JUS QUAESITUM TERTIO IN SCOTS LAW.

Unlike English law, Scots law recognises the right of a third party to a contract to sue upon it. Why this should be so is a question that need not concern us; yet two factors may be mentioned, (1) the absence of a doctrine of consideration, and (2) the fact that Scots law has never had a law of "contract(s)" but of "obligations", and in its formative era the law of obligations arising from a voluntary undertaking, e.g., a promise, was dominated by the intuitionist theory of Grotius. The doctrine, stated in the strongest terms, is found in the earliest and most authoritative of the institutional writings, namely, Stair's *Institutions of the Law of Scotland,* first published in 1681:—

> "It is likewise the opinion of Molina, and it quadrates *with* our customs, that when parties contract, if there be any article in favour of a third party, at any time, *est jus quaesitum tertio,* which cannot be recalled by *either or* both *of* the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform."[1]

The conditions are that the *tertius* must be clearly ascertained and that the stipulation in his favour must be irrevocable by the actual parties to the contract.[2] For convenience of exposition the many decisions to be found in the books can be allocated to one or other of these categories, namely, whether the *tertius* has a title to sue or, if he has, whether the money or property for which he sues belongs to him.[3]

Title to sue.

"The question is whether the debtor in a contract has subjected himself to liability to a third party, so as to give that party a title to sue."[4] The *tertius* must be clearly ascertainable, and it must be shown that the parties intended to secure a benefit to him. "Was their object in entering into the contract, to secure a benefit to a third party, or

[1] 1 STAIR, INST. 10.5.

[2] Finnie v. Glasgow & South Western Rly. Co., (1857) 3 Macq. H.L. 75, per Lord Wensleydale at 90; Blumer v. Scott, (1874) 1 Rettie 379, per Lord Ardmillan at 387; Carmichael v. Carmichael's Executrix, [1919] S.C. 636, per Lord Mackenzie at 652.

[3] GLOAG, CONTRACT 68, 235; Carmichael v. Carmichael's Executrix, [1920] S.C. (H.L.) 195, per Lord Dunedin at 197, 198.

[4] GLOAG, CONTRACT 68.

was the benefit which the fulfilment of the contract would secure to a third party merely the incidental result of an advantage which one or other of them proposed to secure to himself?"[5] If a title to sue is expressly conferred on a *tertius* there seems no reason in principle why this stipulation should not be effective. Thus if A. places money on deposit receipt with bank B., the terms of the receipt making the money payable to C., then C. has a title to sue. The question whether C. is entitled to the beneficial ownership of the money is irrelevant; the bank must pay in terms of the contract.[6] On the other hand, if the *tertius* is not expressly named, then the question is, if the contract is in writing, one of construction of its terms, for parole evidence of actual intention seems to be incompetent.[7] So where A. wrote to the minister of a chapel of ease in the Church of Scotland (who was A's. son-in-law) a letter, dealing otherwise with private matters, in which he said, "I will give you £100 towards endowment should your subscription fall short," an action for payment brought against him by the Committee of Management was dismissed *inter alia* on the ground that there was nothing to show that A. had conferred on the Committee a title to sue.[8] But where M. wrote to a provisional committee, which was promoting a charitable society, offering on certain conditions, if the society was formed on certain lines, to help it with a subscription of £1,000, payable in ten instalments of £100 each, and the offer was accepted by the committee and the society formed to M's. satisfaction, the Court had no difficulty in holding that M. had undertaken an obligation conferring a *jus quaesitum tertio* on the society. Lord Kinnear observed, "The offer is,—If you produce a society answering the description I give you, which may be the creditor in my obligation, then I will pay to that Society £1,000 in the course of ten years. That is an express stipulation in favour of a third party—that is, the Society—definitely described, and it is in effect an agreement between the two parties to the contract that a stipulation shall be performed with that third party, and the rule in such a case is, that though the person in whose favour the stipulation is made is not a party to the agreement . . . he may afterwards adopt the agreement in his favour and sue upon it."[9]

[5] *Ibid.*, 235.

[6] Dickson v. National Bank of Scotland, [1917] S.C. (H.L.) 50, per Lord Dunedin at 53 and Lord Shaw at 55.

[7] Nicholson v. Glasgow Asylum for the Blind, [1911] S.C. 391, per Lord Dunedin at 400.

[8] Cambuslang West Church Committee v. Bryce, (1897) 25 Rettie 322.

[9] Morton's Trustees v. The Aged Christian Friend Society of Scotland, (1899) 2 Fraser 82, at 87.

There must, of course, be an intention to be bound. In *Lamont v. Burnett,*[10] A. sent an offer to B's. agent to purchase an hotel belonging to B. at the price of £7,000. Enclosed with the offer was a letter in which A. wrote, "I will be pleased to give Mrs. B. a sum of not less than £100 as some compensation for the annoyance and worry of the past few days and for kindness and attention to me." B's. agent replied, "I am now instructed to accept your offer as supplemented by your letter." A. refused to pay the £100, and B's. wife brought an action for payment. A's. plea of no title to sue was dismissed, for the language used was clearly of obligation although, as Lord Young pointed out, a little difference in expression might have made a great difference in result; for example, if A. had said that he would have great pleasure in giving B's. wife a present.

The mere fact that a third party is interested in the fulfilment of obligations undertaken by parties to a contract does not, however, give him a *jus quaesitum.* A *jus quaesitum tertio* is the exception, not the rule. In an agreement for the purchase of a company business the purchasers undertook "to pay and discharge all the present and future liabilities of the vendors in connection with the business sold . . . But the pursuer is no party to this contract. He is not named or designed in it. The stipulation in question was not entered into in his interest or for his benefit, but in the interest of the contracting parties. They could alter or revoke it at any time if so advised, and I do not think there was any *jus quaesitum* to the pursuer under it."[11]

Does the money or property belong to the tertius?

Hitherto the emphasis has been on the title to sue—"Has the *tertius* a *jus?*" The cases now to be considered are concerned with the question whether there has been, as the result of a contract between A. and B., an effective disposition of property in favour of C. The late Professor Gloag has written, "Where an obligation is directly conceived in favour of a third party, and where therefore his title to sue may be undisputed, the question may be raised whether the terms of the writing, and the actings of the parties, amount to an irrevocable gift to that third party."[12] This statement is ambiguous. As Lord Mackenzie said in *Carmichael v. Carmichael's Executrix,* "It is as much a truism to say that there is a *jus quaesitum tertio* under a contract if the clause in favour of the *tertius* is irrevocable, as to say that if the clause is irrevocable then there is a *jus quaesitum.*"[13] Irrevocabi-

[10] (1901) 3 Fraser 797.
[11] Henderson v. Stubbs' Limited, (1894) 22 Rettie 51, at 55.
[12] *Op. cit.,* 68.
[13] [1919] S.C. 636, at 652.

lity of the stipulation is the badge of a *jus quaesitum* whether the question is, "Has the *tertius* a right to sue?" or, "If he has, is he entitled to what he claims?" So, in *Rose, Murison & Thomson v. Wingate, Burrill & Co's. Trustee,* the facts were that an association of underwriters in admitting a new member X. obtained a guarantee from the defenders in respect of underwriting obligations to be undertaken by him. The pursuers, who had been assured by X., sued the defenders on the guarantee. Lord Kyllachy held that the pursuers had a title to sue; "I think," he said, "that both on principle and authority persons asuring through brokers who are members of the association have a *jus quaesitum* in these guarantees which gives them a title to sue upon them. The test, I admit, is whether the association and the guarantors could, during the currency of the risks underwritten, agree between them to discharge the guarantees. In my opinion they could not."[14] Thus if in a contract between A. and B. there is a stipulation imposing an obligation upon B. in favour of C. there is no *jus quaesitum* in C. if the contract be revocable by the parties. To say that it is not revocable because C. has a *jus quaesitum* is to argue in a circle, for C. has a *jus quaesitum* because it is not revocable. The question is whether the obligation upon B. is absolute, and the answer depends upon whether in the eyes of the law something has been done to make it absolute. If intimation is made to C. that might well be enough.

In the case last mentioned Lord Kyllachy expressly found that the policies of insurance were accepted "if not always in knowledge of and in reliance on the guarantees, yet always in reliance on the fact that all underwriters admitted having to satisfy the committee by guarantee or otherwise of their ability to fulfil their engagements." In the cases already discussed attention was focussed on the essentials of an ascertainable *tertius* and of an intention by the debtor in the contractual obligation to be bound. If both were satisfied then the point of irrevocability, for one reason or another, was not open, or if one or the other was not satisfied, was immaterial. As Lord Skerrington said in *Carmichael,*[15] there are two different sets of circumstances to which the doctrine of *jus quaesitum tertio* applies; one is "a contract containing a stipulation which, when properly construed, evidences an intention on the part of the contractors that something shall be done or permitted to be done for the benefit of a third person," and this contract "legally evidences an unequivocal and final intention to confer a benefit on a third party," whereas the other, although in the form of a contract whereby a person acquires the right to property or money,

[14] (1889) 16 Rettie 1132, at 1135.
[15] [1919] S.C. 636, at 655.

merely stipulates that the conveyance or payment shall be made to a third party. In the latter, what has been done is ambiguous and does not in itself evidence an unequivocal and final intention to benefit the third party. In the cases about to be discussed the question is whether the apparent *jus* conferred on the *tertius* is effective to confer a benefit on him. It will be if the obligation under the original contract is irrevocable. If the contracting parties can separately or together revoke the stipulation there is no *jus quaesitum tertio*.[16]

That irrevocability is of the essence and does not arise out of the mere making of the contract between A. and B. is the substance of *Carmichael's Case*.[17] A father took out a policy of assurance upon the life of his pupil son. The policy provided that during the son's minority the father should be entitled to the surrender value of the policy and that, if the son died before attaining majority, the premiums then paid should be repaid to the father; but that, if the son attained majority, then, if he or his assigns continued to pay the premiums, the sum assured should be paid on his death to his executors. As an alternative, the son was entitled at majority to exercise certain options, including the conversion of the policy into a cash payment or a fully paid policy. The father paid the premiums during the son's minority. The son attained majority, but died before the next premium fell due, and without having exercised any of the options. He knew of the existence of the policy, but it had not been delivered or intimated to him by his father. In a competition between the father and the son's executrix the House of Lords held that although the policy had never been delivered to the son either actually or constructively, its terms, taken in conjunction with the whole circumstances of the case, showed that the son had acquired a *jus quaesitum* to it, and therefore the proceeds fell to his executrix.

The decision turned upon the point whether after the son attained majority the father could "alter the terms of the contract with the assurance company, and . . . cause the association's contractual relations with the son to disappear."[18] It was argued for the executrix that the terms of the policy alone were sufficient to constitute the right. Reliance was placed on the passage, already quoted, from Stair—"When parties contract, if there be any article in favour of a third party, at any time, *est jus quaesitum tertio,* which cannot be recalled by either or both of the contractors." Lord Dunedin, with the concurrence of Lord Shaw, rejected this argument and interpretation

[16] Blumer & Co. v. Scott, (1874) 1 Rettie 379, per Lord Ardmillan at 387.
[17] [1920] S.C. (H.L.) 195.
[18] *Ibid.*, per Lord Shaw at 207.

(admittedly literal) of Stair. He said, "That would mean that the moment you find from the form of the obligation that there was a *jus* conceived in favour of a *tertius* it proved that the *jus* was *quaesitum* to that *tertius*. I do not think Lord Stair meant to lay down such a proposition," and irrevocability is "a condition, not a consequence, of the expression of the *jus* in favour of the *tertius* . . . Taking now Lord Stair's dictum in the other sense, in which I hold it to be sound, what it comes to is this, that irrevocability is the test; but the mere execution of the document will not constitute irrevocability. It is obvious that if A. and B. contract and nothing else follows, and no one is informed of the contract, A. and B. can agree to cancel the contract."[19]

It remains to consider the ways in which irrevocability may be shown.

As Lord Dunedin remarked in *Carmichael*, "when B., contracting with A., is under no obligation to secure any benefit for C., and makes a stipulation which in form assures a benefit to C., the query 'Did he do that in such a way that C. and not he must be the recipient of the benefit?' may not unaptly be put in the form of 'Did he intend to make a donation in favour of C.?' "[20] The value of the illustration is that to establish a donation, under such circumstances, some proof of the *animus donandi* beyond the mere form of title is required.[21] The clearest proof is delivery of the document to the *tertius*. At one time, particularly in cases involving deposit receipts, it was considered that delivery was essential. In *Crosbie's Trustees v. Wright*,[22] A. deposited £3,500 on deposit receipt in name of himself and B., his sister, and C., her husband, "to be paid to any, or survivor or survivors, of them." After A's death the receipt was found in a book in one of the rooms of the house of B. and C. which A. was in the habit of using. In a competition between A's. trustees and B. and C. the Lord Ordinary (Rutherford Clark) held that there was no donation because A. had not delivered the deposit receipt to B. and C. and sustained the trustee's claim. The First Division reversed this decision holding that the evidence of B. and C. as corroborated by facts and circumstances was sufficient to instruct a *donatio mortis causa*. The Lord President (Inglis) pointed out that the subject of the gift was the money in the bank, not the deposit receipt, which was a mere voucher; therefore,

19 *Ibid.*, at 199-201.

20 *Ibid.*, at 199.

21 This does not affect the rule that a gratuitous promise given by A. to B. is binding and enforceable by the latter.

22 (1880) 7 Rettie 823.

provided there was evidence of *animus donandi,* delivery was not essential. In the same case Lord Shand indicated that in the case of a donation *inter vivos* delivery of the voucher was essential.[23] This was doubtful even when uttered; some subsequent cases are inconsistent with it,[24] and the decision in *Carmichael* seems to establish the contrary, namely, that the test is whether under all the circumstances there was created a *jus* which is *quaesitum tertio.*[25] Thus delivery *per se* need not be conclusive, though the incidents of proof and the strength of presumptions will vary with the subject-matter delivered. The question is always *quo animo* and if need be proof as to the motives and actings of the alleged donor may be led. On the other hand actings of an unequivocal nature may be enough; for example, intimation where there is nothing of which delivery actual or constructive could be made, and, where the terms of the contract between A. and B. clearly evidence a *jus* in favour of C., intimation to C. will give him a direct claim against that contracting party who is the debtor in the obligation.[26] Even without intimation there will be irrevocability "where the *tertius* comes under onerous engagements on the faith of his having a *jus quaesitum,*"[27] and also where there is an antecedent duty on one of the contracting parties to make a stipulation in favour of the *tertius.*

In conclusion, there may be mentioned one qualification which the doctrine of privity of contract has placed upon the right of the *tertius* to sue on the contract, and that is where the contracting party who is debtor in the obligation contained in the stipulation in favour of the *tertius* has performed his obligation defectively with consequent loss to the *tertius.* The *tertius* cannot on the contract sue him for damages. He can sue for nonfeasance, but not for misfeasance.[28]

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[23] *Ibid.*, at 834.

[24] Thomson's Executor v. Thomson, (1882) 9 Rettie 911; Boucher's Trustees v. Boucher's Trustees (1907) 15 Scots L.T. 157; and see Lord Shaw in Carmichael v. Carmichael's Executrix, [1920] S.C. (H.L.) 195, at 205.

[25] *Cf.* Lord Dunedin in [1920] S.C. (H.L.) at 199.

[26] *Cf.* Leslie v. Magistrates of Dundee, (1840) 3 Dunlop 164, per Lord Fullerton at 171.

[27] *Per* Lord Dunedin in Carmichael v. Carmichael's Executrix, [1920] S.C. (H.L.) at 203.

[28] Robertson v. Fleming, (1861) 4 Macq. H.L. 167.

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