

1075; *Wylie v. Heritable Securities Investment Company*, Dec. 22, 1871, 10 Macph. 253; *Stair* iv., 22, 1-17, and 26, 2-10; *Aird v. Forsyth*, Dec. 13, 1853, 16 D. 197; *Duff's Feudal Conveyancing*, 274-6; *Hutchison v. Gordon*, Feb. 14, 1833, 11 S. 395; *Robertson v. Ferrier*, 12 S. 203; *Bridge v. Brown's Trs.*, July 12, 1872, 10 Macph. 958; *Hay v. Marshall*, July 7, 1824, F.C.; *Neill v. Wright*, 2 Macph. 168.

At advising—

LORD PRESIDENT—This is an action of pointing the ground by a creditor infest upon a bond and disposition in security in ordinary form.

There is no doubt that a party with such a title is justified in pointing the ground, unless something has occurred to render the pointing improper, or unless there is oppressive or nimious use of diligence.

The question was argued before the Lord Ordinary only on the ground of incompetency, and the other plea of oppression was for the first time propounded before us. With regard to that plea, it is enough to say that a creditor is entitled to use pointing of the ground to make out payment of a debt, or a portion of it, and unless it can be shown that the diligence is useless for that purpose the Court will not stop the diligence.

As to the plea of incompetency, I agree with the Lord Ordinary. The ground upon which that plea is maintained is that the creditor is already in possession under a decree of mails and duties, and it is said that a person in possession of land cannot point it. The authorities on this point are nearly all in the same terms, and have, I think, been misunderstood by the defenders. Mr Erskine on this matter says—"This action is competent to an annual renter for the arrears of interest due upon his infestment to a superior for his feu-duties, or for the retoured duties due to him before citation of his vassal's heir in an action of declarator, according to the distinction already stated, and, in general, to all creditors in debts which constitute a real burden or lien upon the lands. But it is not competent to proprietors, nor even to possessors, though not strictly proprietors, as adjudgers, liferenters, or other real creditors, who possess under their different titles, for there is a natural impropriety in pointing the ground of lands possessed by the pointer himself. The only process competent to such, for the recovery of their rents, is that of mails and duties."

It is the exception stated in the last two sentences of the passage which I have read that the defender founds upon. Now, in the first place, I think it clear that the possession here referred to is possession which, though not strictly that of a proprietor, is for the time equivalent thereto.

An adjudger or liferenter or wadsetter is, for the time, almost complete proprietor of the lands. So, when Erskine speaks of creditors who are in possession he means that class of creditors who are very nearly proprietors for the time. That is very different from the case of a creditor infest on a bond and disposition in security, which gives him only the character of an encumbrancer, as distinguished from a proprietor. So the possession meant is the full possession of the ground which it is proposed to point, and that sort of possession is had by an adjudger, and wadsetter, and liferenter. Their titles give them access to the ground. But that is not the case of the creditors here. An action of mails and duties, although a high-sounding name, is

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only a process for recovery of rent, and carries nothing more with it. The proprietor who let the lease was entitled to possess all that was not let to the tenant. But has the creditor, merely from holding a decree of mails and duties, the right to any such possession? Could he, for example, go on the ground and shoot the game, or could he work the minerals?

I am therefore of opinion that the decree of mails and duties has not deprived this creditor of his right to point the ground.

LORD DEAS concurred.

LORD ARDMILLAN—I think we can decide this case without touching on the more difficult questions which surround it. What the institutional writers say in regard to proprietors is not applicable to a heritable creditor who is not a *quasi* proprietor, like an adjudger or wadsetter.

There are two modes open to him to enforce his right. First, an action of mails and duties, which is just a warrant to draw the rents; and secondly, a pointing of the ground, which enables him to reach moveables of the debtor on the ground, whether it is let or not. I cannot see that the one remedy deprives the creditor of his right to use the other; and so I do not think that this action is incompetent.

LORD MURE—I concur. When the case was before me in the Outer House I allowed a proof, but I said in my note that I thought there was no actual incompetency in a creditor holding a decree of mails and duties bringing an action of pointing the ground. I do not see any reason why a creditor who has a decree of mails and duties should not have recourse to pointing of the ground, even to reach the effects of a tenant refusing to obey a decree of mails and duties. At all events, it is competent to use pointing of the ground to reach moveables of the landlord.

On the broader question, I agree that a heritable creditor is not a *quasi* proprietor of the class referred to by Erskine.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defenders against Lord Craighill's interlocutor, dated 29th October 1874, Adhere to the said interlocutor and refuse the reclaiming note; find the pursuer entitled to additional expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Mackintosh and Henderson. Agents—Horne, Horne & Lyell, W.S.

Counsel for Defender—Lee and Strachan. Agents—Walls & Sutherland, S.S.C.

Thursday, January 14.

SECOND DIVISION.

[Lord Gifford, Ordinary.]

AULD V. SHAIRP.

Reparation—Slander—Title to sue.

A widow, also the executrix of her husband, brought an action of damages against a person

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for slanderous statements made, it was alleged, with the object of preventing her husband obtaining a professorial chair. The husband, to whom a promise of the appointment had been made, did not get it, and after two years died. *Held (diss. Lord Ormidale)* that the widow had *qua* executrix a good title to sue.

This was an action raised by Mrs Jessie Howat or Auld, widow of James Auld, LL.D., (sometime classical master at Madras College, St Andrews, and afterwards residing at 25 Dick Place, Edinburgh), as executrix of her deceased husband, and also as an individual for all right competent to her personally, against John Campbell Shairp, LL.D., Principal of the United College of St Salvador and St Leonard, St Andrews. The Lord Ordinary repelled the first two pleas put on record by the defenders, which were directed against the pursuer's title to sue and the relevancy of the action, and thereafter his Lordship granted diligence for the recovery of writings, and appointed issues to be lodged.

The note appended to this interlocutor was as follows:—

“*Note*—In this case an anxious argument was maintained on the part of the defender, Principal Shairp, in support of the first and second pleas in law stated for him. He insisted that he was entitled, without any further proceedings whatever, and without even recovering the letters containing the alleged slander complained of, to have the action dismissed with expenses. The defender accordingly resisted the pursuer's motion for a diligence, and objected to any order for issues being pronounced.

“The defender's argument was rested mainly on the maxim ‘*Actio personalis moritur cum persona*,’—A personal action dies with the person. He maintained that an action of damages or for *solatium* for alleged slander was a personal action in the strictest sense, and that the right to raise or to insist in such an action did not transmit to the executors of the person slandered. He supported this contention by various authorities and analogies from the law of England, and also from the Roman law.

“The Lord Ordinary was much moved by the defender's argument, which he has carefully considered. If the question had been quite open, the Lord Ordinary's inclination would have been to give effect to the defence, and to dismiss the action. He thinks there is strong reason, as well as strong authority, for holding that a mere claim for *solatium* for bodily or mental pain, where no damages to estate or patrimonial injury can be relevantly stated or proved, is really a personal action, to which the Roman maxim applies.

“In the present state of the authorities in the law of Scotland, however, the Lord Ordinary has found himself obliged to repel the defender's pleas and to allow the action to proceed. It will be for the jury to consider how far the alleged slander, if proved, and if no other defence is made good, has resulted in loss and injury to the present pursuer.

“In the first place, no case has been cited by the defender in which an action like the present has in Scotland been found incompetent. The Lord Ordinary is not aware of any such case, or even of any dictum in the institutional writers directly in point, although there are expressions

which may be read consistently with the defender's view. The want of any direct authority in favour of the defender's plea is a strong ground for refusing to sustain it. The case must often have occurred.

“But there seems to be authority in the law of Scotland adverse to the defender's pleas, and there are many cases in which actions of damages similar in nature to the present have been insisted in by executors or personal representatives.

“A very well known instance occurs in the celebrated case of *Haggart v. Lord President Hope* (Final Report in the House of Lords, 2 Shaw's Appeal Cases, 125). This was an action of damages at the instance of an advocate against Lord President Hope for alleged slanderous censure uttered by the Lord President on the bench judicially, which censure was alleged to have been made from motives of private malice. In the course of the procedure the pursuer Mr Haggart died, but his trustees and executors were allowed to insist in the action. There seems to have been a question whether the trustees might not have been required to give their oath of calumny, but it was not doubted that they had a right and title to insist in the action.

“In *Mein v. M'Call*, 7th June 1844, 6 D. 1112, 16 Scot. Jur. 486, where the pursuer of an action of damages died during the dependence, it was found that the claim of damages was transmitted to his widow and executrix, who was entitled to insist in the action.

“In *Neilson v. Rodger*, 24th December 1853, 16 D. 325, 26 Scot. Jur., 156, the question was fully and carefully considered, and it was held by the Second Division (dissenting the Lord Justice-Clerk), that in an action for personal injury concluding for damages and *solatium*, where the pursuer died during the dependence of the action, her executors were entitled to insist in the action, with an issue whether the injury which the pursuer had sustained was to the injury and damage of the deceased pursuer and of the executors as representing her. The opinion of the Lord Justice-Clerk Hope, who was in the minority, is a very weighty one, but the decision is binding, at all events upon the present Lord Ordinary.

It is thought no sound distinction can be taken between an action for *solatium* for bodily injury and an action for *solatium* for slander, which occasions mental suffering. Nor will the result be different in the case where the action is actually raised by the original sufferer and afterwards insisted in by his executor, from the case where the party injured dies before raising action. No doubt the fact that the deceased did not himself raise action may be of great weight with the jury, especially if any considerable interval was allowed to elapse, but this will not affect the abstract competency of the action. Reference may be made to the cases of *Milne v. Gauld's Trustees*, 14th January 1841, 3 D. 345, 13 Scot. Jur. 151; *Smith v. Stoddart*, 5th July 1850, 12 D. 1185, 22 Scot. Jur. 532; *Giffillan v. Monkhouse*, 18th May 1824, 3 S. 22.

“But there is another element in the present case which operates strongly as a reason why the present action should be allowed to proceed, and that is, that special patrimonial damage is alleged by the pursuer, consisting not only of the loss of the late Dr Auld's former income, arising from his resignation, but also of the loss of the emoluments of the Humanity Chair, from which it is said Dr

Auld was excluded by the alleged slander complained of. It was not seriously disputed by the defender that, where there has been direct patrimonial damage, the action transmits to an executor. See *Gordon v. Davidson* (Aberdeen Bank), 26th February 1864, 2 Macph. 758, 36 Sc. Jur. 376.

“On this point of the case, however, the defender maintained that there could be no patrimonial damage, because the Chair of Humanity in St Andrews, for which the late Dr Auld was a candidate, was not vacant during Dr Auld's life, having been held by the defender himself all that time, and he being under no obligation to resign. This led to an interesting argument as to how far it was legal or competent for the defender to hold at the same time the office of Principal of the United Colleges of St Salvator and St Leonards and also the office of Professor of Humanity in the United College. On this point the Lord Ordinary has formed a pretty distinct opinion that there is no absolute illegality in the union of the two offices, it not being alleged that the discharge of the duties of the Chair interfere with, or are inconsistent with, the discharge of the duties of Principal. The provisions of the Act of Parliament of 1747 are not conclusive on the question, for although the statute provides that there shall be one principal and nine professors, this does not necessarily mean that one of the professors may not be appointed to and hold the office of Principal. The practice both in St Andrews and other Universities seems to have sanctioned at least the occasional appointment of one of the professors to the office of Principal, without involving the demission of his Chair. The recommendations of the Royal Commissioners of 1826 and 1830 never had the force of law. They were never formally sanctioned or confirmed; but even these recommendations are so qualified as to imply that a Principal may, in certain circumstances, also hold a professor's chair.

“It does not appear necessary, however, to pronounce any judgment upon this question; for the pursuer's case is not founded exclusively on the alleged illegality of the defender's plurality of offices, but also upon his intimation that he was ready to resign, and on an alleged minute of resignation. The pursuer also relied upon the late Dr Auld's actual resignation of his life-appointment of classical master in the Madras College, which resignation is said to have been made in consequence of his appointment to the professorship, which the defender stated would be vacant as from 15th May 1869. On the whole, the Lord Ordinary thinks it would be unsafe to exclude all inquiry into these matters, and to decide them as mere questions of relevancy upon the pursuer's averments.

“The result is, that in the Lord Ordinary's opinion the action must proceed. The usual order would be an order for issues, but the letters containing the alleged slander are not in the pursuer's possession, and as the pursuer intends to put these letters in issue, he moved for a diligence to recover them. The defender resisted this, not only on the grounds of irrelevancy above mentioned, but also on the ground that the letters were private and privileged. The Lord Ordinary has granted the diligence, but the defender's plea of privilege is of course reserved entire. It cannot well be judged of till the letters themselves are seen.

“As the defender's pleas were seriously and keenly

insisted in as excluding the action altogether, the Lord Ordinary has granted leave to reclaim.”

The pursuer, Principal Shairp, reclaimed, and on 15th July 1874 the Second Division pronounced the following interlocutor:—“The Lords having heard counsel on the reclaiming note, before farther answer on so much of the interlocutor of the Lord Ordinary as repels the first and second pleas, Adhere to the same in so far as its grants diligence for the recovery of writings, and appoint issues to be lodged: of new, appoint the said diligence to be reported by the first box-day, and issues to be lodged by the first sederunt-day in October, reserving all questions of expenses.

The pursuer accordingly lodged the following issues:—“(1) Whether, on or about the 17th December 1868 the defender intimated to the Duke of Portland, patron of the Chair of Humanity in the United College of St Andrews, that, as at 15th May immediately succeeding, he intended to resign said chair: whether the said patron, on or about 11th March 1869, intimated to the late James Auld his determination to appoint him as the defender's successor in said chair; and whether the said defender, in order to prevent the said James Auld's appointment to the said chair, wrongfully and illegally retained possession of said chair until after the death of the said James Auld, on or about 11th August 1871, to the loss, injury, and damage of the pursuer? (2) Whether, on or about the 17th March 1869, the defender wrote and sent to the Duke of Portland a letter in the terms contained in the schedule hereunto annexed; whether said letter was of and concerning the late James Auld, LL.D., and falsely and calumniously represents him to have been unfit to discharge the duties of Professor of Humanity in the United College, St Andrews, and as having notoriously failed to discharge his duties as Classical Master in the Madras College, St Andrews, to the loss, injury, and damage of the pursuer? (3) Whether said letter falsely and calumniously represents that the said James Auld had obtained from the patron of said chair a promise to appoint him thereto through the deceitful or fraudulent use of certificates or testimonials which did not truly represent his qualifications as a scholar and teacher, but had been given him to prevent his being dismissed from his position of Classical Master of the Madras College, St Andrews, to the loss, injury, and damage of the pursuer? Damages laid at £5000.”

Appended to these proposed Issues was the following letter:—

“United College, St Andrews,
“17th March.

“My Lord Duke—I trust that my duty to the College over which I have been called to preside will be considered to justify my laying before your Grace the impression which the news of Dr Auld's proposed appointment to the Humanity Chair has created in this University. It has been received with what I can call nothing short of consternation. Those interested in the United College feel that it would be one of the heaviest blows that could possibly be given to its prosperity. If Dr Auld is placed in that chair I feel sure that the reputation of the College as a place of education will receive a grievous shock, and that the number of students attending it will be greatly diminished. On making this assertion, which is my deliberate

opinion, I am speaking at the same time the opinion of almost all the Professors and residents in St Andrews with whom I have conversed on the subject. The grounds on which I make this statement are these—It is a well-known fact here that Dr Auld, though an amiable and respectable man, has not proved himself an energetic or efficient teacher, but has notoriously failed in his present post as Classical Master in the Madras College, which is the name of our Burgh School. In proof of this I have but to refer to the enclosed extract from the report of the Commissioners on Scottish Burgh Schools, 1868.

“If the account given in this extract describes truly his work in school among boys, how much greater will his failure be in teaching our College classes, which require much greater vigour, power of command, and scholarship. I believe that Dr Auld has forwarded to your Grace certain testimonials from some of the Professors here, of whom several are now gone, one or two remain, and of these last I am myself one. Let me inform you of the circumstances under which these were given. Six years or more ago the trustees of the Madras College became so dissatisfied with Dr Auld's teaching that they resolved to remove him from his post. Several of the Professors, believing that he was being somewhat too rudely dealt with, and feeling compassion for an amiable man in danger of losing his livelihood, wrote for him testimonials expressed as strongly as they could, perhaps somewhat too strongly. The testimonials, I believe, saved Dr Auld from dismissal. This was the object with which they were written. But they were never intended to certify to his fitness for a professorial chair; and if Dr Auld has laid them before your Grace for this purpose, I must be allowed to say that he had no right to do so. All the other candidates sent me their testimonials; Dr Auld did not do so, well aware that, in the interests of the College, I would not have given him any countenance in his candidature. Had I entertained any idea that his claims would have appeared to you superior to those of several of the other candidates, men of much higher scholarship and greater success as teachers, I should have felt it my duty to inform you of the real state of the case, as I now do. If it is still possible for your Grace to reconsider your decision, I know that the University would forward to you a memorial signed by almost every Professor, representing how great a calamity Dr Auld's appointment would be considered, and entreating that you would make some other appointment which would be likely not only not to injure the University but might be expected to benefit it.

“In doing this the Professors of the United College and of St Mary's would act, not from any personal feeling against Dr Auld, towards whom personally they are friendly disposed, but simply from the conviction that his appointment would be calamitous to the welfare of the University.

“I would only add that in making this statement I have done so with much pain, but I feel that I should be wanting in my duty both to my College and to your Grace if I did not tell you what I know to be the truth of the case.—I remain, my Lord Duke, your obedient humble servant,
J. C. SHAIRP.”

“EXTRACT from Government Report on the State of Education in the Burgh Schools of Scotland, vol. ii., page 76.

Dr Auld's Department.

“On the whole, the classical teaching resulted in the production of unsatisfactory scholars, only the two or three boys at the top of the class did well enough. The Latin prose exercise was ill done, the discipline was loose, and the boys appeared uninterested.”

The Court in the first instance took up the plea of the defender against the pursuer's title to sue.

Argued for the reclaimer (defender)—*Actio personalis moritur cum persona*. The maxim of the civil law governs here. The Law of France allows such an action to transmit as against heirs, but nothing further. The Law of England requires that the act must be legally wrongful to the complainer, and it is not enough that it causes loss to the complainer. There is no legal right of action unless a legal right of the complainer has been infringed. Addison (on Torts) describes the sort of injury a man must have endured to entitle him to bring an action of this kind. No such injury has here been inflicted. A person who actually suffers wrong is entitled to be restored. This distinguishes the present case from that of *Davidson*. Damages for alleged slander are not to be held *in bonis* of the deceased—*Syme v. Erskine*. [Lord Neaves—Is there any case in which the trustee in a sequestration pursued an action of this nature?—*Thom*.

Authorities—(Civil Law)—*Instit.*, 4, 4, 1, *actio injuriarum*, 4, 12, 1; *Gaius*, 3, 220; *Digest*, bk. 47, 10, 13, 28; *Civil Law Commentaries*; (1) *Heineccius* on *Digest*, 47, 10, § 124; (2) *Voet*, on the same, § 22; (3) *Vinnius* on *Instit.*, 4, 12, § 6. (Law of France)—*Domat*, part ii. bk. 1. tit. 1. § 10; *Pothier*, *Oblig.*, 373; *Merlan*, *Repertoire*, vol. vi, 132 § 6. (Law of England)—*Brougham's Maxims*, 909, 912; *Williams on Executors*, vol. ii, 1728; *Addison on Torts*, 11 and 925; *Starkie on Slander*, 151; *Chamberlain*, 2 Maule and Selwyn, 408, and *Lord Ellenborough* there; *Syme v. Erskine*, 4 Patou's App., 510; *Thom v. Bridges*, 19 D.

Argued for pursuer (respondent)—In the case of *Smith v. Stoddart* a widow sued for damages. [LORD ORMDALE—In the case you have quoted the damage sued for was personal to the widow suing, but here there was no damage to Mrs Auld, it being all to her husband.] (*M'Kenzie*, *Tulloch's Reps.*)—The slander here was much aggravated by the circumstances under which it was uttered and the results which followed. It is a statutory requirement that the University College of St Andrews shall contain a certain number of members, and this could not be so if one person held at the same time the two separate offices of Professor of Humanity and Principal. No such anomaly has ever existed before.

Authorities—*Smith v. Stoddart*, 12 D. 1185; *Milne*, 3 D. 345; *M'Kenzie v. Ewing*, Nov. 19, 1830, aff. July 24, 1833. 1 Sh. Sup. 101; *Tulloch's Reps. v. Davidson's Executors* (Aberdeen Bank) 3 Macq. 783; Act 1747; Report Univ. Commission, 1830; Universities (Scotland) Act, 21 and 22 Vict., cap. 85, § 5.

At advising—

LORD NEAVES—This case is one involving questions of considerable importance and interest, and certainly not unattended with difficulty.

The only points we have to consider at present are involved in the first and second pleas in law for the defender, viz., 1st, “No title to sue;” and 2d,

"The averments of the pursuer are irrelevant and insufficient in law to support the conclusions of the summons." These pleas have been disposed of by the Lord Ordinary's interlocutor in this manner,— "Repels said pleas in so far as the same are insisted in as excluding the action altogether." This interlocutor is brought under our review by the defender, who asks us in the first place to sustain his first plea, for if it were to be sustained the action as he conceives would entirely fail. Now this plea is really rested upon the maxim of the Roman law with regard to an *actio personalis*,—that this is a personal action, and, according to a dictum of the Roman law, that it falls with the death of the person. This action having been brought by Mr Auld's widow, is said not to lie in consequence of Mr Auld's death.

Now, in the first place, as regards this plea, it is not easy to say that there is an absolute want of title to pursue in any view, because the action is partly laid as upon damage to the pursuer individually. What kind of damage does not appear, and of course it is another matter whether it is relevantly stated; but as long as that is concluded for it is impossible to say that she has not a title to sue. In the next place, I conceive that this plea, with reference even to the damage sustained by the late Mr Auld, is not in our law so received and recognised as to be fatal to this action. The Roman law dealt with such actions in the case of the death of either party in different ways. In some cases the death of either party was fatal to the whole action; in others, the right of action was given to the injured party against the heirs of the wrong-doer. The Roman law, as stated in the Institutes, Book IV. title 12, sec. 1, is as follows:—"Non autem omnes actiones, quæ in aliquem aut ipso jure competunt, aut a Prætorè dantur; et in hæredem (rei) æque competunt, aut dari solent. Est enim certissima juris regula, ex maleficiis pœnales actiones in hæredem non competere; veluti furti, vi bonorum raptorum, injuriarum, damni injuriæ. Sed hæredibus hujusmodi actiones competunt, nec denegantur, excepta injuriarum actione." And it is this exception that is now founded upon. It is quite plain that actions of the nature of a proper penalty cannot be insisted in after the death of the defender, but this is the case of the death of the alleged injured party; and the Roman law there states it as a general rule that an action even upon delict may be maintained by the heir of the injured party except in one case, and that is the case of the *actio injuriarum*. Now, is this such an action? The reason of this exception in the case of an *actio injuriarum* is thus assigned by Vinnius:—"Actio injuriarum neque hæredibus neque in hæredes datur. Quod non datur in hæredes, hoc commune habet cum exteris pœnalibus:" It is treated as a penal action—an action for punishment—"quod hæredibus non datur, ejus proprium est, et hanc rationem habet, quod in ea non principaliter de damno facièndo, sed de contumelia vindicanda agitur, quam vindictam, si injuriam passus lite non instituta decesserit,"—If the person who has suffered the wrong has died without instituting an action,— "tacite remissio intelligitur: de quo duxi, et hinc est quod actio injuriarum in bonis nostris non computatur ante quam litem contestemur."

Now, if that be the ground of the law, it appears certainly to be a very arbitrary and artificial one. It may be a very fair presumption, according to

the circumstances of each case, that a party injured by a slander or libel has acquiesced,—has gone to his grave after some time without saying anything about it,—that may be a very good circumstance, when it is investigated and discovered, to relieve the other side from the consequences of that which had been done—which was not apparently felt as an injury. But to make an inflexible rule that the death of the injured party shall terminate the action, and that he shall be held to have condoned it, seems a most artificial assumption. It takes into account in no way the interval of time between the injury and the death, and in that way excludes all probable or reasonable presumption in the matter, and simply makes an inflexible rule which does not, I confess, recommend itself to my mind. Some other authorities say that it requires *litis contestatio* to keep an action alive, not only when the party brings his action, but that *litis contestatio* must take place before the action will pass to the sufferer's heirs and representatives. That is a view altogether inconsistent with the other presumption, because the bringing of the action ought to extinguish the presumption, though it should not have got the length of *litis contestatio*, and the founding on *litis contestatio* as a criterion of the action passing or not passing is inconsistent, and in my opinion an artificial rule. We do not attach the same importance to *litis contestatio* as the Romans did, and therefore I cannot think that we should be prepared to rest our judgment upon that view. There is an obvious difference in principle between an action of a penal or criminal character for punishment or for vindication of the law, and an action for money reparation to a party injured, who has died at a short or a long interval. The one is in the public interest; the other is in the interest of the private party. Money is the universal solvent, and therefore money is asked and damages are due for reparation of every possible kind of suffering and injury that a calumny or a libel can inflict on the party affected. That view of the case is evidently not in accordance with sound principle. Our own law, at least on one side of the question, is stated accurately, as I conceive, by Mr Bell, who, speaking of these actions, says:—"A delict is an offence committed with an injurious, fraudulent, or criminal purpose. Criminal law looks to the prevention of delict by punishment, example, and terror, without any view to indemnification; while civil jurisprudence, looking only to indemnification, without regard to punishment or example, raises for this purpose, by construction of law, an obligation to repair the damage occasioned by the delict." He further adds,— "The civil action for reparation, grounded on delict, is not, like the penal action in criminal law, confined to the delinquent. The wrong-doer's representative is liable for reparation; in which we follow the rule of the canon rather than of the civil law." Now this is stated only with regard to the wrong-doer's representatives,—that the civil action of reparation transmits against the wrong-doer's representatives. But the same reason seems to me to be very plainly applicable also to the case of the sufferer's representatives. For, in the first place, this draws the distinction between criminality and reparation. No representative is liable to be criminally prosecuted for his ancestor's crime, or even for a penalty, in the proper form of penalty, inflicted by the law as a deterrent from crime. No representative is liable for that by any

law, because it is a criminal action in which the public would act unjustly in making another person suffer for that which is of the nature of a crime, to which punishment is attached. But the civil action for reparation Mr Bell correctly states is not like the penal action in criminal law. It is not a penal action; it is not a criminal action. It is a civil action; and if an injury is done causing damage, a civil debt arises which may be sued for in a civil court, and the action passes against the representative of the party who did the injury, just as any other action of debt does. And therefore it seems to me that it must equally pass and transmit to the representative of the injured party, who, unless he has forgiven it, which is not to be assumed, has acquired a right to a claim of debt which may be enforced with all the usual diligences, arrestments on the dependence, and everything of that kind which can be used in any other action; and this action not being criminal, and not being penal, but for reparation only, will pass to his representative as much as it will pass against the representative of the other party.

I observe that the Lord Ordinary has said that but for the authorities in our own law he would have been inclined to have dismissed the action. I confess I have not that feeling. A person is injured by any act of wrong-doing—his character is damaged, his pecuniary affairs are affected, he loses a situation, he suffers a great deal of injury in many ways; why should that not be repaired by those that represent the actual wrong-doer, assuming always that there was wrong done? I cannot see any equity in that, and I doubt very much if that is the result of the general jurisprudence of Europe.

Now, I think it particularly necessary to look at the nature of this action. I cannot say that I look upon it as an action for mere slander, or merely for the purpose of vindicating character. It is not altogether that certainly. The statement substantially is that a line of conduct pursued by the defender, of which injurious representations were a part, but only a part, took place to the evident patrimonial loss and injury of the late Dr Auld, for which a debt arose to him,—a claim for reparation against the party who is said to have injured him. That is the nature of the action. I cannot quite see how that should not transmit. Suppose a great patrimonial loss suffered—or take the special case of a situation being lost,—supposing that he had had a situation and lost it by an injurious act, partly founded upon slander, and partly otherwise,—why should his family, who partook of his fortunes, and would have succeeded indirectly to the benefit conferred if he was in possession or was in expectation of a situation, be deprived of the benefit of what might have been a just claim at his instance, and not be entitled to the benefit after his death in the same way as if he had survived *litis contestatio*? I cannot say that I think that founded on equity or reason.

This is a very peculiar action, and in many respects it may be found, when we get the length of considering the relevancy, a very difficult action to maintain on some points, for it involves some very difficult questions. In particular, it seems to involve the question of wrongfully and illegally retaining the Humanity Chair, which is at the bottom of the whole case. It will be a very difficult action to maintain if that is not well founded, and if it turns out that Principal Shairp

was entitled to hold the chair. The plea here maintained is that the chair was vacant, and that by apparently filling it up, and by these letters to the patron, the deceased Dr Auld was prevented from getting his appointment. That is the nature of the action, and I cannot say that that is an action of mere slander, or mere libel, nor that it is confined to one single part of this case. It is a general case that is stated, and a general line of conduct which is characterised as being wrongful and injurious patrimonially, by the loss of one office and the giving up of another. We have not got the length of relevancy, and I don't go into that question. On the first plea we must hold the action to be relevant as laid, and consider whether, as so laid, the right has perished by the death of the injured party. Now, I cannot make up my mind to that even upon general principles; but I think that what I have stated is a reasonable view in the law of Scotland. Mr Bell in his Principles cites two cases deserving of attention in the 15th volume of the Faculty Collection, both of which relate to an heir proceeding against the wrong-doer—one of them, *Macnaughton v. Robertson*, where an action for reparation of actual patrimonial loss arising *ex delicto* was found competent against an heir *lucratu*s by succeeding to the offender. Now, it is to be observed as to that decision, and some others, that it does not mean that the particular offence had been the means of enriching the party, but if there is a lucrative succession by which he is liable *passive*, he will be liable to repair the injury done. The case was very fully argued. The other case is in the same volume—*Morrison v. Cameron*—and the rubric is as follows:—“Actions *ex delicto* pass against heirs if they are for damages, not punishment,” and in a note annexed it is said, “The opinion of the Court was not rested on the circumstance that the action had proceeded a certain length before the death of the original defender, but on the ground stated above as in itself sufficient,”—that ground being that criminal actions did not transmit against heirs because the object of such an action properly so called was punishment, and it could only answer its purpose by being inflicted on the delinquent himself, but that where damage had arisen by delinquency, the right to reparation was a debt which was no more extinguished by the death of the debtor than any other debt; and I should presume also, in the same way, no more extinguished by the death of the creditor than any other debt; for a man transmits his claims just as a dying man that has incurred a debt transmits his liability to his representative, if he has a representative that is passively liable. In this case it was said the pursuer by the misconduct of somebody had lost the benefit of his diligence, and in consequence suffered damage for which reparation was claimed; and to this extent the action did transmit against the pursuers, and the reporter says that this is the ground, and not the fact that the action had proceeded a certain length, and he mentions another case of *Mackenzie* in which the same view was taken. These remarks show that there is greater difficulty in transmitting these actions against the representative who may be wholly innocent than there is in transmitting the right of action to the other party. But there is another well known case, that of *Neilson v. Rodger*, which settles the point completely. It is a very remarkable case altogether. The rubric is as follows:—“The pur-

suer of an action for injury sustained in the service of an employer died during the dependence of the action from the effects of the accident. *Held* that the right to recover damages transmitted to the executors of the deceased, and that they were entitled to carry on the action." Lord Wood says, in his opinion, "The claim for damages and *solatium* embraced by this action is one which had arisen to the original pursuer Margaret Neilson during her life, and which, by the institution of the action, she had given the best proof she did not mean to abstain from vindicating, as no doubt it was in her power to have done." Then he adds, "Upon the authorities I apprehend it cannot be denied that where a claim for damages and *solatium* arises on account of bodily injury, or from any other cause, the right vests *ipso jure* and *ipso facto* prior to any proceeding or decree for its constitution, that it is a moveable claim,—is assignable either by positive conveyance or implied legal assignation, and that it passes to personal representatives." That was the view adopted by the majority of the Court. There was one opinion adverse to it, and that opinion is very well worth studying, for it is rested on a ground peculiar to that action, and not at all involved in this,—at least not in such a way as is likely to receive any effect here. The view of the Lord Justice-Clerk, who differed from the rest of the Court, was this: the party had been injured in her person, then brought her action, and then had died of the consequences of the injury, and the reasoning of the Lord Justice-Clerk there was, not that the claim, if she had died in some other way might not have transmitted, but as she, the original pursuer, had died in consequence of an act that was the foundation of the act of damages, the remedy arose from her death and vested in those alone who would be entitled to sue for what had happened by her death; in short, that her claim, though made the subject of an action for the smaller damage of being a damaged person during life, was extinguished by the larger claim competent to her representatives on account of her death. I don't know that his Lordship would have had any difficulty in the case if it had not been for this peculiarity. He says, "To me it appears essential, since death ensued from the effects of the injuries before the action came to a close, to consider whether such a claim would exclude the claim of the relatives who are entitled to compensation for the death of their relative;" and he says it could not, and that the temporary action brought in her lifetime would not transmit, because the supervening event had thrown it altogether into the shade. Now that is not applicable substantially to this case. The case is rested by Lord Wood on the footing I have stated, viz., that the right to damages and *solatium* arises *ipso jure* and *ipso facto* by the infliction of the injury, and that being a debt transmits against the heir of the delinquent, and must also in the same way transmit to the heir of the party who had suffered the damage. Now, I do not think we need go further in the case than that authority. Some other cases have been founded on which merely support the same view. There are diversities of view taken in the canon law, and in the French law, and in the English law it may be. The English law of liability and of slander,—certainly of slander,—is very different from ours, and we cannot find any safe authority there. We must look to the general principles that we have established, and to our own

authorities, and the reason of the thing, and I think both reason and authority are in support of the view that we are now taking. That disposes of the first plea in law stated for the defenders.

The second plea is directed against the relevancy; and the Lord Ordinary's interlocutor is limited—and I think very properly limited—to repelling that plea in so far as the same is insisted in as excluding the action altogether. Now, I think it is quite right to do that. If this action is brought as an action for damage to the pursuer herself, I confess I have the greatest possible difficulty in thinking that there is any relevancy, but it is so mixed up that at this stage it is impossible to say that the whole action can be thrown out. Certainly if it is intended to be insisted in, as the issue lodged seems to import, as for injury to her,—“to the loss, injury, and damage of the pursuer,”—and the statements in the record go to this that she has been injured,—if that is to be the case, I confess I don't think there is much relevancy in it. Indeed, with reference to the whole action, there is very great difficulty about its relevancy. It seems to be to me very doubtful indeed whether its relevancy and sufficiency can be reached at all without that preliminary and very difficult question being solved, whether there was an incompatibility between the Principalship and the Chair of Humanity in the circumstances that are here stated, because if there was incompatibility, that could not be cured by acquiescence either of the college or of the patron, then the chair was vacant, and it was erroneously filled, apparently to the exclusion of Dr Auld, who would have got the presentation if it had been open. On the other hand, if there was no incompatibility, and Principal Shairp was entitled to occupy the chair, it is difficult to say that damages could arise. The very important question also occurs, which may depend upon the first one, whether there was privilege. If there was an improper filling up or possession of the chair, that might be one thing; on the other hand, if the chair was well filled and sufficiently taught at the time, it would be very difficult to say that professors are not interested, and a principal above all, in stating objections to the qualifications of any gentleman who was to be brought amongst them to be entrusted with such an important class as that of Humanity. Now, these questions are involved in the relevancy of the action; and while I am quite prepared to say that we should not exclude the action, I think these questions must be carefully considered and disposed of before we proceed another step, for it is a very peculiar action, and I think requires great attention both on the part of the pursuer and also on the part of the defender, if he is right in thinking that he acted correctly, and also that he was doing nothing maliciously, but solely with a view to the interests of the university with which he was so closely connected. On these grounds I am quite prepared to affirm that part of the Lord Ordinary's interlocutor to which I have referred.

LORD ORMDALE—The reclaiming note which has now to be disposed of is at the instance of the defender against an interlocutor of the Lord Ordinary, repelling the defender's two first pleas in law, “so far as the same are insisted in as excluding the action altogether.” The first of these pleas so repelled is that the pursuer “has no title to sue;” and the other, that “the averments of the

pursuer are irrelevant and insufficient to support the conclusions of the summons."

In regard to the latter plea, it would be premature at present to deal with it; for if the pursuer has no title to sue the action, it is unnecessary, and would be idle to inquire whether the allegations, apart from the question of title, are relevant and sufficient or not. Whether, therefore, the pursuer is *in titulo* to sue the action, is the question which must, in the first instance, be disposed of. Whether her statements, except in so far as it is necessary to look at them as bearing on the question of title, or, in other words, to ascertain the nature and character generally of the action, are relevant or not, is for after consideration, if her title to sue be sustained.

The pursuer's title, as stated by her, is of a twofold character, for the summons bears to be at her instance as executrix of her late husband Dr Auld, conform to testamentative in her favour, and "as an individual, for all right competent to her personally in the premises." But as she has stated nothing whatever in the record in support of the latter branch of her title, and did not, as I understand, maintain her right to sue as an individual, independently of her representative character as executrix, the only question for consideration is, whether she has or has not a title to sue as the executrix of Dr Auld. That is a very important question, for its application to a large class of cases is obvious, and that it is also one of nicety and difficulty cannot be doubted. The Lord Ordinary himself says in the note to his interlocutor under review that, "if the question had been quite open, his inclination would have been to give effect to the defence and dismiss the action, but in the present state of the authorities in the law of Scotland he has found himself obliged to repel the defender's pleas, and to allow the action to proceed."

In examining the authorities with reference to their bearing and effect on the present case, it is essential to bear in mind that the pursuer's action, now before the Court, as maintained by her, is one for *solatium* and damages in respect of slanderous or defamatory statements alleged to have been made by the defender of and concerning her late husband Dr Auld; for although the pleas of the pursuer in the record are so expressed as to appear to point at a claim of damages in respect of acts and conduct of the defender irrespective of the alleged slander, I did not understand that the action was to be insisted in except as one laid upon slander or defamation. The Solicitor-General so expressly stated in the outset of his very able address for the pursuers.

In determining, then, whether the action is maintainable at the instance of the pursuer, it is not only necessary to keep in view that it is one for *solatium* and damages in respect of slander or defamation, but also that it was instituted by the pursuer upwards of two years after her husband Dr Auld's death, although there is nothing to show, and it is not said, that Dr Auld himself had, by raising action or otherwise, complained of the alleged injury.

In this state of matters, I have, after a careful examination of the authorities, come to be of opinion, although certainly not without hesitation and difficulty, that the pursuer has no title to sue, and that the defender's plea to that effect ought to be sustained and the action dismissed.

If the action had been purely one for loss and

damage to property, either heritable or moveable, sustained by the late Dr Auld, as in the case of the *Representatives of Tulloch v. Davidson's Executors*, cited in the course of the debate, I should have had no doubt of the pursuer's title to sue in her representative character of executrix, and in that view there would not, I suppose, have been any dispute between the parties. In actions, indeed, laid upon injury to property the claim can be sued for by or against the representatives, just as any claim for ordinary debt. That, however, not being the nature of the present action, but, on the contrary, it being essentially one for vindication of character, where the injured party himself died without raising action or claiming in any form, the maxim I think applies "*Actio personalis moritur cum persona.*" It is true that, in one sense, patrimonial interests are involved, and necessarily so, to some extent, even in such an action; for not only must it, like every other action of damages for slander if successfully prosecuted to a conclusion, result in pecuniary damages small or great, but in many such cases, and possibly in the present if it goes on, in a substantial sum in respect of special loss or damage sustained; but I cannot think that this is sufficient to remove the case from the class of personal actions comprehended by the maxim referred to. It is not to be forgotten that here, as in all cases of its class, the ground of action is injury to personal character, or, in the words of Lord Stair (1, 9, 4), injury to "fame, reputation, and honour;" and that it is only in virtue of that ground of action, supposing it to be established, that any damages could be awarded. That such is the ground of action, or medium in respect of which the pursuer concludes for damages in the present case, is manifest from the statements in the sixth article of her condescendence, where she expressly charges the defender with having slandered the late Dr Auld by "representing him to be a person unfit, both intellectually and morally, to fill the said chair,"—that is, the Chair of Humanity in the University of St Andrews. The pursuer's claim for damages and *solatium*, therefore, cannot, I think, be properly said to be in its nature one for property, or necessarily attached to or involving property. The claim is, at any rate, in its chief and primary object, to have such redress as will clear and vindicate character, and this can generally be accomplished as well, and frequently much better, by retraction and apology, or nominal damages, as by the payment of a large sum of money. There may be, and not unusually are, many circumstances strictly personal to the individual injured by slander which might render it not only undesirable, but positively painful and detrimental to him, to make it the subject of proceedings at law, or of complaint at all. It would be, therefore, as I take leave to think, unreasonable and unjust to allow such an action to be brought after the death of the injured individual by his legal representative, who might not be a relative at all, or one having the slightest interest in his character, feelings, or reputation, but an entire stranger, such as an executor creditor, having no other object but to recover a sum of money. I must own my inability to arrive at a conclusion involving such consequences. And I am all the less disposed to do so when I bear in mind that, having regard to the authorities cited on the part of the defender in the course of the discussion,

such an action as the present could not be maintained according to the civil law, the law of France, or the law of England. And that the principles of the civil law, as bearing on such a question as the present, have been to some extent imported into the law of Scotland, is manifest, I think, from many of the cases reported in the Dictionary under the heading, "Personal and Transmissible." I acknowledge, however, that it is by the authorities of our own land that we must be mainly, or, if they are clear and unambiguous, entirely governed.

The Lord Ordinary, while he states in the note to his interlocutor that he has found no case or even dictum in the institutional writers directly in point, has referred to various decisions which he considers sufficient to support the conclusion he has arrived at. But on examining the decided cases referred to they appear to me, with much deference, to be distinguishable from the present in two important particulars,—1st, In none of them was the action one for vindication of character, or in other words for *solatium* and damages in respect of slander or defamation; and 2d, In all of them that can be said to be of any importance, the action was raised by the injured individual himself, and was a depending *lis* at the time of his death. This was so in the case of *Neilson v. Rodger*, by which the Lord Ordinary says he has felt himself bound; and besides, the action in that case was laid on the ground of injury, not to character, but to the person, and so, for the reason I have adverted to, might not be held to be so strictly personal as to fall with the injured individual. At the same time, I am not to deny that an action for damages and *solatium* in respect of injury to the person, in its character and features so closely resembles an action of damages and *solatium* for vindication of its character, that I might have held myself, as the Lord Ordinary appears to have done, bound by the decision in the case of *Neilson v. Rodger*, although only that of a majority of one of the Divisions of the Court, had it not been for the other distinction so which I have referred between it and the present, created by the circumstance that the action was in dependence, and had made some progress in Court at the instance of the injured party before that party died. That this was considered an important consideration by the Judges in that case is clear, I think, from their reported opinions. Lord Wood, who appears to have been the most decided in support of the judgment, at the outset of his opinion deemed it right to notice and explain that the object of the representatives in sisting themselves as pursuers of the depending action was "not to enforce any different or larger claim than she could have done under the summons had she survived, but strictly to follow out, and in no degree to alter or enlarge, the claim which, had she survived, she would under the summons be entitled to make good." "The question is," said his Lordship, "Is this competent or not?" Lord Murray, again, begins with the observation: "This action was commenced by the deceased during her lifetime, and I think it may be competently carried on by her representatives." And the Lord Justice-Clerk—who dissented from the judgment, and held that the action, although raised by the injured party herself, and in dependence at the time of her death, could not be competently carried on by her representatives—remarked in the course of his lengthened opinion, without any challenge or contradiction that I can

observe: "It was not, I think, contended that the executors could, after the death, themselves raise an action to recover *solatium* for the sufferings of the party herself, although such right clearly existed in her."

It appears to me, therefore, that the decision in the case of *Neilson v. Rodger* is not a conclusive precedent for governing the present. Supposing the action in that case, although in reality different as regard its foundation and object from the present, to be closely analogous, there would still remain the distinction that there it was brought by the injured party herself, and was in dependence at her death, while here no action was brought, and no complaint of any kind was ever made by the injured party. That this is an important distinction appears sufficiently, I think, from the opinions of the Judges in *Neilson v. Rodger*, and it was also a feature of the civil law, and has been recognised and given effect to in the law of Scotland. Thus, in *Montgomery v. The Representatives of Walker*, 17th July 1752, M. 10,360, which was an action of damages for wrongous imprisonment, and the pursuer of which died during its dependence, the Lord Ordinary transferred it against his representatives, and found them entitled to damages, appointing them at the same time to give in a condescence thereof. This interlocutor having been reclaimed against, the report bears that although it was remitted back to the Lord Ordinary in respect of certain allegations made by the defenders, "meantime it is not amiss to observe that on this occasion it was admitted to be a point certain that even penal actions—meaning actions arising *ex delictu* or *quasi delictu*, such as actions of damages for injury to the person—"transmit in hæredes ubi est fuerit contestatu cum defuncto." And in *Calder v. The Children of Kenneth Mackenzie*, 23d July 1776, the Lord Ordinary expressly "in respect *litis contestatio* was made with the defunct," transferred the action against the representatives, and to that interlocutor the Court adhered.

The case of *Hogart's Trustees v. Hope* was also, no doubt, one of damages for defamation, but it was raised by the injured party himself, and after his death taken up and prosecuted by his trustees in obedience to his express instructions to that effect. Besides, as the point now in question does not appear to have been raised or considered in that case, little or no aid can be derived from it. The case, again, of *Mein v. M'Call*, likewise noticed by the Lord Ordinary, was one for damages, but on what ground does not appear from the report, nor have the session papers been preserved in the Advocates' Library. But I have obtained access to copies of the summons and defences in the case, and from them it appears that the action was one of damages for an aggravated assault, or rather a series of assaults. Keeping this in view, and that the action was in dependence in Court at the instance of the injured party at the time of his death, it cannot be held to be adverse to my opinion in the present case.

The case, however, of *Smith v. Stoddart*, likewise referred to in the Lord Ordinary's note, although not directly in point, has, I think, an important bearing on the question now under consideration. There it was held that a claim for damages in respect of a slander uttered against a married woman, was of a character so strictly personal to the injured party that it did not pass *jure mariti* to

her husband, but remained with herself, and could be competently sued for by her after his death, although a question might afterwards arise as to who had right to the damages recovered. It is true that in that case the Court appear to have founded very much on the ground that it would be against reason and justice to prevent the pursuer clearing her character from a gross slander which had been uttered against her. But that is just the principle which I think ought to be given effect to in the present case—viz., that the right to vindicate character from slander adheres so closely to the injured party that it is for that party, and that party alone, to sue an action for reparation,—it being a different question altogether who may have right to the damages, if any, that may be recovered. Such, I think, is the effect of the opinion of all the Judges in the case of *Smith v. Stoddart*. Lord Mackenzie, who delivered the leading opinion, at the outset, after remarking that there was a material distinction between an action for vindication of character and the case of *Gauld v. Milne*, the soundness of the decision in which he seriously questioned, proceeded to observe with reference to the case with which he was more immediately dealing: "It is just a conclusion for vindication of character that the law says cannot be in the form of a declarator, but can only be by concluding for pecuniary conclusions. It cannot be said that the right to vindicate the character is one of property which passes to the husband *jure mariti*." Lord Fullarton, who concurred with Lord Mackenzie, held not only that a right to vindicate character did not pass *jure mariti*, but was from its nature not communicable at all,—marking that there were some grounds of action strictly personal to the wife herself, "and cannot be communicable—such as sensibility to personal wrongs, or personal contumely—which are absolutely confined to her, and are in their nature inalienable." The other Judges, Lord Cunningham and the Lord President, also concurred, the latter observing that he considered the action in *Milne v. Gauld* to be different altogether.

The subsequent case of *Thom v. M'Queen*, 11th March 1857, 9 D. 721—where it was held that a claim of damages in an action for wrongous imprisonment at the instance of an individual who became bankrupt and was sequestrated during its dependence, passed to the trustee in the sequestration—is worthy of notice, for the distinction evidently pointed at by the Lord Justice-Clerk (Ingليس) between such an action and one for reparation and *solatium* for injured character, when he prefaced his opinion by the remark,—“I say nothing as to a question of defamation, or a case where slander is involved, but speak merely of the case before us of *solatium* for imprisonment.”

I have now examined the authorities in the law of Scotland so far as they were cited in argument, and so far as I myself have been able to discover any of importance bearing on the question under consideration, and, having regard to their true import and effect, they appear to me to be adverse to the pursuer's title to sue the present action. I am therefore of opinion that the defender's first plea in law ought to be sustained, the interlocutor of the Lord Ordinary reclaimed against recalled, and the action dismissed.

LORD GIFFORD—This case is extremely important and interesting; and after the best con-

sideration that I have been able give it, I have come entirely to be of the opinion expressed by Lord Neaves. I think I may say that I concur in every one of the observations which Lord Neaves has made, including the criticism which he made upon the note and the interlocutor under review; for I don't think I would have expressed that note in exactly the same terms, although in substance I still adhere to it, if I had had the benefit of the extremely able and instructive argument which we have had in the Inner House. In the first place, I think I have, both in the interlocutor and in the note, failed sharply enough to distinguish the two pleas with which the interlocutor deals. I think we must take them separately, and in their order. The question of title must be regarded separately from the question of relevancy. I have slumped them both in the interlocutor, and to a certain extent in the observations contained in the note. The question of title is, Has the pursuer, upon her own showing, a title to sue the claim which she here makes? And it is no answer to that to say that the claim is bad in law, for that is the meaning of the plea of irrelevancy. We must assume that she will make good her law when she comes to discuss the relevancy. But the plea of title is, that she is not to be heard to discuss anything, because, upon her own showing she has no claim to state. Upon the question of title, therefore, which has been the main question argued before us—although incidentally, and necessarily almost, reference has been made to the plea of relevancy—upon the question of title, I think the sole question has come to be, whether an action of damages for reparation for slander is the case before us, and, as stated by the pursuer, transmits from the late Dr Auld himself, to whom undoubtedly it would have been competent, to his widow and executrix, the present pursuer. Now, I concur with Lord Neaves that the action, being laid at her own instance as an individual as well as in her representative character as executrix, affords a separate ground for saying that she has a title to sue. She may have no claim in her individual character, but she certainly has a title to sue; and we can only repel her title to sue by finding that, in point of law, and assuming her statements to be all correct, she has no individual claim. But we cannot even get that length without sustaining the title to sue. Apart from that, however, and viewing the action, as it undoubtedly substantially is, an action of reparation for the injury which her husband sustained, and which she *qua* his executrix has sustained, I think the title to sue must be sustained. In the first place, this is not an action for pure *solatium*. I am not sure that the action, even if it had been in that character alone, would not have transmitted. But that is not the action with which we have to do. It is an action for reparation and damages, in which specific and very precise patrimonial loss is set forth by the pursuer. In considering the question of title to sue, I assume—I must assume, because that is the condition of the argument—that patrimonial loss has been sustained—that a year or two's salary has been lost by the conduct of Principal Shairp, of which she complains. Of course, in my present observations I don't in the least fore-judge any of the defences which Principal Shairp has stated. For aught I know at present, all these defences may be affirmed; but in considering the pursuer's title to sue I assume that the pursuer's statements

are true, and that she will be able to substantiate them. Now, the loss complained of by the pursuer is undoubtedly a loss resulting substantially from slander. In that respect I agree with Lord Ormisdale that it is hardly an action, looking at the pursuer's own statement, for wrongful acts so much as for wrongful words; but wrongful words may create very serious patrimonial loss, and I cannot think that there is any absolute law that has ever been admitted in Scotland that, if a person commits a verbal injury which results, it may be, in the most serious patrimonial loss to another, that other loses his action, and his estate loses it, because he may happen to die before raising an action to make his claim good. I cannot distinguish this case, which is an action based upon slander, from any other action of reparation and damages. Suppose that, instead of being an action for damages resulting from slander, it had been an action for damages resulting from personal injury—such as was the case in *Neilson v. Rodger*—in both cases the pursuer's demand is for reparation to make good the loss which had been sustained from personal pain. I cannot distinguish between pain of the body and pain of the mind in principle. *Solutum* is due for the one as well as the other. Actual specific damage may be due for the one as well as for the other; and although there may be the element of character embraced in it, that element arises only incidentally, because, as has been frequently remarked, reparation for injury to character can only be attained, apart from the old remedy of *palinode*, by concluding for a pecuniary sum. Now, viewing this as a case where the pursuer, as executrix of Dr Auld—for it is in that capacity that I mainly regard the action—says that the estate to which she has succeeded has been injured by the slanderous and wrongful actings of Principal Shairp, I can find no principle, either in equity or in our own law, to exclude that action at the instance of the executrix. It is true that the Roman law excluded an action for injury at the instance either of the party injured or of the party who had committed the injury. They did not transmit in either case,—neither against the injurer nor to the representative of the injured. But I don't find that principle adopted in our law. Even in other laws, which are fairly enough looked to in this respect, it seems to have been adopted with some measure of qualification, and I find no reason for holding that the Roman law, either in its *dicta* upon that subject, or as modified by the canon law, was ever adopted by the law of Scotland. In that respect I would seek to modify the expression of opinion with which the note to my interlocutor commences. But if we turn to our own law, I think it quite clear that an action of reparation for personal injury transmits to representatives; and I go no further on that matter than the case of *Neilson v. Rodger*. That was an action for personal loss, and it was held that the executors might sue themselves and carry on the action. I feel myself bound by that decision, and I cannot make a distinction between it and the present case, arising merely from the circumstance that in that case the action was raised before the original pursuer had died. *Litis contestatio* had not taken place because the pursuer had died immediately after the summons was raised, and before any defences were lodged; and, therefore, if that circumstance alone were to be held to be the principle

of the decision in the case of *Rodger*, it would be introducing a rule of the most arbitrary description, and fraught with consequences which might be exceedingly unjust. How long after the injury is sustained is the pursuer to be allowed to raise the action? If she survives two or three months and then dies without raising it, is that to cut her out? If she dies very soon after the raising of it, is that not to cut her out? *Litis contestatio* is out of the question; and the only principle sought to be fixed as determining this point of the case, is that there is presumed forgiveness, but is the presumed forgiveness always a question of evidence? In the present case it is said two years elapsed, but then we have this very material circumstance set forth by the pursuer, that she had not got access to the terms of the slander, and the slander was a slander committed not in Dr Auld's presence or before his face,—assuming it to be a slander, for of course I am not saying whether there was a slander or not,—but it was a slander committed by Principal Shairp, as is alleged, secretly, behind Dr Auld's back, in a letter addressed to the patron, of which, if he knew anything, it might only be because of its being incidentally mentioned to him by somebody who knew of it. Now, the defender may have a defence on the ground that there has been condonation or forgiveness, but plainly that is not to be inferred from the mere fact of his having died before the action was raised. Unless a statutory rule had been introduced that a party who claims reparation for injury shall lose the claim if during life he does not raise an action for it, I feel myself quite unable to lay down such a principle as that. Therefore, the case of *Neilson v. Rodger*—that matter being out of view—is a direct authority in the present case, although there the injury was to the body, and here the injury is to the mind. But there is the additional circumstance that in the present case we must assume that there has been separate patrimonial loss to Dr Auld's estate. That circumstance by itself, I think, is conclusive on the question of title. It is sufficiently set forth upon the record that pecuniary loss has been sustained. It says that Dr Auld, in consequence of Principal Shairp's actings, was two years without employment—he was two years deprived, that is, of the emoluments of the chair, a presentation to which had been promised to him by the patron. There is the additional element that in consequence of Principal Shairp's intimation that he was only to teach for the remainder of that session, and then to resign as on a particular day, Dr Auld, on getting the intimation from the patron that he was to receive the presentation, resigned his position as teacher in the Madras College, and that he has not only therefore been deprived of the emoluments of the chair to which he expected to be presented, but he has been deprived of the emoluments and the situation which he then held. I think it was almost conceded in argument that, although personal actions might not transmit, yet if there were pecuniary results—a claim for reparation or for making good pecuniary loss—they undoubtedly transmitted. Thus, even in the case of *Tulloch's Representatives*, where it was laid on fraud, the action was held to transmit against the representatives of the party held to be fraudulent. As to its being a penal action, it appears to me that the word penal is used ambiguously—that it sometimes means an action *ex*

delicto or *quasi ex delicto*, and sometimes means an action for the purpose of inflicting punishment. Now, I demur altogether to the idea that an action *ex delicto* will not transmit. The question about transmission is not the cause of the action. An action *ex delicto* undoubtedly transmits. An action for the recovery of stolen goods is the strongest case that can be put of an action *ex delicto*. But surely it never could be contended that a man whose goods had been stolen would not have an action against the representative of the thief to recover the stolen property. That is not a penal action; it is an action *ex delicto*, for there can be no greater delict than theft; but it is not a penal action. It appears to me that the present action is not a penal action. It is not an action to inflict punishment on Principal Shairp, supposing him found to be liable in all that is sought against him. It is an action to recover what the pursuer says the estate that she represents has lost by that delict or *quasi delict*. In that sense it is not a penal action at all, and it is a fallacy and a delusion to say that penal actions or actions *ex delicto* don't transmit. Penal actions don't transmit because it is impossible to punish a dead person; but when the limitation of the action is *ad civilem effectum* to recover the loss which the delict has caused, then I think that is just a debt which transmits like any other debt against the party who has become the debtor, and in favour of the representative of the party who has become the creditor. In the present state of the argument, and in the present state of the case before us, therefore, I am of opinion that the plea of want of title to sue should be simply repelled, and the action held a competent action, to be insisted in by Mrs Auld as the representative of her husband.

The next question, which is also dealt with in the interlocutor, is as to the relevancy. Now, I repelled that plea in the Outer House, so far as insisted in as excluding the action altogether. That is not a very happy expression, but my meaning was to repel it *hoc statu*, that it might be discussed, as these actions are most conveniently discussed, along with the issues. We will then see exactly what the pursuer insists for, and what issues she proposes to take. Issues have been lodged, but I don't think we have had any argument on the terms of them. The argument was confined to the plea of title, and therefore, before saying how far this action is relevant, or how far she is entitled to any of the issues, or some of them, which she proposes, I would prefer hearing the parties on these issues further. And I am not disposed to go further just now than simply to adhere to the interlocutor—or rather to vary the interlocutor to the effect of simply sustaining the plea of title. We have already recovered the documents, which was another object I had in view in *hoc statu* repelling the plea; and I think we should appoint parties to be heard on the issues and the relevancy, and we will then see what course the case is to take. I concur with the observations made both by Lord Neaves and Lord Ormidale as to the difficulty and nicety of some of the questions which we cannot avoid seeing a-head of us—in particular, how far it was competent for Principal Shairp to retain the Humanity Chair after becoming Principal of the College. It is quite plain that, through that question the pursuer's claim lies to a very large extent—so much so, that she

has proposed a separate issue on that point. It was pressed upon us very strongly that that is not a question in any view for a jury. Perhaps it may be reached through a jury, but it is plainly a question of law, and considerations like that—and there are some considerations of a similar kind—strongly point to the expediency, if it is competent, of trying this question in some other form than by a jury.

LORD JUSTICE-CLERK—This is a very important case, and I must say I have found very great difficulty in coming to a conclusion upon it. We are now engaged, however, in considering only one question, viz., whether the pursuer has a title to sue this action; and to the extent of repelling that plea I concur with the opinion of Lord Neaves and Lord Gifford, but there is no doubt that although we only sustain the plea in the meantime so as to enable the action to proceed, we have to decide an abstract question of law which in terms, as far as I have been able to see, has never yet been the subject of direct decision; I mean, whether it is the law of Scotland that a personal action dies with the person? If this be a personal action, and that is the law of Scotland, then of course the pursuer has no title to pursue. But I am of opinion that it is not the law of Scotland—that the brocard fails when applied in our system, both because we do not adopt the distinction between personal and real actions which prevails in the Roman law, and also because it is not our law that an action, however personal, necessarily dies with the person. In regard to the first, there will be found in Lord Stair's Institutes, Book 4, title 3, section 45, the strongest possible refutation of the Roman distinction between real and personal actions; and that of itself would make it impossible to cite the Roman brocard as necessarily applicable to the law of Scotland. But, in the second place, I can find no authority whatever, and no *dictum* in any one of the institutional writers, or in any decided case, to the effect that we have adopted the view of the Roman law that personal actions do not transmit, and I don't find that any of the Continental systems have adopted that law in its entirety. The canon law has to so large an extent modified the views of Continental jurists that I don't think that the civil law is now regarded as an authority in that matter in any of the systems which have substantially adopted that civil law as their basis. The law of England, singularly enough, does seem to coincide in result with the civil law, but even that is based upon another principle, viz., that a personal action is not assignable or transmissible at all; but that, of course, we do not adopt; nor do I understand it to be contended that, to the extent of referring to injuries of the person, the doctrine applies at all. The argument seems to be confined to the case of slander, and the case of slander alone. At the same time, while it is very clearly laid down by the French authorities that a personal action may transmit against the heirs of the party doing the injury, I rather think that it is the prevalent view of the Continental jurists that it does not transmit to the heirs of the party injured. The question is, What is our law on that subject? Now the authorities are unquestionably by no means very precise on this matter, and Lord Ormidale's very able review of them, I think, brings out the difficulty of the question in a very strong light. It is said that this is an action for vindica-

tion of character, and that there is a different rule to be applied to an action of that kind than that which would be applicable in a case of personal injury. I don't think that this is an action for vindication of character. Slander, no doubt, under the canon law, and still in England, may be the subject of penal prosecution before the Commissary Court, and, I believe, in our old forms the Procurator-Fiscal was wont to intervene in an action of that kind. In the second place, although not in a penal form, it might be the subject of an action for vindication of character. I mean, if that form were adopted which was introduced, of concluding for a palinode or retraction. That was a proper action for vindication of character. But when a party sues in the civil court he does not conclude for vindication of character, but concludes for that which he wants, viz., a sum of damages in reparation of the injury; and however the injury arose, whether from injury to character, or person, or substance, is of no moment. The nature of the action is an action of damages for reparation of an injury, and for nothing else. And, therefore, I don't think that it is a sound distinction in such a case that this is an action for vindication of character, as distinguished from an action of damages for reparation of a wrong. The present action, however, is an action for the reparation of a specific wrong, which is said to have been carried through and effected by means of slanderous imputation; and in that respect, perhaps, it stands somewhat differently from an ordinary action purely for vindication of character. I see that this question may come up again in the course of the investigation of this case, and possibly may present itself in a very different aspect, or at least in a different aspect, and therefore I wish not to indicate or express any opinion except as far as these principles are applicable to this specific plea. I can conceive considerable difficulties in holding that a pure action of defamation so transmits to executors, that executors or creditors having no connection with the deceased at all, except the fact that they are executors, would be entitled to raise it after an interval of time. That is a question I don't think we need go into. But this is an action for the specific damage suffered by Dr Auld in being excluded from the Chair of Humanity by means of slanderous imputations made to the patron; and if these be a relevant ground of action, and sufficient proof of the ground of action which would have enabled Dr Auld to have recovered damages during his lifetime, I cannot doubt that the present pursuer is entitled to insist in that action.

I have only one word to say on the cases of *Smith v. Stoddart* and *Milne v. Gauld*, because I think the case of *Smith v. Stoddart* was pressed rather further than the thing decided will bear, or that the Judges that decided it intended. They decided nothing but this, that where there are imputations made upon the character of a married woman, she has, whether married or a widow, a right and title to vindicate her own character. That does not conflict in any degree with the right passing to the husband in this effect, that the husband may sue for injury done to his wife—which I take to be a proposition not to be contested—or that his executors might have right to damages which the wife might recover, and one of the Judges expressly saves that. I may mention for the information of parties that on turning to Voet, 47th Book of the

Pandects, title 10, section 6, there will be found a decision of the Dutch Courts exactly applicable to that matter, coming to this, that while the husband beyond all question has a right to vindicate as an injury done to himself the character of his wife against aspersions, she also, if her character be personally involved, is entitled to sue on her own account. I have nothing further to add upon this matter except to say that the question of proof, and also the question in regard to the legal right of the Principal to continue to hold this office for the purpose of excluding Dr Auld, are questions of great difficulty, and pure questions of law; and I concur in thinking that while we sustain the title to sue it would be well to put the case in a position to be investigated otherwise than by sending it to a jury; but that is for the parties to consider; and we shall now repel the first plea in law, and appoint the parties to be further heard.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming note for Principal Shairp against Lord Gifford's interlocutor of 30th June 1874—Adhere to said interlocutor in so far as it repels the first plea in law for the defender, and appoint parties to be further heard, and *in hoc statu* reserve all questions of expenses.”

Thereafter, on January 14th, 1875, the Court heard counsel on the question and relevancy, and deeming that the law and fact were inextricably involved in one another, pronounced an interlocutor as follows:—

“The Lords having further heard counsel in the cause—in respect the parties express their willingness that the Court shall determine the mode in which the facts shall be ascertained, before answer allow to both parties a proof of their respective averments; and allow the pursuer to add the word “maliciously” to the 8th article of her condescendence, the proof to be taken before one of the Judges of this Division of the Court, and continue the reservation of the question of expenses.”

Counsel for Principal Shairp—Dean of Faculty (Clark), Q. C., and Lancaster. Agents—Tods, Murray, & Jamieson, W. S.

Counsel for Mrs Auld—Solicitor-General (Watson) & Smith. Agent—Thomas Spalding, W. S.
[J., Clerk.

Friday, January 8.

SECOND DIVISION.

[Lord Shand, Ordinary.

TRUSTEES OF SIMPSON'S ASYLUM *v.* JAMES GOWANS.

(*Ante*, vol. xi., p. 309.)

Lease of Minerals—Lordship—Construction.

Terms of mineral lease held to embrace the entire freestone of a quarry under the classes of ashlar and rubble stone, so that all shaped stone sold by measurement fell under the former category, while all unshaped stone sold solely by weight fell under the latter.