by them as railway managers, but would be a transaction into which any metal broker might enter.

The position of the Board is thus quite different to what it would be if the question raised was as to their duty to make or work and maintain the line authorised by their special Act. There is abundant authority that they could resist any attempt to force them to do either the one or the other. The powers conferred by the statute are permissive only.

The question raised here is whether the company can by their own act, and at their own hand, put it out of their power to fulfil those duties for the discharge of which they were incorporated by Act of Parliament. It may be that the directors are doing no more than their duty by the shareholders, and even the debenture-holders, for the price might, under orders of the Court, be treated as a surrogatum for the materials. It may be that matters are in such a position that no prejudice would be suffered by any members of the public, for if no train is to be run it would not matter whether the company had metal or money. These considerations, however, are not relevant when the company has made a contract with the public under public sanction. The undertaking owes its existence to statute, and by statute only can its existence be terminated. There is careful provision made by statute for the steps which must be taken before a railway undertaking can be abandoned. What the respondents seek to do here is really equivalent to abandoning the undertaking as a railway. Once that conclusion is reached it follows that they must comply with the statutory enactments before they can effect their purpose. If they do not, the powers of the directors are those of administration, which may be defined as the transaction of the company's legitimate business in the way in which such business is usually carried on by other people. They have not power to alienate. The reason why the undertaking of the company is protected against the diligence of the creditors is because Parliament has given effect by enactment to its intention that a railway shall be permanent. The company cannot itself sell, and this is the reason why it cannot create such a security in favour of a creditor as would enable him to destroy the undertaking. The remedy provided in the interest of debenture-holders of the appointment of a receiver indicates the policy of the Legislature.

I am of opinion that there is sufficient to warrant the Court in sustaining the title of the complainers, and in holding that the note should be passed and the interim interdict continued.

It is therefore not necessary to go into other points which were argued, but I may add that the respondents failed, in my opinion, to answer the pertinent question put by the other side in regard to their power to dispose of the proceeds of the sale without going to Parliament.

LORD JOHNSTON did not hear the case.

The Court adhered.

Counsel for Complainers (Respondents)—Macmillan, K.C.—D. Anderson. Agents—John C. Brodie & Sons, W.S.

Counsel for Respondents (Reclaimers)—Morrison, K.C.—Gentles. Agents—J. Miller Thomson & Company, W.S.

Wednesday, March 19.

FIRST DIVISION.

[Lord Hunter, Ordinary.

M'ENANEY *v.* THE CALEDONIAN RAILWAY COMPANY.

Title to Sue—Executor—Reparation—Personal Injury—Claim made, but Action not Raised, in Lifetime of Injured Person—Actio personalis moritur cum persona.

On 25th December 1911 a man was knocked down in a street by a van belonging to a railway company. On 28th December 1911 the law agents of the injured man wrote to the railway company intimating that he held them liable for his injuries. On 5th January 1912 he executed a will in favour of a certain lady whom he appointed his executrix, and the will contained a declaration that the said lady was to be entitled to any sum of money which the Company might pay in name of damages or otherwise. On 6th January 1912 the injured man died.

Held (*rev.* Lord Hunter, Ordinary) that though no action had been raised in the lifetime of the injured man his executrix had a title to sue the railway company for damages.

Bern's Executor v. *Montrose Asylum*, June 22, 1893, 20 R. 859, 30 S.L.R. 748, *distinguished.*

Kathleen M'Enaney, as executrix-nominate of the deceased Ernest Leigh, Charing Cross Road, London, and as an individual, *pursuer*, brought an action against the Caledonian Railway Company, *defenders*, concluding for £1500 as damages for personal injuries sustained by Mr Leigh.

The following *narrative* of *facts* is taken from the opinion of the Lord Ordinary (HUNTER)—"This is an action brought by the executrix-nominate of the late Mr Leigh to recover damages from the defenders in respect of personal injuries sustained by him owing to the fault of the defenders or their servants. On 25th December 1911 Mr Leigh was knocked down in a Glasgow street by a two-horse van belonging to the defenders. On 6th January 1912 he died in consequence of the physical injuries which he then sustained. Prior to his death Mr Leigh had, on 28th December 1911, in a letter written by his agents to the defenders, intimated that he held them liable for the injuries he had sustained, and on 5th January 1912 he had

executed a will in favour of the pursuer which, *inter alia*, contains the following declaration—'I also declare that she (the pursuer) is to be entitled to and to get any sum of money which may be paid in name of damages or otherwise by the Caledonian Railway Company in respect of the accident I have sustained.' For the purposes of this action the defenders admit that they are responsible for the accident, but they maintain that, as no action was raised against them by the deceased in his lifetime, the pursuer has no title to sue the present action." The letter by the pursuer's agents to the defenders was in these terms:—

"Messrs The Caledonian Railway Co.,
"302 *Buchanan Street.*

"Dear Sirs—We have been consulted on behalf of Mr Ernest Leigh, 122 Charing Cross Road, London, who, on the morning of Christmas Day, was knocked down in West Nile Street by a van belonging to you, the horses of which had run away through, we understand, having been left unattended in the street. We have made full enquiries into the whole circumstances connected with the matter, and are quite satisfied that you are liable. Our client was removed to the Royal Infirmary immediately, where he still is and will be for some considerable time. We understand that both his knees have been fractured, and that he has sustained serious internal injuries. We shall be glad to hear from you at your earliest convenience, and after you have made enquiries, whether or not liability is admitted.—Yours faithfully,

"ANGUS CAMPBELL & COCHRAN."

The pursuer pleaded, *inter alia*—"(1) The now deceased Ernest Leigh having suffered loss, injury, and damage in his person through the fault of the defenders, or of those for whom they are responsible, the defenders are liable in reparation therefor. (2) The pursuer having good and undoubted right to sue the present action as executor duly nominated to the said Ernest Leigh, decree should be pronounced in terms of the conclusions of the action. (3) The pursuer, as universal legatory and assignee of the said Ernest Leigh, having good and undoubted right to sue the present action, decree should be pronounced in terms of the conclusions of the action."

The defenders pleaded, *inter alia*—"(1) Any right to make the present claim having ceased on the death of the said Ernest Leigh, the pursuer has no title to sue, and the action is irrevelant. (2) The averments of the pursuer being irrevelant and insufficient to support the conclusions of the summons, the action should be dismissed."

On 13th November 1912 the Lord Ordinary (HUNTER) sustained the first plea-in-law for the defenders, dismissed the action and decerned.

Opinion.—". . . In the case of *Bern's Executor* v. *Montrose Asylum*, 20 R. 859, it was held by a majority of a Court of seven Judges that an executor has no title to institute an action of damages for personal injuries to the deceased person whom he represents. It is true that the deceased in that case had not only not raised an action but he had not by any public act indicated his intention of making a claim. Lord M'Laren's opinion does not, however, appear to me to proceed upon this distinction but upon general grounds. He treats the case of executors following out and insisting in an action raised by the injured party as a recognised exception to the rule against the transmissibility of an action for personal injuries where no patrimonial loss has been sustained—*Neilson* v. *Rodger*, 16 D. 325, and *Darling* v. *Gray*, 19 R. (H.L.) 31.

"Mr Mackay, in a learned argument submitted to me, asked me to treat *Bern's* case as only excluding the action where the injured party had given no public indication of his intention to prosecute the claim. He referred me to the opinion of Lord Shaw in the case of *Hendry* v. *United Collieries*, 1909, S.C. (H.L.) 19, at p. 24, and to the opinion of Lord Kinnear in *Traill & Son*, 6 F. 798. Neither of these learned Judges express disapproval of the decision in *Bern's Executor*, and in neither case was it necessary for the decision of the case to consider to what extent *Bern's* case excluded a claim like the present.

"In the case of *Boyce's Executor*, 1903, 5 F. 452, the executor who raised the action stated that, as *curator bonis* of the injured party he had given instructions to raise an action for damages on account of the injuries, but that the ward had died before the action was raised. The action was dismissed. In giving judgment in that case Lord Moncreiff said, 'I have read the whole opinions in *Bern's* case over again, and I think, having regard to the grounds of judgment on the part of the majority of the Court, they involve this—that an action of this kind will not transmit to an executor unless the action has been actually raised during the lifetime of the party injured. On these grounds, I think the Lord Ordinary had no alternative but to give effect to the case of *Bern* and dismiss the action.'

"The cases of *Bern* and *Boyce* are binding upon me, and I therefore sustain the first plea-in-law for the defenders, and dismiss the action."

The pursuer reclaimed, and argued—The brocard *actio personalis moritur cum persona* was not part of the law of Scotland—*Auld* v. *Shairp*, December 16, 1874, 2 R. 191, 12 S.L.R. 177; *Neilson* v. *Rodger*, December 24, 1853, 16 D. 325; *Darling* v. *Gray & Sons*, May 31, 1892, 19 R. (H.L.) 31, 29 S.L.R. 910; *Hendry* v. *United Collieries Limited*, 1908 S.C. 1215, Lord Kinnear at p. 1218, 45 S.L.R. 944; 1909 S.C. (H.L.) 19, Lord Shaw at p. 124, 46 S.L.R. 780. Nor did the brocard express what was the law of Rome. By Roman law penal actions did not transmit passively but did transmit actively, but the *actio injuriarum* did not transmit either actively or passively—Just. Inst. iv. 12, 1. The *actio injuriarum*, however, was not for personal injuries but only for *contumelia* (slander in the widest sense), injustice, and denial of justice—Just. Inst.

iv. 4 (*proemium*), and thus where an "injuria" was done to a slave jointly owned the damages were assessed not with reference to the respective shares of the co-owners but with respect to their rank —Just. Inst. iv. 4, 4. In England alone of civilised countries had the maxim been accepted as law, but even there it had apparently no authoritative source, and had been much pared away. As to its application in England, reference was made to Broom's Maxims, 8th ed., p. 701-2; *Chamberlain* v. *Williamson*, 1814, 2 Maule & Sel. 408; *Finlay* v. *Chirney*, 1888, 20 Q.B.D. 494, at 502. The doctrine of the maxim was not accepted in the law of France — Pothier, Des Obligations, sections 673-674 (Eng. tr. by Evans, sections 637-638). The decision in *Bern's Executor* v. *Montrose Asylum*, June 22, 1893, 20 R. 859, 30 S.L.R. 748, did not proceed on the recognition of the brocard as sound in the law of Scotland (*Hendry* v. *United Collieries Limited* (*cit. sup.*), *per* Lord M'Laren at 1223), although apparently Lord M'Laren thought the *actio injuriarum* included an action for personal injuries. Assuming *Bern* was rightly decided, it did not rule the present case, because there the injury was of the nature of *contumelia*, here the action was reparatory and not penal — *Black* v. *North British Railway*, 1908 S.C. 444; *Palmer* v. *Wick and Pulteneytown Steam Shipping Company, Limited*, June 5, 1894, 21 R. (H.L.) 39, 31 S.L.R. 937. And moreover there was not in *Bern* as there was here an intimation of claim made by the injured person and an express assignation by will of the claim to the executor. The case of *Boyce's Executor* v. *M'Dougall*, February 18, 1903, 5 F. 452, 40 S.L.R. 361, merely followed that of *Bern*. Where an action had been actually raised by the injured person prior to his death his executor was entitled to carry it on—*Neilson* v. *Rodger* (*cit. sup.*); *Darling* v. *Gray & Sons* (*cit. sup.*). The ratio appeared to be that when an action was raised or a claim made an election to claim damages was then made and the right to an accounting then vested —*Riley* v. *Ellis*, 1910 S.C. 934, Lord President at 942, 47 S.L.R. 788 (*sub nomine General Billposting Company* v. *Youde*). In any case no sound distinction could be made in principle between a claim made by an action actually raised and the present formal intimation of a claim and the assignation of it by will. The latter showed as much as the former that there was no intention of waiving the right to damages. A right of action for personal injuries could be validly assigned *inter vivos* even before the action was raised — *Traill & Sons* v. *Aktiesselskabet Dalbeattie, Limited*, June 7, 1904, 6 F. 798, 41 S.L.R. 614; it was also arrestable—*Riley* v. *Ellis* (*cit. sup.*), and they submitted it could also be assigned *mortis causa*. Where an executor had a right to sue an action of damages for personal injuries to the testator that right was preferable to any right of dependants—*Darling* v. *Gray* (*cit. sup.*). Reference was also made to *Milne* v. *Gauld's Trustees*, January 14, 1841, 3 D. 345.

Argued for the defenders and respondents—As to Roman law, even if an action of damages for personal injuries was not an *actio injuriarum* it was covered by the general words following "injuria" in Just. Inst. iv. 4, 1. As to the law of England, they referred to Broom's Maxims at pp. 704-5, and *Finlay* v. *Chirney* (*cit. sup*). In any case Lord M'Laren's judgment in *Bern* (*cit. sup.*) was founded really on the law of Scotland, and the cases of *Bern* and of *Boyce's Executor* (*cit. sup.*) decided that where no action was raised in the lifetime of the injured person his executor could not raise an action after his death. In *Boyce's Executor* the *curator bonis* had actually given instructions in the lifetime of the injured person for an action to be raised, and yet it was held that the executor could not raise an action. It was not necessary for them to dispute the passing of the right of action to the executor when the action had already been raised, but it was to be noted that *Neilson* v. *Rodger* (*cit. sup.*) appeared to proceed on the ground or assumption that there could be two actions arising out of the same injury, which was contrary to the opinion of Lord Watson in *Darling* v. *Gray & Sons*—the only other case recognising the transmission to an executor. They submitted that mere election to raise an action was not sufficient, and that nothing short of the action having been raised in the lifetime of the deceased would give the injured person's executor a title to pursue the action. In *Traill* (*cit. sup.*) there was not merely an indication of election, but also an actual assignation for onerous causes, both in the lifetime of the injured person, and the soundness of *Bern* or of *Boyce's Executor* was not then questioned.

At advising—

LORD PRESIDENT — This is an action brought by the executor-nominate of the late Mr Leigh to recover damages from the Caledonian Railway Company in respect of personal injury sustained by Mr Leigh owing to the fault of the defenders or their servants. Mr Leigh was knocked down by a van which was the property of and being driven by the servants of the Caledonian Railway Company.

After the accident had happened, and while he was ill, Mr Leigh executed a will in which he made the present pursuer his executrix and universal legatory, and in the will he inserted the following declaration—"I also declare that she"—the pursuer—"is to be entitled to and to get any sum of money which may be paid in name of damages or otherwise by the Caledonian Railway Company in respect of the accident I have sustained." While he was still alive he instructed his solicitors to take proceedings to recover a sum of money for damages from the defenders, and a letter was written on his behalf in general terms asking what the railway company would do. The defenders declined to admit any liability in the meantime, and before anything further was done in that matter Mr Leigh died. This action having been raised, the defenders admit that the acci-

dent was caused by the fault of a servant for whom they were responsible, but they plead that "any right to make the present claim having ceased on the death of the said Ernest Leigh, the pursuer has no title to sue, and the action is irrelevant." That plea was sustained by the Lord Ordinary upon the ground that the case is covered by the case of *Bern's Executor* v. *The Montrose Asylum* (20 R. 859).

We had a very elaborate argument from the learned counsel for the pursuer, which was chiefly based on a discussion of the brocard *actio personalis moritur cum persona*, and especially with regard to what *actio injuriarum* really was in the Roman law, and a distinction was sought to be drawn between this case and *Bern's* case upon that matter. *Bern's* case was a case where the husband of a deceased wife sued the proprietors of an asylum for injury and—as the pursuer's counsel put it, indignity—offered to his wife while she was an inmate of the asylum, and the action was dismissed as incompetent. Speaking for myself, I am not inclined to follow the learned counsel for the pursuer in his discussion upon this matter. I doubt whether we can get any great assistance from the Roman law in such a matter, and I very gravely doubt whether the term *actio injuriarum* as used in Scots law can be taken to be limited by a strict view of what *actio injuriarum* was in the Roman law.

Upon the merits of the case I have found the matter attended with great difficulty, because no recorded instance of such an action being allowed to go on has been found in the books. That is to say, there is no instance where an executor has raised for the first time an action in respect of personal injuries to a dead man. But so far as I am concerned I am really concluded by what I said in *Riley* v. *Ellis* (1910 S.C. 934), and—with great deference to my learned brethren who did not agree with me in that case—I may say that a repeated consideration of *Riley* v. *Ellis* has only confirmed me in my opinion. What was actually decided in *Riley* v. *Ellis* has not any application here, but the topics discussed have a great deal to do with this matter. In that case I was speaking of claims arising out of delicts and of the question of arrestment, and I said that actions in respect of slander might be added to actions that would not transmit, and, though not so obviously, yet I thought equally safely, a claim of damages for personal injuries. "Now why is this? It will not do to say because the claim arises out of delict, because admittedly if action was raised for seduction or slander or damages for personal injury an arrestment in the hands of the defenders to such an action would be good, and the quality of the claim *i.e.*, as arising out of delict and not out of contract, is obviously not affected by the fact that action is raised." I think, if I may say so, that I did two things in *Riley*. I disposed of the idea that the matter was decided by the judgment in the case of *Auld* v. *Shairp* (2 R. 940), but I equally clearly said that the opinion of some of the Judges who took part in *Auld* v. *Shairp* was adverse to the judgment in *Bern's* case.

The extreme case is undoubtedly the opinion of Lord Neaves in *Auld* v. *Shairp*. He holds that the moment that a delict has taken place a civil right is at once vested in the person who is the sufferer by the delict, and that that is part of his patrimony and transmits just as any other part of his property transmits. I am of opinion that that is unsound law, and I think it is quite clear that that law, in its extreme form, cannot live with the law of *Bern's Exr.* But then, while I do not go that length, I did in *Riley* go the length of saying that in the case of a delict there is a transmissible right when a claim is made or an action is raised. That there is a transmissible right after the action is raised is admitted by every one, because there is no question that, if an action has been raised by a man and he dies before the termination of that action, his executors can be sisted as parties. I personally think, for the reasons that I gave in *Riley*, that the same thing happens when a claim is made. The injured man has then elected to say that he means to enforce a claim for damages. Now that being my view, it follows that *Bern's Exr.* does not cover this case. In *Bern's Exr.* there had been no action by the lady which treated her injuries as giving rise to a claim of damages. She had died without saying anything upon the subject; and therefore the decision in that case is quite consistent with my opinion in *Riley*. I said in *Riley* that I thought the case of *Bern's Exr.* was rightly decided, and all the considerations of good sense, I think, point very strongly the same way. Whenever you come to a liability which depends upon reparation that is to be made for personal suffering—whether the suffering is of the purely bodily class, as in the case of injury by accident, or of the mental class, which is represented by slander, or of that still more delicate and still more mixed class which may be represented by seduction—it is, I think, very evident that, if the persons themselves affected do not choose to make a claim it is very right that nobody else should make it. But if the person has elected to make a claim, then I see no reason why that claim should not transmit like any other estate of the injured person. Accordingly I am of opinion that the Lord Ordinary was wrong in dismissing the action.

I think there is a very delicate inquiry in front of us here, especially considering the possible application of what was laid down by the House of Lords in the case of *Darling* v. *Gray & Sons* (19 R. (H.L.) 31), and accordingly I think it would be inexpedient to go into that matter *ab ante*. I think the proper course will be to recall the Lord Ordinary's interlocutor, and remit to his Lordship with instructions to allow a proof.

LORD KINNEAR—I agree with your Lordship. I had occasion to consider this

question in the case of *Traill & Sons* v. *Aktiesselskabet, Dalbeattie, Limited* (6 F. 798), and as I adhere to what I said on that occasion I do not think it will be necessary or at all proper to repeat it. I only wish to add one or two observations for the purpose of considering a point which perhaps did not so directly arise in that case as in the present. I am still disposed to attach the greatest weight to the very high authority of Lord Wood in *Neilson* v. *Rodger* (1853, 16 D., at p. 329), and also of Lord Neaves in *Auld* v. *Shairp* (1874, 2 R., at pp. 199-200) in their statement of the general law, but I think that probably Lord Wood's statement must be taken, since the case of *Bern's Executor* (20 R. 859) with some qualification which was not necessary for the purpose for which he was applying the law in the actual case, and which may or may not have been at the time present to his mind.

The fundamental proposition which Lord Wood lays down, and which I hold to be not only sound in law but obvious, is that a claim for damages or *solatium* for injury to the person or feelings vests *ipso jure* in the injured person. So far as he is concerned I apprehend there can be no doubt. If it did not so vest he could have no action at all, for an action is brought for the purpose of constituting and enforcing rights already vested in the pursuer. If he has no right he has no action. Well then, his Lordship goes on to say that the right vests prior to any proceedings for decree for its constitution. And then he says that it is a moveable claim and assignable either by positive evidence or implied legal assignation, and passes to personal representatives. Now if Lord Wood meant only that the action once instituted may pass to the representative of the pursuer on his death, that proposition is abundantly supported by the authority of decisions of this Court and by the authority of the House of Lords in *Darling* v. *Gray* (1892, 19 R. (H.L.) 31), because in that case the House of Lords expressed no doubt whatever that the deceased pursuer's mother was entitled to be sisted in his room as executor and to carry on the action instituted by him. And he says 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 damages to which the deceased was entitled. Therefore so far, I think, Lord Wood's proposition is beyond doubt. He then goes on to say that it is also assignable, and I must say that I remain of opinion that if a right is transmissible to executors by law, it is, according to our well-settled legal principles, of necessity assignable by the person from whom it may be legally transmitted.

Our law on this subject divides claims into two categories — transmissible, and personal and intransmissible—but there is not to be found in our books the trace of a suggestion that there is a third category — transmissible but not assignable. According to our system, rights of action are assignable; and if a man's right of action will pass to his executors if he does not deal with it himself, it seems to me to follow that he may deal with it himself during his life, or the law would be that the legal executors of a man have the absolute right to take through him against his will, and excluding his assignees or legatees.

So far, therefore, I think there is really no question. But then there does arise the difficulty to which the Lord President has referred. If the injured person has said nothing about his injury, and intimated no intention of raising an action for it, it is very reasonable to say that his executors and personal representatives have not had an action transmitted to them, because they cannot assume that he treated or intended to treat the act of which they complain as a cause of action at all. I think the assumption which may reasonably arise from the possibility of a man having a claim for personal injury, *ex delicto* or *quasi ex delicto*, is totally different from that which arises from his having a claim for an ordinary civil debt. On the death of a creditor it must be assumed that he intended to enforce payment of his debts unless he has done something to waive his right, and the person who affirms waiver has to prove it. But then I think there may be a very reasonable assumption the other way when an executor proposes to sue for an injury to the personal feelings of the deceased which he has indicated no intention of complaining about at all, because it may very well be the case that a man may have suffered a legal injury in respect of which he would never think of bringing an action. If he did not choose to complain, why should his executor be entitled to do so? Therefore, if Lord Wood meant that a right of action transmits absolutely without reference to anything that may have been done by the injured person to establish his own intention to constitute his claim, I think the case of *Bern* would be an authority the other way. On the other hand, his doctrine that the right vests although it may not be actually constituted is borne out by *Darling* v. *Gray*, because a claim is not constituted by raising an action but by obtaining a decree.

The question, therefore, comes to be whether the only way in which the injured person can intimate his intention to enforce his right to recover damages is by raising an action. For the reasons which I have ventured to give in the case of *Traill* (6 F. 798) I think the true principle is as put by his Lordship in the Chair in the case of *Riley* (1910 S.C. 934), when he asks, Why is it that the institution of an action is necessary? and answers that question by saying, Because that determines the intention of the injured person to claim the damages due to him.

I think with his Lordship that the argument is not much affected one way or the other by Mr Mackay's very interesting excursus on the Roman law. I cannot say that I entertain any doubt that when the

words *actio injuriarum* are found in the judgments of this Court—and it is a phrase that has been used by a great many of our predecessors, including Lord President Inglis, who was a great civilian—they are used with reference to the law of Scotland, and not with reference to the law of Rome, from which no doubt the law of Scotland has borrowed a great deal in matters of principle, but little in the matter of remedy. I think the words are used simply as a convenient Latin term for expressing a class of actions known to our own law. The Judges who began to class them together borrowed a phrase from the Roman jurisprudence and used it with reference to their own classification of actions, without considering whether in classical usage it was restricted to claims arising out of insult or outrage, to the exclusion of claims founded on negligence; and in so doing I think they followed a common practice both of law language and ordinary language when Latin terms are employed to express ideas which never were Latin, and so acquired by usage an English or Scottish signification which may be far from identical with their meaning in the original language. And therefore I cannot doubt that the phrase *actio injuriarum* used in the cases cited referred to the actions which Lord Wood describes as actions for bodily suffering and injury to the feelings from wrong by another person.

On the remaining matter to be considered I agree entirely with your Lordship that this is a kind of case which, when it proceeds, will involve very delicate questions as to the amount or measure of damages. I think that was foreseen, and is thoroughly discussed by Lord Wood in the case of *Neilson*. I think they are all questions which can be more satisfactorily decided by a judge than by a jury. They can be brought under the consideration of a court of appeal in the former case when they could not be in the latter case, because the jury would have to decide them without giving the reasons, whereas we shall have the reasons of the judge who tries the case for whatever course he takes.

LORD MACKENZIE—The Lord Ordinary has dismissed this action on the authority of the cases of *Bern* and *Boyce*. There is a specialty in this case which was not present in either of those. The deceased Ernest Leigh met with the accident in question on 25th December 1911. He was knocked down by a van belonging to the defenders the Caledonian Railway Company. He was removed to the Royal Infirmary, Glasgow, where he died, in consequence of the accident, on 6th January 1912. While in the Infirmary, on 28th December 1911 it is averred that he instructed his solicitors to take proceedings to recover from the defenders a sum in name of damages for his injuries and sufferings. His agents accordingly wrote to the Caledonian Railway Company on the same day the letter quoted in Cond. 7. In it they said they had been consulted, that they had made inquiries and were satisfied that the Railway Company were liable, and that they would be glad to hear from the Company at their earliest convenience, and after they had made inquiries, whether or not liability was admitted. It is averred that, on 5th January 1912, the deceased executed a will appointing the pursuer his executrix and universal legatory. It contained this declaration—"I also declare that she is to be entitled to and to get any sum of money which may be paid in name of damages or otherwise by the Caledonian Railway Company in respect of the accident I have sustained." No action was raised by the deceased. The present action was raised after his death by the pursuer as his executrix nominate.

Now the principle upon which the rule laid down in the case of *Bern* rests is that an injured person may have excellent reasons for refraining from bringing an action for reparation for bodily injuries. As Lord M'Laren points out (20 R. at p. 863) —"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." The reason therefore why it was held that the executor in *Bern's* case had no right, title, or interest to sue for the personal injuries alleged to have been suffered by his wife is absent here. If an injured person has himself begun the action, the ground of objection to the executor's title as explained in the passage quoted above to a large extent disappears. That is because the injured person has indicated in the clearest way possible, viz., by raising an action, that he intends to make the claim. He may, however, indicate in a perfectly clear manner his intention to insist on the claim short of the actual signeting or service of a summons. I refer to what Lord Kinnear says in the case of *Traill* (6 F. 798, at p. 806) —"All that was decided in *Bern's* case is that if a person who has sustained bodily injury through the fault of another dies without taking any step to vindicate a right to reparation his executor cannot make a claim which during his life he abstained from making. This makes the title of a representative to sue depend upon the intention of the injured person himself to vindicate his right. But the institution of an action is not the only means of manifesting that intention."

The question raised in *Traill's* case was as to the right of an assignee of a claim by a widow and children for damages for the death of the husband and father, arising *ex delicto* to bring an action in his own name. His title to do so was sustained. The ground of judgment was that the assignation by the injured person was just as plain an assertion of his right to demand reparation as if he had brought an action in his own name. So in the present case I think that the letter written by the agent, and received by the Railway Com-

pany, was a plain assertion by the deceased of his right to demand reparation. The case of *Boyce's Executor* (1903, 5 F. 452) is distinguishable from the present. There the averment was that the executor dative, who brought the action, had as *curator bonis* of the deceased given instructions before the death that an action of damages on account of the injuries should be raised. So far as the averment goes this might have been a mere verbal statement by the *curator bonis*. No claim was ever made upon the defender in that case before the death. Here it was. In the present case it is not the fact of the injury which creates the civil debt, but the election by the deceased to treat the injury caused him as an actionable wrong as evidenced by the claim which he made through his agents. I do not think the judgment in the case of *Riley* v. *Ellis* (1910 F.C. 934) adverse to the view I take, and what is there said by the Lord President confirms it. Nor is the decision in *Darling* v. *Gray & Sons* (19 R. (H.L.) 31) in point for the purpose of the present discussion. No doubt that judgment creates a difficulty in the case where dependents desire to make their claim where a claim has already been made by the executor. That difficulty, however, would necessarily arise if a summons had been served at the instance of the deceased before his death. All that we are here deciding is that what the injured person did was equivalent to the serving of a summons. I therefore think the executrix has a title to sue, and that the first plea-in-law for the defender should be repelled. In coming to this conclusion I express no opinion as to the items of damage the pursuer is entitled to recover. Points for argument may arise when the evidence is being taken. The case does not appear to me to be one suitable for trial by jury.

LORD JOHNSTON was absent.

The Court recalled the Lord Ordinary's interlocutor of 13th November 1912 and allowed a proof.

Counsel for the Pursuer and Reclaimer—Moncrieff, K.C.—A. M. Mackay. Agents—Hill, Murray & Brydon, S.S.C.

Counsel for the Defenders and Respondents—Clyde, K.C.—Blackburn, K.C.—Hon. Wm. Watson. Agents—Hope, Todd & Kirk, W.S.

Thursday, March 20.

FIRST DIVISION.

[Sheriff Court at Glasgow.

ALEXANDER KNOX & ROBB *v.* SCOTTISH GARDEN SUBURB COMPANY, LIMITED.

Principal and Agent—Authority Implied—Custom of Trade—Architect's Power to Employ a Measurer.

There is no rule of law that by custom of trade an official architect who has received no instructions on definitely settled plans to proceed with a particular work, has implied authority from his principal to engage the services of a measurer.

Black v. *Cornelius*, January 24, 1879, 6 R. 581, 16 S.L.R. 475, *distinguished.*

Alexander Knox & Robb, measurers, Mercantile Chambers, Bothwell Street, Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against the Scottish Garden Suburb Company, Limited, 141 West George Street, Glasgow, *defenders*, for payment of £121, 8s. 2d., being the amount alleged to be due by the defenders to the pursuers for work done by them.

The following *narrative* of the *circumstances* of the case is taken from the opinion of Lord Mackenzie (*infra*)—"This is an action by a firm of measurers and surveyors, for payment of an account of £121, 8s. 2d. The defenders are the Scottish Garden Suburb Company, Limited. This company was incorporated on the 6th June 1910, . . . and was promoted with the idea of building workmen's houses in Greenock, having in view the establishment of an Admiralty torpedo factory there. . . . The pursuers aver that they were instructed by Mr Salmon, the official architect of the company, to carry out the work done by them, under dates June 7th and 9th, 1910, and also 13th and 23rd of August 1910. The first three items in the account are small charges for outlays only, and really follow the view to be taken of the items charged under June 7th and 9th. The rest of the work consisted in measuring plans, altering schedules, and preparing estimates.

"The grounds upon which the pursuers seek to make the defenders liable are—(1) that Mr Salmon had the instructions and authority of the defenders to employ the pursuers to do the work; (2) that according to the custom in the building trade Mr Salmon, as the official architect of the defenders, had implied authority to employ the pursuers, and that the defenders became liable for the pursuers' fees although there was between them no direct relation of employer and employed; and (3) that the defenders made use of the information which was the result of the pursuers' work, and are therefore liable in payment. . . ."

From the account it appeared that the items charged under June 7th and 9th were for measuring plans and preparing esti-