estate, failing children of the marriage, goes to the husband's own nearest heirs and assignees, and one half of his moveable estate to his representatives, that is executors—executors-nominate or not—there is this clause—"It being hereby provided that on the dissolution of the marriage by the death of either of the parties without children, the survivor shall be entitled to enjoy the liferent of the whole property, heritable and moveable, then belonging to them, without interference on the part of the representatives of the predeceaser, and that on the death of the longest liver the moveable property so liferented by him or her shall be equally divided between the representatives of both spouses, unless a different distribution shall have been provided by them as herein allowed." Now, the last words I dismiss with the single observation that the distribution referred to means distribution jointly. But the object of the clause is to secure that the liferenter shall not be disturbed by the representatives of the predeceaser. The liferent extended to both heritable and moveable estate, and she was not to be disturbed in the enjoyment of the heritable estate by the representatives of her husband in heritage—that is, by his heirs and assignees whomsoever—that is not representatives intestate but those to whom he might leave—therefore "representatives" in this clause must include disponee. So with regard to the moveable estate, the liferenter is not to be disturbed by the representatives of the predeceaser—and there also the term must include representatives by will or disposition as well as representatives *ab intestato*. And again, in this clause as to the division of the moveable estate the same word "representatives" is used as in the case of the husband's moveable estate. Therefore it follows of necessity that the executors-nominate of the wife are to be preferred to the next of kin. Any other interpretation of the clause would be unnatural and entirely opposed to what must have been the intention of the parties. The husband died long before the wife, and he could have had no predilection, nor could she towards her next of kin, whoever they might be at the date of her death, but rather the predilection on the part of both must have been for those whom she should name.

The case of *Stewart* v. *Stewart* was cited and strongly relied on. But, on examination, I find not only is it not analogous to the present case, but in direct contrast with it. The "representatives" there were really made conditional institutes. And in that case it was most natural that the testator should have a predilection for his next of kin. Apart from that case, however, and on the grounds I have stated, I adhere, though on different grounds from the Lord Ordinary.

The other Judges concurred.

Counsel for Executor—Solicitor-General (Clark) and Rutherfurd. Agent—Alexander Morison, S.S.C.

Counsel for Next of Kin—Watson and W. A. Brown. Agents—Morton, Neilson, & Smart, W.S.

Friday, January 16.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

BLUMER & CO. AND ELLIS & SONS *v.* JOHN SCOTT & SONS.

Privity of Contract—Jus quæsitum tertio.

The buyers of a steamship contracted with the builders that the engines should be supplied by one of two firms "to their (the buyers') satisfaction." The sellers entered into a contract with one of these firms for the supply of the engines, which contract was not implemented. *Held*—(1) that the buyers of the steamship had no right of action against the engineers, either under their own contract with the shipbuilders or on the ground of *jus quæsitum tertio;* (2) that the shipbuilder could recover the amount of direct damage sustained by themselves, and not that in which they might be found liable to the buyers of the ship.

The pursuers in this action, John Blumer & Company, were shipbuilders at Sunderland, in England, and the pursuers, Henry Ellis & Sons, were merchants at 17 Gracechurch Street, London. The defenders were engineers carrying on business at Inverkeithing. On the 20th July 1871, a memorandum of agreement was entered into between Henry Ellis & Sons and John Blumer & Company, whereby the former agreed to purchase, and the latter agreed to sell, a screw steamship, building by the latter, then known as No. 14. The price of the steamer was fixed at £12,500. It was provided by the agreement that the engines for the steamer, which were to be compound engines, were to be built and fitted by the defenders Messrs John Scott & Sons of Inverkeithing, or by Black, Hawthorn & Company, of Gateshead, in either case to the satisfaction of Messrs Henry Ellis & Sons. The steamer was to be delivered to the purchasers not later than February 1872. It was also provided by the agreement that in the event of failure to complete the vessel by the required time, that the sellers should be liable to the purchasers in a sum of £10 per day for liquidated damages, not by way of penalty—strikes of workmen, fire, and other accidents, delays of engineers, and every unavoidable cause excepted. On 7th June 1871 the pursuers Blumer & Co. entered into negotiations with the defenders with a view to the latter supplying the engines for the steamer, and the result was an agreement between the parties in the following terms:—"Memorandum of agreement entered into this 26th day of July between John Scott & Sons, of Inverkeithing, engineers, on the one part, and John Blumer & Company, of Sunderland, shipbuilders, on the other part. The former agree to supply, and the latter to buy, a pair of compound high and low pressure surface condensing marine engines, as per specification of this date, signed by both parties in duplicate, for the price of £3,680, delivered in Sunderland, and completed on board the steamer No. 14, now building by John Blumer & Company,—engines to be started and tried at sea by engineers, and finished to satisfaction of John Blumer & Company's overseer; delivery in all January next, strikes of workmen and lock-outs excepted; payments, £920 in buyers' acceptance

at four months, when bed plate and cylinders are cast; £920 in cash, less 2½ per cent. discount, when engines are erected in workshop; £920 when delivered in North Dock, Sunderland, in buyers' acceptance at four months, and the balance, or £920 in cash, less 2½ per cent., when engines are completed, and after satisfactory trial; platforms for engines and boiler to be supplied by builders, engineers to send studs and rods for railings, and cast-iron gratings for platform round cylinders and ladders.—John Scott & Sons, 26th July 1871. John Blumer & Co., 26th July 1871." The defenders failed to deliver the engines till October 1872, eight months after the time agreed on, and the pursuers accordingly raised this action. The summons concluded for payment of (1) £547, 15s. 3d. to Messrs Blumer & Company for the loss sustained by them; (2) £2580 to Messrs Ellis & Sons for the loss sustained by them; or (3) alternatively, £3127, 15s. 3d. to Messrs Blumer & Company, being the amount of their own loss and of that which they would have to make good to Messrs Ellis & Sons.

The pursuers pleaded—"(1) In the circumstances condescended on, the defenders are liable to the pursuers, John Blumer & Company, and to the pursuers, Henry Ellis & Sons, in the sums respectively concluded for in the first conclusion of the summons. (2) Or otherwise, the defenders are liable to the pursuers, John Blumer & Company, in the sum concluded for in the alternative conclusion of the summons. (3) The pursuers are entitled to decree or decrees of damages for their respective rights and interests, as the same may be determined in this action, with expenses."

The defenders pleaded, *inter alia*,—"(2) The defenders not having contracted with the pursuers, Henry Ellis & Sons, and not being under any obligation to them, are entitled to absolvitor from the conclusions at their instance. (3) The pursuers, John Blumer & Company, having by express stipulation secured themselves from any liability to the other pursuers for the alleged delay, are not entitled to sue for damage alleged to have been caused to the latter by such delay. (4) The damages sued for being remote, indirect, and consequential, the defenders are not liable therefor, either under their agreement or at common law."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 17th July* 1873.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, before answer as to any of the pleas of parties, and under a reservation in the meantime of all these pleas, allows the parties a proof of their respective averments, so far as not admitted; the proof to be adduced before the Lord Ordinary, at a diet to be afterwards fixed, on the case being called in the Lord Ordinary's motion roll.

"*Note*—The defenders insisted that the action should be at once dismissed, in so far at least as Messrs Ellis & Sons are concerned, and that to this extent there was no necessity for an enquiry into the disputed facts, or any of them. The Lord Ordinary could not very well collect in respect of which of their numerous pleas in law this contention on the part of the defenders was maintained, but so far as he understood the argument it was chiefly in respect of their 2d and 3d pleas. It appears, however, to the Lord Ordinary, that the facts ought to be cleared up and ascertained before the law arising under any of the defenders' pleas can be safely or well applied. In this view, it would obviously be incompetent at present to anticipate the discussion which may ultimately arise. All, therefore, the Lord Ordinary will add to what he has already said is, that according to his understanding of the defenders' pleas, so far as they are of a dilatory or preliminary nature, that before disposing of them it would be desirable, and may turn out to be important, to ascertain the truth and effect of the disputed allegations on both sides, and, in particular, the truth and effect of the pursuers' averments in the 3d and 4th articles of their condescendence.

"The pursuers expressed their acquiescence in the course now adopted by the Lord Ordinary; but the defenders, as already stated, insisted in the action being at once dismissed, and also indicated a desire, if investigation is previously to take place at all, that the case should be sent to a jury. But having regard to the questions of law that are likely to arise, some of them probably of nicety and difficulty, the Lord Ordinary considers that a proof before himself is the preferable course."

The defenders reclaimed.

Argued for them—So far as Ellis & Sons are concerned, the defenders had no contract with them whatever, and they had consequently no title to sue at all. The terms of the agreements were sufficient to establish that, and the Lord Ordinary was therefore wrong in allowing them a proof of their averments, which would cause needless expense. The only parties with whom Ellis & Sons had any contract were Blumer & Company, and they must look to them for any damage sustained. As regarded Blumer & Company, even assuming that the terms of the defenders' agreement with them did not exclude their claim for damage alleged to have been sustained specially by them, there was no ground for the alternative conclusion of the summons, in which they claimed not only for the loss incurred by themselves, but also for that incurred by Ellis & Sons. They did not sue as Ellis & Sons' agents, but directly as pursuers, and no proof was necessary to enable the Court to decide that Ellis & Sons could not sue for breach of a contract to which they were not parties.

Argued for the pursuers—Blumer and Company could not be shut up to suing only for the actual damages due to themselves. They might be made liable to Ellis & Sons, and whatever they lost on that account was just as much loss and injury to them as that caused by the breach of their own contract with the defenders. In any view, however, they were in the position of agents. The defenders were told for whom the engines were intended, and entered into the contract knowing that Blumer & Company were bound to satisfy Ellis & Sons as to the sufficiency of the engines, which were to be delivered on board Ellis & Sons' ship. Further, Ellis and Sons had a right to sue on the ground of *jus quæsitum tertio*. When an agreement is entered into between two parties, which either expressly or by implication is meant to benefit a third party, they are not entitled to resile from it or break it to the effect of depriving him of the benefit intended for him.

Authorities—*Finnie* v. *Glasgow and South Western Railway Co.*, Feb. 4, 1853, 15 D. 523; August 13, 3. Macq. 75, Lord Wensleydale's opinion, p. 88; *Peddie* v. *Brown*, June 9, 1857, 3 Macq. 65; *Synno*

v. *Simpson*, May 20, 1854, 5 Clark, H. L. App. 121; *Alexander* v. *Stobo*, March 3, 1871, 9 Macph. 599; *Rankine* v. *M'Gibbon*, Jan. 19, 1871, 9 Macph. 423; *Wood*, M. 7719; *Renton*, M. 7721; *Irvine*, M. 7722; *Nimmo*, M. 7740; *Ogilvy*, M. 7740; Stair i. 10, 5.

At Advising—

LORD PRESIDENT—In this case there are two firms who are pursuers and one company or firm is defender, and the conclusions are (1) that the defenders Scott & Sons should pay to the pursuers John Blumer & Co. the sum of £547, 15s. 3d.; and (2) that the same defenders should pay to the pursuers Henry Ellis & Sons the sum of £2580, or alternatively that they should pay to Blumer & Co. both these sums, amounting in all to £3128, 15s. 3d. Now, on the face of it this is rather a peculiar action; indeed, I am not sure that I ever saw one like it before, and an examination of the grounds of it does not diminish my surprise. The Lord Ordinary has allowed the parties a proof before answer of their respective averments, but the defender has reclaimed against that judgment, and asks that the action should be dismissed except so far as regards the first conclusion of the summons. The transaction out of which the action has arisen is an ordinary one enough and may be very shortly stated. On 20th July 1871 a contract was entered into between Ellis & Sons and Blumer & Co., by which the former agreed to buy a steamship which was at that time being built by Blumer & Co. and was known as No. 14, and among other stipulations there was one that the engines should be built and fitted by John Scott & Sons of Inverkeithing, or by Black, Hawthorn, & Co. of Gateshead, in either case to the satisfaction of Henry Ellis & Sons; delivery to be made not later than February 1872. Further, "it is expressly stipulated and agreed that the said ship, and all the gear, fittings, and materials belonging thereto, are and shall, during the progress of the building thereof, be the absolute property, and be under the uncontrolled management, order, and disposal of the said Chas. Fred. Ellis."

Now, Messrs Blumer & Co., with a view to procure engines, communicated with Messrs Scott & Sons, and the result of this negotiation was the execution of another contract, the parties to which were Messrs Scott and Blumer & Co. The agreement was that Scott & Sons should supply "a pair of compound high and low pressure surface condensing marine engines, as per specification of this date, signed by both parties in duplicate, for the price of £3,680, delivered in Sunderland, and completed on board the steamer No. 14, now building by John Blumer & Company,—engines to be started and tried at sea by engineers, and finished to satisfaction of John Blumer & Company's overseer," and then follow certain stipulations as to the price, which are not material. These two contracts, the one relating to the ship, the other relating to the engines, are separate and independent contracts, the contracting parties and the subject contracted for being different. It appears to me that Ellis & Sons have no concern with the contract between Blumer and Scott except in so far as it enables the former to fulfil their contract with Ellis, and neither have Scott & Co. any concern with the contract between Ellis and Blumer, but this action proceeds on the footing that Ellis & Sons have such an interest in the contract between Blumer and Scott as to enable them to sue for breach of it, and so they claim the sum of £2,580 as damages, and alternatively Blumer & Co. claim damages for Scott's breach of contract not so far only as concerns the loss sustained by themselves, but also for that sustained by Ellis & Sons. It only remains for us to examine the allegations by which these joint pursuers try to establish Scott's liability. Now it is alleged that the pursuers in July 1871 entered into a negotiation, and an attempt is made to show that Scott knew of the destination of the engines which he was to supply. In article 4 of the condescendence it is said 'the result was, that on the 26th July 1871 an agreement was entered into between the pursuers, John Blumer & Company, and the defenders whereby the defenders agreed to supply to the said pursuers, and the said pursuers agreed to buy from the said defenders, a pair of compound high and low pressure surface condensing marine engines, as per specification signed by both parties in duplicate, at the price of £3,680 sterling. The said engines were, in terms of the said agreement, to be delivered in Sunderland, and to be completed on board the steamer then building by the pursuers, not later than January 1872. Throughout the whole of these negotiations, and when the defenders signed the said agreement, they were well aware that the said steamer had, prior to the date thereof, been sold to the pursuers, Henry Ellis & Sons, and that the engines were ordered by the pursuers, Messrs John Blumer & Company, for and on behalf of the other pursuers, Messrs Henry Ellis & Sons. The pursuers, Henry Ellis & Sons, approved of and sanctioned the said agreement made by the pursuers, John Blumer & Company, on their behalf with the defenders, to build and fit up the said engines. Messrs Henry Ellis & Sons, in consequence of the recommendation of Messrs Blumer & Company, accepted of the defenders as the engineers who were to provide the engines for their said steamship. They relied upon the obligation undertaken by the defenders to build and fit up the said engines within the time specified in the said agreement, and made their arrangements accordingly." Article 5 goes on to state "the defenders undertook, and were bound by the said agreement, to build and fit up in the said steamer at Sunderland, on or before January 1872, the engines which they had agreed to supply as above set forth. But in breach of the obligation so undertaken by them, and to the great loss, injury, and damage of both the pursuers, they, as is more particularly hereinafter stated, failed timeously to build and fit up the same."

Now, the averment deserving most notice is that in which it is said that the defenders were to build and fit up the engines for Ellis & Sons, and that Blumer & Co. were contracting on behalf of Ellis. It cannot be said that they were mere agents or mandatories for Ellis & Sons. They bound themselves, not Ellis, and it will be found that not only are all the obligations to be performed by Scott to Blumer & Co., but delivery is to be made to them, and the completion of the work is to be to the satisfaction of their overseer. Now, the contract between Blumer & Ellis is that the vessel including the engines is to be to the satisfaction of Ellis & Sons; Scott is not bound to satisfy Ellis at all, but however much Blumer may be satisfied with Scott's work, it is he who is bound to satisfy Ellis. These are two quite distinct contracts; it appears to me impossible that Ellis can have any right to sue on the contract between Blumer & Scott. That is enough to dispose of the second conclusion of the summons, but there remains the alternative con-

clusion, in which Blumer & Co. seek to recover from Scott damages incurred not only to themselves but also to Ellis & Sons. Now it will be observed that this is not an action of relief, and indeed the pursuers do not seem to have any great confidence in their claim of relief, for when an opportunity was given them of converting this into an action of relief, they declined to avail themselves of it. I do not much wonder at their declining; but it is clear that unless Blumer & Co. can be made liable to Ellis & Sons, they cannot possibly recover from Scott. We see, though it was not material to our judgment, that in the contract between Blumer & Ellis there is a clause which prevents Ellis from suing Blumer for these damages, but that only shows conclusively that Blumer cannot sue Scott. The result, in my opinion, is that the defenders must be assoilzied except as regards the first conclusion of the summons, whereby Blumer & Co. claim the sum of £547.

Lord Deas—I think that if we were dealing with the merits of this case, *prima facie* the pursuers would have a good many difficulties to contend with, but the question now before us is as to the relevancy of the action, and it seems to me to be a question of some difficulty and delicacy. The agreement between Ellis and Blumer was as your Lordship has stated it. (His Lordship here read the terms of the agreement). The engineers who were finally fixed on were the defenders Scott & Sons, and so the question stands on the same footing as if Hawthorn & Co. had never been mentioned at all, and the condition is that the engines are to be built and fitted to the satisfaction of Ellis & Sons. After this Blumer entered into a contract with Scott to furnish the engines, and in that contract it was stipulated that the engines should be finished to the satisfaction of Blumer & Co.'s overseer, and he is apparently appointed as much for the safety of Ellis as of Blumer. The two contracts are dated within a few days of each other, and the question is just whether we are entitled to assume that Ellis had a direct interest as against Scott. The letters which your Lordship has referred to, preceding both contracts, show clearly that Blumer & Co. had told Scott & Sons their purpose to have the engines furnished by them. It is quite clear, I think, that Scott knew what was to be done with the engines, coupling the correspondence with the averments in articles 3 and 4 of the condescendence, in which the pursuers aver such knowledge on his part. Their allegation is that Blumer made the contract with Scott on behalf of Ellis; that is distinctly said, and if that is true Scott would have a good claim against Ellis for the price of the engines, and Ellis of course would have a corresponding claim against Scott for breach of contract. The Lord Advocate tried to show what there can be no doubt about, that if one man contracts to build a house for a purchaser, he may get the materials by contracts with other parties, and that the purchaser would have no right of action under those contracts. That is quite true; but may not the matter be otherwise under this contract? I am rather inclined to approve of the course the Lord Ordinary has followed in allowing a proof before answer. It seems to me that we are being asked to decide on the merits of a case before the merits are before us. At least there can be no harm in allowing such a proof except the one ground of expense.

Lord Ardmillan—This is an action brought by the two pursuers against Scott & Sons, engineers, concluding for damages as due by the defenders in respect of alleged breach of contract and delay in furnishing engines for a vessel, the property of Ellis & Sons.

Two contracts are produced and founded on, 1st, there is a contract dated 20th July 1871 between Blumer & Co. and Ellis, whereby Blumer & Co. agreed to sell, and Ellis agreed to purchase, a screw steam-ship building at Sunderland by Blumer & Co. This ship was to be furnished with engines according to a specification. Delivery of the vessel to the purchasers is therein stipulated as "not later than February 1872," and £10 a day as liquidated damages for delay is set forth as, in the event of delay, due by Blumer & Co. to Ellis, but "subject to delay clauses before mentioned." In the delay clause which precedes this stipulation, and is referred to as qualifying the liability, it it stated, as matter of contract between Blumer & Co. and Ellis, that "strikes of workmen, fire, and other accidents, delays of engineers, and every other unavoidable cause, are excepted." In this contract it is agreed between the sellers and the purchasers that the engines should be built and fitted either by John Scott & Sons, the present defenders, or by Black, Hawthorn, & Co., of Gateshead, in either case to the satisfaction of Ellis & Son, the purchasers. The defenders, Scott & Sons, were not parties to this contract; and no obligation was by this contract laid upon them. Blumer & Co. were at liberty to contract at their own discretion and in any terms which they chose, either with Black, Hawthorn, & Co., or with the defenders. They themselves, as the sellers of the vessel, were bound to furnish her complete and fitted with her engines, and to deliver her at the proper time to Ellis & Sons; but the defenders' obligations in regard to supplying the engines to Blumer & Co. are not within this contract for sale of the vessel, but must be found within a different contract, to which alone the defenders are parties, and which alone can be enforced against them.

Accordingly, a second and separate contract or agreement was entered into on the 26th July 1871 between Blumer & Co. and the defenders, Scott & Sons. This is the only contract to which the defenders are parties. They undertook to supply to Blumer & Co., of Sunderland, shipbuilders, a pair of compound high and low pressure engines for the price of £3680, to be delivered in Sunderland, on board a steamer, No. 14, building by Blumer & Co. This is the steamer which had been sold to Ellis & Sons; but the defenders had nothing to do with that sale. Their contract would have remained, though the sale to Ellis were at an end. It is important to observe that these engines were to be delivered to Blumer & Co. in the North Dock, Sunderland, finished "to satisfaction of John Blumer & Co.'s overseer, and that the other pursuers, Ellis & Sons, were not in Sunderland but in London, and are not named in this contract,—the only contract to which the defenders were parties, the only contract which can be enforced against them, and the contract which the pursuers are actually enforcing.

There is no doubt that Blumer & Co. are entitled to recover from the defenders whatever damages they can instruct as due to themselves in consequence of delay by the defenders in fulfilment of the contract to supply the engines. If such

damages are due, they may be recovered in this action.

Still further, if Blumer & Co. have incurred liability to Ellis & Sons for damage resulting from delay in furnishing the ship, that delay being caused by the defenders' delay in supplying the engines, then Blumer & Co. might have claimed from the defenders relief from their obligation or liability to Ellis & Sons; or perhaps Blumer and Co. might have sued the defenders for the whole sum of damages, taking the liquidate damages in their own contract with Ellis as ascertainment of the amount. This action has not been framed so as to enforce such a claim of relief, or so as to recover damages on such a footing; and the pursuers, though an opportunity of amendment was afforded them, have not thought proper to amend the record. There is no conclusion for relief; and Blumer and Co. do not seek relief; and naturally so, for they have protected themselves against liability to Ellis & Son for damage caused by "delays of engineers."

To me it is very clear that, assuming the statements on record, and assuming the fact of delay in supplying the engines, and assuming delay in furnishing the ship, Blumer and Co. have no direct action against the defenders for damage done, not to themselves, but to Ellis. Still less can Blumer & Co. have an action for what they here claim, viz. the specific sum of liquidated damage contained in their own contract with Ellis, against which they have protected themselves.

On this part of the case I have really no difficulty. There is here no claim of relief of Blumer & Co. from liability to Ellis, and no proposal to take as the measure of damage to the pursuers the amount of their own liability to Ellis. For very obvious reasons this has been advisedly avoided. It would not suit them at all. Blumer & Co. are under no such liability on account of delays of engineers, for against such liability they have carefully protected themselves.

The second question raised is attended with more difficulty. I refer to the direct conclusion for damages, liquidated as under the contract with Blumer & Co., which the pursuers, Ellis & Sons, maintain against the defenders.

Now, Ellis & Sons are not parties to the defenders' contract with Blumer & Co., and the defenders are not parties to Blumer & Co.'s contract with Ellis. There is thus, on the face of the proceedings, no privity of contract between Ellis & Sons and the defenders; and, not only so, but Ellis & Sons have contracted to discharge from liability the party who contracted with them, viz. Blumer & Co., in respect of any damage by delay caused by engineers.

Unless some principle of law can be discovered of which the effect is to introduce Ellis & Sons into the separate contract between Blumer & Co. and the defenders, and to introduce into the same contract the claim of damages and the specific liquidation of damages contained in the contract between Ellis and Blumer & Co., it is, to my mind, clear that Ellis & Sons cannot, in this action, recover from the defenders the damages concluded for. On the face of the contract sued on—the only contract to which the defenders are parties—Ellis & Sons, who did not contract with the defenders, have no right of action.

But it has been suggested, and very ingeniously maintained in argument, that there is here *jus quæsitum tertio*—in other words, that out of the contract between Blumer & Co. and the defenders there arises a right to Ellis to enforce this claim of damages,—and this is the most favourable aspect in which the case of Ellis & Sons can be presented. It must be out of this second contract, if at all, that such right of action arises, for the defenders are not bound by the previous contract for the sale of the ship, to which they were not parties.

Undoubtedly there is a legal doctrine known as *jus quæsitum tertio*, resting on principles which have been to some extent introduced from the Roman law. It is, when rightly understood and applied, a sound and equitable doctrine. But, after careful consideration of the contracts in this case, and of the averments on record, and of the authority of Lord Stair, and of the decisions referred to, reported in Morrison's Dictionary, and of the recent authorities of *Peddie* v. *Brown*, and of *Finnie* v *The Glasgow and South-Western Railway Co.*, I am clearly of opinion that there is no *jus quæsitum tertio* in this case. The opinion of Lord Chancellor Cranworth, and the opinion of Lord Wensleydale, in the House of Lords, in these two last-mentioned cases, appear to me to be valuable and conclusive authorities on the question before us.

According to Lord Stair, it is only where there is in a contract some "article in favour of a third party" which cannot be recalled by one or both of the contractors, that there is *jus quæsitum tertio*, and this doctrine is specially recognised and approved of by Lord Cranworth and Lord Wensleydale. The right may truly be conceived in favour of a third party, and may therefore be enforced by that third party, although he be not named in the contract; but the stipulation of which the benefit can thus be transferred to him must rest on an agreement between the contracting parties—that the stipulation shall be performed in favour and to the satisfaction of the third party. Even if not named, the third party may be entitled to adopt the agreement, and enforce it by action. But in such a case it must be clear that both the contracting parties intended so to secure him, and that they could not, separately or together, revoke the stipulation. If not named, he must at least be described, and it must be clearly apparent that the stipulation was intended to be in reference to him and for his benefit. Now, in the present case Ellis & Sons are not named or described in the contract with the defenders Scott, nor are the defenders taken bound to deliver the engines to Ellis & Sons, nor at the place of their business, nor are the defenders bound to furnish them to the satisfaction of Ellis & Sons. If the contract of sale between Blumer & Co. and Ellis & Sons had been annulled by mutual consent, that would not have annulled or qualified the separate contract between Blumer & Co. and Scott. On the other hand, if the contract between Blumer & Co. and Scott had been annulled by mutual consent, and Black, Hawthorn, & Co. had been employed to furnish engines for this ship, that would not have annulled or qualified the separate contract between Blumer & Co. and Ellis. It thus appears that the supposed right of Ellis, founded on as *jus quæsitum tertio* arising out of the contract between Blumer & Co. and the defenders, could have been revoked and put an end to by the parties to the contract which is said to contain the stipulations out of which his right emerges. It is obvious that this does not satisfy the definition of *jus quæsitum*

tertio given by Lord Stair, and adopted in the House of Lords.

Then, it is to be further observed that the damages here sued for are liquidated damages in terms of the contract between Blumer & Co. and Ellis, —there being no such liquidation in the contract between Blumer & Co. and the defenders. The damages are for failure on the part of Blumer & Co. to complete the vessel according to a certain specification, and within certain required times. Neither that specification nor these required times of delivery to Ellis are set forth in the contract between Blumer & Co. and Scott; and to enforce such liquidated damages in an action against the defenders is to enforce a stipulation against them which is not within their contract. If Ellis & Sons suffered damage by delay in delivery of the ship on the part of Blumer & Co.—the only party bound to deliver to them—they have their action against them; and it may be that if Scott failed to deliver in proper time the engines to Blumer & Co., Scott might be liable in relief. But relief is not here sought. The position of the parties is simply this—The party who alleges that he has suffered injury has no contract with the defenders, and no right of action against them. The party who has a contract with the defenders, and has a right of action thereon, has not suffered the damage now in question, because he has protected himself from liability by a clause in his own contract. I do not disguise that there may be some hardship in this matter as regards Ellis & Sons, supposing them to have suffered this damage. It looks like a wrong without a remedy. But the answer and the explanation is, that Ellis & Sons have by their own act deprived themselves of their remedy, for they have regulated the liability in this matter. They have by express clause excepted the delay of engineers, that is, the delay of the defenders if employed as engineers, from the grounds and causes of Blumer & Co's. liability for these liquidated damages.

I think there was great force and reason in the argument maintained by the Lord Advocate in regard to the effects of enforcing this claim for damages at the instance of Ellis & Sons. I accept the doctrine of *jus quæsitum tertio* when applicable to the language of the contract and the circumstances of the case. But in the present case I am of opinion that no such right has arisen. The result is, according to my view, that the action at the instance of Blumer & Co. should be restricted to such damages as they can instruct to be due to themselves, conform to the conclusion to that effect, and that Ellis & Sons, not having contracted with the defenders, and having, in regard to the damages which they claim, no right emerging out of the only contract to which the defenders are parties, can have no action. I think we should alter the Lord Ordinary's interlocutor, and allow this action to proceed towards ascertainment of the facts, only to the extent and effect which I have now explained.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defenders, John Scott & Sons, against Lord Ormidale's interlocutor dated 17th July 1873, recall the interlocutor; assoilzie the defenders from the conclusions of the summons, except the conclusion for payment of £547, 15s. 3d. by the defenders to the pursuers, John Blumer & Co., and decerns: Find the pursuers liable in expenses since the date of the interlocutor reclaimed against, and also liable in the expenses incurred by the defenders in the Outer House, to the extent of two thirds of the taxed amount thereof: Allow accounts of the expenses now found due to be given in, and remit the same when lodged to the Auditor to tax and to report; and remit the same to the Lord Ordinary to proceed as accords, with power to his Lordship to decern for the said expenses as taxed."

Counsel for Pursuers—Solicitor-General (Clark) and M'Kechnie. Agent—Thomas Maclaren, S.S.C.

Counsel for Defenders—Lord Advocate (Young) and Orr Paterson. Agents—J. & A. Peddie, W.S.

Saturday, December 20.

SECOND DIVISION.

[Lord Shand, Ordinary.

NORTH BRITISH RAILWAY CO. *v.* SLIGO.

Triennial Prescription — Statute 1579, *cap.* 83—*Written Obligation.*

A railway company agreed to supply an iron company with wagons at an agreed upon rate of hire during a period of five years. For a number of years after that period had elapsed the railway company continued to supply wagons at the same rate, but of different size, and in larger numbers, for which second period they rendered an account of hire due by the iron company. More than three years after the date of the latest item contained in said account, the railway company raised an action to recover the amount of the account. The defence was that the account sued for had suffered the triennial prescription. *Answered*—(1) the debt is not one of the class to which the triennial prescription applies; (2) The debt is founded on a written obligation, and therefore excluded by the statute from the operation of this prescription. In support of their second answer the pursuers produced—(1) an excerpt from the Lease Book of the iron company, entitled "Agreement, &c." (between them and the pursuer), and (2) two letters from the defender, of date subsequent to the expiry of the original agreement, ordering wagons to be furnished for the use of the iron company, and argued that agreement itself, or at all events the agreement taken along with the letters referred to, constituted a written obligation.

Held—(1) the debt sued for was one of the class included under the statute; (2) It was not founded upon a written obligation in the meaning of the statute.

This action was raised at the instance of the North British Railway against Mr Smith Sligo, as sole partner of the Forth Iron Company, for £465, 2s. 8d., the sum alleged to be due to the pursuers in respect of the hire of fifty goods or mineral wagons, let by the pursuers to the Forth Iron Company for the period from 1st August 1865 to