years I can only say that it would have been a most serious matter for the present Earl. Nor can I have any doubt that the transaction would never for a moment have been entertained had the policies of insurance not been assigned to him as a means of liquidating the large amount of debt he had undertaken for his father. On the whole matter I am clearly of opinion that these policies were onerously acquired by the present Earl of Fife, and that this therefore is not a succession within the meaning of the Succession Duty Act.

The Court adhered.

Counsel for the Crown—Lord Advocate (Balfour, Q.C.)—Lorimer. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for Defender—Trayner—Keir. Agent—John K. Lindsay, S.S.C.

Friday, November 30.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

WIGHT AND OTHERS *v.* BURNS.

Reparation—Master and Apprentice—Shipping Law—Shipmaster's Right to Chastise Apprentice—Damages for Cruelty.

The personal representatives of a deceased apprentice seaman sued the master of a vessel in which he had served for damages in respect of cruel treatment alleged to have been used towards him during the voyage. The Court *assoilzied* the defender on the ground that the proof did not disclose any conduct on his part amounting to such wanton cruelty or oppression as would render him liable in damages.

Observed (*per* Lord Young) that a court of justice will not review the discretionary powers of a ship's-captain to chastise an apprentice sailing under him for misconduct at sea, unless it is shown that the former has been actuated in such chastisement by a desire wantonly to ill-treat the apprentice.

Process—Title to Sue—Actio personalis moritur cum persona.

Question, Whether the personal representatives of the deceased had a title to sue for damages for the alleged cruel treatment used towards him?

Solatium.

Held that the parents and brothers and sisters of a deceased person had no title to sue the master under whom he had served as an apprentice for *solatium* to their feelings, which they alleged were wounded by the defender's cruel treatment of the deceased.

This action was raised against Edward Burns, master of the ship "James Wishart," of Leith, by the father, mother, brother, and sisters of a youth named David Wight, who was an apprentice seaman on board the defender's ship, and who was at the age of sixteen accidentally drowned at Hamburg on the 11th September 1881. The pursuers sued as the whole living personal representatives of David Wight, and as individuals. The ground of action was that the deceased had been cruelly treated by the defender when serving on board his ship on a voyage to Rangoon and home in 1880-81. The pursuers concluded for £250 as damages and *solatium*. The following specific acts of cruelty were alleged to have been committed on the lad during the voyage:—(1) Flogging of such a severe nature with a rope and with a large leather strap that his body was a mass of bruises. (2) "When the ship was off the Cape of Good Hope, the lad, while greasing the mast, lost his hold, and slid down to the deck; the defender then took a handful of grease out of the pot and slapped it into the boy's mouth. He then compelled him to strip entirely naked, and walk several times ound the deck in presence of the crew, and thereafter to assist for over four hours at the capstan, he being all the time perfectly naked, and exposed to the sight of the crew and the inclemency of the weather, and thereby subjected to great humiliation, pain, and suffering." (3) On another occasion the defender had the lad stripped naked, and painted with red lead over the face and body, and made him walk round the deck in this condition. This was done—the pursuers alleged—at least six times without any apparent justification or motive except wanton cruelty. (4) The defender applied a poultice at boiling heat to a boil on the leg of the lad, who having, in the agony caused thereby, torn off the poultice, the defender clapped it over his face. The boy's leg bore for days a large mark, as if burned, in consequence of this treatment.

The pursuers averred that they were deeply wounded in their feelings by the acts complained of. They also averred that the deceased had intended, had he reached home, to institute proceedings against the defender.

The defender admitted that he chastised the lad on several occasions when he had disobeyed orders or had been guilty of misconduct, but he denied that such chastisement was cruel or immoderate.

The pursuers pleaded—"(1) The deceased David Wight being entitled to damages and *solatium* in respect of the defender's wrongful and njurious conduct, the pursuers, as his personal representatives, are in the circumstances entitled to prosecute his claim. (2) The defender having, by the actings libelled on, deeply wounded the feelings of the pursuers, the parents and relatives of the deceased, is liable to them in *solatium*."

The defender pleaded—"(1) No title to sue. (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) The pursuers' whole material averments being unfounded in fact, the defender should be assoilzied with expenses."

The Lord Ordinary (Adam) pronounced this interlocutor:—"Repels the second plea stated for the pursuers: Further, finds that the pursuer James Wight, as executor of the deceased David Anderson Wight, has a title to sue this action, and to that extent and effect only sustains the first plea-in-law stated for the pursuer, and to the like extent and effect repels the first plea-in-law stated for the defender: *Quoad ultra* sustains the said plea stated for the defender: Grants leave to the defender to reclaim.

"*Opinion.*—The late David Anderson Wight was an apprentice seaman on board the ship 'James Wishart,' of Leith, of which the defender Burns was master. Wight is alleged to have been cruelly ill-used by the defender when on board the ship. Wight, who was 16 years of age, was drowned at Hamburg on the 11th September 1881. There is no connection between his death and the injuries alleged to have been inflicted on him. It is said that as soon as he returned home to Leith he and his relatives intended to institute proceedings against the defender, but that these were prevented, as far as he was concerned, by his premature death. The present proceedings have been brought by his father, mother, brother, and sisters, who design themselves as his whole surviving personal representatives, as such representatives and as individuals. As individuals they claim damages against the defender in respect of injury to their feelings in consequence of the cruel treatment of David Wight. I have no difficulty in repelling this claim, which, so far as I know, is without precedent or authority.

"But as personal representatives of David Wight the pursuers say that a claim of damages in respect of the injuries inflicted on David Wight, vested in him, and that they are now in right of that claim.

"If there be any such claim, it can only be vested in his executor. The first objection accordingly which was stated to the pursuers' title to pursue, was that they had not been when the action was instituted nominated or decerned as executors to David Wight. There is no doubt that the fact is so.

"It is not disputed, however, that the pursuer James Wight, the father of the deceased, is entitled to be decerned executor to him, and that he is in course of obtaining himself decerned executor, and I was asked to dispose of the plea upon the footing that the pursuer James Wight's title as executor had now been produced. It is maintained, however, that the original defect in the pursuer's title cannot be cured by the subsequent production of the pursuer James Wight's title as executor.

"Unless compelled to do so on principle or authority, I should not be disposed to dismiss the action on that ground. If the claim of the executor be well founded on the merits, I do not see that the defender will be prejudiced by the action being now allowed to proceed. It appears that the evidence of certain seafaring men has been taken on commission, and it was urged for the defender that this evidence, while available to the pursuer in this action, would probably be lost, and would not be available to the pursuer in any subsequent action that he might raise, and therefore it was said that the defender had an interest in getting this action dismissed. It appeared to me that this was not a legitimate interest, but rather a strong reason why the present action should be proceeded with.

"I was further referred to the case of *Malcolm* v. *Dick*, November 8, 1866, 5 Macph. 18, as an authority to the effect that the action must be dismissed. That, however, was the case of a decree being taken at the instance of a person suing as executor who had at the date of the decree no title to that character.

"But in this case the pursuer James Wight has produced, or must be taken to have produced, the requisite and appropriate legal evidence of his right and title to insist in any claim which was competent to the deceased David Wight, and therefore any decree which may be pronounced in his favour in this action as his executor will, I think, be competently pronounced.

"But the question on the merits still remains, whether any right to damages vested in David Wight during his life in respect of the injuries alleged to have been inflicted on him by the defender, and whether such claim has passed to the pursuer as his executor?

"Now, it cannot be disputed that the claim would have been relevant at the instance of David Wight himself, nor can it be said, at least in a question of the relevancy of the pursuer's averments, that David Wight during his life condoned or abandoned such claim. On the contrary, it is said that it was only his premature death which prevented him from bringing the action himself.

"On the other hand, it is clear that the pursuer has suffered no patrimonial loss by the death of his son. The claim is purely one for damages for personal injuries inflicted on the son, and it appears to me can only be maintained on the ground that a right to damages had vested in the son, and has transmitted to the father as his executor.

"Now, I think that under the authority of the case of *Auld* v. *Shairp*, December 16, 1874, 2 R. 191, the question must be decided in the pursuer's favour. No doubt that case was complicated by allegations of patrimonial and personal loss on the part of the pursuer, but it appears to me that the majority of the Judges recognised the law of Scotland to be as stated by 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 representative of the party who did the injury, just as any other action of debt does. It seems 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 a right to a debt which may be enforced by all the usual diligences, arrestment on the dependence, and everything of that kind which can be used in any other action.' Assuming, as I think I must assume, this to be the law of Scotland, there is no doubt of its application to the present case. All the authorities are quoted and commented on in that case, and I do not think it necessary further to refer to them.

"On the whole, therefore, I think that the title of James Wight, as executor of David Wight, to insist in the action ought to be sustained, but that the title of the other pursuers ought not to be sustained."

The defender reclaimed, but thereafter lodged a note in which he craved leave to withdraw the reclaiming-note.

On 11th December 1882 the Court pronounced this interlocutor:—"Having considered the note for the defender (No. 14 of pro.), and heard counsel for the parties thereon, refuse the reclaiming-note."

A proof was taken before the Lord Ordinary (Lord M'Laren, to whom the cause had been transferred). On 20th July 1883 his Lordship found the facts set forth in the record not proved by the pursuer; therefore assoilzied the defender from the conclusions of the libel.

The import of the proof appears very fully in the following opinion of the Lord Ordinary:—"This case has caused me some anxiety and difficulty as to the way in which I should dispose of it. On the one hand it is very desirable that the authority of masters in merchant vessels at sea should be maintained. They are often placed in circumstances of difficulty, and in the exercise of their duties, both as representing the owners and as charged with the discipline of the ship, they are sometimes exposed to animadversion and to ill-will on the part of their seamen and apprentices. On the other hand, if a case is clearly made out of cruelty or abuse of the authority of a master, vested as he is by law with very large and undefined powers over his crew, in such a case an abuse of power ought to be visited with exemplary punishment or damages according to the nature of the case. It is not likely in the case of the master of a British ship that a case of gross abuse of power would pass unnoticed, because in such cases the witnesses who are available are generally not unwilling to come forward to testify on behalf of their comrade who has been ill-used and oppressed. In the present case one difficulty which I have felt is, that we have not all the evidence that it is desirable to have if this were a serious case, and I am afraid that to some extent at least the responsibility for that must rest with the pursuers, because they did not bring this action immediately after they came to the knowledge of the alleged injuries. But we have the evidence of several of the seamen, including a young man of intelligence and apparent fairness, who had just come out of his apprenticeship at the time of these occurrences, and who has since become mate of another vessel, and also of the carpenter and sailmaker, who are intelligent men of somewhat higher rank than the ordinary seamen. On the other hand, we have the evidence of the captain, for whom it has, I think, been fairly enough and justly said that he does not deny altogether any of the occurrences with which he is charged, but pleads that they were not in excess of his powers as master, or at least that they were not so extravagantly beyond what a master may do as to render him liable in damages. I must say that I do not approve of the conduct of the defender in this case to the young man David Wight, whose executors bring the action, or to some of the other apprentices, though as to them I have only some hints as to what took place. I did not think it proper to allow that matter to be gone into in detail. But it is another question whether his conduct in any of the matters in question amounts to wanton cruelty or oppression rendering him liable in damages; the only way to arrive at a conclusion in the matter is to look at the cases which have been proved one by one. In doing so I do not overlook that it is possible for the master of a vessel, or for any employer having large authority, by a system of petty persecution and annoyance, to inflict considerable hardship and pain on those who are under his orders without coming within reach of the law. I am afraid that that sort of petty persecution must be regarded as one of the grievances for which in many cases there is no redress, but which fortunately in the case of a ship at sea can never last beyond the voyage, because a sailor may leave, and an apprentice upon just cause may have his indenture cancelled. But I could only find the defender liable in damages by holding that on some of the specific occasions deponed to there was cruelty or abuse of power. The occasions are really not numerous, although there was a good deal of vague observations about habitual ill-treatment. The first case was this—The boy Wight was engaged along with the other apprentices in cleaning the brasses on board ship on a rainy day, and the master found that he had left his work, and challenged him for it. He gave a saucy answer that there was no use in cleaning brass in a shower of rain, and thereupon the master gave him a cuff. I think that that was just what any man of hasty temper would have done in the circumstances—and there are a great many quick-tempered people in the world—and that does not amount to cruelty. It was not, I think, seriously insisted on. The next case was that Wight had altered the hands of the clock that was kept on deck. The master says that he had done it on a previous occasion and been warned. Whether that was so or not, there can be no doubt that it was an improper act, and a breach of discipline on the part of an apprentice, to alter the hands of a clock, and that it might have led to serious mistakes. No doubt the captain had other means of ascertaining the ship's time through his observations, but having a clock which he set every day to the proper time of the longitude, it was undesirable that that clock should be altered by an apprentice, and that I think was an offence for which punishment might properly be awarded by the master in the exercise of his authority. The punishment he gave him was a good whipping with the tawse. If I am to judge by the oral evidence given, the punishment was probably too severe. It was stated that the boy carried the marks of it on his body for about a week. Something may depend on the constitution of the person who is flogged. One can understand that a young person of delicate constitution may bear the marks longer than one of a thicker skin, and who does not feel it so much. But neither on this nor any other occasion was the punishment such as to injure the health of the lad or to unfit him for work. None of the witnesses say so, and although I think probably the punishment was unnecessarily severe, I do not think it was so severe as to render the master liable in damages. The next occasion was that when Wight was sent up to grease the heel of the mizzen-mast or mizzen-topmast, which was then being put into its place—I suppose to replace one that had been injured and taken down. He slipped, as a boy who is only on his second voyage might very well do, bringing down the grease-pot with him, and the captain says that when he was aloft he had let grease fall upon the compass that was stationed there, while another witness—I think two witnesses—say that the compass had been removed so that it might be out of harm's way when the mast was being put up. I cannot help thinking that it was an inconsiderate and improper act in the master to punish the boy for slipping down the mast or down the rope. It was not a thing that he could have done intentionally. And the same observation applies to the punishment given him for having allowed the rope, or the turns of the rope that were wound round the

capstan, to slip when he was to hold on. It is an operation requiring some strength, the paying out a rope that is wound round the capstan, and I can readily believe that the lad did not let the rope slip intentionally. But what does the punishment amount to? In the one case, for letting the grease fall, the captain rubbed it over his face; in the other, he took up the nearest rope's-end and belaboured the boy with it as he stood, making him cry. Now, unless I were to hold that corporal punishment to an apprentice is altogether illegal, I can hardly say that this amounts to a gross abuse of power such as would render the master liable in damages. The part of the case that has influenced me most has been the allegation of degrading punishments—stripping the boy naked and sending him round in company with two other boys, with a piece of sailcloth hanging over their necks, and a degrading inscription fastened upon it. Now, it is very difficult to judge whether there had been such conduct on the part of Wight that the master—who is responsible for the conduct of his apprentices as well as for enforcing obedience—was justified in imposing such punishments. But although there was some talk of Wight having been on more than one occasion stripped and made to walk about the deck, I think the only occasion distinctly proved is the one on which he was sent round with the sailcloth placed across his shoulders and those of the two other boys. Now, the pursuers object to corporal punishment, or say that it should only be inflicted in extreme cases, and it appears that after the incident of the mast the captain had not used corporal punishment again, and in particular that on the voyage home he had on the whole behaved well and kindly to his apprentices. If objection is taken to corporal punishment and also to degrading punishment, it is difficult to see how punishment is to be inflicted at all. I think we might perhaps, if we had been in the master's place, have found out something that was more becoming and less indecent than what was done on this occasion. But still I am not prepared to say that for one act of that kind, perhaps done with a good intention, although not the most proper punishment, I should be prepared to convict this gentleman of cruelty, and to affect his character in the way that a verdict of damages would do in this case. That disposes, I think, of all the charges except those connected with the medical treatment of the boy Wight. I cannot believe that on either of the occasions referred to, either the treatment at the time when according to the captain he was suffering from some derangement of the urethra and unable to make water, or the other occasion when a poultice was applied to a boil on his leg, I cannot believe that the captain meant to inflict unnecessary pain or to act with cruelty. It was rough treatment, and I believe medical treatment on board ship is rather rough, and proper medical or surgical assistance in the case of trading ships with a small number of men on board is not available. A surgeon was sent for as soon as the ship arrived at Rangoon to treat the boy's leg, and that is a circumstance that must be remembered in the captain's favour. I do not believe that the captain intended to scald the boy when he put on the hot poultice. He was merely inconsiderate, and lost his temper when the boy took it off. That is really what the thing comes to. And on the other hand, I think that the incident of putting his leg in splints has been entirely misrepresented by the pursuers, and that so far from being a case of ill-treatment, it shows that the master, with hasty temper and some roughness and want of consideration in smaller matters, had really, when he found that the boy was seriously ill, done his best to bandage his leg and prevent it moving, in the hope that in so doing he was contributing to its healing. I think it unfortunate that that incident should have been classed among the instances of cruelty which are here complained of. I shall therefore, while repeating the observation I made at the beginning, that I do not approve of all the captain did, assoilzie him from the conclusions of the action, but without expenses."

The pursuers reclaimed, and argued—While it was true that a sea captain might in cases of disobedience or disorderly conduct correct his apprentices in a reasonable manner, his authority in this respect being analogous to that of a parent over his child, he was not entitled to make his quasi-parental power a pretext for cruelty and oppression. It was only in very extreme cases that corporal punishment might be inflicted—Maude & Pollock's Merchant Shipping, p. 126; Abbott's Law of Merchant Ships, p. 124; Lord Howell in *The Lowther Castle*, June 8, 1825, 1 Haggard's Ad. Rep. 385; *Watson* v. *Christie*, June 21, 1800, 2 Bos. & Pull. Rep. 224. The proof disclosed, in point of fact, gross cruelty, and the defender had failed to discharge the *onus* of proving justification—*Reekie* v. *Norrie*, December 21, 1842, 5 D. 368.

The defender replied—All the chastisement which was used towards the deceased was fully justified by his bad behaviour, and quite within the powers with which sea captains in the interests of the safety of their ship and crew are invested.

At advising—

Lord Young—This is a case of an unusual kind, and fortunately so. It is an action of damages against a sea captain, based on alleged cruel treatment of an apprentice, and quite a competent, if an unusual, kind of action where it is raised at the instance of the sufferer himself. With respect to the competency of an action at the instance of the executors of a deceased apprentice, based on cruel treatment to him during his life, I desire to reserve my opinion. My present impression is, however, that in such the pursuers would have no title to sue. In the present case the death of the apprentice was not due to the cruel treatment, but was due to accidental drowning, and the action is at the instance of his executors for behoof of his succession. The Lord Ordinary, on the authority of the case of *Auld* v. *Shairp*, December 16, 1874, 2 R. 191, on the 29th of November 1882 repelled the objection as to title to sue. A reclaiming-note was presented, but withdrawn, and unfortunately the interlocutor of the Court pronounced on the minute of withdrawal and refusing the reclaiming-note bears that it was pronounced "after having heard counsel thereon," making it appear as though the Court had decided a question upon which they heard no argument. Now, this interlocutor may be conclusive as regards this question of competency in the present case, but in the light of what really took place in the case there has been no adjudication on the question

of title to sue, and therefore, though the question may be foreclosed in this cause owing to the form of the interlocutor, the Court gives no decision whatever on the abstract question, and I reserve my opinion as to the competency of an action by the executors of a deceased apprentice for an assault committed on him during his lifetime, but to which his death is in no way attributable. My impression, I repeat, is that the question is not ruled by the case quoted by the Lord Ordinary, and I am inclined to be against the title to sue. But assuming that the pursuers have a title to sue, I am of opinion with the Lord Ordinary that they have no good ground of action in point of fact. I refrain from going into the evidence, and generally I concur with his views. The captain of a ship is undoubtedly at liberty to chastise an apprentice for misconduct at sea, and a court of justice cannot review his judgment as to whether that chastisement was merited. There can be no good ground of action unless it can be shown that the alleged misconduct was only a pretence to give apparent justification to a desire to act with cruelty towards the apprentice. I think the evidence falls very far short of this, and though the captain appears to have on certain occasions acted in an exceptionally severe and reprehensible manner, the evidence does not show that he was actuated by a desire wantonly to ill-treat the lad. Therefore, on the whole matter, and without going into the evidence in detail, I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed. I think it right to state that the Lord Justice-Clerk, who is unable to be present to-day, and who heard the opening speech for the reclaimer, read over the evidence, and his impression is in accordance with the interlocutor which I propose we should pronounce.

Lord Craighill—I am of the same opinion. I think that the pursuers have no good ground of action in point of fact. I do not go into the evidence, but concur entirely in the Lord Ordinary's views on it. I desire, however, to reserve my opinion as to the question whether there is title to sue here. Through a mistake in the form of the interlocutor pronounced by us on 14th December 1882, the question is, I apprehend, foreclosed as regards the present case, but in any future similar case the question is still open.

Lord Rutherfurd Clark—If the plea of no title to sue were still open for our judgment I should be inclined to hold it good. I do not give a decision, however, on the question, but only desire to express my extreme doubts of the pursuers' title to sue such an action as this. As regards this case, the proceedings which have taken place are conclusive. On the merits I have come, after very anxious consideration, to be of the same opinion as the Lord Ordinary. I do not mean to enter into the evidence, but I cannot refrain from saying that I think there must be great exaggeration in the evidence given by the pursuers' witnesses. The captain was a man who had done well in all that he had been called to do, his character was good, and it is scarcely credible that he could be so inhuman as that evidence represents him to have been.

The Lord Justice-Clerk was absent.

The Court adhered.

Counsel for Pursuers — R. Johnstone—Kennedy. Agent—John Macpherson, W.S.

Counsel for Defender — Trayner — Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Saturday, December 1.

FIRST DIVISION.

[Lord Kinnear, Bill Chamber.

FLEMING *v.* YEAMAN.

Bankruptcy—Petition for Sequestration—Oath of Petitioning Creditor.

In a petition for sequestration of the estate of a debtor who had become notour bankrupt, the petitioning creditor deponed to a debt forming the balance of an account current, and vouched by a number of I O U's. It appeared from a letter of agreement by the creditor, which was produced, that the creditor had agreed that until adjustment of the account between him and the debtor the I O U's "should be retained as vouchers of the said current account, upon which I cannot sue you nor do diligence for them against you." *Held* that the debtor having become notour bankrupt, the creditor was not debarred by this agreement from applying for sequestration, founding on the I O U's as vouchers of the debt.

Notour Bankruptcy—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34).

A charge was given on a decree obtained in the Court of Session against a debtor. The debtor was insolvent, and the charge was allowed to expire without payment, but after its expiry the debtor presented an appeal to the House of Lords, which he had intimated while the charge was current. *Held* that there was notour bankruptcy under the statute, which could not be affected by the appeal.

On the 1st October 1883 a petition was presented to the Sheriff of Forfarshire at Dundee by Robert Yeaman of The Lea, in the county of Edinburgh, for sequestration of the estates of Alexander Gilruth Fleming, of 57 Commercial Street, Dundee. The petitioner produced (1) an oath to an alleged debt of £1060, 13s. 8d., of which £1000 was said to be an advance by the deponent to Fleming, conform to a bill drawn by Fleming on the firm of J. & W. Kinnes, and endorsed in blank by him to the deponent, and produced with the oath, the remainder being interest thereon; (2) an oath to £1591, 12s. 11d., being the balance on an account-current between Fleming and the deponent from 21st May 1879, conform to thirteen holograph acknowledgments of debt or I O U's granted by Fleming to the deponent, and constituting the vouchers of the debit side of the account. The Sheriff having in common form granted commission to recover evidence of Fleming's notour bankruptcy, and of the other facts necessary to be established in order to obtain his sequestration, there were recovered extract decrees in a petition for recovery of calls at the instance of the liquidators of the Pant Mawr Slate and Slab Quarry Company