entirely upon the construction of the 16th section of the Act referred to. That section gives power to a crofter to leave his right to the croft by will to one person of the same family, who may be his wife or "any person who failing nearer heirs would succeed to him in case of intestacy," that is, any person who if there were no nearer heirs would be entitled to serve. There is a limitation to one person, his wife or some-one else who is of the same blood as himself, but the right is not confined to his wife and the nearest heir only, for there are provisions in the section for the landlord objecting to the "legatee" named, and if the "legatee" accepts and no objection is offered by the landlord, then he is "to possess the holding on the same terms and conditions as if he had been the nearest heir of the crofter." That implies that he is not the nearest heir, for he is to hold "as if he had been." If the bequest is declared null and void because the landlord objects or if the legatee does not accept, what then? The croft is to go to the nearest heir *ab intestato* of the crofter as if the bequest had not been made. That again shows that the Act contemplated the legatee not being the nearest heir, and cannot bear the construction given to it by the Sheriff-Substitute.

LORD M'LAREN—The Act plainly did not intend to confine the crofter's testamentary power within such a narrow range as is implied in the construction which makes the crofter's wife and his heir-at-law the only possible objects of the bequest. If such had been the intention of the Legislature, the proper way would have been to give a power of bequest in favour of the wife, and failing her, to provide for the croft descending to the heir-at-law. It is clear that some selection other than that of the wife was intended, and it is also clear that with the doubtful exception of the son-in-law, the person favoured must be of the same blood as the testator. It is somewhat strange and fanciful legislation to give a crofter the right to leave his croft to anyone who might, failing nearer heirs, become the nearest heir, and yet to withhold from him the right to leave it to a stranger. I do not see any reason in public policy or in jurisprudence for so limiting the exercise of the testamentary power, and I have sympathy with the Sheriff-Substitute in his difficulty, but the Act does not define the class of heirs who may succeed to the bequest, and we cannot do so. Anyone therefore who can establish relationship with the testator may be the "legatee."

LORD KINNEAR—I am of the same opinion. I should have no difficulty in construing the main enactment as your Lordship has done, and in holding that the benefit is not confined to the nearest heir, but if I had any doubt, it would be entirely removed by the provisions contained in sub-sections (*g*) and (*h*), because these provisions make it quite clear that the legatee contemplated is a legatee who will exclude the heir-at-law, for the result of the bequest being declared to be effectual is to give the legatee the same position as if he were heir-at-law, and if ineffectual the heir-at-law is to come in. With these provisions how is it possible to hold that no one but the heir-at-law can be the legatee?

The Court recalled the Sheriff-Substitute's interlocutor, and granted decree of removing as craved.

Counsel for the Pursuers and Appellants —Mackay—W. Campbell. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Defenders and Respondents—M'Kechnie—Craigie. Agents—J. K. & W. P. Lindsay, W.S

Thursday, June 11.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

BROWN *v.* BROWN.

Triennial Prescription—Act 1579, *c.* 83—*Mercantile Agency—Written Obligation.*

In an action for payment of the balance of certain cash advances made by the pursuer in connection with goods ordered upon his credit, and supplied to the defender, a merchant abroad, and for commission on said orders, it was pleaded that the sums sued for, at least so far as for commission, fell under the triennial prescription.

Held that the case was one of mercantile agency, and that accordingly the Act did not apply.

Question—Whether the Act was also elided by reason of written obligation?

In August 1890 Robert Ainslie Brown, S.S.C., Edinburgh, brought an action against his brother Edmund Lamb Brown, of Sydney, New South Wales, but residing in Leith, for payment of (1) the sum of £464, 15s. 4d., being the balance of advances made by the pursuer on behalf of the defender, and resting-owing by him; (2) the sum of £30, 17s. 4d., being balance of interest due on cash advances so made; and (3) the sum of £217, 15s., being the amount due to the pursuer as commission as after mentioned, with interest on said sums respectively.

The pursuer averred that the defender having gone out to Sydney as a shopman in an ironmongery establishment, sent home an order to the pursuer in April 1876 for goods such as he could dispose of in his spare hours; that goods were sent out in September 1876, which were duly paid for by the defender; and that thereafter, down to March 1886, the defender, "who had become established in business, regularly sent for and obtained, through the intervention, agency, and credit of the pursuer, large quantities of goods, amounting, with other consequent and relative disbursements, in the aggregate to £8772,

19s. 6d. In a letter dated 25th November 1877, with reference to the said order for goods, and a subsequent order, the defender wrote to the pursuer thus—'I must return many thanks for your kindness in getting Matheson's goods sent off. I hope they will come safe, and trust will be able to send you the money soon, but will pay you at the rate of 6 per cent., and 2½ for your trouble. I have had an invoice from Mr Hardie, and the ship has been out seventy-eight days now. She may be in any day. I have been thinking that you will be able to do what I have to do quite as well as he can, and if it will be the means of putting a few pounds in your way so much the better. I have paid him over £5 for the first transaction, and I may have to pay him ten times that during the year. If you think it worth your while, let me know by return. You would have nothing to do with the paying of the goods further than drawing a bill on me at six months, and of course seeing as to insuring and shipping. The Birmingham agents charge 2½ per cent., and I would allow 2 per cent. on goods purchased through them, and 2½ on goods purchased by you, such as Matheson's, or any goods you could purchase. You would require to give me all discounts —that is, trade and cash—and then there would be a clear understanding. I hope you will undertake this, and I am quite satisfied it will be of advantage to both. There is every chance my orders will get larger every month.' This letter formed the terms on which the pursuer acted throughout for the defender. . . . The pursuer has charged interest at 5 per cent., and commission at 2½ per cent., the original agreed-on rate. The pursuer during the foresaid period made many large cash payments and advances from time to time on behalf of the defender, at his request, in connection with the said goods, and was largely in advance for him, over and above the sums received for drafts upon him, on a limited credit he held with his bankers."

The defender pleaded, *inter alia*—"(2) The sums sued for, at least so far as for commission, being prescribed, are only provable by writ or oath of the defender."

The Act 1579, c. 83, enacts "That all actions of debt for house maills, mens' ordinaries, servants' fees, merchants' accounts, and others the like debts that are not founded upon written obligations, be pursued within three years, otherways the creditor shall have no action except he either prove by writ or by oath of his party."

The Lord Ordinary (KYLLACHY) upon 20th March 1891 repelled said plea-in-law and allowed a proof.

"*Opinion.*—In this case I am of opinion that the triennial prescription does not apply to the account sued for. In the first place, I incline to think that the action is laid upon a written obligation or written agreement. I do not say that is an obligation absolutely liquid, or that the effect of the documents founded on may not be displaced by production of the further documents which the defender undertakes to produce, but the action appears to be founded on a written obligation, and I think that is enough to elide the plea of prescription.

"In the next place, the plea of prescription does not, I think, apply to a case of mercantile agency, and as I read this record, the relation of the parties was one of mercantile agency. No doubt if this had been a lawyer's account for legal business, in the course of which were included charges for commission incurred in the course of that legal business, I should have been bound to follow the case of *Scott* v. *Gregory's Trustees*, February 24, 1832, 10 Sh. 375, referred to by the defender, and to have held that the whole account must be dealt with as *unum quid*. But here there is no mixing up of commission with legal business. The commission charged is accessory to a proper mercantile account for mercantile business in connection with a mercantile agency, and therefore I think that I must repel the plea of prescription and allow a proof of the averments of parties, which will of course be before answer, keeping everything open."

The defender reclaimed, and argued—The Act applied, because (1) there was not here a completed contract by writing such as the Act contemplated as an exception—*Chalmers* v. *Walker*, November 19, 1878, 6 R. 199. (2) The Act applied to merchants' accounts, accounts for services rendered, factors' accounts, stockbrokers' accounts—*White* v. *Caledonian Railway Company*, February 15, 1868, 6 Macph. 415 — and lawyers' accounts. The services here rendered partook of the nature of all these categories, even if they did not fall under any one category. The pursuer acted as a merchant, factor, broker, and adviser for the defender. The account was to be regarded as *unum quid—Scott, supra; Grubb* v. *Porteous*, 1835, 13 Sh. 603; *Tod's Trustees* v. *Melville*, 1836, 14 Sh. 432.

Argued for the respondent—The Act did not apply—(1) Because this was a case of mercantile agency, not of a merchant's account—*Laing & Irvine* v. *Anderson*, November 10, 1871, 10 Macph. 74, and cases of *M'Kinlay* v. *M'Kinlay*, December 11, 1851, 14 D. 162; *Hamilton*, 1795, M. 11,120; *Anderson & Child* v. *Wood*, Hume, 467, there cited. It was also work out of the scope of the pursuer's ordinary employment—*Blackadder* v. *Milne*, 1851, 13 D. 820, and *Barr* v. *Edinburgh and Glasgow Railway Company*, 1864, 2 Macph. 1250. (2) Because it was a case of contract founded upon writing. There must have been writing, because the defender was abroad. The writ of the defender was given above—*Blackadder, supra; Chisholm* v. *Robertson*. March 10, 1883, 10 R. 760; Bell's Prin., secs. 628, 629, and 630.

At advising—

LORD PRESIDENT—The Lord Ordinary has repelled the plea of triennial prescription, and has done so on two grounds. The first is, because the action was raised upon a written obligation. Now, I should have

some hesitation in affirming that opinion, for the letter quoted on record does not contain terms of obligation at all. Proposals were put forward and the letter gives the terms upon which the pursuer acted for the defender, but yet there was no obligation constituted by that letter. I do not go further than saying that I hesitate to affirm that ground of judgment.

As to the second ground of judgment I entirely concur. If, as the Lord Ordinary says, this account was for legal business in which were included charges for commission, the ground of judgment could not be maintained, "but here," as he says, there is no mixing "up of commission with legal business." The "commission charged is accessory to a proper mercantile account for mercantile business in connection with a mercantile agency." On that ground I am prepared to concur in the judgment of the Lord Ordinary.

LORD ADAM—I am of the same opinion. I agree with your Lordship that this, as the Lord Ordinary says, is not a merchant's account in the sense of the statute, but an account in connection with proper mercantile agency. I am clearly of opinion that the Act has no application to such a case.

On the other ground my opinion is not so strong, but I think I should be prepared to agree with him, although it is unnecessary to give an opinion upon it as we have already a sufficient ground of judgment.

LORD M'LAREN—It results from the decisions that the contracts of sale falling under the statute are generally those of sale by the trader to the consumer, but I imagine that if a contractor undertakes to supply clothes or boots for a regiment of soldiers, his case would be just the same as that of a tailor or a shoemaker who sells to individuals. It has been clearly laid down in the cases of *M'Kinlay* and of *Laing* that the statute does not apply to the case of accounts between merchant and merchant. The one was the case of a contract between parties and their agents in Glasgow who were remunerated by commission. The other was a case of a contract between manufacturers and a mercantile house abroad, in which the remuneration or consideration for the contract was the price of the goods. The present case is one belonging to mercantile transactions, because the pursuer although not by profession a merchant, did mercantile business with the defender who was abroad.

As to the other ground of judgment, it is always difficult to decide whether correspondence constitutes a legal obligation. The question of being a written obligation only arises where otherwise the case would fall under the statute. I have no strong opinion as to that matter in this case. I should not be disposed to hold that to bring the case out of the statute obligatory words were necessary. A promise in writing would probably be enough to elide the statute, if expressed distinctly and with reference to a price or commission ascertained or ascertainable, but there are difficulties in the present case, and I agree that it is unnecessary to decide the question raised, there being another ground for holding the statute does not apply, upon which we are all agreed.

LORD KINNEAR—I agree it is unnecessary to decide the point raised by the first part of the Lord Ordinary's interlocutor, as to which indeed the Lord Ordinary himself does not give so decided an opinion. On the other ground I agree with your Lordship.

The Court adhered.

Counsel for Pursuer and Respondent—Jameson—Alison. Agent—Party.

Counsel for Defender and Reclaimer—Strachan — Craigie. Agents — Miller & Murray, S.S.C.

Friday, June 12.

FIRST DIVISION.

[Lord Low, Ordinary.

PRINGLE *v.* PRINGLE AND OTHERS.

Entail — Disentail — Marriage-Contract — Descent of Estate Secured by Obligation in Marriage-Contract on Issue—Entail (Scotland) Act 1882 (45 *and* 46 *Vict c.* 53), *sec.* 17.

The Entail (Scotland) Act 1882, section 17, provides—"Where any heir of entail in possession . . . shall . . . have secured by obligation in any marriage-contract entered into prior to the passing of the present Act the descent of such estate upon the issue of the marriage . . . it shall not be competent for such heir . . . to apply for . . . the disentail of such estate until there shall be born a child of such marriage capable of taking the estate in terms of such contract, and who by himself or his guardian shall consent to such disentail, or until such marriage shall be dissolved without such child being born unless . . . the parties at whose sight the provisions of the contract are directed to be carried into execution shall concur in such application." . . .

An heir of entail in possession by marriage-contract in 1870, upon the narrative of the 4th section of the Aberdeen Act, made the provisions thereby allowed for "the child or children to be procreated of the said intended marriage who shall not succeed to the said entailed lands." These provisions were granted "under all the conditions and provisions and subject to all the restrictions and limitations whatsoever contained in the statute . . . and which provisions before written to children of the said intended marriage are hereby declared to be in full satisfaction to the whole children of the said intended marriage