£900, he bequeathed it to Miss Maitland. Now, the subject of his delusion was the state of his affairs, the very thing essential to the making of a good will. Therefore, although it was natural to give her £900, it was clearly done under the influence of an insane delusion.

LORD PRESIDENT—I am of opinion that when this writing was executed Mr Maitland was not of a sound disposing mind. I do not think this case can be decided as one of general insanity. The true ground is, that Mr Maitland was labouring under a special insane delusion, and that delusion powerfully affected his mind in regard to the subject-matter of the writing. Upon that ground I hold this writing invalid.

Upon the other branch of the case I agree with the majority of the Court. I begin the few remarks I make upon it by calling attention to the circumstance that the proof is entirely on the question of insanity. If there had been no question here except whether this writing is or is not entitled to the privileges of a holograph writing, all the parole evidence would have been incompetent and excluded, except for the purpose of ascertaining whether this writing was in the handwriting of the deceased, and what part of it was so. That being ascertained, the writing must stand or fall, and cannot be affected by extrinsic evidence. I cannot follow Lord Deas into an examination of the circumstances under which it was executed. To do so would be to violate the fixed rule of the law of Scotland, that a writing shall not be esteemed probative unless it is tested in terms of the statute, or is among the privileged writings. The only privilege that can attach to this writing is that it is alleged to be holograph. The only words which are in the handwriting of the deceased are his own signature and the address "To my executors." The question is, whether this is sufficient to confer the privilege of a holograph writing on the whole document. There are two exceptions to the general rule that a holograph writing must be entirely in the handwriting of the granter—*First*, Where the essential parts of the document are in the handwriting of the granter, and merely formal words are in the handwriting of another person. *Second*, Where there are in the handwriting of the granter words which clearly express an adoption of what is not in his handwriting. Lord Deas admits that the former exception does not apply to this case, but he is of opinion that there is enough to show adoption of that part not in the handwriting of the deceased. I am not aware of any case in which the principle of adoption was carried further than this—that a writing not holograph has been adopted by the granter by a holograph writing. The most remarkable case is that of *M'Intyre*. In that case there were two codicils to a will, the first not holograph, the second holograph. The Court gave effect to the non-holograph codicil, the holograph codicil referring to and adopting the non-holograph codicil, and making an addition to it. The only other case of much importance is that of *Christie's Trustees* v. *Muirhead*, in which the words holograph of the defender and held binding upon him were, "received the sum of £50 stg.—James Muirhead." These words were written after words not holograph, which showed that the money had been advanced as a loan by his sister. It was held, after some hesitation, that the words in the defender's handwriting were sufficient to bind him, being explained by the previous words. This case is very different. There are no words holograph of the testator expressive of his intentions at all. The address to his executors only shows that he had a testamentary purpose. What that purpose is is not to be found, except in the words not in his handwriting. There is nothing in his handwriting to intimate anything beyond that he was going to give some direction to his executors. It might have been to pay a legacy, or to refrain from paying a legacy. If we are to sustain this as a holograph writing, we cannot say where we are to stop. Suppose a person writes a skeleton will, and appends his signature, while the legacies are filled up by some one else, would that be a holograph writing? The case would be at least as strong as the present. A testamentary purpose would be very clearly proved from the person writing a skeleton will. There would be the subscription there as here. Still the person's will would not be expressed in the holograph part. The will does not consist of the formal parts of the writing, but of the substantial directions contained in it. To sustain this writing as holograph would be to sanction a principle inconsistent with the general rule of law.

The following interlocutor was pronounced:—

"*Edinburgh, 15th November* 1871.—The Lords having heard counsel on the reclaiming-note for Margaret Maitland against Lord Jerviswoode's interlocutor of 5th June 1871, recall the interlocutor of the Lord Ordinary; Find that the writing founded on by the claimant Margaret Maitland, as containing a legacy of £900 in her favour by her deceased grandfather Thomas Maitland of Pogbie, is neither tested in terms of the statutes, nor holograph of the said deceased, but is improbative, and is therefore invalid and ineffectual as a testamentary writing: Find *separatim*, that when the said deceased Thomas Maitland subscribed the said writing he was labouring under insane delusions, and was not of sound disposing mind; Therefore of new repels the claim for the said claimant Margaret Maitland, and remit to the Lord Ordinary, with power to his Lordship to decern for the expenses hereinafter found due, when the same shall have been taxed; Find the claimant the said Margaret (Margaret) Maitland liable to the other claimant the Rev. William Alexander Keith in the expenses of the competition, and remit to the Auditor to tax the account of said expenses when lodged, and report to the Lord Ordinary."

Agent for Miss Maitland—W. R. Skinner, S.S.C.

Agent for Mr Keith—Wm. B. Hay, S.S.C.

Friday, November 10.

LAING & IRVINE *v.* WILLIAM ANDERSON AND OTHERS.

WILLIAM LAIDLAW & SONS v. WILLIAM ANDERSON & OTHERS.

Triennial Prescription—Act 1579, *c.* 83. *Held* that the triennial prescription does not apply to proper mercantile transactions between manufacturer and merchant.

The facts in the case of *Laing & Irvine*, as stated by the pursuers, were as follows:—

In 1853 Andrew Cathrae, then resident in Mel-

bourne, Australia, and a partner of the firm of Mark & Cathrae, merchants in Melbourne, transmitted orders for woollen goods to the pursuers Laing & Irvine, manufacturers and merchants, Hawick, to be sent out to Melbourne for the use of his firm. The pursuers sent out the goods on the agreement that payment of the price should be guaranteed by William Cathrae, father of Andrew Cathrae, who resided at Hawick. The invoice prices of the goods, which were sent out at five different times, amounted in all to £914, 6s. 10d. Andrew Cathrae made some payments to account, but he was unsuccessful in business, and Laing & Irvine took no steps to recover the balance from him or his partner. In 1856 William Cathrae was sequestrated, and Laing & Irvine were ranked as creditors on his estate for the balance of the account, in virtue of the guarantee granted by the bankrupt. There still remained due to them, after crediting the dividend received, a balance of £280, 0s. 10d. exclusive of interest since 16th November 1853, the date of the last consignment.

Subsequently Andrew Cathrae removed from Australia to India, where he died in June 1864, leaving moveable estate to the value of £2800. Laing & Irvine, on the 8th December 1870, raised the present action against William Anderson, executor of the deceased Andrew Cathrae, and also against Thomas and Agnes Cathrae, the next of kin of Andrew Cathrae, for payment of the balance of the account due by Andrew Cathrae, with interest.

The defenders pleaded that (1) the claim was excluded by the Act 1579, c. 83; or (2) at all events by the English Statute of Limitations, 21 Jac. I, c. 16.

The Lord Ordinary (MURE) sustained the first plea, and appointed the case to be put to the roll for further procedure.

"*Note.*—The fact that the goods in question had been furnished to a party in a foreign country was not of itself founded upon at the discussion before the Lord Ordinary as a ground for maintaining that the plea of prescription did not apply in this case, as it was not disputed that the mode of enforcing payment of a debt must, in the ordinary case, be regulated by the law of the country where payment was sought to be enforced; *Don* v. *Lippman*, May 26, 1837, 2 Shaw and Maclean, p. 682. But it was contended that, as the debt sued on arose out of wholesale transactions between manufacturer and merchant, it was not of a description to which the Act applied, and it is not without hesitation that the Lord Ordinary has come to the conclusion that it does.

"For if the question raised had related to a consignment of goods to a commission-agent on sale for behoof of the pursuers, or to the balance on an account-current relative to a series of mutual dealings between merchants, the Lord Ordinary would have had no difficulty in holding, on the authority of *M'Kinlay*, Dec. 11, 1851, and other cases, that the triennial prescription did not apply. The present, however, is not a case of that description, but resolves into an ordinary claim for the price of articles furnished by one party to another; and although, if the question had still been open, the Lord Ordinary might have been disposed to have adopted the view indicated by Lord Fullerton in his opinion in the case of *M'Kinlay*, to the effect that the words 'merchants' accounts' used in the statute was probably intended to be applicable to the accounts of parties dealing from day to day by retail, and not to wholesale transactions, he does not consider that it is now open to him to adopt any such construction. For it seems to have been decided in the case of *Ord*, Feb. 16, 1630, D. p. 11,083, and of *Bruce*, Feb. 11, 1670, 1 B. Sup. p. 309, that the Act applies to wholesale bargains; and the Lord Ordinary is not aware that the rule laid down in those decisions has ever been authoritatively departed from; Bell's Principles, § 628."

The pursuers reclaimed.

The SOLICITOR-GENERAL and BALFOUR for them.

WATSON and BIRNIE for the defender William Anderson.

SHAND and ASHER for the other defenders.

Pursuer's authorities—*Hamilton & Co.* v. *Martin*, 24 Jan. 1795, M. 11,120; *Anderson & Auld* v. *Wood*, 18 Jan. 1809, Hume, 467; *M'Kinlay*, 11 Dec. 1851, 14 D. 162.

Defenders' authorities—Cases of *Bruce* and *Ord* (cited by Lord Ordinary), 1 Bell's Com. 331 (5th ed.), 349 (Maclaren's ed.).

At advising—

LORD PRESIDENT—The question in this case is one of considerable and general importance. The pursuers conclude for payment of a sum alleged to be a balance due to them on certain mercantile transactions between them and a certain Andrew Cathrae about the year 1853. They allege that Mr Cathrae, who was then resident in Australia, and a partner of the firm of Mark & Cathrae, transmitted orders to the pursuers, who are manufacturers and merchants in Hawick, for woollen goods to be sent out to Mark & Cathrae to Melbourne. The goods were sent out. Certain payments were made to account, but there still remains a considerable outstanding balance, for which the pursuers are now suing. The demand is met by two defences—that the claim is excluded (1) by the operation of the Scotch Act of 1579; (2) by the English Statute of Limitations, 21 Jac. I. c. 16. For the second plea there is no room. The matter must be determined by the law of Scotland, the *lex fori*. It remains to consider whether the statute of 1579 applies to the claim as now made—one arising from mercantile dealings between the manufacturer in this country and a colonial merchant. It is not a contract of mandate, but one of sale. If we were construing the statute for the first time, I should have no doubt that it is not applicable to the present claim. "Merchants' compts," in the language of the sixteenth century, did not apply to transactions of this sort. I entirely agree with the opinion of Lord Fullerton in the case of *M'Kinlay*, 11 Dec. 1851. In fact, the expression "merchants' compts" means shopkeepers' accounts. I am not prepared to say that any sound distinction can be drawn between wholesale and retail transactions, if by wholesale is meant merely supplying large quantities, or at one time. The statute extends to supplies made by shopkeepers to a large extent, and that not only to consumers, but it may be to smaller dealers in the same goods. But this is a proper mercantile transaction, by which the produce of this country, manufactured by one party, and sold by him, is transmitted to another country to a merchant there. I am glad to see that the Lord Ordinary sympathises with the view I take. He considers himself bound to decide otherwise in consequence of two decisions. I think these cases decide a question of a different kind. The case of *Ord*, 16 Feb. 1630, has no application to the present. If

it had been a case in point, it would have been difficult to dispute its authority. Coming as it did within half a century of the statute, it has almost the authority of a contemporaneous interpretation. But it was a case of commission agency, not of sale. "Mr James Ord having pursued Duffs as heirs and executors to umquhile Alexander Alexander Duffs, for payment of the prices of certain glasses, which were received by the said umquhile Alexander at sundry times, pertaining to Mr James (Ord), and were sent by him to England with his servant in a ship freighted by the said Alexander to that effect, in which ship the said Alexander made sail, and who, after selling of the said glasses in Hull in England, intromitted with the whole prices thereof, and never made him payment thereof." The glasses belonged to Ord, and were sent along with his own servants in a ship to England and sold. Duff intromitted with the proceeds of sale, and never accounted. It was a contract of mandate. The case might have been important as a strong application of the statute 1579 to a proper mercantile transaction. But the case, so explained, is overruled by subsequent authoritative decisions; *Hamilton*, Jan. 24, 1795, M. 11,120; *Anderson and Child v. Wood*, Jan. 18, 1809, Hume 467; *M'Kinlay*, Dec. 11, 1851, 14 D. 162. It is clear then that (1) the case of *Ord* was one of mandate or commission, and not of sale; (2) that, so explained, it must be held to be a case of no authority. The other decision to which the Lord Ordinary refers is that of *Bruce*, reported only in Brown's Supplement, i, 609, taken from Gosford's notes. Entertaining a strong opinion on the non-applicability of the statute to proper mercantile transactions, I should not allow a single obscure judgment to stand in the way of pronouncing a decision in accordance with the light which we now have. All that we are told about the claim in that case is that it was "for merchants goods alleged sold and delivered, extending to £150 sterling." The defence was, "that the action was prescribed, being for merchant goods, and not pursued for within three years; unless the delivery were proved *scripto vel juramento*." It was replied "that the Act of Parliament did only comprehend merchants' accounts where the goods were sold by retailers, but not where they were sold in gross, such as the goods libelled were; it being offered to be proven that they were all delivered at two several times only." The only specialty insisted on to exclude the triennial prescription was that the goods amounted to a considerable quantity, and therefore must be considered as sold wholesale and not retail. Now, this is not sufficient to exclude the operation of the statute if they are "merchants' compts," *i.e.*, furnishings by a shopkeeper. For all that, it appears the case of *Bruce* was a proper shop account, and therefore the defence was sustained. I do not feel the least difficulty arising from the cases of *Ord* and *Bruce* in deciding on what appears to me to be the true construction of the statute. I entirely concur with Lord Fullerton that the statute does not apply to proper mercantile transactions.

Lord Deas—The question is one of importance. The result of my opinion is the same as that of your Lordship. Andrew Cathrae, a merchant in Melbourne, orders woollen goods from the pursuers, of which they are the manufacturers. The question is, whether the claim for payment is cut off by the triennial prescription. I agree with your Lordship that if this question were looked at merely with reference to the terms of the Act of Parliament, it would be most unreasonable to hold a claim of this character as falling under the category of "merchant's compts," or "the like debts." "Merchant's compts," in Scotch language, is mainly, if not entirely, applied to retail dealers, who then, and even now, in common language are called "merchants." The only difficulty which arises is the construction put by the Lord Ordinary on two old cases. The case of *Ord* presents no difficulty to my mind. It was not merely a case of mandate or commission, but really it was a case that could not fall within the statute under any reasonable construction. Duffs got the price of certain glasses for behoof of Ord, and never accounted for it. He kept the money belonging to another. The idea that an action of count and reckoning at the instance of his employer would be cut off by the triennial prescription is absurd. Such an action would last beyond question for forty years. In the case of *Bruce* we have so little information that it is impossible to say whether it is an authority on the present question. The mere fact that the value of the goods was above £150 amounts to nothing. A shopkeepers' account for jewellery might amount to a much larger sum, but would fall within the statute. Is there any authority for holding the statute applicable to a case like this, where the goods are sent out in large quantities by the manufacturer to a merchant in the colonies? We must look to all the circumstances. The parties dealing with one another are in distant countries. That does not affect the question whether the Scotch law is applicable, but it must not be left out of account in interpreting the statute. The world is now brought together by steam and telegraph, but in former days half the three years might be exhausted in the journeys. I can see no difference between the case of *Anderson and Child* and this. The pursuers in that case were merchants in Liverpool, who had dealt with the defender, a merchant in America. The action was brought in Scotland, and the defenders claimed the benefit of the Scotch triennial prescription. The Lords repelled the plea as inapplicable to the nature of the claim and the circumstances of the parties. In short, there is no authority for the defenders' plea, and there is authority, and certainly principle, the other way.

Lord Ardmillan—The question here raised in regard to the application of the triennial prescription to such transactions and such circumstances as are now before us is very important. It is a question of Scotch law, and foreign laws of limitation do not apply.

This prescription rests on the Statute 1579, cap. 83. The words under which the claim here made is said to be comprehended and brought within the law of triennial prescription, are "merchants' accounts."

On principle, and in the absence of authority to the contrary, I am of opinion that where mercantile dealings—commercial transactions—on a large scale, and more especially where the transacting parties are, as in this case, at great distance from each other—the one in Scotland, the other in Australia—then these dealings are not within the fair meaning or sound construction of the Act of 1579.

A right to instruct and recover a debt *prout de jure* cannot be excluded or limited otherwise than

by direct enactment. A statutory prescription or limitation of action is not to be strained or extended by implication.

Since the date of the Act the progress of mercantile enterprise, and of the multiplied and complicated relations of mercantile dealing, has been so remarkable that it is necessary to ask the question—Is the word "merchant," or the expression "merchant's accounts," fairly susceptible of the same construction now as in 1579? I think it is not. I concur in the views expressed by Lord Fullerton and Lord Cunninghame in the case of *M'Kinlay*, Dec. 11, 1851. I think that we must read this Act with reference to the known relations and transactions of business at its date: and in 1579 the word "merchant" meant a shopkeeper —that it is a word of the same force and meaning as the French word "marchand," and that extensive and important transactions, such as are now before us, between mercantile men at opposite ends of the earth, are not within the just and reasonable scope and meaning of the expression "merchants' accounts." If there is no sufficient authority for introducing this triennial prescription into the wide field of mercantile transactions, as distinguished from the retail business, or even the limited wholesale business, of shopkeepers or home-traders, I am not prepared to introduce it.

The commerce of Scotland—the mercantile business of Scotland—as distinguished from shopkeeping, may be said to have grown up since 1579. It is a new phase—a new field—of enterprise, a phase of almost infinite variety, a field on which the sun never sets. Are we, in the 19th century, bound to bring this Scottish commerce within the scope of a statute of the 16th century, which innovates on the common law, and imposes restriction and limitation on the right to recover debts?

I think that some confirmation of the views which I have expressed is to be found in the case of *Hamilton & Co.* v. *Martin*, Jan. 24, 1795, M. 11,120; and in the case of *Anderson & Child* v. *Wood*, Jan. 18, 1809, Hume's Decisions, 467; and most especially in the opinion of Lord Fullerton in the case of *M'Kinlay*.

I have not found, or heard quoted, any authority supporting directly the application of the Statute 1579 to this case, unless it be the decision in the old case of *Ord* v. *Duffs*, Feb. 15, 1630, M. 11,033. But the report of that decision is short and imperfect, and on minutely considering it, even as reported, I take the same view of it as your Lordship. I am of opinion that is not a reliable or satisfactory authority. The transaction in that case of *Ord* seems to have been not a proper sale and purchase as between the two parties to the cause, but rather a transaction of the nature of a mandate, a sale of goods by one party for the other party, probably on commission; and the action seems to have been for the price of the goods so sold and not accounted for. To such a case the triennial prescription is inappropriate, and it would not now be held applicable. That is clear; so that decision, when rightly understood, is no authority. The case of *Bruce*, in 1670, looks more like an authority, but it does not come up to this case; and I agree with your Lordship in viewing it as a decision only on the plea that the extent of the transaction (£150 I think) excluded the prescription. The character of the business as mercantile was not pleaded, and could scarcely be so in 1670. Without authority I cannot hold the triennial prescription to be here applicable. Therefore I think that we should recall the Lord Ordinary's interlocutor and repel the plea of prescription.

Lord Kinloch—I am of opinion that the present claim, which is for the price of successive parcels of woollen goods, amounting in value to a good many hundred pounds, sent by the manufacturers at Hawick to a merchant in Australia, is not one to which the triennial prescription of the Act 1579 is applicable.

I conceive that this statute, when referring to "merchants' accounts," had solely in view the case of shopkeepers and retail dealers, to whom the name of "merchants" was then almost exclusively applied in Scotland. I adopt in terms the opinion of the Court in the case of *Hamilton* v. *Mather*, in 1795, "that the chief object of the Act 1579 was to prevent the hardship which would arise from losing the old discharged accounts of shopkeepers and other retailers, and that it was not meant to cut off claims arising from considerable mercantile transactions." The case which was then in question was a case of consignment, not of sale, to merchants in Virginia, and the Court in part rested their judgment on the ground that the Act "did not extend to actions arising upon the contract of mandate." But they also set forth explicitly their view of the general character of the statute in the terms I have above quoted, and to which I fully subscribe.

I concur also in the similar exposition given by Lord Fullerton in the case of *M'Kinlay* v. *M'Kinlay* in 1851.

I conceive no conclusion to the contrary to arise legitimately out of the two old cases referred to by the Lord Ordinary. I consider these very unsatisfactory and unauthoritative decisions. One of them, that of *Ord*, is on its face pretty plainly a case of goods sold on mandate, the price received for which was not accounted for to the proprietor; and the modern decisions clearly over-rule all pretence of application of the statute to such a case. The other, that of *Bruce*, has not its circumstances well explained. It does not sufficiently appear what the goods really were, or in what relation the parties stood; and the plea repelled was substantially that the Act did not apply where there were only two considerable furnishings—a bad plea under the statute, which regards not the amount, but the kind and character of the furnishings.

I am therefore of opinion that the Lord Ordinary's interlocutor should be altered, and the plea of prescription repelled.

The Court recalled the interlocutor of the Lord Ordinary, repelled the pleas stated above, and found the reclaimer entitled to expenses since the date of the Lord Ordinary's interlocutor.

The case of *William Laidlaw & Sons*, against the same defenders, involved the same facts, and was decided on the same grounds.

Agents for Pursuers—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Defender Wm. Anderson—Webster & Will, S.S.C.

Agents for Other Defenders—J. W. & J. Mackenzie, W.S.