mains; and the words, "proved by writ," means proved by writ of the debtor, not of any third party.

No 313.

"THE LORDS dismissed the claim."

Act. *Burnet.* Alt. *Macqueen.* Clerk, *Kirkpatrick.*

W. S. *Fol. Dic. v.* 4. *p.* 107. *Fac. Col. No* 159. *p.* 240.

1765. *December* 10. BRUCE and COMPANY *against* BEATT.

No 314.
The defence of triennial prescription sustained, although the accounts were attested by an institor, and a decree obtained against him for the amount.

LORD ELIBANK, and others, having right by assignation to a lease of the old Theatre in Edinburgh, and the wardrobe and machinery, granted a commission to John Lee to be manager during their pleasure; after which they transferred the lease to James Callendar and David Beatt, under an obligation to relieve them of all claims against the Theatre, on account of any thing done or contracted by Lee, during his management. Bruce became creditor in three accounts of printing for the Theatre, during Lee's management. For the first of these accounts Lee granted his bill, and attested it as just, after the period of the triennial prescription. The other accounts bore attestations without date; and decree was recovered against Lee for the whole. Action being brought for payment of these accounts against David Beatt, as coming in place of the Gentlemen proprietors of the lease, he pleaded, *first,* That neither he, nor his authors, were liable for the debts contracted by Lee, as there was a clause in the commission granted by the proprietors to Lee, declaring them to be nowise liable for any debts contracted by him as their manager, in carrying on the entertainments of the house. But this defence the LORDS set aside, upon this ground, that a constituent must always be liable for the debts of his institor, unless the clause which declares him free from that obligation is made public. Beatt *pleaded* next, That the accounts were cut off by the triennial prescription. *Urged* for the pursuer, That, as the writing or oath of party takes off the presumption of payment, and as the oath is probative at whatever time it is emitted, so there is no ground, either from reason or the statute, for restricting the mean of proof by writing to three years; the attestations, therefore, whether with dates or without them, must save the accounts from prescription; and, independently of them, the decree against Lee, the institor, will be effectual against his constituents. *Answered,* It is of no consequence, whether the attestations are within the three years or afterwards, as the statute requires the writ or oath of the party; neither of which there is in this case. An institor, or servant employed to manage any business, cannot subject his master or employer, by an oath upon reference, or an attestation in writing; nor can a decree against the institor, for the same reason, interrupt the prescription in favour of the master. Besides, the fact here was, that Lee was removed from

No 314. the management before those accounts were attested.—The Lords sustained the defence of the triennial prescription.

Fol. Dic. v. 4. p. 108. Fac. Col.

*** This case is No 10. p. 4056. *voce* Factor.

1766. *January* 15.
Katharine Donaldson, Relict of John Kedzlie, *against* George Murray.

No 315.
A writing, holograph of the defender, but not signed, was found sufficient to bar the triennial prescription.

Katharine Donaldson brought a process against Murray for payment of L. 30 : 13 : 4 Sterling, as the price of malt delivered to him at different times, and, in proof of her libel, produced a writing in the following words: 'November 21st, 1755, George Murray to Mrs Kedzlie, to 46 bolls of malt, at different times, this day included, at 13s. 4d. Sterling per boll.' This note was admitted to be holograph of Murray, but was not signed.

The defender *pleaded* the triennial prescription; and *contended*, That the exception in the act 1579, c. 83. with regard to written obligations, and a proof by writing after three years, could be understood of probative writings only; but that this note was not probative, and could not be considered in any other light than as an open account.

Answered; The effect of this prescription is only to limit a proof by witnesses, of which our law is particularly jealous. Hence it has been understood to apply to those cases where the creditor proposes to prove the constitution of the debt by parole evidence alone. But, where there is any writing under the hands of the debtor, though affording but presumptive evidence of the debt, that has been thought sufficient to entitle the creditor to a proof by witnesses, if still necessary, or to throw the *onus probandi* of payment upon the debtor, according to the degree of evidence which arises from the writing. It has never been thought necessary that this writing should be strictly probative, or such as would be sufficient *per se* to establish the debt, or show that it is still resting. Thus it was found, that a letter, containing a general mandate for "such furnishings as should be necessary," barred the prescription, and entitled the creditor to prove by witnesses, after three years, that furnishings were actually made; 5th July 1681, Dickson, No 288. p. 11090. The same effect was given to a letter acknowledging debt in general; 20th February 1708, Elliot, Div. 15. *h. t.* In neither of these cases was the writing such as to create a valid obligation, or *per se* to prove the furnishings or debt pursued for. The note founded on in the present case, being holograph of the defender, and found in the custody of the creditor, appears such proof that the malt was delivered to the defender, as even to supersede the necessity of any further evidence.