

No 10.
Constituent
liable for the
debts of the
institor.

1765. December 10. JOHN BRUCE and Co. against DAVID BEAT.

JOHN LEE was proprietor of the lease of the unlicensed theatre in Edinburgh, called the concert-hall, and of the wardrobe and machinery belonging to it.

In 1754, being distressed by his creditors, he assigned his right to Lord Eli- bank, and others, who granted to him 'full power and commission to vary the 'said house, clothes, and scenes at pleasure; declaring us, and the premises, 'nowise liable for any debts the said John Lee may contract in carrying on the 'entertainments of the said house.' There was also a clause declaring the com- mission to be during pleasure, and obliging Mr. Lee to make the scenes, clothes, &c. furthcoming.

Mr Lee continued to act as manager till 1756, when he was dismissed.

In 1758, the gentlemen transferred the lease of the concert-hall, with its per- tinents, to James Callendar and David Beat, under an obligation to relieve them of all claims against the concert-hall, 'on account of any thing done or con- 'tracted by John Lee as their manager; from the time of his assignation to 'them, till he was turned out of the management.'

John Bruce was creditor in three accounts of printing for the concert-hall, in 1755 and 1756. For the first of these accounts, Mr Lee granted his bill in 1755, and attested it as just, after the lapse of the triennial prescription. The other accounts bore attestations without date; and decree was recovered against Lee for the whole in 1758.

An action was brought for payment of those accounts against David Beat, as coming in place of the gentlemen proprietors of the lease, in consequence of the above obligation; and the debate resolved into two points: *1mo*, Whether those gentlemen were liable for the debts contracted by Lee? *2do*, Whether or not the accounts were prescribed?

Pleaded for the defender, on the 1st point, The gentlemen interposed from motives of public spirit, and, without any view of gain; they gave the full use of the house, and of the profits thereof, to Mr Lee, burdened only with the price which they had paid, and certain annuities to which it was subject before their purchase.

In these circumstances, the clause, declaring that they should not be liable for Lee's debts, was superfluous; there were no *termini habiles* for subjecting them; But, though Lee should be considered as an *institor*, the rule of law is, *conditio præpositionis servanda est, l. 11. § 5. D. de Instit. act.*

Answered for the pursuer; It is clear, from the commission granted to Lee, and was universally understood at the time, that the gentlemen had become purchasers of the concert hall, and its pertinents. It likewise appears from the commission, that Lee was an institor or manager employed by them; and they are liable for his debts, even upon the supposition that the pursuer had consi- dered him in a different light, and looked upon him as their lessee.

In that view of the case, the pursuer contracted in the faith that he was proprietor of the lease, scenes, decorations, and other moveables, of which he saw him in possession. Suppose the pursuer had pointed those moveables; that the gentlemen had claimed them as their property; they might indeed have reclaimed the goods, but it could only have been by acknowledging that Lee was their institor; and that acknowledgement must have subjected them to the debts contracted in the course of the employment.

And the case is equally clear, upon the supposition, that the pursuer knew that Lee acted as manager for the proprietors, it being an established point in law, that the constituent is liable for the deeds of the institor, l. 3, 4. l. 5. pr. § 1. *D. de Instit. Act.*

Nor can the defender avail himself of the clause in the commission, as securing the proprietors against Lee's debts. Had Lee sold the furniture of the concert-hall, set up merchant, and broke, the gentlemen would not have been liable for such debts as he might have contracted in a business foreign to the *conditio præpositionis*. This is all that is meant by the text referred to; not that parties can be affected by private clauses in a deed which they had no access to know. On the contrary, if the employer intended that his institor should act, not on the general principles of law, but on any peculiar footing, it was necessary *proscribere palam*, to publish those conditions, in order to put parties on their guard; and so the law is laid down, l. 11. § 2, 3, 4. *D. de Instit. Act.*

This is perfectly analogous to our law; a wife is held to be *præposita negotiis domesticis*, and, whatever private agreement may have taken place to the contrary, the husband will be liable for her deeds, unless he has used an inhibition; a species of the *proscriptio palam*.

Pleaded for the pursuer, on the 2d point, The triennial prescription is, properly speaking, no more than a *præsumptio juris* of payment, which may be taken off by the oath or writing of the party; As the oath would be probative at whatever time it was emitted, there is no reason why the mean of proof by writing should be restricted to the three years; and there is no foundation in the act of Parliament for restricting it.

Though, therefore, the attestations should be supposed to have been granted after the three years, the debt will be saved from prescription. But, independent of them, the decree 1758 must be sufficient, being a document taken against the institor upon his being removed from the management, which will be effectual against his constituents.

Answered for the defender, on the 2d point, It is immaterial whether the attestations were granted within the three years or afterwards. The act of Parliament 1679, c. 85. declares, that, after the three years, 'the creditour sall have na action, except outh he priefe be writ, or be aith of his partie.' But, in this case, there is no such proof. The party is he for whose behoof the furnishing was made, or he who is pursued for it. And, though an institor or servant might be a good witness against his employer, he cannot subject him by

No 10. an oath upon reference, or an attestation in writing, (Edg. 11th Feb. 1724, Guthrie *contra* Marquis of Annandale, *voce* PRESCRIPTION), especially, if, as in this case, it be given after he is dismissed from the service.

Upon the same principles, a decree against the institor cannot interrupt the prescription in favour of the master. Indeed, here, the decree was taken against Lee himself as the proper debtor, and not as having contracted as manager for others.

THE LORDS repelled the defence, that the defender is not liable for the accounts pursued for; but sustained the defence of the triennial prescription. See PRESCRIPTION.

Act. Lockhart, Crosbie.

Alt. Rae.

G. F.

Fol. Dic. v. 3. p. 200. Fac. Col. No 23. p. 238.

1778. July 8.

CREDITORS OF PATRICK M'DOWAL *against* CHARLES M'DOWAL.

No 11.

A factor, appointed by the Court of Session, has no power to enter into submissions.

CHARLES M'DOWAL brought an action of declarator, valuation, and ranking, against the Creditors of his deceased father Patrick M'Dowal of Crichan, as heir served *cum beneficio inventarii* to his father; and obtained a judgment, finding, that he was entitled to hold his father's real estate at a proven value.—Afterwards, in the course of the ranking, on the application of the creditors, a factor was named by the Court, to whom Charles M'Dowal was ordained to pay over the proven value of the lands.

This factor having died, a petition was given into Court in the name of Charles M'Dowal, and a part of the creditors, for having a new factor appointed; in which they set forth, that it would be expedient to vest the new factor with powers to enter into submissions, on behalf of the creditors, with the said Charles M'Dowal, and others they may have claims against. The prayer of the petition was to nominate Alexander Orr factor, 'with power to submit, as to him shall appear most eligible, for the interest of the creditors.' The petition was intimated to certain persons, as doers for the other creditors.—On the 5th March 1759, it was remitted by the Court to an Ordinary, to hear parties procurators, and report; who, on the 8th March, reported, 'That, having heard parties procurators, they consented that Mr Orr be appointed factor, with the powers, as craved in the prayer of the petition.'—On which the Court nominated Mr Orr to be factor, 'for the purposes mentioned in the prayer of the petition, with the usual powers.' A submission was entered into betwixt Mr Orr and Charles M'Dowal, for settling the claims which the creditors and he had against each other; and a decret-arbitral was pronounced.

Upon the death of Orr, a new factor being appointed, an action was brought