Board; and also to find and declare that William Peden Fleming is not a member of said School Board, and was never validly nominated or appointed a member of said School Board." The decision of the Sheriff was that the petitioner was duly elected and Fleming was not. Now, *prima facie*, there is no doubt that was a question in dispute arising out of an election of a School Board, and the Act says that in such questions the Sheriff is to take up the matter and his judgment is to be final. Here then we have *prima facie* a final decision which we have no power to review. But it is here said the Sheriff has gone entirely out of his jurisdiction and has acted in excess of his jurisdiction, and if that were made out we should certainly take up the case and rectify it. Now, the excess of jurisdiction first alleged here is that the Sheriff was acting *ultra vires*, because the returning officer had given a decision, and his decision was final.

Now, that is not the question here, the question here is as to what the returning officer had decided. Nobody questioned that if the returning officer had determined the question committed to him his decision would have been final. The question was, what had the returning officer decided, and the Sheriff has decided that the returning officer's actings amount to a deliverance that the petitioner and not Fleming is a member of the School Board, and the judgment of the Sheriff is final.

The second ground on which the plea of no jurisdiction is maintained is not that the Sheriff-Court has no jurisdiction, but that the Sheriff-Substitute having decided the question, the Sheriff-Principal had no right to take it up.

I entirely agree with your Lordships that it is intended the proceedings in such cases should be very summary, and I also agree with the opinions of the Sheriffs of Fife and Perth in the cases cited [*Lowson* v. *Keddie* and *Hay* v. *Kippen*, *sup. cit.*], but I think there was here no radical want of power in the Sheriff-Principal. I think he was competent to give a judgment in this question. Either the Sheriff-Substitute or the Sheriff-Principal may entertain such questions, and I do not see why if a Sheriff-Principal were in his county he might not take up the case and give the judgment though his Substitute had ordered the case to be debated before him, though of course both cannot pronounce judgment. Here the Sheriff-Substitute had pronounced no judgment, and though irregularities were committed, the radical right was in the Judge who has given us his decision, and I think that decision is final.

Lord Mure was absent.

This interlocutor was pronounced:—

"The Lords having considered the cause, and having heard counsel for the parties on the appeal, dismiss the same as incompetent, and decern."

Counsel for Bone—J. A. Reid—Orr. Agents—Philip, Laing, & Traill, S.S.C.

Counsel for School Board—Low—Ure. Agent—D. Mackenzie, W.S.

Wednesday, March 17.

FIRST DIVISION.

Lord M'Laren, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* CHISHOLM.

Prescription—Triennial Prescription—Act 1579, *c.* 83.

The Triennial Prescription Act being intended to prevent the bringing forward of claims which the creditor has neglected to pursue, it is a relevant answer to the plea that a claim has undergone the triennial prescription, to allege that it was not sooner brought forward owing to the conduct or concealment of the defender.

This was an action at the instance of the Caledonian Railway Company against John Chisholm, sack contractor, Perth, for £8105, 17s., which the pursuers alleged was due to them for the carriage of sacks.

The pursuers averred—"(Cond. 4) By minute of agreement dated 30th July and 12th August 1874 the pursuers and defender entered into a contract for the supply of sacks to be used in the conveyance of grain over the pursuers' lines of railway. The said contract commenced on 1st June 1874, and ended on 30th November 1881. All sacks supplied by the defender under said contract were carried by the pursuers free of charge, but said contract had no reference to the carriage of sacks supplied by the defender for the carriage of grain by sea, or over other lines of railway, and not passing over any of the lines or any part of the system belonging to or leased or worked by the pursuers. (Cond. 5) On 26th February 1884, being more than two years after the said contract came to an end, the defender intimated for the first time a claim against the pursuers for alleged loss of sacks supplied by him during said contract, and on 20th June 1884 he raised an action against the pursuers for the sum of £3164, 13s., as the value of 63,293 sacks alleged by him not to have been returned to him by the pursuers. After a proof had been allowed in said action access was obtained by the pursuers to the defender's books, and a long and laborious inquiry instituted by them testing the accuracy of the defender's allegations. In the course of this inquiry the pursuers ascertained for the first time from the defender's books (they themselves having no means of knowledge thereof) that during the period of the said contract a large quantity of empty sacks had been forwarded by the defender over the pursuers' railways on the pretence that these sacks were to be used for the carriage of grain on the pursuers' lines, whereas they were not used, and were not intended to be used, for this purpose, but were intended to be used, and were used, for the carriage of grain by sea or by other lines of railway; and these sacks were so used without contributing in any way to the forwarding of the pursuers' traffic; and that in like manner large quantities of empty sacks were sent over the pursuers' lines to the defender's depots on the pretence or on the footing that they had been used for the carriage of grain and gone full over the pursuers' lines, but which sacks had not been so used, nor had they

in any way contributed to the pursuers' traffic. These sacks were all carried free by the pursuers under the belief that they were to be used or had been used in the carriage of grain over the pursuers' own lines, and thus no charge was made for their carriage; but the defender knew, and had alone the means of knowledge, that said sacks had not been so used, and he did not disclose this fact to the pursuers. Immediately on this discovery being made the pursuers caused accounts for the carriage of said sacks to be made up and rendered."

They pleaded—"(1) The pursuers having carried the sacks in question, and the sum sued for being due and resting-owing by the defender to the pursuers in respect of the said carriage, the pursuers are entitled to decree in terms of the conclusions of the summons. (3) The pursuers having only recently discovered in the circumstances condescended on that the sacks comprised in the accounts sued for had been carried without the carriage being charged for, under error, and that these sacks were not sacks supplied under the contract, the pleas of prescription and *mora* are unfounded, and the defender is not entitled to plead them against the pursuers' claim."

The defender pleaded—"(1) In respect of the triennial limitation the account sued on cannot be proved except by the writ or oath of the defender."

The Lord Ordinary (M'Laren) on 3d March 1886 sustained the defender's first plea-in-law, and found that the pursuers' averments could only be proved by the writ or oath of the defender.

The pursuers reclaimed, and argued—The defender was bound by his actings from pleading the triennial prescription. The course should be followed that was taken in *M'Kinlay* v. *Wilson*, November 18, 1885, reported *ante*, p. 134; *Laing and Irvine* v. *Anderson*, November 10, 1871, 10 Macph. 74.

The defender argued—The statute introduced two presumptions—first, that the debt had never been constituted; and second, that if ever constituted, it had been paid. The defender relied on the first of these presumptions, and maintained that the constitution could only be proved by his writ or oath. There was no case in which fraud or error had been held enough to elide the plea of prescription; but even if it were so the averments of the pursuers did not amount to that. If the sacks in question were carried under the agreement, then nothing was due. If they were not carried under the agreement, then the triennial prescription applied—*North British Railway* v. *Smith Sligo*, December 20, 1873, 1 R. 309.

At advising—

Lord President—The plea of triennial prescription when stated as a defence against an action as laid must necessarily be determined with reference to the precise statements made by the pursuer of the action, and the nature of his claim; and if the statute does not apply to the claim so made then the duty of the Court is to repel the plea. It may happen even in such a case, as it happens in other cases, that in the course of the investigation of the pursuers' claim the true state of the facts disclosed may show that the statute does apply, and in that case the Court would have no difficulty in giving effect to the statute, and holding that the pursuer in the circumstances which have come out must prove the constitution and resting-owing of his claims by writ or oath. But at the present stage of this case, and of every other case of the kind, we must take the claim as the pursuer makes it, and determine whether the statute applies to the claim so made. Now, the claim which the pursuers, the Caledonian Railway Company, make is substantially this—They say that they were under an agreement to carry sacks free for the defender under certain circumstances and conditions. These were sacks which were to be used for the purpose of conveying grain upon the pursuers' line of railway, not necessarily conveying it exclusively upon their line, but conveying it either exclusively upon their line or partly on their line and partly on some other line. Under that agreement great quantities of sacks was brought to the different stations on the pursuers' line by the defender, and were presented for free carriage as being sacks falling under the agreement; but they say that the agreement had no reference to the carriage of sacks supplied by the defender for the carriage of grain by sea, or upon other lines of railway, and not passing over any part of the lines or any part of the system belonging to or leased or worked by the pursuers. And they say further that in the course of inquiry which was made in another action between the parties the pursuers "ascertained for the first time from the defender's books (they themselves having no means of knowledge thereof) that during the period of the said contract a large quantity of empty sacks had been forwarded by the defender over the pursuers' railway on the pretence that these sacks were to be used for the carriage of grain on the pursuer's lines, whereas they were not used, and were not intended to be used, for this purpose, but were intended to be used and were used for the carriage of grain by sea or by other lines of railway, and these sacks were so used without contributing in any way to the forwarding of the pursuers' traffic, and that in like manner large quantities of empty sacks were sent over the pursuers' lines to the defender's depots on the pretence or on the footing that they had been used for the carriage of grain, and gone full over the pursuers' lines, but which sacks had not been so used, nor had they in any way contributed to the pursuers' traffic. These sacks were all carried free by the pursuers under the belief that they were to be used or had been used in the carriage of grain over the pursuers' own lines, and thus no charge was made for their carriage, but the defender knew, and had alone the means of knowledge that said sacks had not been so used, and he did not disclose that fact to the pursuers. Immediately on this discovery being made the pursuers caused accounts for the carriage of said sacks to be made up and rendered." Now, it appears to me that that case as stated is one to which the statute does not apply. The statute is intended to prevent creditors from delaying bringing forward a certain class of actions enumerated in the statute. It contains, in the first place, an order or direction that all such actions be pursued within three years, and if the creditor fail to

comply with that enactment, then he is to be subjected in this penalty, that he shall have no action unless he prove it by the writ or oath of the defender. Now, that undoubtedly implies that there is negligence upon the part of the creditor, that he ought to have pursued his action sooner, and that he ought not to have allowed the three years to elapse. But how is that possible in the case of these pursuers if their statements be true? By the false pretences of the defender they were prevented from discovering that they were carrying sacks free for which they were entitled to charge. And the defender was in the full knowledge of that and failed to disclose it. To apply the statute to a case of that kind, it appears to me, would not only be entirely unjust, but would be entirely against the meaning of the statute. The statute assumes that the creditor is in a condition to sue, and it is because of his failure to sue—because of his negligence in putting off the making of his claim—that the statute imposes the penalty upon him. It is clear to my mind therefore that wherever a case of this kind can be made, that the failure to sue is due to the conduct of the defender, whether it amount to fraud or not, to concealment on the part of the defender, or to the bringing forward of pretences which are false in fact, whether fraudulent or not, the pursuer cannot be visited by the penalty of the statute, because there is no negligence upon his part, but the sole cause of the delay in bringing forward his claim and raising the action is the conduct of the defender. I am therefore for repelling this plea.

LORD SHAND—I am of the same opinion. I assume that if this had been a case of a large sack contractor, as Mr Chisholm the defender appears to have been, who had from time to time forwarded for the purpose of carriage to different stations upon the Caledonian line and beyond it quantities of sacks, however large, and thereby the ordinary charges for the carriage of sacks had been incurred, an account of that kind is of a nature included and referred to in the statute. It is, as it appears to me, an account of the class which ought to be settled for periodically, and is in practice settled periodically, and therefore the plea of triennial prescription would have application in that case, just as in the case of dealers' accounts, actions for services rendered, and actions for house maills. But this case is certainly very special in its circumstances, and the question is, whether the case as stated by the pursuer is well met by the plea of triennial prescription, which has been sustained by the Lord Ordinary, for of course that plea has been sustained upon the assumption that all that the pursuers have alleged may be established. I think that if the pursuers establish all that is here alleged, the plea of triennial prescription can never apply. The case stated is substantially this, that for the period from 1874 to 1881 there was a contract between the Caledonian Railway Company and Mr Chisholm, by which the railway company were bound to carry a limited class of sacks free of charge. They agreed to carry free of charge all sacks which were to be used in the conveyance of grain over their lines of railway or any part of their lines of railway. Well, under that agreement they say that an immense number of sacks were tendered to them over the whole period of the contract, with the representation that these sacks were being sent for the purpose of carrying grain over their lines of railway. That representation being accepted, of course the sacks must be carried free, and of course it followed that if these sacks were to be carried free, which they were—according to the pursuers' statement—only in consequence of that representation, there could be no accounts rendered for them, and there could be no periodical settlements. But the pursuers, besides alleging that that representation was made to them, and that in consequence they agreed to carry these sacks free, go on to say—"Whereas they were not used, and were not intended to be used, for this purpose, but were intended to be used and were used for the carriage of grain by sea or by other lines of railway." Now, it appears to me that whether the statement was made from an improper motive or not, if it was a statement which was false in itself, it deceived the company to whom it was made, and deprived them for the time of the power of making a charge, because they relied on that representation, and that being so it appears to me that this is not a case of the class of house maills, men's ordinaries, &c., which are struck at by the statute. It is not a case in which the pursuers could have pursued for the debt, for according to the defender's representation there was no debt. It was not a case in which there could be periodical settlements, for there was nothing due. If it was a case in which there was money due, and in which there ought to have been periodical settlements, the only reason for the absence of that was, that the company were deceived by the statements made by the defender. If that be proved, I do not think the defender can in these circumstances take the benefit of the triennial prescription so as to exclude inquiry, and finally to exclude liability for a debt which ought to have been paid according to the pursuers' statement.

LORD ADAM—I am of the same opinion.

LORD MURE was absent.

The Court recalled the interlocutor reclaimed against, repelled the defender's plea founded on the Statute 1579, c. 83, and remitted to the Lord Ordinary to proceed further in the cause, and found the defender liable in expenses since the date of the interlocutor reclaimed against.

Counsel for Pursuers—R. Johnstone—Guthrie. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Defender—Pearson—Dickson. Agents—J. & A. Peddie & Ivory, W.S.