landlords' agents wrote adhering to what they had said upon 30th March. At that point only one of two courses was open to the tenant—either to stay on at the new rent or to go. He chose to stay on, and by doing so he must be held to have agreed to the landlords' terms, and having agreed to them he must pay the sum now sued for.

LORD YOUNG—I am of the same opinion. Of course I do not think that the letter of 4th April can be regarded as an assent by the tenant to the new terms. But I regard the letter of 30th March as specifying the conditions upon which the landlords were willing to keep the defender on as tenant. If he was not willing to agree to these conditions then he had notice to quit. The letter of 4th April does not assent to these terms, but the tenant subsequently agreed to them by staying on. It was not open to him to remain on without agreeing to the new terms. He could only stay on upon the terms mentioned in the letter of 30th March. If an action of removing had been brought by the landlords, the tenant's answer would have been that he was entitled to retain possession, because by staying on he had assented to the new terms proposed by the landlords. Tacit relocation is out of this case. The parties were not tacit. They made a new agreement. I am very far from thinking that there may not be tacit relocation although there have been meetings and conversations and even letters passing between the parties. But here the tenant must be held to have assented to the new terms intimated by the landlords.

LORD TRAYNER—I am of the same opinion. Tacit relocation is out of the case, because on 30th March the landlords' agents intimated that the tenant was not to be allowed to remain in his premises upon the former terms. In reply the tenant's agent wrote saying that he would not agree to the new conditions. But the landlords were entitled to impose what conditions they pleased. All that the tenant's letter came to was, that if these were the only conditions upon which he was to be allowed to stay, he would rather go, as he would not agree to them. But in fact he did not go—he stayed on. That was virtually a departure from his letter. He remained in the premises, and by doing so he must be held to have acquiesced in the letter of 30th March, and to be bound now to fulfil its conditions.

LORD MONCREIFF—I am of the same opinion. Tacit relocation is out of the case here. At first I had some difficulty in spelling out of these letters an agreement on the part of the tenant to pay the increased rent, £110. The letter of 30th March stated the terms upon which the landlords were willing to continue the tenancy. On 4th April the tenant's agent wrote refusing to assent to these terms. If that letter had not been replied to on behalf of the landlords, I should have had difficulty in holding that the tenant impliedly agreed to pay the increased rent. But on 5th April the landlords' agents wrote a letter in which they intimated distinctly that the letter of 30th March contained the conditions upon which alone the tenant would be allowed to occupy the premises for another year. The tenant did not answer that letter and repudiate the terms named, and continued to occupy the premises. What is the fair inference? I think that the reasonable inference is that he agreed to the landlords' terms, and that he is now bound by them.

The Court dismissed the appeal, and of new decerned against the defender for payment of £55, with interest at 5 per cent. per annum from Martinmas 1899 till payment, with expenses.

Counsel for the Pursuers—Jameson, Q.C. — A. S. D. Thomson. Agents — George Inglis & Orr, S.S.C.

Counsel for the Defender — Hamilton. Agents—Clark & Macdonald, S.S.C.

Wednesday, May 30.

FIRST DIVISION.

[Lord Kincairney, Ordinary

JACKSON *v.* BROATCH.

Prescription — Triennial — Law-Agent's Account — Written Obligation — Letter Requesting Agent to Act—Act 1579, *c.* 83.

A client by letter requested a law-agent to act for him in a particular action, and the agent replied undertaking to do so. *Held* (*aff.* Lord Kincairney, Ordinary, *dub.* Lord M'Laren) that the agent's account for his services did not fall under the triennial prescription, in respect that as the client's letter imported an obligation to pay for the agent's services according to the table of fees, the account was a debt founded on "written obligation" within the meaning of the Act 1579, cap. 83.

Robert Broatch, Solicitor, Edinburgh, brought this action against Thomas Jackson, Solicitor, Kirkcaldy, concluding, *inter alia*, for payment of £297, 19s. 7d., which he alleged to be due to him for business charges in respect of three actions, in which he had acted as agent on Mr Jackson's instructions, and in which Mr Jackson was personally interested. In reference to these actions he made the following averment—"(Cond. 2) The defender employed the pursuer to act as his Edinburgh agent in three actions in which he was personally interested, namely, (1) an action of count, reckoning, and payment against the defender at the instance of the late Alexander Malcolm; (2) making up a title under the Presumption of Life Limitation Act in name of William Hutton, with reference to a heritable property in Leith and rents thereof, to which the defender had acquired a right; and (3) a multiplepoinding, *Youden* v. *Rodgers and Others*, in which the defen-

der was a claimant. In connection with these actions the defender incurred to the pursuer the accounts for law-agency and relative outlays which are herewith produced. There is also produced a cash account-current between the pursuer and the defender, showing the payments made by the defender to the pursuer to account of the sums due to the pursuer under the foresaid business accounts. As shown in said cash account, the pursuer's account in Alexander Malcolm's action amounts to £262, 10s. 6d., of which £165, 19s. is outlay, to account whereof the defender has paid the pursuer £95, 17s., leaving a balance due of £166, 13s. 6d. The pursuer's account in relation to Hutton's property amounts to £90, 16s. 4d., of which £57, 8s. 6d. is outlay, to account whereof the defender has paid the pursuer £16, 11s. 6d., leaving a balance due of £74, 4s. 10d. In connection with said multiplepoinding, *Youden* v. *Rodgers and Others*, the pursuer's account amounts to £84, 7s. 3d., of which £41, 7s. 7d. is outlay, to account whereof the defender has only paid the sum of 12s. 2d., leaving a balance due of £83, 15s. 1d. On 11th May 1882 the pursuer lent the defender 5s., and on 14th August 1884 he paid an audit fee of 7s. 6d. on behalf of the defender. The balances upon the said business accounts, together with these two small sums, amount in all to £325, 4s. 7d. As shown by said cash account, the pursuer has further placed to the defender's credit certain small payments received by him, amounting in all to £27, 5s. 8d., which being deducted from said £325, 4s. 7d. leaves a balance due by the defender upon the law business conducted by the pursuer for him personally of £297, 19s. 7d., being the sum first concluded for in the summons. Said sum, subject to taxation, is due by the defender to the pursuer. £152, 6s. 11d. consists of and is the balance of the outlays, these amounting in whole, with said two sums of 5s. and 7s. 6d., to £265, 7s. 7d., and the payments made being £113, 0s. 8d. The remainder of the sum due consists of law charges. The accounts instructing the said sums have been rendered to the defender, but he refuses or delays to pay the same. With reference to the answer, it is admitted that the last items in the accounts sued on are dated in 1885 and 1886. *Quoad ultra* the statements in answer, except so far as coinciding with pursuer's averments, are denied. The defender's instructions in each of the three personal actions referred to were given and accepted in writing."

The defender pleaded, *inter alia*—"(3) Prescription."

In answer to this the pursuer pleaded—"(2) The said employment being founded on written instructions by the defender, and the constitution and resting-owing of the pursuer's claims having been admitted by the defender in writing, the pursuer's accounts against the defender are not subject to the triennial prescription."

Certain letters passing between the parties in reference to Mr Broatch's employment in the actions in question were produced. Those relating to the case of the multiplepoinding, *Youden* v. *Rodgers and Others*, are quoted in the opinion of the Lord President, *infra*. Similar letters, which it is unnecessary to quote, passed in reference to the cases of *Malcolm* and *Hutton*.

By the Act 1579, cap. 83, it is enacted as follows—"Item, it is statute and ordained . . . that all actiones of debt for house mailles, mennis ordinars, servand's fees, merchands' comptes, and uther the like debts, that are not founded upon written obligationes, be persued within three zeires, utherwise the creditour sall have na action except he outher preife be writ or be aith of his partie."

On 20th February 1900 the Lord Ordinary pronounced an interlocutor by which he repelled the third plea-in-law for the defender and *quoad ultra* continued the cause.

Opinion.—"This is an action by a law-agent in Edinburgh against his correspondent, who is a writer in Kirkcaldy. The summons concludes for two sums, £297, 19s. 7d., and £462, 11s. 9d., or such sum as might be found due on accounting. The first sum is for the accounts claimed by the pursuer in three actions in the Court of Session in which the defender was a litigant, and the statements about it are in condescendence 2. The second sum is claimed for accounts and balances of accounts incurred in various actions conducted by the pursuer in the Court of Session as the defender's Edinburgh correspondent for the defender's clients. The averments bearing on this conclusion are in condescendence 3.

"The defender pleads the triennial prescription, and the argument in the procedure roll was on that plea. Although the plea is expressed generally the defender's counsel stated that he did not press it against the second conclusion, and it was, I understand, conceded that there must be inquiry by proof as to that part of the case. The plea was pressed against the first conclusion—that is, against the pursuer's accounts in the three personal actions. There is no doubt that if the Act applies the accounts are prescribed.

"The pursuer's answer to the plea of prescription is expressed in the averment that 'the defender's instructions in each of the three personal actions referred to were given and accepted in writing.' And in support of that averment he refers to three letters by the defender, dated 4th July and 7th October 1881, and 3rd August 1882, and to the pursuer's replies, dated 7th July and 8th October 1881, and 8th August 1882.

"That plea is thus expressed:—'2. The said employment being founded on written instructions by the defender, and the constitution and resting-owing of the pursuer's claims having been admitted by the defender in writing, the pursuer's accounts against the defender are not subject to the triennial prescription.' The plea is rather complicated, and mixes up matters which should be kept separate. But I understand that the pursuer pleads that his action for his accounts is taken out of the statute because his claims are, to use the words of

the Act, 'founded on written obligations.' Strictly speaking it can hardly be said that the action is founded on written obligations, because the letters are not founded on in the original condescendence or pleas, and are only introduced in reply to the defender's plea. But I do not know that it has ever been held necessary that the written obligations founded on to exclude the statute must be founded on in the original pleading; and I think that the question is whether they are such documents as amount to written obligations in the sense of the statute.

"Assuming the correctness of the copy-correspondence, the three letters by the defender which are founded on are simply letters instructing, or perhaps it may be said requesting, the pursuer to act for the defender in the Court of Session actions referred to. These are, I think, the most important letters, because it is said that they oblige the defender. The letters of the pursuer are not of the same consequence. They merely accept employment.

"In considering this question the fact that the defender was a law-agent is unimportant. He was only a client, and the question is whether such letters of instructions by a client, with (or perhaps without) acceptance by a law-agent, exclude the application of the Triennial Prescription Act to an action for his account by the law-agent. The question is of general application and great importance, and of course it is quite different from any question as to proof by writ after the application of the Act has been affirmed.

"There have been various decisions of considerable importance about this provision of the Act, but I do not think they decide the present question.

"Before adverting to the authorities it may be observed, as noticed by Lord Benholme in the case of *The North British Railway Company* v. *Smith Sligo*, December 20, 1873, 1 R. 309, that the statute does not speak of written contracts but of written obligations, and I think that it has never been decided that a bilateral obligation is necessary to satisfy the statute. It is obvious also that what is essential is the written obligation of the defender. There may be some advantage in having the written obligation of the pursuer also, but that by itself is of no avail. Further, if it be not obvious on the words of the statute, it is at all events settled that the writing must originate the employment or contract, and that writings in the course of employment, although they may possibly be available as proof by writ, are not written obligations in the sense of the statute on which an action can be founded.

"It has been decided in three cases reported in Morrison that an action for the price of furnishings is not protected from prescription by the mere fact that they have been furnished on written orders. These are *Cheap* v. *Cordiner*, Nov. 30, 1775. M. 11,111; *Ross* v. *Shaw*, Nov. 19, 1784, M. 11,115; and *Douglas* v. *Grierson*, Nov. 18, 1794, M. 11,116. I do not find the grounds of judgment in these cases very obvious, and I think that the arguments for the defenders stated in the reports have not been sustained in later cases, but they have been held to settle the law to that effect. Yet in *Dickson* v. *M'Aulay*, 1681, M. 11,090, in an action brought after the years of prescription for the price of goods furnished under a written order by the defender 'to let his wife want nothing necessary, and to place it to his account,' it was held that the quantities might be proved by witnesses, the pursuit being founded upon writ. This case has been quoted without disapproval in recent cases, but I suppose it is to be regarded as exceptional.

"Professor Bell, in a passage in his Commentaries—i. 332—which has been approved of and adopted by Lord President Inglis in *Chalmers* v *Walker*, Nov. 19, 1878, 6 R. 199, states the law thus—'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 upon 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 written constitution of the obligation as naturally requires a written discharge.' It may possibly seem not perfectly easy to discover that meaning of the Legislature from a mere construction of the statute, although certainly this particular statute has in its judicial history been construed with remarkable freedom, and I cannot help doubting whether the latter words are supported by decisions.

"The most important recent cases have, in my opinion, been *Blackadder* v. *Milne*, March 4, 1851, 13 D. 820; *Chalmers* v. *Walker, ut supra;* and *Chisholm* v. *Robertson*, March 10, 1883, 10 R. 760. In *Blackadder's* case the action was for payment of professional services as a witness against a bill before a parliamentary committee, and the written obligation founded on was only a letter by the defender employing him, and stating the fees which would be paid. The letter did not of itself establish the constitution of the debt, for it did not by itself prove that the employment was accepted or the services rendered. Yet it was held that the statute did not apply. There were two grounds of judgment, the one that the employment was not covered by the Act, and the other, entertained by a considerable majority of the whole Court, that the claim was founded on a written obligation. The case has been followed, but the first ground of judgment has not always been readily assented to. But I am not aware that doubt has been expressed about the second ground. I think that no writing by the pursuer was produced.

"In *Chalmers* v. *Walker* the action was for payment of furnishings, and the writing founded on was a written offer by the pursuer to supply them. It was held that the statute applied. But it will be observed that there was no writing by the defender of any kind, and the Lord President observed—'A written obligation within the meaning of the statute must be an obliga-

tion constituted by writing and enforceable against the defender. . . . A man who binds himself by words spoken does not bind himself by written obligation.' The writing was held insufficient, not because it was unilateral, but because it was the writ of the pursuer, and not the writ of the defender.

"*Chisholm* v. *Robertson* is, I think, still more important and more in point. The action was for the hire of sacks, and the writing founded on was a form or order prepared by Chisholm, and expressing the conditions of the hiring. This was not signed by the pursuer but by the defender. This document was held to supply what was wanting in the offer in *Chalmers* v. *Walker*, namely, an obligation by the defender, and it was held that the statute did not apply. It was a unilateral, not a bilateral writ. It did not of itself prove that Chisholm had agreed to furnish the sacks, or that they had been furnished. Of course, it was obvious that Chisholm had agreed to furnish the sacks, but that was not made obvious by Chisholm's writ. I doubt whether the obligation by Robertson was an obligation which naturally required a written discharge. It appears to me that the latter part of the passage quoted from Bell's Commentaries did not apply to this case.

"There were certain other cases quoted which I think of less consequence, but to which it is right to advert.

"*Macandrew* v. *Hunter*, June 13, 1851, 13 D. 1111.—This was an action between agent and client, and certainly the employment was by the defender's writing. The case was a singular one, and I do not observe that the pursuer stated any objection to the plea of prescription. It seems to me that if such an objection had been stated it would necessarily have been sustained. The Lord Ordinary (Wood), however, sustained the plea of prescription, and in the same interlocutor, without any allowance of proof, he found that the documents produced by the pursuer satisfied the requirements of the statute, and established both constitution and resting-owing by the writ of the defender. In that case it did not signify whether the action was held to be founded on written obligation or not, and I think it cannot be held to be a judgment that it was not.

"In *Barr* v. *The Edinburgh and Glasgow Railway Company*, June 17, 1864, 2 Macph. 1250, it was held that the statute did not apply, but because of the nature of the employment, not of the writing. But the reason why the writing was not held sufficient seems to have been that it was clear that the contract had been entered into before the date of the writing, and therefore that the action could not be founded on the writing. In that case Lord Neaves made certain observations tending to assimilate the case of a law-agent receiving written directions from a client to a sale of furnishings on written order. But Lord Neaves' remarks do not seem to refer to letters constituting the employment, but to letters written in the course of it.

"The *North British Railway Company* v. *Smith*, *supra*, is more important for the opinions of the Judges than for the judgment, which is too much involved in specialties to be accepted as a safe precedent.

"Whilst none of these cases absolutely rule the present, yet it seems to me that the case of *Chisholm*, in which a writ which did not of itself show that the order had been accepted or fulfilled was held sufficient to exclude the statute, warrants a decision of the question in favour of the pursuer to the effect that his claims are founded on written obligations, and that they exclude the application of the statute.

"They are informal, it is true, and merely of the nature of letters in a correspondence. But the statute does not require any formality, and there is no case which holds it to be necessary. No doubt the same instructions might have been given verbally, but they were not so given, and I suppose could not have been so given conveniently; and I confess I do not see that they are the less written obligations because they might have been verbal. Further, the letters do not verbally express the defender's obligation, but I think they imply it as clearly as if it had been expressed. Further, it is said that the letters differ from the order in *Chisholm's* case, inasmuch as they do not express the conditions of the contract as the order in *Chisholm's* case did. But I am disposed to think that they do. There is in a question between agent and client a marked specialty, which is, that if there be no special bargain the law supplies the conditions. The amount of the law-agent's remuneration does not require to be expressed. The contract is that he shall do the work for the charges expressed in the table of fees and subject to audit. I do not say that there may not be special bargains, nor whether these special bargains may be proved by parole; but apart from special bargain the mere contract of employment contains all that is necessary for a complete contract without any mention of terms.

"On the whole, I consider that these letters (supposing the employment accepted) fix an obligation on the defender as clearly as if it had been expressed in the most formal deed, and that therefore the claim for these accounts is founded on written obligation, and that the statute is therefore excluded."

The defender reclaimed, and argued—The letters from which the Lord Ordinary inferred that the plea of prescription was elided were not "written obligations" within the meaning of the Act 1579, cap. 83. The words of that Act had been construed to mean written obligations to pay—Bell's Commentaries (M'Laren's Ed.), i. 349, where the cases of *Ross* v. *Shaw*, November 19, 1784, M. 11,115, and *Douglas* v. *Grierson*, November 18, 1794, M. 11,116, are cited. These authorities established that an account for goods, though ordered in writing, falls under the triennial prescription where the writing is only an order for the goods and not an express obligation to pay for them. *Cheap* v. *Cordiner*, Novem-

ber 1775, M. 11,111, was another authority to the same effect. The present case was exactly the same, because when a man ordered goods from a shopkeeper the law imported an obligation to pay for them, just as when he instructed an agent to act for him the law imported an obligation to pay the agent's business charges. The passage referred to in Bell's Commentaries had been approved by Lord President Inglis in *Chalmers* v. *Walker*, November 19, 1878, 6 R. 199, and although the statement that a written obligation was one which required a written discharge went too far and could not be supported, yet it was an authority for the statement that more than a mere order for goods or services was required. More recent cases supported the proposition that an express obligation to pay was necessary to elide the plea of prescription —*White* v. *Caledonian Railway Company*, February 15, 1868, 6 Macph. 415; *North British Railway Company* v. *Smith-Sligo*, December 20, 1873, 1 R. 309. In *Chisholm* v. *Robertson*, March 10, 1883, 10 R. 760, the writing founded on contained all the terms of the contract. *Blackadder* v. *Milne*, March 4, 1851, 13 D. 820, was really decided on the ground that the employment from which the debt resulted was not one of those referred to in the Act. It was so treated in *Barr* v. *Edinburgh and Glasgow Railway Company*, June 17, 1864, 2 Macph. 1250, where it was held that letters requesting the attendance of an expert witness did not amount to a written obligation to pay him.

Argued for the respondent—On the words of the Act any written obligation was sufficient, and there could be no doubt that if a man instructed an agent to act for him, he undertook an obligation to pay for his services. Nor had any different rule been established by the decisions. The only cases referred to for the reclaimer—*Ross*, *Douglas*, and *Cheape*, if they could be held to have been rightly decided, were only authorities in cases of written orders for goods from a shop. In the case of other services a written order had long been held to be sufficient—*M'Aulay* v. *Dickson*, 1681, M, 11,090; *Watson* v. *Lord Prestonhall*, Feb. 21, 1711, M. 11,095; *Bell*, Dec. 16, 1755, 5 Brown's Supp. 840; *M'Tavish* v. *Campbell*, March 1777, 5 Brown's Supp. 543; *Sadler* v. *M'Lean*, Nov. 18, 1794, M. 11,119. The same rule had been upheld in *Blackadder* v. *Milne*, *cit. supra*, which was *a fortiori* of the present case, in respect that there was there no written acceptance of the employment. The authority of *Blackadder* was not in any way impugned by *Barr* v. *Edinburgh and Glasgow Railway Co.*, *cit. supra*, as is shown by the opinion of the Lord Justice-Clerk there. The case of *Chisholm* v. *Robertson*, *cit. supra*, could not be distinguished from the present case. *Brown* v. *Brown*, June 11, 1891, 18 R. 881, was also an authority in the respondent's favour.

At advising—

LORD PRESIDENT—The conclusion of the summons, which alone we have at present to consider, is for payment of three professional accounts alleged to have been incurred to the pursuer, who is a solicitor in Edinburgh, by the defender, who is a solicitor in Kirkcaldy, but who in the matters to which these accounts relate is said to have, as an ordinary client, employed the pursuer to act as his law-agent. The defender pleads that the claim falls under the triennial prescription introduced by the Act 1579, c. 83, inasmuch as the alleged debts are not "founded upon written obligations" in the sense of that Act. The employment of the pursuer by the defender is stated to have been constituted by letters which passed between them, and the important question is, whether the letters addressed by the defender to the pursuer are "written obligations" within the meaning of the Act 1579, c. 83.

On each of the three occasions on which it is alleged that the pursuer was employed by the defender to act as his law-agent, the correspondence was initiated by a letter from the defender to the pursuer, which in effect instructed or requested the pursuer to act as his law-agent in a specified matter, and in each case the pursuer replied by a letter accepting the employment. The first two letters raise the question as well as any of the others. On 4th July 1881 the defender wrote to the pursuer in the following terms:—"Dear Sir,—*M P.*, *Youden* v. *Rodger and Others*,—I am interested in this action. I have notice from Mr Barton, S.S.C., that it is to be enrolled for awakening on Friday. He has taken the huff because he has learned that you were acting for me. Will you see that I am protected. Mr J. Young Guthrie, S.S.C., is agent for my adversary. — Yours truly, THOMAS JACKSON;" and to this the pursuer replied on 5th July 1881 as follows:—"Dear Sir,—*M P.*, *Youden* v. *Rodger and Others*—Mr Barton does not know that I have been acting for you. How could he? I shall, however, attend to your interests. —Yours truly, ROB. BROATCH."

These two letters appear to me to constitute a written contract of employment by the defender of the pursuer as a law-agent, to perform the duties of a law-agent in the matter mentioned in the letters. It is true that nothing is said in the letters as to the terms of the employment, but this was not, in my judgment, necessary to the conclusion of a contract, because the table of fees specifies the remuneration to which a law-agent is entitled, where no agreement to a different effect is made. The legal effect of the contract entered into by these letters was, in my view, to bind the pursuer to perform the duties of law-agent for the defender in the matters to which they relate, and to bind the defender to pay to the pursuer, in respect of his professional services, the fees appointed by the table for such services.

The question then comes to be, whether the defender's written instructions to the pursuer to act as his law-agent, accepted by the pursuer in writing, constitute a "written obligation" within the meaning of the Act of 1579, c. 83, on the part of the defender to pay the ordinary professional

fees to the pursuer, and taking the case upon the language of the Act, and apart from decisions, it appears to me that they do. Although words of obligation are not used in the defender's letters instructing or requesting the pursuer to act as his law-agent, these letters seem to me to imply an obligation to pay the ordinary fees to pursuer for his professional services, as unequivocal as if that obligation had been expressed.

It is, however, maintained by the defender that this view is inconsistent with the decisions which have been pronounced with reference to the construction and effect of the Act 1579, cap. 83. It is true that it was held in *Cheap* v. *Cordiner*, Nov. 30, 1775, M. 11,111, *Ross* v. *Shaw*, Nov. 19, 1784, M. 11,115, and *Douglas* v. *Grierson*, Nov. 18, 1794, M. 11,116, that an order or commission for goods followed by the supply of the goods is not a written obligation within the meaning of the Act of 1579, cap. 83, so as to exclude the triennial prescription introduced by that Act, and these decisions appear to have been accepted as binding with respect to the particular matter decided in them. I agree, however, with the Lord Ordinary in thinking that the grounds of the judgments are not very obvious. Thus in the first (*Cheap* v. *Cordiner*) the report says that "the Court did not determine upon the statute, but upon the letter bearing a bill to be sent, which presumed payment;" in the second (*Ross* v. *Shaw*) the Lord Ordinary "repelled the defence of prescription," "but the opinion of the Court was that the prescription was not excluded, and so far they altered the Lord Ordinary's interlocutor but found the defender liable on a different ground;" and in the third (*Douglas* v. *Grierson*) it is stated that the Court were much divided in opinion—that they first repelled the defence of prescription, but that on advising a reclaiming petition and answers they sustained it, and that upon this second judgment being brought under review by a reclaiming petition with answers they adhered. These decisions appear to some extent to have proceeded upon the view that the character of current dealings between a shopkeeper or other small trader and his customer, usually conducted verbally and settled without writing, was not altered by the fact of an order being given in writing. It is, however, to be kept in view that in other four early cases—*Dickson* v. *M'Aulay*, 1681, M. 11,090; *Watson* v. *Lord Prestonhall*, 1711, M. 11,095; *Bell*, December 16, 1755, 5 Brown's Supplement, 840; and *M'Tavish* v. *Campbell of Kilberry*, 1777, 5 Brown's Supplement, 543—a different view of what was sufficient to constitute a "written obligation" under the statute appears to have been taken. In *Dickson* v. *M'Aulay*, which was an action for entertainment, furnishings, &c., to the defender's wife and son after the expiry of three years, the pursuer produced a letter from the defender to the pursuer's author asking him "to let his wife want nothing necessary, and to place it to his accompt," and the Court held that "the pursuit being founded upon writ, viz., the defender's missive letter, the quantities might be proved by witnesses even after three years." In *Watson* v. *Lord Prestonhall*, where a contract for mason work had been entered into between the charger and the suspender, and the charger offered to prove by witnesses that he had performed the work, the Lords, with reference to the suspender's plea on the Act of 1579, cap. 83, found "that the said Act of Parliament took no place here, the bargain being proved by writ." In the case of *Bell* it was held that a commission having been given in writing to a carpenter to repair a house and to furnish everything necessary for that purpose, his account did not fall under the triennial prescription, the debt being constituted by writing; and in the case of *M'Tavish* v. *Campbell of Kilberry*, where the defender had granted a commission to the pursuer to be his wood-keeper, with power, *inter alia*, to cut as much hazel as he should think proper, and out of the price to retain twelve pounds Scots of yearly wages, and the defender soon after prohibited all cutting of hazel, but the pursuer continued in his service for seventeen years, and pursued him for £17 sterling of wages, against which one of the defences pleaded for the defender was the triennial prescription, the report bears "that to this defence, however, the Lords seemed to pay little regard, the debt being constituted by a written obligation," and the pursuer obtained decree, which was upheld in a suspension.

These four cases appear to me to be more consistent both with the language of the statute and with the subsequent course of the decisions than the first three mentioned. Thus in the case of *Blackadder* v. *Milne, &c.*, March 4, 1851, 13 D. 821, an action by a civil engineer for remuneration in respect of professional services, while some of the Judges based their opinions upon the ground that the claim did not belong to the class falling under the statute, the majority expressed the view 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 upon by the pursuer, which contained all the terms of an obligation or contract. Again, in *Chisholm* v. *Robertson*, March 10, 1883, 10 R. 760, which appears to be the last important decision upon the question, the writing relied on was a form or order prepared and issued by the pursuer expressing the conditions on which he was willing to give out sacks on hire. This document was not signed by the pursuer, but by the defender, who was sued, and it was held to be his "written obligation" for the purposes of the statute.

These cases appear to me to establish that a writing signed by the debtor in an obligation to pay or perform, and delivered or sent to the creditor in that obligation, constitutes a written obligation within the meaning of the Act 1579, c. 83, and this is in accordance with the view expressed by Lord President Inglis in *White* v. *The*

Caledonian Railway Company, 6 Macph. 415, where he said—"But it is said that the statute is excluded because it has excepted those debts which are founded on written obligation. That, of course, means that the obligation in respect of which the action is maintained arises from a written mandate or contract. It seems to me that the pursuer has not shown that he is within the exception."

The defender relied upon the cases of the *North British Railway Co.* v. *Smith Sligo*, December 19, 1873, 1 R. 309, but the claims in these cases were held to fall under the statute, because the writings founded on were not granted or signed by the defenders, the debtors in the obligations, but by the pursuers, the creditors in them. The claims were thus not founded upon written obligations by the persons sought to be charged. It further appears to me to be established, at all events by the more recent decisions, that if a written obligation by the defender is produced, the furnishing of the goods or the performance of the services may be proved otherwise than by writing. It is, of course, necessary that the written obligation should appear in a document or documents originating or at the commencement of the employment, not merely in letters or other documents passing during its currency—*Barr* v. *Edinburgh and Glasgow Railway Company*, 2 Macph. 1250; and *White* v. *Caledonian Railway Company*, 6 Macph. 415—but this condition is fulfilled in the present case.

The defender strongly relied upon a passage in Bell's Comm. ii. 332 (approved of by Lord President Inglis in *Chalmers* v. *Walker*, 6 R. 199), in which that learned writer, commenting on the Act of 1579, c. 83, says that the Court had uniformly disregarded the plea that where a written order for goods is given, the debt is of a description to which the triennial prescription does not apply, as being a debt founded on written obligation, "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." In his note to this passage Bell contrasts the case of *Watson* v. *Lord Prestonhall*, with *Ross* v. *Shaw*, *Douglas* v. *Grierson* (all of which I have already dealt with), and *Sadler* v. *M'Lean*, 1794, M. 11,119, in which it was held that an action founded upon a mandate is not affected by the triennial prescription. He seems to distinguish the class of cases to which the Act of 1579, c. 83, directly and by its terms applies, viz., current dealings with tradesmen, from contracts of a different and more important character, *e.g.*, those arising *ex mandato*, and it appears to me that the employment of a law-agent to conduct a litigation belongs to the latter rather than to the former class. In any view, such a case as the present seems to satisfy Bell's criterion, viz., that it would "naturally require a written discharge," as the employment of a law-agent in Edinburgh by a client in Kirkcaldy would, if terminated prior to complete performance, naturally (though perhaps not necessarily) be brought to an end or discharged either by the client recalling the agency (mandate) or by the law-agent resigning it, in writing.

For these reasons I think that, although the course of the decisions under the Statute 1579, c. 83, has not been altogether uniform or consistent, the result at which the Lord Ordinary has arrived is correct.

LORD ADAM concurred.

LORD M'LAREN — I have difficulty in accepting the view that the correspondence which instructs the defender's employment amounts to a "written obligation" excluding the triennial prescription. But as my impressions are not so strong as to lead me to dissent from the judgment proposed, I shall only indicate them briefly.

It is quite settled that writer's accounts fall under the triennial prescription as being debts of the "like nature" with those enumerated in the Scottish statute. In order to take the case out of the statute it is alleged that the debt sued for is founded on "written obligation." Now, when it is once established that writer's accounts fall under the triennial prescription I should have thought that the question whether the debt in question is or is not founded on written obligation was exactly the same for a writer's account as it would be for a tradesman's account. In other words, the question what amounts to a written obligation is independent of the character of the debt. But it is settled by decisions and long practice following on the decisions, that an order to a tradesman for goods is not a "written obligation." I think these decisions are sound. It does not seem very material that in the early history of the law there was a conflict of judicial opinion on this subject, because it is admitted that the production of an order or orders in writing does not take an action for the price of goods out of the statute. I should have thought that an order to a law-agent to conduct a case would follow the same rule. In either case there is an implied obligation to pay the price, or the hire of services, as the case may be; but this is not *literarum obligatio*, because the implied obligation to pay the price or hire would be just the same if the goods were sent or the services rendered without any writing having passed between the parties.

I think, however, that the later authorities regarding professional employment are wholly irreconcileable, and that there is apparently authority for the judgment proposed. I hope that the decision which we are to pronounce may settle the law on this point, or at least may be a beginning of a *series rerum judicatarum* which will have the merit of consistency.

LORD KINNEAR—I agree with the Lord President, although I appreciate the force of the reasons which have induced Lord M'Laren to hesitate. If we were construing the Act of Parliament without the benefit of previous decisions I do not think we should have much difficulty in holding

that this action is founded upon written obligation within the meaning of the statute. The correspondence on which the pursuer relies amounts to a contract in writing, by which the defender on the one hand employs the pursuer as a law-agent, and the pursuer on the other hand accepts the employment and undertakes to do the stipulated work. That is a perfectly complete and effectual contract, which creates in law an obligation on the employer to pay the person employed for the work contracted to be done. It is of no consequence that the sum to be paid is not fixed by express stipulation, because it is fixed by law in accordance with the table of fees. I am not sure that it is necessary to assume an implied intention to pay, because on the completion of the contract the law creates the obligation to pay when the work is done. The contract creates a legal relation between the parties, and the technical and appropriate term for that relation is obligation. It is an excellent definition of a contract that it is an agreement which produces an obligation, and it would, to my mind, be a mere contradiction in terms to say that a contract in writing which creates an obligation in law is not a written obligation.

It is quite true that to enable the pursuer to recover, something more is necessary than production of the written contract. He must prove performance, which cannot be proved by the writings on which he founds. But while the Act requires that in the cases to which it applies the resting-owing, as well as the constitution of the debt, must be proved by the statutory methods, it appears to me that when it defines the class of cases that are excluded from the operative enactment it requires us to examine only the constitution of the debt. Its purpose is to limit the methods of proof, and for that purpose it distinguishes between two classes of debt—book-debts and debts on account on the one hand, and debts founded on written obligation on the other. In the former case it prescribes that after three years the debt shall be proved only by writing or the oath of the party. In the latter case, whatever proof may be required may be by any legal evidence which may in the particular case be available. All that is necessary to support the exemption from the statutory limitation is that the action or the debt—for I do not think it material which of these is the more correct grammatical construction—should be founded on a written obligation. But an obligation constituted by a written instrument is not the less an obligation in writing, because the event on which it is conditioned to become prestable may be a subsequent fact which must necessarily be proved by evidence outside the writing. Accordingly, in *Watson* v. *Lord Prestonhall*, M. 11,095, where a mason sued for payment for work done conform to a contract, the pursuer was allowed to prove by witnesses that he had performed the work. The contrary argument was that the performance not being proved by the contract the action was prescribed *quoad modum probandi*, since it was not insisted upon within three years. But the Court found that the Act of Parliament did not apply because "the bargain was proved by writing." This is an authority directly in point. It decides that if a bargain or contract for the performance of work is constituted by writing, it does not matter that the writing does not prove performance if that can be proved otherwise by competent evidence. I appreciate the difficulty which is created by the cases in which it has been held that a written order for goods to be furnished will not exclude the application of the statute. But I agree with the Lord President and the Lord Ordinary that the reports of these cases are not satisfactory. It is by no means clear in some of them what the ground of decision really was, and Professor Bell, who refers to them, observes that they are to be contrasted with *Watson* v. *Lord Prestonhall*, already mentioned, and *Sadler* v. *M'Lean*, which was an action founded on mandate. I understand him to mean that an action founded on a written contract or mandate is in a different category from an action for the price of goods sold, although in compliance with a written order. Whatever might be thought of the validity of this distinction if it were open to discussion, it is at least a distinction between the decisions which enables us to hold that in following authorities the series of cases of which *Douglas* v. *Grierson* is an example is much less directly in point than *Watson* v. *Lord Prestonhall*. The same observation by Professor Bell may be of some service in helping us to construe the passage cited by the Lord Ordinary, because it is in illustration of that passage that the learned author cites the cases which he says are to be contrasted. I trust it is not inconsistent with the deference due to the authority of Professor Bell, especially when it is confirmed by the approval of Lord President Inglis, to say that on this occasion the learned author has hardly expressed himself with his usual precision. It may be a question what is meant by an obligation which would naturally be discharged by writing. But when he illustrates his meaning by saying that *Watson* v. *Lord Prestonhall* is to be contrasted with the cases in which goods had been bought from a tradesman on written orders, he seems to imply that the former case satisfies the condition which the others do not satisfy.

But if that be so, I agree with the Lord President that the present case may be held to satisfy it also.

I do not think it necessary to examine the other decisions, because the Lord President has done so, and I entirely agree with what he has said. I will only add, therefore, that I accept the doctrine laid down by Lord President Inglis in a passage which the Lord Ordinary has cited, that the obligation must be constituted in writing, and must be enforceable against the defender. But both of these conditions are satisfied.

The Court adhered.

Counsel for the Reclaimer — Sandeman. Agent—W. B. Rainnie, S.S.C.

Counsel for the Respondent—Kennedy—M'Lennan. Agent—Party.

Wednesday, May 30.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

SETON *v.* LINLITHGOW BURGH COMMISSIONERS.

Public Health—Water Supply—Trading or Manufacturing Purposes—Railway—Water for Engines of Trains Passing through Burgh—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 89 (3)—*Lease.*

By section 89, sub-section (1), of the Public Health (Scotland) Act 1867, the local authority of a burgh with a population of less than 10,000 is empowered to provide a supply of water for the domestic use of the inhabitants, and by sub-section (3) it is enacted that if they have any surplus water after supplying what is required for domestic purposes they may supply water from such surplus for trading and manufacturing purposes, on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied.

The local authority of such a burgh leased seven acres of land to be used as a reservoir together with the whole water which drained into it. Under the lease the proprietor was entitled to the whole surplus water which might flow over the byewashes of the reservoir, and it was declared that the powers granted to the local authority were to be held in trust for the use and behoof of the community of the burgh under the provisions of the Public Health (Scotland) Act 1867, and that it should not be in their power to supply water gratuitously or for onerous causes to any person or community outwith the boundaries of the burgh.

Held (*aff.* judgment of Lord Stormonth Darling—*dub.* Lord Justice-Clerk) that the local authority were entitled, without the consent of the proprietor, to supply a railway company having a station within the burgh with water for the purpose of filling the tanks attached to the engines of trains passing through the burgh.

The Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), section 89, enacts as follows:—"With respect to the improvement of burghs having a population of less than ten thousand according to the census last taken, and not having a local Act for police purposes. . . . (1) The local authority, if they think it expedient so to do, may acquire and provide or arrange for a supply of water for the domestic use of the inhabitants. . . . (3) The local authority, if they have any surplus water after fully supplying what is required for domestic purposes, may supply water from such surplus to any public baths or washhouses, or for trading or manufacturing purposes, on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied." . . .

By lease, dated 18th September and 3rd October 1895, Patrick Baron Seton of Preston let to the Commissioners of the Burgh of Linlithgow seven acres of ground in the lands of Hiltly and Preston, to be used as a reservoir for the storage of water therein, together with the whole springs, streams, and runs of water which drained naturally into said reservoir. Mr Seton reserved to himself, *inter alia*, the whole surplus water that might flow over the byewashes of the reservoir.

Article sixth of the lease provided as follows:—"The powers and privileges hereby granted shall be held inalienably in trust by the second parties (the Commissioners) for the use and behoof of the community of the burgh of Linlithgow under the provisions of the Public Health (Scotland) Act 1867 (30 and 31 Vict. c. 101), and for compensating parties interested in said water as before written, but for no other use or purpose whatever, and it shall not be in the power of the second parties hereto to allow the said water to be wasted or to supply the same either gratuitously or for onerous causes to any person or corporation outwith the boundaries of the burgh of Linlithgow except as after mentioned; but declaring that if, after satisfying the requirements of the community of the burgh of Linlithgow, and compensating parties who may have claims on the said water, there remains a sufficient supply of surplus water, the same may, with the written permission of the first party (Mr Seton) or his foresaids, be allowed to be conveyed to the said burgh by means of the pipes of the said second parties, and thence by other pipes to dwelling-houses or farmsteadings within the parish of Linlithgow though outwith the municipal boundaries of said burgh, and that upon such rates as may be mutually agreed upon between the parties hereto."

The North British Railway Company, whose line of railway and line of canal run through the burgh of Linlithgow, and who have a station within the burgh, applied to the Burgh Commissioners for a supply of water. The Commissioners, finding that they had surplus water after supplying domestic purposes within the burgh, gave the Railway Company a supply at a price of 6d. per 1000 gallons. The Railway Company used the water so supplied to them not only for domestic purposes in the station and stationmaster's house, and for supplying locomotives engaged in shunting operations within the burgh, but also for supplying locomotives which in the course of a journey entered the burgh, got supplied at the station situated within the burgh, and proceeded on their journey beyond the burgh.