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-

mates of certain self-contained houses, meeting contractors, &c.

Proof was allowed and led.

On 27th May 1912 the Sheriff-Substitute (FYFE) pronounced the following interlocutor—"... Finds (1) that by the custom and usage of the building trade an architect has implied authority to engage the services of a measurer; (2) that pursuers were employed by defenders' architect to do the work, the cost of which is sued for. Finds in law that pursuers having been employed by defenders' architect, defenders are liable in payment of the account sued on. . . ."

Note.—"The real issue in the case is—Was there employment of pursuers in the legal sense so as to render defenders liable for their fees?

"It is not suggested that pursuers had direct formal employment by letter or minute of the defenders. If they were employed at all they were employed by the defenders' architects acting on behalf of the defenders.

"In my opinion pursuers have established their averment of custom of trade to the effect that the official architect of a person or company proposing to build has implied authority to engage the assistance of a measurer, and that the architect's constituent then becomes liable for the measurer's fees, although the constituent and the measurer have had no direct communication. This agency doctrine has been recognised in a Scottish judgment (*Black* v. *Cornelius*, 1879, 6 R. 581), and in several English cases collected in Hudson on Building Contracts, 3rd ed., p. 129. . . . I entertain no doubt whatever that Messrs Salmon & Gillespie were defenders' architects.

"Nor is there any room for doubt that pursuers were employed by Salmon & Gillespie to do the work they now sue for. . . . In accordance with the proved custom of trade, accordingly, the pursuers have a claim against defenders for their fees."

The defenders appealed to the Court of Session.

The case was heard before the First Division on 21st and 25th February 1913. The following authorities were cited at the hearing—*Brown* v. *M'Connell*, June 7, 1876, 3 R. 788; *In re Rotherham Alum and Chemical Company*, [1883] 25 Ch. D. 103; *Black* v. *Cornelius*, January 24, 1879, 6 R. 581, 16 S.L.R. 475; *Moon* v. *Witney Union*, [1837] 3 Bing. N.C. 814; *Ireland* v. *Livingston*, [1872] L.R. 5, E. & I. App. 395.

At advising—

LORD MACKENZIE—[*After the narrative supra, and after dealing with matters with which this report is not concerned*]—It is also clear that the pursuers did the work they now ask payment for on the instructions of Mr Salmon. It is impossible, however, to find ground for holding as regards the June items that there was any contractual relation between the Company and the measurers. . . . Nor is it possible to agree with the view taken by the Sheriff-Substitute that the defenders are liable in consequence of a custom of trade. I find it impossible to formulate what the custom of trade is under which the defenders are supposed to be liable. It is intelligible that where a private individual or a company has employed an architect and definitely settled plans with him and he is instructed to proceed with the work the architect may then proceed to employ a measurer in accordance with the custom of trade. This is the view taken by Mr Barclay, the pursuers' expert witness. The present case, however, is different. At the time Mr Salmon instructed the measurer this position of matters was still inchoate, although certain plans had been apparently adjusted with the Admiralty. . . . I am of opinion, however, as regards the first five items of the account, that the defenders made use of the work charged for, and must consequently pay for it. . . .

LORD PRESIDENT—I agree with the opinion that has just been delivered, and I would not find it necessary to say anything were it not for the fact that the learned Sheriff-Substitute has gone upon a different ground. I wish most distinctly to say that the proposition which is laid down by the Sheriff-Substitute in his note, that by the custom of trade the official architect of a company proposing to build has implied authority to engage the assistance of a measurer, is not in my opinion good law, and is certainly not borne out by the case which he quotes—the case of *Black* v. *Cornelius* (1879), 6 R. 581. I have no doubt whatever that when an architect is employed, plans have been approved of, and he is instructed to go on with the building, that he has the right, with no further order, to employ a measurer, without whom the whole matter cannot be gone on with or proper schedules for contractors given out. That was all that was decided in *Black* v. *Cornelius*. But the idea that because a man has the position of official architect he has a free hand to employ measurers when he likes is perfectly out of the question.

In the actual circumstances of this case I think it is quite clear that the parties did get the good of these measurements, and never could have gone on to consider what the houses would really cost, and what propositions they could put before the public, without seeing the measurements. Therefore, without going into details which Lord Mackenzie has already discussed, I entirely concur in the interlocutor proposed by him.

LORD JOHNSTON—I have had the advantage of perusing the opinion prepared by Lord Mackenzie, and I entirely concur in the results at which he has arrived and the method of arriving at them. I respectfully concur also in what your Lordship has added.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"... Find that the pursuers did the work charged for in the first five items

of the account sued for on the instructions of Mr Salmon, architect: Find that Mr Salmon had no authority, express or implied, so to employ the pursuers on behalf of the defenders, but find that the directors of the Company subsequent to incorporation made use of the information which was the result of the pursuers' work as detailed in said five items: Therefore find in law that the defenders are liable to make payment to the pursuers of the sums charged under the first five heads. . . ."

Counsel for the Appellants—Clyde, K.C.—Hamilton. Agents—Cadell & Morton, W.S.

Counsel for the Respondents—Macmillan, K.C.—Aitchison. Agents—W. R. Ramsay & Nightingale, Solicitors.

Thursday, March 20.

FIRST DIVISION.

COLQUHOUN'S TRUSTEES *v.* COLQUHOUN'S TRUSTEE.

Revenue—Estate Duty—Deductions Allowable as Incumbrances—"Incumbrances Created by Disposition Made by Deceased"—"Disposition Taking Effect out of Interest of Deceased"—Provisions to Widow and Children—Finance Act 1894 (57 *and* 58 *Vict. c.* 30), *secs.* 7 (1) (*a*) *and* 22 (2) (*b*).

The Finance Act 1894 (57 and 58 Vict. c. 30) enacts, sec. 7 (1)—"In determining the value of an estate for the purpose of estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances, but an allowance shall not be made (*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest."

Sec. 22 (2) (*b*)—"A disposition taking effect out of the interest of the deceased person shall be deemed to have been made by him, whether the concurrence of any other person was or was not required."

A conveyed his whole estates, other than his entailed estate, to trustees, to pay, *inter alia*, an annuity to his son B, the estates on B's death to be conveyed to the heir succeeding to the entailed estate. The trustees were empowered, in the event of B's requesting them to do so, to grant provisions for behoof of his (B's) widow and younger children, and at his (B's) request did so. On B's death in 1907 estate duty was paid by C, the heir succeeding to the estate, the Inland Revenue (though called upon to do so declining to allow any deduction in respect of the widow's bond of annuity and the children's bond of provision.

C having claimed under sec. 14 (1) of the Act to recover from the beneficiaries under the bonds a rateable part of the duty, *held* that, as neither the provision nor the annuity were incumbrances created by a disposition made by the deceased (*i.e.* B) or by a disposition taking effect out of his (B's) interest, allowance ought to have been made therefor in terms of sec. 7 (1) (*a*) of the Finance Act 1894, and that as C had wrongly paid the duty his trustees had no claim for recovery.

The Finance Act 1894 (57 and 58 Vict. c. 30), secs. 7 (1) and 22 (2) (*b*) is quoted *supra* in rubric. Section 14 enacts—"(1) In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person who, being authorised or required to pay the estate duty in respect of any property, has paid such duty, from the person entitled to any sum charged on such property (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary. (3) Any person from whom a rateable part of estate duty can be recovered under this section shall be bound by the accounts and valuations as settled between the persons entitled to recover the same and the commissioners." Section 23 (10) enacts—"The expression 'incumbrance' includes any heritable security or other debt or payment secured upon heritage."

On 25th May 1912 Lt.-Colonel Roderick William Colquhoun, Old Faskally, Perthshire, and others, the testamentary trustees of the late Sir Alan John Colquhoun of Colquhoun and Luss, Bart, K.C.B., *first parties*, David J. Abercromby, 2 Albert Court, London, the trustee acting under a bond of provision granted by the trustees of the late Sir James Colquhoun (*primus*) of Colquhoun and Luss, Bart, for behoof of the younger children of the late Sir James Colquhoun (*secundus*) of Colquhoun and Luss, Bart, *second party*, and Mrs Ivie Colquhoun or Harington, widow of Sir James Colquhoun (*secundus*) and wife of Henry Harington, Lichfield, with the consent and concurrence of her husband, *third party*, brought a special case to determine whether a rateable part of the estate duty paid on Sir Alan's succession to the estates was or was not recoverable from the second and third parties respectively.

The case stated—"1. Sir James Colquhoun of Colquhoun and Luss, in the county of Dumbarton (afterwards referred to as Sir James Colquhoun *primus*) died on 18th December 1873. He was predeceased by his wife and survived by one son James, who succeeded his father in the title, and is afterwards referred to as Sir James Colquhoun (*secundus*).

"2. Sir James Colquhoun (*primus*) left a trust-disposition and settlement, dated 1st May 1871, and registered in the books of Council and Session on 18th February