the decision of this case."

The pursuer having lodged a reclaiming note against this interlocutor, the defenders compromised the case by a payment of £700.

Counsel for Pursuer—Rhind. Agents—Morison & Keith, S.S.C.

Counsel for Defenders—R. Johnstone—Mackintosh. Agents—Hope, Mann, & Kirk, W.S.

Friday, February 9.

FIRST DIVISION.

[Sheriff of Perthshire.

GOW *v.* YOUNG.

Poor—Poor Law Act 1845, *sec.* 70 *—Admission of Liability.*

Held (in conformity with the decision by the Second Division in the case of *Beattie* v. *Arbuckle*, Jan. 15, 1875, 2 Rettie 330) that a parish which has admitted liability for the support of a pauper, and has acted on that admission, is not entitled to withdraw it on the ground that it was made in error.

William Young, inspector of poor of the parish of Perth, wrote upon 24th November 1865 to Alexander Gow, inspector of poor of the parish of Caputh, stating that Agnes Henderson or Cameron, residing at Guard Vennel, Perth, had become chargeable to Perth parish, "which claims relief from your parish as the parish of settlement." In a subsequent letter, dated 28th November 1866, the grounds of the claim were furnished by Perth to Caputh. It was further stated —"Her husband, Alexander Cameron, a wright, was born in Dunkeld, in your parish, deserted her 28 years ago, and has not since been heard of. His father, John Cameron, was a wright in Dunkeld, and well known, but long since dead. James Cameron, a wright there, I suppose, is a brother, and I refer you to him, as I believe he is able to give you the particulars. His workshop is near the police-station. I claim upon you in respect of husband's birth. Your admission and instruction will oblige." On 5th December some further particulars were furnished by Perth to Caputh, and on 20th December 1866 the inspector of Caputh wrote to the inspector of Perth stating the result of his inquiries, and admitting that if the information he had received was correct his parish was liable, but that he would write again should he find anything to the contrary. The claim was afterwards brought before the half-yearly meeting of the Parochial Board of Caputh, held on 8th April 1867, when the meeting instructed the inspector to admit liability. The inspector of Caputh accordingly admitted liability, and repaid the pursuer, the inspector of Perth, his advances up to 11th April 1868. He then came to think that he had made a mistake in giving the admission, and he withdrew or endeavoured to withdraw it, and repudiated further liability. He did so on the ground that the pauper had been deserted by her husband in 1838, since which time nothing had been heard of him, and the pauper had supported herself in Perth, thereby acquiring an industrial settlement there. The withdrawal was not accepted by the inspector of Perth, and eventually this action was raised in the Sheriff Court of Perthshire on 6th October 1875 against Caputh for repayment of advances made, and for relief in the future.

The defender, *inter alia*, pleaded—"(3) The original admission of liability having been made in excusable error as regards the law applicable to the circumstances (then undecided), defender was justified in subsequently withdrawing the admission and repudiating liability. (4) Defender having repudiated liability in April 1868, the claim of pursuer for aliment prior to the raising of the present action is extinguished by *mora*."

The Sheriff-Substitute (BARCLAY), after a proof as to the pauper being a proper object of relief, pronounced an interlocutor containing certain findings of fact, and, applying the law to the facts as thus found, finds—"*Firstly*, That the pursuer, notwithstanding the admission of liability by Caputh in 1866, having homologated the repudiation of liability in 1868 by the defender, and of the great *mora* following thereon, cannot recover for the advances since made to the pauper prior to the date of the action: *Secondly and Separately*, With regard to the conclusion for relief of future aliment, the pauper having resided in the parish of Perth since the desertion of her husband for a period much longer than necessary for acquiring a residential settlement therein, has acquired such, and cannot, in the want of proof of her husband being alive during that period, be sent to the parish of her husband's birth: Therefore assoilzies the defender from the conclusions of the action, finds him entitled to costs, remits the account when lodged to the Auditor to tax, and decerns." In the note it was stated—"Caputh does not sue for repetition of advances made whilst liability was admitted, but Perth sues for past and future aliment as if there had been no repudiation. The pursuer homologated the recal, and for six years made no formal claim of relief. In this way the ratepayers, who were bound to supply the fund every year, are relieved from their proper burden, which is thrown upon their successors. This renders the plea of *mora* much more formidable