this clause can be held to exempt certain individuals from duties imposed on other citizens whose property is within the old boundaries. Now, the maintenance of the footways is a duty incumbent upon the citizens of Glasgow under the Police Acts of that city. I have therefore come without difficulty to the conclusion that though it is a somewhat hard case that those who keep up their own private footpath and street should also maintain this pathway, yet the burden imposed on them is one which they must bear.

Whether they must bear it to the effect of being compelled to lay the footpath with granolithic pavement is a totally different question, of which the Dean of Guild is a much better judge than this Court can be.

LORD YOUNG—Upon the whole, though not without considerable difficulty, I concur in the result at which your Lordship has arrived, that the respondents are liable as proprietors of the adjoining ground in all obligations respecting this foot-pavement as long as it is not taken over by the town. I must say, however, that I regret litigation of this sort exceedingly, and that I think it would be very much for the general public convenience, and probably for the improvement of the paths in cities like Glasgow, if they were under public authority and control, and under the charge of public officers whose duty it would be to see that they were kept in good order, and to raise the money necessary for the purpose by general assessment.

LORD RUTHERFURD CLARK—I am of opinion, though not without considerable hesitation, that these footpaths fall within the ordinary rule applicable to footpaths in the Glasgow Police Act of 1866.

LORD TRAYNER concurred.

The Court recalled the interlocutor appealed against, sustained the first plea-in-law for the petitioner, repelled the first four pleas-in-law for the respondents, and *quoad ultra* remitted to the Dean of Guild to proceed with the cause.

Counsel for the Petitioner and Appellant—Lees—Craigie. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents—Dickson—M'Lure. Agents—Millar, Robson, & Innes, W.S.

Thursday, June 22.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

(With three Consulted Judges of the Second Division.)

BERN *v.* MONTROSE LUNATIC ASYLUM.

Reparation—Personal Injury—Title to Sue—Executor.

Held, by a majority of Seven Judges (*diss.* the Lord Justice-Clerk and Lord Trayner—and *rev.* judgment of Lord Kincairney), that an executor has no title to institute an action of damages in respect of personal injury sustained by the deceased party whom he represents, unless he alleges that such injury resulted in patrimonial loss.

Auld v. *Shairp*, December 16, 1874, 2 R. 191, *distinguished*, in respect that in that case patrimonial loss was averred.

Opinion by Lord Young that a husband may sue for damages on account of injuries to his wife's person, though these injuries do not result in her death.

Opinion by Lord Kincairney, *contra*.

This was an action of damages at the instance of Charles Bern, as executor-dative *qua* husband of the deceased Mrs Bern, his wife, and also as an individual, against the Royal Lunatic Asylum of Montrose.

The pursuer averred that his wife, who was a patient in the defenders' asylum, had, shortly before her death, been grossly maltreated by certain of the attendants in the asylum; that this ill-treatment had caused her great physical and mental pain, and had resulted in her death; and that as it had been inflicted by said attendants in the course of their employment, the defenders were responsible therefor.

The defenders pleaded, *inter alia*—"(2) The pursuer has no right, title, or interest to sue, either as an executor or as an individual."

Proof was allowed, but as the case was finally disposed of on the question of title, it is unnecessary to refer to the results of the evidence further than to say that the pursuer's wife was insane at the date of the alleged injury, and remained insane until her death, and that her death was proved to have been due to natural causes and not to violence.

On 30th June 1892 the Lord Ordinary (KINCAIRNEY) found it not proved that the pursuer's deceased wife was injured by the fault of the defenders, or of those for whom they were responsible, or that her death was caused by such fault, and therefore assoilzied the defenders from the conclusions of the action.

"*Opinion.*—[*After expressing the opinion on the evidence that the pursuer's wife had died from natural causes*]—The responsibility of the defenders for the death of Mrs Bern being thus negatived, the importance of the case to the pursuer, *i.e.*, in a pecuni-

ary point of view, becomes comparatively slight. But the question remains, whether he is entitled to recover damages on account of the injury to his wife, although it did not cause her death.

"The first question is as to the pursuer's title to sue this claim. He puts it alternatively on his own right, and on his office as his wife's executor. His counsel was at some difficulty in selecting between those alternative titles, but ultimately he preferred to put his case on his own title. But I am of opinion that he has no title of his own. If Mrs Bern was unlawfully injured by those for whom the defenders are responsible, there was vested in her a right of action against them. They were due her a sum of money. In the circumstances, had Mrs Bern lived, that would, I suppose, have been sued for by her husband as her administrator, probably without an appointment as curator. But the money would have belonged to her, and as a fund accruing after the Married Women's Property Act, would not have passed to her husband *jure mariti*. Sub-section 2 of section 3 of the Married Women's Property Act 1881 would have applied. On that ground I think that this right of action has not passed to the pursuer *jure mariti*, but was vested in Mrs Bern as her separate estate.

"I am of opinion, however, that the claim transmitted to the pursuer as her executor. There is here no room for the suggestion that she might have elected not to press the claim. The point seems ruled by *Auld* v. *Shairp*, 16th December 1874, 2 R. 191; and I think that the pursuer's title as his wife's executor cannot be rejected consistently with that judgment.

"The defenders founded on the case of *Wight* v. *Burns*, November 30, 1883, 11 R. 217, in which doubt was expressed as to the title of the executors of a person deceased to sue an action of damages for injury to that person during life. But it appears that in that case the point had not been argued at the bar. No reasons whatever are given in the opinions for the doubts expressed, and the decision in *Auld* v. *Shairp* is not questioned. I apprehend I am therefore bound to follow the judgment in that case. I therefore sustain the pursuer's title as his wife's executor to make this claim, and it remains to be considered whether it has been established against the defenders."

The pursuer reclaimed, and after a debate in the course of which counsel for the pursuer gave up the plea that the pursuer had a title to sue *qua* the deceased's husband, the Court appointed the cause to be heard before Seven Judges, "to be argued on the question whether the pursuer as executor-dative *qua* husband of the deceased Mrs Bern, his wife, has a title to sue the action."

The pursuer argued—Where a person suffered an actionable wrong, whether in the form of injury to the person, wrongous apprehension, defamation, or in any other way, he had a right to pecuniary compensation. In other words, he had a claim of debt against the wrongdoer, and this right was an asset belonging to his estate which transmitted to his representatives—*Wights* v. *Burn*, November 13, 1883, 11 R. 217; *Neilson* v. *Rodger*, December 24, 1853, 16 D. 325, esp. Lord Wood's opinion.; *Milne* v. *Gauld's Trustees*, January 14, 1841, 3 D. 345; *Auld* v. *Shairp*, December 16, 1874, 2 R. 191; *Smith* v. *Stoddart*, July 5, 1850, 12 R. 1185. Such a claim was assignable, and passed to a trustee in bankruptcy—*Thom* v. *Bridges*, March 11, 1857, 19 D. 721. It also transmitted against the wrongdoer's representatives—*Evans* v. *Stool*, July 15, 1885, 12 R. 1295. The fact that in *Neilson* v. *Rodgers* and *Thom* v. *Bridges* the actions were instituted by the injured parties was not a valid ground for distinguishing these cases from the present, for there was no principle in holding that a pecuniary claim did not transmit unless the person in whom it was vested instituted an action for its recovery. Opinions of Lord Neaves and Lord Gifford in *Auld* v. *Shairp*. In some cases the fact that no action had been brought by the injured party might raise a presumption that he had abandoned his claim, but that consideration did not apply here, where the injured party was insane. On principle and authority the pursuer was entitled to succeed.

The defenders argued — There was no allegation here that the injury complained of had resulted in patrimonial loss. The whole foundation of the action was the injury done to the feelings of the pursuer's wife. The claim was accordingly one to which the maxim *personalis actio moritur cum persona* was peculiarly applicable. Digest, 47, 10, 13; *Jackson* v. *M'Kechnie*, November 13, 1875, 3 R. 131. Opinions of judges in *Beckham* v. *Drake*, 1849, 2 H. of L. 579. In *Auld* v. *Shairp* patrimonial loss was averred, which distinguished that case from the present. There was also a recognised distinction between cases where the injured party had and where he had not raised an action of reparation—*Wood* v. *Gray & Sons*, L.R. App. Cas., 1892, 576, *per* Lord Watson, 580.

At advising—

LORD M'LAREN—The question referred by the First Division of the Court to the Seven Judges is, whether the pursuer, as executor-dative of his wife, has a title to sue this action?

For the purposes of this inquiry it may be assumed that the summons libels a relevant charge of assault on the pursuer's wife by one of the nurses of the asylum, acting within the scope of her employment, and under circumstances which render the trustees of the asylum civilly responsible for her act. I purposely refrain from entering on the subject of the evidence which has been laid before the First Division, because the question of fact has not been referred to us, and also because the question of title to sue depends on averment, and has to be considered exactly as it would have been if the point had been raised by preliminary defences, and before inquiry into the facts. The objection to the pursuer's title is founded on the rules of the civil law which limit the transmission

of rights of action to and against heirs in the cases of penal actions and actions arising out of personal injuries. These rules are very distinctly set forth in the Institutes (iv. 12, 1), the material points being these—(1) penal actions and actions of compensation for injury do not transmit against the heirs of the wrongdoer, but as regards the right of the heirs of the person having the claim this distinction is taken—sed heredibus hujusmodi actiones competunt non denegantur, *excepta injuriarum actione et si qua alia similis inveniatur.* (2) Pœnales autem actiones, quas supra diximus, si ab ipsis principalibus personis fuerint contestatæ et heredibus dantur, et contra heredes transeunt.

It is contended by the defenders that the right to institute such an action as is before us ought to be subject to the limitation which affects the *actio injuriarum* of the Roman law.

It is stated in the opinions of the Judges by whom the case of *Auld* v. *Shairp* was decided that this rule has been followed in France and other states whose jurisprudence is founded on the civil law. We know that this rule has been received into the law of England, and into the legal systems of the American States and British Colonies, which follow the common law system of England.

If, then, the claim of the executor in this case is maintainable, that must be because the law of Scotland, which in other questions of civil and personal right gives great weight to the principles of the Roman jurisprudence, has in this instance separated itself from the rest of the civilised world, and has conceded a right of action which the courts of other countries from considerations of public and private convenience have refused to recognise.

If this be so, one would expect to find in the institutional writers and in the decided cases clear evidence of the existence of such a right. But with the doubtful exception of *Auld* v. *Shairp*, which I shall presently consider, it is admitted that there is no trace of the recognition of such a right on the part of the executors of an injured person; and it is not a satisfactory answer to say that this right is covered by the general law which vests assets of a deceased person in the executor, if it be the case that in other legal systems the right to sue a personal action is denied to executors. If the right existed, it is not likely that executors would refrain from asserting it. Probably one-half of all the cases that are set down for jury trial in this court are claims of damages for injury to person or reputation; and it cannot be said to be an unprecedented thing that a person having such a claim has died without raising an action. That being so, the circumstance that such claims have hitherto been in abeyance can only be explained by the supposition that the general opinion of the country (including the legal profession) has been adverse to the title of an executor to institute an action for personal injury supplied by the ancestor.

But the argument founded on the non-assertion of such a right on the part of executors is strengthened by the consideration that a more limited right has been accorded by our law to executors and representatives—I mean the right to follow out and insist in an action raised by the injured person himself. The first and leading case on this subject is *Neilson* v. *Rodger*, 16 D. 325. Lord Justice-Clerk Hope in that case dissented in a weighty opinion. Lord Murray gave his opinion in these terms—"This action was commenced by the deceased during her lifetime, and I think it may competently be carried on by her representatives. I do not, however, mean to lay it down that it could have been raised by them after her death." Lord Cockburn and Lord Wood, who agreed with Lord Murray in sustaining the title of the representatives to carry on an action already begun, certainly used arguments that might be urged in support of the present claim; but neither of these judges went so far as to say that the executors could have instituted such an action in their representative capacity, and subsequent cases have not extended the right of executors where the ground of action was bodily injury. In the recent case of *Wood* v. *Gray* in the House of Lords (L.R. App. Cas. 1892, 576, and 19 R. 31) Lord Watson, who delivered the leading opinion, treats the rule established by the case of *Neilson* v. *Rodger* as a rule of positive law, but reserves his opinion on the question whether executors would have a title to institute an action after the death of the injured person. Thus the state of the decisions is, that in this Court and in the House of Lords the right of the executor to follow out an action instituted by the ancestor is treated as a right *sui generis*, the larger question being expressly reserved. In these circumstances it appears to me that *Neilson* v. *Rodger* cannot be regarded as an authority which ought to influence the decision of the present case one way or the other.

There are many reasons against the title of an executor, or an assignee, or trustee for creditors to institute an *actio injuriarum*, which do not apply to his claim to carry on such an action where already begun. In the case of actions of slander, and claims of damage for seduction, or breach of promise of marriage, the institution of such an action always and necessarily puts the character of the pursuer in issue. The injured person may have exeellent reasons for refraining from bringing such an action, and is it to be said that next-of-kin who have sustained no injury, and who merely wish to make money out of the sufferings of the deceased, are to be entitled to institute an action which the injured person would have disclaimed, and with the result of giving publicity to facts which no pecuniary inducement and no pressure from creditors would have induced him to disclose. This argument is not so strong in the case of actions of reparation for bodily injuries. But even in such cases it is a fact perfectly familiar to counsel that

the injured party often refrains from pressing his claim, or accepts an inadequate sum of compensation because of his unwillingness to set his face to an inquiry involving the disclosure of facts connected with infirmity of health, losses in business, and the like, disclosures which may be very painful even when not discreditable.

Now, if the injured person has himself begun the action, this ground of objection to the executor's title (a very serious one in my opinion) to a large extent disappears. But I am not greatly concerned to find reasons for upholding the law of *Neilson* v. *Rodger*. I find this law existing, recognised by high authority, and fortified by a course of practice of nearly forty years' duration, and the question really is, whether the title of executors thus established is to be confined within the limits laid down in the cases, or is to be extended universally to claims of damages as to which in general there can be no knowledge that the deceased would have been willing to prosecute the claim. This brings me to the consideration of the case of *Auld* v. *Shairp*, 2 R. 191.

Now, in *Auld* v. *Shairp* the pursuer came into Court averring patrimonial injury, and in the view of the Judges who determined the question of title, this was a very material element in the case. Moreover, as I may say for myself at least, that I think it undesirable to introduce unnecessary distinctions between the laws of England and Scotland, it is not irrelevant to notice how this element of patrimonial loss is regarded by writers of authority on the law of England. It may be sufficient for this purpose to refer to the results given by Mr Broom under the head of *Actio personalis moritur cum personâ* (Legal Maxims, 6th ed., p. 885)—"An action is not maintainable by an executor or administrator for a breach of promise of marriage made by the deceased where no special damage is alleged, and generally with respect to injuries affecting the life or health of the deceased . . . the maxim as to *actio personalis* is applicable, unless some damage done to the personal estate of the deceased be stated on the record."

Now the case of Mrs Auld was not simply that Principal Shairp had defamed her husband in a letter to the Duke of Portland, the patron of the Chair, but that, as a direct consequence of the defamatory letter, her husband had lost the appointment to the Chair of Humanity at St Andrews which the Duke had previously promised him.

Here we have a distinct averment of special damage; a better illustration of patrimonial loss resulting from verbal injury could not be desired.

In Lord Gifford's note appended to the original judgment, that learned Judge gives a qualified opinion in favour of the executor's title generally, and then refers to the allegations of patrimonial loss, adding, "It was not seriously disputed by the defender that where there has been direct patrimonial damage the action transmits to an executor." The point was again argued before the Second Division of the Court, in which Division Lord Gifford had meantime taken his seat; and their Lordships were unanimous in sustaining the title of Mrs Auld, in the character of her husband's executrix, to recover damages for the alleged wrongs.

Lord Neaves, who delivered the leading opinion, begins by examining the law of the Institutes, which he quotes fully and compares with some expressions of the modern civilians and writers on the law of Scotland, and then he proceeds (p. 200)—"It is particularly necessary to look at the nature of this action. I do not look on it as an action for mere slander, or merely for the purpose of vindicating character. 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 patrimonial loss and injury of the late Dr Auld. . . . I cannot see how that should not transmit." And so while it may be argued from his Lordship's general reasoning that he was favourable to the executor's title to sue for reparation for mere verbal injury, his Lordship in the passage quoted makes it clear that the actual decision was in favour of the executor's title to sue as for patrimonial loss.

Lord Ormidale dissented from the judgment. Lord Gifford again gave his opinion in favour of the executor's title generally, adding, however (p. 210)—"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."

At this stage of the case Lord Moncreiff expressed himself with some reserve on the general question, and expressly rested his judgment on the fact that the claim was for "specific damage suffered by Dr Auld in being excluded from the Chair of Humanity by means of slanderous imputations made to the patron." When the case came to be decided on its merits his Lordship again called attention to this distinction. After showing that the case on special damage had failed, Lord Moncreiff observed that the case had resolved into a simple action of damages for defamation—"I do not say," he continues, "if that had been the complexion of the action at first, whether I should have thought it clear that the right to sue did descend to an executor, for that was not the position in which the case was originally presented."

It appears to me to be reasonably clear that the case of *Auld* v. *Shairp* cannot be founded on as a decision in favour of an executor's title to sue irrespective of averments of special damage, because Lord Moncreiff expressly reserved his judgment on the point, and Lord Ormidale's opinion was against the executor's title. I also note that in *Wight* v. *Burns*, 11 R. 221, all the Judges present (in the same Division) expressed grave doubts as to the executor's title to sue, the point not having been argued to them.

When the order was made for the rehearing of the present case the Judges of

the First Division had the case of *Auld* v. *Shairp* under consideration, and I think it was in view of the fact that the judgment in *Auld* v. *Shairp* proceeded partly on the element of special damage as there averred, and partly on the consideration of the general question of an executor's title to sue an action of damages for personal injury, that it was thought desirable to remit this case to a Court consisting of Judges of both Divisions. Assuming, as I do, that the case of *Auld* v. *Shairp* is not decisive of the present question, my opinion is adverse to the pursuer's title to sue this action in the character of executor-dative of his wife. My opinion, as will be seen, is rested mainly on the absence of direct authority in favour of the executor's claim. In the absence of such authority, and there being, as I conceive, no precedent for such an action, I think we ought to follow the civil law and the law of England rather than make a new and different rule for ourselves.

The LORD PRESIDENT concurred in the opinion of Lord M'Laren.

LORD TRAYNER—The question here submitted for determination is, whether the pursuer as executor-dative of his deceased wife has a title to sue this action? The fact that the pursuer was the husband of the deceased does not affect the question, for the claim put forward by the husband *qua* husband is not insisted in. The question really is the abstract one—Has an executor, whether nominate or dative, a title to raise an action for damages on account of injury done to the deceased whom he represents? If regard is had to the existing authorities in our law on this question I think it clear that the question has already been answered in the affirmative. The case of *Auld* v. *Shairp* is directly in point, and the decision in that case, although brought under notice in our own Court in *Wights* v. *Burn* and in the House of Lords in *Wood* v. *Gray*, has never been disapproved or overruled. It has been suggested that *Auld* v. *Shairp* is distinguishable from a case like the present because in it the pursuer concluded for damages for injuries, as she alleged, done not merely to her deceased husband but also to herself. Very little consideration, however, suffices to show that this peculiarity did not affect the decision in so far as it bears upon the present question. There was no averment of direct or substantive wrong done to the pursuer herself. The wrong done to her, if any, was the consequence of the wrong done to her husband, and if the wrong done to her husband had been negatived, or the pursuer's title to insist in an action for reparation on account of that wrong repelled, there was no case left to try. Accordingly, the main, indeed the only question debated and determined was whether, the pursuer, as executor of her husband, had a title to sue for reparation for a wrong done to him? There was no question, and could be none, whether the pursuer had a title to sue for reparation on account of a wrong done to herself if relevantly averred. I take it, therefore, that *Auld* v. *Shairp* affords a direct authority in favour of the present pursuer's title to sue. The case of *Wights* v. *Burn*, so far as it goes, is an authority in the same direction. In it the Lord Ordinary sustained the title of an executor-dative to sue for damages on account of personal injury inflicted on the deceased. The Judges of the Inner House expressed doubts as to the soundness of that judgment, and it cannot therefore be quoted as having the same weight as *Auld* v. *Shairp*. It may, however, be noticed that the Judge who decided in favour of the executor's title had heard and considered an argument upon the question, while the Judges who expressed doubt of the soundness of the decision had not heard any argument on the matter, the defender in the case having acquiesced in the Lord Ordinary's judgment.

Apart, however, from the cases I have already alluded to, it appears to me that the pursuer's title to sue this action follows as a necessary consequence from another principle well settled in our law. The law has long been settled "that when the deceased has instituted an action to enforce his claim, his executor can take up and insist in the process to the effect of recovering the pecuniary damages to which the deceased was entitled" (*per* Lord Watson in *Wood* v. *Gray*). A personal claim therefore once judicially made—it may be by the mere service of a summons—entitles the executor to insist in the claim. It seems to me to follow that an executor may raise the action, which if raised by the deceased the executor could insist in.

The mere service of a summons does not make any difference in the character of the claim made. It precludes, no doubt, the idea of its having been waived or abandoned. But so would a letter written by the deceased or his law-agent making the same claim. An extrajudicial demand is, or may be, just as good evidence of the intention and desire to prosecute the claim as a judicial demand, and just as effectual an answer to the defence that the claim had been waived. Again, the claim made, whether judicially or extrajudicially, does not make the claim itself better or worse. The claim to be made effectual must be established in either case by the same kind of evidence, and according to the same rules of procedure. I see no reason or principle for saying that the claim shall be capable of prosecution by an executor if it has been made by the deceased, but that it shall be otherwise if the claim has not been so made. If, however, the question before us is to be regarded as an open question, not concluded by the authorities and the settled principle already referred to, I desire to express my concurrence in the views expressed by Lords Neaves and Gifford in *Auld* v. *Shairp*. I have heard nothing to induce me to doubt the soundness of the conclusion reached by them in that case, and have nothing to add to the reasons they have assigned for holding that an executor has a title to raise as well

as insist in an action for wrong or injury done to the deceased whom he represents.

Any rule to the effect that an executor might insist in a claim once made by the deceased, but could not make such a claim himself if not previously made by the deceased, might be attended with great injustice, and therefore be inexpedient. No case could better illustrate that than the present. Assuming, for the moment, the facts averred here to be true, and that the deceased was maltreated as alleged, a claim clearly arose for damages in respect of that maltreatment. At the time when the cause of action happened the deceased was not in a mental condition enabling her to appreciate that such a claim had become her right. If she had survived and recovered her mental health she could have made good that claim, but having died before recovery of her mental health the claim is not made by anyone. The responsibility, thus, of the wrongdoers for their wrongful act in this case would depend on the mental condition of the sufferer; if she remained insane there would be no liability; if she recovered, their liability would emerge. Or, again, suppose a man injured in some railway collision, and so seriously that he was unable to apply his mind through mere physical weakness to the question of claiming compensation. Compensation will be due if the sufferer gains sufficient strength to make the claim, but otherwise not. Such considerations show, as I have said, that in such cases injustice would be done if the law required that no claim could be enforced by an executor which had not previously been made by the deceased. Such a rule, in my opinion, would be as inexpedient as unjust.

In truth, the right of an executor does not depend upon, and is not affected by such considerations. The right of an executor is to the whole moveable estate of the deceased, whether that estate consists of money or other moveables in the possession of the deceased, or in rights which when enforced result in money or other moveable property being recovered. In other words, the executor takes up the whole "assets" of the deceased, and claims for money are among the assets of the deceased. It does not appear to me to be material to consider under what circumstances the deceased's claim arises. Suppose he had lent a friend £50. The right to recover payment in such a case is personal—it may be enforced or abandoned as the creditor pleases—but if the creditor dies without making his demand, the executor may make it and insist in it beyond all question. But if so, why may not the executor sue for a debt of £500 owing to the deceased on account of personal injury or wrong? It may be said that the two cases I have thus put are different, the one being the case of a right emerging from contract—the contract of loan—the other a right arising *ex delicto* or *quasi ex delicto*. That is obviously so. But, as I have said, this is immaterial. For the right of the executor does not depend upon the question, How did the claim, in the person of the deceased, arise? The only question, in my opinion, which can be asked or considered when an executor seeks to enforce a claim in that character is, whether the claim so made was one vested in the deceased which he could have enforced. If it was, then the executor may enforce that claim as one of the assets or effects of the deceased which he is bound or at least entitled to recover.

I agree with Lord Neaves, that "If an injury is done causing damage, a civil debt immediately arises, which may be sued for in a civil court, and that action passes against the representatives of the party who did the injury, just as any other action of debt does. It appears to me that it must equally pass and transmit to the heir and representative of the injured party, who, unless his predecessor has forgiven it, which is not to be assumed, has acquired right to debt which may be enforced with all the usual diligences, arrestment on the dependence, and everything of that kind which can be used in any other action"—*Auld* v. *Shairp*.

I think the present claim had vested in the deceased, and that therefore her executor's title to sue this action should be sustained.

The LORD JUSTICE-CLERK concurred in the opinion of Lord Trayner.

LORD YOUNG—The action is one of damages against the defenders for the maltreatment of a married woman when a patient in their asylum. The woman died before the action was raised, and the pursuer is her husband. He sues in two capacities, viz.—First, as executor-dative *qua* husband of the deceased, and (alternatively) second, as an individual. As the case is presented on record the woman's death is attributed to the maltreatment complained of, and it went to proof on that footing. The Lord Ordinary negatived the pursuer's case on the facts. The pursuer now admits that the death is not attributable to the maltreatment, but maintains that the maltreatment is proved, and that he is entitled to damages therefor. Whether it is proved or not I have not to consider, but must assume that it is or may be, and that the defenders are responsible therefor to the pursuer if he has a title to sue.

Now, the first observation that must occur to anyone considering the case is, that the maltreatment of a patient in an asylum, such as the keepers of the asylum are responsible for, is an actionable wrong, and the second is that the patient being a married woman, it is a wrong to her husband—for I should think it not maintainable that a man's wife may be maltreated in the sense of being assaulted and cruelly used in an asylum without doing him any wrong. A third observation is, I think, manifest — that in the case which has occurred, viz., that of the patient's death before action raised, but survived by her husband, who is also her executor, only two alternatives are presented, viz., first, that the husband either in his own right

or as executor of his deceased wife has a title to sue, or second, that the responsibility of the wrongdoers is discharged and at an end—there being no title anywhere to sue them—for it is not and cannot be suggested that any other has a title. The woman is childless, and, so far as we know, has no relations near or remote. If the defenders can be sued at all, it must be by the present pursuer, and whether his suit be as an individual in his own right or as executor of his deceased wife cannot possibly be of any interest to them.

Taking the case as stated on the record, the Lord Ordinary was of course of opinion that the pursuer, either *qua* husband or *qua* executor, had a good title to sue, for otherwise he would not have sent the case to trial. Being of opinion on the evidence that the whole case failed on the facts, the question of title to sue was necessarily immaterial to his judgment. He deals with it nevertheless, and expresses his opinion upon it to the effect, as I read his note, that had it been proved that the death of the woman resulted from the maltreatment averred on record (the defenders being responsible) the pursuer *qua* husband would have been entitled to damages, but that for the same maltreatment not resulting in death the claim for damages transmitted to him *qua* executor, as estate vested in the deceased in her lifetime, the defenders being, as he expresses it, "due her a sum of money," which was, he thinks, "a fund accruing upon the Married Women's Property Act 1881."

This opinion suggests considerations of an important and far-reaching character. As regards the right of a husband to sue anyone who has wrongfully occasioned the death of his wife, I suppose no doubt exists. This right rests on a familiar rule of our common law, which differs from that of England, by which, as briefly and tersely stated by Mr Broom under the maxim *actio personalis*, &c., "prior to the 9 and 10 Vict. c. 93, an action was not maintainable against a person who by his wrongful act occasioned the death of another."

The Lord Ordinary suggests no doubt as to our common law on this point, and there is none. Nor does his Lordship seem to doubt that at the common law, and irrespective of the Married Women's Property Act 1881, a husband has right to sue and recover damages for the maltreatment of his wife—for any actionable injury to her person or reputation. He is, however, of opinion that this right was based on the assignation to him *jure mariti* of her property or estate, and that this basis being destroyed by the Act of 1881, the right which vested on it has fallen, and given place to another which previously had no existence, viz., a right in the wife herself (exclusive of her husband) while alive, and in her executor after her death.

In dealing with the question whether the pursuer "is entitled to recover damages on account of the injury to his wife, although it did not cause her death," the Lord Ordinary observes that "the first question is as to the pursuer's title to sue this claim. He puts it alternatively in his own right, and in his office as his wife's executor. His counsel was at some difficulty in selecting between these alternatives, but ultimately he preferred to put his case on his own title," which, as I have pointed out, the Lord Ordinary negatives, while affirming his title as executor.

The legal distinction which this view involves between personal injuries to a married woman resulting in her death and similar injuries not so resulting with respect to her husband's title to sue and recover damages from the wrongdoer is, so far as I know, novel, and indeed the Lord Ordinary presents it as a novelty springing from the Married Women's Property Act 1881.

Now, it seems to me that the validity of this distinction, now for the first time suggested, and that only on the ground that it has been created by the Act of 1881, is the only question of interest in the case. Should we be of opinion that it is invalid, we must affirm the pursuer's title to sue and recover in his own right, and consequently negative his title as executor.

Now, what is the foundation of the rule of our common law that a person who by his wrongful act occasioned the death of a married woman may be sued for damages by her husband? It is the *jus mariti* in a sense, for he has no other *jus* than as *maritus*. But it is not that *jus mariti* which we refer to when we use the expression as signifying what operates a transference of personal property, or that *jus mariti* which is dealt with in the Act of 1881. The *jus mariti* taken as signifying the whole *jus* of a husband extends beyond and outside anything which can be spoken of as estate or property. It would be ridiculous to speak of a woman's life and limbs and reputation as property or estate. Yet not only the woman herself, but if married, her husband, has rights and interests in these which the law recognises as legal rights and interests. A husband is admittedly legally interested in the continuance of his wife's life, protected not only by the criminal law but also by the civil law, against any wrongful act which may terminate it prematurely, and if his right is violated he is admittedly allowed action against the wrongdoer, not as for recovery of a debt or sum of money due to her, but for reparation of a wrong to himself. But is his interest in the integrity or soundness of his wife's health and body and limbs of a different legal character or quality? That it is, must be the view of anyone who thinks that the husband's right to sue for injuries resulting in her death is based on one legal ground, and his right to sue for similar injuries not so resulting on another. The Lord Ordinary distinguishes between the two, and is of opinion that the former rests (or prior to the Act of 1881 rested) on his own title, irrespective of any transference of property or estate by the *jus mariti*, and the latter only on such transference which is now hindered by that statute. I am unable to assent to this opinion. I think that a husband's interest

in his wife's life, and in the soundness of her health in body and limb, is one and the same interest resting on his marital relation—the nearest and closest that exists, and so close that her *persona* is merged in his, and the two thereby made one. The proposition that a husband may recover damages for the maltreatment of his wife whereby she is killed, but not for similar maltreatment which she survives—the injuries being short of mortal—is in my opinion as unsound in law as it is contrary to reason and good sense. The amount of damages will depend on circumstances, whether death ensues or not, and especially on the nature and extent of the injuries. In dealing with the general question of title to recover, I cannot enter into these, and have not the means of doing so. I only assume (as I must) that there was in fact maltreatment of such extent and character that the defenders are liable in damages more or less.

I must observe that the Lord Ordinary uses inaccurate language, in my opinion, when he says that if Mrs Bern was unlawfully injured by the defenders "they were due her a sum of money." A person who has injured another in his person or reputation is not in the position of a debtor for a sum of money, and an action of damages for such injury is in no sense an action of debt. A right to sue such an action will not pass to a trustee in bankruptcy, or, as I think, to executors or to the fisk, which a right to sue for a debt or money due would. If the wrongdoer was "owing a sum of money" the debt might be attached by arrestment or other legal diligence by any creditor of the party injured to whom the debt was due, and be recovered by a forthcoming or other proper action, and would certainly pass as an asset in bankruptcy or to an executor, as estate of the deceased which it was his right and duty to ingather and distribute according to will, or the law of intestate succession, after paying the debts of the deceased. That liability for personal injury is not of that character seems to me to be clear from the consideration which I have suggested, and also from the further consideration that the liability is personal to the wrongdoer and does not pass against his representative. Such liability may be turned into a debt by action thereon, but the action can only be pursued by a sufferer from the wrong which creates the liability. That the individual whose *persona* has been injured can alone pursue such action is generally true, but not universally, because our common law following the dictates of good sense and right feeling (the only solid foundation of common or customary law) holds that a husband is a sufferer from an injury to his wife's *persona*—necessarily, as in every case, to a greater or less extent according to the quality and magnitude of the injury. It may be very slight or very great, as when his life's companion is crippled and invalided by unlawful violence, or distracted, and he too in sympathy with her, by foul slander. A child also may be a sufferer from an injury to his parent, although, so far as I know, the instances of action by a child have occurred only in the case of death. But that the right is limited to that case I am not prepared to affirm. Suppose the only surviving parent of a child (say the mother) lost not her life but her reason in a railway collision for which the railway company was liable, I think it reasonably might and probably would be held that the child was a sufferer and so be permitted to sue in his own right. But if there be doubt in the case of a child, there is, I think, none in the case of a husband under similar circumstances. Could it be said that he had suffered nothing by the wrong because his wife was not killed but survived to him as a cripple, imbecile, or lunatic?

With respect to the husband's title to sue the wrongdoer, there is, in my opinion, no distinction between such injuries as result in death and such as do not. The liability of the wrongdoer attaches when the wrong is done, although the whole consequences (which may affect the amount of damages) may be some time of developing. But be the consequences more or less serious, the right to sue the wrongdoer must necessarily be upon the liability which attached when the wrong was done, and if the husband can sue when death follows as a consequence, it must be because liability to him was incurred by the commission of the wrong which in the result occasioned it. The proposition that no suffering of his other than by the death of his wife can be taken account of is one which I am unable to appreciate. Nor can I accept the view that a right of action vested in the wife or not—according as the injuries in the result proved fatal or not—or that it vested in her at once, but contingently and subject to defeasance in the event of her death from the injuries, in which event it accrued to her husband. Rejecting these views, it seems to me that our familiar and established practice of allowing a husband to sue when his wife dies from injuries wrongfully inflicted on her person, is conclusive authority for the proposition that the right of action vests in him from the first, that is, from the time that the wrong was done, when liability therefor certainly attached to the wrongdoer. I had not thought it doubtful that he was equally entitled to sue and recover for injuries which she survived, whether likely or not to prove fatal in the end, and regarded the no doubt common practice of joining her name to his in the action as a mere superfluity. That it was so in the view which the Lord Ordinary takes, viz., that his suit was on the *jus mariti* is clear, for a husband certainly need not join his wife's name to his own in an action to recover what has passed to him *jure mariti*.

I must further observe that the notion of a discharge or exclusion of *jus mariti* having any bearing or significance in an action by a husband for injuries inflicted on his wife's person, whether she dies of them or not, is quite novel. Nor can the

Married Women's Property Act 1881 give it any importance which it had not before, for that Act simply excludes the *jus mariti* as it might have been, and frequently was, excluded by deed before. The notion that the exclusion applies to the whole right or *jus* of a husband can hardly, I should think, be seriously propounded, and if not, what is the limitation? I think we practically realised the limitation centuries before 1881, viz., the husband's *jus* in the wife's property vesting on the assignation thereof, which without the exclusion the marriage would have operated. No one has hitherto imagined that it had any relation to the husband's right to have the life of his wife and the integrity of her person (and reputation) preserved to him, protected against outrage, or, to put it simply and plainly, against actionable wrong.

A right to sue for damages done to property is of a quite other character. It is incident to the property and will pass to creditors and executors just as the property does although it is not an action of debt or for a sum of money due. I suggest no doubt and entertain none that a right of action for damages to the property of a married woman which came to her after 1881 would vest in her and pass to her executors under the Act. Damage done to her back or her limbs is of another kind. I do not think this "property" Act of 1881 was intended to affect, or does, the backs and limbs of married women or the legitimate interests therein at the common law of their husbands.

By the interlocutor of 24th January, appointing "this cause to be heard" before Seven Judges, it was ordered "to be argued on the question, Whether the pursuer, as executor-dative *qua* husband of the deceased Mrs Jessie Steele or Bern, his wife, has a title to sue the action?" and it was accordingly argued on that question only. At an early stage of the argument I inquired whether any importance was attached to the fact that the pursuer was executor-dative "*qua* husband" of the deceased, and was, with the assent and approbation of the learned Judges who pronounced the interlocutor, answered that it was unimportant, and that the pursuer was to be taken as in the same position as any possible executor-dative of however remote kindred or of none—such as an executor-creditor or the fisk. The argument accordingly proceeded on that footing, and with the necessary result that no argument was addressed to us on the question of the husband's title to sue and recover, in which, in my opinion, is to be found the true ground of judgment upon the executor's title to sue and recover. The counsel for the executor could not of course say anything in support of the husband's title, for that would of necessity have been destructive of the executor's title which he was then to support, and it was not to be expected that the counsel for the defenders should—their case on record being that there is no title in anyone, and it being of no interest to them in whom it may be if in anyone.

I therefore disregard the fact (pronounced, and I think most properly pronounced, to be immaterial to the question of "difficulty and importance" before us) that the executor-dative is (or rather was) the husband of the deceased, and take the question generally whether any executor-dative of the deceased has a title to sue the action upon the facts as averred on record—taking account of these material facts, viz., 1st, that the deceased was a married woman when the injuries averred were inflicted upon her in the hospital to which her husband had sent her, and, 2nd, that she is survived by her husband. Now, as I have already observed, there is no more conclusive argument against the title of a pursuer than one which shows that the title is in another. I am of opinion that there is ground for such argument here, and having stated it to the best of my judgment I express my opinion on the question argued to us, viz., the title of the executor-dative, by saying that I think he has no title. I am of opinion that the husband was, whether during his wife's life or after her death, in a position to discharge on such terms as he saw fit the manager or keepers of the hospital for their maltreatment of his wife, and that no other has a title to sue them.

This view of course excludes any argument on the maxim *actio peronalis moritur cum persona*, the only person having a title to sue being alive, and, as it happens (though that is an accident), suing.

It may, however, be proper that I should state my views regarding this maxim, and the rule of our common law which it expresses, all the more that what I have to say on it will I think further illustrate and strengthen the views which I have expressed in favour of the husband's title.

The term *actio personalis* occurring in the maxim has a limited meaning which is not expressed by the translation "personal action," for it certainly does not comprehend every action or even many actions which we commonly and familiarly call personal. Thus it does not comprehend actions on contracts, express or implied, and whether for implement or breach—as, for example, contracts (express or implied) for rent, or for lent money, or the sale of goods, or for carriage, or work and labour, or for an accounting for intromissions with property. Neither does it comprehend actions *ex delicto* (or *quasi ex delicto*) for the destruction of or damage to property. These are all in our common language called personal actions, and many others so called might be enumerated to which the maxim has no application—the word "personal" as applied to them not being a true translation of the word *personalis* as used in the maxim.

We use this Latin maxim as we do many others only because it expresses briefly and tersely a rule of our common law which is not of foreign origin, but founded on considerations approved by the judgment and good sense of the people of this country. These are, 1st, that it is unreasonable and inexpedient that an action of damages for

a personal wrong should be allowed after the death of the person wronged, and when there is no one in existence who has been damaged by it; and, 2nd, that it is not fitting or just that the executor of a delinquent should be made answerable for a delict by which the executry estate was not enlarged, or the estate of any other diminished. When a man who has been unjustly called a knave, or has undeservedly received a thrashing, dies, there is no longer in existence any sufferer from the wrong—at least of whose suffering a court of law can take account. If an executor can relevantly aver that the wrong (slander for example) to the defunct, although of a personal character, was such as to diminish the executry estate, the action might be allowed, but only, I should think, to the extent of repairing such diminution. The case of *Auld* v. *Shairp* was of this character, for there it was averred that the slander was with the design and effect of disappointing the deceased of a desirable and lucrative appointment which he had been promised, and had made his preparations to enter upon at the sacrifice of abandoning his previous business and giving up the premises where he had carried it on. Cases of this sort may raise questions of nicety and difficulty which we have now no occasion to consider. As a rule a man's executry estate is not diminished by a slanderous affront, and I should say never by a slap in the face, although he might himself perhaps have succeeded in turning his injured feelings into money.

A third and I think forcible consideration on which the rule rests is that it is only reasonable and fitting that one who has been assaulted and slandered should be the sole judge whether it is proper to raise action therefor, and it is I think a misapprehension to suppose that this only signifies his right to discharge or waive a legal claim. It signifies that the claim is personal to himself, and such as no other can take up. I cannot therefore assent to the view that in such cases action is refused to an executor, or ought to be only when there is ground for holding that the claim had been abandoned or waived by the deceased. Of course an executor cannot recover upon any right which was in the deceased, but which he had discharged or waived in a manner effectual against himself. But these remarks occur here, viz., 1st, that a creditor for money due or damage to property is not at absolute liberty to discharge or waive his claim; his power may be largely limited by the bankrupt laws, which would strike at a gratuitous discharge when insolvent; and, 2nd, that a person who had been defamed or assaulted would effect nothing by the most emphatic written statement that he did not intend to waive his claim therefor. Suppose, for example, that he so declared in his will, and expressed his desire that the claim should be prosecuted by a friend named, and to whom he gave as a legacy such damages as he might recover.

I have not overlooked the rule of our law and practice that the raising of an action by the sufferer from the wrong changes the situation altogether. Action raised changes the situation in many perhaps most other cases as well as this, and that for reasons quite apart from the notice of discharge or waiver being thereby excluded. The most obvious of these is perhaps this, that the case is then brought within these well-settled rules, viz., 1st, that when the defender in a pending action dies it may always be transferred against his legal representative; and 2nd, that when the pursuer of such action dies, not only may his representative be sisted in his room, but if required by the defender must sist himself, or allow the defender to have judgment on the footing of his refusal, which will be effectual against the estate of the deceased which he holds or administers. The effect may seem great and striking when the action has been newly brought, but it has been found impossible to distinguish between one stage of an action and another. This rule of our law that action raised changes the situation is in accordance with, but, not so far as I know, founded on, the Roman law on the same subject.—(Justinian, lib. 4, tit. 12, sec. 1)—"Pœnales autem actiones quas supra diximus, si ab ipsis principalibus personis fuerint contestatæ, et hæredibus dantur, et contra hæredes transeunt."

LORD ADAM—I wish to say that when this case was argued before the First Division, counsel for the pursuer expressly gave up the plea that the pursuer had a title to sue as the husband of the injured party, and that is the reason why the question of title is put in the limited form it is in in the interlocutor appointing the cause to be heard before Seven Judges. The only question to which I have applied my mind is whether the pursuer has a title to sue as his wife's executor, and upon that question I concur with Lord M'Laren.

LORD KINNEAR concurred in the opinion of Lord M'Laren.

The Court recalled the interlocutor of the Lord Ordinary, sustained the defenders' second plea, and dismissed the action.

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