there would be no means of knowing what debt had been paid when the money in the I O U was handed over. Now, I was struck on reading this record that no debt is alleged by the pursuer, and I doubt if he has proved any distinct debt. I think that the nature of the debt should be stated, and the pursuer should be in a position to say that a distinct debt is proved. I think that both parties have misapprehended their case, and I repeat that I think the pursuer ought to amend his record, and the defender if necessary may state his new defence, although it may not be necessary. I should be for reserving the expenses altogether, and the whole question can come up for discussion in the end.

LORD RUTHERFURD CLARK—The only question before us at present is, whether the defender is to be allowed to amend his record, and on what conditions he should be allowed to do so. The pursuer does not propose to amend his record. It may be a defective record, and we may have to decide that at another time. In my opinion we cannot do so at present. If the defender had chosen to maintain that the action was irrelevant in respect that the debt was not sufficiently specified, we might have decided that plea, but he does not do so; he only wishes to amend. That being so, the amendment must be allowed; the only question is, on what conditions. No doubt some expense has been occasioned to the pursuer by the course of procedure taken, and he is entitled to be indemnified. I should not have been averse to reserve the whole expense, but that may be equally hard upon the pursuer. I think the amendment may be allowed on condition of the defender paying fifteen guineas.

LORD TRAYNER—I agree with Lord Rutherfurd Clark. With reference to what Lord Young said as to an I O U being taken as a ground of debt, it was very fully recognised as such by the Lord President in *Haldane* v. *Spiers*, March 7, 1872, 11 Macph. 537. Whether that view is sound or not, we cannot ask the pursuer to amend his record unless he wishes to do so, and the defender has not stated any objection to the relevancy of the record. If the defender wishes to amend, I think that fifteen guineas is not too heavy a penalty to pay for the expense to which he has put the pursuer.

The Court allowed the defender to put the amendment craved, and stated in a minute, to be put upon record upon payment by him to the pursuer of fifteen guineas.

Counsel for the Appellant—Watt. Agents—J. & A. Hastie, Solicitors.

Counsel for the Respondent—M'Kechnie—Boyd. Agents—T. & W. A. M'Laren, W.S

Wednesday, June 10.

FIRST DIVISION.

[Sheriff-Substitute of Argyllshire.

M'LEAN *v.* M'LEAN.

Crofter's Power of Bequeathing his Right to his Holding — Limitations on that Power—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. c.* 29), *sec.* 16.

Under the 16th section of the Crofters Holdings Act 1886 a crofter may . . . bequeath his right to his holding to one person, being a member of the same family; that is to say, his wife or any person who failing nearer heirs would succeed to him in case of intestacy. . . .

A crofter who had sons and daughters living, bequeathed his right to his holding to a brother's daughter. His eldest son as heir-at-law maintained that the bequest was null and void on the ground that the legatee did not possess the necessary statutory qualifications.

Held that the bequest was a valid exercise of the power conferred by said Act.

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29) by section 16 provides that "A crofter may, by will or other testamentary writing, bequeath his right to his holding to one person, being a member of the same family; that is to say, his wife or any person who, failing nearer heirs, would succeed to him in case of intestacy (hereinafter called the 'legatee'), subject to the following provisions—(*d*) If the landlord or his known agent intimates that he objects to receive the legatee as crofter in the holding, the legatee may present a petition to the Sheriff praying for decree declaring that he is the crofter therein . . . and if any reasonable ground of objection is established to the satisfaction of the Sheriff he shall declare the bequest to be null and void; but otherwise he shall decern and declare in terms of the prayer of the petition . . . (*g*) If the legatee shall accept the bequest, and the bequest is not declared to be null and void as aforesaid, the legatee shall be entitled to possess the holding on the same terms and conditions as if he had been the nearest heir of the crofter. . . . (*h*) If the legatee does not accept the bequest, or if the bequest is declared to be null and void as aforesaid, the right to the holding shall descend to the heir of the crofter, in the same manner as if the bequest had not been made. Provided always that in the case of any legatee or heir-at-law more distant than wife, son, grandson, daughter, granddaughter, brother or son-in-law it shall be competent to the landlord . . . to represent that for the purpose of enlarging their holding or holdings the holding ought to be added to them; . . ."

By deed of settlement dated 1st October 1890 the late Niel M'Lean, crofter, Cornaigbeg, Tiree, who died 14th November 1890, bequeathed his right to his holding to his

niece Mrs Flora M'Lean, the daughter of his brother, as her own absolute property. The bequest was duly intimated to the landlord, who expressed his willingness to accept of her as tenant. The deceased was survived by two sons and five daughters, of whom Malcolm, the eldest son, and a daughter Margaret came to the funeral and refused thereafter to leave the croft. In consequence of said refusal Mrs Flora M'Lean, with concurrence of her husband, brought an action of removing in the Sheriff Court at Oban in December 1890 against the said Malcolm M'Lean and the said Margaret M'Lean to have them ordained summarily and instantly to flit and remove themselves furth and from the dwelling-house and lands at Cornaigbeg aforesaid, in which she pleaded, that "having the sole legal right and title to the holding of crofts at Cornaigbeg aforesaid which belonged to the deceased" she was entitled to decree as prayed for.

It was pleaded in defence—"(1) No title to sue. (2) The bequest founded on is null and void, in respect that the female pursuer is not a member of the same family as the deceased Niel M'Lean, and that nearer heirs have not failed. (3) The female pursuer does not possess the qualification of a legatee required by section 16 of the 'Crofters Holdings (Scotland) Act 1886,' and the bequest to her is null and void. (4) The defender being the eldest lawful son and nearest lawful heir of the deceased Niel M'Lean, is entitled to retain possession of the said croft."

The Sheriff-Substitute (MACLACHLAN) found that the said Mrs Flora M'Lean did not possess the qualification of a legatee, required by section 16 of the Crofters Holdings (Scotland) Act 1886, and that said request was insufficient to exclude the claim of the defender Malcolm M'Lean as eldest son and heir to the deceased, to the said holding, and therefore assoilzied the defenders.

"*Note.*—By section 16 of the Crofters Holdings (Scotland) Act 1886, a crofter is empowered to bequeath his holding to one person being a member of the same family, and the question is, whether a niece can be so considered when the deceased has left sons and daughters. The section defines a member of the same family as meaning the wife or any person who, failing nearer heirs, would succeed to the crofter in the case of intestacy. If this were to mean, as the pursuers contend, any who might succeed in the hypothetical case of there being no nearer heirs in existence, it would leave the power of bequest practically unlimited, and the section itself would be meaningless, because any person, however distantly related, might claim to be included in this description. It is not difficult, however, to come to the conclusion that by the above expression is meant those who would succeed in the case of intestacy, nearer heirs having failed—that is to say, the next-of-kin—and that the nearer heirs must fail before the holding can be bequeathed to more distant relatives. In the present case the deceased's next of kin are his sons and daughters, including the issue of any that may have predeceased him, and it is only when those fail that a niece can be included among the next-of-kin or have the holding bequeathed to her. Taking this view of the case, it is unnecessary to consider the objections to the deceased's settlement stated by the defender by way of exception."

The pursuers appealed to the First Division of the Court of Session, and argued—There was no trace in the Act of the restriction sought to be put upon the crofter's choice by the Sheriff-Substitute, the effect of whose judgment would be to set up a compulsory law of primogeniture throughout the Western Highlands. The next-of-kin had no place here, the subject being heritable. If it had been intended to benefit the heir-at-law, the power of bequest conferred upon the crofter was unmeaning. A simple power in favour of the wife would have been sufficient. The person who might be benefited was the wife (perhaps the son-in-law, though his name had dropped out of the principal part of the clause) and any person who might become the crofter's heir *ab intestato*.

Argued for the respondents—The nearer heirs not having failed, the bequest was invalid. Possibly a crofter might select one of his family or even of his household although not his heir-at-law, but not as here a descendant of collaterals not even resident with him. If the Sheriff-Substitute was wrong, there was virtually no limitation on the crofter's right of bequest.

At advising—

LORD PRESIDENT—The question we have to determine is as to the construction of the 16th section of the Crofters Holdings Act 1886, which provides that a crofter may bequeath his right to his holding to one person, being a member of the same family, that is to say, his wife or any person who failing nearer heirs would succeed to him in case of intestacy subject to certain provisions. The power of bequest then is limited in this way. It must be exercised in favour of one person—to prevent undue sub-division of crofters' holdings—and that one person must be a member of the same family. It may be his wife but the only other person suggested in the section is a person "who failing nearer heirs, would succeed to him in case of intestacy." Now I do not think that that means the existing nearest heir-at-law. On the contrary, I think the language of the section is repugnant to that construction. I think the person who, failing nearer heirs, would succeed in case of intestacy, is a person who would not succeed except in event of such failure. We must therefore look for some other person, one not the nearest heir at present, but who would become so failing certain others as being in the legal order of succession. I entertain no doubt that that is the true meaning of the clause.

LORD ADAM—The question raised depends

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,