of the defenders' account of expenses in the action as taxed, and further, to grant a certificate of the compensation so awarded, and of the Court's directions as to deduction of expenses in accordance with the terms of the said Act, and to do further or otherwise in the premises as to your Lordships may seem necessary."

On 20th March the Court (LORD PRESIDENT, LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE) pronounced this interlocutor—

> "The Lords, including the Lord President, who presided at the trial, having heard counsel for the parties on the bill of exceptions, disallow the exceptions; of consent apply the verdict of the jury, and in respect thereof dismiss the action and decern: Find the defenders entitled to expenses, and remit the account thereof to the Auditor to tax and to report: Further, having heard counsel for the parties, on the motion for the pursuer for a finding and award under the Workmen's Compensation Act 1906, find that the pursuer is entitled to compensation under said Act, interpone authority to the joint-minute for the parties . . . and in terms thereof make an award of compensation in favour of the pursuer for the sum of 10s. per week from 6th August 1910, under deduction always of the amount of the defenders' account of expenses above found due, as the same shall be taxed: Appoint a certified copy of this interlocutor to be issued as a certificate of the above award within the meaning and intent of section 1 (4) of the said Act: Find the pursuer entitled to the expense of obtaining the above award, and decern against the defenders for the sum of £5, 5s. as the modified amount thereof."

Counsel for the Pursuer—Munro, K.C.—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders—Crabb Watt, K.C.—C. H. Brown. Agents—Inglis, Orr, & Bruce, W.S.

Wednesday, March 20.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

MORRISON *v.* MORRISON'S EXECUTRIX AND OTHERS.

Expenses—Title to Sue—Executor—Beneficiary Suing in Executor's Name—Caution for Expenses — Consignation — Amendment—A.S., 20th March 1907, *sec.* 2 (*a*).

The executor of a deceased intestate having declined to raise an action to establish a partnership, of which A, one of the next-of-kin, alleged that the deceased was a member, A raised the action in his own name. The Lord Ordinary having held that A had no title to sue, A reclaimed, but in the Inner House craved leave to amend, and to sue in the executor's name on consignation of a sum of £200 in lieu of caution for expenses.

Circumstances in which the Court *held* that A was entitled to proceed on consignation of the sum named, but with leave to the executor to apply at any stage for further indemnification should such appear to be necessary.

The Act of Sederunt, 20th March 1907, section 2 (*a*), enacts—"Where an action or other proceeding has been commenced in the name of the wrong person as pursuer, or where it has been commenced without a person whose conjunction may be deemed necessary to make a good instance, or where it is doubtful whether it has been commenced in the name of the right person, the Court or Lord Ordinary, if satisfied that it has been so commenced through *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may allow any other person to be sisted as pursuer in substitution for, or in addition to, the original party, on such terms as to expenses as to the Court or Lord Ordinary shall seem proper."

On 3rd June 1911 Robert Morrison, leather merchant, Blackness, *pursuer*, brought an action against Mrs Margaret M'Killop or Morrison, Hampton Villa, Linlithgow, widow and executrix of Alexander Morrison junior, leather merchant, Linlithgow, and others, *defenders*, in which he sought declarator that his (the pursuer's) brother, the late William Morrison, was at the time of his death a partner of the firm of Alexander Morrison & Sons, leather merchants, Linlithgow, and entitled to an equal one-third share of the capital thereof. Conclusions for accounting and for payment to George Steel Morrison as William's executor followed.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (SKERRINGTON)—[*vide* also the opinion of the Lord President]—who on 24th January 1912 sustained the defenders' plea of no title to sue and dismissed the action.

Opinion.—"The pursuer is a brother and one of the five next-of-kin and heirs *in mobilibus* of William Morrison, who died on 18th May 1905, unmarried and intestate. The pursuer was resident in Johannesburg at the time of the intestate's death, and two other brothers of the intestate, viz., Alexander Morrison junior, and George Steel Morrison, were appointed executors. The former died in January 1906, and the latter is the sole surviving executor of the intestate. He is cited, but only for any interest he may have as executor or as an individual. His sister Mrs Brockley is also called for her interest. The defenders are (1) the widow and executrix of the said Alexander Morrison junior, and (2) the trustees of the deceased James Morrison, who was also a brother of the intestate, and who died on 26th August 1910. The first conclusion of the action is for declara-

tor that the said William Morrison was at the date of his death entitled to an equal one-third of the capital, stock, and goodwill of the firm of Alexander Morrison & Sons, leather merchants and boot and shoe manufacturers, Linlithgow, and also to an equal one-third share of the whole profits made by the said firm from 31st December 1890 to 31st December 1904. In other words, the pursuer wishes to establish a partnership between William and his brothers Alexander and James as at the date of William's death. There are also conclusions for accounting, and for payment to the said George Steel Morrison as William's executor.

"The first plea-in-law for the defenders is to the effect that the pursuer has no title to sue. In the ordinary case the title to prosecute an action like the present one is vested in the executor as the deceased's legal representative and a creditor of the executor, including in this description a beneficiary either under intestacy or under a will, has no title to enforce a contract of copartnery to which he was not a party. For this proposition the defender's counsel cited *Rae* v. *Meek*, 15 R. 1033, 25 S.L.R. 737, *aff.* 16 R. (H.L.) 31, 27 S.L.R. 8; *Henderson* v. *Robb*, 16 R. 341, 26 S.L.R. 222; and *Gill's Trustees* v. *Patrick and Others*, 16 R. 403, 26 S.L.R. 292. It is certainly logical that no one should be allowed to sue an action unless the contract or property right sought to be enforced has been duly transferred to him and is vested in his person. In general any injustice which this rule of law might operate is obviated by the further rule that the person who has the beneficial interest may compel the person who has the formal title to lend his name as pursuer on receiving security against expenses, or, alternatively, may in certain cases demand an absolute assignation of his own share of the alleged asset. The latter alternative is not always available, and if the former is adopted the pursuer may be unable to find the necessary security. I am of opinion that where justice absolutely requires it the action may, in spite of legal technicalities, be allowed to proceed at the instance of the party who has the beneficial interest. Lord Herschell indicates an opinion to that effect in *Rae* v. *Meek*, 16 R. (H.L.), p. 33. A decree in such an action would I think be *res judicata*, provided always that the whole trustees and beneficiaries had been called as defenders. The case of *Watt* v. *Rogers*, 17 R. 1201, 27 S.L.R. 904, was cited by the pursuer's counsel as an example of such an exceptional case, but I rather think that it was a case the facts of which did not bring it within the ambit of the general rule. In that case the real defender was herself one of the trustees, and I think that the pursuer (a beneficiary) had a good title to compel the performance of a duty which was incumbent on the defender both as factor for the trustees and also in respect of her being a trustee. I am aware that Lord Lee and Lord Young, who sustained the pursuer's title to sue, proceeded upon more general grounds. On the other hand Lord Rutherfurd Clark, in the Inner House, and the Lord Ordinary (Lord Trayner) held that the pursuer had no title to sue. The case of *Teulon* v. *Seaton*, 12 R. 971, 1179, 22 S.L.R. 786, is another decision where the title of a beneficiary to sue a debtor to the trust was sustained. According to the report, and also according to my recollection as one of the counsel in the case, the pursuer's title to sue was not much discussed or considered in the Inner House, but the judgment as it stands is an authority for the proposition that in exceptional cases a beneficiary may sue a debtor to the trust. I cannot extract from either of these decisions a general rule to the effect that a beneficiary has a title to sue a debtor to the trust in every case where the trustee in whom the formal title is vested has an adverse interest, either fiduciary or personal. In the present case the intestate's executor George Steel Morrison is one of the two testamentary trustees of the deceased James Morrison, and he is also a beneficiary under the latter's will. These interests, fiduciary and personal, might prevent him from forming an impartial judgment as to the propriety of trying to establish that William was a partner in the firm up to the day of his death. Assuming all this to be the fact, I see no reason why the pursuer should not bring his action in the ordinary way in name of the executor, nor do I see any injustice in requiring from him an indemnity to the executry estate against expenses. I accordingly sustain the defender's first plea, and dismiss the action."

The pursuer reclaimed, but at the hearing in the Inner House lodged a minute craving leave to amend by sisting the late William Morrison's executor, George Steel Morrison, as pursuer of the action. He further stated that he was prepared to consign in Court the sum of £200 in security of any expenses in which the said G. S. Morrison as executor foresaid might be found liable in the course of the present proceedings, and to pay the expense of the proposed amendment. He cited *Harvey* v. *Farquhar*, July 12, 1870, 8 Macph. 971.

Counsel for the executor objected to the amount proposed to be consigned as insufficient, looking to the fact that the estate had been already divided and that he had no funds in hand, and also that the inquiry which the pursuer wanted to raise would extend over a large number of years, and would involve the question whether the said William Morrison was or was not *capax* at the time he retired from the firm.

LORD PRESIDENT—This is a case in which the pursuer, as one of the next-of-kin of a deceased brother, desired the executor of the deceased to raise an action against certain parties, of whom he (the executor) was one, to affirm that the deceased had a partnership with certain parties, and that certain moneys were due him. The executor declined to raise such an action, and then the pursuer brought the action in his

own name. The Lord Ordinary sustained the plea of no title to sue and dismissed the action, and a reclaiming note was brought against his Lordship's judgment. Your Lordships upon the hearing took the view that the Lord Ordinary's judgment was quite right, but that there was no reason why the pursuer should not take advantage of the recent Act of Sederunt, 20th March 1907, section 2 (*a*)—that is to say, that he could amend the instance by putting the executor in as pursuer, taking, so to speak, a compulsory borrowing of the executor's name, which is always allowed where an executor will not raise an action which a beneficiary seeks to raise, if the beneficiary keeps the executor free in the matter of expense, and accordingly the parties were given time in order that the proposed amendment might be made and arrangements made about expenses.

Now the amendment could only be allowed upon payment of expenses, because the progress of the action so far was quite useless; it was really equivalent to making a new action; and the matter came up again by the pursuer's counsel appearing and saying that though the pursuer was willing to make the amendment and to pay the expenses as a condition of being allowed to make that amendment, he was not in a position to find caution in ordinary form for the executor's expenses, because he had been long absent from the kingdom, and he did not happen to have friends whom he could ask to find caution, and in lieu thereof he proposed to consign the sum of £200, and upon that he asked your Lordships to allow the action to go on.

There is no question that the ordinary condition of allowing a beneficiary to use an executor's name is that the executor should be kept *indemnis* by satisfactory caution being found, and I am far from suggesting that we should countenance any deviation from the ordinary rule except in a very special case. It is not to be supposed that parties are to come forward and make offers of consignation where they should find caution. But there are cases—and this may be one of them—where a man has no friends whom he can ask to come forward as cautioners, and where it might amount to a denial of justice if the case were not allowed to proceed on other terms. The executor, however, comes forward and says, "£200 is not enough—that sum would not keep me *indemnis*." I do not think this is a question which we can at this stage determine. On the other hand, it is quite clear that the executor is entitled to be kept *indemnis* against proper expenses incurred, and therefore I think, following the semi-precedent—it is not really a precedent—in the case of *Harvey* v. *Farquhar* (1870, 8 Macph. 971) the circumstances there were different, and that is why I call it a semi-precedent—we should pronounce an interlocutor allowing the amendment only upon payment of the actual expenses already incurred, and that we should then remit the case to the Lord Ordinary to allow the pursuer to go on upon the £200 being consigned, but with leave to the executor to apply at any stage of the proceedings in which he can satisfy the Lord Ordinary that the expenses already incurred by him have come so near the £200 that he needs further indemnification, and leave the Lord Ordinary to deal with that situation as it arises.

LORD KINNEAR—I agree.

LORD M'KENZIE—I also agree.

LORD JOHNSTON did not hear the case.

The Court pronounced this interlocutor—

"Recal said interlocutor: Ordain the pursuer to consign the sum of £200 as offered by him in said minute: Find him liable in expenses since the closing of the record . . . and remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, to whom remit the cause to sist George Steel Morrison, executor-dative of the deceased William Morrison, . . . as a pursuer in the action and to allow the amendments proposed in said minute, but that only on consignation of the above sum and payment of the expenses above mentioned. . . ."

Counsel for Pursuer (Reclaimer)—Constable, K.C. — D. Anderson. Agents — Purves & Simpson, S.S.C.

Counsel for Defenders (Respondent)—J. A. Christie — Mercer. Agent — G. R. Stewart, S.S.C.

Wednesday, March 20.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

HUBER *v.* ROSS.

Reparation—Landlord and Tenant—Derogation from Grant—Urban Tenement—Damage Due to Landlord's Operations on Adjacent Subjects—Measure of Damages.

The tenant of urban subjects which had been let to him for a photographic studio brought an action against his landlord for damages in respect of structural damage and loss of business which he alleged he had sustained through the defender's operations upon the adjacent premises of which he (the defender) was in occupation as proprietor. The operations, which were of an extensive character and accompanied by noise, dust, vibration, and interference with access, were conducted without negligence and under warrant from the Dean of Guild.

Held (*rev.* judgment of Lord Guthrie, Ordinary) that the pursuer was entitled to recover, not only in respect of the cost of restoring his premises to their original condition and loss of business during such restoration, but also in respect of (1) injury to furniture and photographic materials, and (2) loss of business during the operations complained of arising from such physical and tangible injuries as were of a mate-