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

31st August 1867. The account sued for was made up so as to show the amount payable at the end of each month. The last item in the account was dated 31st August 1867. The present action was not raised until 28th August 1872, about five years thereafter, and the defender, who adjusted and settled his "coal carriage accounts" with the pursuers on 5th May 1871 by a payment of £812, 3s. 9d., pleaded that the pursuers' claims in this action were excluded by the triennial prescription. The Act 1579, cap. 83, provides "that all actions of debt for housemails, men's ordinars, servants' fees, merchants' compts, and other the like debts that are not founded upon written obligations, be pursued within three years, otherwise the creditor shall have no action, except he either prove by writ or by oath of his party." The pursuers, in answer to the plea of prescription, maintained that the statute did not apply to the debt claimed by them, in respect that—(1) their debt was founded upon a written obligation; and (2) that even if this were not the case, the debt was not one of the nature of those to which the statute applied. An extensive diligence was granted to the defender for the recovery of documents, and after a number of writings had been recovered, the pursuers asked leave to amend the record, in terms of a minute of amendment, to which the Lord Ordinary gave effect by the interlocutor reclaimed against. On the record as thus amended, it was alleged that, on 1st August 1865, when the undertaking of the Edinburgh and Glasgow Railway Company was transferred to the pursuers by Act of Parliament, there was a subsisting arrangement or agreement by which the Forth Iron Company were entitled to the use of wagons belonging to the Railway Company, at the rate of £13 per annum for large wagons, and £10 per annum for small wagons, subject to certain abatements to be deducted monthly from the carriage account. When the action was raised the pursuers were not in possession of the alleged agreement, or any copy of it; but having recovered from the lease book of the Forth Iron Company a document titled "Agreement with the Stirling and Dunfermline Railway Company," they, in the amendment on the record, referred to this as the only copy of the alleged agreement which they had been able to recover, and founded on this document, and on certain letters and accounts, as constituting the agreement or obligation on which the action was based, as taking the case out of the operation of the statute relied on by the defender.

On 13th August 1873 the Lord Ordinary pronounced the following interlocutor:—The Lord Ordinary having considered the cause, allows the pursuers to amend their condescendence in terms of the minute of amendment, No. 72 of process: Finds that the debt sued for has undergone the triennial prescription introduced by the Act 1579, c. 83, and can only be proved by the writ or oath of the defender: Finds that the pursuers having obtained a full diligence for the recovery of books and documents, have failed to prove the constitution and, *separatim*, the subsistence of the debt sued for: Therefore sustains the defender's first plea in law, and assoilzies the defender from the conclusions of the action, and decerns: Finds the pursuers liable to the defender in expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor, to tax and to report.

"*Note.*—. . . . The question raised is, whether the debt sued for can properly be represented as 'founded upon written obligation,' within the meaning of the Act which introduced the triennial prescription in respect of the writings now referred to. The Lord Ordinary is of opinion that this question must be answered in the negative. It has been held, on the one hand, that a mere order or commission for goods, followed by furnishings, is not an obligation of the nature referred to in the statute, which will save the effect of prescription, *Ross* v. *Shaw*, 1784, M. 11,115; *Douglas* v. *Grierson*, 1794, M. 11.116. On the other hand, it has been held that the statute will not apply where the pursuer, in claiming his debt, can refer to a written contract containing the terms on which it was incurred, *Watson* v. *Lord Prestonhall*, 1711, M. 11,095, or can produce letters containing the substance of the arrangement under which the debt was contracted, *Blackadder* v. *Milne*, &c., 4th March 1851, 13 D. 821. In the latter of these cases, while certain of the Judges rested their opinion on the ground that the claim was not one of the class falling within the statute, a majority of the Court were of opinion that, apart from this, the statute did not apply, because the employment for which remuneration was claimed proceeded on a special letter of instructions received and acted on by the pursuer, which contained all the terms of an obligation or contract. If therefore the pursuers in the present action had been able to refer to any document granted by the Forth Iron Company, or any one on their behalf, containing the terms of the alleged arrangement under which the wagons were said to be let for hire or leased, even though it had not been executed also by or on behalf of the Railway Company, the Lord Ordinary would have held, on the authority of the two last mentioned cases, that the statute did not apply, and that the pursuers were entitled to a proof at large to instruct the actual use of the wagons, and the consequent liability of the defender for the hire, unless he could instruct payment. But the documents referred to as sufficient to take the case out of the statute appear to the Lord Ordinary to fall entirely short of what is required to have that effect. The pursuers have no agreement or obligation granted by the Forth Iron Company, or any one on their behalf. The writings founded on would be important evidence of the terms of the arrangement or agreement between the parties in any action raised before the expiry of three years from the date when the account was incurred, for they would show the footing on which the use of the wagons had gone on. They might further, indeed, be sufficient writ of the defender to instruct the alleged arrangement and constitution of the debt, assuming the plea of prescription to be applicable, although this might be of little avail unless the pursuers were in a position to instruct by writ also that the amount of their claim is still due, for the presumption introduced by the statute is twofold—(1) against the constitution of the debt, and (2) in favour of its having been paid, and both of these presumptions must be overcome by writ or oath where the statute applies. Important, however, as the writings might be as the writ of the defender, they do not of themselves constitute either a written obligation or agreement. The document mainly founded on does not appear to have been signed by any one. It is titled 'Proposed Heads of Agreement.' Its first article provides that it shall be in force for five years from 26th June 1854, so that it expired in

June 1859. It embraces a great number of different matters, all apparently mutually depending on each other, and specifies in the seventh head relating to wagons, thirty large wagons and thirty small wagons as the number to be given and taken on lease, while the number, the hire of which is sued for in the present case, is thirty-five large and fifteen small wagons.

"The pursuers no doubt allege that this agreement, though not signed, was acted on; that in so far as regards the wagons, it was from the first arranged that the number of wagons to be hired should be varied from time to time as the trade of the Forth Iron Company required, and that after the period of the agreement had expired it was extended from time to time, and so was in operation during the period embraced in the account sued for. In support of this they refer to various letters in the fragmentary correspondence which has been produced. These letters are not very distinct in themselves. They cannot be regarded as constituting an agreement or obligation separately from the proposed heads of agreement in 1854, and it rather appears to the Lord Ordinary, from the settled account of 30th August 1865, and the letter of Mr Drummond, addressed to Mr Reid, goods manager of the Railway Company, of 22d March 1865, that between 14th March and 2d April 1865, the wagons or trucks had been let at some different rate of charge from that specified in the agreement, and that a new arangement must have been made in respect of the fifty wagons the use of which, it appears from Mr Drummond's letter, was made dependent on the Railway Company granting certain concessions on their rates of carriage. Assuming however that the writings as a whole would be sufficient as evidence, or even as the defender's writ under the statute to instruct the agreement under which the wagons were in use, the Lord Ordinary cannot regard them as a written obligation such as will take the case out of the statute. The distinction between the use of such writings as evidence or writ of the party, as amounting to contract or obligation, has formed the subject of observation in the cases of *Barr* v. *Edinburgh and Glasgow Railway Company*, 17th June 1864, 2 Macph. 1850; *White* v. *Caledonian Railway Company*, 15th February 1868, 6 Macph. 418; and *Walker* v. *Flint*, 20th February 1863, 1 Macph. 417; and referring to these authorities the Lord Ordinary is of opinion that the pursuers have failed to take the case out of the statute by showing that the debt claimed is founded upon a written obligation.

"The next question is whether the debt is of the nature of those enumerated in the Act to which the triennial prescription applies. A claim for hire of carriages or wagons is not expressly mentioned in the Act, but the statute does not profess by its terms to enumerate the particular cases to which it applies, for, after a certain enumeration, 'other the like debts' are added. It has been observed in previous cases that the effect to be given to these words must often be attended with difficulty,—to what extent must there be likeness as regards the debt sued for to the debts particularly enumerated? It is evident that the extent of such likeness must often strike different minds differently. Perhaps all that can be said is, that if the debt sued for be substantially within the same general class or category as the debts enumerated, the statute should be held to apply. The main characteristic of all these classes of debts appear to be that they are of a kind usually settled between debtor and creditor periodically, and at comparatively short intervals—'housemails, men's ordinars, servants' fees, and merchants' compts.,' which primarily refers to shopkeepers' accounts. Under 'other the like debts,' have been included the accounts of tradesmen for their work or wages, accounts of law agents or other professional men for services rendered, and house-rents, although not extending to agricultural subjects, have been held to apply to rents of urban subjects and houses payable half-yearly—*Cumming's Trustees* v. *Simpson and others*, 18th February 1825, 3 S. (N. E.) 377, and *Rankin* v. *Black & Sons*, July 1873, not yet reported.

"The Lord Ordinary is of opinion that an account for the hire of wagons is a debt of the like nature with those enumerated in the statute. It belongs to the class of debts usually settled periodically and at short intervals, in the same way as the rents of houses, hire or wages of servants of all classes, or accounts of shopkeepers, tradesmen, and professional men. If the case were that of a coach-builder suing for an account for furnishings and for the hire of a carriage, it would be difficult to draw a distinction between the carriage hire and other parts of the account, and it would not make any real difference that several carriages were hired, and for a period of time. It appears to the Lord Ordinary that no sound distinction can be drawn between that case and the case of a railway company or wagon company, or other owner of carts or wagons letting out carts or wagons in considerable numbers not under a written contract. The number of wagons cannot afford a good ground of distinction. In the case of *Rankin*, above referred to, the triennial prescription was applied to a claim for rent of fifty houses per annum.

"It was urged by the pursuers that in recent decisions the Court had shown a reluctance to extend the scope of the triennial prescription, and reference was made to the case of *Laing* v. *Anderson &c.*, 10th November 1871, 10 Macph. 74, and *M'Kinlay*, therein referred to; and it is true the Court, in these particular cases, refused to extend the effect of the words 'merchants' compts.' further than has already been done, and so as to include large mercantile transactions, to which the Court held that the statute was never intended to be applied. The amount of the claim, however was not the determining element, and while it may be of general advantage that care should be taken to avoid giving the statute a wider scope than can be gathered from its terms to be its true intention, it is equally important that it should be applied to every case of that general class for which it was designed, for otherwise debtors in Scotland would be exposed, to their great hardship and wrong, for forty years to claims of a kind which are usually settled shortly after the debt is incurred, and for which frequently vouchers are not preserved. Although, in a particular case, as the result of the creditor's own want of diligence or neglect, he may suffer hardship and loss, yet on the whole less injustice will be done and less hardship sustained by the community by the certain application and enforcement of a known rule of law, limiting the time within which debts like the present can be sued for, than by either allowing fine distinctions on which differences of opinion may readily occur, and which arise out of what are called the special circumstances of particular cases, to de-

termine whether the rule shall be applied, or, by unduly narrowing the application of the rule, and leaving the settlement and discharge of a large class of the common transactions of life, which have not been made the subject of written contract or obligation, unprotected by anything short of the long prescription of forty years, which is certainly not in reason the prescription which ought to be applicable to such transactions. It appears to the Lord Ordinary that the present claim is one of the class for which the triennial prescription was introduced and to which it is applicable.

"The agreement, as alleged by the pursuers, refers to abatements 'to be deducted monthly from the carriage account." The claim is one of a kind usually settled at short dates, and for which, after payment, vauchers would not necessarily be kept for any length of time, and the Lord Ordinary is of opinion that it would be unsafe to refuse to apply the rule of the statute in a case between a railway company letting out wagons on hire and a trader, which would be applied in other circumstances, such as the Lord Ordinary has already referred to.

"Assuming that the statute applies, the only remaining question is whether the plea of prescription has been obviated by the production of the defender's writs. The pursuers must prove in this way the constitution of the prescribed debt and its subsistence. The Lord Ordinary is of opinion that the writings produced are not sufficient for either of these purposes. The pursuers have had a very full diligence, and have exhausted every means for the recovery of writings; and, as the Lord Ordinary understood at the debate, they did not ask for any further diligence, because they did not anticipate that they could make any further recoveries. In these circumstances, the defender appears to be entitled to absolvitor, the pursuers being, of course, entitled to refer the cause to his oath, if they think fit."

The pursuers reclaimed.

The argument stated for both parties, and authorities cited, are fully stated in the note to the Lord Ordinary's interlocutor, and in the opinions of the Judges on advising.

At advising:—

Lord Neaves—In this case, which is one of considerable importance, and involving questions of interest to persons engaged in commercial transactions, two questions appear to be raised under the first plea in law for the defenders. That plea is, that the action is excluded by the triennial prescription. These two questions seem to be these:—Does the Act establishing the triennial prescription apply to claims of the kind here libelled, generally speaking? The second question is, Is the action excluded by the specialty that the debts claimed come under the category of being founded on written obligation? With regard to the first of these questions, I have no doubt that claims of the general nature libelled fall under the Act. The pursuers were here acting as furnishers of articles for hire to the defenders as customers. I think it clear that the claims successively put forward for the pursuers for the several items of hire just amount to those ordinary and every-day dealings which suffer, as they ought to do, the triennial prescription. I think it would be a very great detriment to trade, and a very material defeasance of the beneficial Act in question, if this were not recognised. Supposing the Act generally to apply to this class of claims, the next question is, Is the Act excluded by the special qualification contained in the statute itself as to debts founded on written obligations? Is this claim now libelled founded on a written obligation? We have had a very able argument upon that point, and I am quite prepared to accede to the view that a claim may be founded on a written obligation although it is not fully constituted by that written obligation—not fully evidenced at least by that written obligation. I think there is great room for contending that that is the case, and I think there are examples where there is no doubt that it applies. But the question is, Does it apply to the present case?—Is the present claim by the pursuers against the defenders founded upon a written obligation? Now, it is rather remarkable that the pursuers, in so far as I have observed, do not in the record or pleas in law profess to bring these claims under the express category of being founded on the statutory exception. The pursuers refer to the alleged document in the lease book, but they nowhere call that a written obligation. They call it an arrangement or agreement. That is all; and I confess there seem to me to be good grounds for that cautious form of expression. There may be questions in the case whether the document founded upon, which is not an original nor a probative document, and which is called in the lease book an "agreement,"—and *in gremio* of the copy that follows is called "proposed heads of agreement"—can be considered, or can by general evidence be raised to the position of a probative "writing" at all. Assuming that it may be so, it remains to be inquired what kind of writing it is at the best. I am of opinion that the writing in question can in no view be considered as a written obligation, such as the prescription Act contemplates as excluding prescription for debts founded upon it. I conceive that the debts excluded by the statute as founded on written obligation, must proceed upon obligations by the debtor sued upon these debts, and against whom the debts are demanded as created by the writing. It appears to me that the execution of the agreement, if it was executed, created no obligation for debt in the Forth Iron Co. now sued. It contained an eventual agreement by the North British Railway Co. to furnish wagons on certain terms, but there was no obligation on the Forth Iron Co. to ask for wagons or to take wagons. It was an option to them to order them or not as they liked, but they might never have done so. Now it may be a question of nicety, but I think it cannot be held that anything is a written obligation in terms of the statute that does not *se ipso* create an obligation against the debtor afterwards sued. A good example of such an obligation—and I think it is to be found mentioned in some of the cases—would be a binding contract such as is often referred to where the builder becomes bound to build, and the employer becomes bound to receive the building, and to pay for it—that creates a present mutual relation of the rights of debtor and creditor. Each is creditor and each is debtor in that obligation from the first and that has been carried so far that a contract of this kind, where there are two debtors and two creditors from the first, may be made the subject of an arrestment in the hands of the party who is to be the paymaster, although the obligation is not even carried out; because from the first the mutual relation *debiti et crediti* exists, not as a unila-

teral obligation, but as a mutual obligation from the first to take as well as to pay for the articles that are got, and on the other side to furnish them on the terms there stated. There are some cases in which that arrestment has been sustained. We had one quoted to us not long ago, and there are other cases in the books. But I take it no such arrangement could possibly have taken place here in the hands of the Forth Iron Company, until they had ordered the furnishings and got them, so as to become due, not under the original writing, but under the transaction that followed upon it, which it was entirely in their option whether they would carry out or not. It seems to me that this writing was nothing else than a tariff by the pursuers expressing their agreement to make furnishings if required at the rates specified. I cannot conceive that such an agreement by the furnishers is such a written obligation against the employers as excludes prescription. It clearly does not constitute an obligation in itself upon the Forth Iron Company until it came to be acted upon, which it might never have been. Nor can it be said, in my opinion, that a mere order under it would convert it into a mutual agreement for any definite period or length of time. It is quite fixed that in ordinary transactions a mere letter ordering things that might be ordered verbally does not constitute a written obligation in the sense of the statute; for a writing of that description, which is a mere order in certain arranged terms, is nothing more than a more convenient way of ordering the article, which might equally be done verbally. No writing appears to exist at all that ever created a written obligation against the Forth Iron Company. Another question of a very formidable kind arises against the pursuers, Whether the continuance of the agreement after the term stipulated in it had expired, so as to make the subsequent actings founded on a written obligation which on the face of it did not then exist, can be established without writing, and prorogated, so as to amount to something like tacit relocation? A good deal is to be said in favour of that view, but as I do not think that there ever was a written obligation of this nature against the Forth Iron Company, it is unnecessary to decide whether that which was originally nugatory can improve by being afterwards prorogated. I think the true way to view those cases in which the prescription is pleaded, is to look at the case in the first instance as presented by the pursuer suing for his alleged debt. But if he comes to sue upon what he calls a written obligation, he must set forth that obligation, and the Court are then constrained to look at it and see whether it amounts to what he says it is. Now he sets forth this, not as an obligation but as an arrangment or agreement. It is produced, and having seen it I think we are constrained to hold that the claim is not founded on a written obligation by the defenders to take anything of this kind, or to become the debtor of this party, except in so far as he chooses, upon the terms that the pursuers were willing to accede to. In these circumstances, I am for adhering to the Lord Ordinary's interlocutor, that is to say, the findings which find that the Act of prescription applies, and that it is not excluded by any written obligation. But it occurs to me that, having found that from which will be deduced the conclusion that the Act points at, viz., that the pursuer is then limited to a certain kind of evidence, it is premature to go further and assoilzie the defenders at this stage; because the Act of prescription does not extinguish the debt, it merely limits the mode of proof, and the pursuer may say the demand is not excluded, but it is to be proved by the writ or oath of the defenders. There has been a diligence already, and I see nothing that will make the case good so as to satisfy the Act in that way as to its constitution, though if parties have anything to say as to that, we shall hear it. But certainly we could not assoilzie till we hear if the oath is to be resorted to or not. What the statute contemplates is not a reference to the oath of the party after the case is decided in his favour, but a reference in the course of the action.

Lord Benholme—In some points of view this is an important case, and in one respect I am doubtful whether I could go quite along with my brother Lord Neaves in his view of the law; for whilst we agree that the demand falls under the statute 1579, we may perhaps differ as to what the statute makes an exception under the words not founded on written obligation,—It is not "written contract," it is "written obligation." Now, a conditional obligation may not be strictly a contract, but it is still an obligation; and I take it that these parties at one time, during the subsistence of the written arrangement, stood perhaps in this position, that the one party was under obligation to furnish in a certain way, and on certain terms, whilst the others were not under obligation till they had taken advantage of the arrangement. But still my idea is that they might be said to have founded upon written obligation during the currency of that arrangement, which was limited, as I understand, to five years. That is in my view the decisive circumstance against the pursuer here. The document upon which he founds may in one sense be termed an obligation—a conditional obligation—that if the other party wants the furnishings he is bound to supply them at a certain rate; and if it be an obligation it is evidenced by this writing. But the view that I take of the case is that the writing itself is at an end in a definite period, and I cannot understand the notion of rearing it up anew in any way other than in writing. The contract is at an end. If you choose you may make a new contract, and that may be in writing too; otherwise, it don't satisfy the words of the statute. But to say that there formerly was a contract or obligation limited to a certain time, and that we have prorogated it by our dealings, does not appear to me to satisfy the words of the statute. I concur with Lord Neaves in thinking that this debt is not founded upon written obligation, for there was no written obligation then current; it was at an end, and was not renewed. I agree with him that there was in point of fact no foundation of written obligation here upon which the parties can found. I reserve my opinion as to whether it is necessary to have a written contract. I think a written obligation perhaps might do—an obligation on the one party which the other may take the benefit of whenever he chooses to do so. But although I think it might be very well said that that might satisfy the statute, the document on which that argument is founded contains within itself its own termination. I concur in Lord Neaves' observation as to what we should do here. I think the ordinary practice in a case of this kind is to find the application of the statute, and then, if the party has in

any way deprived himself of the opportunity of having farther written evidence by what he has done, he will have no other remedy except a reference to oath. I think the practice is just to find that the statute applies, and consequently that the pursuer cannot prove except by writ or oath of party.

Lord Justice-Clerk—I have arrived at the same conclusion, and without any difficulty, but I am anxious to explain in a few words the ground, and the only ground, upon which I proceed. The question raised here is, Whether this debt which is sued for is founded on a written obligation? The pursuers allege that it is, and they offer to prove it. If the pursuers have relevantly alleged a written obligation, they must be allowed to prove it, and we must assume not merely that an agreement was executed, which they say it was, but that it was continued, and even varied as the pursuers allege, as a matter of fact, provided the allegation be relevant. Whether it was so executed, or continued, or varied, I cannot tell, because we have no proof before us on which we can proceed. But this is quite plain, that if that be a relevant statement, the pursuer is in no way restricted as to the mode of establishing it. But I am of opinion that the defender did not come under any obligation at all in regard to the debt sued for, by executing, if he did execute, the agreement in question. The obligation, such as it was, was laid on the creditor solely—I mean the creditor in this debt—who was bound to furnish, if required, and at a reduced rate, the waggons in respect of the hire of which the claim is made. Now, nothing in the shape of a writing will exclude the operation of the statute excepting that which expresses present obligation, although the thing to which the party is bound may be paid or performed in the future, or conditionally.

All the cases referred to consist of present obligations, like the case of *Dickson*, where the obligation was a contingent cautionery obligation, but still the party wss held bound to it in the event of the furnishings being made. And so in the case of *Blackadder*, the party was bound to give out, and the party who employed him was bound to pay him in that event. The only question of difficulty is the effect of the written order; and in regard to that I do not concur in Lord Benholme's view that the limitation of time in regard to the subsistence of the agreement is of much conseqence. I do not know that in this matter, which is *in re mercatoria*, if the question had arisen here, at what rate these waggons was to be charged for? and it had been clearly proved that according to a course of dealing for many years after the five years had expired, the parties had gone on acting on it, but that that would have been quite enough to set up the agreement. I cannot doubt that—and certainly it would be a very narrow view to take if the rights of parties were regulated by an interpretion such as that—that because the prorogation had not been reduced to writing, therefore it was not founded on a written obligation. The question that does arise is, how far this written order, taken along with the obligation of the Company to furnish the wagons, makes out a written obligation; but I am of opinion that it does not make out a written obligation for this debt, because I see nothing that obliged the party ordering the wagons to retain them for the period in question, nor do I see anything to prevent the Company resuming them at any time they thought fit, for whether the agreement was prorogated or not, it is quite clear there was no limit in point of time. On the whole matter therefore, and agreeing entirely that this is one of the claims which properly falls under the statute, I am of opinion that the Lord Ordinary's conclusion is correct, and I agree with Lord Neaves as to the interlocutor which he proposes.

The Court accordingly pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for the North British Railway Company against Lord Shand's interlocutor of 13th August 1873: Adhere to the first finding of the said interlocutor: Find the defenders entitled to their expenses since the date of that judgment: *Quoad ultra* continue the cause, and reserve all other questions of expenses: Remit to the Auditor to tax the expenses now found due, and to report."

Counsel for Pursuer—Solicitor-General (Clark) and Jamieson. Agents—Dalmahoy & Cowan, W.S.

Counsel for Defender—Watson and Orr Paterson Agents—Hill, Reid & Drummond, W.S.

Friday, January 16.

SECOND DIVISION.

[Lord Gifford, Ordinary.

SAWERS *v.* J. & H. M'CONNELL.

(*Ante*, vol. x, p. 249.)

Landlord and Tenant—Bona Fides—*Personal Bar.*

A contribution having been annually made for forty years by the landlord of a Bleachwork to upper heritors on a stream in respect of certain dams maintained by them, and this contribution having been continued by the tenant during the last five years of his lease without any express permission or prohibition by the landlord; *held*, (*reversing* Lord Gifford, *diss.* Lord Neaves), that the tenant was entitled to deduct the same from his rent, because the landlord was bound by implication and usage under the lease to make the payment, or had led the tenant to believe in *bona fide* that the contribution was a debt.

Interest.

Interest at 4 per cent. allowed on balances of rent unpaid by the tenant, although he had termly tendered payment of his rent on receiving certain deductions to which he was ultimately found entitled by the Court.

This was a reclaiming note against the interlocutor of the Lord Ordinary in an action previously reported, and which was an action at the instance of "the Rev. Peter Sawers, now designating himself Peter Russell Sawers, Free Church minister, Gargunnock," as sole surviving trustee of the late Peter Sawers, bleacher, Nether Kirkton, against Messrs John & Hugh M'Connell, bleachers, Nether Kirkton, and Hugh M'Connell, the sole surviving partner of the firm, for payment of a balance of £281, 7s. 1d., with periodical interest amounting to £30, 8s. 7d., and with interest until payment, in name of overdue rents. Payment of £50 of the sum sued for was resisted on the ground—(1) of no title to sue, the pursuer not being entitled to