ported by the terms of the advertisement. I desire to reserve my opinion as to how far a newspaper can be made responsible without averments of negligence for the publication of an advertisement which was *prima facie* innocent and non-injurious, because I think that the position of a newspaper may in some respects be differentiated from that of a person who in good faith repeats words which might have a calumnious meaning. I say that, because actions of this kind directed against newspapers which receive and insert advertisements in the ordinary course of their business, must be more carefully looked at than when we are dealing with statements by private individuals affecting their neighbour's reputation. This advertisement which the defenders were asked to insert was *prima facie* perfectly innocent, and I think it is open to question how far apart from negligence they can be made responsible for its insertion, even if it bore a calumnious meaning in the particular circumstances of the pursuers.

LORD KINNEAR — I concur with Lord Salvesen in reserving my opinion upon the question to which his Lordship has referred. We do not require in this case to consider the extent of a newspaper's liability for publishing an advertisement apparently innocent when there are no circumstances before them to create a suspicion in the minds of their managers that some imputation is intended against some particular person.

The LORD PRESIDENT was absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Defenders (Reclaimers)—Morison, K.C. — Mair. Agents—Weir & Macgregor, S.S.C.

Counsel for the Pursuers (Respondents)—J. R. Christie—A. A. Fraser. Agents—Galbraith Stewart & Reid, S.S.C.

Friday, July 15.

FIRST DIVISION.

GENERAL BILLPOSTING COMPANY, LIMITED *v.* YOUDE AND OTHERS.

Diligence — Arrestment — Damages for Wrongous Dismissal—Creditor of Dismissed Servant Uses Arrestment before Servant has Made Claim or Raised Action —Validity of Arrestment.

Held (*rev.* the Lord Ordinary, Mackenzie, the Lord President *diss.*) that a claim of damages for illegal dismissal can be effectually arrested so as to give the arresting creditor a preference over the sum of damages recovered, although at the date when the arrestment was used the dismissed servant had made no claim, judicial or extra-judicial, against his employers.

Observations (by the Lord President) on the maxim of the civil law *Actio personalis moritur cum persona*, and on *Auld* v. *Shairp*, December 16, 1874, 2 R. 191, 12 S.L.R. 177, July 14, 1875, 2 R. 940, 12 S.L.R. 611.

The General Billposting Company, Limited, having their registered office at No. 16 North St Andrew Street, Edinburgh (*pursuers and real raisers*), raised an action of multiplepoinding against Robert Youde, Portobello (*common debtor*), Henry Lindon Riley, barrister, 3 Percy Street, Liverpool, Walter Angus Ellis, Official Receiver in Bankruptcy, Sunderland, and others, in which they sought to have it declared that they were only liable in once and single payment of the sum of £2000 contained in a decree of the Sheriff of the Lothians and Peebles at Edinburgh, dated 25th May 1909, whereby the General Billposting Company, Limited, were found liable to the said Robert Youde in the sum of £2000, and that to such of the defenders or to such other person as should be found at discussing of their rights to the same.

Claims were lodged by, *inter alios*, the said Henry Lindon Riley and Walter Angus Ellis.

The *facts* of the case and grounds of the claims appear in the opinion of the Lord Ordinary (MACKENZIE), who on 1st February 1910 repelled the claim for Henry Lindon Riley, and found him liable in expenses to Walter Angus Ellis, official receiver of the estate of Robert Youde.

Opinion.—"The fund *in medio* in this multiplepoinding is a sum of £2000 awarded as damages to Robert Youde for illegal dismissal by the General Billposting Company, Limited. Youde's appointment as managing director of the company was terminated on 23rd August 1907. A Sheriff Court action to recover damages was raised in January 1908, the Sheriff-Substitute decerned in favour of the pursuer on 15th April 1909, and the case was settled by joint-minute on 25th May 1909.

"On 31st March 1909 a receiving order was pronounced in England against Youde, and the claimant Walter Angus Ellis became the receiver. On 19th April 1909 the receiver intimated a claim to the General Billposting Company for all money payable to Youde under the above-mentioned decree. On 18th June 1909, at a meeting of Youde's creditors held in England, it was resolved that Youde should be adjudged a bankrupt. An order of adjudication was made against him by the Court on the same day.

"The receiver claims that he has a preference on the fund as against the claimants who now remain in the competition.

"The first of these is Henry Lindon Riley. In September 1907 he raised an action in the Court of Session against Youde for payment of £241, 17s. 10d. On the dependence of this action, on 3rd September 1907, he arrested the sum of £300 in the hands of the General Billposting Company. Decree for £217, 14s. 8d. and expenses was pronounced in the action on 13th November 1909.

"Riley claims a preference in virtue of his arrestment being prior in date to the receiving order and the arrestments used subsequently.

"The answer by the receiver is that at the date of the arrestments there was nothing arrestable in the hands of the arrestees. The arrestments in security were used on the 3rd September 1907. At that date no claim had been made by Youde against the General Billposting Company. The Sheriff Court action was not brought until January 1908. Youde's claim against the company was truly contingent at the date of Riley's arrestment, and could not therefore be the subject of arrestments. In support of Riley's claim the passage in Ersk. Prin., iii, 6, 4, was founded on. It is there stated that claims depending on the issue of a suit are not considered as future or contingent debts; for the sentence when pronounced has a retrospect to the period at which the claim was first founded. The authority cited for this is *Wardrop* v. *Fairholm*, M. 4860, but there the action to enforce the claim had been raised and was in dependence when the arrestments were used. This is not authority for saying that before any claim has been made or action raised arrestments can be used. I think the receiver's position as regards Riley's claim is sound. This claim will therefore be repelled. [*His Lordship dealt with certain other claims depending on arrestments made on 27th May* 1909.]

"Repel Riley's claim, reserving as to ordinary ranking."

The claimant Henry Lindon Riley reclaimed, and the case was heard on 4th March 1910.

Argued for the reclaimer—The right to damages vested on the date of dismissal *ipso jure*, and *ipso facto* prior to any proceeding or decree for its constitution—*Neilson* v. *Rodger*, December 24, 1853, 16 D. 325, Lord Wood at 329, and his dictum to that effect had been adopted and endorsed by Lord Neaves in *Auld* v. *Shairp*, December 16, 1874, 2 R. 191, at p. 201, 12 S.L.R. 177. The dictum had, it was true, been qualified to some extent by *Bern's Executor* v. *Montrose Asylum*, June 22, 1893, 20 R. 859, 30 S.L.R. 748, which decided that the right to institute an action of damages for personal injuries did not transmit to the executor of the injured person. Lord Neaves' opinion was also referred to in *Hendry* v. *United Collieries, Limited*, 1908 S.C. 1215, by Lord Kinnear at p. 1218, 45 S.L.R. 944, and in the House of Lords, 1909 S.C. (H.L.) 19, by Lord Shaw at p. 25, 46 S.L.R. 780. Any claim of a moveable nature might be arrested even though the power to make it effectual and the ascertainment of the sum due depended upon the issue of an action, and "the sentence, when pronounced, has a retrospect to the period at which the claim was first founded"—Ersk. Inst., iii, 6, 6; Ersk. Prin., iii, 6, 4; *Wardrop* v. *Fairholm & Arbuthnot*, 1744, M. 4860. Similarly, a claim for personal injuries transmitted to the injured person's trustee in bankruptcy—*Thom* v. *Bridges*, March 11, 1857, 19 D. 721. They admitted that a *spes successionis* was not capable of arrestment—*Trappes* v. *Meredith*, November 3, 1871, 10 Macph. 38, 9 S.L.R. 29. Decree in Youde's action merely constituted the debt. The debt or obligation to account existed, or was "first founded," from the date of the wrongful act. It was the obligation to account which was the proper subject of attachment—*American Mortgage Company of Scotland* v. *Sidway*, 1908, S.C. 500, 45 S.L.R. 390; *Marshall* v. *Nimmo & Company*, December 18, 1847, 10 D. 328; Bell's Com., vol. ii, p. 71; Bell's Prin., 2276. An arrestment might be good though the arrester could not raise a furthcoming to make it effectual without the assistance of his debtor (the common debtor) constituting his debt by obtaining decree in an action against the arrestee, for an arrestment might be valid though the arrester had not the power to make it effectual—*Chambers' Trustees* v. *Smiths*, April 15, 1878, 5 R. (H.L.) 151, 15 S.L.R. 58; *Corse* v. *Masterton*, 1705, M. 767—even though the debt or right arrested might be subject to defeasance—*Chambers* (*cit. sup.*). [In answer to Lord Skerrington they admitted that an arresting creditor could not constitute in a furthcoming a claim of damages for breach of contract.] Reference was also made to *Lindsay* v. *London and North-Western Railway Company*, January 27, 1860, 22 D. 571; *Smith Cunninghame* v. *Anstruther's Trustees*, March 16, 1869, 7 Macph. 689; *Crawcour* v. *Graham*, February 3, 1844, 6 D. 589.

Argued for the claimant and respondent (the Official Receiver)—The passages in Erskine relied on by the reclaimer, and the case of *Wardrop*, did not cover the present case. "First founded" was ambiguous, but they submitted a claim was not founded until made. In *Wardrop* action had been raised by the injured person before arrestment was made, and *fictione juris* the date of the debt was taken back from its real date, the date of decree, to the date of the summons. The present case could not be brought within the dictum of Lord Kinnear in *Heron* v. *Winfields Limited*, December 11, 1894, 22 R. 182, at 185, 32 S.L.R. 137. There was no debt in the hands of the arrestee at the time of the arrestment which he was bound to discharge to the common debtor; neither was there at that time any pecuniary fund as referred to in Bell's Prin. 2273 and Bell's Com., vol. ii, p. 72, nor a fully-contracted obligation to account, as in *American Mortgage Company of Scotland* (*cit. sup.*) and in *Marshall* v. *Nimmo & Company* (*cit. sup.*). The case of *Thom* v. *Bridges* (*cit. sup.*) was a case of a going action. Reference was also made to *Reid* v. *Morison*, March 10, 1893, 20 R. 510, 30 S.L.R. 477.

At advising—

LORD JOHNSTON—In this case a claim of damages for illegal dismissal from an appointment arose against his employers, the General Billposting Company, Limited, to Robert Youde, their managing director, on 23rd August 1907, the date of his dismissal. He did not raise his action against

the company until January 1908, and his claim was not settled by decree in terms of joint-minute until 25th May 1909.

Meantime, after the claim of damages arose, but before the action to enforce the claim was raised, Henry Lindon Riley, a creditor of Youde's, raised an action against him, on the dependence of which he arrested on 3rd September 1907 in the hands of the General Billposting Company. During the dependence of this action, in which Riley did not get decree until 13th November 1909, a receiving order against Youde was pronounced in England on 31st March, and he was adjudged bankrupt on 18th June 1909. The Official Receiver disputes the validity of Riley's arrestment, and claims in this multiplepoinding a preference over the sum ultimately recovered by Youde, which is the fund *in medio* in this multiplepoinding. The Lord Ordinary has sustained the objection to Riley's claim.

With reference to a Scottish case, it is well not to use the brocard *actio personalis moritur cum persona*, because, though there is no real doubt about the meaning of the expression when applied in Scots law, the term *actio personalis* is not used with scientific accuracy, and is open to criticism, if not misconstruction. But without using this controversial term, I think that it may be said with accuracy that it is recognised by the law of Scotland that an action for strictly personal wrong, whether to the person or to the reputation, dies with the person.

Although to this rule an exception has been admitted in the case of *Neilson* v. *Rodger*, 16 D. 325, to the effect that if the action has been raised in the lifetime of the party it transmits. To this decision there is a strong dissent by Lord Justice-Clerk Hope, but the case has been recognised as ruling practice—*Darling* v. *Gray & Sons*, 19 R. (H.L.) 31, *per* Lord Watson—and, as was pointed out by Lord M'Laren in *Brown* v. *Montrose Asylum*, 20 R. 859, it must be treated as an exception to a general rule. Moreover, many of the dicta of the Judges in the majority are of doubtful soundness; amongst others the statement by Lord Wood, that such a claim not only vests *ipso jure* and *ipso facto* prior to any proceeding or decree, but is assignable and transmissible.

But where the claim is for personal injury and at the same time for patrimonial loss resulting from that injury, it has been held in *Auld* v. *Shairp*, 2 R. 191, that the claim transmits, not by reason of the personal injury, but of the patrimonial loss. That decision has been canvassed. But so long as it stands it is binding on me, and I cannot read the judgments of the majority of the Court as determining anything else than what I have stated. The claim of Dr Auld's widow in her own right may be set aside. But apart from that speciality, the action was viewed, as undoubtedly it substantially was, as an action for reparation for the injury which her husband had sustained, and which she, *qua* his executrix, had sustained (*per* Lord Gifford at p. 208). Her title to sue that action was indubitably sustained. Where their Lordships in the majority indicated doubt was as to the relevancy—as to whether the widow *qua* executrix had set forth a relevant case for damages either for personal wrong or patrimonial loss. But this question of relevancy would have arisen in the same way, and to precisely the same effect, had her husband survived and been himself the pursuer. I cannot more clearly express my view of the transmissibility of such an action as the present than by referring to Lord Neaves' opinion, at p. 200, where his Lordship instances the very case of the loss of a situation. If, then, an action with the mixed ground of personal injury and patrimonial loss transmits to representatives, *a fortiori* must a claim which is purely for patrimonial loss as a claim of damages for breach of contract. And what transmits to representatives is, I think, assignable. But assume that it does not follow that what is assignable is also arrestable. What, then, is the objection to the arrestability of a claim of damages which the party injured has not yet put in suit? It is said to be contingent, but that I think is a misconception. It may be ill-founded, but if it is not ill-founded it has accrued from the date of the breach, and the only question to be determined is its measure. If the claim is good though the amount be unascertained, it cannot be said that from the date of the breach there was nothing due to the common debtor, and therefore nothing to arrest until an action to constitute the claim is brought. "It is the obligation to account which is the proper subject of attachment" (Bell's Com. ii, 71), and the obligation to pay what may be found due is surely the equivalent of an obligation to account.

It is also suggested as an objection to the transmissibility that the wrong which is the foundation of the action is capable of being condoned. And so it is. But such condonation would form a defence equally against the original party wronged as against his representatives. But that plea does not in my opinion go to the transmissibility. And it is not altogether immaterial to remember that the competition in this case is between two parties both claiming in a representative character, and that the one who takes the plea under consideration is standing on the ground that there was in fact so little condonation that the party injured, and whom as judicial assignee he represents, had made and prosecuted a claim to a successful result. I cannot think that, when the defence of condonation cannot be stated, a party unable to pay his debts can be heard to void his creditors' diligence by gratuitous surrender of a claim which might be made effectual to their benefit, either directly or through a trustee in his sequestration.

LORD SKERRINGTON — The question in this multiplepoinding is whether a claim of damages for illegal dismissal can be effectually arrested so as to give the arresting creditor a preference, although at the date when the arrestment was used the

dismissed servant had made no claim, judicial or extrajudicial, against his former employers. The dismissed employee subsequently to the arrestment brought an action for damages and got decree for £2000. This sum forms the fund *in medio*. The competition is between a creditor of the dismissed employee, who used arrestments in the hands of the employer within a month after the dismissal, and the official receiver in bankruptcy, who claims to be vested in the estate of the employee. The arrestment was long prior in date to the receiving order, but the Lord Ordinary has repelled the claim of the arresting creditor on the ground that at the date of the arrestment no claim had been made against the employers and no action had been raised. Counsel for the official receiver argued that the diligence of arrestment applies only to debts in the proper sense of the term, and has no application to a claim of damages unless and until such claim has been constituted by decree. He argued that in the present case no debt actually existed until the decree for payment of damages was pronounced, but he admitted that by a legal fiction the debt must be deemed to have come into existence at the date when the action of damages was raised. It followed that the arrestment, being prior to the action, attached nothing. No authority was quoted which in any way supported this contention, and in my opinion it is both novel and unsound.

I have always understood that, with certain exceptions (such as bills of exchange and alimentary rights) any *jus crediti* for payment of a sum of money may be arrested, and no principle or authority was adduced in favour of the view that the diligence applies only to debts in the narrow sense of the word. In treating of arrestment the institutional writers speak of "debts" as the ordinary subject of the diligence, but they make it clear that (with certain exceptions already referred to) any claim for money or *jus crediti* of a moveable character may be arrested. Thus Bell (Com. ii, 68) says that during a debtor's lifetime arrestment is "the sole diligence for attaching his personal claims." Erskine (iii, 6, 2) says that by arrestment the debtor "in a moveable obligation" is prohibited "to make payment of his debt or perform his obligation." He also states (iii, 6, 6) that "every claim competent upon moveables, though its validity or extent may depend on the issue of a suit," is arrestable. Further, I have always supposed that a claim of damages for breach of contract comes into existence at the date of the breach, though it may not at that date be certain whether the injured party will or will not bring an action of damages. Somewhat to my surprise counsel for the arresting creditor conceded that such a creditor cannot constitute in a furthcoming a claim of damages for breach of contract, though he admitted that an arresting creditor may in such an action constitute a direct claim *ex contractu*, however complicated that claim may be. No reason and no precedent was cited in favour of this supposed distinction, and I am of opinion that it is unfounded. In *Galloway* v. *Gardner* (1838, 1 D. 74) the Lord Ordinary (Moncreiff) and the Second Division had to consider a furthcoming following on an arrestment of a claim of damages for breach of warrandice. They repelled the objection that the debt alleged to be due in virtue of the warrandice clause had never been constituted.

The argument on both sides was complicated by reference to the fact that certain claims are of such a personal character that they cannot be constituted by an arresting creditor in an action of furthcoming. Thus a tradesman who was unable to recover payment of his account from a lady customer would probably not be entitled to use arrestments in the hands of a male acquaintance of the lady and thereafter to constitute in a furthcoming a claim of damages for breach of promise of marriage or seduction. Cases of this kind constitute an exception to the general rule stated by Mr Bell to the effect that "the arrestor ought to be considered as having by his diligence acquired every right which is in the original creditor and every remedy for enforcing payment as well as establishing the debt which was in him"—ii, p. 67 note; 7th ed., p. 64. I do not need to consider whether the claim of damages in the present case was or was not of this personal character, seeing that the employee himself raised action and obtained decree. He thereby converted his illiquid claim of damages into a judgment debt, but in my opinion the arrestment affects the debt as it did the claim, and entitles the arresting creditor to a preference. It was not, as I understand, disputed that an arrestment of an illiquid claim is in the ordinary case effectual, notwithstanding that the claim has subsequently been constituted by decree.

The Lord Ordinary's judgment proceeds upon the view that there can be no liability for damages until a claim has been made either judicially or at least extrajudicially by the party aggrieved. This view seems to me to be unsound if it means anything more than is comprised in the four following propositions, each of which is a truism — (1) an act which in ordinary circumstances would be a breach of contract or a delict is not wrongful if it was done with the antecedent authority of the person who otherwise could have complained of it; (2) a wrongful act may be ratified by the party entitled to complain, and if so ratified it ceases to be wrongful; (3) a claim of damages may be discharged like any other pecuniary claim; and (4) certain claims of damages arising out of breach of contract or out of delict are of such a personal character that they cannot be enforced unless the sufferer himself chooses to bring an action against the wrongdoer. This last proposition, as also the possibility in every case of ratification or discharge, indicate that difficult questions may arise as to the rights of arresting creditors where the common debtor is unwilling to sue or has attempted to waive any claim he might otherwise have. The possibility of such

questions does not in my opinion support the general proposition that there is no liability for damages in respect of breach of contract or delict unless and until an action is raised or a claim is intimated. The opposite is I think obviously true where a claim of damages is purely patrimonial; in other words, where a claim is capable of being measured on a purely commercial basis and where its amount would not be affected by any reference to the character or feelings or sufferings of the injured party. It can hardly be suggested that the principle of the case of *Bern's Executor*, 20 R. 859, would prevent an executor from instituting an action of damages against a person who had wrongfully destroyed the property of the testator. Nor do I see any reason why such a claim should not be constituted by an arresting creditor in a furthcoming. In defence to such an action it would be open to the defender to prove that he acted with the authority of the owner of the property destroyed, or that the owner had subsequently but prior to the arrestment ratified the act or discharged his claim. On the other hand, if the claim was not purely patrimonial but was a personal one of the kind referred to by Lord M'Laren in his opinion in *Bern's Executor*, I am disposed to think that an arresting creditor could not enforce the claim by action of furthcoming unless and until the injured party had successfully prosecuted the action and obtained decree in his favour. In this respect an arresting creditor is in my opinion in a less favourable position than an executor who is entitled to make himself the pursuer of an action instituted by the author. Once, however, that such a claim has been constituted in an action at the instance of the injured person, it is established that a claim of damages came into existence at the date of the breach of contract or delict complained of, and there remains no obstacle to the efficiency of the creditor's arrestment.

For these reasons, I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that the case should go back to him for further procedure.

LORD PRESIDENT — I have found this question one of great difficulty, but I have come in the end to the conclusion that the Lord Ordinary is right, and am of opinion that his judgment should be affirmed. I do not think that the question is in any sense covered by authority, and I do not think it easy to resolve on principle.

I do not think that the argument against the validity need at all be rested upon a contention that arrestment is limited to "debts" in the narrow sense of the term. Such a contention would, I think, be vain. As little, however, is it possible to say that every claim which an individual may make against another is arrestable in the hands of that other. And it is not to my mind a satisfactory solution when such claims are instanced to say simply that they are exceptions to the rule. That always leaves the question open, if this case is not also an exception to the rule, and gives no assistance in determining that vital consideration.

The only general rule that I can deduce is that arrestment is only possible where there is a present liability to account. By present I mean at the date of the arrestment. I deduce this from a consideration of the things which admittedly are and the things which admittedly are not liable to arrestment.

The simplest case is a debt. That is arrestable if it is contingent (Erskine). And under the head of contingency will be reckoned a debt alleged and denied, and the ultimate existence of which depends on the issue of a suit.

In the case of a debt proper there is an obligation to pay, and an obligation to pay necessarily includes an obligation to account. But there may be an obligation to account when at the moment there is no obligation to pay. A familiar example is a share of a partnership, or as was affirmed by us the other day in the case of *American Mortgage Company of Scotland, Ltd.* v. *Sidway* (1908 S.C. 500), a share in a limited company. In both these cases there may be nothing actually at the moment due. In other words, the furthcoming will be available to realise, but only according to the tenor of the obligation to account.

On the other hand, a pure future debt is not arrestable because there is no present obligation either to pay or to account.

Now let me turn from debts to claims, pecuniary or otherwise. Claims can arise in three ways—by operation of law, by contract, by delict.

Operation of law may really be regarded in the light of an enforced contract which creates the debtor and the creditor, and contracts unilateral may embrace all the cases where the creditor owes his right to bounty, *e.g.*, the right of a legatee to be paid by the executor. *Prima facie*, therefore, instances in these cases might be treated in the same manner in which I have treated simple debts.

But what of claims arising out of delicts? It is here that the difficulty of stating a general rule that arrestment applies to all "claims" is at once felt, because admittedly the claims in respect of certain delicts are not arrestable before the claims are made or actions raised.

Lord Skerrington has given one illustration where no one could suppose an arrestment could be good or a furthcoming available. Actions in respect of slander might be safely added. And though not so obvious, yet I think equally safely, a claim for damages for personal injury. 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. The real reason

seems to be that in these cases there is no present liability to account until either a claim is made or action is raised. This may not be the case with all claims arising out of delict, but it seems to be the case where the wrong needs to be stated as such by the injured, or, in other words, depends for its quality of wrong upon the attitude assumed by the injured party.

It remains to apply this test to the question before us. It seems to me that claims for "wrongous dismissal," although arising under a contract, is in this province rather to be assimilated to a personal claim arising from delict than to a claim for ordinary breach of contract. In other words, I think there has to be a personal attitude assumed or an election made by the person concerned before you can say whether the dismissal was wrongous or not. The term of service may be fixed, and the employer, before the end of that term, may say Go. But the servant may be delighted to go, and the dismissal is only shown to be wrongous if the servant professes ability and willingness to continue to perform his part of the contract. The moment he raises action that is determined. But until he does so, I do not see that there is a present liability to account.

It may not be amiss to consider for a moment the question of transmissibility. I agree with Lord Johnston that transmissibility does not necessarily settle arrestability. But I also agree with him in thinking that if a claim is transmissible it may go a long way to show that it is arrestable. In the term transmissibility I do not wish to include voluntary transmission by assignation, but to restrict it to transmissibility from the dead to the living. Voluntary assignation is obviously no test —*e.g.*, ordinary debts are assignable and arrestable; a *spes successionis* is assignable but not arrestable.

As to *actio personalis moritur cum persona*, I regret I cannot agree with my brother Lord Johnston that that is recognised by the law of Scotland. The expression if translated refers to a division of actions known to the Roman law but not known to the law of Scotland; if paraphrased, it refers to a doctrine of English law which was never adopted in the law of Scotland *eo nomine*.

The case of *Bern's Executors*, which was heard by Seven Judges, decides that a claim for damages for personal injury does not transmit, and that decision would doubtless cover a case of damages for slander pure and simple. But it is said that *Auld* v. *Shairp* decided that if there is a patrimonial as well as a personal loss the claim is transmissible; and the alleged wrong in *Auld* v. *Shairp* was slander, but not slander pure and simple, but slander with, so to speak, a patrimonial consequence. I think it is certain that *Auld* v. *Shairp* decided no such thing, and as the case has been often quoted I think it necessary to examine it somewhat narrowly. I think it can be demonstrated that *Auld* v. *Shairp*, owing to the peculiar course of the action, really decided nothing as to these matters, though there were dicta which I shall examine.

Mrs Auld, the widow of a Madras College master, raised an action against Principal Shairp for damages. Her complaint was that Shairp by means of a libellous communication to the Duke of Portland, the patron of the Humanity Chair in St Andrews University, and by means of his, Shairp's, illegal acting in retaining the occupancy of the said chair after he had been appointed Principal of the University, had prevented the Duke appointing Auld, as he otherwise would have done according to promise made.

The defender, *inter alia*, pleaded (1) no title to sue, (2) irrelevancy, (3) so far as the slander was concerned, privilege.

The Lord Ordinary repelled the first plea only, without so far disposing of the others, and granted leave to reclaim. The Inner House at the first discussion upheld that decision, but solely on the ground that as Mrs Auld averred that she had suffered pecuniary damages that was conclusive as to title if she had a relevant case, which they left over for further discussion.

The case was then put out for discussion on the relevancy, but after argument they allowed a proof before answer, *i.e.*, without pronouncing on the relevancy.

The proof was led, and when the case was disposed of the Court held, first, that Shairp having been all along *de facto* Professor of Humanity, any contention as to the legality of his continuing to be so after he was appointed Principal might be raised between him and the patron or the university authorities, but could not be raised by a person whose only title lay in the fact that if there was a vacancy he had been promised that he would be appointed; and second, that the alleged libellous communication being privileged, and there being no evidence of malice, action could not lie on that head. Both these pleas were good as against the merits, *i.e.*, would have been good if the action had been raised by Mr Auld in his life; and consequently in the end the decision did not and could not affirm the proper transmissibility of a good claim by Auld to his widow.

While this I think is certain, it is, I confess, to my mind equally clear that supposing, for instance, there had been malice found against Shairp, the Judges in the Inner House who tried the action would have held that this claim transmitted to Mrs Auld. But then in so doing they would have run counter to the Seven Judges case (I mean in principle, for of course the case itself was subsequent) of *Bern's Executors*. For they would have gone on Lord Neaves' dictum—"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 a 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."

That dictum covers it. But it cannot live with the Seven Judges case. I think Lord Trayner, who was a dissentient in the Seven Judges case, was quite right when he cited Lord Neaves' authority for his dissent, though for the reasons given I do not think he could claim the authority of the judgment.

Now the Seven Judges case is binding on me, and, further, I agree with it. I am therefore justified in rejecting as overruled the dictum of Lord Neaves — the result being in my mind clearly that *Auld* v. *Shairp* is devoid of all authority whatsoever except for the proposition for which no one cites it, viz., that a communication from a principal of a university to the patron of a chair regarding the appointment to the chair is privileged.

The question of transmissibility of claims for damages for breach of contract is to a certain extent mixed up with the question of the transmissibility of the contract itself The ordinary contract can be transmitted in every sense; that for personal service cannot. The executor cannot offer to perform his part of the contract of personal service; as little, I think, can he affirm whether he will treat a *de facto* dismissal as a wrongous dismissal.

It is obvious that the moment action is raised all difficulty vanishes. Then this becomes an election to treat what has happened as a wrongous dismissal, a present demand for damages, and a present liability to account and pay contingent only on the success of the action, and that is all that the only authority cited, namely, the old case *Wardrop* v. *Fairholm & Arbuthnot* (M. 4860) actually decided.

On the whole matter, though not without difficulty, I agree with the Lord Ordinary that this arrestment attached nothing, and not having been repeated after action raised cannot compete with the universal title of the Commissioner in Bankruptcy.

LORD M'LAREN and LORD KINNEAR were absent at the hearing.

The Court recalled the interlocutor of Lord Mackenzie dated 1st February 1910, sustained the claim of Henry Lindon Riley, and remitted the case to the Lord Ordinary to proceed as accords; found the claimant Walter Angus Ellis, Official Receiver of the Estate of Robert Youde, liable in expenses to the said Henry Lindon Riley since the date of lodging his claim; and remitted the account thereof to the Auditor to tax and to report to the Lord Ordinary, to whom granted power to decern for the taxed amount thereof.

Counsel for the Claimant and Reclaimer Henry Lindon Riley — Graham Stewart, K.C. — J. H. Millar. Agent — James M'William, S.S.C.

Counsel for the Claimant and Respondent the Official Receiver of the Estate of Robert Youde — Wilson, K.C. — Hon. W. Watson. Agents — E. A. & F. Hunter & Co, W.S.

Wednesday June 15.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

LAIRD & SON *v.* BANK OF SCOTLAND AND OTHERS.

Bankruptcy — Right in Security — Bill of Lading — Delivery Order — Holder for Value and in Good Faith—Illegal Preference—Act 1696, *c.* 5.

A cargo of timber was purchased by A, who accepted bills for the price, and in return for his acceptance received the bills of lading blank endorsed. The sale was induced by fraudulent representations on the part of A. The cargo was on arrival stored with a firm of timber measurers subject to A's orders. Thereafter A, in return for advances, granted certain delivery orders to the lenders, to whom the bills of lading were handed over. At the date of these transactions A was in fact in great pecuniary difficulties though still carrying on business. A having become bankrupt within sixty days of the granting of the delivery orders, and the sale having been reduced on the ground of A's fraud, the cargo was claimed by (1) the unpaid sellers, (2) the liquidator on A's estate, and (3) the grantees of the various delivery orders.

Held (*diss.* Lord Johnston on the question of good faith as brought out in the evidence) that as the grantees of the delivery orders had no knowledge of A's fraud in inducing the sale, they were holders in good faith and for value, and consequently that where the logs assigned had been specifically identified, the grantees had acquired a good title to the timber, valid against the unpaid vendors and the liquidator. *Per* Lord Kinnear — "There is no wrong done to any one in dealing with an insolvent person in such a way as to keep his business going for a time so long as the person dealing with him confines his transactions to those for full value" — Lord Mansfield's statement of the principle in *Foxcroft*, 1760 2 Burr 931, *applied.*

Held, further, that a delivery order, although specific and duly intimated to the custodiers of the timber, which had been granted in substitution of a prior delivery order which was not specific, was invalid, it being granted in further security of a prior debt within sixty days of granter's insolvency, contrary to the Act 1696, c. 5.