Counsel for Respondents (Pursuers)—Watson and Trayner. Agents—Henry & Shiress, S.S.C.
Counsel for Appellants (Defenders)—Fraser and Reid. Agents—Renton & Gray, S.S.C.

Friday, January 16.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

MANSON *v.* HUTCHEON AND OTHERS.

Deed—Construction—Representatives.

In a question between the executor-nominate and the next of kin of a deceased, *held* the designation "representatives" did not exclude the executor.

This was an action of multiplepoinding raised to try the question, what parties were indicated by the term "representatives" employed in an antenuptial contract of marriage entered into between Mr Leslie and Mrs Isobel Sheriffs or Leslie. By that deed, dated 1st November 1832, Mr Leslie disponed, assigned, and made over to and in favour of himself and the said Isobel Sheriff, his intended spouse, in conjunct fee and liferent, and to the children of the marriage equally in fee, whom failing to his own nearest heirs and assignees whomsoever, all and sundry lands, houses, heritages, tacks, heritable bonds, and other heritable property whatsoever then belonging to him or to which he might succeed or acquire right during the subsistence of the marriage; he also thereby assigned, conveyed, and made over to and in favour of himself and the said Isobel Shireffs in conjunct fee and liferent, and to the children of the marriage equally, whom failing, at the death of the longest liver of the spouses, "to be equally divided between the representatives of each of them, the whole moveable goods, gear and effects, debts, and sums of money then belonging to him or to which he may acquire right during the subsistence of the marriage." On the other part, the said Isobel Shireffs thereby assigned, disponed, conveyed, and made over to and in favour of Mr Leslie the whole subjects and effects, debts, and sums of money, whether heritable or moveable, then belonging to her, or to which she might succeed or acquire right during the subsistence of the marriage, with the whole vouchers and instructions of the said debts, and all that had followed or was competent to follow thereon.

It was further provided by said contract that on the dissolution of the marriage by the death of either of the parties without children, the survivor should 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 predecessor, 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 therein allowed. Reserving always full power and liberty to the said contracting parties to make any other settlement or distribution than herein provided of the estate and effects belonging to them, unless in so far as the same regards the liferent hereby provided to the said James Leslie and Isobel Shireffs themselves." No other settlement or distribution was made by Mr and Mrs Leslie.

Mr Leslie predeceased his wife, and there was no issue of the marriage. After his death Mrs Leslie was confirmed executrix *qua* relict of Mr Leslie, and gave up an inventory of his personal estate and effects, amounting to £1343, 5s. 10d. One half of this sum, with interest accruing thereon since Mrs Leslie's death, under deduction of debts and other preferable claims, formed the fund *in medio* in this case.

By her last will and testament, dated 12th April 1870, Mrs Leslie, "in order to regulate the management and distribution of my moveable means and estate," conveyed her whole personal means and estate to the claimant, Mr Manson, who was thereby appointed her sole executor. Mr Manson was directed to pay certain legacies and bequests, and thereafter the residue of the whole estate was bequeathed (subject to any future legacies) to Mr Manson, for behoof of such local, charitable, educational, and religious purposes in or connected with the parish of Meldrum as the testator should specify, or, in the absence of specification, as the said James Manson might select. No reference was made in Mrs Leslie's settlement to the estates falling under and dealt with by the marriage contract. At the time she executed her settlement she had separate personal estate of her own, which was sufficient to meet the bequests mentioned in her settlement.

The competitors for the fund *in medio* were,—1st, Mr Manson, who claimed the same in respect of his being Mrs Leslie's representative under her last will and testament; and 2d, Mr Walter Hutcheon, and others, who maintained that they were entitled to the fund as her representatives, in repect of their being her next of kin.

On 17th July 1873 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, sustains the claim for James Manson, and ranks and prefers him in terms thereof, and decerns in his favour accordingly: Repels the competing claim for Walter Hutcheon and others, and decerns: Finds no expenses due to or by either party.

"*Note.*—. . . The disputed question turns upon the meaning and effect of the expression 'representatives' in the antenuptial contract of marriage of Mr and Mrs Leslie. If the sense in which Mr and Mrs Leslie themselves used the expression, and the effect they intended it to have, could have been collected from their antenuptial contract of marriage itself, taking it in all its clauses, the Lord Ordinary would have held himself thereby bound. But as he cannot find any indications in the marriage-contract sufficient to enable him to ascertain this, and as he is not aware that the term 'representatives' has any technical or fixed meaning, he thinks he is entitled, and indeed feels he has been left no alternative, but to interpret it and deal with it according to what he believes to be its natural, ordinary, and legal import. Now, in this view there appears to be no room for doubt that the claimant, Mr Manson, is the 'representative' of Mrs Leslie. He has come into her place in virtue of her last will and settlement, and by that deed he is entitled to the whole of her estate, whatever that may be, and represents her accordingly. By so representing her he has become liable, at least to the extent of her succession, for her legacies or bequests, and generally for all her debts and obli-

gations, and, as her representative, he must be held, the Lord Ordinary thinks, to be the party meant and pointed out in the antenuptial contract of marriage as entitled, in the circumstances which have occurred, to the fund in question.

"In conformity with the meaning thus attached to the term 'representative,' the Lord Ordinary finds that the Act 4 Geo. IV. c. 98, 'For the granting of confirmations in Scotland,' has been construed. By the first section of that statute it is enacted that 'in all cases of intestate succession where any person or persons who, at the period of the death of the intestate, being next of kin, shall die before confirmation be expede, the right of such next of kin shall transmit to his or her representatives.' And in the case of *Mann or Smith and Husband* v. *Thomas*, 8 Shaw, 468, it was held that where one of the next of kin of an intestate defunct died unconfirmed, but had executed an assignation of his share in the moveable succession, the assignee was entitled to claim that share under the statute 4 Geo. IV. c. 98, in preference to a party who was confirmed executor *qua* next of kin both to the deceased cedent of the assignee and to the intestate. In that case Lord Corehouse, as Ordinary, remarked that, 'in a legal sense, "representatives" may include those who take by deed as well as by intestate succession.' And in the English case of *Crawford's Trust*, 2 Drewry's Chancery Cases, p. 230, Vice-Chancellor Kindersley, in an elaborate judgment in which he reviewed all the authorities bearing on the matter, decided, on principles which appear to the Lord Ordinary to be equally applicable here, that where the testator gave the residue of his property to his daughter for life, and after her death a twelfth of such residue to be equally divided amongst all his cousins-german then existing, or their 'representatives,' that the testator intended to use the word 'representatives' in its ordinary legal sense, and that the executors or administrators of the cousins-german, and not the next of kin, were entitled to the twelfth part of the residue.

"Having regard to these authorities, as well as on general principles of construction, the Lord Ordinary must hold that the claimant Mr Manson, as her executor confirmed, and as such the representative of Mrs Leslie, has been justly preferred to her next of kin in the present case. In truth and reality, her next of kin are in no sense her representatives. They have neither taken nor could take up any of her estate, and do not say that they have or could have done so. They do not, therefore, in that or in any other way, come into her place, or can be said to represent her to any effect whatever. They are related to her, it is true, and in blood are her next of kin, but that is all."

The defeated claimants, the next of kin, reclaimed, citing as an authority the case of *Stewart*, 21st May 1802, F.C.

At advising—

Lord President—By the antenuptial contract of marriage between Mr Leslie and Isobel Shirreffs or Leslie, executed 1st November 1832, the moveable estate of the husband was divisible at the death of the longest liver of the spouses into two equal portions, one of which was to go to the representatives of the husband, and the other to the representatives of the wife, and the competition in which we are asked to give judgment is as to the half which is to go to the representatives of the wife. The question raised by the competition is, which of the competing parties are the representatives of the wife? The Lord Ordinary has preferred the executor-nominate, but his reasons for doing so are not quite satisfactory to my mind. He says he "cannot find any indications in the marriage contract sufficient to enable him to ascertain" "the sense in which Mr and Mrs Leslie themselves used the expression (representatives)" "and as he is not aware that the term 'representatives' has any technical or fixed meaning, he thinks he is entitled . . . . to interprete it and deal with it according to what he believes to be its natural, ordinary, and legal import."

Now, I have very great difficulty as to what is the legal import of such a term. It embraces a greater variety of classes than any other term. It embraces all executors—executors-nominate—assignees—mandatories, &c., as well as heirs of every description. So that its import must depend in every case on the terms of the deed in which it is used, and on the circumstances of the case. And I am happy that I feel none of the difficulty of the Lord Ordinary in finding light from the marriage contract, which leaves no reasonable doubt as to the intention of the parties.

The wife on her side conveys all the property she *then* possesses or which she may acquire during the subsistence of the marriage absolutely to her husband. So that what is disposed of by the marriage contract is really the husband's estate, and he "dispones, assigns, and makes over to and in favour of himself and the said Isobel Shirreffs, his intended spouse, in conjunct fee and liferent, and to the children of the marriage equally in fee, whom failing, to his own nearest heirs and assignees whomsoever, all and sundry lands, &c," and then he "assigns, conveys, and makes over to and in favour of himself and the said Isobel Shirreffs, in conjunct fee and liferent, and to the children of the marriage equally, whom failing, at the death of the longest liver of the said spouses, to be equally divided between the representatives of each of them, the whole moveable goods," &c.

It was contended, not without some plausible grounds, that, considering that the wife conveyed absolutely the whole estate she might acquire, this conveyance of moveables does in effect give her a fee in the half of the moveable estate. I think that view was strongly and powerfully urged in the debate, and it would be sufficient, if sustained, to enable the Court to adhere to the judgment of the Lord Ordinary; for if the wife were fiar of the half of the moveable estate, she had of course the power of disposing of it as she pleased, and her executor would take. But I am not prepared to base my judgment on that view. I think the sounder view is that the fee of the whole estate remained with the husband, and on that footing I interprete the clause dealing with the event of failure of children. It is to be observed that the words used are identical with those employed with reference to the husband's moveable estate, and the question naturally occurs—Supposing a competition had arisen under that clause between the executors and next of kin of the husband? As to that there can be no doubt that his executors would have taken in preference to his next of kin; and it would be very strange that with regard to the wife's half, dealt with in the same deed, the same word 'representatives' should mean something different. Keeping in mind that the heritable

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