nion that no liability such as is claimed lies upon him.

The claim at the instance of the tenant is a valid claim in the sequestration, but I think it is nothing more. I have been at a loss to understand the language used at the debate in reference to the trustee "taking up" or "taking over" property. He has not taken up; he was bound to realise the estate to the best advantage, and he has done so.

The case of *Harvie* (quoted *supra*) settles that even in a case where a trustee has taken up and adopted a contract of lease, so as to put himself in the bankrupt's place, in this case the trustee would only be responsible to the extent to which he drew the rents.

Lord Ormidale—I am of the same opinion. The case of *Harvie* was a much stronger case for the pursuer there than this case is for this pursuer, and it is conclusive. But further, surely the trustee in the circumstances of this case could sell the estate without making himself or the creditors liable for all the bankrupt's obligations connected with it. The sale was the only thing relied on in argument by the pursuer, and I am quite clear that the Lord Ordinary is right on this point, and that the trustee is not liable.

It is another matter altogether as to ranking on the estate.

Lord Gifford—I am of the same opinion, and with no difficulty. I am anxious only to say that to my mind the idea that a trustee on a sequestrated estate represents in any respects the personal obligations of the bankrupt is out of the question. He is just there because he does not so represent them. The estate is taken out of the bankrupt's hands and given over to the trustee, in order that he may realise it and pay it to the creditors. He may take up the estate or any contract if he likes, but if he does not there is no liability.

This is enough for the decision of this case, and therefore I am of opinion that, on the relevancy, the pursuer has no case against the trustee or against the creditors.

The Court pronounced the following interlocutor:—

> "Recal the said interlocutor: Find that the lease founded on by the pursuer has not, upon the averments set forth by the pursuer on the record, been adopted by the defender David Rattray, so as to render him, or the bankrupt estate under his administration, liable to the pursuer for payment in full of such damage as may be shown by the pursuer to have been sustained through delay in fulfilment of the clause of the said lease quoted in article 3 of the condescendence, and therefore assoilzie the said David Rattray from the conclusions of the action so far as directed against him personally, and dismiss the same so far as directed against him as trustee on the sequestrated estates of the defenders M'Ewen & Nelson, but this without prejudice to the right of the pursuer to claim in the sequestration for damages in the premises that she may be ranked therefor with the other creditors of the bankrupt, and decern: *Quoad ultra* remit the cause to the Lord Ordinary," &c.

Counsel for Pursuer (Reclaimer)—Kinnear—Brand. Agent—Adam Shiell, S.S.C.

Counsel for Defender (Respondent)—Asher—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, November 19.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

CHALMERS *v.* WALKER.

Prescription—Triennial Limitation under Stat. 1579, *cap.* 83—*Written Obligation.*

A tradesman gave a written estimate for the erection of a gate, &c., at a house which was in course of building, and the work was admittedly executed in conformity therewith, but there was no written acceptance. In an action brought for payment after the lapse of three years from the date of the account, *held* that the Triennial Limitation Act 1579, cap. 83, applied, and that, there being no writing by the debtor, the contract did not fall under the exception of a written obligation as recognised by the statute.

Observations (*per* Lord Shand) on the case of *Blackadder* v. *Milne*, March 4, 1857, 13 D. 820.

This was an action under "The Debts Recovery Act 1867," brought in the Sheriff Court of Aberdeenshire, in which James Chalmers, smith and ironmonger, Greenock, sued Robert Stewart Walker, Belhelvie, for the sum of £40, "per account produced." The account produced was as follows:—

"Greenock, 1877.

"Robert Stewart Walker, Esq.

"To James Chalmers, smith and ironmonger, Greenock.

1870.				
July 6.	To 146 ft. wall rail.			
	,, 296 ,, balusters.			
	,, 8 gate posts.			
	,, 4 iron gates.			
	,, 7 dead locks.			
	,, fitting up do., &c., as per offer,	£30	0	0
1877.				
August 16.	To interest at 5 per cent., restricted to	10	0	0
		£40	0	0'

The defence pleaded was—(1) Prescription of the account, and (2) payment.

The pursuer founded on the following offer addressed to the defender's factors, and dated March 18, 1870:—

"Messrs Alex. Agnew & Co.

"Gent.,—I hereby offer to supply and fit up, at Mr R. S. Walker's new house, Finnart Street,

about 170 feet of cast-iron railing, including three single and one double leaved gate, of pattern shown in drawing, with malleable iron frame and lock complete, for the sum of 9/9 stg. per lineal yard.

"The lower part of gates to be measured and charged same as railing.—I am, your obed. servt.,

"James Chalmers.

"John Findlay.

On back—

"Will complete the whole work for £30.

"J. C."

A proof was led in the cause, and the defender admitted that the work specified in the account had been executed, but deponed that he had paid it subsequently in 1874, but had lost the receipt.

The Sheriff-Substitute (Dove Wilson) found "That the pursuer has failed to prove his allegation that the debt sued on is constituted by a written obligation, and therefore finds that the account libelled is prescribed: Finds further that the pursuer has failed to prove the subsistence or resting-owing of the debt by the writ or oath of the defender, and therefore assoilzies the defender from the conclusions of the action: Finds him entitled to expenses, and appoints the cause to be enrolled that their amount may be fixed."

The Sheriff (Guthrie Smith) on appeal recalled the Sheriff-Substitute's interlocutor, and found it proved that by the writing of March 18, 1870, the pursuer had contracted to complete the work in question for £30, that the offer was accepted verbally, and that that constituted a written obligation within the meaning of the Act 1579, cap. 83, and further that the defender had failed to prove his averment of payment.

He added this note:—

"*Note.*—The point which is here raised is one of very considerable importance, and it is remarkable that although the Act of 1579 has been three centuries in operation, the cases on what perhaps is its most important clause are both few in number and somewhat indistinct in their result. In the one cited by the Sheriff-Substitute—*Hotson* v. *Threshie*, February 28, 1833, 11 S. 482—the question was not determined, but it was recently much discussed in the *N. B. Railway Co.* v. *Smith Sligo* (1 Rettie 309).

"The Act says, that all debts of the class named 'not founded on written obligations,' must be pursued for within three years. The reason of the exception is obvious. In transactions provable by parole, witnesses misapprehend or forget what passed between the parties at the time, but when the contract is reduced to writing *litera scripta manet*, and the risk of mistake is removed.

"What appears to have been settled is, that it is insufficient to show a written order for goods to prove a written obligation of the kind contemplated (*Ross* v. *Shaw*, 1784, M. 11,115; *Douglas* v. *Grierson*, 1794, M. 11,116); nor is it enough, as the Sheriff-Substitute observes, that goods verbally ordered have been sent home with an invoice or other note or memorandum of the sum payable, but a written contract made with a tradesman, *e.g.*, with a mason to erect a building, or a joiner to do some carpenter work, has been decided to be within the exception (*Watson* v. *Prestonhall*, M. 11,095, and see *Blackadder* v. *Miln*, 13 D. 820).

"In this case the writing is an offer by the tradesman himself. It is complete in itself, and is quite distinct in its terms. It specifies the work to be done and the sum to be paid. It was delivered to the employer or his factor duly authorised, and the work was done on the faith of its being accepted.

"It may be true that there is no formal acceptance by the debtor in writing, but it is well established that a written offer may be accepted verbally or by acting in terms of it (Dickson on Evidence, sec. 556). In almost every case of work done under a written estimate, the transaction takes the same form, and Lord Benholme seems to be of opinion that the statute would be satisfied 'by an obligation on the one party which the other may take the benefit of whenever he chooses to do so.' It appears to the Sheriff to be too great a refinement to say after the work is finished that this is not a debt constituted by a written obligation. Its terms are fixed, and the obligation is of a kind requiring a writing to discharge it."

The defender appealed to the Court of Session.

Authorities—*Watson* v. *Lord Prestonhall*, February 21, 1711, M. 11,095; *Blackadder* v. *Milne*, March 4, 1851, 13 D. 820; *White* v. *Caledonian Railway*, February 15, 1868, 6 Macph. 415; *Barr* v. *Edinburgh and Glasgow Railway*, June 17, 1864, 2 Macph. 1250; *Douglas* v. *Grierson*, 1794, M. 11,116, Bell's Fol. Cas. 974; *Ross* v. *Shaw*, 1784, M, 11,115.

At advising—

Lord President—This is an action which libels that the defender is owing to the pursuer a sum of £40, and concludes for payment. The account is for furnishings supplied by an ironmonger, all the goods supplied being under one date, 6th July 1870, with interest running until 16th day of August 1877, the date of the action.

The defences stated are (1) that the account is prescribed; and (2) that it has been paid. The case has been dealt with by the Sheriff-Substitute as falling under the triennial prescription, but the Sheriff on appeal reversed his Substitute's interlocutor.

I am of opinion that the Sheriff is in error. I think that a written obligation must, besides being constituted by writing, be enforceable against the defender. Now, the only writing here is the offer by the pursuer to execute certain work. There is no written acceptance, and no writing of any sort by the defender, and the mere circumstance that it was verbally accepted cannot, I think, possibly make it a written obligation. There may be, no doubt, contracts of this kind, constituted on one side verbally and on the other side by writing, which are perfectly valid and binding, but in cases of that sort it cannot be said that the party who binds himself verbally binds himself by writing. That is too plain for argument, and on that principle alone, even if we had no authority on the subject to guide us, I should hold that this account falls under the triennial prescription. But there is no place where the principle is better stated than in Bell's Commentaries, vol. i. p. 349 (7th ed.) (332, 5th ed.):—"If the writing go only to the origin or first construction of the debt, as a written order for articles to be furnished; this—although when completed by a carrier's receipt for the goods it will be good evidence of the constitution of the debt—will not

satisfy the law on the other point, viz., that the debt is resting-owing. That will still remain to be established by the creditor. It has, indeed, been often contended that where a written order is given the debt is of a description to which the triennial prescription does not apply, as being a debt founded on a written obligation. But this plea the Court has uniformly disregarded, on the principle that the Legislature meant to apply the triennial prescription to all debts in which there is not such a regular written constitution of the obligation as naturally requires a written discharge." The law laid down there I adopt here. The case put by Mr Bell is weaker than the case we have here—for he puts it that the defender has given a written order, but here the only writing is an offer made by the pursuer; in the case before us there is no writing by the defender, in Mr Bell's case there is. But the result of both is the same, namely, that there is not a written contract requiring a written discharge. It is therefore subject to the triennial prescription. I think, therefore, that the Sheriff's interlocutor must be recalled.

Lord Deas—I concur. The view of the Sheriff, and the arguments presented to us upon it, are ingenious. It is plausibly maintained that this was a written contract, there being a written estimate on the one side which was adopted by the other. If that had been made out, it might not have been affected by the triennial prescription; as it is, I cannot see how it escapes it.

Lord Shand—This is a case of considerable importance. It is an attempt to include under debts not affected by the triennial prescription a class of obligations not hitherto so included, and which if admitted would very much limit the operation of that statute. There is no case recorded where a written obligation is said to have been granted where it was not granted by the defender or those authorised by him. The cases referred to by Bell, viz., *Ross* v. *Shaw* and *Douglas* v. *Grierson*, are *a fortiori* of the present, because in both there was writing by the defender showing what the articles ordered had been, and in the latter, in addition, a carrier's receipt for the goods; and yet the Court held there was no written obligation.

The argument upholding the judgment of the Sheriff was founded mainly on the case of *Blackadder* v. *Milne*, but your Lordships have taken opportunity in the cases of *White* v. *Caledonian Railway Company* and *Barr* v. *Edinburgh and Glasgow Railway Company* to limit the operation of that case, and to intimate that you would not be disposed to apply the principle which there received effect in circumstances not clearly the same in all essential particulars.

Lord Mure was absent.

The Court recalled all the interlocutors pronounced in the Inferior Court, and sustained the defence founded on the Statute 1579, c. 83, and in respect thereof assoilzied the defender.

Counsel for the Pursuer (Respondent)—Kinnear—Patten. Agents—J. & J. Patten, W.S.

Counsel for the Defender (Appellant)—Trayner—Moncreiff. Agents—Carment, Wedderburn, & Watson, W.S.

Tuesday, November 19.

FIRST DIVISION.

[Sheriff of Banffshire.

WATSON (INSPECTOR OF BOHARM) *v.* CAIE (INSPECTOR OF FORGLEN) AND MACDONALD (INSPECTOR OF KEITH).

Poor—Settlement—Acquisition of Industrial Settlement where Party Incapable of Earning Livelihood.

A pauper had been deaf and dumb from her birth, and likewise suffered from great bodily weakness, the result of an accident in childhood. She was further irritable in temper, and lazy in disposition, so as to be quite incapable of earning her livelihood, although she had been in service for a time. She had been an inmate of a deaf and dumb institution for some years, and had subsequently been taught dressmaking; she could answer questions put to her by the Sheriff through the slate with fair intelligence. *Held* that she was not legally incapable of acquiring a settlement by residence.

Poor—Interference to Prevent the Acquisition of a Settlement—Incidental Absence.

An illegitimate pauper resided with her aunt, her mother being in service. In order to prevent the acquisition of a settlement in the parish of the aunt's residence, the chairman of the board, who was also factor to the aunt's landlord, interfered. The pauper, who did not at the time require parochial relief, was in consequence sent to live in another parish with the aunt's daughter, but after an absence of eleven months returned. *Held* that in these circumstances the residence had not been interrupted.

In this case the inspector of poor of the parish of Boharm concluded alternatively against the inspector of the parish of Forglen and the inspector of the parish of Keith for the repayment of certain alimentary sums paid by him in respect of a pauper named Isabella Smith.

The pauper was the illegitimate daughter of Isobel Grant, domestic servant at Carnousie, in the parish of Forglen, and was born in the parish of Keith in 1841. She was deaf and dumb from birth, and for long suffered from spinal irritation and rheumatism. It was further averred by the pursuer, and also by the defender the inspector of Keith, that she was incapable of earning her own subsistence, having been imbecile all her days. She resided in the parish of Boharm with her aunt, a Mrs Edwards, from the 20th March 1865 until the date of the raising of this action on 10th April 1875, with the exception of a period of about eleven months, from Whitsunday 1869 to Whitsunday 1870, during which she lived in the parish of Inverkeithny with a daughter of Mrs Edwards. Her mother's settlement was in the parish of Forglen.

The pursuer, the inspector of Boharm, pleaded, *inter alia*—"(2) Either the parish of Forglen, as the residential settlement of the pauper's mother, and her own parentage settlement, or the parish of Keith, as her own birth settlement, is liable to the pursuer as concluded for in the summons, with expenses."